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Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California

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1 MB Practice Guide: Fed Pretrial Civ Proc in CA Author(s)

Author(s)

Matthew Bender[(R)] Practice Guide:
FEDERAL PRETRIAL CIVIL PROCEDURE IN CALIFORNIA 1 CHAPTERS 1-8 Litigation Milestones
First Steps
Pleading Stage

Richard B. Kendall Kendall Brill & Klieger
Hon. Richard Seeborg United States District Judge, Northern District of California
Mary Jo Shartsis Shartsis Friese LLP
Hon. Fern M. Smith United States District Judge (Ret.), Northern District of California

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2010

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1 MB Practice Guide: Fed Pretrial Civ Proc in CA Cite As

Cite As

Cite this publication as:
Kendall et al., Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in Cal., [00.00] (year). **Example:** Kendall et al., Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in Cal., 26.32 (2010). Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

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ISBN **978-0-8205-5692-5**
Library of Congress Card Number: 2004-048713

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Publication Information

1 MB Practice Guide: Fed Pretrial Civ Proc in CA Authors

Authors

Richard B. Kendall

Richard B. Kendall is a founding partner of Kendall Brill & Klieger. His practice encompasses a wide range of trial and appellate matters.

Mr. Kendall has tried over 30 cases in the federal and state courts, and has also supervised numerous litigations in European and Asian courts. In his appellate practice, he has argued major cases before the United States Supreme Court, the United States Court of Appeals, the California Supreme Court, the Delaware Supreme Court, and the California Court of Appeals. He has twice argued before the United States Supreme Court: in 1996, he argued *Smiley v. Citibank* on behalf of Citibank; and in 2008 he argued *Winter v. NRDC* for the Natural Resources Defense Council.

Over the years, Mr. Kendall has frequently represented major companies in both the media and banking industries, as well as foreign governments. He has litigated on behalf of the Paramount, Columbia Tri-Star, and Universal film studios, and also for several television networks, including MTV, VH1, CBS, UPN, Showtime, and Nickelodeon. In radio, he has represented the CBS Radio Group, and in outdoor advertising he represents CBS Outdoor and Clear Channel Outdoor. In banking and securities litigation, Mr. Kendall's clients have included Citigroup, JPMorgan Chase, and Credit Suisse First Boston. Foreign government clients have included the Philippine government in its cases against Ferdinand and Imelda Marcos, the Bank of China and the China National Coal Development Corp., and the Brunei Investment Authority.

Mr. Kendall has been honored by the Century City Bar Association as its "Litigator of the Year," and has been recognized as a leading media & entertainment/litigation lawyer by *The Hollywood Reporter* in its annual ranking of the "100 Most Influential Lawyers In Entertainment" and by Chambers & Partners in its *Chambers USA Leading Lawyers for Business Guide*. In addition, Mr. Kendall has been repeatedly selected for inclusion in The Best Lawyers in America in commercial litigation as well as entertainment law and as a "Southern California Super Lawyer" in *Los Angeles Magazine*.

Mr. Kendall has taught both evidence and international litigation and arbitration as an adjunct professor of law at the University of Southern California. He has served as a member of numerous bar association committees and advisory groups, including as the state bar-appointed member of the Board of Directors of the Western Center on Law and Poverty from 1989 through 1997, and on the board of directors of the Los Angeles Legal Aid Foundation from 2001 through 2007.

Mr. Kendall attended the Gould School of Law at the University of Southern California, where he served as Executive Notes Editor for the *Southern California Law Review*. After graduating in 1979, he served as a law clerk with The Honorable J. Clifford Wallace, Judge of the United States Court of Appeals for the Ninth Circuit. He then practiced from 1980-85 as an Assistant United States Attorney in Los Angeles, and as Assistant Chief of the Criminal Division during 1983 through 1985. In December 1984, he received the John Marshall Award for Trial of Litigation, the highest award in the Justice Department for trial work, for "ingenuity in developing new forensic techniques, and outstanding trial skills."

Richard Seeborg

Richard Seeborg was appointed to the United States District Court for the Northern District of California by President Barack Obama in 2009. Judge Seeborg served as Magistrate Judge for the United States District Court from 2001-2009. He received his B.A. degree, summa cum laude, Phi Beta Kappa, from Yale College in 1978. Upon graduating from Columbia University School of Law in 1981, where he was a Harlan Fiske Stone Scholar, Judge Seeborg served (1981-1982) as a law clerk to United States District Judge John H. Pratt in Washington, D.C. In 1982, he joined Morrison & Foerster's San Francisco office in the litigation department, becoming a partner with the firm in 1987. From 1991 to 1998, Judge Seeborg served as an Assistant U.S. Attorney for the Northern District of California in San Jose. In that capacity, he acted as lead prosecutor on a wide range of complex white collar criminal matters. He re-joined Morrison & Foerster in March 1998, where he resumed a litigation practice in the fields of securities, intellectual property, and general commercial matters.

Judge Seeborg has been a member of the Adjunct Faculty at Santa Clara University School of Law where he has served as instructor for a course on Federal Criminal Litigation and has served as co-chair of the Federal Courts Committee of the Santa Clara County Bar Association and as a member of the Executive Committee of Magistrate Judges for the Ninth Circuit. At present, he is a member of the Working Group on Electronic Public Access for the United States Courts and a member the Ninth Circuit Jury Instructions Committee.

Mary Jo Shartsis

Mary Jo Shartsis is one of the founding partners of Shartsis Friese LLP. She specializes in general business litigation, including, business torts, commercial transactions, securities, real estate, officer and director liability and corporate and partnership derivative litigation. In June 2003, Ms. Shartsis was chosen as one of the Top 50 Women Litigators in California by the Los Angeles and San Francisco Daily Journal.

Ms. Shartsis served as a lawyer representative to the Ninth Circuit Judicial Conference from 1994 to 1997. She is a co-author of California Federal Court Practice, Local Civil Rules Annotated, a guide to local federal practice published by LexisNexis. Ms. Shartsis is past chair of the Litigation Section of the Bar Association of San Francisco.

Ms. Shartsis is admitted to practice in the state and federal courts of California as well as the Second Circuit Court of Appeals and the United States Supreme Court. Her state court practice has also been extensive in San Francisco, Marin,

Alameda, Santa Clara, San Mateo and Contra Costa County Superior Courts. She is a member of various sections of the American Bar Association and a fellow of the American Bar Foundation. She is also a member of the Association of Business Trial Lawyers.

As a member of the Board of Directors and participant in programs sponsored by the Institute for the Study and Development of Legal Systems, Ms. Shartsis has lectured on various alternative dispute resolution techniques to lawyers and judges in Egypt, India, Israel, Jordan and the Palestinian Authority. Ms. Shartsis serves on several boards, including the Board of Directors of the Legal Aid Society of San Francisco.

Ms. Shartsis received an A.B. degree from the University of California, Berkeley in 1969 and a J.D. degree from the University's Boalt Hall School of Law in 1972, where she was a member of the California Law Review. She has remained involved in the Law School through a variety of activities and served as President of the Boalt Hall Alumni Association in 1994-95.

Fern M. Smith

Fern M. Smith was appointed to the United States District Court for the Northern District of California by President Ronald Reagan in 1988. Judge Smith served as the Director of the Federal Judicial Center in Washington, DC from July 1999 to July 2003. The Federal Judicial Center is the primary research and continuing education agency for the federal courts. At the completion of her 4-year assignment at the FJC, she returned to the U.S. District Court in San Francisco where she retired from office as of June 30, 2005. Judge Smith was educated at Stanford University, where she graduated with Distinction (Phi Beta Kappa) in 1972. She graduated from Stanford Law School in 1975. Judge Smith practiced with Bronson, Bronson & McKinnon in San Francisco from 1975-1986, and was a member of the firm's management committee from 1985-1986. Judge Smith served as Judge of the Superior Court of California in and for the City and County of San Francisco from 1986-1988.

Judge Smith was Chair of the U.S. Judicial Conference Committee on International Judicial Relations from 2003 to 2005. She was a member of the Advisory Committee on the Rules of Evidence from 1993 through 1996 and served as its Chair from 1996 through 1999. She was a member of the Executive Committee of the Ninth Circuit Judicial Conference from 1994 to 1996. She was a member of the California State-Federal Judicial Council from 1990 through 1993. In addition, she was a member of the California Judicial Council from 1987 through 1988, and a member of that Council's Advisory Task Force on Gender Bias from 1988 through 1990.

Judge Smith actively participates in international judicial delegations involved in the education, reform and modernization of legal processes in countries around the world, including Egypt, Bolivia, Mexico, Tunisia, Israel, Jordan, Greece, Italy, France, India, Russia, Morocco, Thailand, China, Turkey, Bahrain, the Netherlands, and Brazil. She currently works for JAMS, the nation's largest private provider of alternative dispute resolution services.

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1 MB Practice Guide: Fed Pretrial Civ Proc in CA Abbreviations

Abbreviations

United States Constitution and Statutory Sources

US Const United States Constitution

USC United States Code

USC app United States Code Appendices

IRC United States Code, Title 26 **California Constitution and Statutory Sources**

Cal Const California Constitution

B&P Code Business and Professions Code

CC Civil Code

CCP Code of Civil Procedure

Com Code Commercial Code

Corp Code Corporations Code

Ed Code Education Code

Elec Code Elections Code

Evid Code Evidence Code

Fam Code Family Code

Fin Code Financial Code

F&G Code Fish and Game Code

F&A Code Food and Agriculture Code

Gov Code Government Code

H&N Code Harbors and Navigation Code

H&S Code Health and Safety Code

Ins Code Insurance Code

Lab Code Labor Code

M&V Code Military and Veterans Code

Pen Code Penal Code

Prob Code Probate Code

PC Code Public Contract Code

PR Code Public Resources Code

PU Code Public Utilities Code

R&T Code Revenue and Taxation Code

S&H Code Streets and Highways Code

UI Code Unemployment Insurance Code

Veh Code Vehicle Code

Water Code Water Code

W&I Code Welfare and Institutions Code

Cal Stat California Statutes **California and Federal Regulations**

CCR California Regulations

CFR Code of Federal Regulations

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

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

US United States Supreme Court Reports

S Ct Supreme Court Reporter

L Ed Lawyer's Edition

L Ed2d Lawyer's Edition, Second Series

F Federal Reporter

F2d Federal Reporter, Second Series

F3d Federal Reporter, Third Series

F Supp Federal Supplement

F Supp2d Federal Supplement, Second Series

FRD Federal Rules Decisions

C California Reports

C2d California Reports, Second Series

C3d California Reports, Third Series

C4th California Reports, Fourth Series

CA California Appellate Reports

CA2d California Appellate Reports, Second Series

CA3d California Appellate Reports, Third Series

CA4th California Appellate Reports, Fourth Series

CA Supp California Appellate Reports, Supplement

CA2d Supp California Appellate Reports, Second Series, Supplement

CA3d Supp California Appellate Reports, Third Series, Supplement

CA4th Supp California Appellate Reports, Fourth Series, Supplement

CR California Reporter

CR2d California Reporter, Second Series

P Pacific Reporter

P2d Pacific Reporter, Second Series

P3d Pacific Reporter, Third Series **Federal Rules**

Fed R Civ P Rules of Civil Procedure

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

Fed R App P Federal Rules of Appellate Procedure

9th Cir R Circuit Rules

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

Sup Ct R Supreme Court Rules

Multidistrict R Multidistrict Rules

Fed R Evid Rules of Evidence

Fed R Bankr P Rules of Bankruptcy Procedure

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

CD Cal Civ LR Local Rules

CD Cal Local Civil Appendix Civil Appendices

CD Cal Mag LR Magistrate Judge Rules

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

ED Cal Gen LR General Rules

ED Cal Civ LR Civil Rules

ED Cal Mag LR Magistrate Judge Rules

ED Cal Adm LR Admiralty and In Rem Rules

ED Cal Automated Case Assignment Plan Automated Case Assignment Plan

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

ND Cal Civ LR Local Rules

ND Cal ADR LR Local Rules for Alternative Dispute Resolution

ND Cal Appendix Appendixes of Sample Forms

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

SD Cal Civ LR Local Rules

SD Cal Gen Order General Orders **California State Court Rules**

Cal Rules Ct California Rules of Court

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

US Code Cong & Admin News Congressional and Administrative News

UST United States Treaties

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What's New

1 MB Practice Guide: Fed Pretrial Civ Proc in CA Scope

Scope

HIGHLIGHTS

Release 13 September 2010

Local Rules and Cases
This release updates the publication throughout with recent changes to local district court rules, including all rule changes and revised forms in effect as of May 10, 2010.
Updates Include:
The revision of the Northern District Local Rules for Alternate Dispute Resolution.
The complete renumbering of the Eastern District Local Rules.
The time computation amendments to the Local Rules in the Central District, Eastern District, Northern District and Southern District, which reflect the time period amendments to the Federal Rules of Civil Procedure.
Developments in Other Areas of Law Include:
Jurisdiction.
Standing.
Certification of class actions.

Chapter 2, *Determining Forum (Jurisdiction and Venue)* has been updated to include the recent Supreme Court case, *Hertz Corp. v. Friend (2010) 130 S Ct 1181, 175 L Ed2d 1029* , defining a corporation's principal place of business. *See § 2.18[3].*

The chapter also has been updated to include recent Supreme Court decisions addressing standing, including *Alvarez v. Smith (2009) 130 S Ct 576, 175 L Ed2d 447* and *Salazar v. Buono (2010) 130 S Ct 1803, 176 L Ed2d 634* . *See §§ 2.45[1], 2.43[3][a].*

Chapter 6, *Drafting the Summons and Complaint*, includes discussion of ND Cal Gen Order 62, effective May 10, 2010, which revises the procedures for filing sealed documents in civil cases, pending consideration of a revision to *ND Cal Civ LR 79-5. See § 6.21[7][b].*

Chapter 20, *Class Actions*, has been updated with coverage of *Dukes v. Wal-Mart Stores, Inc. (9th Cir 2010) 603 F3d 571* , in which the Ninth Circuit set out the standards to be applied by district courts in adjudicating a Rule 23 motion for class certification. The court also established a new test to determine whether monetary relief predominates over injunctive relief or declaratory relief, in determining whether Rule 23(b)(2) certification is appropriate--overruling *Molski v. Gleich (9th Cir 2003) 318 F3d 937 . See §§ 20.05A, 20.07[2], 20.07[4][b].*

Chapter 32, *Court Annexed ADR*, has been updated throughout to incorporate the extensive revision of the Northern District's ADR Local Rules, effective December 1, 2009.

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HowTo.01 Finding This Publication and Other Sources on *lexis.com* [(R)]

[1] Contact LexisNexis[(R)]

New customers can contact a LexisNexis[(R)] Account Representative at http://www.lexisnexis.com/trial/contactrepNALM.asp or by calling (800) 227-4908.

Existing subscribers can reach LexisNexis[(R)] Customer Support 24/7/365 at 800-227-4908 or can contact their Account Representative.

[2] Using Content Online at *lexis.com* [(R)]

Online subscribers have access to the **Total Research System** at *lexis.com* [(R)]. When searching at *lexis.com* [(R)] tabs lead users to Legal Sources, Public Records, and News and Business Sources. Additional tabs, such as Litigation Practice, can be readily created by the user through the Add/Edit Tabs link directly above the first tab on the left. Sources preceded by a dollar sign and/or an "interrupt" message indicate content outside a subscription plan. These sources may be accessed when available under a customer's alternate transactional pricing plan.

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

Additionally, a task-based web page is available for this publication at http://www.lexisnexis.com/clients/CApracticeguide.

[3] Selecting a Source on *lexis.com* [(R)]

Use **Source Searches** to select the source you wish to search. For example, on the **Legal** tab see the **States Legal -- US** list and follow this jurisdictional path:

California> Search Analysis & CLE Materials > Litigation Practice & Procedure[]> **Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California**.

Content can also be accessed from topical paths related to the publication, e.g., **Legal** tab> Area of Law -- By Topic>

Litigation Practice & Procedure> Search Analysis, Law Reviews & Journals> Federal> **Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California**.

Use the **Find a Source** tab to locate available paths and sources by entering an exact word or phrase from the source name, or if known, by entering the source library and file. Users may consult the Source Description link following each source (click on the "i" symbol), LexisNexis Customer Support, or the Directory of Online Sources to get information regarding sources, search strategy, or coverage. The standard search price for each source is contained at the bottom of the Source Description page for that source.

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HowTo.02 Authority and Sources Referenced in This Publication

[1] Using *lexis.com* [(R)] Resources to Update Cases

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

[2] Federal Case Databases

Several sources may assist research needs. They include:

- Federal Court Cases After 1944, Combined (GENFED;NEWER)
- Federal Court Cases Within 2 Years, Combined (GENFED;CURRNT)
- 9th Circuit-US Court of Appeals, District & Bankruptcy Cases, Combined (GENFED;9TH)
- 9th Circuit-US Court of Appeals Cases & Bankruptcy Appellate Panel (GENFED;9CIR)
- 9th Circuit-US District Court Cases (GENFED;9DIST)

Case law from all 50 states, the Virgin Islands, Guam, Northern Marianas Islands, Washington D.C. federal courts, state and federal agencies is also available on *lexis.com* [(R)] through the Legal tab> Cases -- U.S.

[3] Hypertext Links

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

[4] Finding Related Sources and Suggested Searches

This publication highlights additional online sources to assist your research tasks, both legal and factual, related to

federal pretrial civil procedure. Thousands of additional sources are also available on *lexis.com* [(R)]. The following list highlights frequently used sources and sample search strategies relevant to topics contained in this publication:

REFERENCED CASE LAW SOURCES ON *lexis.com* [(R)]:

Federal & State Court Cases --After 1944, Combined (see *Sample Searches in section 4.02*)

To learn about other litigation in which the person or entity was a party, try a NAME segment search of the case law: *name (First Name /3 Last Name)* (see *4.02*)

9th Circuit-US Court of Appeals Cases & Bankruptcy Appellate Panel (see *Sample Searches in sections 2.02*, *2.84*, *16.24*)

For appellate decisions on a judge's rulings in a particular procedural setting or on a particular substantive topic, use the HISTORY segment with the judge's last name in this format plus words for finding the specific topic, for example: summary judgment and history *(First Name /3 Last Name /3 j or judge or hon!)* (see *2.02*, *2.84*)

For appellate decisions on a magistrate judge's rulings in a particular procedural setting or on a particular substantive topic, use the HISTORY segment with the judge's last name in this format plus words for finding the specific topic, for example: summary judgment and history *(First Name /3 Last Name /3 j or judge or hon!)* (see *16.24*)

REFERENCED TOPICAL, PUBLIC RECORDS, COURT FILINGS AND NEWS SOURCES ON *lexis.com* [(R)]:

Biographies (see *Sample Searches in sections 2.02*, *2.75*, *2.84*, *16.24*, *32.02*)

For biographical information on a particular judge, use a NAME segment search: *name (First Name /3 Last Name)* (see *2.02*, *2.84*)

To find biographical information about a particular ADR practitioner, try this NAME segment search of the Biographies file: *name (First Name /3 Last Name)* (see *2.75*, *32.02*)

Sample Search: For biographical information on a particular magistrate judge, use a NAME segment search: *name (First Name /3 Last Name)* (see *16.24*)

Class Actions: Mealey's Litigation Report (see *Sample Search in section 20.04*)

To track recent issues with regard to class action litigation against pharmaceutical companies, enter the Terms and Connectors search: *pharmaceutical and date aft 2003*. To save this as a recurrent search in Mealey's Class Action Litigation Report, click the Save As Alert link on the top center of the results screen. Complete the options on the Save LexisNexis(R) Alert dialog box (see *20.04*)

Combined State Civil Filings (see *Sample Search in sections 4.02*, *21.05*)

To learn about other litigation in state courts in which the person or entity is a party, try a NAME segment search of the docket filings: *name (First Name /3 Last Name)* (see *4.02*, *21.05*)

Combined State Criminal Filings (see *section 21.05*)

Search within this database for state criminal actions in which a witness was named as a party (see *21.05*)

County Demographics (see *Sample Search in section 13.04*)

Try the following Terms and Connectors search to find demographic information for a particular county: *county (orange) and state (cal!)* (13.04)

LexisNexis(R) Corporate Affiliations (see *Sample Search in sections 4.02*, *4.30*)

Determine Corporate parent/subsidiary relationships, including directors and officers by searching the Directory of Corporate Affiliations online. A product search may be performed, such as search: *brand/business(Tylenol)*. A company search follows this format: *company(lexisnexis)* (see *4.02*, *4.30*)

Electronic Discovery: Mealey's Combined Reports (see *Sample Search in section 23.158*)

To find current analysis of e-discovery and digital document retention, enter the Terms and Connectors search: *electronic or digital or computer! or e-discovery and document or data /3 storage or retention* (see *23.158*)

Forensic Services Directory (see *Sample Search in section 21.05*)

To find a California forensic expert in a given speciality, e.g., accident reconstruction, try this SPECIALTY segment search: *specialty (accident reconstruction) and ca* (see *21.05*)

Judicial Staff Directory (see *Sample Searches in sections 2.02*, *2.84*, and *16.24*)

For biographical information on a judge currently sitting on a federal bench, use a NAME segment search: *name (First Name /3 Last Name)* (see *2.02*, *2.84*)

For biographical information on a magistrate judge currently sitting on a federal bench, use a NAME segment search: *name (First Name /3 Last Name)* (see *16.24*)

Jury Verdicts and Settlements, Combined (see *Sample Searches in section 31.04*)

To find examples of federal verdicts or settlements in a products liability action involving injuries from a "rollover" accident, try this search: *court (united states or u.s.) and product liability and rollover or roll over* (see *31.04*)

To find examples of federal court verdicts or settlements in a wrongful death action based on misdiagnosis, try this TOPIC segment search: *court(united states or u.s.) and topic (wrongful death and misdiagnos! or diagnos!)* (see *31.04*)

Medline References (see *Sample Searches in section 23.190*)

To obtain a bibliographic list of medical articles on a particular topic, use the MAJOR-TERMS segment to search the MEDLINE(R) bibliographic database: *major-terms (aspartame)* (see *23.190*)

To obtain a bibliographic list of medical articles by a particular author, enter a Terms & Connectors search, such as: *AUTHOR(last name /3 first name)* (see *23.190*)

News, All (English, Full Text) (see *Sample Searches in sections 2.02*, *2.75*, *2.84*, *16.24*, *21.05*, *32.02*)

For news articles on a particular judge, try a simple search: *First Name /3 Last Name* (see *2.02*, *2.84*)

To find news articles about an ADR practitioner, search the News, All (English, Full Text) file using this format: *First Name /3 Last Name* (see *2.75*, *32.02*)

For news articles on a particular magistrate judge, try a simple search: *First Name /3 Last Name* (see *16.24*)

A search in the format *First Name / 3 Last Name* can find articles about a person, and using appropriate terms can find articles about events in a number of news publications (see *21.05*)

Stock Ownership (see *Sample Search in section 21.05*)

For information on significant stock holdings, including changes of ownership of public company insiders and investors, search in this database (see *21.05*)

US District Courts, Civil Filings (Full Docket) (see *Sample Search in sections 4.02*, *21.05*)

To learn about other litigation in federal courts in which the person or entity is a party, search within this database (see *4.02*, *21.05*)

US District Courts, Criminal Filings (Full Docket) (see *Sample Search in section 21.05*)

Search within this database for federal criminal actions in which a witness was named as a party (see *21.05*)

What's It Worth? A Guide to Personal Injury Awards and Settlements (see *Sample Search in section 31.04*)

For a national perspective in helping to assess the damages demand for, *e.g.,* an ankle injury, try an INJURY segment search, such as: *injury (brok! or fractur! /2 ankle)* (see *31.04*)

ZIP Demographics (see *Sample Search in section 13.04*)

Try the following Terms and Connectors search to find demographic information for a particular ZIP code: *zip (92843)* (see *13.04*)

[5] Search by Topic Links to Related Cases and Analytical Materials

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

Several **Search by Topic** areas of law relate to this publication, including **Civil Procedure**.

This publication is tied to **Search by Topic**. From the sections of this publication you can search the topics related to the section you are looking at in this publication.

In **Search by Topic**, you can search within a collection of cases already restricted to the subtopic. You can use **Search by Topic** as a current awareness case law update device by specifying a date restriction in the search box, e.g., **"AND DATE > 2007"**.

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HowTo.03 Formulating a Search Query on *lexis.com* [(R)]

[1] Frame Your Search

After you have selected your source, you can use available tables of contents or enter search terms to retrieve relevant documents. This search interface on lexis.com links to tips about structuring your search, search connectors, segment searching and date restrictions.

[2] Develop Your Search Strategy

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

[3] Narrow Your Search

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

[4] Find More Authorities Like This

When you find cases or other documents that are helpful (or hurtful) and you want (or need) to find whether there are other similar materials, you can click the More Like This link at the top of the page. More Like This extracts the relevant search terms for the document you are viewing and gives you the option to use these terms to locate additional materials in the same or a different database. Cases have an additional benefit using More Like This to extract citations from an on point case and use similar citation patterns to locate other cases, treatises or law reviews. Similarly, the More Like Selected Text link at the top of documents can be used to target specific paragraphs or language you

highlight in an on-point document to locate similar materials. In case law, More Like This Headnote creates a virtual case law digest online based on the language, law and topic discussed in headnotes.

[5] Keep Current With Alerts

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

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HowTo.04 Shepardize[(R)] to Validate Your Results and as a Research Tool

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

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Unit 1 Litigation Milestones
CHAPTER 1 Litigation Milestone Checklists

1-1 MB Practice Guide: Fed Pretrial Civ Proc in CA 1.syn

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

1.01 Scope.

1.02 CHECKLIST: Steps to Take Before Filing a Lawsuit.

1.03 CHECKLIST: Determining Basis for Bringing Action in Federal Court.

1.04 CHECKLIST: Plaintiff's Next Steps Upon Filing Lawsuit.

1.05 CHECKLIST: Defendant's Answer and Initial Response Under Rule 12.

1.06 CHECKLIST: Defendant's Steps to Remove Case to Federal Court.

1.07 CHECKLIST: Plaintiff's Responses.

1.08 CHECKLIST: Case Management Process.

1.09 CHECKLIST: Pretrial Motions and Steps Initiated by Plaintiff.

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

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

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

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Unit 1 Litigation Milestones
CHAPTER 1 Litigation Milestone Checklists
I. SCOPE

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1.01 Scope.

This chapter provides an outline of procedures that should be followed in the pretrial phases of a civil action filed in federal district court. This chapter covers civil actions generally. The chapter is intended as an overview of the pretrial steps leading up to trial, and makes extensive cross references to other chapters where each step or procedure is covered in detail.

The chapter begins with a checklist of considerations and steps before the plaintiff files a lawsuit, including gathering information, interviewing the client, establishing the attorney-client relationship, and determining a course of action [*see 1.02*]. This is followed by a section on determining the basis for federal jurisdiction over the action [*see 1.03*], and a checklist for the plaintiff's next steps, including filing and serving the summons and complaint and preparing for the Rule 26(f) conference and initial disclosures [*see 1.04*]. The defendant's steps in answering and/or responding under Rule 12 are listed next, as well as preparing for the Rule 26(f) conference and initial disclosures [*see 1.05*], followed by a checklist for the defendant to remove the action from state to federal court [*see 1.06*]. This is followed by steps the plaintiff can take to reply to the defendant's response, including moving for a default judgment, defeating removal, and remanding to state court if appropriate [*see 1.07*].

Pretrial procedures are covered including case management steps for both parties [*see 1.08*], pretrial motions and steps initiated by the plaintiff such as summary judgment [*see 1.09*], and the defendant's response to these pretrial steps including setting aside a default, opposing summary judgment, and filing a cross-motion for summary judgment [*see 1.10*]. Additional pretrial actions initiated by the defendant are covered including moving for summary judgment and impleading a third party [*see 1.11*]. Finally, the plaintiff's response to pretrial motions initiated by the defendant is discussed, including responses to defenses and opposing summary judgment [*see 1.12*].

Warning:

Always check judges' individual standing orders and district courts' local rules to determine whether a specific or different procedure applies in a particular situation, particularly as to the timing of events.

Legal Topics:

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

Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessSummonsIssuance

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Unit 1 Litigation Milestones
CHAPTER 1 Litigation Milestone Checklists
II. FIRST STEPS IN FILING OR RESPONDING TO A LAWSUIT

1-1 MB Practice Guide: Fed Pretrial Civ Proc in CA 1.02

1.02 CHECKLIST: Steps to Take Before Filing a Lawsuit.

☐ Gather initial facts from potential client.

☐ Perform conflicts check.

Cross Reference:

Attorney conflict of interest rules, see 30 Moore's Federal Practice, Ch. 808, Conflicts of Interest (Matthew Bender 3d ed.).

☐ Review costs and risks of representing client in litigation.

○ Can client afford to pay attorney fees and costs?

○ Is case strong enough to take on contingency fee basis?

○ Are you knowledgeable enough in federal law and procedure to competently proceed in federal court?

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

○ Will case occupy too much time for you to afford to take it on a contingency fee basis?

- If contingency fee arrangement, is client able to pay out of pocket costs?
- Is client credible?
- Will client make a good witness?
- Has client been interviewed by other attorneys who would not take case?
- Has client been represented by another attorney? If so, determine reasons for change of counsel.
- How settled is the area of law on which plaintiff's claim is based?
- What are nature and extent of client's injuries and anticipated range of recovery versus time and expense associated with achieving a successful outcome?
- Is the basis for filing in federal court clear?

☐ Consider how representation will impact existing clients or developed practice niche (e.g., likelihood of need to take position that will be negatively perceived by other clients, such as representing plaintiff in Title VII employment action when practice traditionally has been management-oriented).

☐ Decide on fee arrangement with client:

- If hourly fee, try to obtain advance fee (or retainer) from client.
- If contingency fee, determine if client can pay costs as they are incurred.
- Prepare and have client execute retention letter.

Cross Reference:

Fee agreements, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 3.16*.

☐ Identify potential claims for relief and applicable statutes of limitation, including:

- Any claim period if public entity is potential defendant.
- Any claim period if person who would be potential defendant is deceased.
- Any claim period for making a claim or providing notice in a relevant insurance policy or other

contract.

- Any shortened period of limitation imposed by insurance policy or contract.

☐ Determine whether dispute is or may be within scope of an arbitration agreement [*see* Ch. 2, Determining Forum (Jurisdiction and Venue), 2.74-2.82].

☐ Verify plaintiff's capacity to bring action [*see Ch. 4, Determining Parties to the Action, 4.20 -4.40*]:

- If entity, is entity qualified or suspended?
- If entity, is entity bankrupt?
- If plaintiff is transacting business under a fictitious name, has plaintiff filed fictitious business name statement?
- Is next friend or guardian ad litem required [*see Fed R Civ P 17(c)*]?
- Is there a statutorily created capacity to sue, such as under federal Civil Rights Act [*see 42 USC § 1983*]?

☐ Can attorney's fees be recovered from the opposing party?

- If contract is involved, check for attorney's fee clause.
- Determine if attorney's fees can be recovered from opposing party as pretrial sanctions [*see Fed R Civ P 11, 26(g)*].
- Determine if statutory attorney's fee award is available.

Cross Reference:

Availability of statutory attorney's fee award, see 10 *Moore's Federal Practice, §§ 54.170 -54.174* (Matthew Bender 3d ed.).

☐ Investigate potential defendants [*see Ch. 4, Determining Parties to the Action, 4.20 -4.40*].

- Identify.
- Determine whether any are judgment-proof.
- If an entity, does entity have capacity to defend suit?

- If a public entity, are there sovereign immunity issues?

☐ Consider prospect of prompting defendant to countersue.

☐ In considering out-of-state defendants, understand the forum state's long-arm jurisdiction statute, as well as whether a relevant federal statute or rule provides for national service [*see* Ch. 2, Determining Forum (Jurisdiction and Venue), 2.31-2.41].

☐ Further investigate facts of the case, including:

- Comprehensive interview with client.
- Thorough review and analysis of client documents, including:
  - ☐ Any correspondence between the parties.
  - ☐ Written statements made by the parties to third parties.
- Witness interviews.

☐ Do witnesses verify client's version of event?

☐ Will key witnesses be available to testify at trial?

- View publicly accessible sites.
- Gather publicly available documents.
- Ensure protection of tangible evidence in hands of third parties.
- If action cannot presently be brought, engage in prefiling discovery or take other steps to perpetuate testimony or preserve evidence [*Fed R Civ P 27*; *see* *Ch. 23, Methods of Discovery, 23.03-23.12*].

☐ Verify claims for relief to be pursued.

- Review jury instructions and reported district court cases for claims for relief, and perform legal research to determine what proof is needed.

☐ Consider all potential affirmative defenses defendant may assert [*see* *1.05*; *see also* Ch. 8, Answers and

Responsive Motions Under Rule 12, 8.10].

☐ Satisfy any claim prerequisites, such as:

- ○ Government claims.
- ○ Claims against decedents' estates.
- ○ Insurance claims.
- ○ Claims against bankrupt estates.
- ○ Exhaust any administrative remedies.

Cross Reference:

Claims requirements under Federal Tort Claims Act, see 16 *Moore's Federal Practice, § 105.26* (Matthew Bender 3d ed.).

☐ Determine if there is a reason the federal district court may decline jurisdiction [*see 1.03*; *see also* Ch. 2, Determining Forum (Jurisdiction and Venue), 2.03 et seq.].

☐ Identify forum [*see 1.03*; *see also* Ch. 2, Determining Forum (Jurisdiction and Venue), 2.48 et seq.].

- ○ Contractual arbitration:
  - ☐ To be pursued.
  - ☐ To be resisted.
- ○ Action in state or federal court:
  - ☐ In which county or federal district?
  - ☐ In which courthouse?
- ○ Existence of forum selection clause in contract or government policy.

☐ If the dispute involves an out-of-state defendant, consider [*see* Ch. 2, Determining Forum (Jurisdiction and Venue), 2.31 et seq.]:

- ○ Whether the defendant's contacts with the state are systematic and continuous, supporting general

personal jurisdiction.

- Whether the defendant's minimum contacts with the forum are purposeful, such that it is reasonable to expect the defendant to be hailed into court in that state, supporting specific jurisdiction.

☐ Identify any related cases [*see* Ch. 2, Determining Forum (Jurisdiction and Venue), 2.26-2.30].

- Continuing obligation to advise court while case is pending.

☐ Draft summons and complaint [*see* Ch. 6, Drafting the Summons and Complaint].

Warning:

Filing the signed complaint certifies that, among other things, to the best of the attorney's knowledge, information, and belief, the allegations and other factual contentions have evidentiary support, or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery [*Fed R Civ P 11(b)(3)*]. A falsely certified complaint can result in imposition of sanctions under Rule 11 [*Fed R Civ P 11(c)*; *see* Ch. 33, Rule 11 Sanctions].

☐ Fill out the civil cover sheet and cover page, if required by local rules [*see Ch. 5, Formatting, Serving, and Filing Papers, 5.05*].

☐ Determine if TRO should be requested to protect status quo [*see Ch. 19, Preliminary Injunctions, TROs, and Other Provisional Remedies, 19.03[3], 19.09*].

Timing:

File the TRO with the summons and complaint or anytime thereafter. A TRO granted without notice to the adverse party can be valid for up to 14 days [*Fed R Civ P 65(b)*].

☐ Determine whether seizure of person or property should be requested to secure satisfaction of judgment ultimately to be entered [*Fed R Civ P 64*; see *Ch. 19, Preliminary Injunctions, TROs, and Other Provisional Remedies, 19.02[2], 19.37 -19.77*].

Timing:

File request with summons and complaint or anytime thereafter [*Fed R Civ P 64*].

☐ If action concerns real property, consider filing notice of pendency of action in county recorder's office where property is situated.

Cross Reference:

California law on availability and procedure for lis pendens, see Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, Ch. 21, Lis Pendens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessSummonsIssuance

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Kendall, Seeborg, Shartsis, Smith

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Unit 1 Litigation Milestones
CHAPTER 1 Litigation Milestone Checklists
II. FIRST STEPS IN FILING OR RESPONDING TO A LAWSUIT

1-1 MB Practice Guide: Fed Pretrial Civ Proc in CA 1.03

1.03 CHECKLIST: Determining Basis for Bringing Action in Federal Court.

☐ Determine if justiciability requirements are met [US Const, art III, § 2; *see SEC v. Medical Comm. for Human Rights (1972) 404 US 403, 407, 92 S Ct 577, 30 L Ed2d 560*].

- ○ There is a concrete, substantial case or controversy.
- ○ The parties have adverse legal interests.
- ○ The plaintiff has standing to sue.
- ○ The action is not moot.
- ○ The time is ripe for the court to consider the claim.
- ○ The action does not involve a political question between different government branches.

☐ Determine if the federal court will decline to exercise jurisdiction under the abstention doctrine to prevent federal interference with pending state proceedings [*Hawaii Hous. Auth. v. Midkiff (1984) 467 US 229, 236, 104 S Ct 2321, 81 L Ed2d 186*].

☐ Determine if there is *Eleventh Amendment* limitation to federal court jurisdiction [*US Const, amend*

XI; *see* *Edelman v. Jordan (1974) 415 US 651, 668, 94 S Ct 1347, 39 L Ed2d 662*].

○ The proceeding is an action against a state by one of its citizens or a citizen of another state.

○ The entity being sued is entitled to immunity.

○ Claims under federal statutes may override *Eleventh Amendment* immunity.

○ Congress may be able to override *Eleventh Amendment* immunity.

☐ Determine if federal court will decline jurisdiction in family law or probate case [*Ankenbrandt v. Richards (1992) 504 US 689, 703, 112 S Ct 2206, 119 L Ed2d 468*].

☐ Determine if federal question jurisdiction exists [*28 USC § 1331*].

○ The claim arises under the U.S. Constitution, statutes, or treaties, or under federal common law.

○ The federal element in a state law claim is important enough to justify federal jurisdiction.

○ The federal question can be determined from the face of the complaint.

○ A state law cause of action is preempted by federal law.

☐ Determine if diversity jurisdiction exists [*28 USC § 1332*].

○ The amount in controversy exceeds $75,000.

○ The citizenship of all plaintiffs is diverse from the citizenship of each defendant.

○ Determine the domicile of each party at the time the suit is filed.

Consider:

Diversity is determined by the domicile, not the residence, of each party [*Kanter v. Warner-Lambert Co. (9th Cir 2001) 265 F3d 853, 857*]. There are special factors to consider in the case of diversity jurisdiction involving corporations and partnerships, which may have offices, officers, directors, principals, and partners in different states. For example, corporations are deemed citizens of both their state of incorporation and the state where their principal place of business is located [*28 USC § 1332(c)*; *see* *United Computer Sys., Inc. v. AT&T Corp. (9th Cir 2002) 298 F3d 756, 763*]. A general or limited partnership is deemed to have the citizenship of each of its general partners and

limited partners [*see Carden v. Arkoma Assocs. (1990) 494 US 185, 197, 110 S Ct 1015, 108 L Ed2d 157*].

- Determine if any factors, such as status as class action or derivative action, affect diversity.

☐ Determine if basis for class action exists [*Fed R Civ P 23*].

☐ Determine if exclusive federal jurisdiction exists in one of following areas, among others:

- Admiralty jurisdiction [US Const, art III, § 2; *28 USC § 1333*; *Executive Jet Aviation, Inc. v. City of Cleveland (1972) 409 US 249, 268, 93 S Ct 493, 34 L Ed2d 454*].
- Bankruptcy jurisdiction [*28 USC § 1334*].
- Antitrust jurisdiction [*28 USC § 1337*].
- Patent, copyright, and plant-protection jurisdiction [*28 USC § 1338*].
- Actions for environmental damage brought under CERCLA [*42 USC § 9613(b)*].
- Pension benefits actions arising under ERISA [*29 USC § 1132*].

Cross Reference:

Complete discussion of exclusive federal jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§ 2.08[2]*.

☐ Determine if concurrent federal jurisdiction exists in one of following principal areas of litigation:

- Civil rights actions [*28 USC § 1343*].
- Suits arising under act of Congress regulating interstate commerce or protecting trade and commerce against restraints and monopolies [*28 USC § 1337*].
- Suits arising under trademark laws [*28 USC § 1338(b)*].
- Suits arising under laws relating to post office [*28 USC § 1339*].
- Certain specific actions against United States [*28 USC §§ 1346(a), (d), 1491*] including tort claims [*28 USC § 1346(b)*].
- Pension benefits actions arising under ERISA [*29 USC § 1132*].

Cross Reference:

Complete discussion of concurrent federal jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§ 2.08[1]*.

☐ Determine basis for supplemental jurisdiction [*see 28 USC § 1367*; *Owen Equip. & Erection Co. v. Kroger (1978) 437 US 365, 375-376, 98 S Ct 2396, 57 L Ed2d 274*].

○ The supplemental claim is so related to the main claim as to be part of the same case or controversy.

○ In its discretion, the court may decline jurisdiction of supplemental claim if it is novel or predominant, or if the main claim has been dismissed.

Cross Reference:

Discussion of bases of supplemental federal court jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.26 -2.30*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureVenueGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAbstentionCivil ProcedureFederal & State InterrelationshipsSovereign ImmunityState Immunity

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1-1 MB Practice Guide: Fed Pretrial Civ Proc in CA 1.04

1.04 CHECKLIST: Plaintiff's Next Steps Upon Filing Lawsuit.

☐ File complaint and have summons issued [*see Ch. 5, Formatting, Serving, and Filing Papers, 5.24 -5.25*].

Warning:

Particularly check local rules as to the details of filing and service.

Timing:

It is crucial to file the complaint within the applicable limitations period.

☐ Serve summons and complaint, generally within 120 days after filing the complaint [*see Ch. 7, Service of Summons, 7.03 -7.07*].

Warning:

Failure to meet this deadline, without court approval of an extension, can result in dismissal of the action [*Fed R Civ P 4(m)*].

☐ Consider whether voluntary mediation or arbitration could be beneficial.

☐ Be prepared to discuss possibility of court annexed mediation or other form of ADR [*see* Ch. 32, Court Annexed ADR; *see, e.g., ND Cal Civ LR 16-8*].

○ Check local rules for details on the court's ADR program for civil actions.

☐ Determine whether to consent to leave case with magistrate judge, if one is assigned to case on filing [*see, e.g., ND Cal Civ LR 3-3, 72-1*].

☐ At least 21 days before a scheduling conference is held or a scheduling order is due under *Fed R Civ P 16(b)*, prepare for and attend the initial discovery conference [*Fed R Civ P 26(f)*; *see* Ch. 15, Rule 26(f) Conference and Initial Disclosures, 15.03-15.14].

☐ Within 14 days of initial discovery conference, make mandatory initial disclosures [*Fed R Civ P 26(a)*; *see* Ch. 15, Rule 26(f) Conference and Initial Disclosures, 15.15-15.26].

☐ Prepare discovery plan and file with the court within 14 days after discovery conference [*Fed R Civ P 26(a)*; see Ch. 15, Rule 26(f) Conference and Initial Disclosures, 15.17-15.26].

☐ Commence early discovery after Rule 26(f) conference.

Timing:

Except for perpetuation of testimony under *Fed R Civ P 26* or mandatory initial disclosures, or except by agreement or order, a party may not seek discovery from any source before the parties have conferred as required by *Fed R Civ P 26(f)* [*Fed R Civ P 26(d)*]. To take an oral or written deposition, a party must first give written notice to every other party in the action [*Fed R Civ P 30(b), 31(a)(3)*; *see Ch. 23, Methods of Discovery, 23.29*].

☐ Determine if costs and attorney's fees can be recovered from opposing party for unsuccessful discovery motion [*see Fed R Civ P 37(a)(5)*].

☐ Determine if attorney's fees can be recovered because opposing party willfully abused judicial process [*see 28 USC § 1927*].

☐ If seeking jury trial, serve jury demand within 14 days after service of last pleading addressing the issues as to which a jury trial is demanded [*Fed R Civ P 38(b)*; *see Ch. 13, Demanding a Jury Trial, 13.05, 13.06*].

☐ For the plaintiff, the "last pleading" will normally be the complaint, or if a crossclaim or counterclaim is filed, the reply.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessProofCertificatesCivil ProcedurePleading &

PracticeService of ProcessSummonsIssuance

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1.05 CHECKLIST: Defendant's Answer and Initial Response Under Rule 12.

☐ Review complaint.

Timing:

Calendar time for response to complaint, generally 21 days after service of summons and complaint [*Fed R Civ P 12(a)(1)(A)(i)*].

☐ Gather additional initial facts from potential client.

☐ Perform conflicts check.

Cross Reference:

Attorney conflict of interest rules, see 30 Moore's Federal Practice, Ch. 808, Conflicts of Interest (Matthew Bender 3d ed.).

☐ Review costs and risks of representing client in litigation.

○ Can client afford to pay attorney fees and costs?

○ Are you knowledgeable enough in federal law and procedure to competently proceed in federal court?

- Are you knowledgeable enough in area of law to competently handle case?
- Is client credible?
- Will client make a good witness?
- Has client been interviewed by other attorneys who would not take case?
- Has client been represented by another attorney? If so, determine reasons for change of counsel.
- How settled is the area of law on which plaintiff's claim is based?
- Is the basis for filing in federal court clear?

☐ Consider how representation will impact existing clients or developed practice niche.

☐ If contract is involved, check for attorney's fee clause.

☐ Decide on fee arrangement with client.

- If hourly fee, try to obtain advance fee (or retainer) from client.
- Prepare and have client execute retention letter.

Cross Reference:

Fee agreements, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 3.16*.

☐ Determine whether defendant has the capacity to defend the action [*see Ch. 4, Determining Parties to the Action, 4.20 -4.40*].

- If entity, is entity suspended?
- Is guardian ad litem required?

☐ Determine whether dispute is or may be within scope of an arbitration agreement.

☐ Further investigate the facts of the case, including:

- Obtain all relevant documents in the client's possession, including:

- [ ] Any correspondence between the parties.
- [ ] Written statements made by the parties to others.
- [ ] Insurance policies.
- [ ] Electronically stored information.

- Witness interviews.
  - [ ] Do witnesses verify client's version of event?
  - [ ] Will key witnesses be available to testify at trial?
- View publicly accessible sites.
- Gather publicly available documents.
- Ensure protection of tangible evidence in hands of third parties.

Cross Reference:

Informal investigation and management of documents, see Ch. 21, Discovery Strategy and Planning, see *§ 21.05*.

- [ ] After investigation, determine whether to implead any third party based on liability that is derivative of, or secondary to, that of defendant [*Fed R Civ P 14*; *see Ch. 12, Third-Party Actions, 12.03 -12.10*].
- [ ] Notify insurance carrier if there is any potential for coverage under any of client's insurance policies.
- [ ] If action was filed in state court, consider possible advantages of removal of the action to federal court [*see 1.06*].
  - Advantage from federal rules.
  - Advantage from local federal rules.
  - Easier access to interlocutory appeals in federal court.
  - Congested state court docket that will delay trial.
  - Different ADR procedures in federal court.

- Easier venue transfers in federal court.
- Favorable interpretation in federal court of unclear state law.
- Prospect of assignment to single judge for all purposes.
- Availability of limitation on punitive damages.

Cross Reference:

Discussion of removal, see Ch. 3, Removing a State Court Case to Federal Court, see *§§ 3.03 -3.15*.

☐ On receiving pleading, determine when response is required [*see* Ch. 8, Answers and Responsive Motions Under Rule 12, 8 .05].

- If no period is specified by statute, defendant must normally serve an answer or Rule 12 motion within 21 days of service of the complaint [*Fed R Civ P 12(a)(1)(A)(i)*].
- If a statutory period is specified, respond within that period [*see Fed R Civ P 12(a)(1)*].
- If defendant is a federal agency or officer, or a foreign state, serve an answer or response within 60 days of service of the complaint [*Fed R Civ P 12(a)(2), (3); 28 USC § 1608(d)*].
- If defendant timely waived service of process on plaintiff's request, serve an answer or response within 60 days after the request for a waiver was sent [*Fed R Civ P 12(a)(1)(A)(ii)*].
- If responding to an amended complaint, respond within 14 days after amended complaint is served or within time remaining to respond to original complaint, whichever is longer [*Fed R Civ P 15(a)(3)*].
- If making a preanswer Rule 12 motion, serve the responsive pleading within 14 days of any of the following [*Fed R Civ P 12(a)(4)*]:

  ☐ Receiving notice that the court has denied the Rule 12 motion, denied it in part, or postponed its disposition until trial.

  ☐ Service of the more definite statement, if the court has granted a motion for a more definite statement.

  ☐ Service of the amended pleading, if instead of dismissing the complaint, the court permits the plaintiff to amend the pleading.

- Determine whether the time period is extended [*Fed R Civ P 6(a), (d)*].
  - ☐ If the pleading was served by mail, add three days to the applicable period.
  - ☐ If the pleading was served to the clerk of the court based on no known address, add three days to the applicable period.
  - ☐ If service is made by electronic or other means consented to in writing under *Fed R Civ P 5(b)(2)(E)* or *(F)*, add three days to the applicable period.
  - ☐ If the time period ends on Saturday, Sunday, or a legal holiday, extend the time period to the first day that is not a Saturday, Sunday, or legal holiday.
  - ☐ If the period for responding is less than 11 days, Saturdays, Sundays, and legal holidays within that period are not counted as part of the period.
- If a response cannot be made within the prescribed time period, request the court to grant additional time for responding [*Fed R Civ P 6(b)*; *see Ch. 26, Pretrial Motion Practice, 26.35*].

☐ After reviewing complaint and summons, decide whether to file answer or to file Rule 12 motion, considering response periods above [*see* Ch. 8, Answers and Responsive Motions Under Rule 12, 8.03-8.05]. Rule 12 motions include:

- Motion to dismiss for [*see Fed R Civ P 12(b)*]:
  - ☐ Lack of subject matter jurisdiction.
  - ☐ Lack of personal jurisdiction.
  - ☐ Improper venue.
  - ☐ Insufficiency of process or service of process.
  - ☐ Failure to state a claim on which relief can be granted.

Trap:

In bringing a motion based on failure to state a claim under Rule 12(b)(6), if material outside the pleadings is presented, the moving party risks of having the motion converted into a motion for summary judgment under Rule 56. The danger in having that occur is that the moving party may then be precluded from bringing a motion for summary judgment later in the case when that party has assembled more evidence in support of the motion [*Fed R Civ P 12(b)(6)*].

☐ Failure to join a required party under *Fed R Civ P 19*.

○ Motion for judgment on the pleadings [*see Fed R Civ P 12(c)*].

○ Motion for more definite statement [*see Fed R Civ P 12(e)*].

○ Motion to strike [*see Fed R Civ P 12(f)*].

☐ Note that Rule 12(b) defenses (e.g., insufficiency of service of process) can be raised in the answer [*see Fed R Civ P 12(b)*].

☐ If asserting Rule 12 defenses by motion, join all available Rule 12 defenses in single motion [*Fed R Civ P 12(g)*]. Note that:

○ Failure to include some Rule 12 defense, or objection in a Rule 12 motion prevents later making that same defense or objection [*Fed R Civ P 12(g), (h)(1)*].

○ Lack of subject matter jurisdiction, failure to state a claim on which relief can be granted, failure to join an indispensable party, and failure to state a legal defense to a claim are so fundamental that they are *not* waived if omitted from a Rule 12(b) motion of other responsive pleading, and can be asserted at any time [*Fed R Civ P 12(g), (h)(2), (3)*].

○ Venue decisions are interlocutory orders and cannot normally be reviewed until the end of the action. In rare cases a writ of mandate may be effective for review [*see 28 USC § 1651(a)*].

☐ If complaint is so vague or ambiguous that defendant cannot reasonably be required to frame a responsive pleading from it, consider filing a Rule 12 motion for a more definite statement [*Fed R Civ P 12(e)*].

☐ If complaint contains an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter, consider filing motion to strike [*Fed R Civ P 12(f)*].

☐ If Rule 12 motion to dismiss is denied, note that the denial is not considered final, and thus is not immediately appealable [*Gulfstream Aerospace Corp. v. Mayacamas Corp. (1988) 485 US 271, 287, 108 S Ct 1133, 99 L Ed2d 296*].

☐ Determine whether suitable alternative forum for trial exists, or whether contract in dispute between the parties contains forum selection clause directing use of different forum [*see* Ch. 2, Determining Forum (Jurisdiction and Venue), 2.48-2.60]. If so:

○ Prepare and file motion to transfer to a district where the action might have been brought for the convenience of parties and witnesses [*28 USC § 1404(a)*].

○ Prepare and file motion to transfer to any district where the action could have been brought if venue is improper [*28 USC § 1406(a)*].

Timing:

Although there is no mention in the transfer statutes about the timing of the motion, it should be made early in the action to avoid waiver.

○ Prepare and file motion to coordinate or consolidate pretrial proceedings in complex case subject to multidistrict litigation [*28 USC § 1407*].

Timing:

These motions must be filed under the same timetable as Rule 12 motions, covered above.

☐ Request a hearing on the Rule 12 motion. The court must conduct a hearing on request, but may defer the hearing until trial [*Fed R Civ P 12(i)*].

☐ If Rule 12 motion is denied, prepare and file answer. If motion to strike part of complaint is granted, file answer to remaining portions of complaint [*see* Ch. 8, Answers and Responsive Motions Under Rule 12, 8 .23-8.26].

Timing:

If the court denies a Rule 12 motion or postpones its disposition until trial on the merits, the answer must be served within 14 days after notice of the court's action [*see Fed R Civ P 12(a)(4)*].

☐ Prepare answer [*see* Ch. 8, Answers and Responsive Motions Under Rule 12, 8 .06-8.13].

○ Review each allegation of complaint with defendant to determine which facts and claims are untrue.

○ If appropriate, make general denial, being mindful of Rule 11 certification, making attorney subject to sanctions for violation [*Fed R Civ P 8(b), 11(b), (c)*].

○ More commonly, make specific denials, because it is rare that every averment in the complaint, including jurisdiction, is subject to a general denial [*Fed R Civ P 8(b)(3)*].

Warning:

Note that averments in a complaint to which a response is required, other than the amount of damages, are admitted if not denied in the responsive pleading [*Fed R Civ P 8(b)(6)*].

○ Identify and include potential defenses and affirmative defenses including, among others, the following [*Fed R Civ P 8(c)*]:

☐ Failure to state a claim.

- ☐ Statute of limitations.
- ☐ Laches.
- ☐ Res judicata/collateral estoppel.
- ☐ Assumption of risk.
- ☐ Contributory or comparative fault.
- ☐ Actions of others.
- ☐ Unclean hands.
- ☐ Waiver.
- ☐ Estoppel.
- ☐ Immunity.
- ☐ Privilege.
- ☐ Statute of frauds.
- ☐ Accord and satisfaction.
- ☐ Rescission.
- ☐ Discharge.
- ☐ Release.
- ☐ Duress.

Warning:
Failure to plead an affirmative defense usually results in its waiver.

○ Determine whether any information collected from client constitutes a basis for counterclaim or crossclaim against any plaintiff or co-defendant [*Fed R Civ P 13*; *see Ch. 11, Counterclaims, Crossclaims, and Replies, 11.03*

-11.43].

☐ If so, file counterclaim against a plaintiff in a responsive pleading, generally the answer [*Fed R Civ P 7*, *13(a)-(e)*,].

Warning:

Compulsory and permissive counterclaims are subject to different pleading requirements, chiefly that compulsory claims must be asserted, or are lost [*see Fed R Civ P 13(a)*, *(b)*].

☐ If so, include crossclaim against a co-defendant in the answer [*Fed R Civ P 13(g)*].

☐ If the defendant mistakenly designates a defense as a counterclaim or a counterclaim as a defense, the court may treat the pleading as if there had been a proper designation [*Fed R Civ P 8(c)*].

☐ File and serve answer, generally within 21 days of service of the complaint [*Fed R Civ P 12(a)(1)(A)(i)*; *see* Ch. 8, Answers and Responsive Motions Under Rule 12, 8.13].

☐ After filing answer and pleadings are closed, determine whether to file Rule 12 motion for judgment on the pleadings because no material factual issue remains, and defendant is entitled to judgment as a matter of law [*Fed R Civ P 12(c)*].

○ If so, prepare and file motion within time period specified above.

○ If matters outside the pleadings are presented to, and not excluded by the court, the motion will be treated as a motion for summary judgment under *Fed R Civ P 56* [*Fed R Civ P 12(c)*].

☐ Determine whether to consent to leave case with magistrate judge, if one is assigned to case [*see, e.g., ND Cal Civ LR 3-3*, *72-1*].

☐ At least 21 days before a scheduling conference is held or a scheduling order is due under *Fed R Civ P 16(b)*, prepare for and attend the initial discovery conference [*Fed R Civ P 26(f)*].

Cross Reference:

Ch. 15, Rule 26(f) Conference and Initial Disclosures, §§ 15.03- 15 .14.

☐ Within 14 days of initial discovery conference, make mandatory initial disclosures [*Fed R Civ P 26(a)*].

☐ Prepare discovery plan and file with the court within 14 days after discovery conference [*Fed R Civ P 26(a)*].

☐ Within 14 days of initial discovery conference, make mandatory initial disclosures [*Fed R Civ P 26(a)*].

☐ Prepare discovery plan and file with the court within 14 days after discovery conference [*Fed R Civ P 26(a)*].

☐ Commence early discovery after Rule 26(f) conference [*see* Ch. 15, Rule 26(f) Conference and Initial Disclosures].

Timing:

Except for perpetuation of testimony under *Fed R Civ P 27* or mandatory initial disclosures under *Fed R Civ P 26(a)*, or except by agreement or order, a party may not seek discovery from any source before the parties have conferred as required by *Fed R Civ P 26(f)* [*Fed R Civ P 26(d)*]. To take an oral or written deposition, a party must first give written notice to every other party in the action [*Fed R Civ P 30(b)*, *31(a)(3)*; *see Ch. 23, Methods of Discovery, 23.29*].

☐ Determine if costs and attorney's fees can be recovered from opposing party for unsuccessful discovery motion [*see Fed R Civ P 37(a)(5)*; see *Ch. 25, Motions to Compel and Discovery Sanctions, 25.16 -25.20*].

☐ Determine if attorney's fees can be recovered because opposing party willfully abused judicial process [*see 28 USC § 1927*; see *Ch. 34, Other Sanction Provisions, 34.03 -34.11*].

☐ If seeking jury trial, serve jury demand within 14 days after service of last pleading addressing the issues as to which a jury trial is demanded [*Fed R Civ P 38(b)*; *see Ch. 13, Demanding a Jury Trial, 13.06*].

Strategic Point

--Defendant: For the defendant, the "last pleading" will normally be the answer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDenialsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticePleadingsAnswers

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1.06 CHECKLIST: Defendant's Steps to Remove Case to Federal Court.

☐ If plaintiff has filed the action in state court, determine whether removal to federal court is desirable [*see 1.05*].

☐ Determine whether removal of the action from state to federal court is possible. Consider the following [*see Ch. 3, Removing a State Court Case to Federal Court, 3.03 -3.15*]:

- ○ Was the case originally filed in state court?
- ○ Is there federal question jurisdiction or diversity jurisdiction?
- ○ Will all defendants join in removal? If not, is the case a class action qualifying for removal by any defendant without the consent of all defendants [*see 28 USC § 1453(b)*]?
- ○ Can the petition for removal be timely filed?
- ○ Do specific removal statutes apply?
- ○ Is there a valid forum selection clause?
- ○ Have defendants already submitted to state court jurisdiction?

☐ Key test for removal is whether the case could have been brought in federal court originally [*see 28 USC § 1441*].

☐ Prepare and file notice of removal in the federal district court for the district and division in which the state action is pending [*28 USC § 1446(a)*].

○ Indicate that requirements for federal jurisdiction are met, based on one or more of the following [*see* Ch. 2, Determining Forum (Jurisdiction and Venue), 2.03-2.25]:

☐ Federal question jurisdiction [*28 USC § 1331*].

☐ Diversity jurisdiction [*28 USC § 1332*].

☐ Special removal statute [*28 USC § 1442 et seq.*].

○ Sign notice [*28 USC § 1446(a)*; *Fed R Civ P 11*].

Timing:

The notice of removal must be filed within 30 days of receipt of a pleading that demonstrates a basis for removal [*28 USC § 1446(b)*].

☐ Include copies of all papers, pleadings, and orders served on the removing defendant in the state court proceeding [*28 USC § 1446(a)*].

☐ Draft a notice of related cases, if applicable.

☐ Join all defendants in the notice of removal [*Hanrick v. Hanrick (1894) 153 US 192, 197, 14 S Ct 835, 837, 38 L Ed 685*].

Warning:

Failure to join all defendants in the notice of removal, and the failure of any defendant to join in the notice, precludes removal [*28 USC § 1446(a)*; *Chicago, Rock Island & Pac. Ry. v. Martin (1900) 178 US 245, 248, 20 S Ct 854, 44 L Ed 1055*].

Exception:

Multi-state mass actions and class actions may be removable without the consent of all defendants [*28 USC § 1453(b)*]

☐ Provide notice of filing to all adverse parties [*28 USC § 1446(d)*].

☐ File notice of removal with state court clerk [*28 USC § 1446(d)*].

Cross Reference:

Procedure for removal, see Ch. 3, Removing a State Court Case to Federal Court, see *§§ 3.16 -3.20*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalElementsFederal VenueCivil ProcedureRemovalElementsRemovabilityCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalWaivers

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1.07 CHECKLIST: Plaintiff's Responses.

☐ Determine whether removal can be prevented by one of following [*see Ch. 3, Removing a State Court Case to Federal Court, 3.03[2]*]:

- ○ Avoid raising any claims under federal law in complaint, to prevent federal question jurisdiction.
- ○ Join legitimate nondiverse local defendants to prevent diversity jurisdiction.
- ○ Demand less than $75,000 jurisdictional threshold amount in diversity case.
- ○ Serve defendant least likely to remove first and stagger service thereafter to other defendants.
- ○ If action is multi-state mass action or class action, file the action in state court of a state in which two-thirds or more of the proposed plaintiff class and the primary defendants are citizens [*see 28 USC § 1332(d)(4)(B)*].

☐ If plaintiff originally brought the action in state court and defendant removed it to federal court, if appropriate, prepare and file notice of motion for order remanding the removed action to state court on one of the following grounds [*28 USC § 1447(c)*; *see Ch. 3, Removing a State Court Case to Federal Court, 3.23 -3.26*]:

- Lack of subject matter jurisdiction.
- Error in removal procedure.
- District court must, or should exercise discretion to, decline jurisdiction over class action.

Timing:

Remand based on lack of subject matter jurisdiction may be brought at any time. Remand based on an error in the removal procedure must be brought within 30 days of the filing of the notice of removal [*28 USC § 1447(c)*]. Nonstatutory grounds for remand include abstention and interpretation of a forum selection clause [*see Ch. 3, Removing a State Court Case to Federal Court, 3.26[2]*].

Warning:

Remand orders are generally not appealable [*Bish v. Brady-Hamilton Stevedore Co. (9th Cir 1989), 880 F2d 1135, 1137*].

Exceptions:

While remand orders are generally not appealable [*see 28 USC § 1447(d)*], two key exceptions exist. First, an order remanding a civil rights case is reviewable by appeal [*28 USC § 1447(d)*; *see 28 USC § 1443*]. Second, an order granting or denying a motion to remand a qualified class action is appealable if the application is made to the court of appeals within ten days after entry of the order [*see 28 USC § 1453(c)*].

☐ Determine whether defendant is in default for having failed to plead or otherwise defend by serving an answer to a complaint or crossclaim, or a reply to a counterclaim within the applicable time period [*Fed R Civ P 55(a)*; *see Ch. 27, Defaults and Motions for Relief From Default, 27.04*].

Timing:

Generally the defendant must have served the answer within 21 days after service of the summons and complaint (60 days if service was waived) [*Fed R Civ P 12(a)(1)(A)*]. The time for an answer to a crossclaim or a reply to a counterclaim is 21 days [*Fed R Civ P 12(a)(1)(B)*].

☐ Determine if opposing party is guilty of misconduct that warrants entry of default judgment as sanction [*see Fed R Civ P 55(a)*].

☐ Prepare and file written application requesting entry of default, attaching affidavits or declarations and other documents, as needed.

☐ To support entry of default, affidavits and declarations must show all of the following [*Fed R Civ P 4*, *55(a)*]:

- Defaulting party was properly served with summons and complaint.

- Nondefaulting party has not been served with a responsive pleading or motion.
- Defaulting party's time to respond has expired.

Cross Reference:

Coverage of default, see Ch. 27, Defaults and Motions for Relief From Default, see *§§ 27.03 -27.17*.

☐ Plaintiff may respond to defendant's answer by [*see* Ch. 8, Answers and Responsive Motions Under Rule 12, 8 .23-8.29]:

- Filing and serving a motion for judgment on the pleadings [*Fed R Civ P 12(c)*].
- Filing and serving a motion for a more definite statement [*Fed R Civ P 12(e)*].
- Filing and serving a motion to strike part or all of the answer [*Fed R Civ P 12(f)*].

☐ Plaintiff may respond to defendant's Rule 12 motion by:

- Filing and serving opposition papers.
- Voluntarily dismissing the action and refiling it when the defect can be cured [*Fed R Civ P 41(a)*; *see* Ch. 30, Voluntary Dismissal].
- Amending the complaint to correct the defect [*Fed R Civ P 15(a)*; see *Ch. 9, Amending and Supplementing Pleadings, 9.03 -9.14*].

☐ Consider requesting a hearing on the Rule 12 motion. The court must conduct a hearing on request, but may defer the hearing until trial [*Fed R Civ P 12(i)*].

☐ Plaintiff may respond to a crossclaim by [*see Ch. 11, Counterclaims, Crossclaims, and Replies, 11.44 -11.51*]:

- Filing and serving motion to dismiss [*Fed R Civ P 12(b)*].
- Raising Rule 12(b) defenses in answer [*Fed R Civ P 12(b)*].
- Raising all compulsory counterclaims.
- Moving to sever crossclaim [*Fed R Civ P 13(i)*].
- Filing and serving an answer to the crossclaim.

Timing:

Serve the answer to a pleading containing crossclaims within 21 days after being served [*Fed R Civ P 12(a)(1)(B)*].

☐ Plaintiff should respond to a counterclaim by [*see Ch. 11, Counterclaims, Crossclaims, and Replies, 11.44-11.51*]:

○ Replying only to counterclaims denominated as such (there is no requirement to reply to affirmative defenses) [*Fed R Civ P 7(a)*].

○ Limiting response to allegations contained in counterclaim [*Fed R Civ P 7(a)*].

○ Preserving jurisdictional defenses [*Fed R Civ P 12(b)*].

○ Raising compulsory counterclaims and including any additional claims [*Fed R Civ P 13(b)*].

○ Complying with pleading and service requirements [*Fed R Civ P 8(c)*, *Fed R Civ P 12(a)*, *(b)*].

Timing:

Serve the reply to a pleading containing counterclaims within 21 days after being served [*Fed R Civ P 12(a)(1)(C)*].

☐ Consider making an offer to compromise or a settlement offer [*Fed R Civ P 68*; *see* Ch. 31, Settlement Agreements and Offers of Judgment].

Timing:

The party defending against a claim may serve on the adverse party an offer of judgment at least 14 days before the date set for trial [*Fed R Civ P 68(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalElementsFederal VenueCivil ProcedureRemovalElementsRemovabilityCivil ProcedureRemovalNonremovable ActionsCivil ProcedureRemovalProceedingsNoticesCivil ProcedureRemovalWaivers

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Unit 1 Litigation Milestones
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1.08 CHECKLIST: Case Management Process.

☐ Federal courts generally take a relatively active role in case management compared to state courts [*see Fed R Civ P 16*]. Be prepared to work in a cooperative manner with the judge, clerk, and opposing counsel in the management of prosecution of the case [*see Ch. 16, Case Management Conferences, 16.02*].

Warning:

For case management procedures, always consult local district court rules and the assigned district judge's or magistrate judge's standing orders.

☐ Calendar date for pretrial case management conference [*see Ch. 16, Case Management Conferences, 16.03*].

☐ If desired, meet and confer with other parties before conference to discuss, among other things:

- ○ Whether to request jury trial.
- ○ Whether to request bifurcated trial.
- ○ Identity of any related cases.
- ○ Discovery plans (taking into account disclosures from Rule 26(f) conference).

- Scheduling of further case management conferences and motions dates.
- Setting of dates for trial, pretrial, and submission of pretrial materials.
- Whether action is subject to arbitration or mediation; if not, consider agreeing to submit action to mediation or arbitration [*see* Ch. 32, Court Annexed ADR].
  - Note that Alternative Dispute Resolution Act of 1998 [*see 28 USC § 471 et seq.*] requires every federal district court to devise and implement an ADR program for civil actions.
  - Check local rules to determine your court's procedures for court annexed ADR [*see, e.g., ND Cal Civ LR 16-8*; *see* Ch. 32, Court Annexed ADR].

- Attend case management conference in person and be prepared to discuss and commit to positions on the issues listed in *Fed R Civ P 16(c)* [*see Ch. 16, Case Management Conferences, 16.11*].
  - In developing an overall case plan that will shape discussion at the conference, consider the following items [*see Fed R Civ P 16(c)*]:
    - Discovery schedule and any anticipated motions.
    - Stipulations on uncontested issues.
    - Facts needed to establish claims and defenses.
    - Discovery plans.
    - Key witnesses and documents.
    - Settlement possibilities.
- Review scheduling order, which may not be revised except on a showing of good cause, and calendar deadlines set by the order [*see Fed R Civ P 16(b)*].
- If scheduled, attend final pretrial conference to formulate trial plan, including a program to facilitate admission of the evidence [*Fed R Civ P 16(e)*; *see Ch. 17, Final Pretrial Conference, 17.03 -17.15*].

Timing:

Any final pretrial conference must be held as close to the time of trial as possible [*Fed R Civ P 16(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConferencesScheduling Conferences

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1.09 CHECKLIST: Pretrial Motions and Steps Initiated by Plaintiff.

☐ Consider moving for summary judgment if undisputed facts show that there is no defense to plaintiff's action or that a counterclaim (or affirmative defenses, in appropriate cases) filed by defendant lacks merit [*Fed R Civ P 56*; *see Ch. 29, Summary Judgment, 29.03 -29.13*].

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

○ Prepare affidavits and testimony, and be ready to attend the summary judgment hearing.

Timing:

The plaintiff may move for summary judgment "at any time" until 30 days after the close of all discovery [*Fed R Civ P 56(c)(1)(A)*]. In fact, a plaintiff may move for summary judgment as early as the commencement of the action. However, if the motion seems premature, the court has the power to extend the time to respond [*see Fed R Civ P 56(c)(1)*, Committee Note of 2009]. In addition, if a plaintiff's motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is extended from the normal 21 days after the motion is served to 21 days after the responsive pleading would otherwise be due [*Fed R Civ P 56(c)(1)(B)*; *Fed R Civ P 56*, Committee Note of 2009.] In practice, local rules and Rule 16 scheduling orders are more important than the permission to file the motion "at any time" or the "30 days after the close of discovery" deadline set out in Rule 56. Rule

56's timing provisions will not apply if "different time is set by local rule or the court orders otherwise" [*Fed R Civ P 56(c)(1)*; *see Ch. 29, Summary Judgment, 29.06*].

☐ If defendant pleads affirmative defenses such as statute of limitations or res judicata, consider moving for separate trial of those defenses [*see 1.05*; *see also Ch. 18, Consolidation and Separate Trials, 18.21 -18.35*].

○ Intent to move for separate trials should be discussed in the case management conference [*see Ch. 16, Case Management Conferences, 16.07*].

☐ If separate trials of the claims or issues will further convenience, avoid prejudice, or be expeditious, consider moving for separate trials [*Fed R Civ P 42(b)*; *see Ch. 18, Consolidation and Separate Trials, 18.04*, *18.21* et seq.].

○ Prepare and file motion and memorandum of points and authorities to establish that claim or issue should be separately tried [*Fed R Civ P 42(b)*].

Timing:

File the separate trial papers at the pretrial conference or case management conference [*Fed R Civ P 16(a)*].

○ Arrange hearing date, serve notice of the hearing, appear at the hearing, and prepare to draft the court's order.

☐ If multiple actions are pending before the court that involve a common question of law or fact, consider moving for consolidation of cases for all purposes or only for a joint hearing or trial of certain common issues [*Fed R Civ P 42(a)*; *see Ch. 18, Consolidation and Separate Trials, 18.02*, *18.05* et seq.].

○ Prepare and file motion and memorandum of points and authorities [*Fed R Civ P 42(a)*].

Timing:

File the consolidation papers once the cases clearly indicate common issues, well before the cases are ready for trial.

○ Arrange hearing date on consolidation, serve notice of the hearing, appear at the hearing, and prepare to draft the court's order.

☐ If related cases are pending in other districts, consider:

○ If cases pending before *other* district courts can be transferred to a single court for the convenience of parties and witnesses and in the interest of justice [*28 USC § 1404(a)*; see Ch. 2, Determining Forum (Jurisdiction and Venue), 2.57].

○ Under multidistrict litigation procedure, if cases can be transferred to a single district for pretrial discovery and other pretrial matters [*28 USC § 1407(a)*; see Ch. 2, Determining Forum (Jurisdiction and

Venue), 2.61-2.73].

☐ If needed or desired, amend complaint or answer to include crossclaim [*Fed R Civ P 15(a)*; *see Ch. 9, Amending and Supplementing Pleadings, 9.03 -9.07*].

○ If no responsive pleading is required, amendment is allowed once as matter of right within 21 days after serving responsive pleading [*Fed R Civ P 15(a)(1)(A)*].

○ If the pleading is one to which a responsive pleading is required, amendment is allowed 21 days after service of the responsive pleading, or 21 days after service of a motion under *Fed R Civ P 12(b)*, *(e)*, or *(f)*, whichever is earlier [*Fed R Civ P 15(a)(1)(B)*].

○ Later amendments may be allowed by leave of court or consent of the adverse party [*Fed R Civ P 15(a)(2)*].

☐ If pleadings should be modified to reflect changes that occurred after a previous pleading, move to supplement complaint or answer to crossclaim [*Fed R Civ P 15(d)*; *see Ch. 9, Amending and Supplementing Pleadings, 9.19 -9.21*].

Timing:

The court may allow a party to supplement a pleading at any time [*see Fed R Civ P 15(d)*].

☐ Consider filing a motion for judgment on the pleadings if the complaint states a cause of action and the answer does not state facts sufficient to constitute a defense to the complaint [*Fed R Civ P 12(c)*].

Timing:

Motion for judgment on the pleadings may be filed at anytime, except that it cannot be filed at a time that will delay the trial [*Fed R Civ P 12(c)*].

Warning:

If matters outside the pleadings are presented to and not excluded by the court, the motion will be treated as a motion for summary judgment under *Fed R Civ P 56* [*Fed R Civ P 12(c)*].

☐ Move for continuance of trial date if necessary to reopen discovery or prepare new defenses [*see Fed R Civ P 12(b)*].

Timing:

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedurePretrial MattersConsolidation of

ActionsCivil ProcedurePretrial MattersSeparate Trials

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

☐ If default judgment is entered against defendant, determine whether good cause exists to have it set aside by the court [*Fed R Civ P 55(c)*; *see Ch. 27, Defaults and Motions for Relief From Default, 27.18 -27.19*].

Timing:

File the motion to set aside default within 10 days after entry of the default judgment [*Fed R Civ P 60(b)*].

☐ File and serve any responses to pleadings and motions made by plaintiff [*see Fed R Civ P 12*; *see also* Ch. 8, Answers and Responsive Motions Under Rule 12; Ch. 26, Pretrial Motion Practice, 26.37-26.43].

☐ If plaintiff moves to strike defendant's counterclaim, file and serve a memorandum of points and authorities in opposition to the motion [*see* Ch. 8, Answers and Responsive Motions Under Rule 12, 8.26; Ch. 11, Counterclaims, Crossclaims, and Replies, 11.44-11.51].

☐ If plaintiff answers the counterclaim, determine whether grounds exist for a motion to strike the answer [*see* Ch. 8, Answers and Responsive Motions Under Rule 12, 8 .26; Ch. 11, Counterclaims, Crossclaims, and Replies, 11.44-11.51].

○ File and serve motion to strike accordingly.

Timing:

A Rule 12 motion to strike must normally be served within 21 days of service of the prior pleading [*Fed R Civ P 12(a)(1)(A)(i)*].

☐ If plaintiff files a motion for summary judgment, Rule 56 requires filing opposition papers not less than seven days before the hearing, unless the court permits service at another time [*Fed R Civ P 6(c)*, *56(c)*; *see Ch. 29, Summary Judgment, 29.14 -29.20*]. In practice, judges' standing orders and local rules require much earlier filing, in some cases up to 35 days beforehand for the motion.

○ Consider filing a cross-motion for summary judgment [*Fed R Civ P 56(a)*; *see Ch. 29, Summary Judgment, 29.30*].

Timing:

The cross-motion can be filed "at any time" until 30 days after the close of all discovery [*Fed R Civ P 56(c)(1)(A)*]. In practice, however, local rules and Rule 16 scheduling orders are more important than the permission to file the motion "at any time" or the "30 days after the close of discovery" deadline set out in Rule 56. Rule 56's timing provisions will not apply if "different time is set by local rule or the court orders otherwise" [*Fed R Civ P 56(c)(1)*; *see Ch. 29, Summary Judgment, 29.06*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureSummary JudgmentOppositionGeneral Overview

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

☐ Consider moving for summary judgment if undisputed facts show that defendant is entitled to judgment as a matter of law [*Fed R Civ P 56(b)*; *see Ch. 29, Summary Judgment, 29.03 -29.13*].

○ Prepare affidavits and testimony, and be ready to attend the summary judgment hearing.

Timing:

The defendant may move for summary judgment "at any time" until 30 days after the close of all discovery [*see Fed R Civ P 56(c)(1)(A)*]. However, if the motion seems premature, the court has the power to extend the time to respond [*see Fed R Civ P 56(c)(1)*, Advisory Committee Note of 2009]. Further, Rule 56's timing provisions will not apply if "different time is set by local rule or the court orders otherwise" [*Fed R Civ P 56(c)(1)*; *see Ch. 29, Summary Judgment, 29.06*].

☐ To avoid multiplicity of actions or inconsistent decisions, consider impleading a person not a party to the action who is or may be liable to defendant [*Fed R Civ P 14(a)*; *see Ch. 12, Third-Party Actions, 12.03 -12.16*].

○ Defendant may also bring a new party into the action by a crossclaim [*Fed R Civ P 13(g)*; *see Ch. 11, Counterclaims, Crossclaims, and Replies, 11.26 -11.43*].

Timing:

Leave of court is not required if the third-party complaint is filed not later than 10 days

after serving the original answer. Otherwise leave on noticed motion is required [*Fed R Civ P 14(a)(1)*].

☐ If pleading affirmative defenses such as statute of limitations or res judicata, consider moving for separate trial of those defenses [*Fed R Civ P 42(b)*; *see Ch. 18, Consolidation and Separate Trials, 18.21 -18.35*].

○ Prepare and file motion and memorandum of points and authorities to establish that claim or issue should separately tried [*Fed R Civ P 42(b)*].

Timing:

File the separate trial papers at the pretrial conference or case management conference [*Fed R Civ P 16(a)*].

○ Arrange hearing date, serve notice of the hearing, appear at the hearing, and prepare to draft the court's order.

☐ If multiple actions are pending before the court that involve a common question of law or fact, consider moving for consolidation of cases for all purposes or only for a joint hearing or trial of certain common issues [*Fed R Civ P 42(a)*; *see Ch. 18, Consolidation and Separate Trials, 18.05 -18.16*].

○ Prepare and file motion and memorandum of points and authorities [*Fed R Civ P 42(a)*].

Timing:

File the consolidation papers once the cases clearly indicate common issues, well before the cases are ready for trial.

○ Arrange hearing date, serve notice of the hearing, appear at the hearing, and prepare to draft the court's order.

☐ If related cases are pending in other districts, consider:

○ Cases pending before *other* district courts can be transferred to a single court for the convenience of parties and witnesses and in the interest of justice [*28 USC § 1404(a)*; see Ch. 2, Determining Forum (Jurisdiction and Venue), 2.57].

○ Under multidistrict litigation procedure, cases can be transferred to a single district for pretrial discovery and other pretrial matters [*28 USC § 1407(a)*; see Ch. 2, Determining Forum (Jurisdiction and Venue), 2.61-2.73].

☐ If needed or desired, amend answer or counterclaim [*Fed R Civ P 15(a)*; *see Ch. 9, Amending and Supplementing Pleadings, 9.03 -9.11*].

○ If no responsive pleading is required, amendment is allowed once as matter of right within 21 days

after serving it [*Fed R Civ P 15(a)(1)(A)*].

○ If the pleading is one to which a responsive pleading is required, amendment is allowed 21 days after service of the responsive pleading, or 21 days after service of a motion under *Fed R Civ P 12(b)*, *(e)*, or *(f)*, whichever is earlier [*Fed R Civ P 15(a)(1)(B)*].

○ Later amendments may be allowed by leave of court or consent of the adverse party [*Fed R Civ P 15(a)(2)*].

☐ If pleadings should be modified to reflect changes that occurred after a previous pleading, move to supplement answer or counterclaim [*Fed R Civ P 15(d)*; *see Ch. 9, Amending and Supplementing Pleadings, 9.19 -9.21*].

Timing:

The court may allow a party to supplement a pleading at any time [*see Fed R Civ P 15(d)*].

☐ Consider filing a motion for judgment on the pleadings if the complaint does not state a cause of action [*Fed R Civ P 12(c)*; *see* Ch. 8, Answers and Responsive Motions Under Rule 12, 8.27-8.29].

Timing:

Motion for judgment on the pleadings may be filed at anytime, except that it cannot be filed at a time that will delay the trial [*Fed R Civ P 12(c)*].

Warning:

If matters outside the pleadings are presented to and not excluded by the court, the motion will be treated as a motion for summary judgment under *Fed R Civ P 56* [*Fed R Civ P 12(c)*].

☐ If grounds exist for involuntary dismissal for failure to prosecute or to comply with the rules or a court order, prepare and file motion for dismissal [*Fed R Civ P 41(b)*, *(c)*]. The court also has the inherent power to dismiss for failure to prosecute [*Link v. Wabash R.R. Co. (1962) 370 US 626, 633, 82 S Ct 1386, 8 L Ed2d 734* ; *see Ch. 28, Dismissal for Delay in Bringing to Trial, 28.03 -28.16*].

Timing:

There is no set period for what is an unacceptable delay justifying involuntary dismissal, but courts have dismissed actions with delays as little as 10 months [*see, e.g.,* Smith v. Plummer (ND Cal 1998) 1998 US Dist LEXIS 17131, at *3].

☐ Consider making an offer to compromise or a settlement offer [*Fed R Civ P 68*; *see* Ch. 31, Settlement Agreements and Offers of Judgment].

Timing:

The party defending against a claim may serve on the adverse party an offer of judgment at least 14 days before the date set for trial [*Fed R Civ P 68(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate Trials

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

☐ File and serve any responses to all defense motions at least 10 calendar days before the hearing scheduled on the motion unless otherwise indicated by applicable statute [*see Ch. 26, Pretrial Motion Practice, 26.41*].

Timing:

There is no federal rule governing reply papers to motions. Check any applicable local rules and standing orders.

☐ If defendant files a motion for summary judgment, Rule 56 requires filing opposition papers not less than seven days before the hearing, unless the court permits service at another time [*Fed R Civ P 6(c), 56(c); see Ch. 29, Summary Judgment, 29.14 -29.20*]. In practice, judges' standing orders and local rules require much earlier filing, in some cases up to 21 days beforehand for opposition papers.

○ Consider filing a cross-motion for summary judgment [*Fed R Civ P 56(a); see Ch. 29, Summary Judgment, 29.30*].

Timing:

The cross-motion can be filed "at any time" until 30 days after the close of all discovery [*Fed R Civ P 56(c)(1)(A)*]. In practice, however, local rules and Rule 16 scheduling orders are more important than the permission to file the motion "at any time" or the "30 days after the close of discovery" deadline set out in Rule 56. Rule 56's timing provisions will not apply if a "different time is set by local rule or the court orders otherwise" [*Fed R Civ P 56(c)(1); see Ch. 29, Summary Judgment, 29.06*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentTime LimitationsGovernmentsLegislationStatutes of LimitationsTime Limitations

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Unit 2 First Steps
CHAPTER 2 Determining Forum (Jurisdiction and Venue)

1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.syn

§ 2.syn Synopsis to Chapter 2: Determining Forum (Jurisdiction and Venue)

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Unit 2 First Steps
CHAPTER 2 Determining Forum (Jurisdiction and Venue)
I. STRATEGY

1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.01

2.01 Scope.

This chapter covers:

- Analyzing a federal court's subject matter jurisdiction over a case:
  - Federal question jurisdiction [*see 2.04 -2.09*].
  - Diversity jurisdiction [*see 2.09A -2.25*].
- Analyzing a case for supplemental jurisdiction [*see 2.26 -2.30*].
- Analyzing a case for personal jurisdiction [*see 2.31 -2.41*].
- Analyzing a case to determine standing, ripeness, and mootness [*see 2.43 -2.45*].
- Analyzing a case to determine applicability of the political question doctrine [*see 2.46*].
- Analyzing a case to determine whether federal court should abstain from hearing the case [*see 2.47*].
- Determining venue [*see 2.48 -2.60*; *Forms 2.91*, *2.92*].
- Understanding Multidistrict litigation [*see 2.61 -2.73*; *Form 2.93*].
- Analyzing arbitration agreements and ADR Requirements [*see 2.74 -2.82*; *Form 2.93*].
- Moving to disqualify a judge [*see 2.83 -2.90*; *Form 2.94*].

Core Statutes:
28 USC §§ 1331, *1332*, *1391*, *1404*- 1407, 1631 .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityPolitical QuestionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral Overview

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Unit 2 First Steps
CHAPTER 2 Determining Forum (Jurisdiction and Venue)
I. STRATEGY

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2.02 Objective and Strategy.

Every prospective case requires consideration of the available courts in which the action may be filed. All federal courts (except the U.S. Supreme Court) are courts of limited jurisdiction--creatures of statute, within constitutional guidelines--so there is nothing automatic about federal court jurisdiction or venue. Many actions that can be brought in federal court can be brought in state court as well. Therefore, a decision must be made as to the most advantageous forum. Depending on the nature of the dispute, and the number of prospective parties and their location, the decision may not be simple.

In small federal districts, if there is a choice between federal and state litigation, the choice may be a personal one. Plaintiff's counsel will likely know the federal judges in the district, at least by reputation and track record, so that a knowledgeable comparison can be made between federal and state judges for the purpose of the particular case. In large federal districts, the choice cannot practicably be made based on the identity of judges. Rather, the choice is typically made on an institutional basis: are there differences between the basic operations of the state and federal courts that influence an informed decision for a particular plaintiff's case?

Historically, the principal perceived difference between state and federal cases was the amount of time and attention a case would receive in the federal courts. District judges, generally accustomed to large cases, were able to give discovery regulation and motion practice the necessary attention, and typically brought a more sophisticated judicial approach to the issues. The federal procedures were more accommodating of the large or important case as well, with broad discovery the norm. In general, emergency litigation involving, for example, the need for prompt injunctions with expedited discovery and hearings could be accommodated in the federal courts far more readily than in the state courts. The availability of magistrate judges (and special masters), permitting a division of work, facilitated more efficient case movement.

These distinctions have been diluted as state courts have made a determined effort to become accommodating toward large cases. California has revised its discovery rules, often identical to the federal rules, which increasingly place restrictions on discovery.

Nevertheless, differences remain that lead many lawyers to endeavor to find federal jurisdiction, at least for the larger cases.

Specific advantages of bringing an action in federal court include the following:

- Assignment of a single judge to the case, if you like the judge.
- More predictability in timelines for the case.
- Wider jury venire.
- Dockets generally are less crowded.
- Greater likelihood of considered decisions on motions.
- For complex cases, the judge is likely to have more experience in certain areas of law.

Specific disadvantages of bringing an action in federal court include the following:

- Assignment of a single judge to the case, if you dislike the judge.
- Very little chance of disqualifying the judge.
- Federal court can be more expensive because of federal motion practice.
- The possibility of a less sympathetic court if the primary relief sought is based on state law.
- A case that involves claims against the same defendant that don't qualify for supplemental jurisdiction.
- A case that involves issues for which there is a helpful court of appeals case from the district in which a state court is located.
- Less favorable jury pool than in state court.

Investigating Judges Using Online Resources.

Many resources are available online for investigating judges. These resources can help you find information and cases pertaining to your assigned judge. For example, helpful resources at lexis.com include:

- Legal tab> Reference> Law> Judicial Staff Directory.
  - Sample Search: For biographical information on a judge currently sitting on a federal bench, use a NAME segment search: *name (First Name/3 Last Name)*.
- Legal tab> Reference> Biographies> Biographies.
  - Sample Search: For biographical information on a particular judge, use a NAME segment search: *name (First Name/3 Last Name)*.

- Legal tab> Federal Legal--U.S.> Federal Courts By Circuit > Federal Cases By Circuit> 9th Circuit--US Court of Appeals Cases & Bankruptcy Appellate Panel

  - Sample Search: For appellate decisions on a judge's rulings in a particular procedural setting or on a particular substantive topic, use the HISTORY segment with the judge's last name in this format plus words for finding the specific topic, for example: summary judgment and history *(First Name/3 Last Name/3 j or judge or hon!)*.

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

  - Sample Search: For news articles on a particular judge, try a simple search: *First Name/3 Last Name*.

Detailed Discussion/Forms:

15 Moore's Federal Practice, Ch. 101, Issues of Justiciability (Matthew Bender 3d ed.).

15 Moore's Federal Practice, Ch. 102, Diversity Jurisdiction (Matthew Bender 3d ed.).

15 Moore's Federal Practice, Ch. 103, Federal Question Jurisdiction (Matthew Bender 3d ed.).

15 Moore's Federal Practice, Ch. 104, Specific Grants of Federal Question Jurisdiction (Matthew Bender 3d ed.).

16 Moore's Federal Practice, Ch. 105, Other Subject Matter Jurisdiction Statutes (Matthew Bender 3d ed.).

16 Moore's Federal Practice, Ch. 106, Supplemental Jurisdiction (Matthew Bender 3d ed.).

16 Moore's Federal Practice, Ch. 108, Territorial Jurisdiction: Jurisdiction Over Persons and Property (Matthew Bender 3d ed.).

17 Moore's Federal Practice, Ch. 110, Determination of Proper Venue (Matthew Bender 3d ed.).

17 Moore's Federal Practice, Ch. 111, Change of Venue (Matthew Bender 3d ed.).

17 Moore's Federal Practice, Ch. 112, Multidistrict Litigation (Matthew Bender 3d ed.).

4 *Bender's Federal Practice Forms, Form 12:10 et seq*. (Matthew Bender).

Cross Reference:

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject

Matter JurisdictionJurisdiction Over ActionsLimited JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral Overview

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A. Federal Question Jurisdiction

1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.03

2.03 CHECKLIST: Jurisdiction.

Consider the following subjects, relating to jurisdiction of the district court, before an action is filed. Similarly these subjects may be used to determine if there are areas in which to challenge the court's jurisdiction over an action that has been filed:

☐ **Case or Controversy.** Is there a case and controversy?

Discussion:
See *§ 2.42*

☐ **Standing.** Does the plaintiff have standing to bring the action?

Discussion:
See *§ 2.43*

☐ **Ripeness.** Is the case ripe for adjudication?

Discussion:
See *§ 2.44*

☐ **Mootness.** Has the case become moot?

Discussion:
See *§ 2.45*

☐ **Federal Question Jurisdiction.** Is there federal question jurisdiction?

- Does federal question appear on plaintiff's complaint?
- Under what particular statute, regulation, or constitutional provision does the action arise?
- Is the federal question substantial?
- If no federal question appears on plaintiff's complaint, are state law claims completely preempted by federal law?

Discussion:
See *§§ 2.04 -2.09*

☐ **Diversity Jurisdiction.** Is there diversity jurisdiction?

- What is the citizenship of the parties?
- Is there complete diversity?
- Is there diversity at the time of filing?
- Is there more than $75,000 in controversy?
- Is the case a multi-state class action or mass action that will be governed by the Class Actions Fairness Act?
- Has jurisdiction been properly alleged?

Discussion:
See *§§ 2.09A -2.25*

☐ **Political Question Doctrine.** Should the court decline jurisdiction because a political question is at issue?

Discussion:
See *§ 2.46*

☐ **Abstention.** Should the court abstain from exercising jurisdiction because a concurrent state proceeding is pending?

Discussion:
See *§ 2.47*

☐ **Supplemental Jurisdiction.** Are there claims over which the district court has, or needs to have, supplemental

jurisdiction?

Discussion:
See *§ 2.26*

☐ **Personal Jurisdiction.** Does the court have personal jurisdiction over all the parties?

- ○ Are the parties present in California?
- ○ Have the parties consented to federal court jurisdiction?
- ○ Where are the parties domiciled?
- ○ Does the defendant(s) have minimum contacts with state?
- ○ Is there general jurisdiction over defendants?
- ○ Is there specific jurisdiction over defendants?
- ○ Does the California long-arm statute provide personal jurisdiction over defendants?
- ○ Is there jurisdiction over the property that is the subject of the suit?

Discussion:
See *§§ 2.31 -2.41*

☐ **Service.** Can the parties be served?

- ○ How should service be accomplished?
- ○ Was service made on parties present in the state?

Discussion:
See *§ 2.40*

☐ **Objecting to Jurisdiction.**

- ○ Federal question jurisdiction.
- ○ Diversity jurisdiction.

Discussion:
See *§§ 2.09*, *2.25*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsSubstantial QuestionsCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint RuleCivil ProcedureFederal & State InterrelationshipsAbstentionConstitutional LawThe JudiciaryCase or ControversyMootnessGeneral OverviewConstitutional LawThe JudiciaryCase or ControversyRipeness

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1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.04

2.04 "Federal Question Jurisdiction" Defined.

District courts have jurisdiction of all civil actions "arising under" the Constitution, laws, or treaties of the United States: so called federal question jurisdiction [US Const, art III, § 2; *28 USC § 1331*]. The federal law under which a claim arises must be a direct and essential element of the plaintiff's claim for relief [*see King County v. Rasmussen (9th Cir 2002) 299 F3d 1077, 1082 , cert. denied, 538 US 1057 (2003)*].

For purposes of the general federal question jurisdiction statute, federal *laws* include:

- Federal statutes [*see* Murphey v. Lanier (9th Cir 2000) 204 F3d 911, 914].

- The acts and regulations of administrative agencies unless Congress has expressly exempted them from judicial review [*see Califano v. Sanders (1977) 430 US 99, 105, 97 S Ct 980, 51 L Ed2d 192* (effect of elimination of jurisdictional amount requirement for federal question jurisdiction is to confer jurisdiction on federal courts to review agency action); *see also Alexander v. Sandoval (2001) 532 US 275, 286-287, 121 S Ct 1511, 149 L Ed2d 517* (Congress's intent to create private right of action and remedy is determinative)].

- Federal common law [*National Farmers Union Ins. Cos. v. Crow Tribe of Indians (1985) 471 US 845, 850, 105 S Ct 2447, 85 L Ed2d 818* (federal common law is law of United States for purposes of Section 1331); *see Franchise Tax Bd. v. Construction Laborers Vacation Trust (1983) 463 US 1, 8-9, 103 S Ct 2841, 77 L Ed2d 420* (Section 1331 applies when federal law creates claim for relief)].

In the majority of federal question cases, federal statutes will be the source of the claim for relief.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsSubstantial QuestionsCivil

ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint Rule

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1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.05

2.05 Establishing Federal Question Jurisdiction.

2.05[1] Plaintiff Must Allege Jurisdiction. The plaintiff's complaint must contain "a short and plain statement" of the grounds on which the court's jurisdiction depends [*Fed R Civ P 8(a)(1)*]. A plaintiff seeking to invoke federal question jurisdiction must make reference to the specific federal law (e.g., constitutional provision or federal statute) under which relief is sought. If the plaintiff fails to plead adequate facts to support subject matter jurisdiction the complaint must be dismissed [*see Fed R Civ P 8(a)*].

A plaintiff may bring a federal question suit if either [*see Christianson v. Colt Indus. Operating Corp. (1988) 486 US 800, 808, 108 S Ct 2166, 100 L Ed2d 811*]:

- The claim for relief is created by federal law [*see 2.07[1]*].
- The claim for relief requires the resolution of a substantial question of federal law [*see 2.07[2]*].

In the Ninth Circuit a nonfrivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is subsequently dismissed on the merits [*see Cement Masons Health & Welfare Trust Fund v. Stone (9th Cir 1999) 197 F3d 1003, 1008 , cert. denied, 534 US 1104 (2002)*].

Example:
An action for trademark infringement presents a federal question because a federal statute, the Lanham Trademark Act [*15 USC § 1051 et seq.*], is the source of the right asserted by the plaintiff [*28 USC § 1338(b)*]. However, there is no federal question jurisdiction over an ownership dispute that does not require the application of any federal law [*Postal Instant Press v. Clark (9th Cir 1984) 741 F2d 256, 257*].

Warning:
The rule requiring that a pleading stating a claim for relief contain this short and plain statement of the

grounds for the court's jurisdiction applies to an original claim, counterclaim, crossclaim, or third-party claim, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it [*Fed R Civ P 8(a)(1)*].

2.05[2] LOCAL PRACTICE: Jurisdictional Allegation.

2.05[2][a] LOCAL PRACTICE: CD Cal Requirements. In the Central District of California, the allegation of jurisdiction must be plainly stated in the first paragraph of a document invoking the court's jurisdiction [*CD Cal Civ LR 8-1*].

2.05[2][b] LOCAL PRACTICE: ED Cal Requirements. In the Eastern District of California, the allegation of jurisdiction must [*ED Cal Civ LR 204*]:

- Be the first allegation of any complaint, petition, counterclaim, crossclaim, or third party claim;
- Be styled "Jurisdiction";
- State the claimed statutory or other basis of federal jurisdiction; and
- State the facts supporting the jurisdictional claim.

2.05[2][c] LOCAL PRACTICE: ND Cal Requirements. In the Northern District of California, each complaint, petition, counterclaim, and crossclaim must include a separate paragraph entitled "Jurisdiction." The paragraph must identify the statutory or other basis for federal jurisdiction and the facts supporting such jurisdiction [*ND Cal Civ LR 3-5(a)*].

2.05[2][d] LOCAL PRACTICE: SD Cal Requirements. In the Southern District of California, a statement of jurisdiction, including a concise statement of the facts and statutory basis conferring federal jurisdiction, should appear in the second paragraph of the Pretrial Order [*SD Cal Civ LR 16.1(f.6.c)*].

2.05[3] Parties Cannot Confer Jurisdiction. Parties to an action cannot confer jurisdiction on federal courts by stipulation or waiver. If a federal court lacks subject matter jurisdiction, that defect cannot be cured by an agreement between or among the parties that the case may be heard in that court [*Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee (1982) 456 US 694, 702, 102 S Ct 2099, 72 L Ed2d 492*]. Indeed, the absence of subject matter jurisdiction may be raised at any time, even after judgment [*see Fed R Civ P 12(h)(3)*].

2.05[4] Defective Jurisdictional Allegations May Be Amended. A defective allegation of jurisdiction may generally be amended at any stage of the proceedings unless the jurisdictional facts themselves are defective [*28 USC § 1653*; *see Snell v. Cleveland, Inc. (9th Cir 2002) 316 F3d 822, 825-828*].

Cross Reference:

15 Moore's Federal Practice, see *§§ 103.32*, *103.33* (Matthew Bender 3d ed.).

2.05[5] Jurisdiction Is Determined When Suit Is Commenced. The existence of federal question jurisdiction is determined as of the time the suit is commenced [*Morongo Band of Mission Indians v. California State Bd. of Equalization (9th Cir 1988) 858 F2d 1376, 1380 , cert. denied, 488 US 1006 (1989)*].

2.05[6] Party Invoking Federal Jurisdiction Has Burden of Proof. The party seeking to invoke federal jurisdiction carries the burden of establishing the existence of federal subject matter jurisdiction [*see Gaus v. Miles, Inc. (9th Cir 1992) 980 F2d 564, 567* ; *but see Berry v. American Express Publ'g (CD Cal 2005) 381 F Supp2d 1118, 1123* (holding that in cases removed under *28 USC §§ 1332(d)*, *1453*, pursuant to Class Action Fairness Act of 2005,

the party seeking *remand* has the burden of proving that the federal court lacks jurisdiction)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsSubstantial QuestionsCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint Rule

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1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.06

2.06 Invoking Federal Question Jurisdiction.

2.06[1] Constitutional Challenges. A party may invoke federal question jurisdiction by:

- Claiming that a statute is facially inconsistent with the US Constitution [*see Clinton v. Babbitt (9th Cir 1999) 180 F3d 1081, 1086-1087* (Navajo Nation members living on Hopi lands sufficiently invoked federal question jurisdiction by alleging that proposed leases violated equal protection regardless of whether members stated claim on which relief could be granted)].

- Claiming that defendant's conduct violated plaintiff's constitutional rights [*Presbyterian Church v. United States (9th Cir 1989) 870 F2d 518, 524* (federal jurisdiction over declaratory relief suit alleging violation of the *First* and *Fourth Amendments*); *Church of Scientology Int'l v. Kolts (CD Cal 1994) 846 F Supp 873, 878* , *disapproved on other grounds*, *Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1034*].

Cross Reference:

15 Moore's Federal Practice, see *§ 103.32[1]* (Matthew Bender 3d ed.).

2.06[2] Claims Under Federal Statutes.

2.06[2][a] Statutes Creating Federal Question Causes of Action. Most statutes creating federal question jurisdiction for specific types of actions are located in Title 28 of the United States Code. If the right to the action is limited to a certain class of persons, only those persons may invoke federal question jurisdiction [*Franchise Tax Bd. v. Construction Laborers Vacation Trust (1983) 463 US 1, 27, 103 S Ct 2841, 77 L Ed2d 420*].

Examples of specific federal question statutes include:

- Actions against foreign states (including political subdivisions and agencies and instrumentalities) pursuant to the Foreign Sovereign Immunities Act [*28 USC § 1330* (exclusive federal jurisdiction)].

- Admiralty cases (exclusive jurisdiction) [*28 USC § 1333*].

- Bankruptcy actions (exclusive federal jurisdiction) [*28 USC § 1334*].

- Suits arising under any act of Congress regulating interstate commerce or protecting trade and commerce against restraints and monopolies (concurrent jurisdiction) [*28 USC § 1337*].

- Suits arising under patent, copyright, and plant-protection laws (exclusive federal jurisdiction) [*28 USC § 1338(a)*].

- Suits arising under trademark laws (concurrent jurisdiction) [*28 USC § 1338(b)*].

- Suits arising under any laws relating to the postal service (concurrent jurisdiction) [*28 USC § 1339*].

- Actions involving the Internal Revenue Service (exclusive federal jurisdiction) [*28 USC § 1340*].

- Civil rights actions (concurrent jurisdiction) [*28 USC § 1343*].

- Certain specific actions against the United States (concurrent jurisdiction) [*28 USC §§ 1346(a), (d), 1491*], including tort claims (exclusive jurisdiction) [*28 USC § 1346(b)*]. Claims arising from injuries in foreign countries, regardless of whether the United States is involved in causing the injury, are excepted from the Federal Tort Claims Act waiver of sovereign immunity [*28 USC § 2680(k)*; *see Sosa v. Alvarez-Machain (2004) 542 US 692, 124 S Ct 2739, 159 L Ed2d 718, 741*].

- Pension benefits actions arising under ERISA [*29 USC § 1132*; *see Aetna Health Inc. v. Davila (2004) 542 US 200, 209, 124 S Ct 2488, 159 L Ed2d 312* (state-law cause of action for denial of benefits under ERISA-regulated plan is completely preempted by ERISA)].

- Employment discrimination actions arising under Title VII [*42 USC § 2000e-5(f)*].

- Actions for environmental damage brought under CERCLA [*42 USC § 9613(b)*].

- Actions to enforce an emission standard or limitation under the Clean Air Act [*42 USC § 7604*; *see, e.g., Our Children's Earth Found. v. United States EPA (9th Cir 2003) 527 F3d 842, 846-847 , pet. for cert. filed* August 21, 2008 (circuit court had exclusive jurisdiction to determine whether EPA discharged its non-discretionary duties under Clean Water Act)].

- Actions to enforce a regulation under the Safe Drinking Water Act [*42 USC 300f-42 USC 300j*; *see United States v. Alisal Water Corp. (9th Cir 2005) 431 F3d 643, 651 , cert. denied, 547 US 1113 (2006)*].

- Actions under the Magnuson-Moss Warranty Improvement Act [15 USC § 2310(d); *see, e.g., Romo v. FFG Ins. Co. (CD Cal 2005) 397 F Supp2d 1237* (civil penalties available under state law can be considered in calculating amount in controversy required for subject matter jurisdiction under the Act).

Exceptions:

The Federal Arbitration Act alone is not a basis for subject matter jurisdiction when a petition is brought to confirm or vacate an arbitration award [*see Garrett v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (9th Cir 1993) 7 F3d 882, 883*]. An independent basis for federal jurisdiction is required for the court to

hear a claim under the Act [*Luong v. Circuit City Stores, Inc. (9th Cir 2004) 368 F3d 1109, 1111* ; *Peabody Coal Co. v. Navajo Nation (9th Cir 2004) 373 F3d 945, 952 n5*]. For example, an independent basis is provided when a petition to vacate an arbitration award alleges that the award was rendered in manifest disregard of federal law: that allegation creates federal question subject matter jurisdiction [*Luong v. Circuit City Stores, Inc. (9th Cir 2004) 368 F3d 1109, 1112* ; *Carter v. Health Net of Cal., Inc. (9th Cir 2004) 374 F3d 830, 838* ; *see Greenberg v. Bear, Stearns & Co. (2d Cir 2000) 220 F3d 22, 27*]. However, an action falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards comprises a federal question [*9 USC § 203*]. An action removable based on the convention must "relate" to an arbitration agreement between the *parties* to the action, not just to an arbitration agreement concerning the subject matter of the action [*see Atgames Holdings Ltd. v. Radica Games Ltd. (CD Cal 2005) 394 F Supp2d 1252, 1254-1256* ; *see also Beiser v. Weyler (5th Cir 2002) 284 F3d 665, 670*].

Also, the Declaratory Judgment Act alone does not confer subject matter jurisdiction; an independent basis for federal jurisdiction must be pleaded [*see Nationwide Mut. Ins. Co. v. Liberatore (9th Cir 2005) 408 F3d 1158, 1161*].

By declaration of Congress, some types of actions are defined to "arise under" federal law without regard to the claim that is the subject of the suit, such as suits involving the Federal Deposit Insurance Corporation and the Resolution Trust Corporation [*see, e.g., FSLIC v. Ticktin (1989) 490 US 82, 83, 109 S Ct 1626, 104 L Ed2d 73*].

Noncombatant foreign nationals held in federal custody anywhere that the United States exercises exclusive jurisdiction and control are covered by the federal habeas corpus statute [*see 28 USC § 2241*], as well as the general federal question statute and the Alien Tort Statute [*see 28 USC §§ 1331, 1350*]. Accordingly, federal district courts have federal question jurisdiction over these actions [*Rasul v. Bush (2004) 542 US 466, 124 S Ct 2686, 159 L Ed2d 548, 563*].

Exception:

Federal district courts only have jurisdiction over habeas corpus applications filed by aliens detained by the Department of Defense at Guantanamo Bay, Cuba to the extent provided by the Detainee Treatment Act of 2005 [*see* 28 USC § 2241(e); *but see Hamdan v. Rumsfeld (2006) 548 US 557, 126 S Ct 2749, 165 L Ed 2d 723, 741-749* (Detainee Treatment Act does not strip federal courts' jurisdiction of cases pending on December 30, 2005, the date of Act's enactment)].

Cross References:

15 *Moore's Federal Practice, § 103.32[2]*; Ch. 104, Specific Grants of Federal Question Jurisdiction; 16 Moore's Federal Practice, Ch. 105, Other Subject Matter Jurisdiction Statutes (Matthew Bender 3d ed.).

2.06[2][b] Statutes Creating Implied Right of Action. A federal statute may give rise to federal question jurisdiction by expressly or impliedly creating a right to a claim for relief. A private right of action may be implied from a federal statute if each of the following conditions are met [*Cort v. Ash (1975) 422 US 66, 78, 95 S Ct 2080, 45 L Ed2d 26* ; *see Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang (9th Cir 2004) 376 F3d 831, 834-835*]:

- The plaintiff is a member of the class for whose benefit the statute was enacted.
- Congress intended to create a private right of action.
- A private right of action is consistent with the underlying purpose of the legislative scheme.
- The claim for relief is not one traditionally delegated to state law and it would not be inappropriate to

infer a claim for relief based solely on federal law.

The critical inquiry is Congressional intent: absent a clearly expressed Congressional intent both to create a private right of action and to create a private remedy, no such right of action may be implied [*Alexander v. Sandoval (2001) 532 US 275, 286-287, 121 S Ct 1511, 149 L Ed2d 517*].

Statutory standing is a type of prudential standing [*Potter v. Hughes (9th Cir 2008) 546 F3d 1051, 1055*].

Example:

Federal employees are not entitled under Title VII of the Civil Service Reform Act of 1978 to a private right of action against an employee union for breach of duty of fair representation because neither the language nor the structure of the Act show any congressional intent to provide such a private right of action. Although the duty is expressly recognized in the Act, the Act expressly provides an administrative remedy, but nothing more. The legislative history does not indicate that Congress contemplated direct judicial enforcement of the union's duty [*Karahalios v. National Fed'n of Fed. Employees (1989) 489 US 527, 532-533, 109 S Ct 1282, 103 L Ed2d 539* ; *see also Rivera v. Nibco, Inc. (9th Cir 2004) 364 F3d 1057, 1067* , *cert. denied, 544 U.S. 905 (2005)*].

Strategic Point:

If an action cannot be removed to federal court on the basis of federal question jurisdiction because the applicable federal statute does not create a private right of action, a party may be able to invoke diversity jurisdiction to justify removal [*see Webb v. Smart Document Solutions, LLC (9th Cir 2007) 499 F3d 1078, 1083* (removal was appropriate based on diversity jurisdiction, even though lack of private right of action to enforce HIPAA would have foreclosed claim based on federal question jurisdiction under *28 USC § 1331*)].

Cross References.

Analysis of diversity jurisdiction, see *§ 2.09A* et seq. Prudential standing, see *§ 2.43[4]*.

2.06[3] Claims Under Administrative Acts and Regulations. A plaintiff's claim may invoke federal question jurisdiction if the plaintiff is adversely affected by federal agency action in violation of the law [*see 5 USC § 702*; *see also Abbott Labs. v. Gardner (1967) 387 US 136, 140, 87 S Ct 1507, 18 L Ed2d 681*].

The Supreme Court has held that challenges to Medicare Act regulations must be made through the review channel provided under the Act, rather than through an independent federal question lawsuit [*Shalala v. Illinois Council on Longterm Care, Inc. (2000) 529 US 1, 20-24, 120 S Ct 1084, 146 L Ed2d 1*].

Federal question jurisdiction applies to the acts and regulations of administrative agencies unless Congress has specifically exempted them from judicial review [*see Califano v. Sanders (1977) 430 US 99, 105, 97 S Ct 980, 51 L Ed2d 192*]. There is a strong presumption that Congress intended judicial review of administrative actions unless a contrary intent is clear from the statute or legislative history [*Bowenv. Michigan Acad. of Family Physicians (1986) 476 US 667, 670-674, 106 S Ct 2133, 90 L Ed2d 623* (Medicare regulations)]. When Congress intends that a statute be enforced through a private claim for relief, Congress also intends that regulations providing authoritative interpretations of that statute be subject to private enforcement [*Alexander v. Sandoval (2001) 532 US 275, 284-289, 121 S Ct 1511, 149 L Ed2d 517*].

Strategic Point:

If a federal statute does not create a private right of action, a party aggrieved by a federal agency's acts may pursue its remedies under the Administrative Procedure Act if both federal question jurisdiction [*see San Carlos Apache Tribe v. United States (9th Cir 2005) 417 F3d 1091, 1099*], and prudential standing [*see Ashley Creek Phosphate Co. v. Norton (9th Cir 2005) 420 F3d 934, 939-940 , cert. denied, 126 S. Ct. 2967 (2006)*] exist.

2.06[4] Claims Under Federal Common Law. Federal question jurisdiction is rarely invoked by alleging violation of federal common law. The instances in which federal jurisdiction may be premised on federal common law fall into essentially two categories [*Texas Indus., Inc. v. Radcliff Materials, Inc. (1981) 451 US 630, 641, 101 S Ct 2061, 68 L Ed2d 500*]:

- Cases in which a federal rule of decision is necessary to protect uniquely federal interests.
- Cases in which Congress has given the courts the power to develop substantive law.

Example:

A district court had jurisdiction over a non-Indian father's federal common law claim for relief challenging a tribal court's jurisdiction to decide a custody dispute over his daughter [*Boozer v. Wilder (9th Cir 2004) 381 F3d 931, 935*].

Unless a claim presents an issue requiring construction of an act of Congress or unless a distinctive policy or an act of Congress requires that federal principles control the disposition of the claim, there is no independent claim for federal question jurisdiction [*see Patrickson v. Dole Food Co. (9th Cir 2001) 251 F3d 795, 799-803 , aff'd in part and cert. dismissed in part, 538 US 468 (2003)*].

"Uniquely federal interests" are present if there is an overriding federal interest in the need for a uniform rule of decision, or if the controversy touches basic interests of federalism [*Illinois v. City of Milwaukee (1972) 406 US 91, 105-106 n6, 92 S Ct 1385, 31 L Ed2d 712*].

The vesting of jurisdiction does not give rise to authority to formulate federal common law; federal courts are not free to develop a common law [*Texas Indus., Inc. v. Radcliff Materials, Inc. (1981) 451 US 630, 641, 101 S Ct 2061, 68 L Ed2d 500*]. For example, a right of action for contribution is neither authorized nor implied by the antitrust laws, and none exists in federal common law [*Texas Indus., Inc. v. Radcliff Materials, Inc. (1981) 451 US 630, 639, 101 S Ct 2061, 68 L Ed2d 500*]. Federal courts may develop substantive rules of decision based on federal common law in the following narrow areas [*Texas Indus., Inc. v. Radcliff Materials, Inc. (1981) 451 US 630, 641, 101 S Ct 2061, 68 L Ed2d 500*]:

- Cases concerned with the rights and obligations of the United States.
- Interstate and international disputes implicating the conflicting rights of states or relations with foreign nations.
- Admiralty cases.

That a lawsuit involves a uniquely federal interest is insufficient to invoke federal common law jurisdiction; displacement of state law will only occur if a significant conflict exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation [*Boyle v. United Techs. Corp. (1988) 487 US 500, 507, 108 S Ct 2510, 101 L Ed2d 442* (imposition of civil liability on defense contractors for government work involves uniquely federal interest as it directly affects terms of government contracts); *see Wallis v. Pan Am. Petroleum Corp. (1966) 384 US 63, 68, 86 S Ct 1301, 16 L Ed2d 369* (guiding

principal is significant conflict between some federal policy or interest and use of state law)].

Congress has given the courts the power to develop substantive law in suits under the Labor Management Relations Act and the Sherman Act [*see Texas Indus., Inc. v. Radcliff Materials, Inc. (1981) 451 US 630, 642-643, 101 S Ct 2061, 68 L Ed2d 500*].

When federal common law governs a case, that case necessarily presents a federal question within the subject matter jurisdiction of the federal court system just as if the case were controlled by federal statute [*Battle v. Seibels Bruce Ins. Co. (4th Cir 2002) 288 F3d 596, 606* (federal question jurisdiction over flood insurance claims as policy was issued under national program and claims necessarily required resolution of substantial question of federal common law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsSubstantial QuestionsCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint RuleCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive JurisdictionCivil ProcedureRemovalBasisFederal QuestionsEnvironmental LawFederal & State InterrelationshipsFederal PreemptionTortsPublic Entity LiabilityLiabilityFederal Tort Claims ActGeneral Overview

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 2 First Steps
CHAPTER 2 Determining Forum (Jurisdiction and Venue)
II. ANALYZING SUBJECT MATTER JURISDICTION
A. Federal Question Jurisdiction

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2.07 Determining Federal Question Jurisdiction.

2.07[1] Applying "Arising Under" Test.

2.07[1][a] Federal Law Creates Cause of Action. If the claim for relief is created by federal law, as it is in most federal question suits, the "arising under" test is satisfied [*Merrell Dow Pharms., Inc. v. Thompson (1986) 478 US 804, 808, 106 S Ct 3229, 92 L Ed2d 650* ; *see Millers Nat'l Ins. Co. v. Axel's Express, Inc. (9th Cir 1988) 851 F2d 267, 270-271* , *cert. denied*, *489 US 1012 (1989)*]. Under the "arising under" test, any non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is later dismissed on the merits [*Trustees of the Screen Actors Guild-Producers Pension & Health Plans v. NYCA, Inc. (9th Cir 2009) 572 F3d 771, 775*].

Cross Reference:

Dismissal for failing to meet "arising under" test, see *§ 2.07[1][c]*.

2.07[1][b] Resolution of State Law Claim Requires Resolution of Substantial Issue of Federal Law. If state law creates the cause of action, the "arising under" test asks whether that cause of action poses a substantial federal question [*Smith v. Kansas City Title & Trust Co. (1921) 255 US 180, 201, 41 S Ct 243, 65 L Ed 577* ; *Wander v. Kaus (9th Cir 2002) 304 F3d 856, 858* (mere presence of federal issue in state cause of action insufficient); *Altavion, Inc. v. Konica-Minolta Sys. Lab., Inc. (ND Cal 2008) 2008 US Dist LEXIS 37768, at *13-*17* (plaintiff's claims did not "arise under" federal patent law, even if patent law issues were necessary element of plaintiff's theory, because plaintiff's alternative law theory based on state trade secrets law was sufficient to support its claims)].

To determine when the federal element is deemed sufficiently substantial, federal courts examine congressional intent and the nature of the federal interest at stake [*Merrell Dow Pharms., Inc. v. Thompson (1986) 478 US 804, 810, 813-814, 106 S Ct 3229, 92 L Ed2d 650*].

For federal question jurisdiction to arise under a state law claim, the claim must necessarily raise a federal issue that is actually disputed and substantial. In addition, the federal court must be capable of addressing the question without

disrupting "any congressionally approved balance of federal and state judicial responsibilities" [*Grable & Sons Metal Prods. v. Darue Eng'g & Mfg. (2005) 545 US 308, 125 S Ct 2363, 162 L Ed2d 257, 264-265* ; *see Shanks v. Dressel (9th Cir 2008) 540 F3d 1082, 1093-1094* (city municipal code did not create federal subject matter jurisdiction); *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean Geological Formation (9th Cir 2008) 524 F3d 1090, 1102* (state law negligence and conversion claims alleging defendant's gas production wells were causing loss of stored natural gas did not identify "a substantial question" of federal law, applying *Grable & Sons*)]. Finally, a federal cause of action is not a necessary condition for exercising jurisdiction over state-law claims that implicate significant federal issues [*Grable & Sons Metal Prods. v. Darue Eng'g & Mfg. (2005) 545 US 308, 125 S Ct 2363, 162 L Ed2d 257, 266-267*].

Example:

The Internal Revenue Service seized real property owned by plaintiff to satisfy a federal tax delinquency. After the sale of the property to defendant, plaintiff brought a quiet title action in state court claiming that defendant's title was invalid because plaintiff did not receive notice of the sale in the manner required by federal law. Defendant removed the case to district court as presenting a federal question because the title claim depended on an interpretation of federal tax law. The United States Supreme Court agreed with the district court and the Sixth Circuit that federal question jurisdiction was warranted [*Grable & Sons Metal Prods. v. Darue Eng'g & Mfg. (2005) 545 US 308, 125 S Ct 2363, 162 L Ed2d 257, 265-268*]:

- Whether plaintiff received the required notice was an essential element of his quiet title claim;
- The federal statute's meaning was actually disputed and presented a substantial issue of federal law;
- A quiet title action would rarely raise a federal issue, thus the exercise of jurisdiction would have a minimal impact on the balance of federal and state judicial responsibilities; and
- The fact that no quiet title action could be brought against defendant under federal law did not preclude the exercise of jurisdiction; the existence of a federal cause of action was not a prerequisite to the exercise of jurisdiction under the circumstances.

Strategic Point:

The Supreme Court has clarified *Grable & Sons*, observing that the case covers only a "special and small category" of federal question jurisdiction [*Empire Healthchoice Assurance, Inc. v. McVeigh (2006) 547 US 677, 126 S Ct 2121, 165 L Ed2d 131, 149*]. Federal issues posing pure questions of law whose resolution "would be controlling in numerous other cases" are more likely to qualify as substantial federal issues for purposes of federal question jurisdiction. Conversely, "situation-specific" federal issues are less likely to provide a basis for exercising jurisdiction over a state law claim [*Empire Healthchoice Assurance, Inc. v. McVeigh (2006) 547 US 677, 126 S Ct 2121, 165 L Ed2d 131, 150* ; *see, e.g., In re NSA Telcomms. Records Order Litig. (ND Cal 2007) 483 F Supp2d 934, 941-943* (plaintiffs' claims gave rise to federal jurisdiction under *Grable's* "embedded federal issue" doctrine based on application of state secrets privilege)].

2.07[1][c] Dismissal for Failing to Meet "Arising Under" Test. Dismissal for lack of substantiality is a dismissal for lack of subject matter jurisdiction. Dismissal for lack of subject matter jurisdiction is proper only when the claim is foreclosed by prior Supreme Court decisions, "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction," is "wholly insubstantial and frivolous," or otherwise does not involve a federal controversy [*Steel Co. v. Citizens for a Better Env't (1998) 523 US 83, 89, 118 S Ct 1003, 140 L Ed2d 210* (quoting *Bell v. Hood*

(1946) 327 US 678, 682-683, 66 S Ct 773, 90 L Ed 939); *see 28 USC §§ 1331*, *1343*].

Example:

Plaintiff's *42 USC § 1983* claim alleging that defendant city's towing its trailers for being parked in violation of a city ordinance violated its due process rights was so implausible that it did not present a federal question supporting subject matter jurisdiction [*Lone Star Sec. & Video, Inc. v. City of L.A. (9th Cir 2009) 572 F3d 685, 692-693*].

Because the inquiry goes to the merits of the allegations in the pleadings, the dismissal is equivalent to a dismissal for failure to state a claim on which relief may be granted. [*see Bell v. Hood (1946) 327 US 678, 682, 66 S Ct 773, 90 L Ed 939* ("If the court ... exercise[s] its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.")]. However, it is not a dismissal on the merits and therefore res judicata does not apply [*see Fed R Civ P 12(b)(1)*; *Bell v. Hood (1946) 327 US 678, 683, 66 S Ct 773, 90 L Ed 939*].

Strategic Point:

When a claim is dismissed for lack of subject matter jurisdiction all supplemental claims must be dismissed because the court never had proper jurisdiction over the case [*see Bell v. Hood (1946) 327 US 678, 683, 66 S Ct 773, 90 L Ed 939*].

2.07[2] Applying Well-Pleaded Complaint Rule.

2.07[2][a] Violation of Federal Law Must Be Alleged. Not only must a claim arise under federal law [*see 2.07[1]*], the plaintiff must allege federal question jurisdiction and the specific federal law under which the claim arises must appear on the face of the plaintiff's well-pleaded complaint [*see Aetna Health Inc. v. Davila (2004) 542US 200, 124 S Ct 2488, 159 L Ed2d 312, 326* ("[o]rdinarily, determining whether a particular case arises under federal law turns on the 'well-pleaded complaint' rule"); *Ansley v. Ameriquest Mortgage Co. (9th Cir 2003) 340 F3d 858, 861* ("In scrutinizing a complaint in search of a federal question, a court applies the well-pleaded complaint rule"); *Fax Telecommunicaciones, Inc. v. AT&T (2d Cir 1998) 138 F3d 479, 486*].

A plaintiff may not rely on federal issues anticipated or raised in the defendant's answer to establish federal question jurisdiction [*see Oklahoma Tax Comm'n v. Graham (1989) 489 US 838, 840-841, 109 S Ct 1519, 103 L Ed2d 924* ; *see also Franchise Tax Bd. v. Construction Laborers Vacation Trust (1983) 463 US 1, 10-11, n9, 103 S Ct 2841, 77 L Ed2d 420* (federal defense insufficient)]. A defendant cannot create federal jurisdiction by inserting a federal question into the plaintiff's case [*Caterpillar, Inc. v. Williams (1987) 482 US 386, 399, 107 S Ct 2425, 96 L Ed2d 318* ; *see Karambelas v. Hughes Aircraft Co. (9th Cir 1993) 992 F2d 971, 974-975*]. A federal counterclaim is insufficient to establish federal question jurisdiction [*Holmes Grp. v. Vornado Air Circulation Sys., Inc. (2002) 535 US 826, 122 S Ct 1889, 1894, 153 L Ed2d 13*].

2.07[2][b] Declaratory Relief Plaintiff Must State That Anticipated Suit Arises Under Federal Law. The plaintiff in a declaratory relief action must state in his or her well-pleaded complaint that the underlying suit anticipated from the defendant is one that arises under federal law [*see Fed R Civ P 57*; *Skelly Oil Co. v. Phillips Petroleum Co. (1950) 339 US 667, 673-674, 70 S Ct 876, 94 L Ed 1194* (federal declaratory judgment suits); *Franchise Tax Bd. v. Construction Laborers Vacation Trust (1983) 463 US 1, 3-6, 103 S Ct 2841, 77 L Ed2d 420* (state declaratory judgment actions in state court); *see also Mobil Oil Corp. v. City of Long Beach (9th Cir 1985) 772 F2d 534, 539-540* (federal issue did not constitute necessary element of declaratory-relief defendant's theoretical well-pleaded complaint for coercive relief under state law)].

Federal jurisdiction is proper if the underlying claim for relief arises under federal law and appears in plaintiff's

well-pleaded complaint [*see Morongo Band of Mission Indians v. California State Bd. of Equalization (9th Cir 1988) 858 F2d 1376, 1384-1386 , cert. denied, 488 US 1006 (1999)* ; *see also Northeast Fed. Credit Union v. Neves (1st Cir 1988) 837 F2d 531, 534-536*].

2.07[2][c] Artful Pleading Doctrine As Exception to Well-Pleaded Complaint Rule. A plaintiff is free to forgo federal causes of action and only plead state law claims [*see Caterpillar, Inc. v. Williams (1987) 482 US 386, 398-399, 107 S Ct 2425, 96 L Ed2d 318*]. However, a plaintiff cannot avoid federal court simply by omitting to plead a necessary federal question in the complaint; in such a case the necessary federal question will be deemed to be alleged in the complaint. This artful pleading doctrine operates as a corollary or exception to the well-pleaded complaint rule [*Franchise Tax Bd. v. Construction Laborers Vacation Trust (1983) 463 US 1, 22, 103 S Ct 2841, 77 L Ed2d 420*]. The Ninth Circuit limits the application of the artful pleading doctrine to situations in which federal law not only displaces state law but also confers a federal remedy [*Hunter v. United Van Lines (9th Cir 1984) 746 F2d 635, 642-643 , cert. denied, 474 US 1014 (1985)*].

2.07[2][d] Complete Preemption As Exception to Well-Pleaded Complaint Rule. A second corollary to the well-pleaded complaint rule is that a federal question will be found when Congress has so completely preempted an area of law such that any claims asserted in this area are necessarily federal in nature. Federal preemption is ordinarily a federal defense that does not give rise to federal question jurisdiction [*see Franchise Tax Bd. v. Construction Laborers Vacation Trust (1983) 463 US 1, 21-22, 103 S Ct 2841, 77 L Ed2d 420*]. However, in the few areas in which Congress has completely preempted state law, federal question jurisdiction exists even when the complaint asserts only state law claims [*Metropolitan Life Ins. Co. v. Taylor (1987) 481 US 58, 63-64, 107 S Ct 1542, 95 L Ed2d 55* (ordinary preemption insufficient); *see Caterpillar, Inc. v. Williams (1987) 482 US 386, 393, 107 S Ct 2425, 96 L Ed2d 318*].

Complete preemption arises only in extraordinary situations. The test for complete preemption is "whether Congress clearly manifested an intent to convert state law claims into federal question claims" [*Ansley v. Ameriquest Mortgage Co. (9th Cir 2003) 340 F3d 858, 862* ; *see Serrano v. Am. Airlines, Inc. (CD Cal 2008) 2008 US Dist LEXIS 40466, at *4-*5* (collecting cases discussing distinction between jurisdictional complete preemption and ordinary preemption)]. The complete preemption exception is applied primarily under *§ 301 of the Labor* Management Relations Act when a state law claim is based on a collective bargaining agreement [*Valles v. Ivy Hill Corp. (9th Cir. 2005) 410 F3d 1071, 1075*].

Distinguish:

Implied preemption is not the same thing as an implied federal claim. Implied preemption occurs when Congress has not expressly stated an intent to preempt state law in a statutory scheme, but its intent to have federal authority occupy the field can be implied from the extent of regulation [*see, e.g., Schweiker v. Chilicky (1988) 487 US 412, 108 S Ct 2460, 101 L Ed2d 370* (extensive regulatory scheme for Social Security); *Montalvo v. Spirit Airlines (9th Cir 2007) 508 F3d 464, 468* (comprehensiveness of federal air safety regulations demonstrated congressional intent to occupy entire field and thus preempt state regulation of air safety)]. An implied federal claim may be inferred from Congressional action, largely from the language of a statute, the statutory structure, or legislative history [*Karahalios v. National Fed'n of Fed. Employees (1989) 489 US 527, 532-533, 109 S Ct 1282, 103 L Ed2d 539* ; *see 2.06[2][a]*].

Conflict preemption occurs when compliance with both state and federal law is impossible or when the state law is an obstacle to "the accomplishment and execution of the full purposes and objectives" of Congress [*In re Cybernetic Servs., Inc. (9th Cir 2001) 252 F3d 1039, 1045-1046*]. For conflict preemption to apply, a particular state statute need not be in conflict with federal law. Rather, causes of action relying on state common law may be preempted if they present obstacles to federal objectives [*Bennett v. T-Mobile United States, Inc. (CD Cal 2008) 597 F Supp2d 1050, 1052* (conflict preemption barred plaintiff's claims of injury by electromagnetic radiation emanating from cell phones,

because Congress and Federal Communications Commission have long regulated telecommunications industry generally, and emissions from cell phones specifically)].

Examples:

The National Labor Relations Act (NLRA) (*29 USC § 151 et seq.*) contains no express pre-emption provision, but "Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy" [*Chamber of Commerce of U.S. v. Brown (2008) 554 US 60, 128 S Ct 2408, 171 L Ed2d 264, 271-272*]. The first, the "Garmon pre-emption," prohibiting states from regulating activities that are arguably protected or prohibited by *29 USC § 157* (permitting employees to unionize) and *29 USC § 158* (prohibiting interference with that right), is intended to "preclude state interference with the National Labor Relations Board's interpretation and active enforcement" of the NLRA [*see San Diego Bldg. Trades Council v. Garmon, 359 US 236, 244, 79 S Ct 773, 3 L Ed2d 775 (1959)*]. The second, the "Machinists pre-emption," prohibiting state regulation of areas outside the four corners of the NLRA if Congress intended them "to be controlled by the free play of economic forces[,]" reflects congressional intent to occupy the field of labor dispute regulation [*Machinists v. Wis. Employment Relations Comm'n (1976) 427 US 132, 140, 96 S Ct 2548, 49 L Ed2d 396* ; *see, e.g., Chamber of Commerce of U.S. v. Brown, 554 US 60, 128 S Ct 2408, 171 L Ed2d 264, 271-272 (2008)* (California statutes prohibiting several classes of employers that received state funds from using those funds to assist, promote, or deter union organizing were preempted by NLRA, because they regulated employer speech about union organizing)].

The Federal Aviation Act of 1958 (FAA) preempts the entire field of aviation safety through implied field preemption, because the FAA and its implementing regulations "establish complete and thorough safety standards for air travel, which are not subject to supplementation by ... state laws" [*Montalvo v. Spirit Airlines (9th Cir 2007) 508 F3d 464, 468* ; *cf. Martin v. Midwest Express Holdings, Inc. (9th Cir 2009) 555 F3d 806, 811-812* (FAA did not preempt airline passenger's personal injury claim alleging that airline's stairs were defectively designed)].

Cross References:

15 Moore's Federal Practice §§ 103.31, 103.33, 103.40 -103.47 (Matthew Bender 3d ed.).

Form of notice of motion to dismiss for lack of subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, 8.33.

2.07[3] Applying Federal Question Jurisdiction in Action Against Native Sovereign. The mere fact that the defendant is a Native sovereign does not raise a federal question. When suit is brought against a Native sovereign, an independent basis for federal jurisdiction must exist [*Peabody Coal Co. v. Navajo Nation (9th Cir 2004) 373 F3d 945, 949* ; *Gila River Indian Cmty. v. Henningson, Durham & Richardson (9th Cir 1980) 626 F2d 708, 714*].

Example:

In an action challenging the validity of a contract with a Native sovereign, a federal question will exist if the contract's validity depends on the application of federal statutory or common law [*see Peabody Coal Co. v. Navajo Nation (9th Cir 2004) 373 F3d 945, 949-951*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsSubstantial QuestionsCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint RuleCivil

ProcedureRemovalBasisFederal Questions

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2.08 Distinguishing Concurrent and Exclusive Federal Jurisdiction.

2.08[1] Concurrent Jurisdiction With State Courts. In many cases, the jurisdiction exercised by the federal courts is concurrent with that of the state courts and the plaintiff may choose to proceed in either state or federal court [*Gulf Offshore Co. v. Mobil Oil Corp. (1981) 453 US 473, 478, 101 S Ct 2870, 69 L Ed2d 784*].

If the plaintiff chooses state court, the defendant may try to remove the case to federal court [*see 28 USC § 1441*].

Cross Reference:

Discussion of removal, see Ch. 3, Removing a State Court Case to Federal Court.

2.08[2] When Federal Forum Is Exclusive. Examples of exclusive federal jurisdiction include:

- Admiralty and maritime [*28 USC § 1333*].
- Bankruptcy [*28 USC § 1334*].
- Patents and copyrights [*28 USC § 1338*].
- Actions against foreign states pursuant to the Foreign Sovereign Immunities Act [*28 USC § 1330*].

Cross References:

Ch. 3, Removing a State Court Case to Federal Court.

15 Moore's Federal Practice see §§ 103.31, 103.33, 103.40 -103.47 (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive Jurisdiction

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2.09 Challenging Federal Question Jurisdiction.

2.09[1] Methods for Challenge. Federal question jurisdiction may be challenged by any of the following:

- Motion for Rule 12(b) dismissal [*Fed R Civ P 12(b)(1)*].
- Answer [*Fed R Civ P 12(h)(3)*].
- Motion for relief from judgment [*see Fed R Civ P 60(b)(6)*; *see, e.g., Bank of Montreal v. Olafsson (6th Cir 1981) 648 F2d 1078, 1079* , *cert. denied, 454 US 1084 (1981)*].
- In a collateral proceeding, but only if the party did not appear in the underlying action and a default judgment was entered [*see Chicot County Drainage Dist. v. Baxter State Bank (1940) 308 US 371, 378, 60 S Ct 317, 84 L Ed 329*].

Warning:

The court may dismiss the action for lack of subject matter jurisdiction sua sponte [*Fed R Civ P 12(h)(3)*; *see, e.g., Scholastic Entm't, Inc. v. Fox Entm't Group, Inc. (9th Cir 2003) 336 F3d 982, 985*].

Cross Reference:

Rule 12 dismissal, Ch. 8, Answers and Responsive Motions Under Rule 12.

2.09[2] Generally Challenge May Be Made at Any Time. Any party, including the party that invoked federal question jurisdiction, may bring a motion to dismiss for lack of subject matter jurisdiction at any time during the proceedings (including appellate proceedings) [*Fed R Civ P 12(h)(3)*; *see also American Fire & Cas. Co. v. Finn (1951) 341 US 6, 17-18, 71 S Ct 534, 95 L Ed 702* (superseded by statute on different grounds)].

2.09[3] LOCAL RULE: CD Cal Requirements. In the Central District of California, if some question of subject

matter jurisdiction is raised by any party, that party must address the jurisdictional issue by motion to be heard before the Final Pretrial Conference [*CD Cal Civ LR 16-2.1*].

Cross Reference:

Form of notice of motion to dismiss for lack of subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, *§ 8.33*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsSubstantial QuestionsCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint RuleCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureDismissalsGeneral Overview

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B. Diversity Jurisdiction

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2.09A CHECKLIST: Analyzing Diversity Jurisdiction.

Consider the following subjects, relating to jurisdiction of the district court, before an action is filed. Similarly these subjects may be used to determine if there are areas in which to challenge the court's jurisdiction over an action that has been filed:

☐ Does the nature of the case require only minimal diversity?

Discussion:
See *§§ 2.24*, *2.24A*

☐ Does the amount in controversy exceed $75,000?

Discussion:
See *§§ 2.21*, *2.23*

☐ Is the citizenship of all plaintiffs diverse from that of any defendant?

- ○ Is a nondiverse party omitted from the complaint?
- ○ Are the parties aligned according to their real interests?
- ○ Determine the effect if an alien is a party?
- ○ Determine the effect if Does are parties? (e.g., if they will not defeat diversity)

Discussion:
See *§§ 2.10*, *2.11*, *2.16*, *2.20*

☐ What is each party's domicile at the time of the suit, as determined by:

- ○ Current residence?
- ○ Voting registration?
- ○ Location of real and personal property?
- ○ Location of brokerage and bank accounts?
- ○ Location of spouse and family?
- ○ Place of employment or business?
- ○ Driver's license and auto registration?
- ○ Jurisdiction where taxes are paid?
- ○ Intent to remain?

Discussion:
See *§ 2.17*

☐ If corporation is a party:

- ○ Where is it incorporated?
- ○ Where is its principal place of business?

Discussion:
See *§ 2.18*

☐ What is the citizenship of each member of a limited partnership or unincorporated association?

Discussion:
See *§ 2.19*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity

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2.10 Diverse Citizenship Is Required.

2.10[1] Diversity Statute Is Strictly Construed. The diversity statute is strictly construed; any doubts about jurisdiction are resolved against the exercise of federal court jurisdiction [*China Basin Props., Ltd. v. Allendale Mut. Ins. Co. (ND Cal 1992) 818 F Supp 1301, 1303*].

A suit may be brought in federal court invoking diversity jurisdiction if the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between the following parties:

- Citizens of different states [*28 USC § 1332(a)(1)*; *see Mutuelles Unies v. Kroll & Linstrom (9th Cir 1992) 957 F2d 707, 712*].
- Citizens of a state and citizens or subjects of a foreign state [*28 USC § 1332(a)(2)*].
- Citizens of different states with citizens or subjects of a foreign state as additional parties [*28 USC § 1332(a)(3)*].
- A foreign state as plaintiff and citizens of a state or different states [*28 USC § 1332(a)(4)*].

The term "states" for diversity purposes includes the United States territories, the District of Columbia, and the Commonwealth of Puerto Rico [*28 USC § 1332(e)*].

Distinguish:
Neither the United States nor any individual state is a citizen of any state [*Moor v. County of Alameda (1973) 411 US 693, 698, 93 S Ct 1785, 36 L Ed2d 596* ; *see Morongo Band of Mission Indians v. California State Bd. of Equalization (9th Cir 1988) 858 F2d 1376, 1380-1382 , cert. denied, 488 US 1006 (1999)* (no diversity jurisdiction over state agency that is state alter ego or over state officer in official capacity)].

Exception:

Special jurisdictional requirements apply to multistate class actions and mass actions. For further discussion see *2.24A*.

Warning:

Shareholder derivative actions can present complicated identification issues [*see Diaz v. Davis (In re Digimarc Corp. Derivative Litig.) (9th Cir 2008) 549 F3d 1223, 1234-1235* (corporation was improperly realigned as plaintiff for diversity purposes); 6 *Moore's Federal Practice, § 26.41[10]* (Matthew Bender 3d ed.)].

Cross Reference:

15 Moore's Federal Practice *§§ 102.10 -102.13* (Matthew Bender 3d ed.).

2.10[2] Complete Diversity Is Required in Most Cases. Diversity jurisdiction generally requires that all plaintiffs be from different states from all defendants [*Strawbridge v. Curtiss (1806) 7 US (3 Cranch) 267, 267, 2 L Ed 435* ; *see State Farm Fire & Cas. Co. v. Tashire (1967) 386 US 523, 530-531, 87 S Ct 1199, 18 L Ed2d 270* ; *Allstate Ins. Co. v. Hughes (9th Cir 2004) 358 F3d 1089, 1095* ("Diversity jurisdiction under § 1332 requires complete diversity of citizenship[;] each of the plaintiffs must be a citizen of a different state than each of the defendants")]. In general, diversity jurisdiction is determined as of the time the complaint is filed [*Co-Efficient Energy Sys. v. CSL Indus., Inc. (9th Cir 1987) 812 F2d 556, 557*].

Warning:

The Multiparty, Multiforum Trial Jurisdiction Act of 2002 [*see* 107 PL 273, § 11020, 116 Stat 1758 (effective Nov. 2, 2002)] provides special jurisdictional and procedural provisions for civil cases arising from accidents that result in at least 75 deaths [*see 28 USC §§ 1369*, *1391(g)*, *1441(e)*, *(f)*, *1697*, *1785*]. The legislation contains modified requirements for diversity jurisdiction. For further discussion, see *§ 2.24*.

The Class Action Fairness Act of 2005 [*see* 109 PL 2, 199 Stat 4] provides special jurisdictional and procedural provisions, including modified requirements for diversity jurisdiction, for certain class actions commenced on or after February 18, 2005, in which the matter in controversy exceeds the sum or value of $5 million [*see 28 USC § 1332(d)(2)*]. For further discussion, see *§ 2.24A*.

Subsequent changes in citizenship do not ordinarily affect jurisdiction [*Faysound Ltd. v. United Coconut Chem. Inc. (9th Cir 1989) 878 F2d 290, 296*]. However, if an amendment joins new parties, diversity must exist at the time of amendment [*Lewis v. Lewis (9th Cir 1966) 358 F2d 495, 502* ; *China Basin Props., Ltd. v. Allendale Mut. Ins. Co. (ND Cal 1992) 818 F Supp 1301, 1303*].

If the court realigns the parties, the court must reassess diversity jurisdiction at that time. If there is no complete diversity after realignment, diversity jurisdiction is lost [*City of Indianapolis v. Chase Nat'l Bank (1941) 314 US 63, 68, 62 S Ct 15, 86 L Ed 47*]. However, subsequent events do not deprive a court of jurisdiction over parties who were properly aligned initially [*Richmond Steel, Inc. v. Legal & Gen. Assurance Soc'y (DPR 1992) 799 F Supp 234, 239*].

A federal court has discretion to drop a nondiverse party who is found not to be indispensable to the action under Rule 19 [*Fed R Civ P 19*, *21*; *see 2.15*].

Consider:

Note that in a diversity action, a federal court lacks supplemental jurisdiction over certain claims if exercising supplemental jurisdiction over the claim would defeat diversity [*28 USC § 1367(b)*; *Owen*

Equip. & Erection Co. v. Kroger (1978) 437 US 365, 373-377, 98 S Ct 2396, 57 L Ed2d 274 ; *see § 2.28[1]*].

Cross Reference:

15 Moore's Federal Practice, see *§§ 102.16*, *102.20* (Matthew Bender 3d ed.).

2.10[3] Jurisdiction Is Determined When Suit Is Commenced. Generally, diversity jurisdiction is determined as of the time the complaint is filed. This is true regardless of the cost or difficulty it imposes [*Grupo Dataflux v. Atlas Global Group, L.P. (2004) 541 US 567, 573-577, 124 S Ct 1920, 158 L Ed2d 866* (rejecting exception for cases that have already been tried); *Co-Efficient Energy Sys. v. CSL Indus., Inc. (9th Cir 1987) 812 F2d 556, 557*]. Subsequent changes in citizenship do not ordinarily affect jurisdiction [*Faysound Ltd. v. United Coconut Chem. Inc. (9th Cir 1989) 878 F2d 290, 296*], although exceptions exist when there is a change of parties, such as the addition of defendants in an amended complaint [*see Lewis v. Lewis (9th Cir 1966) 358 F2d 495, 502*], and in removal actions [*see Caterpillar Inc. v. Lewis (1996) 519 US 61, 75, 117 S Ct 467, 136 L Ed2d 437*].

A challenge to diversity jurisdiction is measured against the state of facts that existed at the time of filing, regardless of when the challenge is made [*Grupo Dataflux v. Atlas Global Group, L.P. (2004) 541 US 567, 573-577, 124 S Ct 1920, 158 L Ed2d 866* (jurisdictional defect not cured when diversity existed at time of verdict through change in partnership's partners, but not at time of filing)].

In class actions subject to the modified diversity requirements of the Class Action Fairness Act of 2005 [*see* 109 PL 2, 199 Stat 4], the citizenship of the members of the proposed plaintiff class is determined as of the date of filing of the complaint or amended complaint. However, if the initial pleading was not subject to federal jurisdiction, citizenship of the members of the proposed plaintiff class is determined as of the date of service by the plaintiffs of the amended pleading or other paper indicating the existence of federal jurisdiction [*28 USC § 1332(d)(7)*].

Cross Reference:

15 Moore's Federal Practice, see *§ 102.16* (Matthew Bender 3d ed.).

2.10[4] Domestic Relations Exception. Federal courts have excepted domestic relations cases from diversity jurisdiction. Thus, federal courts lack jurisdiction over actions for the traditional family law remedies of divorce, support, and custody [*Ankenbrandt v. Richards (1992) 504 US 689, 703-704, 112 S Ct 2206, 119 L Ed2d 468* ; *see Thompson v. Thompson (9th Cir 1986) 798 F2d 1547, 1558* , *aff'd, 484 US 174 (1988)* ; *see also Peterson v. Babbitt (9th Cir 1983) 708 F2d 465, 466* (jurisdiction should be declined when primary issue concerns status of parent and child or spouses)].

Although this exception has traditionally been narrowly defined [*see Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel (2d Cir 1973) 490 F2d 509, 512-516*], federal courts may be required to abstain in cases involving elements of the domestic relationship even if the parties are not seeking divorce, support, or child custody. Abstention is appropriate if the case presents "difficult questions of state law" bearing on policy problems of substantial import that transcend the result in the case [*Ankenbrandt v. Richards (1992) 504 US 689, 704-705, 112 S Ct 2206, 119 L Ed2d 468*].

The Ninth Circuit has held that the domestic relations exception applies only to cases in which jurisdiction is based on diversity [*Atwood v. Fort Peck Tribal Court Assiniboine & Sioux Tribes (9th Cir 2008) 513 F3d 943, 947*].

Cross Reference:

15 Moore's Federal Practice, see *§ 102.91* (Matthew Bender 3d ed.).

2.10[5] Probate Exception. Federal courts may not exercise diversity jurisdiction to probate a will, administer an

estate, or entertain an action that would interfere with pending probate proceedings in a state court or with the state court's control of property in its custody. In other words, federal courts may adjudicate property rights in estate property if the final judgment would not interfere with the state court's possession, except to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court [*Markham v. Allen (1946) 326 US 490, 494, 66 S Ct 296, 90 L Ed 256*].

The probate exception is narrow and only applies if a matter is purely probate in nature, e.g., that the federal court is being asked directly to probate or annul a will or administer an estate, or is being asked to adjudicate the right to property that is in the custody of a state probate court. When a matter is otherwise within federal jurisdiction, federal courts are not barred from adjudicating that matter by the probate exception [Marshall v. Marshall (2006) 547 US 293, 126 S Ct 1735, 164 L Ed2d 480, 498].

Cross Reference:

15 Moore's Federal Practice, see *§ 102.92* (Matthew Bender 3d ed.).

2.10[6] Diversity Jurisdiction May Not Infringe on Native American Self-Government. Diversity jurisdiction is precluded if its exercise would infringe on the right of Native American self-government [*R.J. Williams Co. v. Fort Belknap Hous. Auth. (9th Cir 1983) 719 F2d 979, 982* & n2, *cert. denied, 472 US 1016 (1985)* ; *see Iowa Mut. Ins. Co. v. LaPlante (1987) 480 US 9, 16-17, 107 S Ct 971, 94 L Ed2d 10*].

Cross References:

Form of notice of motion to dismiss for lack of subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, *§ 8.33*.

15 Moore's Federal Practice, see *§ 102.23* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness EntitiesCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividualsCivil ProcedureJurisdictionFamily Law & Probate Exceptions

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2.11 Citizenship of Named Parties Is Determinative.

The citizenship of all named parties is considered in determining the existence of diversity jurisdiction. The presence of unserved defendants is irrelevant [*see Preaseau v. Prudential Ins. Co. of Am. (9th Cir 1979) 591 F2d 74, 78-79* ; *Republic W. Ins. Co. v. International Ins. Co. (ND Cal 1991) 765 F Supp 628, 629*].

The citizenship of defendants sued under fictitious names, such as "Doe" defendants, is disregarded for diversity jurisdiction purposes [*Soliman v. Philip Morris, Inc. (9th Cir 2002) 311 F3d 966, 971*]. However, this rule applies only to John Does as such, and not to subsequently named parties identifying one of those fictitious defendants [*see Doleac v. Michalson (5th Cir 2001) 264 F3d 470, 475-477*].

The citizenship of nominal and formal parties who have no interest in the suit is disregarded for purposes of determining diversity [*Navarro Sav. Ass'n v. Lee (1980) 446 US 458, 460-461, 100 S Ct 1779, 64 L Ed2d 425* ; *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc. (9th Cir 2000) 204 F3d 867, 873*]. A nominal or formal party has neither an interest in the result of the suit nor an actual interest in or control over the subject matter of the litigation [*Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc. (9th Cir 2000) 204 F3d 867, 873*].

Example:
A typical nominal defendant is a bank or trustee that has only a custodial claim to the property in issue [*SEC v. Colello (9th Cir 1998) 139 F3d 674, 675-677* (nominal defendant joined to facilitate collection)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness EntitiesCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividuals

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2.12 Plaintiff Must Allege Jurisdiction.

A plaintiff invoking diversity jurisdiction must plead specifically the following [*see Lew v. Moss (9th Cir 1986) 797 F2d 747, 750-751*]:

- The citizenship of each of the parties to the action;
- The state of the principal place of business of any corporate parties; and
- The requisite amount in controversy.

Cross Reference:

Local rules pertaining to format of allegations, see *§ 2.05[2]*.

A plaintiff may amend the complaint to correct any defects or omissions in the allegations of jurisdiction [*28 USC § 1653*; *see Snell v. Cleveland, Inc. (9th Cir 2002) 316 F3d 822, 825-828*]. However, a plaintiff may not amend the complaint when the defects are in the jurisdictional facts themselves [*Newman-Green, Inc. v. Alfonzo-Larrain (1989) 490 US 826, 830-832, 109 S Ct 2218, 104 L Ed2d 893*].

Cross Reference:

Discussion of amendment, see 15 *Moore's Federal Practice, § 102.17* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.13 Party Invoking Federal Jurisdiction Has Burden of Proof.

The party seeking to invoke diversity jurisdiction bears the burden of proving that complete diversity existed when the action was filed [*McNutt v. General Motors Acceptance Corp. of Ind., Inc. (1936) 298 US 178, 189, 56 S Ct 780, 80 L Ed 1135* ; *Lew v. Moss (9th Cir 1986) 797 F2d 747, 751* ; *China Basin Props., Ltd. v. Allendale Mut. Ins. Co. (ND Cal 1992) 818 F Supp 1301, 1303*].

Cross Reference:

15 Moore's Federal Practice, see *§ 102.14* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.14 Parties Cannot Confer Jurisdiction.

Parties cannot establish jurisdiction by waiver, estoppel, or agreement [*Holman v. Laulo-Rowe Agency (9th Cir 1993) 994 F2d 666, 668 n1* ; *Richardson v. United States (9th Cir 1991) 943 F2d 1107, 1113*].

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2.15 Court May Drop Nondiverse, Dispensable Parties.

To preserve diversity, a federal court has discretion to drop a nondiverse party who is found not to be indispensable to the action under Rule 19, on motion by any party or sua sponte, at any stage in the proceedings on just terms [*see Fed R Civ P 19, 21*; *see, e.g., Kirkland v. Legion Ins. Co. (9th Cir 2003) 343 F3d 1135, 1142*]. Further, appellate courts may dismiss a dispensable nondiverse party to preserve federal jurisdiction, although this power must be used sparingly, based on an assessment of possible prejudicial impact on any of the parties. If the presence of the nondiverse party produces a tactical advantage for any of the parties and a factual dispute arises, the court of appeals should remand the case to the district court, which is better suited to determine the existence of prejudice under the facts of the individual case. There is no per se rule, however, that the district court must make the initial determination in every case [*see Newman-Green, Inc. v. Alfonzo-Larrain (1989) 490 US 826, 833, 837-838, 109 S Ct 2218, 104 L Ed2d 893*].

Distinguish:

The presence of a nondiverse and not indispensable defendant intervenor does not destroy complete diversity and such an intervenor need not be dismissed from the case to preserve jurisdiction [Mattel, Inc. v. Bryant (9th Cir 2006) 446 F3d 1011, 1013].

Cross Reference:

15 Moore's Federal Practice, see *§ 102.18* (Matthew Bender 3d ed.).

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2.16 Joinder May Affect Diversity.

2.16[1] Joinder of Nondiverse Indispensable Party Requires Dismissal. If an indispensable party is joined pursuant to Rule 19 [*Fed R Civ P 19(a)*], and joinder destroys diversity, the court must dismiss the case [*see ZB Holdings, Inc. v. White (SDNY 1992) 144 FRD 42, 46*].

2.16[2] Improper or Collusive Joinder Barred. Federal district courts lack jurisdiction over a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined in order to invoke the court's diversity jurisdiction [*28 USC § 1359*].

To establish diversity, a plaintiff-assignee must show both of the following:

- A real and substantial interest in the outcome of the litigation [*see Attorneys Trust v. Videotape Computer Prods., Inc. (9th Cir 1996) 93 F3d 593, 596*]; and

- That the transaction was made for a bona fide business purpose and not to obtain federal diversity jurisdiction [*Dweck v. Japan CBM Corp. (9th Cir 1989) 877 F2d 790, 793*].

Parties may not use collusive joinder for the purpose of destroying diversity [*see Attorneys Trust v. Videotape Computer Prods., Inc. (9th Cir 1996) 93 F3d 593, 597-599* ; *Mercado v. Allstate Ins. Co. (9th Cir 2003) 340 F3d 824, 825-826* (discussing "fraudulent joinder")].

2.16[3] Citizenship of Insurer When Insured Not Joined As Defendant. In any direct action against an insurer in which the insured is not joined as a party-defendant (but could be) the insurer is deemed to be a citizen of the following states [*28 USC § 1332(c)(1)*; *see Searles v. Cincinnati Ins. Co. (9th Cir 1993) 998 F2d 728, 728-729*]:

- The state of which the insured is a citizen;

- Any state in which the insurer is incorporated; and

- The state where the insurer has its principal place of business.

A direct action is one in which a party who suffered injuries or damage for which another is legally responsible is entitled to bring suit against the other's liability insurer without joining the insured or first obtaining a judgment against the legally responsible party [*Searles v. Cincinnati Ins. Co. (9th Cir 1993) 998 F2d 728, 728-729*].

The direct action statute, by its terms, does not apply to the following:

- A suit initiated by an insurer, even though the suit is initiated from an apparently defensive posture [*Searles v. Cincinnati Ins. Co. (9th Cir 1993) 998 F2d 728, 728-729*];

- A suit initiated by the insured against his or her insurer [*Searles v. Cincinnati Ins. Co. (9th Cir 1993) 998 F2d 728, 728-729*];

- A suit brought by an injured party against a tortfeasor's insurer based on the insurer's own wrongful conduct, such as alleged bad-faith failure to settle [*Beckham v. Safeco Ins. Co. of Am. (9th Cir 1982) 691 F2d 898, 901-902*], fraud, or negligent misrepresentation [*Mezzetti v. State Farm Mut. Auto. Ins. Co. (ND Cal 2004) 346 F Supp2d 1058, 1064*];

- A suit against an insurer under *Ins Code § 11580(b)(2)* to collect on a judgment secured by the plaintiff against the insured [*Mezzetti v. State Farm Mut. Auto. Ins. Co. (ND Cal 2004) 346 F Supp2d 1058, 1062-1064*].

Cross Reference:

Discussion of actions against insurer, see 15 *Moore's Federal Practice, § 102.58* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.17 Determining Citizenship of Individuals.

2.17[1] Citizenship Requires United States Citizenship and Domicile. A natural person is a citizen of a state within the meaning of the diversity statute, if that person is both a citizen of the United States and domiciled within that state [*Kantor v. Wellesley Galleries, Ltd. (9th Cir 1983) 704 F2d 1088, 1090*].

A citizen of a foreign state always has access to federal court in an action against an American citizen under *28 USC § 1332*.

Cross Reference:

15 Moore's Federal Practice, see *§§ 102.30 -102.37* (Matthew Bender 3d ed.).

2.17[2] Determining United States Citizenship. The following persons are deemed to be citizens of the United States [*8 USC § 1401*; *see 2.20*]:

- A person born in the United States and subject to its jurisdiction.
- A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe.
- A person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, before the birth of that person.
- A person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year before the birth of that person, and the other of whom is a national, but not a citizen of the United States.

- A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time before that person's birth.

- A person of unknown parentage found in the United States while under the age of five years, until shown, before that person's attaining the age of 21, not to have been born in the United States.

- A person born outside the United States and its outlying possession of parents one of whom is an alien, and the other a citizen of the United States who, before that person's birth, was physically present in the United States or its outlying possessions for a total period not less than five years, at least two of which were after attaining the age of 14.

- A person born before noon (Eastern Standard Time) May 24, 1934, outside the jurisdiction of the United States of an alien father and a citizen mother who, before that person's birth, had resided in the United States.

Cross Reference:

15 Moore's Federal Practice, see *§ 102.33* (Matthew Bender 3d ed.).

2.17[3] Determining Domicile.

2.17[3][a] Federal Law Determines Domicile. In general, federal common law determines domicile for purposes of diversity jurisdiction [*Kantor v. Wellesley Galleries, Ltd. (9th Cir 1983) 704 F2d 1088, 1090*]. However, federal courts may look to state law for guidance [*see Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr. (10th Cir 1993) 12 F3d 171, 172*]. The determination of a person's domicile is a mixed question of law and fact; if the application of the rule of law to the facts requires essentially a factual inquiry, the conclusion may not be set aside by an appellate court unless clearly erroneous [*Lew v. Moss (9th Cir 1986) 797 F2d 747, 750-751*].

2.17[3][b] State Citizenship Is Equivalent to State Domicile. For purposes of diversity jurisdiction, citizenship of a state is the equivalent of domicile in that state [*Abbott v. United Venture Capital, Inc. (D Nev 1988) 718 F Supp 823, 826* ; *Carter v. McConnel (D Nev 1983) 576 F Supp 556, 558*]. Domicile means actual physical presence in a state with the intent to remain in the state indefinitely and make it home [*McCormick v. Aderholt (11th Cir 2002) 293 F3d 1254, 1257-1258*].

2.17[3][c] Residence Alone Is Insufficient. Domicile and residence are not necessarily synonymous for purposes of diversity. A citizen may have multiple residences but only one domicile. In determining which of a person's residences is his or her domicile, the court must focus on the intent of the party, which requires an examination of the entire course of a person's conduct [*see Bair v. Peck (D Kan 1990) 738 F Supp 1354, 1356*].

Cross Reference:

15 Moore's Federal Practice, see *§ 102.34* (Matthew Bender 3d ed.).

Federal courts examine the totality of the circumstances to determine domicile; no one factor controls [*see Lew v. Moss (9th Cir 1986) 797 F2d 747, 749-750*]. Factors evidencing an intent to remain in a new domicile include [*Lew v. Moss (9th Cir 1986) 797 F2d 747, 749-750*]:

- Voting registration and voting practices;

- Place of employment or business;

- Current residence;
- Location of real property;
- Location of spouse and family;
- Driver's license and automobile registration;
- Location of bank accounts;
- Payment of taxes;
- Union membership; and
- Location of social organizations with which affiliated.

Warning:

If a defendant asserts a change in domicile after the plaintiff has met the burden of showing the defendant's initial domicile, the burden shifts to the defendant to establish that the domicile had changed when the suit was filed [*Lew v. Moss (9th Cir 1986) 797 F2d 747, 751*].

Cross Reference:

15 Moore's Federal Practice, see *§§ 102.35*, *102.36* (Matthew Bender 3d ed.).

2.17[4] Determining Citizenship of Particular Individuals. Estate Representatives. The legal representative of the estate of a decedent, an infant, or an incompetent is deemed to be a citizen of the state of citizenship of the principal [*28 USC § 1332(c)(2)*].

Receivers. If a party is represented by a court-appointed receiver, the citizenship of the receiver controls [*New Alaska Dev. Corp. v. Guetschow (9th Cir 1989) 869 F2d 1298, 1301*].

Fiduciaries. The citizenship of a fiduciary, rather than the beneficiary, generally controls [*O'Brien v. Avco Corp. (2d Cir 1969) 425 F2d 1030, 1032*].

Native Americans. Native Americans are citizens of the state in which they reside [*Iowa Mut. Ins. Co. v. LaPlante (1987) 480 US 9, 17-18 n10, 107 S Ct 971, 94 L Ed2d 10*].

Students. Students attending school in another state are generally regarded as only temporary residents of the state in which they are attending school; it is presumed that they retain their domicile at their former abode [*see Hakkila v. Consolidated Edison Co. (SDNY 1990) 745 F Supp 988, 989-990*].

Prison Inmates. A person incarcerated in prison in another state does not change domicile [*Sullivan v. Freeman (7th Cir 1991) 944 F2d 334, 337 , cert. denied, 513 US 1060 (1991)*].

Minors. Except in the case of an emancipated minor (which is determined by state law), domicile is first acquired at birth and is determined by the domicile of the parent or guardian on whom the child is dependent [*Safeco Ins. Co. of Am. v. Mirczak (D Nev 1987) 662 F Supp 1155, 1157*].

United States Citizens Domiciled Abroad. When a citizen is traveling or temporarily residing abroad with no intention to permanently change his or her existing domicile, the citizen's domicile is unchanged for purposes of diversity jurisdiction [*see, e.g.*, *Anderson v. Watt (1891) 138 US 694, 706, 11 S Ct 449, 34 L Ed 1078*]. If an American citizen is domiciled abroad, he or she is not a citizen of any state and cannot sue or be sued in federal court based on diversity jurisdiction [*Newman-Green, Inc. v. Alfonzo-Larrain (1989) 490 US 826, 830-832, 109 S Ct 2218, 104 L Ed2d 893* ; *see Brady v. Brown (9th Cir 1995) 51 F3d 810, 815*].

Foreign states. A foreign state always has access to federal court in an action against an American citizen [*28 USC § 1332(a)(4)*].

Permanent Residents. Aliens admitted to the United States for permanent residence are citizens of the state in which they are domiciled [*28 USC § 1332(a)*].

Persons With Dual Citizenship. A person who holds dual citizenship is considered an citizen of a state for diversity purposes [*Mutuelles Unies v. Kroll & Linstrom (9th Cir 1992) 957 F2d 707, 711*].

Naturalized Citizens. A naturalized citizen cannot assert his or her foreign citizenship for purposes of alienage jurisdiction [*see Raphaelv. Hertzberg (CD Cal 1979) 470 F Supp 984, 986*].

Military Personnel. Military personnel are presumed to retain their prior domicile unless they manifest their intent to change domicile [*see Vitro v. Town of Carmel (SDNY 1977) 433 F Supp 1110, 1112*].

Cross Reference:

15 Moore's Federal Practice, see *§ 102.37* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.18 Determining Citizenship of Corporations.

2.18[1] Citizens of State of Incorporation and Principal Place of Business. Corporations are deemed citizens of both their state of incorporation and the state where their principal place of business is located [*28 USC § 1332(c)*; *see United Computer Sys., Inc. v. AT&T Corp. (9th Cir 2002) 298 F3d 756, 763* ; *but see Homestake Lead Co. v. Doe Run Res. Corp. (ND Cal 2003) 282 F Supp2d 1131, 1136-1137* (for inactive corporation, citizenship may revert only to state of incorporation)].

2.18[2] Determining States of Incorporation. A corporation is deemed a citizen of every state in which it is incorporated [*see United Computer Sys., Inc. v. AT&T Corp. (9th Cir 2002) 298 F3d 756, 763*].

If a state requires that a corporation incorporate in that state to do business there, the corporation will not be considered a citizen of that state for purposes of diversity jurisdiction; involuntary incorporation is disregarded [*Rudisill v. Southern Ry. (WDNC 1976) 424 F Supp 1102, 1103-1104 , aff'd, 548 F2d 488 (4th Cir 1977)* (citing **Moore's**; "a corporation [is] a citizen of every state in which it has been freely and actually incorporated")].

2.18[3] Determining Principal Place of Business. A corporation's principal place of business is its "nerve center," where its officers direct, control, and coordinate the corporation's activities [*Hertz Corp. v. Friend (2010) -- US --, 130 S Ct 1181, 175 L Ed2d 1029, 1041]* .

In practice, the "nerve center" should normally be "the place where the corporation maintains its headquarters--provided that the headquarters is the actual center of direction, control, and coordination, i.e., the 'nerve center,' and not simply an office where the corporation holds its board meetings" [*Hertz Corp. v. Friend (2010) -- US --, 130 S Ct 1181, 175 L Ed2d 1029, 1041-1042]* . For example, if the bulk of a company's business activities visible to the public take place in New Jersey, while its top officers direct those activities just across the river in New York, the "principal place of business" is New York [*Hertz Corp. v. Friend (2010) -- US --, 130 S Ct 1181, 175 L Ed2d 1029, 1043-1044]* . Parties may not manipulate jurisdiction by identifying a nerve center at a place where only a mailbox or bare office exists [*Hertz Corp. v. Friend (2010) -- US --, 130 S Ct 1181, 175 L Ed2d 1029, 1044]* .

This single test enunciated by the Supreme Court provides "administrative simplicity" [*Hertz Corp. v. Friend (2010) -- US --, 130 S Ct 1181, 175 L Ed2d 1029, 1037]* . Before *Hertz*, the Ninth Circuit's test looked to the state where the corporation's activity "is significantly larger," or "substantially predominates," then, if no such state can be identified, to the state where most of the corporation's executive and administrative functions take place [*United Computer Sys., Inc. v. AT&T Corp. (9th Cir 2002) 298 F3d 756, 763]* .

2.18[4] Citizenship of Alien Corporations. The rule for corporate citizenship [*28 USC § 1332(c)(1)*], applies to both foreign and domestic corporations. Therefore, an alien corporation's citizenship is in the country where it was incorporated and the location of its principal place of business [*Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A. (9th Cir 1994) 20 F3d 987, 990*].

2.18[5] Citizenship of Particular Corporate Entities. Nonprofit Corporations. A nonprofit corporation is considered a corporation for diversity purposes. The citizenship of the nonprofit corporation is determined by the citizenship of the corporation if the corporation is the real party in interest [*see Burton v. United States Olympic Comm. (CD Cal 1983) 574 F Supp 517, 521-522* ; *see also Kuntz v. Lamar Corp. (9th Cir. 2004) 385 F3d 1177, 1182-1183* (non-profit cooperative incorporated under state law treated as corporation)]. However, if members have been wronged directly, an argument can be made that the members are considered the real parties in interest and their citizenship should be deemed relevant for diversity purposes [*CCC Info. Servs., Inc. v. American Salvage Pool Ass'n (7th Cir 2000) 230 F3d 342, 345-347* ; *National Ass'n of Realtors v. National Real Estate Ass'n (7th Cir 1990) 894 F2d 937, 940*].

Defunct or Inactive Corporations. The Ninth Circuit has not determined the appropriate test to determine citizenship. However, the district courts have adopted the Fifth Circuit's facts and circumstances test [*see, e.g., Patel v. Sugen, Inc. (ND Cal 2005) 354 F Supp2d 1098, 1112* ; *Homestake Lead Co. v. Doe Run Res. Corp. (ND Cal 2003) 282 F Supp2d 1131, 1136-1137*]. Under this test, if the corporation has been inactive for a substantial period of time, it is a citizen only in the state of incorporation. If the corporation has not been inactive for a substantial period of time, the place of its last business activity would be relevant to, but not dispositive of, the determination of the principal place of business [*Harris v. Black Clawson Co. (5th Cir 1992) 961 F2d 547, 551*].

Federally Chartered Corporations. A federally chartered corporation in which the United States owns half or more of the stock may sue or be sued in federal court under federal question jurisdiction [*see 28 USC § 1349*]. A federally chartered corporation in which the United States owns less than half the stock and is organized to conduct business or activities in more than one state generally is not a citizen of a state unless the activities of the corporation are confined to one particular state or if Congress has expressly provided for state citizenship [*Burton v. United States Olympic Comm. (CD Cal 1983) 574 F Supp 517, 519* ; *Engelmeyer v. Production Credit Ass'n of Midlands (DSD 1987) 652 F Supp 1235, 1236*].

Incorporated Native American Tribes. A corporation created under tribal law is not a citizen of the state in which it was incorporated merely because its incorporation occurred within that state. A Native American corporation is only a citizen of its principal place of business [*Cook v. AVI Casino Enterprises, Inc. (9th Cir 2008) 548 F3d 718, 724* ; *see R.J. Williams Co. v. Fort Belknap Housing Auth. (9th Cir 1983) 719 F2d 979, 982 n 2* (Native American housing authority had its "principal place of business in Montana"); *25 USC § 477* (Indian Reorganization Act)].

Distinguish:

An Indian tribe or an unincorporated arm of a tribe is not a citizen of any state [*American Vantage Cos. v. Table Mountain Rancheria (9th Cir 2002) 292 F3d 1091, 1098*].

National Banking Associations. By statute, national banking associations are deemed citizens of states in which they are located [*28 USC § 1348*]. The Supreme Court has held that a national bank is a citizen only of the state in which it has its main office, as set forth in its articles of incorporation; it is not a citizen of every state in which it has branch

operations [*Wachovia Bank v. Schmidt (2006) 546 US 303, 317-319, 126 S Ct 941, 163 L Ed 2d 797*].

Public Corporations. Public corporations are citizens of the state that created them. Multistate public corporations are citizens of each state in which they are incorporated [*Oslick v. Port Auth. of N.Y. & N.J. (SDNY 1979) 83 FRD 494, 495-496*].

Parent and Subsidiary Corporations. The subsidiary corporation maintains a separate corporate character and does not adopt the citizenship of its parent corporation unless the subsidiary is deemed to be the alter ego of the parent corporation [*see U.S.I. Props. Corp. v. M.D. Constr. Co. (1st Cir 1988) 860 F2d 1, 7 , cert. denied sub nom. Compania de Desarrollo Cooperativo v. U.S.I. Props. Corp., 490 US 1065 (1989)*]. Therefore, courts look to the state of incorporation and the principal place of business of the subsidiary itself [*Danjaq, S.A. v. Pathe Communications Corp. (9th Cir 1992) 979 F2d 772, 776*].

Merged Corporations. The citizenship of the surviving corporation ordinarily determines diversity [*see Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp. (7th Cir 1975) 523 F2d 543, 548*].

Corporations Not in Good Standing. A corporation that has not remained in good standing in the state of its incorporation remains a citizen of that state as long as the state has not revoked its corporate charter [*Smith v. Arundel Coop., Inc. (DDC 1987) 660 F Supp 912, 913*]. If the charter has been revoked, the corporation may nevertheless remain a citizen of the state of incorporation if it retains the capacity to sue and be sued under state law [*Wild v. Subscription Plus, Inc. (7th Cir 2002) 292 F3d 526, 528-529 , cert. denied, 537 US 1045 (2002)*].

Cross References:

Form of notice of motion to dismiss for lack of subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.33*.

15 Moore's Federal Practice, see *§§ 102.50 -102.56* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFormationPlace of IncorporationGeneral OverviewBusiness & Corporate LawCorporationsFormationPlace of IncorporationPrincipal OfficeCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness EntitiesCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividuals

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2.19 Determining Citizenship of Noncorporate Entities.

2.19[1] Partnerships. A general or limited partnership is deemed to have the citizenship of each of its general partners and limited partners [*see Cosgrove v. Bartolotta (7th Cir 1998) 150 F3d 729, 731* ; *see also Carden v. Arkoma Assocs. (1990) 494 US 185, 197, 110 S Ct 1015, 108 L Ed2d 157*]. The citizenship of a limited liability partnership is determined by the citizenship of each of its partners [*China Nuclear Energy Indus. Corp. v. Andersen, LLP (D Colo 1998) 11 F Supp2d1256, 1257-1258*]. A partnership cannot invoke diversity jurisdiction if any partner who is a United States citizen is domiciled abroad, because that partner is not a citizen of any state [*see Coudert Bros. v. Easyfind Int'l, Inc. (SDNY 1985) 601 F Supp 525, 526-527*]. Diversity jurisdiction is lacking if a partner sues the partnership, because the partner's citizenship is counted on both sides of the case [*Boulder Creek Co. v. Maruko, Inc. (CD Cal 1991) 772 F Supp 1150, 1153*].

Distinguish:

While dismissal of a party can cure lack of diversity [*see 2.15*], withdrawal of partners cannot. The citizenship of a partnership is determined by the citizenship of the partners at the time of filing: a subsequent change in the composition of the partnership does not cure a failure of diversity [*Grupo Dataflux v. Atlas Global Group, L.P. (2004) 541 US 567, 574-576, 124 S Ct 1920, 158 L Ed2d 866*].

2.19[2] Other Noncorporate Entities. Limited Liability Companies. The citizenship of a limited liability company is determined by the citizenship of its members; therefore, the company is a citizen of every state of which its owners or members are citizens [*Johnson v. Columbia Props. Anchorage, LP (9th Cir 2006) 437 F3d 894, 899*].

Joint Ventures. The citizenship of a joint venture is the citizenship of each member, regardless of whether the member has an interest in the suit [*Schiavone Constr. Co. v. City of New York (2d Cir 1996) 99 F3d 546, 548*].

Unincorporated Associations. An unincorporated association is deemed to have the citizenship of each of its members [*United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc. (1965) 382 US 145, 146-150, 86 S Ct 272, 15 L Ed2d 217*].

Exception:

For purposes of the minimal diversity requirements of the Class Action Fairness Act of 2005 [*see* 109 PL 2, 199 Stat 4], an unincorporated association is deemed to be a citizen of the state where it has its principal place of business and the state under whose laws it is organized [*28 USC § 1332(d)(10)*].

Sociedad en Comandita. A Sociedad en Comandita is treated as a corporation for diversity purposes and is deemed to be a citizen of Puerto Rico only [*see Carden v. Arkoma Assocs. (1990) 494 US 185, 189-190, 110 S Ct 1015, 108 L Ed2d 157*].

States, State Agencies, and Local Governments. States and state agencies are not citizens of any state and therefore cannot invoke diversity jurisdiction [*Postal Tel. Cable Co. v. State of Alabama (1894) 155 US 482, 487, 15 S Ct 192, 39 L Ed 231* ; *U.S.I. Props. Corp. v. M.D. Constr. Co. (1st Cir 1988) 860 F2d 1, 7 , cert. denied sub nom. Compania de Desarrollo Coop. v. U.S.I. Props. Corp., 490 US 1065 (1989)*]. Local governments and their agencies that are not simply the "arm or alter ego" of states are citizens of the states in which they are located [*see Moor v. County of Alameda (1973) 411 US 693, 698, 93 S Ct 1785, 36 L Ed2d 596*].

Commonwealth of Northern Mariana Islands. The commonwealth is a United States territory, and thus a state and not a citizen for diversity purposes [*Dyack v. Commonwealth of N. Mariana Islands (9th Cir 2003) 317 F3d 1030, 1037*].

Trusts. A trust is a citizen of the state where the trustee is a citizen [*May Dep't Stores Co. v. Federal Ins. Co. (7th Cir 2002) 305 F3d 597, 599* (resisting efforts to base citizenship determination on functional considerations)]. Trustees of an express trust are entitled to bring diversity actions in their own names and on the basis of their own citizenship. A trustee is a real party to the controversy for purposes of diversity jurisdiction if the trustee possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others [*Navarro Sav. Ass'n v. Lee (1980) 446 US 458, 464, 100 S Ct 1779, 64 L Ed2d 425*].

Unincorporated Native American Tribes. Unincorporated Native American tribes are not citizens of any state, and are not unincorporated associations for purposes of diversity jurisdiction. Neither an unincorporated Indian tribe operating a casino that was an unincorporated arm of the tribe nor the casino itself are citizens of a state for purposes of diversity jurisdiction [*American Vantage v. Table Mountain Rancheria (9th Cir 2002) 292 F3d 1091, 1094-1098, 1100*].

Cross References:

Form of notice of motion to dismiss for lack of subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.33*.

15 Moore's Federal Practice, see *§ 102.57* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness EntitiesCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividuals

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2.20 Diversity Jurisdiction in Suits Involving Aliens.

2.20[1] Actions Where Parties Are Mixture of Citizens and Aliens. Diversity jurisdiction exists for actions between citizens of a state and citizens or subjects of a foreign state (alienage jurisdiction) [*28 USC § 1332(a)(2)*].

Diversity jurisdiction also exists for actions between citizens of different states and in which citizens or subjects of a foreign state are additional parties on both sides of the dispute [*28 USC § 1332(a)(3)*; *see Transure, Inc. v. Marsh & McLennan, Inc. (9th Cir 1985) 766 F2d 1297, 1299*]. However, no diversity jurisdiction exists when an alien sues an alien and a citizen of another state; if the alien defendant is an indispensable party, the case must be dismissed [*Cheng v. Boeing Co. (9th Cir 1983) 708 F2d 1406, 1412 , cert. denied, 464 US 1017 (1983)* ; *see Allendale Mut. Ins. v. Bull Data Sys., Inc. (7th Cir 1993) 10 F3d 425, 427-428* (no jurisdiction when one side has only foreign parties and other is mixture of foreign and domestic parties)].

Distinguish:

Alienage jurisdiction is distinct from suits under the Alien Tort Claims Act [*see 28 USC § 1350*]. As to the latter, a violation of a well-defined norm of customary international law provides the basis for federal subject matter jurisdiction [*see Sosa v. Alvarez-Machain (2004) 542 US 692, 124 S Ct 2739, 159 L Ed2d 718, 753-757* ; *see also In re Estate of Ferdinand Marcos Human Rights Litig. (9th Cir 1994) 25 F3d 1467, 1474-1475*].

2.20[2] Actions by or Against Foreign States. Diversity jurisdiction exists for actions between a foreign state, as plaintiff, and citizens of a state or different states [*28 USC § 1332(a)(4)*; *see 28 USC § 1603* ("foreign state" defined)].

Federal jurisdiction in actions brought against foreign states is governed exclusively by the Foreign Sovereign Immunities Act [*28 USC § 1330*; *see Republic of Austria v. Altmann (2004) 541 US 677, 691, 124 S Ct 2240, 159 L Ed2d 1* ; *Moore v. United Kingdom (9th Cir 2004) 384 F3d 1079, 1082*].

Unless an exception applies, a foreign state is presumptively immune [*see Republic of Iraq v. Beaty (2009) ___ US ___, 129 S Ct 2183, 173 L Ed 2d 1193, 1204-1205* (National Defense Authorization Act, *28 USC § 1605A*, authorized

President to exempt Iraq from terrorism exception to foreign immunity)].

Cross Reference:

15 Moore's Federal Practice, see *§ 102.72* (Matthew Bender 3d ed.).

2.20[3] Actions Between Aliens. Diversity jurisdiction does not exist for actions by foreign plaintiffs against foreign defendants [*see 28 USC § 1332*; *Mutuelles Unies v. Kroll & Linstrom (9th Cir 1992) 957 F2d 707, 711* ; *see also Verlinden B.V. v. Central Bank of Nigeria (1983) 461 US 480, 491-492, 103 S Ct 1962, 76 L Ed2d 81* (no alienage jurisdiction in suit between aliens); *Van Der Steen v. Sygen Int'l, PLC, No. C 06-4966 CRB (ND Cal 2006) 464 F Supp2d 931, 936-937* (court declined to exercise jurisdiction in case solely between aliens, even though presence of citizen defendant might have conferred jurisdiction when case was removed)].

2.20[4] Citizenship of Permanent Resident Aliens. A permanent resident alien is deemed to be a citizen of his or her state of domicile for purposes of diversity jurisdiction [*28 USC § 1332(a)*; *see Arai v. Tachibana (D Haw 1991) 778 F Supp 1535, 1540*].

2.20[5] Citizens of British Dependent Territories. A citizen of the Cayman Islands, a British dependent territory, is deemed a citizen of the United Kingdom and its colonies [*see Wilson v. Humphreys (Cayman) Ltd. (7th Cir 1990) 916 F2d 1239, 1242* , *cert. denied*, *499 US 947 (1991)*]. The Supreme Court has unanimously held that a corporation organized under the laws of the British Virgin Islands is a "citizen or subject of a foreign state" for purposes of alienage diversity jurisdiction [*JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd. (2002) 536 US 88, 91-93, 122 S Ct 2054, 153 L Ed2d 95*].

2.20[6] Law of Nation of Citizenship Determines Status. In general, the determination of whether an individual is a foreign citizen for purposes of alienage jurisdiction is governed by the law of the nation in which citizenship is claimed [*see Autocephalous Church v. Goldberg & Feldman Arts (7th Cir 1990) 917 F2d 278, 285*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAlienage JurisdictionCitizenshipCivil ProcedureJurisdictionDiversity JurisdictionAlienage JurisdictionJurisdictional RequirementsCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness EntitiesCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividuals

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2.21 Over $75,000 in Controversy Is Generally Required.

2.21[1] Amount Is Jurisdictional. In addition to complete diversity of the parties, diversity jurisdiction generally requires that the amount in controversy exceed $75,000, exclusive of interest and costs [*28 USC § 1332(b)*; *see Valdez v. Allstate Ins. Co. (9th Cir 2004) 372 F3d 1115, 1116-1118*].

The amount in controversy is a jurisdictional requirement and is not waivable by the parties [*28 USC § 1332(b)*].

Strategic Point:

Provided that the other elements of jurisdiction are present, such as complete diversity, and at least one named plaintiff satisfies the amount in controversy requirement, supplemental jurisdiction may be exercised over the claims of other plaintiffs in the same case even if those claims are for less than the jurisdictional amount [*Exxon Mobil Corp. v. Allapattah Servs., Inc. (2005) 545 US 546, 549, 125 S Ct 2611, 162 L Ed2d 502*].

Exception:

Special jurisdictional requirements apply to multistate class actions and mass actions. For further discussion see *2.24A*.

Cross References:

Nature and scope of supplemental jurisdiction, see *2.26 -2.30*. Form of notice of motion to dismiss for lack of subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, *§ 8.33*.

2.21[2] Federal Law Determines Amount in Controversy. Federal standards apply to determine whether the amount in controversy satisfies the jurisdictional requisite [*Horton v. Liberty Mut. Ins. Co. (1961) 367 US 348, 352, 81 S Ct 1570, 6 L Ed2d 890*].

Distinguish:

Federal courts look to state law to determine the nature and extent of damages [*see Luckett v. Delta Airlines, Inc. (5th Cir 1999) 171 F3d 295, 298*].

2.21[3] Amount Determined When Complaint Is Filed. The amount in controversy is determined as of the time the complaint is filed [*Freeport-McMoRan, Inc. v. K N Energy (1991) 498 US 426, 428, 111 S Ct 858, 112 L Ed2d 951*]. However, if a defendant asserts a compulsory counterclaim in its answer and alleges an insufficient amount in controversy, rather than moving to dismiss for lack of subject matter jurisdiction, the counterclaim must be considered in determining the requisite amount in controversy [*Spectacor Mgmt. Group v. Brown (3d Cir 1997) 131 F3d 120, 125 , cert. denied, 523 US 1120 (1998)*].

Distinguish:

When a party seeks to vacate an arbitration award, the amount in controversy for diversity jurisdiction is measured by the amount in dispute in the underlying litigation between the parties, not the amount of the award [*Theis Research, Inc. v. Brown & Bain (9th Cir 2004) 386 F3d 1180, 1181 , amended at 400 F3d 659 (9th Cir 2005)*].

Federal courts have distinguished between *subsequent events* that change the amount in controversy and *subsequent revelations* that show, in fact, that the required amount was or was not in controversy at the commencement of the suit [*see Coventry Sewage Assocs. v. Dworkin Realty Co. (1st Cir 1995) 71 F3d 1, 8*]. Further, when alleged damages include state tax liability that has not been finally determined when the federal complaint is filed, a district court may consider the subsequent ruling of the state taxing authority in assessing the actual amount in controversy [*Spielman v. Genzyme Corp. (1st Cir 2001) 251 F3d 1, 6* & n4].

Warning:

If a plaintiff who originally filed in federal court is finally adjudged to recover less than the jurisdictional minimum (computed without regard to any set-off or counterclaim to which the defendant may be entitled and exclusive of interests and costs), the trial court has discretion to both deny costs to the plaintiff and impose costs on the plaintiff [*see 28 USC § 1332(b)*; *see also Fischer v. First Chicago Capital Mkts., Inc. (7th Cir 1999) 195 F3d 279, 285*]. Courts generally apply a bad-faith test [*see Dr. Franklin Perkins Sch. v. Freeman (7th Cir 1984) 741 F2d 1503, 1525*].

2.21[4] Jurisdictional Amount Does Not Include Costs and Interest. In general, the jurisdictional amount must be met exclusive of costs and interest [*see 28 USC § 1332(b)*; *see also State Farm Mut. Auto. Ins. v. Narvaez (10th Cir 1998) 149 F3d 1269, 1270-1272*].

The following costs are may be included:

- Costs associated with the defendant's allegedly wrongful conduct [*Griffin v. Holmes (EDNC 1993) 843 F Supp 81, 84-85*];

- Interest that is an underlying obligation and not solely attributable to a delay in payment or wrongful deprivation of funds [*see, e.g., State Farm Mut. Auto. Ins. v. Narvaez (10th Cir 1998) 149 F3d 1269, 1270-1272*].

Interest is includible if it is an integral part of the aggregate amount of damages claimed, or is itself a principal obligation, as opposed to being incidental or accessory to the principal amount demanded [*see Edwards v. Bates County (1896) 163 US 269, 272, 16 S Ct 967, 41 L Ed 155* ; *see also Brown v. Webster (1895) 156 US 328, 330, 15 S Ct 377, 39 L Ed 440*]. For example, statutory damages imposed for failure to timely pay insurance claims as a coercive penalty to prompt settlement, often expressed in terms of interest, are included in the amount in controversy calculation

to the extent that they have accrued as of the time of the filing of the federal suit [*St. Paul Reinsurance Co. v. Greenberg (5th Cir 1998) 134 F3d 1250, 1254-1255*].

2.21[5] Punitive Damages Are Part of Amount in Controversy. Punitive damages are properly aggregated as part of the amount in controversy [*Marquardt v. United Airlines, Inc. (D Haw 1992) 781 F Supp 1487, 1490*] if recoverable as a matter of applicable state law [*Richmond v. Allstate Ins. Co. (SD Cal 1995) 897 F Supp 447, 450* ; *see also* Martinez v. Kirk Xpedx (ND Cal 2003) 2003 US Dist LEXIS 12657, at *3 (determination of amount in controversy for complaint alleging FEHA violations could include punitive damages)].

Claims for punitive damages are subjected to closer scrutiny than claims for actual damages, particularly when the claim for punitive damages comprises the bulk of the amount in controversy [*see Anthony v. Security Pac. Fin. Servs., Inc. (7th Cir 1996) 75 F3d 311, 315-318*].

Whether a plaintiff has established the availability of punitive damages is a question of law for the court [*D'Amato v. Rhode Island Hosp. Trust Nat'l Bank (DRI 1991) 772 F Supp 1322, 1325*].

2.21[6] Attorney's Fees Are Part of Amount in Controversy Only If Provided for in Contract or by Statute. Attorney's fees do not constitute part of the matter in controversy unless the fees are provided for by contract or statute [*Galt G/S v. JSS Scandinavia (9th Cir 1998) 142 F3d 1150, 1155-1156* ; *see Goldberg v. CPC Int'l, Inc. (9th Cir 1982) 678 F2d 1365, 1367* , *cert. denied*, *459 US 945 (1982)*].

If recoverable by statute or contract, attorney's fees are included in determining the amount in controversy regardless of whether the award is mandatory or discretionary [*Galt G/S v. JSS Scandinavia (9th Cir 1998) 142 F3d 1150, 1155-1156* ; *see also* Martinez v. Kirk Xpedx (ND Cal 2003) 2003 US Dist LEXIS 12657, at *3 (determination of amount in controversy for complaint alleging FEHA violations could include attorney's fees)].

2.21[7] Suits Involving Equitable Relief. In suits involving equitable relief, if the value of the thing to be accomplished is equal to the dollar minimum of the jurisdictional amount requirement to any party in the action, then jurisdiction will be found [*McCauley v. Ford Motor Co. (9th Cir 2001) 264 F3d 952, 958* , *cert. dismissed*, *537 US 1 (2002)* (the either party viewpoint rule is applied to determine the amount in controversy in actions for equitable relief by individuals, and in class action cases in which the plaintiffs' have a common and undivided interest in the injunctive relief)]. The plaintiffs' viewpoint rule is applied in class actions when the claims asserted for injunctive relief are separate and distinct [*McCauley v. Ford Motor Co. (9th Cir 2001) 264 F3d 952, 963* , *cert. dismissed*, *537 US 1 (2002)*].

Cross References:

Form of notice of motion to dismiss for lack of subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.33*.

15 Moore's Federal Practice, see *§§ 102.101 -102.109* (Matthew Bender 3d ed.).

2.21[8] Amount Is Determined Under Legal Certainty Test. If the plaintiff has pleaded the amount in controversy in good faith and it does not appear to a *legal certainty* that the claim is really for less than the jurisdictional minimum, the amount claimed by the plaintiff controls [*St. Paul Mercury Indem. Co. v. Red Cab Co. (1938) 303 US 283, 288-289, 58 S Ct 586, 82 L Ed 845* ; *see Marquardt v. United Airlines, Inc. (D Haw 1992) 781 F Supp 1487, 1490*].

Under the legal certainty rule, a strong, rebuttable presumption exists that the face of the complaint is a good-faith representation of the actual amount in controversy [*see Singer v. State Farm Mut. Auto Ins. (9th Cir 1997) 116 F3d 373, 377*].

The plaintiff need only establish that it does *not* appear to a legal certainty that the claim is below the jurisdictional minimum. Thus, under this standard, courts must be very confident that a party cannot recover the jurisdictional amount before dismissing the case for want of jurisdiction [*Pachinger v. MGM Grand Hotel-Las Vegas, Inc. (9th Cir 1986) 802 F2d 362, 364* ; *see, e.g.,* New York Life Ins. Co. v. Regelson-Blanck (ND Cal 2004) 2004 US Dist LEXIS 22153, at *16 (sum claimed by plaintiff did not control because it was alleged as means to obtain federal court jurisdiction)].

2.21[9] Evidence of Valid Defense or Counterclaim Does Not Defeat Diversity. The amount in controversy is determined without regard to any valid defense, counterclaim or offset, even if revealed in plaintiff's complaint [*St. Paul Mercury Indem. Co. v. Red Cab Co. (1938) 303 US 283, 288-289, 58 S Ct 586, 82 L Ed 845*].

2.21[10] Party Asserting Jurisdiction Has Burden of Proof. If the existence of the minimum jurisdictional amount is disputed, the burden of proof falls on the party seeking relief in the federal forum [*see Gaus v. Miles, Inc. (9th Cir 1992) 980 F2d 564, 567*]. The burden of proof is by a preponderance of the evidence. Conclusory allegations as to the amount in controversy are insufficient to meet this burden [*Valdez v Allstate Ins. Co. (9th Cir 2004) 372 F3d 1115, 1117* (allegation on "information and belief" did not prove jurisdictional amount for purposes of removal jurisdiction)].

Strategic Point:

The proponent of jurisdiction may introduce summary-judgment type evidence concerning the amount in controversy if the face of the complaint does not support jurisdiction [*see Valdez v Allstate Ins. Co. (9th Cir 2004) 372 F3d 1115, 1117*].

Distinguish: In cases removed under the Class Action Fairness Act of 2005 [*see* 109 PL 2, 199 Stat 4 (applicable to civil cases commenced on or after February 18, 2005)], at least one district court has held that the party seeking *remand* has the burden of proving that the federal court lacks jurisdiction [*see Berry v. American Express Publ'g (CD Cal 2005) 381 F Supp2d 1118, 1123*].

Cross References: For further discussion of proving the amount in controversy, see Ch. 3, Removing a State Court Case to Federal Court, *§ 3.10[3][d]*. For further discussion of the burden of proof when removal is contested, see Ch. 3, Removing a State Court Case to Federal Court, *§ 3.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyChallengesCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminationsEvidenceProcedural ConsiderationsBurdens of ProofAllocation

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2.22 Costs May Be Awarded When Recovery Is Below Jurisdictional Minimum.

If a plaintiff who originally filed in federal court is finally adjudged to be entitled to less than the jurisdictional minimum, computed without regard to set-offs or counterclaims and exclusive of interest and costs, the trial court may deny costs to the plaintiff and may impose costs on the plaintiff [*28 USC § 1332(b)*; *see Fischer v. First Chicago Capital Mkts., Inc. (7th Cir 1999) 195 F3d 279, 285*].

Cross References:

Form of notice of motion to dismiss for lack of subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.33*.

15 Moore's Federal Practice, see *§§ 102.106*, *102.107* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyChallengesCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminationsCivil ProcedureRemediesCosts & Attorney FeesGeneral Overview

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2.23 Claims May Be Aggregated.

2.23[1] Single Plaintiff--Single Defendant. A single plaintiff may aggregate all claims, related or unrelated, that he or she has against a single defendant in calculating the amount in controversy, even if the claims were assigned to the plaintiff by a third party, unless the assignment was made collusively for the purpose of creating federal jurisdiction [*Fed R Civ P 18(a)*; *see Budget Rent-A-Car, Inc. v. Higashiguchi (9th Cir 1997) 109 F3d 1471, 1473-1474*].

2.23[2] Single Plaintiff--Multiple Defendants. A plaintiff may not aggregate his or her claims against multiple defendants unless the claims against the defendants are common and undivided, such that the defendants' liability is properly characterized as joint and not several [*Libby, McNeill, & Libby v. City Nat'l Bank (9th Cir 1978) 592 F2d 504, 509-510* ; *see Snyder v. Harris (1969) 394 US 332, 335, 89 S Ct 1053, 22 L Ed2d 319*].

2.23[3] Multiple Plaintiffs--Single Defendant. Plaintiffs may join to sue a common defendant but each plaintiff must establish that his or her claim against that defendant meets the jurisdictional minimum unless they are enforcing a single title or right in which they have a common and undivided interest [*see Skokomish Indian Tribe v. France (9th Cir 1959) 269 F2d 555, 559* ; *see also Smiley v. Citibank (S.D.), N.A. (CD Cal 1993) 863 F Supp 1156, 1163*] or at least one named plaintiff satisfies the amount in controversy requirement and supplemental jurisdiction may be exercised over the claims of other plaintiffs [*see Exxon Mobil Corp. v. Allapattah Servs., Inc. (2005) 545 US 546, 125 S Ct 2611, 162 L Ed2d 502, 515*].

Cross Reference:

Nature and scope of supplemental jurisdiction, see *§§ 2.26 -2.30*.

2.23[4] Class Actions. In class actions subject to the minimal diversity requirements of the Class Action Fairness Act of 2005 [*see* 109 PL 2, 199 Stat 4], the claims of individual class members are aggregated to determine whether the matter in controversy exceeds the sum or value of $5 million, exclusive of interest and costs, thereby triggering the modified diversity requirements [*28 USC § 1332(d)(6)*]. The amount in controversy may be satisfied either from the view of the aggregate value to the class members or to the defendants [*Berry v. American Express Publ'g Corp. (CD Cal 2005) 381 F Supp2d 1118, 1123*]. However, in other class actions, class members may not aggregate their claims [

see Tortola Rests., L.P. v. Kimberly-Clark Corp. (ND Cal 1997) 987 F Supp 1186, 1189-1190, 1190 n2 ; 109 PL 2, § 9, 199 Stat 4].

Cross References:

Actions subject to modified diversity requirements of Class Action Fairness Act of 2005, see *§ 2.24A*.

Form of notice of motion to dismiss for lack of subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.33*.

Aggregation of claims generally, see 15 *Moore's Federal Practice, § 102.108* (Matthew Bender 3d ed.).

Furthermore, if at least one named plaintiff satisfies the amount in controversy requirement, supplemental jurisdiction may be exercised over the claims of other plaintiffs in the class [*see Exxon Mobil Corp. v. Allapattah Servs., Inc. (2005) 545 US 546, 549, 125 S Ct 2611, 162 L Ed2d 502*].

Cross Reference:

Nature and scope of supplemental jurisdiction, see *§§ 2.26 -2.30*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyChallengesCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminations

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2.24 Minimal Diversity Required by Multiparty, Multiforum Trial Jurisdiction Act of 2002.

The Multiparty, Multiforum Trial Jurisdiction Act of 2002 [*see* PL No 107-273, 116 Stat 1758, § 11020 (effective Nov. 2, 2002)] provides special jurisdictional and procedural provisions for civil cases arising from accidents that result in at least 75 deaths [*see 28 USC §§ 1369*, *1391(g)*, *1441(e)*, *(f)*, *1697*, *1785*]. When at least 75 natural persons have died in a single accident at a discrete location, district courts have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from the accident if any of the following are true [*28 USC § 1369(a)*]:

- A defendant resides in a state and a substantial part of the accident took place in another state or other location, regardless of whether that defendant is also a resident of the state where a substantial part of the accident took place.

- Any two defendants reside in different states, regardless of whether those defendants are also residents of the same state or states.

- Substantial parts of the accident took place in different states.

However, district courts must abstain from hearing any of the above-described civil actions when (1) the substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens, and (2) the claims asserted will be governed primarily by the laws of that state [*28 USC § 1369(b)*].

For purposes of this statute, the following rules and definitions apply [*28 USC § 1369(c)*]. First, *minimal diversity* exists between adverse parties if any party is a citizen of a state and any adverse party is (1) a citizen of another state, (2) a citizen or subject of a foreign state, or (3) a foreign state [*28 USC § 1369(c)(1)*; *see 28 USC § 1603(a)* (defining foreign state).] Second, a corporation is deemed to be a citizen of any state, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of any state in which it is incorporated or licensed to do business or is doing business [*28 USC § 1369(c)(2)*]. The term *injury* means physical harm to a natural person, and includes physical damage to or destruction of tangible property, but only if a natural person has been physically harmed [*28 USC § 1369(c)(3)*]. The term *accident* means a sudden accident, or a natural event culminating in an accident, that results in death incurred at a discrete location by at least 75 natural persons [*28*

USC § 1369(c)(4)].

A civil action under this Act may be brought in any district in which any defendant resides, or in which a substantial part of the accident giving rise to the action took place [*28 USC § 1391(g)*].

An action may be removed if it (1) could have been brought in a federal district court under the Act or the defendant is a party to an action that is or could have been brought in a federal district court in whole or in part under the Act, and (2) it arises from the same accident as the state court action, even if that action could not have been originally brought in district court [*28 USC § 1441(e)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminationsCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureVenueMultiparty Litigation

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2.24A Minimal Diversity Required by Class Action Fairness Act of 2005.

2.24A[1] Complete Diversity Requirement Eliminated for Certain Class Actions When Amount in Controversy Exceeds $5 Million. Under the Class Action Fairness Act of 2005 (CAFA) [*see* 109 PL 2, 199 Stat 4], a district court has original jurisdiction of certain class actions in which the matter in controversy exceeds the sum or value of $5 million, exclusive of interest and costs, and diversity of citizenship exists between any member of a class of plaintiffs and any defendant [*28 USC § 1332(d)(2)*; *see also Lowdermilk v. U.S. Bank Nat'l Ass'n (9th Cir 2007) 479 F3d 994, 998* (when plaintiff has pled amount in controversy less than $5 million, party seeking removal must prove with "legal certainty" that CAFA's jurisdictional amount is met); *Berry v. American Express Publ'g (CD Cal 2005) 381 F Supp2d 1118, 1123* (amount-in-controversy requirement may be satisfied either from view of aggregate value to class members or defendants)]. For this purpose, the claims of individual class members are aggregated to determine whether the amount in controversy exceeds $5 million [*28 USC § 1332(d)(6)*].

Cross References:

Proving amount in controversy, see *§ 3.10[3][d]*. Removal in multi-defendant action under Class Action Fairness Act of 2005, see *§ 3.18[4][b]*.

2.24A[2] Class Actions as to Which Minimal Diversity Does Not Apply. The minimal diversity requirements of CAFA [*28 USC § 1332(d)(2)*; *see* 109 PL 2, 199 Stat 4] do not apply when any of the following is true:

- The action was commenced before February 18, 2005 [109 PL 2, § 9, 199 Stat 4]. For purposes of CAFA retroactivity, "commenced" means the date the complaint is filed, not the date the case is removed [*Bush v. Cheaptickets, Inc. (9th Cir 2005) 425 F3d 683, 689* ; *see also Pritchett v. Office Depot, Inc. (10th Cir 2005) 420 F3d 1090, 1094*]. For purposes of determining CAFA's effective date, an action is commenced under California law when the original complaint in the action is filed, irrespective of any relation back analysis [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1016-1017* ; see *McAtee v. Capital One, F.S.B. (9th Cir 2007) 479 F3d 1143, 1148* (any amendment of original complaint does not change action's commencement date for purpose of CAFA's effective date)]. Further,

an amendment to a cross-complaint in California state court (a counterclaim in federal court) does not commence an action under the CAFA as of the date of the amendment [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1015-1016*].

- The amount in controversy is less than $5 million [*28 USC § 1332(d)(2)*].

- The primary defendants are states, state officials, or other governmental entities against whom relief is foreclosed [*28 USC § 1332(d)(5)(A)*].

- The number of members in all proposed plaintiff classes is less than 100 [*28 USC § 1332(d)(5)(B)*].

- The action solely involves a covered security [*28 USC § 1332(d)(9)(A)*; *see* Davis v. Chase Bank U.S.A., N.A. (CD Cal2006) 453 F Supp2d 1205, 1209].

- The action solely relates to the internal affairs or governance of a corporation or other business entity and arises under the laws of the state of incorporation or organization [*28 USC § 1332(d)(9)(B)*].

- The action solely relates to the rights, duties, and obligations relating to or created by or under any security [*28 USC § 1332(d)(9)(C)*].

In addition, CAFA does not supersede the statutory bar against removal of cases arising under the Securities Act of 1933 (*15 USC § 77v(a)*) [*Luther v. Countrywide Home Loans Servicing LP (9th Cir 2008) 533 F3d 1031, 1034* (reasoning that more specific statute controls over more general statute, even if general statute is enacted later)].

2.24A[3] Exercise of Modified Class Action Diversity Jurisdiction on Removal.

2.24A[3][a] When Two-Thirds or More of Class Members Are Citizens of State Where Action Was Originally Filed, District Court Must Decline Jurisdiction on Removal Under Certain Circumstances. Even if a district court would have original jurisdiction over a class action originally filed in the district court, it must decline to exercise that jurisdiction on removal in specified circumstances when two-thirds or more of the members of all proposed plaintiff classes are citizens of the state in which the action was originally filed [*28 USC § 1332(d)(4)*].

Cross Reference:

When district court must decline jurisdiction on removal of class action, see *Ch. 3, Removing a Case to Federal Court, § 3.26A[2].*

2.24A[3][b] When More Than One-Third of Class Members Are Citizens of State Where Action Was Originally Filed, District Court May Decline Jurisdiction on Removal. Even if a district court would have original jurisdiction over a class action originally filed in the district court, it may decline to exercise that jurisdiction on removal when more than one-third but less than two-thirds of the members of all proposed plaintiff classes are citizens of the state in which the action was originally filed [*28 USC § 1332(d)(3)*].

Cross Reference:

When district court may decline jurisdiction on removal of class action, see *Ch. 3, Removing a Case to Federal Court, § 3.26A[1].*

2.24A[4] Class Action Fairness Act of 2005 Eliminates Complete Diversity Requirement for Certain Mass Actions. The minimal diversity provisions of CAFA generally extend to "mass actions" [*28 USC § 1332(b)(11)(A)*]. A "mass action" is a civil action (other than a class action) in which the monetary relief claims of 100 or more persons will be jointly tried on the ground that their claims involve common questions of law or fact [*28 USC § 1332(d)(11)(B)(i)*;

see Tanoh v. Dow Chemical Co. (9th Cir 2009) 561 F3d 945, 953 (seven individual state court actions, each with fewer than 100 plaintiffs, could not be considered together for purposes of 100-person minimum required to create one "mass action" eligible for removal to federal court under CAFA)].

Exceptions:

None of the following may qualify as a mass action [*28 USC § 1332(d)(11)(B)(ii)*]:

- An action in which all claims arise from an event or occurrence in the state in which the action was filed and that allegedly resulted in injuries in that state or states contiguous to that state.
- An action in which the claims are joined on the motion of a defendant.
- An action authorized by a state statute in which all claims are asserted on behalf of the general public.
- An action in which claims were consolidated or coordinated solely for pretrial proceedings.

Distinguish:

In a mass action, unlike in a class action under CAFA, jurisdiction exists only over those plaintiffs whose claims satisfy the traditional jurisdictional amount requirements, that is $75,000 for each plaintiff [*28 USC § 1332(d)(11)(B)(i)*; *see 28 USC § 1332(a)*].

Cross Reference:

Minimal jurisdiction required under Class Action Fairness Act, 15 Moore's Federal Practice, see *§ 102.26* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminationsCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureClass ActionsClass Action Fairness ActCivil ProcedureClass ActionsGeneral Overview

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2.25 Challenging Diversity Jurisdiction.

2.25[1] Methods for Challenge. Diversity jurisdiction may be challenged by any of the following:

- Motion for Rule 12(b) dismissal [*Fed R Civ P 12(b)(1)*].
- Answer [*Fed R Civ P 12(h)(3)*].
- Motion for relief from judgment [*see Fed R Civ P 60(b)(6)*; *see, e.g., Bank of Montreal v. Olafsson (6th Cir 1981) 648 F2d 1078, 1079 , cert. denied, 454 US 1084 (1981)*].
- A party may challenge subject matter jurisdiction in a collateral proceeding only if the party did not appear in the underlying action and a default judgment was entered [*see Chicot County Drainage Dist. v. Baxter State Bank (1940) 308 US 371, 377-378, 60 S Ct 317, 84 L Ed 329*].

Warning:

The court can question the amount in controversy sua sponte [*see Matheson v. Progressive Specialty Ins. Co. (9th Cir 2003) 319 F3d 1089, 1091* (appellate court remanded, after removal and summary judgment, when record did not show the district court determined requisite amount in controversy)]. However, if the defendant does not challenge the amount in controversy, the court apparently does not have an independent duty to inquire into the sufficiency of the amount pleaded [*see In re "Agent Orange" Prod. Liab. Litig. (2d Cir 1987) 818 F2d 145, 163*].

2.25[2] Generally Challenge May Be Made at Any Time. Any party, including the party that invoked diversity jurisdiction, may bring a motion to dismiss for lack of subject matter jurisdiction at any time during the proceedings, including on appeal [*Fed R Civ P 12(h)(3)*; *see also American Fire & Cas. Co. v. Finn (1951) 341 US 6, 16-18, 71 S Ct 534, 95 L Ed 702* (superseded by statute on different grounds)].

Although the absence of diversity jurisdiction may be raised at any time, the standard shifts when the argument on appeal raises new factual bases for the lack of jurisdiction that were not developed in trial court. The failure to contest facts alleged on removal constitutes an admission of those facts. An appellate court will only remand for a determination of diversity if a substantial question concerning the plaintiff's citizenship exists on the face of the pleadings at the time of removal [*Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1031-1032*].

Cross Reference:

Form of notice of motion to dismiss for lack of subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.33*.

2.25[3] LOCAL PRACTICE: CD Cal Requirements. In the Central District of California, if some question of subject matter jurisdiction is raised by any party, that party must address the jurisdictional issue by motion to be heard before the Final Pretrial Conference [*CD Cal Civ LR 16-2.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyChallengesCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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2.26 CHECKLIST: Supplemental Jurisdiction.

Counsel should consider the following factors relating to asserting supplemental jurisdiction in federal court:

☐ **Supplemental Jurisdiction Over Parties.** Ascertain whether supplemental jurisdiction exists over parties to suit.

Discussion:
See *§§ 2.27*, *2.30*

☐ **Supplemental Jurisdiction Over Claims.** Ascertain whether supplemental jurisdiction exists over claims.

○ Are additional claims part of same case or controversy?

Discussion:
See *§§ 2.27*, *2.29*

☐ **Diversity and Joinder.** If suit is within diversity jurisdiction, ascertain whether there are claims made under following joinder devices over which the exercise of supplemental jurisdiction would defeat diversity:

○ Claims by plaintiffs against persons made parties by impleading third parties, compulsory joinder, permissive joinder; and intervention.

○ Claims by persons proposed to be joined under *Fed R Civ P 19*.

○ Claims by persons seeking to intervene under *Fed R Civ P 24*.

Authority:
Fed R Civ P 14, *19*, *20*, *24*

Discussion:
See *§ 2.28[1]*

☐ **Discretionary Decline of Supplemental Jurisdiction.** Ascertain whether the court should exercise its discretion and decline to exercise supplemental jurisdiction?

Discussion:
See *§ 2.28[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionAncillary JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent PartiesCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & ControversyCivil ProcedurePartiesJoinderPermissive Joinder

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2.27 Federal Court May Have "Supplemental Jurisdiction" Over Other Claims.

2.27[1] Related Claims and Parties in Single Suit. When a district court has proper jurisdiction over a civil action, it also has supplemental jurisdiction over all other claims that are so related to claims in the original action that they form part of the same case or controversy [*see 28 USC § 1367(a)*; *see also Trustees of Constr. Indus. & Laborers Health & Welf. Trust v. Desert Valley Landscape & Maint., Inc. (9th Cir 2003) 333 F3d 923, 925* , *cert. denied*, *540 US 1017 (2003)* ; *Mendoza v. Zirkle Fruit Co. (9th Cir 2002) 301 F3d 1163, 1174* (upholding constitutionality of supplemental jurisdiction)].

Nonfederal claims are part of the "same case or controversy" as the federal claims when they derive from a common nucleus of operative fact and are such that a plaintiff would ordinarily be expected to try them in the same proceeding [*Finley v. United States (1989) 490 US 545, 549, 109 S Ct 2003, 104 L Ed2d 593* , *superseded by statute on other grounds*, quoting *United Mine Workers v. Gibbs (1966) 383 US 715, 725, 86 S Ct 1130, 16 L Ed2d 218*].

Cross Reference:

16 Moore's Federal Practice, see *§ 106.05* (Matthew Bender 3d ed.).

2.27[2] Supplemental Jurisdiction Is Generally Mandatory. Once it is determined that a supplemental claim is related to the claim within the court's original jurisdiction, such that they form the same case or controversy, supplemental jurisdiction over the related claim is mandatory. The court has some discretion to not hear a claim over which supplemental jurisdiction exists, if the claim falls within one of circumstances enumerated in *28 USC § 1367(c)* [*see Executive Software N. Am., Inc. v. United States Dist. Court (9th Cir 1994) 24 F3d 1545, 1552-1555, 1556* ; *see also 2.28[2]*].

A federal court may not decline to exercise supplemental jurisdiction on a ground not specified by statute [*see Executive Software N. Am., Inc. v. United States Dist. Court (9th Cir 1994) 24 F3d 1545, 1560* (error to decline jurisdiction on ground that retention of state claims would require substantial expenditure of judicial time and resources), *overruled on other grounds* by *Cal. Dep't of Water Res. v. Powerex Corp. (9th Cir 2008) 533 F3d 1087, 1093*].

2.27[3] Statute of Limitations. The statute of limitations on a state law claim is tolled while the claim is pending in federal court and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period [*28 USC § 1367(d)*].

Cross References:

16 Moore's Federal Practice, see *§ 106.05* (Matthew Bender 3d ed.).

Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, Ch. 4, Limitation of Actions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionAncillary JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent PartiesCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & Controversy

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2.28 Limitations on Supplemental Jurisdiction.

2.28[1] Diversity Actions. In any diversity action, a federal court lacks supplemental jurisdiction over claims made under the following joinder devices if exercising supplemental jurisdiction over the claim would defeat diversity [*28 USC § 1367(b)*; *see Owen Equip. & Erection Co. v. Kroger (1978) 437 US 365, 373-377, 98 S Ct 2396, 57 L Ed2d 274*]:

- Claims by plaintiffs against persons made parties by impleading third parties [*Fed R Civ P 14*], compulsory joinder [*Fed R Civ P 19*], permissive joinder [*Fed R Civ P 20*]; and intervention [*Fed R Civ P 24*].

- Claims by persons to be joined under Rule 19.

- Claims by persons seeking to intervene under Rule 24 [*see Hallco Mfg. Co. v. Quaeck (D Or 1995) 161 FRD 98, 102*].

Cross Reference:

16 Moore's Federal Practice, see *§§ 106.05*, *106.40 -106.47* (Matthew Bender 3d ed.).

However, as long as the complete diversity requirement remains satisfied and there are no other jurisdictional defects, a district court may exercise supplemental jurisdiction over the claims of other plaintiffs in the same case even if those claims are for less than the jurisdictional amount [*Exxon Mobil Corp. v. Allapattah Servs., Inc. (2005) 545 US 546, 549, 125 S Ct 2611, 162 L Ed2d 502*].

2.28[2] Court May Decline Supplemental Jurisdiction.

2.28[2][a] When Novel or Complex Issue of State Law Exists. A district court has discretion to decline to exercise supplemental jurisdiction over a claim if the claim raises a novel or complex issue of state law [*28 USC § 1367(c)(1)*; *see Dream Palace v. County of Maricopa (9th Cir 2004) 384 F3d 990, 1022* (no abuse of discretion in

declining to exercise jurisdiction over delicate issues of state law involving balance of power between state and local authorities); *Arpin v. Santa Clara Valley Transp. Agency (9th Cir 2001) 261 F3d 912, 926-927* (no abuse of discretion in declining to exercise jurisdiction over claim raising state law issues of first impression); *see also San Pedro Hotel Co., Inc. v. City of Los Angeles (9th Cir 1998) 159 F3d 470, 478 n12* (*28 USC § 1367(c)(1)* permits district court to decline supplemental jurisdiction over novel pendent state law claims)]. However, the fact that an issue is one of first impression regarding the interpretation of a state statute does not require a court to decline to exercise supplemental jurisdiction if the issue is not "complex" [*see Schwarm v. Craighead (ED Cal 2006) 233 FRD 655, 659*].

2.28[2][b] When Supplemental Claim Substantially Predominates. A district court has discretion to decline to exercise supplemental jurisdiction over a claim that substantially predominates over the original claim [*28 USC § 1367(c)(2)*].

A state law claim predominates if [*Acri v. Varian Assocs. (9th Cir 1997) 114 F3d 999, 1001* ; *see Diven v. Amalgamated Transit Union Int'l (DC Cir 1994) 38 F3d 598, 602*]:

- The supplemental claim is more complex than the federal claim.
- The supplemental claim requires more judicial resources to adjudicate than the federal claim.
- The supplemental claim is more salient in the case as a whole than the federal claim.
- There is a substantial quantity of evidence supporting the supplemental claim that would not be relevant to the federal claim [*see Picard v. Bay Area Reg'l Transit Dist. (ND Cal 1993) 823 F Supp 1519, 1527* (although based on different legal theories, federal and state claims required virtually same evidentiary presentation at trial)].

Warning:

A district court lacks power to decline to exercise jurisdiction in a diversity case solely on the ground of the uncertainty of the state-law issue involved [*see Meredith v. City of Winterhaven (1943) 320 US 228, 234, 64 S Ct 7, 88 L Ed 9* ; *see also O'Connor v. Nevada (9th Cir 1994) 27 F3d 357, 362-363* , *cert. denied, 514 US 1021 (1995)*].

2.28[2][c] When Federal Claim Is Dismissed. If all federal claims against all defendants are dismissed on the merits before trial, the district court has the discretion to retain or dismiss any remaining supplemental claims [*28 USC § 1367(c)(3)*; *Foster v. Wilson (9th Cir 2008) 504 F3d 1046, 1051-1052* ("decision whether to continue to exercise supplemental jurisdiction over state law claims after all federal claims have been dismissed lies within the district court's discretion")]. The district court retains authority to hear supplemental claims (including state law claims), considering the factors set out in *28 USC § 1367(c)*, after dismissing the jurisdiction-conferring claim(s) only if it had original federal subject matter jurisdiction in the case. If such subject matter jurisdiction never existed, the court has no choice but to dismiss the action [*Herman Family Revocable Trust v. Teddy Bear (9th Cir 2001) 254 F3d 802, 805-806*].

All claims supported by original jurisdiction must be dismissed before a court may exercise its discretion to decline to exercise supplemental jurisdiction [*28 USC § 1367(c)*; *Trustees of Constr. Indus. & Laborers Health & Welf. Trust v. Desert Valley Landscape & Maint., Inc. (9th Cir 2003) 333 F3d 923, 925-926* , *cert. denied, 540 US 1017 (2003)* (district court must first identify the dismissal that triggers the exercise of discretion, and then explain how declining jurisdiction serves the objectives of economy, convenience, and fairness to the parties and comity)].

A court may decline to exercise supplemental jurisdiction at any stage of the litigation; the fact that a court had previously exercised supplemental jurisdiction does not bar it from exercising its discretion to relinquish that

jurisdiction at a later time [*In re Latex Glove Prods. Liab. Litig. (WD Wash 2005) 373 F Supp2d 1205, 1208*].

Warning:

If the federal claim is dismissed for lack of subject matter jurisdiction, a district court has no discretion to retain the supplemental claims for adjudication and must dismiss the state law claims without prejudice [*Herman Family Revocable Trust v. Teddy Bear (9th Cir 2001) 254 F3d 802, 805*]. If the district court grants a default judgment on the federal claim, that judgment represents a determination that the federal claim was well-founded. As such, the district court lacks discretion to decline supplemental jurisdiction over the remaining claims [*Trustees of Constr. Indus. & Laborers Health & Welf. Trust v. Desert Valley Landscape & Maint., Inc. (9th Cir 2003) 333 F3d 923, 926 , cert. denied, 540 US 1017 (2003)* (dismissal was neither fair to parties nor efficient use of judicial resources and constituted an abuse of discretion)].

2.28[2][d] Court May Decline Supplemental Jurisdiction Under Exceptional Circumstances. A district court may decline to exercise supplemental jurisdiction if in exceptional circumstances there are other compelling reasons to do so [*28 USC § 1367(c)(4)*].

Declining supplemental jurisdiction on the grounds of "exceptional circumstances" should be the exception rather than the rule [*Executive Software N. Am., Inc. v. United States Dist. Court (9th Cir 1994) 24 F3d 1545, 1555-1560* , *overruled on other grounds* by *Cal. Dep't of Water Res. v. Powerex Corp. (9th Cir 2008) 533 F3d 1087, 1093*].

Example:

A district court properly declined to exercise its supplemental jurisdiction over claims that were the subject of a pending state court proceeding. The court found that rejection of supplemental jurisdiction in this situation was appropriate because it furthered the values of economy, convenience, fairness, and comity [*Polaris Pool Sys. v. Letro Prods., Inc. (CD Cal 1995) 161 FRD 422, 425* (pending state court action "probably" constitutes exceptional circumstances under 1367(c)(4))].

When a district court declines to exercise supplemental jurisdiction, the court should set forth specific reasons explaining that decision [*see Bahrampour v. Lampert (9th Cir 2004) 356 F3d 969, 979*].

Cross Reference:

16 Moore's Federal Practice, see *§§ 106.05*, *106.60 -106.68* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionAncillary JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent PartiesCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & ControversyCivil ProcedureDismissalsGeneral Overview

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2.29 Determining Whether Additional Claims Are Part of Same Case or Controversy.

2.29[1] "Common Nucleus" Standard. An additional claim is part of the original case or controversy if both of the following requirements are met [*see United Mine Workers v. Gibbs (1966) 383 US 715, 725, 86 S Ct 1130, 16 L Ed2d 218* ; *see also Trustees of Constr. Indus. & Laborers Health & Welf. Trust v. Desert Valley Landscape & Maint., Inc. (9th Cir 2003) 333 F3d 923, 925* , *cert. denied*, *540 US 1017 (2003)* ; *Mendoza v. Zirkle Fruit Co. (9th Cir 2002) 301 F3d 1163, 1173* (rejecting per se constitutional bar on supplemental jurisdiction over claims against new parties)]:

- The additional claim and the federal claims derive from a common nucleus of operative fact.

- The nonfederal claims are such that the plaintiff would ordinarily be expected to try them with the federal claims in one proceeding.

2.29[2] Plaintiff May Join or Aggregate Claims. A single plaintiff may join all claims against a single defendant in an action, whether or not those claims arise from a common nucleus of operative fact [*Fed R Civ P 18(a)*]. The plaintiff may aggregate these claims to reach the required amount in controversy [*see Budget Rent-A-Car, Inc. v. Higashiguchi (9th Cir 1997) 109 F3d 1471, 1473-1474*].

2.29[3] Counterclaims and Crossclaims.

2.29[3][a] Jurisdiction Over Counterclaims. Supplemental jurisdiction may be used by defendants to bring a counterclaim within a federal court's jurisdiction in either federal question or diversity actions. If the main claim is federal and the counterclaim arises under state law between nondiverse parties, supplemental jurisdiction nonetheless provides for jurisdiction over the defendant's counterclaim. If the main claim is a diversity action and defendant's counterclaim fails to meet the jurisdictional minimum for assertion of the diversity jurisdiction, supplemental jurisdiction provides for jurisdiction over the counterclaim [*28 USC § 1367(a), (b)*; *see also Fed R Civ P 13(a), (b)*].

Strategic Point:

If a defendant's counterclaims are compulsory, supplemental jurisdiction exists and no further analysis is necessary. If, however, a defendant's counterclaims are permissive, the court must analyze whether supplemental jurisdiction exists over those claims under the "case or controversy" test and whether to exercise its discretion to exercise that jurisdiction [*Sparrow v. Mazda Am. Credit (ED Cal 2005) 385 F Supp2d 1063, 1068-1071* ; *Campos v. Western Dental Servs., Inc. (ND Cal 2005) 404 F Supp2d 1164, 1167-1170*].

Cross Reference:

Distinguishing between compulsory and permissive counterclaims, Ch. 11, Counterclaims, Crossclaims, and Replies, see *§ 11.09*.

2.29[3][b] Jurisdiction Over Crossclaims. Crossclaims against coparties asserted under Rule 13(g) may be asserted in either federal question or diversity actions. Crossclaims against coparties asserted in diversity actions are supported by supplemental jurisdiction whether or not the parties on the crossclaim are diverse [*28 USC § 1367(a)*; *see Meritor Sav. Bank v. Camelback Canyon Investors (D Ariz 1991) 783 F Supp 455, 456-457* ; *see also Fed R Civ P 13(g)*].

Cross Reference:

Discussion of counterclaims and crossclaims, see Ch. 11, Counterclaims, Crossclaims, and Replies, *§§ 11.11*, *11.33*.

2.29[4] Federal Question Cases.

2.29[4][a] Federal Question Must Be Substantial. In federal question cases, a court may exercise supplemental jurisdiction only if a sufficiently substantial federal claim supports the underlying jurisdiction [*United Mine Workers v. Gibbs (1966) 383 US 715, 725, 86 SCt 1130, 16 L Ed2d 218* ; *see Purgess v. Sharrock (2d Cir 1994) 33 F3d 134, 139*].

2.29[4][b] State Claims May Be Remanded After Removal. Whenever a separate and independent claim or cause of action arising under federal question jurisdiction is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed. The district court may determine all issues, or in its discretion, remand all matters in which state law predominates [*28 USC § 1441(c)*].

2.29[5] Claims That Constitute "Same Case or Controversy."

2.29[5][a] Single Injury With Alternate Theories of Recovery. If the same act or omission violates parallel federal and state laws, the common nucleus of operative facts is obvious and federal courts routinely exercise supplemental jurisdiction over the state law claims [*see, e.g., Vreeland v. Ethan Allen, Inc. (SDNY 1993) 828 F Supp 14, 15*].

2.29[5][b] Single Act With Injuries to More Than One Person. Claims for relief by different persons arising from an act or omission by the defendant constitute a single case or controversy. For example, a claim for relief for personal injury by one plaintiff and a claim for relief for loss of consortium by another stemming from the same act or omission by the defendant is the same case or controversy [*see Arnold v. Kimberly Quality Care Nursing Serv. (MD Pa 1991) 762 F Supp 1182, 1186*].

2.29[6] Single Injury With Multiple Causation Is Generally Not "Same Case or Controversy." The Ninth Circuit generally ignores the single-injury approach to the common nucleus standard with regard to multiple causation [*Galt G/S v. Hapag-Lloyd AG (9th Cir 1995) 60 F3d 1370, 1374-1375*].

Example:

In *Galt G/S v. Hapag-Lloyd AG,* the court found that a claim against transporters for damaging cargo in transit was not the same case or controversy as the transporters' indemnity claim against a retailer for improper storage, which was alleged to have actually caused the damage to cargo. The court found that the two occurrences were separated by the carriers' relinquishing control over the cargo, and that they were also remote from each other in time [*Galt G/S v. Hapag-Lloyd AG (9th Cir 1995) 60 F3d 1370, 1374-1375*].

Warning:

Federal courts disagree as to whether a single injury is a single case or controversy regardless of how many parties are alleged to have contributed to the injury and how unrelated to or remote from each other in time and place is their conduct [*compare Sinclair v. Soniform, Inc. (3d Cir 1991) 935 F2d 599, 603* (claims against crew and manufacturers were part of same case or controversy since both sets of claims were based on same purported injuries stemming from same scuba diving incident) *with Galt G/S v. Hapag-Lloyd AG (9th Cir 1995) 60 F3d 1370, 1374-1375*].

Cross Reference:

16 Moore's Federal Practice, see *§§ 106.20 -106.25*, *106.41* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & ControversyCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral Overview

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2.30 Determining Whether Supplemental Jurisdiction Exists Over Joined Parties.

2.30[1] Supplemental Jurisdiction May Apply. Supplemental jurisdiction may apply to claims that involve the joinder or intervention of additional parties through the Federal Rules of Civil Procedure [*28 USC § 1367(a)*].

2.30[2] Joinder of Parties to Counterclaim. A defendant counterclaiming against the plaintiff may join additional parties to the counterclaim pursuant to Rule 13(h) [*Fed R Civ P 13(h)*]. These claims are supported by supplemental jurisdiction even if complete diversity would be destroyed, assuming they are part of the same case or controversy [*see FDIC v. Bathgate (3d Cir 1994) 27 F3d 850, 874 n14*].

Cross Reference:

Joinder, see Ch. 10, Adding, Dropping, and Substituting Parties, *§§ 10.04 -10.09*.

2.30[3] Impleaded Parties.

2.30[3][a] Supplemental Jurisdiction Over Defendant's Impleader Claims. Claims by defendants against impleaded third-party defendants are supported by supplemental jurisdiction without regard to whether an independent basis of jurisdiction exists, provided that the court has jurisdiction over the main claim between the original parties [*28 USC § 1367(a)*; *Estate of Bruce v. City of Middletown (SDNY 1992) 781 F Supp 1013, 1015*].

Cross Reference:

Impleader, see Ch. 12, Third-Party Actions.

2.30[3][b] No Supplemental Jurisdiction Over Plaintiff's Claims Arising out of Defendant's Impleader or Counterclaim in Diversity Action. State law claims by plaintiffs against third-parties impleaded by defendants are not supported by supplemental jurisdiction if there is no complete diversity between plaintiffs and the impleaded third parties [*28 USC § 1367(b)*].

Supplemental jurisdiction does not exist over a plaintiff's *Fed R Civ P 14* impleader claim for indemnity or contribution growing out of a counterclaim against the plaintiff unless complete diversity exists between the plaintiff and the

impleaded third parties [*28 USC § 1367(b)*; *Chase Manhattan Bank N.A. v. Aldridge (SDNY 1995) 906 F Supp 866, 868-869* ; *see also Owen Equip. & Erection Co. v. Kroger (1978) 437 US 365, 373-377, 98 S Ct 2396, 57 L Ed2d 274*].

2.30[4] Interplay of Supplemental Jurisdiction and Compulsory Joinder. Rule 19, dealing with joinder of parties needed for "complete relief" or otherwise required for a "just adjudication," can not be used in diversity actions if the joinder would defeat complete diversity [*28 USC § 1367(b)*; *see Fed R Civ P 19*; *see also Krueger v. Cartwright (7th Cir 1993) 996 F2d 928, 933 n6*]. Parties joined under Rule 19 may not then assert claims that would defeat diversity.

The court lacks original jurisdiction if the inability to join an indispensable party means that the action is subject to dismissal pursuant to Rule 19 [*ZB Holdings, Inc. v. White (SDNY 1992) 144 FRD 42, 47*].

Cross Reference:

Discussion of Rule 19 joinder, see Ch. 10, Adding, Dropping, and Substituting Parties, *§§ 10.04 -10.09*.

2.30[5] Interplay of Supplemental Jurisdiction and Permissive Joinder.

2.30[5][a] Federal Question Cases. If the basis for original jurisdiction is a federal question, supplemental jurisdiction exists for all claims against parties joined under *Fed R Civ P 20*, the permissive joinder provision [*28 USC § 1367(a)*].

If one plaintiff asserts a federal claim against a defendant, a joined plaintiff's state law claim against that defendant is supported by supplemental jurisdiction without regard to the diversity of the parties provided the claim arises out of a common nucleus of operative fact [*Palmer v. Hospital Auth. of Randolph County (11th Cir 1994) 22 F3d 1559, 1566-1569*].

Cross Reference:

Discussion of permissive joinder, see Ch. 10, Adding, Dropping, and Substituting Parties, *§ 10.08*.

2.30[5][b] Diversity Cases. No supplemental jurisdiction exists in diversity cases over claims by plaintiffs against persons permissively joined under *Fed R Civ P 20* if the joinder destroys diversity [*28 USC § 1367(b)*; *see Borgeson v. Archer-Daniels Midland Co. (CD Cal 1995) 909 F Supp 709, 714-717*].

2.30[6] Class Actions. The supplemental jurisdiction statute, *28 USC § 1367*, overrules the traditional rule requiring each member of a class action invoking diversity jurisdiction to meet the jurisdictional minimum amount in controversy requirement. Nevertheless, at least one claim must meet the amount in controversy in diversity class actions to establish a cognizable claim to which the other claims are supplemental [*Exxon Mobil Corp. v. Allapattah Servs., Inc. (2005) 545 US 546, 549, 125 S Ct 2611, 162 L Ed2d 502*].

Cross Reference:

Jurisdictional requirements in class actions, see Ch. 20, Class Actions, *§ 20.12*.

2.30[7] Intervention.

2.30[7][a] Claims by Intervening Plaintiffs. Claims against nondiverse parties asserted by persons seeking to intervene as plaintiffs are not supported by supplemental jurisdiction in a diversity action, even if intervention is by right under *Fed R Civ P 24(a)* [*28 USC § 1367(b)*; *see Fed R Civ P 24*; *see also Development Fin. Corp. v. Alpha Hous. & Health Care, Inc. (3d Cir 1995) 54 F3d 156, 159*].

Cross Reference:

Ch. 14, Intervention.

2.30[7][b] Claims by Intervening Defendants. One may intervene as a defendant and then assert a counterclaim against a nondiverse plaintiff or a crossclaim against a nondiverse party [*28 USC § 1367*]. However, a party may not intervene as a defendant solely for the purpose of asserting a claim against a nondiverse plaintiff; the intervenor must be potentially liable to the plaintiff on the primary claim to be treated as a defendant to whom supplemental jurisdiction may apply under *28 USC § 1367(b)* [*see MCI Telecomms. Corp. v. Logan Group (ND Tex 1994) 848 F Supp 86, 88-89*].

Cross References:

Ch. 10, Adding, Dropping, and Substituting Parties.

Joinder of claims, see 16 *Moore's Federal Practice, §§ 106.40 -106.47* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.30A CHECKLIST: Analyzing Personal Jurisdiction.

Consider the following subjects, relating to jurisdiction of the district court, before an action is filed. Similarly these subjects may be used to determine if there are areas in which to challenge the court's jurisdiction over an action that has been filed:

☐ **Presence:** Ascertain whether parties are present in California.

Discussion:
See *§ 2.32*

☐ **Consent:** Determine whether parties have consented to federal jurisdiction.

Discussion:
See *§ 2.33*

☐ **Domicile:** Ascertain the domicile of the parties.

Discussion:
See *§ 2.34*

☐ **General Jurisdiction:** Consider whether court may exercise jurisdiction over defendant based on any claim:

○ Have there been continuous, systematic, or substantial activities in the forum that permit the jurisdiction concerning acts unrelated to the forum?

○ Was nonresident defendant served with process within the forum state?

Authority:
Burnham v. Superior Court (1990) 495 US 604, 622-623, 110 S Ct 2105, 109 L Ed2d 631

Discussion: See *§ 2.36*

☐ **Specific Jurisdiction:** Consider whether court may exercise jurisdiction based on claim arising directly from defendant's contacts with forum state:

○ Did nonresident defendant direct his or her activities or consummate some transaction with the forum or a resident of the forum?

○ Did nonresident perform act by which he or she purposefully availed himself or herself of the privileges of conducting activities in the forum state?

○ Did claim arise out of, relate to, or result from the defendant's forum-related activities?

○ Would the exercise of jurisdiction comport with fair play and substantial justice?

Authority:
Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd. (9th Cir 2003) 328 F3d 1122, 1129

Discussion: See *§ 2.37*

☐ **Long-Arm Statute:** If applicable, ascertain whether California long-arm statute provides personal jurisdiction over defendants.

Authority:
CCP § 410.10; *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd. (9th Cir 2003) 328 F3d 1122, 1134-1136 .*

Discussion: See *§ 2.38*

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.31 "Personal Jurisdiction" Defined.

2.31[1] Court Authority Over Parties. Personal jurisdiction refers to the court's authority over the parties to an action and is required to render a judgment in personam [*see Burnham v. Superior Court (1990) 495 US 604, 609-610, 110 S Ct 2105, 109 L Ed2d 631*]. A judgment in personam requires a party to pay an opposing party a sum of money or take other actions to satisfy the judgment [*Hanson v. Denckla (1958) 357 US 235, 246, n12, 78 S Ct 1228, 2 L Ed2d 1283*].

A court without personal jurisdiction over the defendant is without authority to hear the dispute, if the dispute requires an in personam judgment for effective relief. If the court proceeds to hear such an action, its judgment is invalid and voidable [*see World-Wide Volkswagen Corp. v. Woodson (1980) 444 US 286, 291, 100 S Ct 559, 62 L Ed2d 490*].

Strategic Point:

The plaintiff bears the burden of establishing that the court has personal jurisdiction over the defendant. Until the court conducts an evidentiary hearing, the plaintiff need only make a prima facie showing of the court's jurisdiction. Unless contravened, the plaintiff's version of facts is taken as true, and conflicts between the facts stated in the affidavits must be resolved in the plaintiff's favor to determine whether a prima facie case exists for personal jurisdiction [*Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd. (9th Cir 2003) 328 F3d 1122, 1129*].

Cross Reference:

Jurisdiction checklist, see *§ 2.03*.

2.31[2] Due Process Requirements. Before a person or entity may be subjected to a court's jurisdiction, due process requires the following [*see International Shoe Co. v. Washington (1945) 326 US 310, 311, 66 S Ct 154, 90 L Ed 95* ; *see also World-Wide Volkswagen Corp. v. Woodson (1980) 444 US 286, 291-292, 100 S Ct 559, 62 L Ed2d 490*]:

- **Basis:** The person must have adequate connection with the state. If a basis exists, the person or property is amenable to jurisdiction.

- **Process:** In addition to basis, certain prescribed steps must be taken to subject a person to the court's authority. These prescribed steps are commonly called process. Service of process in accordance with statutory and due process requirements invokes jurisdiction.

2.31[3] Defendant May Waive Lack of Personal Jurisdiction. A defendant may waive a defective exercise of personal jurisdiction either expressly (for example, by consenting to jurisdiction), or impliedly (for example, by failing to object in a timely manner) [*see Fed R Civ P 12(h)(1), (3); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee (1982) 456 US 694, 703, 102 S Ct 2099, 72 L Ed2d 492*]. A party waives any defense of lack of personal jurisdiction by failing to raise the defense in its first motion under Rule 12(b) [*see Fed R Civ P 12(b), (h)(1)(A); Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1033*].

2.31[4] Establishing Personal Jurisdiction in Patent Cases. When the personal jurisdiction inquiry "is intimately involved with the substance of patent laws," the law of the federal circuit applies [*Oakley, Inc. v. Jofa AB (CD Cal 2003) 287 F Supp2d 1111, 1113*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsLong-Arm JurisdictionCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral Overview

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2.32 Jurisdiction Based on Presence.

Courts can exercise personal jurisdiction over a nonresident defendant when the defendant is personally served with process while present in the forum state [*Burnham v. Superior Court (1990) 495 US 604, 612, 619-622, 110 S Ct 2105, 109 L Ed2d 631* ; *see Pennoyer v. Neff (1877) 95 US 714, 728, 733, 24 L Ed 565*].

A challenge to jurisdiction based on due process grounds by a defendant who was personally served while physically present in the state will rarely, if ever, be successful [*see Bourassa v. Desrochers (9th Cir 1991) 938 F2d 1056, 1057-1058*].

Cross References:

Ch. 7, Service of Summons, 7.45-7.49.

Discussion of personal jurisdiction, see 16 Moore's Federal Practice, Ch. 108, Territorial Jurisdiction: Jurisdiction Over Persons and Property (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal Delivery

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2.33 Jurisdiction Based on Consent.

2.33[1] Appearance. A nonresident defendant who appears in an action without raising lack of personal jurisdiction is deemed to have consented to the court's jurisdiction [*Goldey v. Morning News (1895) 156 US 518, 525, 15 S Ct 559, 39 L Ed 517*].

The defendant's filing of a counterclaim constitutes consent to personal jurisdiction where the action is pending, and waives any objection to lack of service [*Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1037*].

Distinguish:

The Ninth Circuit has held that a non-named party may intervene as of right under Rule 24(a) and contest the court's exercise of personam jurisdiction [*see SEC v. Ross, 504 F3d 1130, 1148-1150 (9th Cir 2007)*].

Cross Reference:

Discussion of jurisdiction by consent, see 16 *Moore's Federal Practice, § 108.53* (Matthew Bender 3d ed.).

2.33[2] Forum Selection Clauses Are Ordinarily Enforced. In general, a defendant may consent by contract to the court's jurisdiction. A contractual forum selection clause requires parties to submit to jurisdiction in a designated court or in a court chosen by one of the parties for any action arising out of the contract [*National Equip. Rental, Ltd. v. Szukhent (1964) 375 US 311, 315-316, 84 S Ct 411, 11 L Ed2d 354*]. A forum selection clause is enforceable unless it is shown that to enforce it would be unreasonable or unjust or that some invalidity such as fraud or overreaching is attached to it [*M/S Bremen v. Zapata Off-Shore Co. (1972) 407 US 1, 15, 92 S Ct 1907, 32 L Ed2d 513*].

Clauses permitting a party to bring suit on a contract in a particular district court are broadly enforced in most courts and have been found to be enforceable even if the clause is part of boilerplate language in a form contract [*Carnival Cruise Lines v. Shute (1991) 499 US 585, 589, 111 S Ct 1522, 113 L Ed2d 622* ; *see CQL Original Prods., Inc. v. National Hockey League Players' Ass'n (1995) 39 CA4th 1347, 1355, 46 CR2d 412* (clause may be enforced if party had

"the power to walk away from negotiations if displeased with the provision")].

Warning:

A forum selection clause should expressly select the agreed-on court as the chosen venue. For example, a defendant's motion to dismiss under *Fed R Civ P 12(b)(3)* or to transfer pursuant to *28 USC § 1406* to Utah federal court was denied, because the relevant clause in the agreement (titled "Controlling Law; Consent to Jurisdiction") did not expressly select the Utah District Court as the venue of choice [*Bomanite Corp. v. Newlook Int'l, Inc. (ED Cal 2008) 2008 US Dist LEXIS 31482, at *14-*16*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.34 Jurisdiction Based on Domicile.

A court has jurisdiction over persons domiciled within the forum state at the time the action is filed, even if the defendant is absent from the state [*Milliken v. Meyer (1940) 311 US 457, 464, 61 S Ct 339, 85 L Ed 278*].

A person's domicile is the state where the person has a permanent home, to which he or she has the intention of returning whenever absent [*see Lew v. Moss (9th Cir 1986) 797 F2d 747, 750-751*]. Although a person may have more than one residence, each person has only one domicile [*see Milliken v. Meyer (1940) 311 US 457, 464, 61 S Ct 339, 85 L Ed 278*].

Cross Reference:

Discussion of domicile, see *§ 2.17[3]*.

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2.35 Jurisdiction Based on Minimum Contacts.

2.35[1] Factors Considered. Federal courts assess the following factors in determining whether a defendant has sufficient contacts with the forum for personal jurisdiction to be exercised over that defendant consistent with the Constitution [*see Hanson v. Denckla (1958) 357 US 235, 251, 78 S Ct 1228, 2 L Ed2d 1283* ; *World-Wide Volkswagen Corp. v. Woodson (1980) 444 US 286, 296-297, 100 S Ct 559, 62 L Ed2d 490* ; *Burger King Corp. v. Rudzewicz (1985) 471 US 462, 473-474, 105 S Ct 2174, 85 L Ed2d 528*]:

- Whether the defendant purposefully availed itself of the privileges and benefits of conducting activities within the forum [*Ballard v. Savage (9th Cir 1995) 65 F3d 1495, 1498* (purposeful availment rule met if defendant took deliberate action within forum state or created continuing obligations to forum residents); *see California Software, Inc. v. Reliability Research, Inc. (CD Cal 1986) 631 F Supp 1356, 1361* (when defendants expressly aim their conduct at resident of forum state, and injury results therefrom, defendants should anticipate answering for their conduct in that forum)].

- Whether the defendant's conduct in the forum are such that the defendant should reasonably anticipate being sued in the forum.

- Whether the defendant's business contacts with the forum are continuous and systematic.

Forum contacts include acts performed outside the forum state that have an effect within the forum, such as a single contract executed by mail with a forum resident or the issuance of an insurance policy to a forum resident [*see McGee v. International Life Ins. Co. (1957) 355 US 220, 223, 78 S Ct 199, 2 L Ed2d 223* ; *see also Lake v. Lake (9th Cir 1987) 817 F2d 1416, 1421* (if only one forum state contact, claim for relief must arise out of that particular purposeful contact)].

If forum contacts result from the acts of others and are unforeseen and unintended by the defendant, jurisdiction cannot be exercised [*Hanson v. Denckla (1958) 357 US 235, 253, 78 S Ct 1228, 2 L Ed2d 1283* ; *see Burger King Corp. v. Rudzewicz (1985) 471 US 462, 474-475, 105 S Ct 2174, 85 L Ed2d 528* ; *see also* Shute v. Carnival Cruise Lines *(9th*

Cir 1990) 897 F2d 377, 381 , rev'd on other grounds, 499 US 585 (1991) (focus on defendant's affirmative conduct ensures that defendant is not haled into court based on random, fortuitous or attenuated contacts or the unilateral activities of third parties)].

A parent-subsidiary relationship alone is insufficient to attribute the subsidiary's contacts to the parent for jurisdictional purposes. However, a subsidiary's contacts may be imputed to the parent if the subsidiary is the parent's alter ego or general agent [*Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd. (9th Cir 2003) 328 F3d 1122, 1134-1136*].

Whether a person was acting as an agent for the nonresident defendant, sufficient for personal jurisdiction, or as an independent contractor, is determined by applicable state law [*Ochoa v. J.B. Martin & Sons Farms, Inc. (9th Cir 2001) 287 F3d 1182, 1189*].

2.35[2] Fundamental Fairness Is Required. If it can be established that the defendant had minimum contacts with the forum, the court must then decide whether it is fair to subject the defendant to litigation in the forum [*see Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd. (9th Cir 2003) 328 F3d 1122, 1129* ; *see also Core-Vent Corp. v. Nobel Indus. AB (9th Cir 1993) 11 F3d 1482, 1487-1488*].

The Ninth Circuit weighs and balances the following factors in determining the fairness and reasonableness of the exercise of jurisdiction [*Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd. (9th Cir 2003) 328 F3d 1122, 1132* ; *see Core-Vent Corp. v. Nobel Indus. AB (9th Cir 1993) 11 F3d 1482, 1487-1488* ; *World-Wide Volkswagen Corp. v. Woodson (1980) 444 US 286, 292, 100 S Ct 559, 62 L Ed2d 490*]:

- The defendant's "purposeful" interjection into the forum state's affairs [*see Insurance Co. of N. Am. v. Marina Salina Cruz (9th Cir 1981) 649 F2d 1266, 1271* (degree of interjection is factor in assessing reasonableness of jurisdiction)].

- The burden on the defendant to defend in the forum [*see Asahi Metal Indus. Co. v. Superior Court (1987) 480 US 102, 114, 107 S Ct 1026, 94 L Ed2d 92*].

- The extent of the conflict with the sovereignty of the defendant's state [*see Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd. (9th Cir 2003) 328 F3d 1122, 1133* (litigation against alien creates higher but not insurmountable jurisdictional barrier than suit against sister state citizen)].

- The interests of the forum state in adjudicating the dispute [*see Sinatra v. National Enquirer (9th Cir 1988) 854 F2d 1191, 1200*].

- The most efficient judicial resolution of the controversy [*see Caruth v. International Psychoanalytical Ass'n (9th Cir 1995) 59 F3d 126, 129* (inquiry focuses on location of evidence and witnesses)].

- The importance of the forum to the plaintiff's interest in convenient and effective relief [*see Dole Food Co. v. Watts (9th Cir 2002) 303 F3d 1104, 1116* (factor not paramount)].

- The existence of an adequate alternative forum.

Strategic Point:

Once it is decided that the defendant purposefully established minimum contacts within a forum, the defendant must present a compelling case that the presence of other considerations makes the forum

court's exercise of jurisdiction unreasonable [*see Dole Food Co. v. Watts (9th Cir 2002) 303 F3d 1104, 1114-1116*]. The case law appears split as to whether the plaintiff bears the burden of proving the unavailability of an alternative forum [*see Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd. (9th Cir 2003) 328 F3d 1122, 1133-1134*], or whether this factor is only considered after the defendants otherwise satisfy the burden of overcoming the presumption of reasonableness [*see Dole Food Co. v. Watts (9th Cir 2002) 303 F3d 1104, 1116-1117*].

2.35[3] Electronic Communications Issues. A California state court of appeals has held that a New York defendant who negotiated a business contract by e-mail and telephone communications with the California plaintiff was subject to personal jurisdiction in California, stating that "there is no reason why the requisite minimum contacts cannot be electronic" [*Hall v. LaRonde (1997) 56 CA4th 1342, 1347, 66 CR2d 399*]. Jurisdictionally sufficient harm was found in a suit challenging the scheme of registering domain names to extort money from corporations: although the trademark violations occurred in cyberspace, the scheme injured the defendant in the forum state where the corporation maintained its principal place of business [*Panavision Int'l, L.P. v. Toeppen (9th Cir 1998) 141 F3d 1316, 1320-1322* & n2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsLong-Arm JurisdictionCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral Overview

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2.36 Invoking General Jurisdiction.

2.36[1] General Jurisdiction Refers to All Claims. General jurisdictionallows a court to exercise jurisdiction over a defendant based on any claim, including claims unrelated to the defendant's contacts with the state [*Burger King Corp. v. Rudzewicz (1985) 471 US 462, 473 n15, 105 S Ct 2174, 85 L Ed2d 528* ; *Helicopteros Nacionales de Colombia, S.A. v. Hall (1984) 466 US 408, 414 n9, 104 S Ct 1868, 80 L Ed2d 404*].

Cross Reference:

General and specific jurisdiction, see 16 *Moore's Federal Practice, § 108.40* (Matthew Bender 3d ed.).

2.36[2] Connections With Forum Must Be Continuous, Systematic, and Substantial. A forum court may assert general jurisdiction over a nonresident defendant only when the defendant's connections with the forum are continuous, systematic, and substantial [*Burnham v. Superior Court (1990) 495 US 604, 622, 110 S Ct 2105, 109 L Ed2d 631* ; *see Lake v. Lake (9th Cir 1987) 817 F2d 1416, 1420*].

2.36[3] Courts Are Reluctant to Assert General Jurisdiction Over Nonresident Defendants. Courts have been reluctant to assert general jurisdiction over nonresident defendants even when the contacts with the forum state are quite extensive [*Perkins v. Benguet Consol. Mining Co. (1952) 342 US 437, 445-446, 72 S Ct 413, 96 L Ed 485, 63 Ohio Law Abs. 146* ; *see Helicopteros Nacionales de Colombia, S.A. v. Hall (1984) 466 US 408, 417-419, 104 S Ct 1868, 80 L Ed2d 404*]. The general jurisdiction threshold of "continuous and systematic" contacts typically requires the business defendant to have an office in the forum state, although lesser involvement with the forum state has been found sufficient for general jurisdiction [*see Reed v. American Airlines, Inc. (1982) 197 Mont 34, 36, 640 P2d 912, 915* ("presence"); *North Dakota v. Newberger (1980) 188 Mont 323, 328-329, 613 P2d 1002, 1005*].

2.36[4] Exception for Personal Service in State. An important exception to the continuous and substantial contacts rule is the traditional rule allowing general jurisdiction over a transient individual if the defendant was served with process within the forum state. Proper service within the forum may be an adequate basis for general jurisdiction, even if the defendant has no other forum state contacts [*Burnham v. Superior Court (1990) 495 US 604, 622-623, 110 S Ct 2105, 109 L Ed2d 631*]. In a sense, questions of personal jurisdiction arise only when personal service within the state is not obtained.

2.36[5] Mere Purchasing Activity Does Not Support General Personal Jurisdiction. Purchases and incidental contacts within the forum state are not sufficient to satisfy the requirements of due process in a case not arising from the purchases, even if the purchasing activity is systematic and continuous [*Helicopteros Nacionales de Colombia, S.A. v. Hall (1984) 466 US 408, 417-419, 104 S Ct 1868, 80 L Ed2d 404* ; *see Lake v. Lake (9th Cir 1987) 817 F2d 1416, 1421*].

Cross Reference:

General personal jurisdiction, see 16 *Moore's Federal Practice, § 108.41* (Matthew Bender 3d ed.).

2.36[6] Establishing General Jurisdiction in Website Cases. Although the fact that a company maintains a highly interactive website *by itself* may not be enough to establish general jurisdiction, the totality of the company's contacts with California may support general jurisdiction when, given the economic realities of its activities, the company "could reasonably anticipate being haled into court" in California [*Corematrics, Inc. v. Atomic Park.com, LLC (ND Cal 2005) 370 F Supp2d 1013, 1021*].

Example:

General jurisdiction in California existed over an Ohio-based e-tailer when its California sales were central to its business and it advertised to Californians, made a substantial portion (both in numbers and revenue) of its sales to Californians, made systematic and continuous sales to Californians, made substantial purchases from California, and stipulated to personal jurisdiction in California for some of its contracts with third parties [*Corematrics, Inc. v. Atomic Park.com, LLC (ND Cal 2005) 370 F Supp2d 1013, 1021*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral Overview

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2.37 Invoking Specific Jurisdiction.

2.37[1] When Claim Arises Directly From Defendant's Contacts With Forum. A court may exercise specific jurisdiction when the defendant has few contacts, or even a single contact with the forum state, if the claim arises directly from the defendant's contacts within that state [*see Burger King Corp. v. Rudzewicz (1985) 471 US 462, 472-473, 479, 105 S Ct 2174, 85 L Ed2d 528*].

The Ninth Circuit uses a three-part test to determine specific jurisdiction [*Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd. (9th Cir 2003) 328 F3d 1122, 1129* ; *see Dole Food Co. v. Watts (9th Cir 2002) 303 F3d 1104, 1113-1115*]:

- The nonresident defendant must purposefully direct his or her activities or consummate some transaction with the forum or a resident of the forum, or perform some act by which the defendant purposefully avails himself or herself of the privileges of conducting activities in forum state, thereby invoking the benefits and protections of the forum's laws.

- The claim must arise out of, relate to, or result from the defendant's forum-related activities.

- The exercise of jurisdiction must comport with fair play and substantial justice, that is, it must be reasonable [*see Core-Vent Corp. v. Nobel Indus. A.B. (9th Cir 1993) 11 F3d 1482, 1487* (seven-factor test for determining whether asserting personal jurisdiction over defendant is reasonable); *see, e.g., Doe v. Geller (ND Cal 2008) 533 F Supp2d 996, 1007-1011* (all seven factors suggested that jurisdiction would be unreasonable)].

Physical contact with the forum state is not required. Within the rubric of purposeful availment, personal jurisdiction may be exercised over a defendant whose only "contact" with the forum state is the "purposeful direction" of a foreign act having an effect in the forum state [*Haisten v. Grass Valley Med. Reimbursement Fund Ltd. (9th Cir 1986) 784 F2d 1392, 1397*]. If the defendant's intentional act is not expressly aimed at the forum state, there is no jurisdiction even if harm is ultimately caused in the forum state [*see* Pebble Beach Co. v. Caddy (9th Cir 2006) 453 F3d 1151, 1158

(no California jurisdiction over resident of Great Britain based on domain name and passive website not directed at California); *Schwarzenegger v. Fred Martin Motor Co. (9th Cir 2004) 374 F3d 797, 807* (no California jurisdiction over Ohio car dealer who used movie star's picture in advertisement aimed at Ohio residents, even if dealer may have known movie star lived in California)].

Examples:

Personal jurisdiction could be exercised over a nonresident defendant in a copyright infringement suit when he "expressly aimed" his activities at the forum by using a forum resident's copyrighted material on his website [*Brayton Purcell LLP v. Recordon & Recordon (9th Cir 2009) 575 F3d 981, 986-987*]. This "individualized targeting" distinguished this case from *Pebble Beach Co. v. Caddy (9th Cir 2006) 453 F3d 1151* and from *Schwarzenegger v. Fred Martin Motor Co. (9th Cir 2004) 374 F3d 797* . In *Pebble Beach*, defendant, by merely registering and operating a passive informational website, "engaged in no 'individualized targeting' " [*Brayton Purcell LLP v. Recordon & Recordon (9th Cir 2009) 575 F3d 981, 987* , quoting *Pebble Beach Co. v. Caddy (9th Cir 2006) 453 F3d 1151, 1157*]. In *Schwarzenegger*, defendant's use of Arnold Schwarzenegger's image in a local Ohio newspaper was insufficient to confer jurisdiction because the advertisement "was expressly aimed at Ohio rather than California." The court found no individual targeting because "[t]he Advertisement was never circulated in California, and ... [defendant] had no reason to believe that any Californians would see it" [*Brayton Purcell LLP v. Recordon & Recordon (9th Cir 2009) 575 F3d 981, 987* , quoting *Schwarzenegger v. Fred Martin Motor Co. (9th Cir 2004) 374 F3d 797, 807*].

The "effects" test, applicable in intentional tort cases, requires that (1) the defendant allegedly committed an intentional act expressly aimed at the forum state that causes harm and (2) the defendant knows that the harm is likely to be suffered in the forum state [*Dole Food Co. v. Watts (9th Cir 2002) 303 F3d 1104, 1111-1112* ; *see Bancroft & Masters, Inc. v. Augusta Nat'l, Inc. (9th Cir 2000) 223 F3d 1082, 1087* ("express aiming" test met when defendant allegedly engaged in conduct targeted at a plaintiff whom defendant knew resided in forum state)]. It is unclear whether the "brunt of the harm" must be suffered in the forum state, or merely that some significant amount of harm have occurred there [*Dole Food Co. v. Watts (9th Cir 2002) 303 F3d 1104, 1113-1114*].

Examples:

Judgment creditor's conduct, which prevented judgment debtor from closing on a pending sale of his Arizona real property by recording an improper lien, demanding a sum in excess of that due under the judgment, and refusing to remove the lien, satisfied the "conduct aimed at the forum state," even though the creditor's contacts with Arizona were minimal [*Menken v. Emm (9th Cir 2007) 503 F3d 1050, 1059-1061*].

Jurisdictionally sufficient harm was found in a suit challenging the scheme of registering domain names to extort money from corporations: although the trademark violations occurred in cyberspace, the scheme injured the defendant in the forum state where the corporation maintained its principal place of business [*Panavision Int'l, L.P. v. Toeppen (9th Cir 1998) 141 F3d 1316, 1320-1322* , & n2; *see Dole Food Co. v. Watts (9th Cir 2002) 303 F3d 1104, 1114* (corporate managers were induced to approve injurious transactions in forum state)].

2.37[2] Establishing Specific Jurisdiction in "Stream of Commerce" Cases. A plurality of the Supreme Court has determined that the purposeful availment threshold is met when a manufacturer places a product in the stream of commerce with awareness of its ultimate sale in the forum state, even though the product reached the state through the independent, but foreseeable, conduct of others [*Asahi Metal Indus. Co. v. Superior Court (1987) 480 US 102, 116-117, 107 S Ct 1026, 94 L Ed2d 92* ; *see Buckeye Boiler Co. v. Superior Court (1969) 71 C2d 893, 902, 80 CR 113, 458 P2d 57* (it may suffice if manufacturer is aware that its products are regularly sold for use in forum state, even if particular defective product was not sold there)].

A second plurality of the Supreme Court has determined that additional conduct must be "purposefully directed" at the forum state. This additional conduct could include designing a product for the forum state market, advertising in the forum, providing consumer advice in the forum, or marketing a product through a distributor or sales-agent in the forum state [*Asahi Metal Indus. Co. v. Superior Court (1987) 480 US 102, 112, 107 S Ct 1026, 94 L Ed2d 92*]. In the Ninth Circuit, the question of what constitutes purposeful availment under a stream of commerce theory of personal jurisdiction appears to be an open question [*compare Holland Am. Line, Inc. v. Wartsila N. Am., Inc. (9th Cir 2007) 485 F3d 450, 459-460* ("The placement of a product into the stream of commerce, without more, is not an act purposefully directed toward a forum state."), *with Hedrick v. Daiko Shoji Co., Ltd. (9th Cir 1983) 715 F2d 1355, 1358* ("[a] manufacturer or supplier of a defective product who knew or should have known that a product would enter the stream of commerce can be subjected, consistently with due process, to a forum state's long-arm jurisdiction and be sued in the forum where the injury occurred")]. In the absence of clear direction from the Ninth Circuit, district courts in the circuit have taken different approaches [*see Lamm v. Bumbo (ND Cal 2008) 2008 US Dist LEXIS 39042, at *15-*16* and n.1 (collecting cases)].

Cross Reference:

Specific personal jurisdiction, see 16 *Moore's Federal Practice, § 108.42* (Matthew Bender 3d ed.).

2.37[3] Establishing Specific Jurisdiction in Website Cases. The operation of a strictly passive website, in which the only contacts with the forum state consist of mere viewings of the website's content by those surfing the Internet, by itself, does not give rise to specific jurisdiction when the website is not directed at the forum state [Pebble Beach Co. v. Caddy (9th Cir 2006) 453 F3d 1151, 1158.] However, jurisdiction may be appropriate when the Internet conduct includes "something more" to show the party directed substantial activity toward the forum [*Cybersell, Inc. v. Cybersell, Inc. (9th Cir 1997) 130 F3d 414, 418* (jurisdiction is more likely the greater the level of interactivity and commercial nature of the exchange of information that occurs with the forum state); *see Starlight Int'l, LTD. v. Lifeguard Health, LLC (ND Cal 2008) 2008 US Dist LEXIS 58927, at *14-*16* (defendant company that made $ 2,559 in sales to California consumers via its website over 13 months, through approximately 20 transactions, was subject to specific jurisdiction)].

Selling a single item on eBay is not a substantial contact with the buyer's home state that will support specific jurisdiction [*Boschetto v. Hansing (9th Cir 2008) 539 F3d 1011, 1016-1017*]. However, when eBay is used to establish regular business with a remote forum, so that a finding of personal jurisdiction "comports with traditional notions of fair play and substantial justice," a defendant's use of eBay may be properly taken into account for purposes of establishing personal jurisdiction [*Boschetto v. Hansing (9th Cir 2008) 539 F3d 1011, 1018-1019* (dicta)].

Example:

The sale of an antique car was merely a contract for the sale of a good, and was insufficient to create a substantial connection with California. The defendants did not create any ongoing obligations with the plaintiff in California. Performance of the contract did not require the defendants to engage in any substantial business in California. The plaintiff sent payment to Wisconsin, and arranged to pick up the car there. Accordingly, this single transaction for the sale of one item did not establish that the defendants purposefully availed themselves of the privilege of doing business in California. [*Boschetto v. Hansing (9th Cir 2008) 539 F3d 1011, 1017-1019*].

The scope and nature of the related contacts are key to this analysis. Factors for consideration include [*Cybersell, Inc. v. Cybersell, Inc. (9th Cir 1997) 130 F3d 414, 419*]:

- Whether the defendant encouraged residents of the forum state to engage in relevant contacts with the defendant.

- Whether there is evidence that the contacts constitute a continuous and substantial part of the defendant's business.

- Whether the defendant exchanged messages with forum residents or gained subscribers through its contacts.

- Whether the defendant otherwise purposefully availed itself of the privilege of doing business in the forum.

Cross Reference:

Specific personal jurisdiction, see 16 *Moore's Federal Practice, § 108.44* (Matthew Bender 3d ed.).

2.37[4] Pendent Personal Jurisdiction May Require Defense of Claim for Which There Is No Independent Basis of Jurisdiction. Once a basis for exercising personal jurisdiction over a defendant has been established, the doctrine of pendent personal jurisdiction may require the defendant to defend another claim for which there is no independent basis of jurisdiction. The pendent claim must arise out of the same set of operative facts as the claim over which the court does have personal jurisdiction. Whether to exercise pendent personal jurisdiction is within the discretion of the district court [*CE Distribution, LLC v. New Sensor Corp. (9th Cir 2004) 380 F3d 1107, 1113-1114* ; *Action Embroidery v. Atlantic Embroidery (9th Cir 2004) 368 F3d 1174, 1180-1181*].

Example:

Court could exercise personal jurisdiction over a breach of contract claim although the "purposeful availment" test was not met when that breach of contract claim arose out of the same facts as the plaintiff's tortious interference with contract claim against the defendant for which the "effects test" was satisfied [*CE Distribution, LLC v. New Sensor Corp. (9th Cir 2004) 380 F3d 1107, 1113*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsLong-Arm JurisdictionCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsPurposeful AvailmentCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral Overview

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2.38 Determining Personal Jurisdiction Under California Long-Arm Statutes.

2.38[1] Due Process Test Applies. California's long arm statute [*CCP § 410.10*] allows courts to exercise personal jurisdiction over defendants to the extent permitted by the Due Process Clause of the Constitution [*Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd. (9th Cir 2003) 328 F3d 1122, 1134-1136*]. Thus, a federal court need only determine whether the assertion of personal jurisdiction violates the Due Process Clause [*Brainerd v. Governors of the Univ. of Alberta (9th Cir 1989) 873 F2d 1257, 1258*].

California state court practice provides no immunity from service for a nonresident who enters California, even if that entry is involuntary [*Silverman v. Superior Court (1988) 203 CA3d 145, 149, 249 CR 724*].

Cross Reference:

Long-arm statutes, see 16 *Moore's Federal Practice, § 108.60* (Matthew Bender 3d ed.).

2.38[2] Out-of-State Corporations May Consent to Jurisdiction. Out-of-state corporations often must consent to state court jurisdiction pursuant to "doing business statutes" in order to qualify to do business in a state not of their incorporation. Doing business statutes may be used as an alternative to long-arm statutes for asserting jurisdiction over foreign corporations [*Saes Getters S.P.A. v. Aeronex, Inc. (SD Cal 2002) 219 F Supp2d 1081, 1087* ; *see CCP § 410.10*; *see also Tillay v. Idaho Power Co. (ED Wash 1976) 425 F Supp 376, 379*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsLong-Arm JurisdictionCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral Overview

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2.39 Establishing Jurisdiction Over Property.

2.39[1] Property in State As Basis for Jurisdiction. Property located within a state serves as a sufficient basis for jurisdiction in in rem or quasi in rem actions to determine interests in that property, or in actions where the property is the source of the underlying controversy between the plaintiff and the defendant. This type of judgment does not impose any personal obligation on the defendant [*Shaffer v. Heitner (1977) 433 US 186, 207-208, 97 S Ct 2569, 53 L Ed2d 683*].

Property-based jurisdiction is subject to the same constitutional due process standards that govern personal jurisdiction. The test is whether there is a constitutionally sufficient "relationship among the defendant, the forum, and the litigation" [*Shaffer v. Heitner (1977) 433 US 186, 201, 97 S Ct 2569, 53 L Ed2d 683*].

2.39[2] Types of Jurisdiction Over Property.

2.39[2][a] In Rem Jurisdiction. A judgment in rem affects the interests of all persons with respect to a designated property [*Hanson v. Denckla (1958) 357 US 235, 246 n12, 78 S Ct 1228, 2 L Ed2d 1283*].

2.39[2][b] Quasi in Rem Jurisdiction. In a quasi in rem action, the plaintiff seeks to assert jurisdiction over the interests of particular persons with respect to designated property. There are two types of quasi in rem jurisdiction [*Hanson v. Denckla (1958) 357 US 235, 246 n12, 78 S Ct 1228, 2 L Ed2d 1283*]: (1) a claim to the actual property, or (2) a claim (*e.g.*, in contract or tort) against the property seeking to establish an interest in the defendant's property.

A minimum contacts connection between the property and the subject matter of the action is required [*see Shaffer v. Heitner (1977) 433 US 186, 212, 97 S Ct 2569, 53 L Ed2d 683*].

2.39[3] Enforcing a Sister-State Judgment. Presence of property in the forum state is a sufficient basis for jurisdiction in an action to enforce a sister-state judgment against the property, even if the defendant does not have other contacts with the forum state [*Shaffer v. Heitner (1977) 433 US 186, 210 n36, 97 S Ct 2569, 53 L Ed2d 683*].

2.39[4] Enforcing Judgments That Operate on Real Property. In rem jurisdiction may result in the transfer of

land to the plaintiff, even if the defendant fails to obey the judgment. In an action for specific performance to convey real property, a court may enforce its decree by requiring the sheriff to act directly on the real property, by transferring interest or title in land [*see State ex rel. Miller v. District Court (Mont 1947) 186 P2d 506, 510*].

Cross Reference:

In rem jurisdiction, see 16 *Moore's Federal Practice, § 108.70* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.40 Invoking Jurisdiction Through Service of Process.

2.40[1] Constitutional Limits.

2.40[1][a] Notice and Opportunity to Defend. Due process requires adequate notice to the defendant of the action and an opportunity for the defendant to be heard. Even if a basis for jurisdiction exists, a judgment will be invalid if the defendant is not given adequate notice [*see World-Wide Volkswagen Corp. v. Woodson (1980) 444 US 286, 297, 100 S Ct 559, 62 L Ed2d 490* ; *Pennoyer v. Neff (1877) 95 US 714, 722-723, 24 L Ed 565*].

2.40[1][b] Statutory Compliance Required. Due process requires compliance with the method of service provided by statute [*Wuchter v. Pizzutti (1928) 276 US 13, 19, 24, 48 S Ct 259, 72 L Ed 446*].

2.40[1][c] Standard for Adequate Notice. The method of notice must be reasonably certain to inform the defendant that he or she is being sued. If it is not possible to provide such notice, the chosen form of notice must be as likely as other feasible and customary forms of notice to notify the defendant [*Mullane v. Central Hanover Bank & Trust Co. (1950) 339 US 306, 313-314, 70 S Ct 652, 94 L Ed 865*].

Due process also requires that the defendant be afforded an opportunity to be heard. Therefore, notice must be given sufficiently in advance to enable the defendant to properly prepare a defensive pleading [*see Mullane v. Central Hanover Bank & Trust Co. (1950) 339 US 306, 314, 70 S Ct 652, 94 L Ed 865*].

Publication may be sufficient if the defendant cannot be found, and the plaintiff exercised due diligence in searching for the defendant [*Mullane v. Central Hanover Bank & Trust Co. (1950) 339 US 306, 314-315, 70 S Ct 652, 94 L Ed 865*]. However, notice by publication (or publication and posting) is inadequate in state condemnation proceedings when the property owner's name and address are known [*Walker v. City of Hutchinson (1956) 352 US 112, 116, 77 S Ct 200, 1 L Ed2d 178* ; *Schroeder v. City of New York (1962) 371 US 208, 213, 83 S Ct 279, 9 L Ed2d 255*]. Publication and posting of property is insufficient notice to the mortgagee in a tax foreclosure sale [*Mennonite Bd. of Missions v. Adams (1983) 462 US 791, 799-800, 103 S Ct 2706, 77 L Ed2d 180*].

2.40[2] Methods of Service of Process.

2.40[2][a] Service Under Rule 4. *Fed R Civ P 4* governs service of a summons and complaint in federal court. Service of process may be accomplished in suits within the United States by any of the following means [*Fed R Civ P 4*; *see* Ch. 7, Service of Summons]:

- Personal service on the defendant or authorized agent in the forum state [*see, e.g., Fed R Civ P 4(c), (e)(2)*; *see also Wuchter v. Pizzutti (1928) 276 US 13, 20-21, 48 S Ct 259, 72 L Ed 446*].
- Leaving the process at the dwelling house of an individual defendant, with a person of suitable age and discretion residing there [*see Fed R Civ P 4(e)(2)*].
- Personal service outside the state on a domiciliary of the state [*see Milliken v. Meyer (1940) 311 US 457, 463, 61 S Ct 339, 85 L Ed 278*].
- Service pursuant to the law of the state in which the district court sits [*Fed R Civ P 4(e)(1)*].
- Service pursuant to the law of the state where service is effected [*Fed R Civ P 4(e)(1)*].

2.40[2][b] Methods of Service Under California Law. Mail service, posting, publication and other methods of service are available to a federal plaintiff only if provided for by the laws of the forum state [*Fed R Civ P 4(e)(1)*].

2.40[2][c] Serving Defendant in Foreign Country. Service of process may be accomplished on a foreign defendant by any of the following means [*Fed R Civ P 4(f)*]:

- Service by internationally agreed on methods, such as those prescribed by the Hague Convention.
- If the foreign country has not agreed on a method of service, then service may be made by personal delivery or any form of mail requiring a signed receipt, unless the foreign country bars those methods.
- If personal delivery or mail is prohibited by the foreign country's law, by any manner prescribed by the foreign country's law or directed by the foreign authority in response to a letter of request.
- Service directed by the court by any means not prohibited by international agreement.

Cross Reference:

Discussion of serving foreign defendants, see Ch. 7, Service of Summons, *§§ 7.32 -7.42*.

2.40[3] Territorial Limits of Effective Service.

2.40[3][a] Service Within 100 Miles of Federal Courthouse. Service on persons impleaded under *Fed R Civ P 14* or joined under *Fed R Civ P 19* is permitted in any district in the United States that is within 100 miles of the federal courthouse where the action is pending [*Fed R Civ P 4(k)(1)(B)*].

Cross Reference:

Discussion of 100-mile service, see Ch. 7, Service of Summons, *§ 7.47*.

2.40[3][b] Nationwide Service of Process for Certain Claims. Congress has authorized nationwide service of process in a variety of actions, including the following [*see Fed R Civ P 4(k)(1)(C), (D)*]:

- The Securities Exchange Act of 1934 [*15 USC § 78aa*].

- The Employee Retirement Income Security Act (ERISA) [*29 USC § 1132(e)*].
- The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [*42 USC § 9613(e)*].
- The Racketeer Influenced and Corrupt Organizations Act (RICO) [*18 USC § 1965*].
- The Clayton Act [*28 USC § 1391*].
- Statutory impleader actions [*see Fed R Civ P 14(a)*].

Because causes of action subject to nationwide service of process are exclusively federal, the Ninth Circuit looks to the defendant's contacts with the nation as a whole [*see Action Embroidery v. Atlantic Embroidery (9th Cir 2004) 368 F3d 1174, 1180* ; *Go-Video, Inc. v. Akai Elec. Co. (9th Cir 1989) 885 F2d 1406, 1413*].

Cross Reference:

Discussion of nationwide service, see Ch. 7, Service of Summons, *§ 7.48*.

2.40[3][c] Federal Question Cases and Nationwide Service. Even absent a federal statute specifically authorizing nationwide service, defendants who are not subject to personal jurisdiction in any state court, but who have contacts with the United States as a whole, may be subject to personal jurisdiction in federal question cases [*Fed R Civ P 4(k)(2)*].

2.40[4] Waiver of Service of Process.

2.40[4][a] Rule Applies Only to Individuals, Corporations, Partnerships, and Associations. The waiver of service provisions of *Fed R Civ P 4(d)* apply only to individuals, corporations, and associations that are subject to service under *Fed R Civ P 4(e)*, *(f)*, or *(h)* [*Fed R Civ P 4(d)(1)*], including the following:

- Individuals within a judicial district of the United States [*Fed R Civ P 4(e)*].
- Individuals in a foreign country [*Fed R Civ P 4(f)*].
- Domestic and foreign corporations [*Fed R Civ P 4(h)*].
- Partnerships and unincorporated associations [*Fed R Civ P 4(h)*].

The waiver option does not apply to service on the following [*Fed R Civ P 4(d)(1)*]:

- Infants or incompetent persons (service governed by *Fed R Civ P 4(g)*).
- The United States, its agencies, corporations, or officers (service governed by *Fed R Civ P 4(i)*).
- Foreign, state, or local governments (service governed by *Fed R Civ P 4(j)*).

2.40[4][b] Requesting Waiver of Service. To initiate the waiver of service option, a plaintiff must notify the defendant that an action has been commenced, and request the defendant to waive service of process. The notice and request for waiver must be delivered in writing, by first-class mail or "other reliable means," such as overnight or express mail, fax, or messenger [*Fed R Civ P 4(d)(1)(A), (G)*]. It must also be accompanied by a copy of the complaint identifying the court where the action has been commenced, but need not be accompanied by a summons [*Fed R Civ P*

4(d)(1)(C)].

If the defendant is an individual, the notice of action and request for waiver must be addressed directly to the defendant. If the defendant is a corporation, partnership, or other unincorporated association, the notice and request for waiver must be addressed directly to an officer or agent [*Fed R Civ P 4(d)(1)(A)(ii)*].

The plaintiff must mail to the defendant a copy of the complaint, as well as two copies of the waiver, together with a prepaid means of compliance in writing [*Fed R Civ P 4(d)(1)(C)*]. Failure to include all necessary documents may invalidate the waiver of service of process [*Fed R Civ P 4(d)(1)*].

2.40[4][c] Use Form 1A to Inform Defendant of Consequences of Compliance and Noncompliance. A notice of action and request for waiver of service must inform the defendant of the consequences of compliance and failure to comply with the request. This notice must be by means of a text prescribed by Official Form 5 [*Fed R Civ P 4(d)(1)(D)*; *see* Fed R Civ P, Official Form 5].

2.40[4][d] Responding After Request for Waiver. If the defendant signs the waiver of service, the defendant will have 60 days from the date of the request (90 days if outside the United States) within which to answer the complaint [*Fed R Civ P 4(d)(3)*].

Consequences of failing to sign the waiver of service are that (1) the defendant must respond to the complaint within 20 days after service of the summons and complaint, and (2) the court will impose the costs subsequently incurred in effecting service on the defendant, unless good cause for the failure is shown [*Fed R Civ P 4(d)(1)*, *12(a)(1)(A)(i)*].

Cross Reference:

Discussion of waiver of service, see Ch. 7, Service of Summons, *§§ 7.12 -7.19*.

2.40[4][e] Waiver of Service Must Be Filed. The filing of an executed waiver of service supersedes the obligation to file proof of service with the clerk of the court. After the plaintiff files a waiver of service with the court, the action is treated by the court as if the defendant had been served formally and proof of service had been filed with the court [*Fed R Civ P 4(d)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessWaiversGeneral Overview

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Unit 2 First Steps
CHAPTER 2 Determining Forum (Jurisdiction and Venue)
IV. ANALYZING PERSONAL JURISDICTION

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2.41 Challenging Personal Jurisdiction.

2.41[1] Procedures for Challenging Jurisdiction. Personal jurisdiction may be challenged as follows:

- Defendant may attack jurisdiction by filing a motion to dismiss for lack of jurisdiction over the person at beginning of action [*Fed R Civ P 12(b)*].

- Defendant may raise a jurisdictional defense in the answer [*Fed R Civ P 12(b)*].

- Defendant may allow plaintiff to obtain a default judgment by not appearing in the action, and then collaterally attack the default judgment for lack of jurisdiction [*see Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee (1982) 456 US 694, 706, 102 S Ct 2099, 72 L Ed2d 492*].

Cross Reference:

Discussion of motion to dismiss for lack of personal jurisdiction, Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.18*.

2.41[2] Opposing the Challenge. In response to a defendant's motion to dismiss for lack of personal jurisdiction under *Fed R Civ P 12(b)*, the plaintiff must make a prima facie showing of proper jurisdiction by alleging facts that, if true, would support the court's exercise of personal jurisdiction over the defendant [*see Mattel, Inc. v. Greiner & Hausser GmbH (9th Cir 2003) 354 F3d 857, 862*]. Any conflicts over statements in affidavits are resolved in the plaintiff's favor [*Schwarzenegger v. Fred Martin Motor Co. (9th Cir 2004) 374 F3d 797, 800*].

2.41[3] Avoiding Waiver of Objection to Personal Jurisdiction. A defendant must raise an objection to personal jurisdiction, either by proper pre-pleading motion or in the initial responsive pleading, to avoid waiving the right to object. The jurisdiction objection is waived if either [*see Fed R Civ P 12(b), (g), (h)(1)*; *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee (1982) 456 US 694, 704, 102 S Ct 2099, 72 L Ed2d 492*]:

- Defendant makes a *Fed R Civ P 12* motion but does not include an objection to personal jurisdiction.

- Defendant does not make a *Fed R Civ P 12* motion, and fails to include the objection in the answer.

2.41[4] Case May Be Transferred to Court Where Venue and Personal Jurisdiction Proper. If the defendant makes a timely and successful objection to personal jurisdiction, it does not necessarily mean the action will be dismissed. A federal court lacking both personal jurisdiction and venue may transfer the case to a federal court where venue and personal jurisdiction would be proper [*28 USC § 1406(a)*; *Goldlawr, Inc. v. Heiman (1962) 369 US 463, 466, 82 S Ct 913, 8 L Ed2d 39*].

A transfer to cure a lack of personal jurisdiction may also be made when venue is proper, and transfer, accordingly, is made under *28 USC § 1404(a)* [*see Corke v. Sameiet M.S. Song of Norway (2d Cir 1978) 572 F2d 77, 78-81*]. The authority to transfer a case to cure a lack of jurisdiction is codified in *28 USC § 1631*. Although some courts have interpreted the statute as applying only when subject matter jurisdiction is lacking, the language of the statute is certainly broad enough to permit its application in cases in which personal jurisdiction is lacking, and the Ninth Circuit has so interpreted the statute [*see Nelson v. International Paint Co. (9th Cir 1983) 716 F2d 640, 643*].

Strategic Point:

A motion to dismiss under *Fed R Civ P 12* may be combined with an alternative motion to transfer venue [*see 28 USC §§ 1404(a), 1406(a)*].

Cross Reference:

Discussion of challenging jurisdiction, see 16 *Moore's Federal Practice, § 108.143* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsChallengesCivil ProcedurePleading & PracticeService of ProcessWaiversGeneral Overview

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V. ANALYZING OTHER JURISDICTIONAL ISSUES

1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.41A

2.41A CHECKLIST: Analyzing Other Jurisdictional Issues.

Consider the following subjects, relating to jurisdiction of the district court, before an action is filed. Similarly these subjects may be used to determine if there are areas in which to challenge the court's jurisdiction over an action that has been filed:

☐ Ascertain whether there is a case and controversy.

Discussion:
See *§ 2.42*

☐ Ascertain whether plaintiff has standing to bring the action.

Discussion:
See *§ 2.43*

☐ Ascertain whether the case is ripe for adjudication.

Discussion:
See *§ 2.44*

☐ Ascertain whether the case has become moot.

Discussion:
See *§ 2.45*

☐ Ascertain whether the court should decline jurisdiction because a political question is at issue.

Discussion:
See *§ 2.46*

☐ Ascertain whether the court should abstain from exercising its jurisdiction.

Discussion:
See *§ 2.47*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityCase or Controversy RequirementsGeneral OverviewCivil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesGeneral OverviewConstitutional LawThe JudiciaryCase or ControversyMootnessGeneral OverviewConstitutional LawThe JudiciaryCase or ControversyRipeness

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2.42 Jurisdiction Over Cases and Controversies.

Federal courts only have jurisdiction over actual cases and controversies; no federal subject matter jurisdiction exists absent a proper case or controversy [*see* US Const, art III, § 2; *see* *Cardinal Chem. Co. v. Morton Int'l, Inc. (1993) 508 US 83, 99, 113 S Ct 1967, 124 L Ed2d 1*]. This rule requires a tangible dispute between the parties before the court [*see* *Church of Scientology v. United States (1992) 506 US 9, 12, 113 S Ct 447, 121 L Ed2d 313*].

Article III requires that a plaintiff's claim be live not just when the action is commenced, but throughout the litigation, including while the case is on appeal [*see* *Lewis v. Continental Bank Corp. (1990) 494 US 472, 477-478, 110 S Ct 1249, 108 L Ed2d 400*].

The following are components of the case or controversy determination:

- Standing [*see 2.43*].
- Ripeness [*see 2.44*].
- Mootness [*see 2.45*].
- Political questions [*see 2.46*].

Cross Reference:

Case or Controversy, see 15 *Moore's Federal Practice, §§ 101.01 -101.07* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawThe JudiciaryCase or ControversyGeneral OverviewConstitutional LawThe JudiciaryCase or ControversyPolitical QuestionsConstitutional LawThe JudiciaryCase or ControversyRipeness

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2.43 Standing.

2.43[1] "Standing" Defined. Standing addresses who may bring a suit. The question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue [*Flast v. Cohen (1968) 392 US 83, 99, 88 S Ct 1942, 20 L Ed2d 947*]. The standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted [*Allen v. Wright (1984) 468 US 737, 750-752, 104 S Ct 3315, 82 L Ed2d 556*].

To qualify as a plaintiff with standing to litigate, a person must show, first and foremost, an invasion of a legally protected interest, that is "concrete and particularized" and "actual or imminent" [*Lujan v. Defenders of Wildlife (1992) 504 US 555, 560, 112 S Ct 2130, 119 L Ed2d 351* ; *see Jacobs v. Clark County Sch. Dist. (9th Cir 2008) 526 F3d 419, 425* (discussing "requisite personal interest" required for plaintiff to have standing); *see also Vasquez v. Los Angeles Cty. (9th Cir 2008) 487 F3d 1246, 1250* (purpose of "injury in fact" requirement is to ensure that "there is an advocate with a sufficient personal concern to effectively litigate the matter")].

Examples:

Plaintiff's status as a federal taxpayer was too generalized and attenuated to confer standing to assert an *Establishment Clause* challenge to discretionary expenditures by the Executive Branch from general appropriations [*Hein v. Freedom from Religion Found., Inc., (2007) 551 US 587, 127 S Ct 2553, 168 L Ed2d 424, 438-439*].

EPA's steadfast refusal to regulate greenhouse gas emissions presented a risk of harm to Massachusetts that was both "actual" and "imminent" [*Massachusetts v. Environmental Protection Agency (2007) 549 US 497, 127 S Ct 1438, 167 L Ed2d 248, 269-270*].

Cross Reference:

Injury-in-fact, see *2.43[3][a]*.

Status as a real-party-in-interest under *Fed R Civ P 17(a)* at the time the lawsuit was filed does not, by itself, confer

standing [*see Davis v. Yageo Corp. (9th Cir 2007) 481 F3d 661, 678*].

An interest shared generally with the public at large in the proper application of the Constitution and laws is insufficient [*Arizonans for Official English v. Arizona (1997) 520 US 43, 64, 117 S Ct 1055, 137 L Ed2d 170*].

Example:

Plaintiffs did not have standing because their injury as taxpayers was not "concrete and particularized but instead a grievance the taxpayer suffers in some indefinite way in common with people generally" [*Daimler Chrysler Corp. v. Cuno (2006) 547 US 332, 126 S Ct 1854, 164 L Ed2d 589, 602-604* ; *see Arakaki v. Lingle (9th Cir 2007) 477 F3d 1048, 1065*].

Distinguish:

A municipality may have standing under Article III when it sues to protect its own "proprietary interests," even if those interests are congruent with those of its citizens [*City of Sausalito v. O'Neill (9th Cir 2004) 386 F3d 1186, 1190*].

A licensee may have standing if it has an exclusive license that amounts to a *de facto* assignment of property rights [*Nova Wines, Inc. v. Adler Fels Winery LLC (ND Cal 2006) 467 F Supp2d 965, 973-974*]. However, when the licensor reserves all property rights in the mark, the licensee has no standing [*Nova Wines, Inc. v. Adler Fels Winery LLC (ND Cal 2007) 467 F Supp2d 965, 974* (winery lacked standing to bring claims based on "Marilyn Monroe" trademark because its license was non-exclusive and did not convey a property interest)].

Federal courts also recognize the concept of *procedural standing*. A plaintiff alleging procedural injury must show only that plaintiff has a procedural right that, if exercised, "*could* protect [plaintiff's] concrete interests" [*Salmon Spawning & Recovery Alliance v. Gutierrez (9th Cir 2008) 545 F3d 1220, 1226* (conservation groups, challenging federal agencies' decision to enter into treaty between Canada and United States to manage salmon populations, had procedural standing to bring claim for relief under Endangered Species Act); *see, e.g.*, *Massachusetts v. Environmental Protection Agency (2007) 549 US 497, 127 S Ct 1438, 167 L Ed2d 248, 268* (petitioners had procedural standing to challenge EPA's denial of their petition to regulate greenhouse gas emissions from motor vehicles, because at least one petitioner state properly asserted concrete injury from potential further loss of its coastal land, both privately and state owned, from rising sea levels caused by climate change)].

Warning:

The procedural nature of the injury does not affect the requirement that the alleged injury be *concrete* [*Summers v. Earth Island Inst. (2009) -- US --, 129 S Ct 1142, 173 L Ed 2d 1, 11* (environmental groups do not have standing to challenge U.S. Forest Service regulations absent live dispute over concrete application of those regulations].

Example:

In a case challenging the Forest Service's failure to subject a salvage sale of timber on Burnt Ridge, in the Sequoia National Forest, to the notice, comment, and appeal process contained in the Service's regulations implementing the Forest Service Decisionmaking and Appeals Reform Act, plaintiffs had standing to challenge the regulations as applied to the Burnt Ridge timber sale. The plaintiffs satisfied the injury-in-fact requirement with respect to that sale through affidavits establishing that a member of one of plaintiff organizations had repeatedly visited the site and had imminent plans to do so again, and that his interests in viewing the flora and fauna of the area would be harmed if the sale went forward without incorporating the ideas he would have suggested if the Forest Service had provided him an opportunity to comment. However, the parties' settlement of the Burnt Ridge controversy remedied that member's injury with regard to that project [*Summers v. Earth Island Inst. (2009) -- US --, 129 S Ct 1142, 173 L Ed 2d 1, 8-9*]. Once that controversy was settled, plaintiffs had no standing to challenge the

U.S. Forest Service regulations, because they did not identify any other particular application of the regulations that threatened imminent and concrete harm to their members' interests [*Summers v. Earth Island Inst. (2009) -- US --, 129 S Ct 1142, 173 L Ed 2d 1, 9-10*].

Cross Reference:

Discussion of standing, see 15 *Moore's Federal Practice, § 101.20 et seq.* (Matthew Bender 3d ed.).

2.43[2] Standing Is Determined When Suit Is Filed. Standing is determined as of the time that the suit is filed [*Pederson v. Louisiana State Univ. (5th Cir 2000) 213 F3d 858, 870*]. Whether a plaintiff has standing at the time of trial implicates the related doctrine of mootness [*see 2.45*]. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness) [*United States Parole Comm'n v. Geraghty (1980) 445 US 388, 397, 100 S Ct 1202, 63 L Ed2d 479* ; *Jacobs v. Clark County Sch. Dist. (9th Cir 2008) 526 F3d 419, 425*].

Distinguish:

State courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law [*Virginia v. Hicks (2003) 539 US 113, 120, 123 S Ct 2191, 156 L Ed2d 148*].

2.43[3] Constitutional Requirements.

2.43[3][a] Injury-in-Fact. The alleged injury must affect the plaintiff in a personal and individual way [*Lujan v. Defenders of Wildlife (1992) 504 US 555, 561, 112 S Ct 2130, 119 L Ed2d 351*]. This injury must be "distinct and palpable" [*Whitmore v. Arkansas (1990) 495 US 149, 155-156, 110 S Ct 1717, 109 L Ed2d 135* ; *Idaho Conservation League v. Mumma (9th Cir 1992) 956 F2d 1508, 1514*]. It must be real and immediate, not conjectural or hypothetical [*Gratz v. Bollinger (2003) 539 US 244, 123 S Ct 2411, 156 L Ed2d 257* ; *O'Shea v. Littleton (1974) 414 US 488, 494, 94 S Ct 669, 38 L Ed2d 674*]. A purely ideological interest is insufficient to confer standing [*see Diamond v. Charles (1986) 476 US 54, 67, 106 S Ct 1697, 90 L Ed2d 48* ; *United States v. SCRAP (1973) 412 US 669, 687, 93 S Ct 2405, 37 L Ed2d 254*]. In the Ninth Circuit, however, merely being ideologically offended, and therefore reluctant to visit public land where a perceived *Establishment Clause* violation is occurring, suffices to establish "injury-in-fact."

Examples:

Lesbian and agnostic parents had suffered an injury-in-fact sufficient to confer standing because they disagreed with Boy Scouts' religious and moral position and therefore avoided recreational park facilities used by Boy Scouts [*Barnes-Wallace v. City of San Diego (9th Cir 2008) 530 F3d 776, 784-785*].

Plaintiff, a practicing Roman Catholic who was ideologically offended by the government's decision to maintain a cross on public land, but not offended by the cross itself, had Article III standing because his opposition to the government's action led him to avoid the area where the cross was located [*Buono v. Norton (9th Cir 2004) 371 F3d 543, 546-547*] ; *see also Salazar v. Buono (2010) -- US --, 130 S Ct 1803, 176 L Ed2d 634, 645* (having obtained a final judgment granting injunctive relief on his claims, plaintiff from *Buono v. Norton* had standing to ask the court to enforce the injunction by prohibiting the government from transferring the land on which the cross stood)].

Jewish War Veterans and four individual plaintiffs had standing to challenge the presence of a cross on federal property as part of a veterans' memorial, as an unconstitutional establishment of religion. Plaintiffs stopped coming to the site, because they felt offended or that the memorial did not represent them as non-Christians [Trunk v. City of San Diego (SD Cal 2008) 568 F Supp2d 1199, 1204-1205].

A plaintiff who only alleges a violation of others' rights does not have standing [*Loritz v. United States Court of Appeals for the Ninth Circuit (9th Cir 2004) 382 F3d 990, 992* ; *Schmier v. United States Court of Appeals for the*

Ninth Circuit (9th Cir 2002) 279 F3d 817, 821-822]. However, the required injury can exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing" [*Warth v. Seldin (1975) 422 US 490, 500, 95 S Ct 2197, 45 L Ed2d 343*]. The standing question in these cases is whether the constitutional or statutory provision on which the claim rests can be understood as granting persons in the plaintiff's position a right to judicial relief [*Warth v. Seldin (1975) 422 US 490, 500, 95 S Ct 2197, 45 L Ed2d 343* ; *see, e.g., Fulfillment Servs. v. UPS (9th Cir 2008) 528 F3d 614, 619* (freight shipping company had standing to bring putative class action under Motor Carrier's Act, *49 USC § 14704*, based on its allegations that motor carrier injured it by subjecting it to unlawful shipping rates)].

Examples:

A bank against which a Tribal Court rendered a monetary judgment and an option to purchase a parcel of land had standing to challenge the Tribal Court's jurisdiction in federal district court [*Plains Commerce Bank v. Long Family Land & Cattle Co. (2008) 554 US 316, 128 S Ct 2709, 171 L Ed2d 457, 469-471*]. The bank was injured by the Tribal Court's exercise of jurisdiction over the respondents' (members of an Indian tribe and their ranching company) discrimination claim with respect to both the damages award and the option to purchase [*Plains Commerce Bank v. Long Family Land & Cattle Co. (2008) 554 US 316, 128 S Ct 2709, 171 L Ed2d 457, 470-471*]. These injuries could be remedied by a ruling that the Tribal Court lacked jurisdiction and that its judgment on respondents' discrimination claim was null and void [*Plains Commerce Bank v. Long Family Land & Cattle Co. (2008) 554 US 316, 128 S Ct 2709, 171 L Ed2d 457, 470-471*].

A county attorney lacked standing to bring suit seeking a judgment that the special Spanish-speaking and Native American DUI courts instituted by the state superior court were unconstitutional, because the county attorney's "abstract outrage" at his obligation to participate in these programs was official, not personal [*Thomas v. Mundell (9th Cir 2009) 572 F3d 756, 763)*]. The alleged victims of the DUI offenders who participated in either "regular" DUI court or Spanish-speaking DUI court also lacked standing to bring suit seeking a judgment declaring the special DUI courts unconstitutional and enjoining their operation. The allegation that the victims had been "disadvantaged by ... having the case of the defendant who harmed them adjudicated in a racially separate DUI court system" described injuries too generalized and impersonal to generate standing [*Thomas v. Mundell (9th Cir 2009) 572 F3d 756, 764)*].

A physically disabled person who required use of a wheelchair sought injunctive relief under the Americans with Disabilities Act. Plaintiff had standing because her testimony plainly evidenced an intent to return to the area and that she would like to stay at an ADA compliant hotel. Because the district court focused on plaintiff's history of ADA litigation as a basis for questioning the sincerity of her intent to return to defendant hotel, the circuit court rejected its purported adverse credibility determination [*D'Lil v. Best W. Encina Lodge Suites (9th Cir 2008) 538 F3d 1031, 1037-1039*].

Plaintiff, associated with the Democratic party, had direct standing to bring an as-applied *First Amendment* challenge to the Department of Veteran Affairs (VA) regulation that prohibited him from registering voters within one of the VA facilities. When the group asked to register veterans, the VA turned back plaintiff personally. Therefore, the harm to plaintiff was "actual, concrete, and particularized." The VA also harmed plaintiff by barring him from registering voters [*Preminger v. Peake (9th Cir 2008) 536 F3d 1000, 1006*].

An Air Force reservist nurse suffered a cognizable injury sufficient to establish standing for her substantive due process and equal protection claims, based on her long term suspension on account of her sexual relationship with a civilian woman. She lost pay and points toward promotion and retirement benefits, and her suspension seriously harmed her chances of being promoted [*Witt v. Dep't of the Air Force (9th Cir 2008) 527 F3d 806, 811-812*].

A parents' organization had standing to challenge a system that assigned children to a school based in part on race, because the children were forced to compete in a race-based system that might prejudice them. The fact that the children might not actually be denied admission to a particular school based on their race, because they chose either an undersubscribed school or an oversubscribed school in which race was an advantage, did not negate the injury of being forced to compete for seats at certain high schools that used race as a deciding factor in some cases [*Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (2007) 551 US 701, 127 S Ct 2738, 168 L Ed2d 508, 522*].

Employees' claims that they had been denied equal pay because of their race were sufficient, on a motion to dismiss, to establish the injury component of standing to sue defendant employer for race discrimination under *42 USC § 1981* for any compensation discrimination that occurred prior to a specified date [*Williams v. Boeing Co. (9th Cir 2008) 517 F3d 1120, 1127-1128*]. However, an employee failed to demonstrate injury, and thus lacked standing to bring a § 1981 compensation claim against defendant, when she stated that she did not have any complaints about pay within the given job, as opposed to about pay as a function of promotions [*Williams v. Boeing Co. (9th Cir 2008) 517 F3d 1120, 1127 n. 4*].

A union had standing to assert a violation of its own *First Amendment* rights. Allegations that the Transportation Security Administration (TSA) interfered with the union's ability to solicit membership and to communicate its message qualified as a "concrete and demonstrable" injury. The injury was fairly traceable to the TSA's decision to discipline and fire a baggage screener after he engaged in various union-related activities, thus depriving the union of an employee-organizer and conveying to other screeners the message that union activity would not be tolerated. The injury would likely be redressed if the union prevailed on the merits, particularly if the district court granted the union's request to enjoin the TSA from retaliating against plaintiff and other union members [*AFGE Local 1 v. Stone (9th Cir 2007) 502 F3d 1027, 1032-1033*].

Plaintiffs, participants in drug prescription plans, sued a pharmacy benefits management company, claiming that in addition to earning fees from the plan, the company secretly retained the difference between what it charged the plans for the drugs and what it paid suppliers. Plaintiffs asserted that they were harmed by high co-payments, and that a favorable resolution of the case would lead to a decrease in drug costs to the plans, which might in turn reduce their co-payments. The Ninth Circuit ruled the plaintiffs lacked standing because they could not demonstrate a redressable injury. Even if plaintiffs' suit were successful, the relief sought would not require the plans to decrease the co-payments, nor would an award to the plans for past overpayments inure to the benefit of participants [*Glanton v. Advance PCS Inc. (9th Cir 2006) 465 F3d 1123, 1124-1125*].

The mother of two public school students sued the National Science Foundation, among others, for providing funding for a website on evolution published by the University of California. The plaintiff claimed that the website endorsed, advanced, and proselytized religious beliefs in violation of the *Establishment Clause*. The district court ruled that the plaintiff lacked Article III standing because she suffered no injury in fact. The plaintiff alleged only psychological consequences produced by observation of conduct with which she disagreed. The plaintiff also did not allege that her contact with the views expressed on the website was "frequent and regular" or "unwelcome." These allegations amounted to nothing more than generalized grievances which do not constitute an injury in fact *[(9th Cir 2008) 545 F3d 1126, 1133-1134* ; *see Valley Forge Christian College v. Americans United for Separation of Church & State (1982) 454 US 464, 472, 102 S Ct 752, 70 L Ed2d 700*].

The injury can be either economic or noneconomic [Indep. Living Ctr. of S. Cal., Inc. v. Shewry (9th Cir 2008) 543

F3d 1050, 1065 (petitioner independent pharmacies and health care providers participating in state's Medi-Cal program, that would be "directly injured by loss of gross income," had standing to seek to enjoin legislation reducing payments to medical service providers; petitioner individual Medi-Cal beneficiaries risked noneconomic injury, because proposed cuts would reduce "quality services, and access to quality services")]. For example, environmental harm is a nonecomonic injury [*Association of Data Processing Serv. Orgs., Inc. v. Camp (1970) 397 US 150, 152, 90 S Ct 827, 25 L Ed2d 184* ; *see United States v. SCRAP (1973) 412 US 669, 686-687, 93 S Ct 2405, 37 L Ed2d 254* ; *see also Kootenai Tribe of Idaho v. Veneman (9th Cir 2002) 313 F3d 1094, 1112-1113* (geographic nexus between claims and land suffering environmental impact)]. A credible threat of environmental harm suffices to establish an injury-in-fact [*Central Delta Water Agency v. United States (9th Cir 2002) 306 F3d 938, 949*] when the plaintiff alleges that he or she uses the affected area and is a person for whom the aesthetic and recreational values of the area will be lessened by the challenged activity [*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc. (2000) 528 US 167, 183, 120 S Ct 693, 145 L Ed2d 610*]. Impairment of constitutional rights also constitutes a noneconomic injury that can support standing.

Example:

An insurance agent from California had standing to challenge a Nevada statute precluding out-of-state insurers from finalizing policies in Nevada without countersignature of a resident agent and payment of a commission. Because the Privilege and Immunities Clause guarantees that citizens of state A can do business in state B on substantial equity with citizens of state B, the agent suffered both economic and noneconomic injuries [*see, e.g., Council of Ins. Agents & Brokers v. Molasky-Arman (9th Cir 2008) 522 F3d 925, 931*].

A nonprofit community fair housing organization alleged a sufficient injury-in-fact for purposes of standing under the Fair Housing Act [*see 42 USC § 3604*] because the organization had drained its resources trying to counteract the defendant's violations, which frustrated its counseling services [*Fair Hous. of Marin v. Combs (9th Cir 2002) 285 F3d 899, 904*]. "Testers" also have standing under the Fair Housing Act [*Smith v. Pac. Props. & Dev. Corp. (9th Cir 2004) 358 F3d 1097, 1104 , cert. denied, 543 US 869 (2004)*].

To establish an injury in fact sufficient to confer standing to pursue *injunctive* relief, the plaintiff must demonstrate a real or immediate threat that the plaintiff will be wronged again [*City of Los Angeles v. Lyons (1983) 461 US 95, 111, 103 S Ct 1660, 75 L Ed2d 675* ; *see, e.g., Harris v. Stonecrest Care Auto Ctr. LLC (SD Cal 2005) 472 F Supp2d 1208, 1218-1219* (ADA plaintiff failed to establish likelihood of future injury)].

The plaintiff's obligation to turn the proceeds of its litigation over to a third party does not deprive that plaintiff of Article III standing that it otherwise enjoys [*Sprint Communs. Co. v. APCC Servs. (2008) 554 US 269, 128 S Ct 2531, 171 L Ed2d 424, 429* (assignee's agreement to give all proceeds of litigation to assignor does not destroy assignee's standing to sue on assigned claim)]. The inquiry regarding redressability focuses on whether the injury that a plaintiff alleges is likely to be redressed through the litigation--"not on what the plaintiff ultimately intends to do with the money he recovers" [*Sprint Communs. Co. v. APCC Servs. (2008) 554 US 269, 128 S Ct 2531, 171 L Ed2d 424, 438*].

The plaintiff must establish standing for each challenge plaintiff wishes to bring and each form of relief plaintiff seeks [*Friends of the Earth, Inc. v. Laidlaw Environmental Srvs. (TOC), Inc. (2000) 528 US 167, 180-181, 120 S Ct 693, 145 L Ed2d 610* ; *Sacks v. Office of Foreign Assets Control (9th Cir 2006) 466 F3d 764, 771*].

2.43[3][b] Injury Must Be Traceable to Defendant. Standing requires that there be a direct causal connection between plaintiff's asserted injury and defendant's challenged action [*Allen v. Wright (1984) 468 US 737, 751, 104 S Ct 3315, 82 L Ed2d 556*].

Example:

Activist organization, asserting a *First Amendment* challenge against a city ordinance that conditioned

granting "special events" permits on purchasing insurance and agreeing to indemnify the city, established the "fairly traceable" element of standing by alleging that it had modified its behavior as result of the ordinance by declining to hold events in that city [*Long Beach Area Peace Network v. City of Long Beach (9th Cir 2008) 522 F3d 1010, 1018*].

2.43[3][c] Plaintiff's Injury Must Be Redressable. Plaintiff must demonstrate that its injury will likely be redressed by a favorable decision [*Whitmore v. Arkansas (1990) 495 US 149, 155-156, 110 S Ct 1717, 109 L Ed2d 135* ; *Paulsen v. CNF Inc. (9th Cir 2009) 559 F3d 1061, 1073-1075)*].

2.43[4] Prudential Aspects of Standing Inquiry.

2.43[4][a] Court Must Consider Three Prudential Concerns in Assessing Standing. In deciding whether standing exists, a court must consider three prudential concerns in addition to the constitutional aspects of standing [*Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc. (1982) 454 US 464, 475, 102 S Ct 752, 70 L Ed2d 700*]:

- First, whether the alleged injury to plaintiff falls within the "zone of interests" protected by the statute or constitutional provision at issue [*Air Courier Conference of Am. v. American Postal Workers Union (1991) 498 US 517, 521, 111 S Ct 913, 112 L Ed2d 1125* ; *see Desert Citizens Against Pollution v. Bisson (9th Cir 2000) 231 F3d 1172, 1179*]. This prudential "zone of interest" test is not meant to be especially demanding and is satisfied unless the party's interests are so marginally related to the statute or inconsistent with its purposes that it is unreasonable to assume that Congress intended standing [*see Clarke v. Securities Indus. Ass'n (1987) 479 US 388, 399, 107 S Ct 750, 93 L Ed2d 757* ; *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc. (9th Cir 2004) 368 F3d 1053, 1059*].

- Second, whether the complaint raises nothing more than abstract questions, amounting to generalized grievances that are more appropriately resolved by the legislative and executive branches [*see National Wildlife Fed'n v. Burford (9th Cir 1989) 871 F2d 849, 852*].

- Third, whether the plaintiff is asserting his or her own legal rights and interests, rather than those of third parties [*Elk Grove Unified Sch. Dist. v. Newdow (2004) 542 US 1, 13-18, 124 S Ct 2301, 159 L Ed2d 98* ; *United States v. Raines (1960) 362 US 17, 22, 80 S Ct 519, 4 L Ed2d 524* ; *Doran v. 7-Eleven, Inc. (9th Cir 2008) 524 F3d 1034, 1046* (ADA plaintiff who had constitutional standing to bring claim for injunctive relief as result of at least one barrier at place of public accommodation also met requirements of prudential standing and could, in one suit, challenge all barriers in that public accommodation that were related to his or specific disability)]. For example, a noncustodial father who was barred under California law from suing as his child's "next friend" lacked prudential standing to bring a *First Amendment* challenge to a school board's policy requiring teacher-led recitation of the Pledge of Allegiance [*see Elk Grove Unified Sch. Dist. v. Newdow (2004) 542 US 1, 13-18, 124 S Ct 2301, 159 L Ed2d 98*]. And an assignee who claimed to be the lawful owner of a patent did not have prudential standing to be a party in a patent infringement action, because the assignee was not the sole owner of the patent. Only the party holding the exclusionary rights has sufficient injury in fact to meet the constitutional requirements for standing [*Visioneer, Inc. v. KeyScan, Inc. (ND Cal 2009) 626 F Supp2d 1018, 1024-1025*].

Prudential standing embodies judicially self-imposed limits on the exercise of federal jurisdiction [*Elk Grove Unified Sch. Dist. v. Newdow (2004) 542 US 1, 11-12, 124 S Ct 2301, 159 L Ed2d 98*]. The judiciary seeks to avoid deciding questions of broad social import if no individual rights would be vindicated, and to limit access to the federal courts to those litigants best suited to assert a particular claim [*Phillips Petroleum Co. v. Shutts (1985) 472 US 797, 804, 105 S Ct 2965, 86 L Ed2d 628*].

Prudential standing requirements are relaxed in *First Amendment* cases when the plaintiff raises an overbreadth challenge to a statute that regulates speech [*see, e.g., ACLU of Nev. v. Heller (9th Cir 2004) 378 F3d 979, 983-985* ; *Canatella v. California (9th Cir 2002) 304 F3d 843, 853* ; *Humanitarian Law Project v. Ashcroft (CD Cal 2004) 309 F Supp2d 1185, 1197*].

2.43[4][b] Association May Have Prudential Standing to Sue on Behalf of Its Members. An association has standing to sue on behalf of its members when [*United States v. Comprehensive Drug Testing, Inc. (9th Cir 2007) 473 F3d 915, 926* ; *see, e.g., Stormans, Inc. v. Selecky (9th Cir 2009) 571 F3d 960, 972-973* (pharmacy and two pharmacists had prudential standing to challenge new rules requiring pharmacies to deliver lawfully prescribed FDA-approved medications, including contraception medication); *IBEW, AFL-CIO Local 1245 v. Citizens Telcoms. Co. (9th Cir 2008) 549 F3d 781, 788-789* (union had associational standing to compel arbitration on behalf of its current members)]:

- Its members would otherwise have standing to sue in their own right;
- The interests the association seeks to protect are germane to the organization's purpose; and
- Neither the claim asserted nor the relief requested requires the participation of individual members.

When the participation of an individual plaintiff in the litigation is required, the association lacks prudential standing [*see, e.g., Molski v. Kahn Winery (CD Cal 2005) 381 F Supp2d 1209, 1210* ; *Molski v. Mandarin Touch Restaurant (CD Cal 2005) 359 F Supp2d 924, 935-936*].

Because shareholders usually lack standing to assert claims based on harm to a corporation, a for-profit corporation cannot usually satisfy the first requirement of associational standing [*RK Ventures, Inc. v. City of Seattle (9th Cir 2002) 307 F3d 1045, 1047* ; *see also Fleck & Assocs. v. City of Phoenix (9th Cir 2007) 471 F3d 1100, 1101-1102* (corporation operating gay men's social club lacked associational standing to bring action to vindicate customers' putative privacy rights, because suit was not germane to its organizational purpose, which was to make a profit)].

Distinguish:

A for-profit corporation's lack of associational standing is irrelevant if the corporation has standing on its own [*see, e.g., Bains LLC v. Arco Prods. Co. (9th Cir 2005) 405 F3d 764, 770* (corporation with imputed racial identity had standing to sue for discrimination under *42 USC § 1981*); *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc. (9th Cir 2004) 368 F3d 1053, 1059* (same)].

2.43[4][c] Third Party Standing to Assert Rights of Another Is Not Favored. The circumstances under which a person will be deemed to have third party standing to assert the rights of another are very limited. The third party must demonstrate both a "close" relationship with the person who possesses the right and a "hindrance" to the possessor's ability to protect his or her own interests [*Kowalski v. Tesmer (2004) 543 US 125, 129-130, 125 S Ct 564, 160 L Ed2d 519* ; *Powers v. Ohio (1991) 499 US 400, 411, 111 S Ct 1364, 113 L Ed2d 411*].

Examples:

Attorneys asserting that they had third-party standing to assert the rights of indigent defendants denied appellate counsel failed to demonstrate both a close relationship, as they had no relationship at all with merely hypothetical clients, and a hindrance, as the indigents could pursue their claims pro se [*Kowalski v. Tesmer (2004) 543 US 125, 130-133, 125 S Ct 564, 160 L Ed2d 519*].

An alien, seeking adjustment of her status to lawful permanent resident based on her marriage to a United States Citizen, lacked standing to pursue claims that requiring her husband to be domiciled in the United States in order to serve as her sponsor violated her husband's rights to due process and equal

protection. There was no indication that her husband did not have the ability to protect his own interests [*Kyung Park v. Holder (9th Cir 2009) 572 F3d 619, 625)*].

2.43[5] Raising Standing Issue.

2.43[5][a] Court May Raise Issue Sua Sponte. Federal courts are under an independent obligation to examine their own jurisdiction, and standing is as important as any jurisdictional doctrine [*see FW/PBS, Inc. v. City of Dallas (1990) 493 US 215, 231, 110 S Ct 596, 107 L Ed2d 603*]. If the parties fail to raise the standing issue, it must be addressed sua sponte by the court at the trial or appellate stage of proceedings [*Fed R Civ P 12(h)(3)*; *see Bender v. Williamsport Area Sch. Dist. (1986) 475 US 534, 542, 106 S Ct 1326, 89 L Ed2d 501* ; *D'Lil v. Best W. Encina Lodge & Suites (9th Cir 2008) 538 F3d 1031, 1035* ; *Bernhardt v. County of Los Angeles (9th Cir 2001) 279 F3d 862, 868*].

2.43[5][b] Issue Can Be Raised by Defendant. As an element of subject matter jurisdiction, the issue of standing may be raised by a motion to dismiss for lack of jurisdiction over the subject matter [*Fed R Civ P 12(b)(1)*; *see* Ch. 8, Answers and Responsive Motions Under Rule 12]. Standing may also be raised by a summary judgment motion [*Fed R Civ P 56*; *see Lujan v. National Wildlife Fed'n (1990) 497 US 871, 889, 110 S Ct 3177, 111 L Ed2d 695*].

In reviewing a *Fed R Civ P 12(b)* motion to dismiss on the pleadings, the court presumes that general allegations embrace those specific facts that are necessary to support the claim [*see Lujan v. National Wildlife Fed'n (1990) 497 US 871, 889, 110 S Ct 3177, 111 L Ed2d 695*]. In contrast, in reviewing a grant of summary judgment, the court need not accept the plaintiffs' alleged chain of events if they are unable to demonstrate competent evidence to support each link [*Lujan v. Defenders of Wildlife (1992) 504 US 555, 561, 112 S Ct 2130, 119 L Ed2d 351*].

Cross Reference:

Raising standing issue, see 15 *Moore's Federal Practice, § 101.30 et seq.* (Matthew Bender 3d ed.).

2.43[5][c] Issue Can Be Raised at Any Time. Because standing is an element of the case or controversy requirement, it cannot be waived. Thus, the standing issue may be raised at any point in the proceedings [*Fed R Civ P 12(h)(3)*; *see Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc. (1982) 454 US 464, 475, 102 S Ct 752, 70 L Ed2d 700* ; *see also* Friery v. Los Angeles Unified School Dist. (9th Cir 2006) 448 F3d 1146, 1148-1149 (raised at "advanced stage" of litigation); *Baranowicz v. Commissioner (9th Cir 2005) 432 F3d 972, 973-976* (raised on appeal)].

2.43[6] Party Invoking Federal Jurisdiction Bears Burden of Proof. The party invoking federal jurisdiction has the burden of establishing the elements of standing [*Lujan v. Defenders of Wildlife (1992) 504 US 555, 561, 112 S Ct 2130, 119 L Ed2d 351* ; *Association of Data Processing Serv. Orgs., Inc. v. Camp (1970) 397 US 150, 152, 90 S Ct 827, 25 L Ed2d 184* ; *see Los Angeles County Bar Ass'n v. Eu (9th Cir 1992) 979 F2d 697, 701*]. To meet this burden, the litigant must clearly and specifically set forth facts sufficient to satisfy the Article III standing requirements [*Whitmore v. Arkansas (1990) 495 US 149, 155-156, 110 S Ct 1717, 109 L Ed2d 135* ; *see United States v. SCRAP (1973) 412 US 669, 688, 93 S Ct 2405, 37 L Ed2d 254* ("factual showing of perceptible harm" required); *see also Mendoza v. Zirkle Fruit Co. (9th Cir 2002) 301 F3d 1163, 1172*].

Standing cannot be inferred from the pleadings, but must affirmatively appear in the record [*FW/PBS, Inc. v. City of Dallas (1990) 493 US 215, 231, 110 S Ct 596, 107 L Ed2d 603*].

Cross References:

Objecting to subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.17*.

Standing, 15 Moore's Federal Practice, see *§§ 101.20* -101.62 (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureJusticiabilityStandingBurdens of ProofCivil ProcedureJusticiabilityStandingInjury in FactCivil ProcedureJusticiabilityStandingPersonal StakeCivil ProcedureJusticiabilityStandingThird Party Standing

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 2 First Steps
CHAPTER 2 Determining Forum (Jurisdiction and Venue)
V. ANALYZING OTHER JURISDICTIONAL ISSUES

1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.44

2.44 Ripeness.

2.44[1] Ripeness Is Question of Timing. The ripeness doctrine concerns the timing of the suit [*Anderson v. Green (1995) 513 US 557, 559, 115 S Ct 1059, 130 L Ed2d 1050* ; *see Cardenas v. Anzai (9th Cir 2002) 311 F3d 929, 934*]. Ripeness is assessed based on the facts as they exist at the present moment [W. Radio Servs. Co. v. Qwest (9th Cir 2008) 530 F3d 1186, 1205-1206]. Unless a case is ripe, a court cannot be assured that the facts have been sufficiently developed and the matter sufficiently concrete for the court to render a decision that will resolve the dispute and affect the parties' conduct; the ripeness doctrine therefore prevents the courts from becoming entangled in purely abstract or theoretical disagreements [*Abbott Labs. v. Gardner (1967) 387 US 136, 148, 87 S Ct 1507, 18 L Ed2d 681* ; *see, e.g., NRDC v. Abraham (9th Cir 2004) 388 F3d 701, 704-707*].

Cross Reference:

Discussion of ripeness, see 15 *Moore's Federal Practice, §§ 101.70 -101.81* (Matthew Bender 3d ed.).

2.44[2] Issues Must Be Fit for Judicial Review. To constitute an actual case or controversy the issue involved must be "fit" for review [*Abbott Labs. v. Gardner (1967) 387 US 136, 149, 87 S Ct 1507, 18 L Ed2d 681*]. The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated, or that may never occur [*see Bova v. City of Medford (9th Cir 2009) 564 F3d 1093, 1096* (reasoning that if contingent events do not occur, plaintiff will not have suffered injury that is concrete and particularized enough to establish first element of standing); *Witt v. Dep't of the Air Force (9th Cir 2008) 527 F3d 806, 812-813* (procedural due process claim was not ripe for adjudication on court's records because injury plaintiff asserted "may or may not occur")]. The issue also raises concerns as to the finality of the issue presented for review, the definiteness of the threat of harm, and the extent to which resolution of the matter depends on facts not yet developed [*see Ohio Forestry Ass'n, Inc. v. Sierra Club (1998) 523 US 726, 732-737, 118 S Ct 1665, 140 L Ed2d 921*].

Examples:

A facial challenge to a National Park Service administrative regulation is not ripe for adjudication unless there is a concrete dispute between the challenging party and the agency that issued the regulation as to a particular concession contract [*see National Park Hospitality Ass'n v. Department of Interior (2003)*

538 US 803, 807-812, 123 S Ct 2026, 155 L Ed2d 1017].

Similarly, an as-applied challenge to a regional land use plan was not ripe absent allegations that the relevant agency had made an individual determination as to mitigation as applicable to the plaintiff's parcel [*see Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (9th Cir 2003) 322 F3d 1064, 1085-1086*].

Contract employees' challenge to the questionnaire that NASA required them to complete, based on NASA's requirement that "low risk" contract employees submit to in-depth background investigations, was ripe for review, because if the employees did not sign a waiver by a specified date, they would be deemed to have voluntarily resigned [*Nelson v. NASA (9th Cir 2008) 530 F3d 865, 873-874*]. However, their challenges to NASA's suitability determination based on this questionnaire was unripe and unfit for judicial review, because the record did not establish how the government intended to determine suitability [*Nelson v. NASA (9th Cir 2008) 530 F3d 865, 873*].

Pharmacists' claims challenging constitutionality of rules promulgated by the Washington State Board of Pharmacy requiring pharmacies to deliver lawfully prescribed FDA-approved medications, including contraception medication, particularly the "morning-after" pill, were ripe for review, because one pharmacist had been forced to leave her job and the other was in danger of being terminated [*Stormans, Inc. v. Selecky (9th Cir 2009) 571 F3d 960, 974*]. However, pharmacists' claims against the State Human Rights Commission, seeking declaratory and injunctive relief against enforcement of the rules promulgated by the State Board of Pharmacy were not ripe for review, because no enforcement action against the pharmacists was concrete or imminent or even threatened [*Stormans, Inc. v. Selecky (9th Cir 2009) 571 F3d 960, 975*].

A political action committee's challenge to provisions of the Alaska Code of Judicial Conduct that allegedly prevented judges from responding to the committee's questionnaire, which solicited the judges' views on legal and political issues, such as abortion and assisted suicide, was not ripe. Without a more fully developed factual record, including evidence of some real threat of enforcement, and without a showing that withholding federal adjudication would have imposed hardship on the committee, the district court should have declined jurisdiction for lack of a justiciable case or controversy [*Alaska Right to Life v. Feldman (9th Cir 2007) 504 F3d 840, 848-851*].

In determining the ripeness of a pre-enforcement challenge to a law, the court must examine whether the plaintiffs have articulated a "concrete plan" to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement [*Sacks v. Office of Foreign Assets Control (9th Cir 2006) 466 F3d 764, 773*].

Examples:

Physicians' pre-enforcement challenge to Title VII policy guidelines issued by the Department of Health and Human Services (HHS), regarding access to HHS funded programs by limited English proficient persons, was not ripe for adjudication. Even though the physicians alleged they were spending money on language assistance and had altered their conduct because of the policy guidance, the HHS had "not threatened any direct action against" them [*Colwell v. US Dep't of Health and Human Servs. (9th Cir 2009) 558 F3d 1112, 1126-1128*].

Challenge brought by member of advocacy group opposed to sanctions in Iraq was not ripe for adjudication because the plaintiff did not face genuine threat of imminent prosecution and the government had declined for eight years to prosecute him for sending unlicensed donations of humanitarian medical supplies to Iraq [*Sacks v. Office of Foreign Assets Control (9th Cir 2006) 466*

F3d 764, 774].

2.44[3] Court Must Determine If Withholding Judicial Review Will Impose Hardship. In evaluating ripeness, courts will examine the hardship the parties would endure if consideration of the issue were withheld on grounds that the controversy was not ripe [*see Ohio Forestry Ass'n, Inc. v. Sierra Club (1998) 523 US 726, 732-737, 118 S Ct 1665, 140 L Ed2d 921*].

Mere uncertainty as to the validity of a regulation does not constitute hardship if it creates no adverse legal effects [*National Park Hospitality Ass'n v. Department of Interior (2003) 538 US 803, 123 S Ct 2026, 155 L Ed2d 1017*].

That is, hardship does not mean "just anything that makes life harder." It means hardship "of a legal kind," that imposes a "significant practical harm" on the plaintiff [*Colwell v. US Dep't of Health and Human Servs. (9th Cir 2009) 558 F3d 1112, 1128* (postponing review of policy guidelines regarding access to Department of Health and Human Services (HHS) funded programs by limited English proficient persons did not impose hardship on plaintiff physicians "that is immediate, direct, and significant," because HHS had neither threatened direct action against them nor requested their compliance with those guidelines)].

2.44[4] Tension Between Declaratory Judgment Remedy and Ripeness Doctrine. As with any suit filed in federal court, federal declaratory judgment actions [*28 USC § 2201*] are limited by the case-or-controversy requirement in general and the ripeness doctrine in particular.

A case must present a "real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts" [*North Carolina v. Rice (1971) 404 US 244, 246, 92 S Ct 402, 30 L Ed2d 413*].

To ensure that a legitimate dispute exists between the parties in a declaratory judgment action, the parties must have adverse legal interests [*Maryland Cas. Co. v. Pac. Coal & Oil Co. (1941) 312 US 270, 273, 61 S Ct 510, 85 L Ed 826* ; *Principal Life Ins. Co. v. Robinson (9th Cir 2005) 394 F3d 665, 671*]. An adversity of interest between the parties is a necessary element of an actual controversy. The harm need not have already been committed; a substantial threat of real and immediate harm is sufficient [*Principal Life Ins. Co. v. Robinson (9th Cir 2005) 394 F3d 665, 671-672*].

Example:

Plaintiffs challenged the validity of an order issued by the United States Department of Energy (DOE) which, together with its accompanying manual and implementation guide, provided a process for determining whether certain radioactive waste streams would not be considered "high-level" waste. The Ninth Circuit pointed out the DOE had not actually applied the order and its contemplated processes to any particular situation existing at any particular site. The court concluded the case was not ripe because (1) further factual development was necessary to avoid dealing with highly technical questions of chemistry and physics in the abstract, and (2) delayed review would not result in any cognizable hardship [*NRDC v. Abraham (9th Cir 2004) 388 F3d 701, 704-707*].

Even if an action for declaratory relief is ripe, the district court may still exercise its discretion to decline jurisdiction. In exercising this discretion, the court should avoid needless determination of state law issues, discourage forum shopping, and avoid duplicative litigation [*see Principal Life Ins. Co. v. Robinson (9th Cir 2005) 394 F3d 665, 672* ; *American States Ins. Co. v. Kearns (9th Cir 1994) 15 F3d 142, 143-145*]. If the district court declines to exercise jurisdiction, the basis for that decision must be explained on the record [*Government Employees Ins. Co. v. Dizol (9th Cir 1998) 133 F3d 1220, 1221*].

Cross Reference:

Discussion of declaratory judgments, see 12 Moore's Federal Practice, Ch. 57, Declaratory Judgment

(Matthew Bender 3d ed.).

2.44[5] Raising Issue of Ripeness. The question of ripeness, like other challenges to a court's subject matter jurisdiction, can be raised as a motion to dismiss under *Fed R Civ P 12(b)(1)* [*Fed R Civ P 12*]. It is the burden of the complainant to allege facts demonstrating the propriety of invoking judicial resolution of the dispute [*Renne v. Geary (1991) 501 US 312, 316, 111 S Ct 2331, 115 L Ed2d 288*].

Federal courts can consider the question of ripeness sua sponte [*Metropolitan Washington Airport Auth. v. Citizens For Abatement of Airport Noise (1991) 501 US 252, 265 n13, 111 S Ct 2298, 115 L Ed2d 236*].

Cross References:

Objecting to subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.17*.

Raising issue of ripeness, 15 Moore's Federal Practice, see *§ 101.73* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityRipenessImminenceCivil ProcedureJusticiabilityRipenessRationaleCivil ProcedureJusticiabilityRipenessTests

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Unit 2 First Steps
CHAPTER 2 Determining Forum (Jurisdiction and Venue)
V. ANALYZING OTHER JURISDICTIONAL ISSUES

1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.45

2.45 Mootness.

2.45[1] Mootness Occurs When Issues Are No Longer Live. Mootness addresses the issue of standing throughout the litigation: the requisite personal interest required to establish standing at the outset of the action must continue during the entire time frame of the litigation [*Arizonans for Official English v. Arizona (1997) 520 US 43, 68 n22, 117 S Ct 1055, 137 L Ed2d 170* ; *Southern Oregon Barter Fair v. Jackson County (9th Cir 2004) 372 F3d 1128, 1133-1134*].

Distinguish:

Standing is evaluated by the facts that existed when the complaint was filed; mootness inquiries require courts to look to changing circumstances that arise after the complaint is filed [*ACLU v. Lomax (9th Cir 2006) 471 F3d 1010, 1016-1017*].

A controversy ceases to be real or definite when the issues are no longer "live," or the parties lack a legally cognizable interest in the outcome [*see Powell v. McCormack (1961) 395 US 486, 496, 89 S Ct 1944, 23 L Ed2d 491*]. A case is also moot if the court will not be able to grant effective relief [*see Center for Biological Diversity v. Marina Point Dev. Co. (9th Cir 2009) 566 F3d 794, 804* (delisting Bald Eagle from endangered species list rendered moot endangered species claim, because court could not grant effective relief); *Center for Biological Diversity v. Lohn (9th Cir 2007) 511 F3d 960, 964* (environmental advocacy group's challenge to government agency's proposed ruling not to list specific whale species as endangered was mooted when agency reversed itself, and placed species on endangered species list)].

The circuit court may vacate the district court's judgment if the case becomes moot on appeal due to circumstances beyond the control of any of the parties or if the mootness results from the unilateral action of the party who prevailed in the district court [*NASD Dispute Resolution v. Judicial Council (9th Cir 2007) 488 F3d 1065, 1069-1070* (vacatur of judgment is proper if appeal was mooted by court decisions in other cases rather than by parties' settlement)]. However, if a case becomes moot on appeal by reason of a settlement, the circuit court will vacate the district court's judgment only in exceptional circumstances, and the fact that the settlement agreement provides for vacatur does not constitute an exceptional circumstance for this purpose [*U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership (1994) 513 US 18, 26, 29, 115 S Ct 386, 130 L Ed2d 233* (case dismissed as moot after settlement but petitioner's motions to vacate

judgment of circuit court denied); *but see Alvarez v. Smith (2009) -- US -- , 130 S Ct 576, 175 L Ed2d 447, 454-455* (although settlement of state-court forfeiture proceedings mooted appeal of federal action challenging constitutionality of state-court proceedings, vacatur of lower federal court's judgment was appropriate because settlement did not involve agreement on issue contested in federal action or voluntary forfeiture of legal remedy sought in federal action)].

A court is not required to dismiss a live controversy as moot merely because it may become moot in the near future [*Hunt v. Imperial Merchant Servs., Inc. (9th Cir 2009) 560 F3d 1137, 1142*].

Examples:

The following situations illustrate the application of the mootness doctrine:

- Issues no longer exist due to the passage of time [*Flynt v. Weinberger (DC Cir 1985) 762 F2d 134, 135* (challenge to ban on press coverage declared moot when Grenada invasion came to an end)].

- Issues no longer exist due to intervening factual events [*City News & Novelty, Inc. v. City of Waukesha (2001) 531 US 278, 121 S Ct 743, 148 L Ed2d 757, 762-763* ; *but see San Francisco Baykeeper, Inc v. Tosco Corp. (9th Cir 2002) 309 F3d 1153, 1160* (change in ownership did not moot suit against factory as penalties against former owner would demonstrate cost of future violations)].

- Issues have been resolved in another forum [*Powder River Basin Res. Council v. Babbitt (10th Cir 1995) 54 F3d 1477, 1484-1485* ; *see NASD Dispute Resolution, Inc. v. Judicial Council (9th Cir 2007) 488 F3d 1065, 1068-1070* (appeal mooted by unrelated 9th Circuit and California Supreme Court decisions)].

- When deciding the issue would have no effect within the confines of the case itself [*Tur v. Youtube, Inc. (9th Cir 2009) 2009 US App LEXIS 8237, at *4* (voluntary dismissal of plaintiff's copyright infringement action rendered moot defendant's appeal from district court's denial of summary judgment in its favor, despite plaintiff's claims in pending putative class action against defendant)].

- Parties have voluntarily settled their dispute [*S. California Painters & Allied Trades v. Rodin & Co., Inc. (9th Cir 2009) 558 F3d 1028, 1035-1036* (union's declaratory relief claim for damages against union contractor was moot, because contractor paid back union dues at issue under protest, but did not seek refund of payment); *but see Zucker v. Occidental Petroleum Corp. (9th Cir 1999) 192 F3d 1323, 1329 , cert. denied, 529 US 1066 (2000)* (no Article III case or controversy required for attorney's fee award that is ancillary to matter over which court retained equitable jurisdiction after settlement mooted underlying case)].

- Change in plaintiff's status [*Arizonans for Official English v. Arizona (1997) 520 US 43, 117 S Ct 1055, 137 L Ed2d 170* (employee's resignation mooted claim that English only constitutional provision violated free speech); *Mayfield v. Dalton (9th Cir 1997) 109 F3d 1423, 1425-1426* (marine's challenge to tissue sample policy mooted by discharge)].

- Change in defendant's status [*see Commodity Futures Trading Comm'n v. Board of Trade (7th Cir 1983) 701 F2d 653, 656* (suit to void patent was mooted when patent sold during pendency of appeal and defendant no longer held title)].

- Change in statute or regulation [*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc. (2000) 528 US 167, 189, 120 S Ct 693, 145 L Ed2d 610* (repeal of challenged statute makes it absolutely clear that allegedly wrongful behavior cannot be reasonably expected to recur); *Lewis v. Continental*

Bank Corp. (1990) 494 US 472, 478, 110 S Ct 1249, 108 L Ed2d 400 (stake represented by applicant rendered moot by amendment of law); *Maldonado v. Morales (9th Cir 2009) 556 F3d 1037, 1042-1043* (amendment to California's Outdoor Advertising Act rendered moot billboard owner's claim that Act impermissibly favored commercial over non-commercial speech)].

An intervening event only moots a case if the plaintiff is wholly divested of all personal interest in the outcome of the case or the event completely eliminates the effect of the alleged violation and there is no reason to believe that future violations will recur [*Park County Res. Council v. United States Dep't of Agric. (9th Cir 1987) 817 F2d 609, 614*].

Cross Reference:

Discussion of mootness, see 15 *Moore's Federal Practice, § 101.90 et seq.* (Matthew Bender 3d ed.).

2.45[2] Exceptions to Mootness.

2.45[2][a] Acts That Are Capable of Repetition, Yet Will Evade Review. Although a lawsuit may be technically moot, an exception to the mootness doctrine will be found if the defendant's conduct is capable of repetition, yet will evade review [*Southern Oregon Barter Fair v. Jackson County (9th Cir 2004) 372 F3d 1128, 1133-1134*]. This exception applies only if the claim of the same litigant will evade review [*see* Doe v. Madison Sch. Dist. No. 321 *(9th Cir 1999) 177 F3d 789, 797-798* ; *Phoenix Newspapers v. United States Dist. Court (9th Cir 1998) 156 F3d 940, 945-946*]. For this exception to apply, two elements must be present [*see Davis v. FEC (2008) 554 US 724 128 S Ct 2759, 171 L Ed 2d 737, 749* ; *Unabom Trial v. United States Dist. Court (9th Cir 1999) 183 F3d 949, 950*]:

- The challenged action is inherently too short in duration to be fully litigated before its cessation or expiration.

- There is a reasonable expectation that the plaintiff will again be subjected to the same action unless court intervention occurs.

Examples:

A notable example of this exception is *Roe v. Wade*: by the time the case reached the Supreme Court, the woman seeking to assert the right to abortion had already had her baby, factually mooting her constitutional challenge. The Court nevertheless reasoned that when "pregnancy is a significant fact in the litigation, the normal gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination moots a case, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid" [*Roe v. Wade (1973) 410 US 113, 125, 93 S Ct 705, 35 L Ed2d 147*].

Plaintiff's challenge to an election law is not rendered moot by the passing of an election [*Federal Election Comm'n v. Wisconsin Right to Life, Inc. (2007) 551 US 449, 127 S Ct 2652, 168 L Ed2d 329, 341-342* ("as applied" challenge to statute that criminalized corporate sponsorship of federal electioneering communications could be heard after relevant election); *Padilla v. Lever (9th Cir 2006) 463 F3d 1046, 1049* (en banc)].

A candidate's challenge to campaign financing laws fell within the "capable of repetition, yet evading review" exception. The candidate's claims could not be resolved before the election at issue, and he publicly expressed an intent to self-finance another bid for a seat in the House of Representatives [Davis v. FEC (2008) ___ US ___, 128 S Ct 2759, 71 L Ed 2d 737, 748-749].

This exception to mootness is narrow, applies only in exceptional circumstances, and only when the two factors are present [*Unabom Trial v. United States Dist. Court (9th Cir 1999) 183 F3d 949, 950*].

2.45[2][b] Voluntary Cessation of Challenged Activity. The voluntary cessation of the defendant's challenged activity does not moot the controversy unless there is no reasonable possibility the conduct will resume [*Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (2007) 551 US 701, 127 S Ct 2738, 168 L Ed2d 508, 522* (school district's voluntary cessation of use of race in school assignments pending outcome of litigation did not moot case); *Gluth v. Kangas (9th Cir 1991) 951 F2d 1504* , 1507-1508 (long history of denying access to law library; defendant offered no reasonable assurance that alleged violations would not recur); *cf. Siskiyou Reg'l Educ. Project v. United States Forest Serv. (9th Cir 2009) 565 F3d 545, 559* (plaintiff's suit challenging Forest Service's directive requiring plan of operation for certain mining activity did not fall with exception for voluntary cessation of unlawful activity, because defendant's current policy was not to require plan, notwithstanding that defendant could change its policy in future); *see also Buono v. Norton (9th Cir 2004) 371 F3d 543, 546* (mere voluntary cessation of allegedly illegal conduct does not moot case)].

Whether the voluntary cessation of activity by a defendant can provide a basis for dismissing a case on mootness grounds turns on two key questions [*Adarand Constructors, Inc. v. Slater (2000) 528 US 216, 221-222, 120 S Ct 722, 145 L Ed2d 650* ; *FTC v. Affordable Media, LLC (9th Cir 1999) 179 F3d 1228, 1237-1238*]:

- Whether the defendant is free to return to its "old ways."
- Whether it is likely that the defendant will do so.

This test for mootness is stringent. Although an alleged victim can moot the need for injunctive relief by his or her own conduct, an alleged wrongdoer cannot so easily moot the need for injunctive relief [*FTC v. Affordable Media, LLC (9th Cir 1999) 179 F3d 1228, 1237-1238*].

2.45[2][c] Past Acts Having Present, Future, or Collateral Consequences. Although a change in circumstances, an intervening event, an amendment to legislation, or a revision in policy may moot a claim in terms of the court's inability to undo or grant effective relief as to past acts or conditions, a case is not moot (and judicial review is still available) if those past acts have present, future, or collateral consequences that may be judicially addressed [*Spencer v. Kemna (1998) 523 US 1, 13, 118 S Ct 978, 140 L Ed2d 43* ; *Super Tire Eng'g Co. v. McCorckle (1974) 416 US 115, 122, 94 S Ct 1694, 40 L Ed2d 1* ; *Council of Ins. Agents & Brokers v. Molasky-Arman (9th Cir 2008) 522 F3d 925, 933* (California insurance agent's challenge to Nevada statute prohibiting nonresident agents from finalizing policies in Nevada without countersignature of resident agent was not moot, even though agent's employer had acquired Nevada-based agency with in-house agent who could countersign policies; statute's effect remained legally significant because it precluded nonresident agents from participating in Nevada market on equal terms with resident agents); *EEOC v. Federal Express Corp. (9th Cir 2009) 558 F3d 842, 847-848* (employer's compliance with administrative subpoena in another case, which resulted in its providing EEOC with same information it sought to compel in case on appeal, did not moot appeal); *Zegarra-Gomez v. INS (9th Cir 2003) 314 F3d 1124, 1127* (deportation did not moot case as alien continues to suffer actual collateral consequences from deportation); *Washington v. Daley (9th Cir 1999) 173 F3d 1158, 1164-1165* ; *cf. Center for Biological Diversity v. Lohn (9th Cir 2007) 511 F3d 960, 965* (party could not invoke exception for "collateral legal consequences" when suggested harm was "merely hypothetical or speculative"); *see also Pacific Bell Telephone Co. v. linkLine Communs. Inc. (2009) ___ US ___, 129 S Ct 1109, 1117, 172 L Ed2d 836* (case was not rendered moot by plaintiffs' agreement with dissent to Ninth Circuit court's decision in plaintiffs' favor after Supreme Court granted certiorari, because parties continued to seek different relief, and circuit conflict would remain if Court did not decide case on merits [*Pacific Bell Telephone Co. v. linkLine Communs. Inc. (2009) ___ US ___, 129 S Ct 1109, 1117, 172 L Ed2d 836*].

2.45[3] Counsel Must Inform Court of Change of Status. It is the duty of counsel to bring to the federal court's attention, without delay, facts that may raise a question of mootness [*Arizonans for Official English v. Arizona (1997) 520 US 43, 68 n23, 117 S Ct 1055, 137 L Ed2d 170*].

2.45[4] Raising Mootness Issue. When a case becomes moot the court lacks subject matter jurisdiction over the action. As with other defects in subject matter jurisdiction, mootness may be raised at any stage of the litigation [*In re Kurtzman (2d Cir 1999) 194 F3d 54, 58*].

The question of mootness, like other challenges to a court's subject matter jurisdiction, may be treated as a motion to dismiss under *Fed R Civ P 12(b)(1)* [*Fed R Civ P 12*]. It is the burden of the complainant to allege facts demonstrating the appropriateness of invoking judicial resolution of the dispute [*see Renne v. Geary (1991) 501 US 312, 316, 111 S Ct 2331, 115 L Ed2d 288*].

Federal courts may raise the issue of mootness sua sponte [*North Carolina v. Rice (1971) 404 US 244, 245, 92 S Ct 402, 30 L Ed2d 413*].

Cross References:

Objecting to subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.17*.

Raising issue at any time, 15 Moore's Federal Practice, see *§ 101.92* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityMootnessEvading Review ExceptionCivil ProcedureJusticiabilityMootnessPublic Interest ExceptionCivil ProcedureJusticiabilityMootnessReal Controversy RequirementCivil ProcedureJusticiabilityMootnessVoluntary Cessation Exception

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2.46 Political Question Doctrine.

The political question doctrine requires federal courts to abstain from the review of constitutional claims that are more amenable to resolution by other branches of the federal government than by a judgment on the merits [*Baker v. Carr (1962) 369 US 186, 217, 82 S Ct 691, 7 L Ed2d 663*].

The Supreme Court has explained that several formulations that vary according to context may describe a political question. Prominent on the surface of any case held to involve a political question, the Court found at least one of the following [*Baker v. Carr (1962) 369 US 186, 217, 82 S Ct 691, 7 L Ed2d 663* ; *see Nixon v. United States (1993) 506 US 224, 228, 113 S Ct 732, 122 L Ed2d 1*]:

- A textually demonstrable constitutional commitment of the issue to a coordinate political department.

- A lack of judicially discoverable and manageable standards for resolving the issue.

- The impossibility of deciding the issue without an initial policy determination of a kind clearly more appropriate for nonjudicial discretion.

- The impossibility of a court's undertaking independent resolution of the issue without expressing lack of the respect due coordinate branches of government [*see, e.g., Mujica v. Occidental Petroleum Corp. (CD Cal 2005) 381 F Supp2d 1164, 1193-1194*].

- An unusual need for unquestioning adherence to a political decision already made [*see, e.g.,* Mujica v. Occidental Petroleum Corp. *(CD Cal 2005) 381 F Supp2d 1164, 1194 n5*].

- The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Example:
The mere fact that a case may touch upon foreign relations and arise in a "politically charged" context

does not necessarily preclude justiciability of particular claims on the basis of the political question doctrine. For example, in a case against the Vatican Bank involving losses allegedly suffered at the hands of a Nazi puppet regime in World War II, common law property claims for conversion, unjust enrichment, restitution, and accounting were allowed to proceed. Other claims stemming from slave labor were held to be related to human rights and the war and were precluded by the political question doctrine. The Ninth Circuit did, however, acknowledge that the plaintiffs faced looming procedural and substantive problems on issues such as class certification, discovery, and allocation [*see Alperin v. Vatican Bank (9th Cir 2005) 410 F3d 532, 537-539*].

In addressing the second formulation concerning judicially discoverable and manageable standards, the focus should be on whether the court is capable of granting real relief in a reasoned fashion and not on logistical problems [*see, e.g., Alperin v. Vatican Bank (9th Cir 2005) 410 F3d 532, 553*].

The question of political questions, like other challenges to a court's subject matter jurisdiction, may be treated as a motion to dismiss under *Fed R Civ P 12(b)(1)*, or *(b)(6)* [*Fed R Civ P 12*].

Cross References:

Objecting to subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.17*.

Political question doctrine, 15 Moore's Federal Practice, see *§ 101.110* et seq. (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityPolitical QuestionsForeign AffairsCivil ProcedureJusticiabilityPolitical QuestionsNational SecurityCivil ProcedureJusticiabilityPolitical QuestionsSeparation of PowersCivil ProcedureJusticiabilityPolitical QuestionsTreaties

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2.47 Abstention Doctrines.

2.47[1] ***Pullman*** Abstention: Avoiding Federal Constitutional Rulings. *Pullman* abstention is appropriate when an uncertain question of state law exists in the case and that question of state law is susceptible of a construction that will either eliminate the need to decide the federal constitutional question altogether, or materially alter the way in which the federal court will view that issue [*Harris County Comm'rs Court v. Moore (1975) 420 US 77, 84, 95 S Ct 870, 43 L Ed2d 32* ; *see Railroad Comm'n of Texas v. Pullman Co. (1941) 312 US 496, 61 S Ct 643, 85 L Ed 971*].

The Ninth Circuit applies a three-part test for *Pullman* abstention [*see Spoklie v. State of Montana (9th Cir 2005) 411 F3d 1051, 1055* ; *San Remo Hotel v. City & County of San Francisco (9th Cir 1998) 145 F3d 1095, 1104*]:

> (1) The complaint must touch a sensitive area of social policy into which the federal courts should not enter unless there is no alternative to adjudication;
>
> (2) A definitive ruling on the state issue(s) by a state court must potentially obviate the need for constitutional adjudication by the federal court; and
>
> (3) The proper resolution of the possibly determinative state law issue must be uncertain.

The court has suggested that abstention is appropriate only when all three elements are present [*see* Smelt v. County of Orange (9th Cir 2006) 447 F3d 673, 679-681; *Cinema Arts, Inc. v. County of Clark (9th Cir 1983) 722 F2d 579, 580*].

The Ninth Circuit has identified several areas of sensitive social policy that may warrant *Pullman* abstention:

- State regulation of marriage [Smelt v. County of Orange (9th Cir 2006) 447 F3d 673, 679-681].
- A state court's role in interpreting unique state constitutional provisions [*Brown v. Woodland Joint Unified Sch. Dist. (9th Cir 1994) 27 F3d 1373, 1375*].

- State building codes [*Cedar Shake & Shingle Bureau v. City of Los Angeles (9th Cir 1993) 997 F2d 620, 622*].

- The operation of state detention facilities [*Manney v. Cabell (9th Cir 1980) 654 F2d 1280, 1284*].

- State election codes [*Burdick v. Takushi (9th Cir 1988) 846 F2d 587, 589*].

- Regulation of prostitution and sexually explicit films [*Almodovar v. Reiner (9th Cir 1987) 832 F2d 1138, 1140*].

- State custody and care of juveniles [*L.H. v. Jamieson (9th Cir 1981) 643 F2d 1351, 1355*].

- Regulation of public utilities energy resources [*International Bhd. of Elec. Workers v. Public Serv. Comm'n (9th Cir 1980) 614 F2d 206, 212*].

- Land use planning [*Pearl Inv. Co. v. City & County of San Francisco (9th Cir 1985) 774 F2d 1460, 1461-1462 , cert. denied, 476 US 1170 (1986)*].

- The location of a nuclear waste facility [*United States v. Morros (9th Cir 2001) 268 F3d 695, 703-704*].

Example:

Plaintiffs, the creator and users of an election website, sued the Secretary of State for California under *42 USC § 1983* after the Secretary threatened prosecution under California Election Code against a similar website. The plaintiffs' claims were based on *First Amendment* violations. Abstention was inappropriate because the first *Pullman* factor was not present. Abstention could have resulted in chilling the plaintiffs' future creation of a website. Although a new website would not have been created until 2004, it was not clear that the case would have been resolved prior to the 2004 election if the plaintiffs were sent to state court. Constitutional challenges based on the *First Amendment* right of free expression are the kinds of cases the federal courts are particularly well-suited to hear. That is why abstention is generally inappropriate when *First Amendment* rights are at stake [*Porter v. Jones (9th Cir 2003) 319 F3d 483, 491-494*].

Cross Reference:

Discussion of *Pullman* abstention, see 17A *Moore's Federal Practice, § 122.02* (Matthew Bender 3d ed.).

2.47[2] ***Thibodeaux*** Abstention: Unclear State Law in Diversity Cases. *Thibodeaux* abstention is appropriate when a diversity case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case [*Louisiana Power & Light Co. v. City of Thibodaux (1959) 360 US 25, 26, 79 S Ct 1070, 3 L Ed2d 1058* ; *see Colorado River Water Conservation Dist. v. United States (1976) 424 US 800, 814, 96 S Ct 1236, 47 L Ed2d 483*].

Thibodeaux abstention is not appropriate if state law is certain [*City of Tuscon v. US West Communications, Inc. (9th Cir 2002) 284 F3d 1128, 1134*].

Cross Reference:

Discussion of *Thibodeaux* abstention, see 17A *Moore's Federal Practice, § 122.03* (Matthew Bender 3d ed.).

2.47[3] ***Burford*** Abstention: Avoiding Interference With Comprehensive State Administrative Procedures. *Burford* abstention is designed to prevent federal courts from interfering with the proceedings or orders of state administrative agencies when timely and adequate state court review is available [*see New Orleans Pub. Serv., Inc. v. Council of New Orleans (1989) 491 US 350, 361, 109 S Ct 2506, 105 L Ed2d 298* ; *see also Burford v. Sun Oil Co. (1943) 319 US 315, 317-318, 63 S Ct 1098, 87 L Ed 1424*].

The Ninth Circuit requires three elements to abstain under *Burford* [*City of Tuscon v. U.S. West Communications, Inc. (9th Cir 2002) 284 F3d 1128, 1132-1134*]:

- The state has chosen to concentrate suits challenging the actions of the agency involved in a particular court.
- The federal issues cannot be easily separated from complex state law issues with respect to which state courts have special competence.
- Federal review might disrupt state efforts to establish a coherent policy.

Cross Reference:

Discussion of *Burford* abstention, see 17A *Moore's Federal Practice, § 122.04* (Matthew Bender 3d ed.).

2.47[4] ***Colorado River*** Abstention: Concurrent State Proceedings. A district court has discretion to abstain from exercising jurisdiction over an action when a concurrent state proceeding is pending based on "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation' " [*Colorado River Water Conservation Dist. v. United States (1976) 424 US 800, 817, 96 S Ct 1236, 47 L Ed2d 483*].

Factors to consider in deciding whether a federal court may abstain in favor of a parallel state action are [*Colorado River Water Conservation Dist. v. United States (1976) 424 US 800, 818, 96 S Ct 1236, 47 L Ed2d 483* ; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp. (1983) 460 US 1, 23-26, 103 S Ct 927, 74 L Ed2d 765*]:

- The assumption of jurisdiction over any res or property.
- The inconvenience of the federal forum.
- The desirability of avoiding piecemeal litigation.
- The order in which the concurrent forums obtained jurisdiction.
- The source of the applicable law.
- The adequacy of protections in the state court to protect the federal plaintiff's rights [*see* Intel Corp. v. Advanced Micro *Devices, Inc. (9th Cir 1993) 12 F3d 908, 913* (substantial doubt as to whether state proceedings will resolve federal action precludes stay)].

No one factor is necessarily determinative [*Colorado River Water Conservation Dist. v. United States (1976) 424 US 800, 818, 96 S Ct 1236, 47 L Ed2d 483*]. Moreover, the weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case [*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp. (1983) 460 US 1, 16, 103 S Ct 927, 74 L Ed2d 765*]. A stay of proceedings based on the *Colorado River* doctrine is justified only in "exceptional circumstances" [*Colorado River Water Conservation Dist. v. United States (1976) 424 US 800, 813, 96 S Ct 1236, 47 L Ed2d 483*], which are exceedingly rare. The existence of a substantial doubt as to whether the state proceedings will resolve the federal action precludes *Colorado River* abstention [*Smith v. Central Ariz. Water*

Conservation Dist. (9th Cir 2005) 418 F3d 1028, 1033].

Examples:

In proceedings in rem or quasi in rem, the forum first assuming custody of the property at issue has exclusive jurisdiction to proceed [*Colorado River Water Conservation Dist. v. United States (1946) 424 US 800, 817, 819, 96 S Ct 1236, 47 L Ed2d 483*]. A quiet title action is a proceeding in rem. Accordingly, under *Colorado River*, a district court was required to stay a federal quiet title action because the state court, in defendant's quiet title action, was the first court to exercise jurisdiction over the disputed property [*40235 Washington Street Corp. v. Lusardi (9th Cir 1992) 976 F2d 587, 589*].

Plaintiff sought to enjoin a state unlawful detainer action. The district court found it had a duty under *Colorado River* to abstain from interfering with the related state court proceedings, because the state action was filed before the federal action and, critically, was a quasi in rem action. Accordingly, the forum first assuming custody of the property had exclusive jurisdiction to proceed [*Scherbenske v. Wachovia Mortgage, FSB (CD Cal 2009) 626 F Supp2d 1052, 1057-1058*].

Consider:

Colorado River abstention may apply when concurrent proceedings are pending in a foreign court [*see Mujica v. Occidental Petroleum Corp. (CD Cal 2005) 381 F Supp2d 1134, 1158-1160*].

Cross Reference:

Discussion of *Colorado River* abstention, see 17A *Moore's Federal Practice, § 122.06* (Matthew Bender 3d ed.).

2.47[5] *Younger* Abstention: Avoiding Interference With Pending State Proceedings. *Younger* abstention is designed to prevent federal courts from exercising their jurisdiction over state criminal proceedings or other proceedings that are pending and that involve important state interests. Abstention is proper as long as adequate relief is available in the state proceedings [*see Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*].

The Ninth Circuit applies a four-part test to *Younger* abstention [*see Middlesex County Ethics Committee v. Garden State Bar Ass'n (1982) 457 US 423, 432, 102 S Ct 2515, 73 L Ed2d 116* (applying first three elements required by Ninth Circuit); *San Jose Silicon Valley Chamber of Commerce Political Action Committee v. City of San Jose (9th Cir 2008) 546 F3d 1087* (all *Younger* requirements were met and exception did not apply); *AmerisourceBergen Corp. v. Roden (9th Cir 2007) 495 F3d 1143, 1148-1149* (clarifying that there is "a vital and indispensable fourth element" and that abstention under *Younger* is not proper unless all four elements are strictly satisfied)]:

- There must be ongoing state judicial proceedings.
- The ongoing state judicial proceedings must implicate important state interests.
- There must be an adequate opportunity in the state proceedings to raise federal questions.
- The court's action would enjoin, or have the practical effect of enjoining, ongoing state court proceedings.

Examples:

Abstention was not warranted when a ruling on the issue of damages, which was the relief plaintiff sought, would not enjoin or have the effect of enjoining the state court action, in which plaintiff sought reinstatement [*Huey v. City & County of San Francisco (ND Cal 2007) 2007 US Dist LEXIS 73732, at *8-*10*].

Younger abstention justified the district court's dismissal of a petition filed in federal district court, seeking a writ of administrative mandamus and challenging the constitutionality of a municipal rent ordinance. Although a state mandamus petition of nearly identical claims was filed three days after the filing in federal court, the state trial court had completed its proceedings and rendered a judgment [*Equity Lifestyle Props. v. County of San Luis Obispo (9th Cir 2008) 548 F3d 1184, 1196-1197*].

Cross Reference:

Discussion of *Younger* abstention, see 17A *Moore's Federal Practice, §§ 120.22, 122.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesGeneral OverviewCivil ProcedureFederal & State InterrelationshipsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAbstention

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2.47A First-to-File Rule.

The first-to file rule is a well-established doctrine that permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues already has been filed in another district [*Pacesetter Sys., Inc. v. Medtronic, Inc. (9th Cir 1992) 678 F2d 93, 94-95* ; *Inherent.com v. Martindale-Hubbell (ND Cal 2006) 420 F Supp2d 1093, 1097*]. Application of the rule requires identity of the parties and issues. However, the two actions do not have to be identical for the rule to apply, provided they are "substantially similar" [*Inherent.com v. Martindale-Hubbell (ND Cal 2006) 420 F Supp2d 1093, 1097*]. A district court retains the discretion to depart from the rule when the filing of the first action shows bad faith or forum shopping, or when the first action was anticipatory [*Alltrade, Inc. v. Uniweld Prods., Inc. (9th Cir 1991) 946 F2d 622, 628*]. An action is "anticipatory" when it is an action for declaratory relief filed by a plaintiff with specific indications that a suit against it by the defendant is imminent and that is filed for the purpose of depriving that defendant of its choice of forum [*Inherent.com v. Martindale-Hubbell (ND Cal 2006) 420 F Supp2d 1093, 1097-1098*].

Cross Reference:

Discussion of first-to-file rule, see 17 Moore's Federal Practice, § 111.13[1][o][ii] (Matthew Bender 3d ed.).

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2.48 CHECKLIST: Determining Venue.

Consider the following subjects, relating to the correct district court in which to file the action. Similarly, these questions may be used by counsel seeking to challenge venue.

☐ Is there a forum selection clause in a relevant contract?

Discussion:
See *§ 2.56*

☐ What is the applicable venue statute?

Discussion:
See *§§ 2.50*, *2.54*

☐ Where do the parties reside?

Discussion:
See *§ 2.51*

☐ Where did a substantial part of the events or omissions at issue occur?

Discussion:
See *§ 2.52*

☐ Is the suit proceeding as a class action?

Discussion:
See *§ 2.53*

☐ Are there venue requirements for the particular type of action?

Discussion:
See *§ 2.54*

☐ Can the action be transferred to another district court?

Discussion:
See *§ 2.58*

☐ Is there a more convenient forum?

Discussion:
See *§ 2.57*

☐ If venue is challenged:

- ○ Does the transferor court have subject matter jurisdiction?
- ○ Does the proposed transferee court:
  - ☐ Have proper venue under applicable transfer statutes?
  - ☐ Have independent personal jurisdiction over moving party?

Discussion:
See *§§ 2.58[6], [7]*

☐ Does another court have exclusive subject matter jurisdiction?

Discussion:
See *§ 2.59*

☐ Does the doctrine of forum non conveniens apply?

Discussion:
See *§ 2.60*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueAgentsCivil ProcedureVenueCorporationsCivil ProcedureVenueForum Non Conveniens

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2.49 Venue: Initial Considerations.

2.49[1] Federal Law Determines Venue. Venue involves determining the appropriate district court in which an action may be heard and is governed exclusively by federal law [*Stewart Org'n, Inc. v. Ricoh Corp. (1988) 487 US 22, 28, 108 S Ct 2239, 101 L Ed2d 22*]. Thus, federal law determines where the events occurred and the resolution of the convenience factors [*District No. 1, Pac. Coast Dist. v. Alaska (9th Cir 1982) 682 F2d 797, 798*].

2.49[2] Plaintiff Must File in Proper Forum. A plaintiff is not obligated to file an action in the most convenient forum, only in a proper forum [*see Newton v. Thomason (9th Cir 1994) 22 F3d 1455, 1463-1464*]. However, if the plaintiff chooses a relatively inconvenient forum, the action may be subject to a transfer to a more convenient forum pursuant to the change of venue statute [*28 USC § 1404*; *see 2.57*].

2.49[3] Pleading Proper Venue.

2.49[3][a] Generally No Venue Allegation Is Required. The plaintiff does not have to plead proper venue when filing in a particular district [*see Ripperger v. A. C. Allyn & Co. (2d Cir 1940) 113 F2d 332, 334 , cert. denied, 311 US 695 (1940)*].

If the defendant challenges venue, the plaintiff has the burden of proving that venue is proper [*French Transit Ltd. v. Modern Coupon Sys., Inc. (SDNY 1994) 858 F Supp 22, 25*].

2.49[3][b] LOCAL PRACTICE: SD Cal Requirements. In the Southern District of California, a concise statement of the facts and statutory basis conferring federal jurisdiction and venue should appear in the second paragraph of the Pretrial Order [*SD Cal Civ LR 16.1(f.6.c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueAgentsCivil ProcedureVenueCorporationsCivil ProcedureVenueIndividual Defendants

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2.50 General Venue Statute Applies to Most Actions.

The general venue statute governs venue of transitory actions "except as otherwise provided by law." Venue is appropriate in the following districts [*28 USC § 1391(a), (c)*; *see Arley v. United States Pac. Ins. Co. (9th Cir 1967) 379 F2d 183, 185*]:

- Where any defendant resides if all defendants reside in the same state. The Ninth Circuit limits the term "all defendants" to indispensable parties under *Fed R Civ P 19(b)* [*Anrig v. Ringsby United (9th Cir 1978) 603 F2d 1319, 1324*].

- Where a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.

- In an action based solely on diversity, if the first two rules leave an action without venue, then venue may be had where any defendant is subject to personal jurisdiction at the time the action is commenced.

- In an action not based solely on diversity without venue, if the first two rules leave an action without venue, then venue may be had where any defendant may be found. The phrase "where any defendant may be found" has been interpreted to mean where the defendant is subject to personal jurisdiction [*see Varsic v. United States Dist. Court for Cent. Dist. of Cal. (9th Cir 1979) 607 F2d 245, 248*].

Cross Reference:

17 Moore's Federal Practice, see *§ 110.02* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueAgentsCivil ProcedureVenueCorporationsCivil ProcedureVenueIndividual DefendantsCivil ProcedurePartiesJoinderIndispensable Parties

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2.51 Determining Residence of Parties.

2.51[1] Residence Determined at Commencement of Action. Residence is determined at the commencement of the action, not at the time of the events that gave rise to the claim [*28 USC § 1391(c)*; *see Hoffman v. Blaski (1960) 363 US 335, 342-343, 80 S Ct 1084, 4 L Ed2d 1254*].

Cross Reference:

Discussion of residence, see 17 *Moore's Federal Practice, § 110.03* (Matthew Bender 3d ed.).

2.51[2] Individuals. For purposes of venue, the residence of an individual is the same as the individual's permanent residence or legal domicile as used in determining diversity [*Shaw v. Quincy Mining Co. (1892) 145 US 444, 449, 12 S Ct 935, 36 L Ed 768* ; *see Cohen v. United States (9th Cir 1962) 297 F2d 760, 774*].

2.51[3] Aliens. The residence of alien defendants for purposes of venue is irrelevant because actions against aliens can be brought in any district in which personal jurisdiction exists [*28 USC § 1391(d)*]. Thus, suits against aliens are free from venue restrictions and subject only to the requirements of personal jurisdiction and service of process [*Brunette Mach. Works, Ltd., v. Kockum Indus., Inc. (1972) 406 US 706, 708, 92 S Ct 1936, 32 L Ed2d 428*].

This rule applies to alien corporations as well as individuals [*Brunette Mach. Works, Ltd., v. Kockum Indus., Inc. (1972) 406 US 706, 714, 92 S Ct 1936, 32 L Ed2d 428*].

2.51[4] Public Officials. A civil action in which a defendant is an officer or employee of the United States or any of its agencies acting in an official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which [*28 USC § 1391(e)*]:

- A defendant in the action resides; or
- A substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

- The plaintiff resides if no real property is involved in the action.

Only federal defendants count for purposes of venue under *28 USC § 1391(e)* [High Sierra Hikers Ass'n v. United States Forest Serv. (ND Cal 2005) 2005 US Dist LEXIS 6628, at *6].

Merely maintaining an office in a judicial district does not make a federal agency a resident of that district for purposes of venue in a specific action [High Sierra Hikers Ass'n v. United States Forest Serv. (ND Cal 2005) 2005 US Dist LEXIS 6628, at *5 ; *Schwarz v. I.R.S. (NDNY 1998) 998 F Supp 201, 203*].

2.51[5] Domestic Corporations.

2.51[5][a] Defendants. A corporate defendant resides in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. If there is more than one judicial district in the state, a corporation is deemed to reside in any district in that state within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate state. If there is no district that meets that criteria, it is deemed to reside in the district with which it has the most significant contacts [*28 USC § 1391(c)*].

2.51[5][b] Plaintiffs. A corporate plaintiff's residence for venue purposes is limited to the state or states of its incorporation [*see Suttle v. Reich Bros. Constr. Co. (1948) 333 US 163, 166, 68 S Ct 587, 92 L Ed 614* ; *see Data Disc, Inc. v. Systems Tech. Assocs., Inc. (9th Cir 1977) 557 F2d 1280, 1289*]. This rule is in contrast to the rule for diversity jurisdiction, whereby a corporation is deemed to be a citizen of both the state of its incorporation and of its principal place of business [*28 USC § 1332(c)(1)*; *see 2.16*].

2.51[6] Unincorporated Associations. Unincorporated associations are generally treated like corporations for purposes of determining proper venue [*see Denver & Rio Grande W. R.R. v. Brotherhood of R.R. Trainmen (1967) 387 US 556, 562, 87 S Ct 1746, 18 L Ed2d 954* ; *Decker Coal Co. v. Commonwealth Edison Co. (9th Cir 1986) 805 F2d 834, 841-842* (residence of joint venture between two corporations was joint venture's principal place of business)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueAgentsCivil ProcedureVenueCorporationsCivil ProcedureVenueIndividual Defendants

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2.52 Determining District Where Substantial Part of Events or Omissions Occurred.

Venue is proper where a substantial part of the events or omissions giving rise to the claim occurred [*28 USC § 1391(a)(2), (b)(2)*]. The majority of the events need not have occurred in the district; the statute requires only that a substantial part of the events occurred in the district [*Radical Products, Inc. v. Sundays Distrib. (WD Wash 1992) 821 F Supp 648, 650* (substantial part of events in trademark infringement case occurred in district where confusion between products would occur, even though product was not sold there)].

The determination of what constitutes a "substantial part" takes into consideration the purpose of the venue statute [*see Myers v. Bennet Law Offices (9th Cir 2001) 238 F3d 1068, 1075-1076*].

The court must focus on the activities of the defendant and not of the plaintiff for venue purposes [*see PKWare, Inc. v. Meade (ED Wis 2000) 79 F Supp2d 1007, 1016-1017*].

Cross Reference:

Discussion of substantial part of events or omissions, see 17 *Moore's Federal Practice, § 110.04* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueAgentsCivil ProcedureVenueCorporationsCivil ProcedureVenueIndividual Defendants

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2.53 Determining Venue for Class Actions.

In defendant class actions, venue is determined by the residence of the class representative. Thus, venue is proper if it is proper with respect to the named defendants without regard to unnamed class members [*In re Gap Stores Sec. Litig. (ND Cal 1978) 79 FRD 283, 292*].

Cross References:

Discussion of class actions, see Ch. 20, Class Actions.

Venue in class actions, 17 Moore's Federal Practice, see *§ 110.07* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueAgentsCivil ProcedureVenueCorporationsCivil ProcedureVenueIndividual DefendantsCivil ProcedureClass ActionsGeneral Overview

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2.54 Determining Venue in Special Cases.

2.54[1] Actions Removed to Federal Court. The removal statute governs the venue of an action removed from state court to federal court. The statute provides that the action may be removed to the district court and division that encompasses the place where the action is pending [*28 USC § 1441(a)*; *Polizzi v. Cowles Magazines, Inc. (1953) 345 US 663, 665-666, 73 S Ct 900, 97 L Ed 1331*].

Once an action has been removed to federal court, the action may be transferred to another district under the venue transfer statutes [*Hollis v. Florida State Univ. (11th Cir 2001) 259 F3d 1295, 1300*].

If new claims or defendants are added after removal, venue must be proper as to the added claims and defendants [*see Freeman v. Bee Mach. Co. (1943) 319 US 448, 457, 63 S Ct 1146, 87 L Ed 1509*].

In the absence of a controlling forum selection clause, a defendant's removal of an action waives or cures any objection the defendant may have to improper venue in the district to which it was removed [*Polizzi v. Cowles Magazines, Inc. (1953) 345 US 663, 665-666, 73 S Ct 900, 97 L Ed 1331*].

A contractual designation of forum cannot override the venue dictated by the removal statute [*Kerobo v. Southwestern Clean Fuels, Corp. (6th Cir 2002) 285 F3d 531, 534-536*].

Cross References:

Discussion of removal, see Ch. 3, Removing a State Court Case to Federal Court.

Venue in removal actions, 17 Moore's Federal Practice, see *§ 110.08* (Matthew Bender 3d ed.).

2.54[2] Actions Against Aliens. An action against an alien may be brought in any district, provided that service of process is proper [*Brunette Mach. Works, Ltd. v. Kockum Indus., Inc. (1972) 406 US 706, 708, 92 S Ct 1936, 32 L Ed2d 428*]. The venue statute regarding aliens applies to alien corporations and individuals [*Brunette Mach. Works, Ltd. v. Kockum Indus., Inc. (1972) 406 US 706, 714, 92 S Ct 1936, 32 L Ed2d 428*].

2.54[3] Actions Against United States, United States Agency, or United States Officials or Employees.

2.54[3][a] Venue Proper in Several Districts. Venue is proper in an action against the United States, an agency of the United States, or an official or employee of the United States on a claim against such official or employee acting in his or her official capacity [*28 USC § 1391(e)*; *see Stafford v. Briggs (1980) 444 US 527, 534-535, 100 S Ct 774, 63 L Ed2d 1*]:

- In any judicial district where a defendant in the action resides.
- In any judicial district where a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.
- In any judicial district where the plaintiff resides if no real property is involved in the action.

This venue statute applies only to actions against the executive branch and does not apply to actions for damages that could be recovered against the official or employee personally [*see Kreines v. United States (9th Cir 1994) 33 F3d 1105, 1108 , cert. denied, 513 US 1148 (1995)*].

2.54[3][b] Residence Is Place of Official Duties. The residence of a defendant federal official for this purpose is deemed to be the place where he or she performs his or her official duties [*see Rogers v. Civil Air Patrol (MD Ala 2001) 129 F Supp2d 1334, 1336-1338*].

When venue is based on the plaintiff's residence, only one plaintiff needs to reside in the district in which the action is brought for venue to be proper [*see Railway Labor Executives' Ass'n v. ICC (9th Cir 1991) 958 F2d 252, 256*]. The residence of a corporate plaintiff is limited to the state or states of its incorporation [*see Dual Mfg. and Eng'g, Inc. v. Burris Indus., Inc. (7th Cir 1976) 531 F2d 1382, 1385*].

2.54[3][c] Nationwide Service of Process. Nationwide service of process by mail is permitted in an action against an officer or agent of the United States [*28 USC § 1391(e)*].

2.54[3][d] Exceptions for Contract Cases. Venue is proper for contract claims for amounts not exceeding $10,000 against the United States pursuant to *28 USC § 1346(a)* in the district where plaintiff resides [*28 USC § 1402(a)*].

Contract claims for amounts exceeding $10,000 against the United States must be brought in the United States Court of Federal Claims [*28 USC § 1491*].

2.54[3][e] Actions Under Federal Torts Claim Act. An action under the Federal Torts Claim Act may be brought in the judicial district where [*28 USC § 1402(b)*]:

- The plaintiff resides; or
- The act or omission giving rise to the claim occurred.

2.54[4] Actions Against Foreign States. Venue for an action against a foreign state, its political subdivisions, agencies or instrumentalities may be [*28 USC § 1391(f)*; *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co. (2d Cir 2001) 241 F3d 135, 153*]:

- In any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

- In any judicial district in which a vessel or cargo of a foreign state is situated in an action to enforce a maritime lien when it is based on a commercial activity of the foreign state;

- In any judicial district in which an agency or instrumentality is licensed to do business or is doing business, if the action is brought against the agency or instrumentality of a foreign state as defined in *28 USC § 1603(b)*; or

- In the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

2.54[5] Actions Against Closed Banks Administered by FDIC. Any action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver, or against the Federal Deposit Insurance Corporation as receiver, must be brought within the district in which the association's principal place of business is located [*12 USC § 94*].

2.54[6] Interpleader Actions. An action of interpleader [*28 USC § 1335*] may be brought in the judicial district in which one or more of the claimants reside [*28 USC § 1397*].

2.54[7] Copyright Actions. An action arising under federal statute relating to copyright may be brought in the judicial district in which [*28 USC § 1400(a)*; *see VE Holding Corp. v. Johnson Gas ApplianceCo. (Fed Cir 1990) 917 F2d 1574, 1584*]:

- The defendant or his or her agent resides; or

- The defendant or his or her agent is subject to personal jurisdiction.

Under *28 USC § 1400(a)*, venue is proper in any judicial district in which the defendant would be amenable to personal jurisdiction if the district were a separate state [*Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc. (9th Cir 1997) 106 F3d 284, 288 , overruled on other grounds by Feltner v. Columbia Pictures Television (1998) 523 US 340, 118 S Ct 1279, 140 L Ed2d 438* ; *Brayton Purcell LLP v. Recordon & Recordon (ND Cal 2005) 361 F Supp2d 1135, 1138*].

Example:

Plaintiff law firm sued defendant law firm for copyright infringement based on the defendant having copied seven pages of plaintiff's website and incorporated the pages into its own website. Venue in the Northern District was proper when plaintiff (1) made a prima facie showing that defendant willfully infringed its copyrights and (2) alleged without dispute that defendant knew plaintiff's principal place of business was in the Northern District [*Brayton Purcell LLP v. Recordon & Recordon (ND Cal 2005) 361 F Supp2d 1135, 1140-1143*].

2.54[8] Patent Actions. An action for patent infringement may be brought in the judicial district where [*28 USC § 1400(b)*]:

- The defendant resides; or

- The defendant committed acts of infringement and has a regular and established place of business.

An action against a corporate infringer may be brought wherever personal jurisdiction may be obtained over the infringer [*see 28 USC § 1391(c)*; *see also Regents of Univ. of Cal. v. Eli Lilly & Co. (ND Cal 1990) 734 F Supp 911, 913*].

An action to appeal the denial of a patent may be brought against the Board of Patent Appeals and Interferences in the district court for the District of Columbia [*35 USC § 145*]. An action to determine the priority of invention with respect to conflicting patents or applications need not involve the Director of Patents and is governed by the general venue statutes [*35 USC §§ 146, 291*].

2.54[9] Shareholder's Derivative Action. An action by a stockholder on behalf of his or her corporation may be brought in any judicial district in which the corporation might have sued the same defendants [*28 USC § 1401*].

2.54[10] Antitrust Actions. An antitrust action under the Clayton Act may be brought in any district where [*15 USC §§ 15(a), 22*]:

- The defendant resides;
- The defendant is found;
- The defendant has an agent; or
- A corporate defendant transacts business.

In addition, venue is proper in any district as provided by the general venue statute [*see 28 USC § 1391*; *see also Go-Video, Inc. v. Akai Elec. Co. (9th Cir 1989) 885 F2d 1406, 1409*].

2.54[11] Civil Rights Actions. The general venue statute is not applicable to actions under the Civil Rights Act of 1964 [*see Johnson v. Payless Drug Stores NW, Inc. (9th Cir 1991) 950 F2d 586, 587-588*].

An action under the Civil Rights Act of 1964 may be brought in any judicial district where the defendant is found, or where [*42 USC § 2000e-5(f)(3)*; *see Passantino v. Johnson & Johnson Consumers Prods., Inc. (9th Cir 2000) 212 F3d 493, 506*]:

- The employment records relevant to an unlawful employment practice are maintained and administered; or
- The aggrieved person would have worked but for an alleged unlawful employment practice.

Venue is also proper "in any judicial district *in the State* in which the unlawful employment practice is alleged to have been committed" [*42 USC § 2000e-5(f)(3)* (emphasis added)]. Because of this special provision for state-wide venue, a plaintiff's choice of forum is entitled to greater deference before an intrastate transfer when venue is based on allegations of unlawful employment practices that occurred in the state, but not in the district where the suit was filed [*Ellis v. Costco Wholesale Corp. (ND Cal 2005) 372 F Supp2d 530, 538*].

If the defendant is not found in any of the listed districts, the action may be brought in the judicial district in which the principal office of the defendant is located [*42 USC § 2000e-5(f)(3)*].

2.54[12] RICO Actions. An action under the Racketeer Influenced and Corrupt Organization Act (RICO) may be brought in any district in which the defendant [*18 USC § 1965(a)*]:

- Resides;
- Is found;
- Has an agent; or

- Transacts his or her affairs.

A corporation is "found" in a district for purposes of this venue provision if its officers and agents are present and carrying on the corporation's business within the district [*see* Luten Clarey Stern, Inc., v. Randolph & Hein, Inc. (SDNY 1991) 1991 US Dist. LEXIS 6123, at *2].

2.54[13] ERISA Actions. An action under the Employee Retirement Income Security Act (ERISA) may be brought in any district where [*29 USC § 1370(c)*]:

- The plan is administered;
- The violation occurred;
- The plan administrator resides or does business;
- Any plan asset is located; or
- Where the defendant resides or may be found.

The same test for corporate residence under the general venue statute applies to ERISA actions. Suit may be brought in any judicial district in which the corporation is subject to personal jurisdiction [*see McCracken v. Automobile Club of S. Cal., Inc. (D Kan 1995) 891 F Supp 559, 562*]. Jurisdiction over noncorporate defendants may be found where the defendant has minimum contacts sufficient to support personal jurisdiction [*see Varsic v. United States Dist. Court for Cent. Dist of Cal. (9th Cir 1979) 607 F2d 245, 248-249*].

2.54[14] Actions Under the Securities Exchange Act of 1934. An action under the Securities Exchange Act of 1934 may be brought in any judicial district where the violation occurred; or where the defendant [*15 USC § 78aa*]:

- Is found;
- Is an inhabitant; or
- Transacts business.

2.54[15] Multiparty, Multiforum Cases. Multiparty, multiforum cases involving accidental death to at least 75 persons [*see 28 USC § 1369(a)*] may be brought in any district where [*28 USC § 1369(g)*]:

- Any defendant resides; or
- A substantial part of the accident occurred.

Cross Reference:

Actions under Multiparty, Multiforum Trial Jurisdiction Act, see *§ 2.24*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueFederal Venue TransfersJurisdictional TransfersCopyright LawCivil Infringement ActionsJurisdiction

& VenueVenueImmigration LawJudicial ReviewVenuePatent LawJurisdiction & ReviewPersonal Jurisdiction & VenueGeneral OverviewTortsProcedureCommencement & ProsecutionVenue

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Kendall, Seeborg, Shartsis, Smith

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Unit 2 First Steps
CHAPTER 2 Determining Forum (Jurisdiction and Venue)
VI. ANALYZING VENUE

1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.55

2.55 Improper Venue May Be Waived.

The right to object to improper venue is waived absent a sufficient and timely objection [*see Fed R Civ P 12(h)(1)*; *Libby, McNeill & Libby v. City Nat'l Bank (9th Cir 1978) 592 F2d 504, 510*].

Cross Reference:

17 Moore's Federal Practice, see *§ 110.01* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for Review

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2.56 Enforcing Forum Selection Clauses.

2.56[1] Federal Law Generally Applies. Federal law generally controls the interpretation of a forum selection clause because its enforceability is primarily a matter of venue [*Manetti-Farrow, Inc. v. Gucci, Am., Inc. (9th Cir 1988) 858 F2d 509, 513*]. If a forum selection clause is involved in a federal question case, the federal court will apply a federal rule of interpretation, or at most borrow from an analogous state rule [*see Carnival Cruise Lines v. Shute (1991) 499 US 585, 590-594, 111 S Ct 1522, 113 L Ed2d 622*].

2.56[2] Forum Selection Clauses Are Ordinarily Enforceable. Forum selection clauses requiring an action on a contract to be brought in a specific forum are prima facie valid and will ordinarily be enforced [*M/S Bremen v. Zapata Off-Shore Co. (1972) 407 US 1, 8-20, 92 S Ct 1907, 32 L Ed2d 513* ; *see Carnival Cruise Lines v. Shute (1991) 499 US 585, 590-594, 111 S Ct 1522, 113 L Ed2d 622* ; *see also Zenger-Miller, Inc. v. Training Team, GmbH (ND Cal 1991) 757 F Supp 1062, 1066*].

An action brought in a forum other than the one contractually agreed on may be dismissed [*Carnival Cruise Lines v. Shute (1991) 499 US 585, 590-594, 111 S Ct 1522, 113 L Ed2d 622*].

The party opposing the application of the forum selection clause bears a heavy burden of proof [*M/S Bremen v. Zapata Off-Shore Co. (1972) 407 US 1, 18, 92 S Ct 1907, 32 L Ed2d 513* ; *see, e.g., Batchelder v. Kawamoto (9th Cir 1998) 147 F3d 915, 919* (party must show that inclusion of forum clause was product of fraud or coercion)].

2.56[3] Some Limitations on Enforceability Exist. Forum selection clauses will not be enforced in any of the following circumstances:

- The clause is not fundamentally fair [*Carnival Cruise Lines v. Shute (1991) 499 US 585, 590-595, 111 S Ct 1522, 113 L Ed2d 622* ; *see, e.g., Batchelder v. Kawamoto (9th Cir 1998) 147 F3d 915, 919* (adhesion contract may be enforceable if not unreasonable or fundamentally unfair)].

- The clause was obtained through fraud or overreaching [*Carnival Cruise Lines v. Shute (1991) 499 US 585, 590-594, 111 S Ct 1522, 113 L Ed2d 622* ; *see, e.g., Batchelder v. Kawamoto (9th Cir*

1998) 147 F3d 915, 919 (party must show that inclusion of forum clause was product of fraud or coercion)].

- The clause violates a strong public policy of the forum [*M/S Bremen v. Zapata Off-Shore Co. (1972) 407 US 1, 15, 92 S Ct 1907, 32 L Ed2d 513* ; *Jones v. GNC Franchising, Inc. (9th Cir 2000) 211 F3d 495, 497* ; *see Swenson v. T-Mobile USA, Inc. (SD Cal 2006) 415 F Supp2d 1101, 1104-1005* (question is whether enforcement of forum selection clause *itself* will contravene strong public policy of the forum)].

- The clause is not enforceable under governing contractual law [*see, e.g., Laxmi Invs., LLC v. Golf USA (9th Cir 1999) 193 F3d 1095, 1097* (clause not enforceable absent meeting of minds)].

- Enforcement of the clause would require litigation in a seriously inconvenient forum so as to deprive a party of a meaningful day in court [*Carnival Cruise Lines v. Shute (1991) 499 US 585, 594, 111 S Ct 1522, 113 L Ed2d 622* ; *see, e.g., Contraves Inc. v. McDonnell Douglas Corp. (MD Fla 1995) 889 F Supp 470, 472* (unfair inconvenience to nonparties, such as witnesses)].

2.56[4] Comparing Mandatory and Permissive Forum Selection Clauses.

2.56[4][a] Mandatory Forum Selection Clauses. A mandatory forum selection clause designates the exclusive forum in which an action on the contract must be brought [*Docksider, Ltd. v. Sea Tech. Ltd. (9th Cir 1989) 875 F2d 762, 764*].

Compared to a permissive forum selection clause, a challenge to venue of an action filed in the forum designated by a mandatory forum selection clause will not be successful unless the clause is fundamentally unfair [*Carnival Cruise Lines v. Shute (1991) 499 US 585, 590-594, 111 S Ct 1522, 113 L Ed2d 622*].

Cross Reference:

See *§ 2.56[4][b]*].

2.56[4][b] Permissive Forum Selection Clause. A permissive forum selection clause provides that a particular forum will have jurisdiction for any action on the contract, but does not state that such jurisdiction is exclusive [*see Hunt Wesson Foods, Inc. v. Supreme Oil Co. (9th Cir 1987) 817 F2d 75, 77*].

Compared to a mandatory forum selection clause, an action brought in a forum designated in a permissive forum selection clause may be successfully challenged on the basis of convenience to the parties and witnesses [*Hunt Wesson Foods, Inc. v. Supreme Oil Co. (9th Cir 1987) 817 F2d 75, 77*].

Cross Reference:

See *§ 2.56[4][a]*.

2.56[4][c] Dismissal Based on Forum Selection Clause. Defendants may seek dismissal of a case that has been filed in a court not named in a forum selection clause by:

- Dismissal sought pursuant to a *Fed R Civ P 12(b)(1)* motion for lack of subject matter jurisdiction [*see AVC Nederland B.V. v. Atrium Inv. P'ship (2d Cir 1984) 740 F2d 148, 152*].

- Dismissal for improper venue under *Fed R Civ P 12(b)(3)* granted on the basis of a forum selection clause [*Argueta v. Banco Mexicano, SA (9th Cir 1996) 87 F3d 320, 324*].

Cross Reference:

Effect of forum selection clause, see 17 *Moore's Federal Practice, § 111.04* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewContracts LawContract Conditions & ProvisionsForum Selection Clauses

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2.57 Transferring Venue for Convenience.

2.57[1] Court May Transfer Action to Another Proper Venue. When a plaintiff brings an action in a district court with proper venue, the court may, upon proper motion, or consent, transfer the action to any other district (or division within a district) in which the action may have originally been brought provided the moving party establishes that the transfer promotes [*28 USC § 1404(a)*, *(b)*; *see Van Dusen v. Barrack (1964) 376 US 612, 634, 84 S Ct 805, 11 L Ed2d 945*]:

- The convenience of the parties and witnesses; and
- The interest of justice.

The court may also order such a transfer *sua sponte* [*see* Dudash v. Varnell Struck & Assocs. (ND Cal 2004) 2004 US Dist LEXIS 24872, at *12].

2.57[2] Factors Considered. When considering a Section 1404(a) convenience transfer motion, in addition to determining that the transferee court is one in which the action "might have been brought", the court must determine that transfer of the action will accomplish the following [*28 USC § 1404(a)*]:

- Enhance the convenience of the parties;
- Enhance the convenience of the witnesses; and

Strategic Point:

Determining the convenience of witnesses is not merely a "head count," but includes consideration of the importance of each witness--including non-party witnesses outside the scope of the court's subpoena power--and the geographic location of any witnesses likely to testify [*Costco Wholesale Corp. v. Liberty Mutual Ins. Co. (SD Cal 2007) 472 F*

Supp2d 1183, 1193-1194)]. Convenience of counsel is irrelevant to a Section 1404(a) analysis [*Costco Wholesale Corp. v. Liberty Mutual Ins. Co. (SD Cal 2007) 472 F Supp2d 1183, 1195-1196*].

- Be in the interest of justice.

In addition to these three factors expressly set forth in the transfer statute, the courts consider a variety of additional factors thought to have a bearing on the determination, including:

- The plaintiff's original choice of forum [*Jones v. GNC Franchising, Inc. (9th Cir 2000) 211 F3d 495, 498 , cert. denied, 531 US 928 (2000)* ; *Decker Coal Co. v. Commonwealth Edison Co. (9th Cir 1986) 805 F2d 834, 843*]; however, the plaintiff's choice is given less deference when it has little connection to the action [*Saleh v. Titan Corp. (SD Cal 2005) 361 F Supp2d 1152, 1156-1157*].

- Where the events at issue in the lawsuit ("the operative events") took place [*Chedid v. Boardwalk Regency Corp. (ED Va 1991) 756 F Supp 941, 944* (transfer to site of accident)].

- The comparative availability of compulsory process to compel the attendance of unwilling witnesses [*Saleh v. Titan Corp. (SD Cal 2005) 361 F Supp2d 1152, 1165-1166*].

- The location of the physical evidence [*In re Warrick (2d Cir 1995) 70 F3d 736, 741*].

- The relative court congestion in the two forums [*Parsons v. Chesapeake & O. Ry. Co. (1963) 375 US 71, 73, 84 S Ct 185, 186, 11 L Ed2d 137* (condition of transferor court's docket is legitimate consideration in transfer analysis)].

- The relative familiarity of the courts with the applicable law [*see Amazon.com v. Cendant Corp. (WD Wash 2005) 404 F Supp2d 1256, 1261-1262* (when case involved complex technological issues, litigation of related case in Delaware weighed strongly in favor of transfer to that forum)

- Existence of forum selection clause [*see Argueta v. Banco Mexicano, S.A. (9th Cir 1996) 87 F3d 320, 325*].

No individual factor is determinative. The court has discretion to weigh each factor to reach a fair result, although plaintiff's choice of forum may be accorded significant weight [*see Lou v. Belzberg (9th Cir 1987) 834 F2d 730, 739 , cert. denied, 485 US 993 (1988)* (fortuitous choice given less weight; shareholder derivative action); *Saleh v. Titan Corp. (SD Cal 2005) 361 F Supp2d 1152, 1159* (plaintiff's choice not entitled to deference when it had no substantial connection to class action and plaintiffs were foreign residents)], and the convenience of non-party witnesses is an important factor [*Saleh v. Titan Corp. (SD Cal 2005) 361 F Supp2d 1152, 1165* (convenience of witnesses factor weighed heavily in favor of transfer)].

Cross Reference:

Factors considered, see 17 *Moore's Federal Practice, § 111.13* (Matthew Bender 3d ed.).

2.57[3] Standing to Move for Convenience Transfer.

2.57[3][a] Defendant. The defendant's motion to transfer venue should establish, by declaration or affidavit, that the proposed transferee forum is more convenient based on the relevant factors and the specific facts of the case [*see Anglo Am. Ins. Group, PLC v. Calfed, Inc. (SDNY 1996) 916 F Supp 1324, 1327*].

Warning:

A court may, on its own motion, transfer an action based on convenience and interest of justice after giving the parties notice and an opportunity to be heard [*see Ferens v. John Deere Co. (1990) 494 US 516, 530, 110 S Ct 1274, 108 L Ed2d 443*].

2.57[3][b] Plaintiff. A plaintiff may move to change venue but may be required to show that circumstances have changed since the action was originally filed, or that the transfer is in the interest of justice [*Ferens v. John Deere Co. (1990) 494 US 516, 524, 110 S Ct 1274, 108 L Ed2d 443*].

2.57[4] Time for Moving for Transfer. The defendant should move for a transfer either before or with the answer. If the defendant becomes aware of circumstances supporting a convenience transfer after answering, he or she should move with reasonable promptness after factors supporting transfer become evident [*Vaz Borralho v. Keydril Co. (5th Cir 1983) 696 F2d 379, 386-387*]. Any delay should be explained.

No limit applies to restrict the time for bringing a motion for convenience transfer. A motion for convenience transfer will not be denied solely because it is filed after the pretrial phase is well under way [*see United States Fid. & Guar. Co. v. Republic Drug Co. (EDNY 1992) 800 F Supp 1076, 1081*]. However, delay is a factor in determining the propriety of transfer [*see Moore v. Telfon Comms. Corp. (9th Cir 1978) 589 F2d 959, 968* (court properly considered six year delay in seeking transfer); *see also Allen v. Scribner (9th Cir 1987) 812 F2d 426, 436-437*].

Cross Reference:

Time for § 1404(a) motion to transfer, see 17 *Moore's Federal Practice, § 111.17* (Matthew Bender 3d ed.).

2.57[5] Transferor Must Have Subject Matter Jurisdiction. To transfer an action under the convenience transfer statute, the transferor court must ordinarily have subject matter jurisdiction over the action [*see Bacik v. Peek (ND Ohio 1993) 888 F Supp 1405, 1413*]. A court may grant a transfer on the basis of convenience even if the original court does not have personal jurisdiction over the defendant [*see Corke v. Sameiet M.S. Song of Norway (2d Cir 1978) 572 F2d 77, 80*].

Strategic Point:

If the court lacks subject matter jurisdiction because a federal statute vests exclusive jurisdiction over a particular category of action or appeal in another federal court, transfer to that court may be available under another federal transfer statute [*see 28 USC § 1631*].

2.57[6] Transferee Court Must Have Proper Venue, Subject Matter Jurisdiction, and Personal Jurisdiction. The proposed transferee court must have proper venue under applicable venue statutes at the time the action was originally filed [*see Hoffman v. Blaski (1960) 363 US 335, 343-344, 80 S Ct 1084, 4 L Ed2d 1254*]. The transferee court must also have subject matter jurisdiction [*see Packer v. Kaiser Found. Health Plan (DDC 1989) 728 F Supp 8, 11*].

The transferee court's right to exercise personal jurisdiction must exist independently of the defendant's consent to jurisdiction as part of the transfer motion [*Hoffman v. Blaski (1960) 363 US 335, 342-343, 80 S Ct 1084, 4 L Ed2d 1254* ; *see Commercial Lighting Prods., Inc. v. United States Dist. Court (9th Cir 1976) 537 F2d 1078*].

2.57[7] Party Seeking Transfer Has Burden of Proving Transferee Forum Is Proper. The party seeking the transfer has the burden of proving that the action could have been brought originally in the transferee district [*see Volkswagen de Mexico, S.A. v. Germanischer Lloyd (SDNY 1991) 768 F Supp 1023, 1029*].

2.57[8] Waiving Improper Venue Does Not Preclude Seeking Convenience Transfer. The waiver of objections to improper venue does not preclude a defendant from moving for a convenience transfer [*see Hoffman v. Blaski (1960) 363 US 335, 342-343, 80 S Ct 1084, 4 L Ed2d 1254* ; *see also Haskel v. FPR Registry, Inc. (EDNY 1994) 862 F Supp 909, 915*].

2.57[9] Choice of Law After Convenience Transfer.

2.57[9][a] Diversity Cases. Following a transfer for convenience pursuant to *28 USC § 1404(a)* in a diversity case, the transferee court must ordinarily apply the law of the state of the transferor court, including applicable choice of law rules [*Van Dusen v. Barrack (1964) 376 US 612, 627, 84 S Ct 805, 11 L Ed2d 945* ; *see Ferens v. John Deere Co. (1990) 494 US 516, 524-527, 110 S Ct 1274, 108 L Ed2d 443* ; *see also International Bus. Mach. Corp. v. Bajorek (9th Cir 1999) 191 F3d 1033, 1037*]. However, if the transferor court (after a convenience transfer in a diversity case) lacked personal jurisdiction over the defendant, the transferee court must apply the law of the state of the transferee court [*see Muldoon v. Tropitone Furniture Co. (9th Cir 1993) 1 F3d 964, 967*].

2.57[9][b] Federal Question Cases. Following a transfer for convenience pursuant to *28 USC § 1404(a)* in a federal question case, the transferee court ordinarily applies the law as interpreted by its own circuit [*Wilborn v. Department of Health & Human Servs. (9th Cir 1994) 49 F3d 597, 600* (after § 1404(a) transfer, transferee court is bound only by its circuit's precedent); *see Newton v. Thomason (9th Cir 1994) 22 F3d 1455, 1460* (transferee court should apply own circuit precedent to federal claim under Lanham Act, not precedent that transferor court would have applied)].

2.57[9][c] Transfer Based on Forum Selection Clause. Following a transfer for convenience pursuant to *28 USC § 1404(a)* based on a forum selection clause, the transferee court should apply the law of the state in which it sits if the law of the state of the transferor court would have required dismissal of the action on the basis of the forum selection clause; however, if the transferor state would not have dismissed the action, the transferee court must apply the law of the transferor state [*Caribbean Wholesales & Serv. Corp. v. US JVC Corp. (SDNY 1994) 855 F Supp 627, 631*].

2.57[10] Review of Transfer Order. Review of a district court's decision to transfer a case, either within its own circuit or to a district court in another circuit, must be sought in the circuit of the transferor district court. If a case is transferred from an out-of-circuit district court, review is not available in the circuit of the transferee court [*Posnanski v. Gibney (9th Cir 2005) 421 F3d 977, 979*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersConvenience TransfersCivil ProcedureVenueForum Non ConveniensCivil ProcedureVenueMotions to TransferConvenience of PartiesCivil ProcedureVenueMotions to TransferConvenience of Witnesses

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2.58 Challenging Improper Venue.

2.58[1] Objection Must Be Timely. A defendant must object to improper venue in a timely and sufficient manner and must not act in a way that might be considered an implicit waiver and submission to the jurisdiction of the court [*see 28 USC § 1406(b)*; *King v. Russell (9th Cir 1992) 963 F2d 1301, 1305-1306 , cert. denied, 507 US 913 (1993)*].

2.58[2] Object in Answer or Motion to Dismiss. Improper venue can be asserted as a defense in an answer or raised in a motion to dismiss [*Fed R Civ P 12(b)(3)*]. If venue is improper, the court must either dismiss or, in the interests of justice, transfer the case to a district having proper venue [*see 28 USC § 1406(a)*].

Most courts hold that the plaintiff bears the burden of establishing proper venue; a prima facie showing of proper venue is sufficient to defeat a motion to dismiss [*Nissan Motor Co. v. Nissan Computer Corp. (CD Cal 2000) 89 F Supp2d 1154, 1161 , aff'd, 246 F3d 675 (9th Cir. 2000)*]

Cross Reference:

Improper venue, raising defenses, see Ch. 8, Answers and Responsive Motions Under Rule 12, *§ 8.19*.

If the defense of improper venue was not available when the first responsive pleading was filed, no waiver occurs and the defendant may raise the defense when it becomes available [*see Engel v. CBS, Inc. (CD Cal 1995) 886 F Supp 728, 730*].

When objecting to improper venue the defendant must specify the grounds for the objection [*see, e.g., Albany Ins. Co. v. Almacenadora Somex, S.A. (5th Cir 1993) 5 F3d 907, 909-910*].

2.58[3] Standing to Object to Improper Venue.

2.58[3][a] Defendant. Any defendant has standing to object to improper venue. One defendant may not move to dismiss or transfer an action on the ground that venue is improper as to a second defendant unless the second defendant is an indispensable party, in which case the court should dismiss or transfer the entire action [*see Camp v. Gress (1919) 250 US 308, 316, 39 S Ct 478, 63 L Ed 997* ; *King v. Russell (9th Cir 1992) 963 F2d 1301, 1305-1306 , cert.*

denied, 507 US 913 (1993) ; *Anrig v. Ringsby United (9th Cir 1978) 603 F2d 1319, 1324*].

Warning:

The court may on its own motion dismiss or transfer the action after giving the parties notice and an opportunity to be heard [*see Costlow v. Weeks (9th Cir 1986) 790 F2d 1486, 1488*]. The court may transfer an action even if the defendant only moves to dismiss the action for lack of proper venue [*Concession Consultants, Inc. v. Mirisch (2d Cir 1966) 355 F2d 369, 371 n3*]. However, the court may not dismiss an action once the defendant has waived objection to improper venue [*Concession Consultants, Inc. v. Mirisch (2d Cir 1966) 355 F2d 369, 371*].

2.58[3][b] Plaintiff. In general, a plaintiff waives his or her objection to improper venue when he or she files suit [*Olberding v. Illinois Cent. Ry. (1953) 346 US 338, 340, 74 S Ct 83, 98 L Ed 39*]. If a plaintiff in good faith mistakenly brings an action in a forum without proper venue, the plaintiff may move to transfer the action [*Manley v. Engram (11th Cir 1985) 755 F2d 1463, 1467-1471*].

2.58[4] Waiving Objection. A defendant may waive the right to object to improper venue in the following ways [*see 28 USC § 1406(b)*; *Fed R Civ P 12(h)*]:

- By failing to object in the initial response to the complaint [*Fed R Civ P 12(h)(1)*; *see King v. Russell (9th Cir 1992) 963 F2d 1301, 1305 , cert. denied, 507 US 913 (1993)* ; *but see Engel v. CBS, Inc. (CD Cal 1995) 886 F Supp 728, 730* (no waiver if improper venue defense unavailable when first response to pleading due)].

- By implicitly submitting to the jurisdiction of the court; for example, by making a motion other than one to dismiss [*see Manchester Knitted Fashions v. Amalgamated Cotton Garment & Allied Indus. Fund (1st Cir 1992) 967 F2d 688, 691*].

- By defaulting [*see, e.g., Hoffman v. Blaski (1960) 363 US 335, 343, 80 S Ct 1084, 4 L Ed2d 1254*]

Filing a counterclaim and participating in discovery does not constitute an abandonment of an objection to venue raised in the defendant's answer [*Rogen v. Memry Corp. (SDNY 1995) 886 F Supp 393, 396*].

Waiver of improper venue does not preclude a subsequent motion for a convenience transfer [*28 USC § 1404(a)*].

2.58[5] Dismissal Is Not Favored. If a plaintiff brings an action in a district or division that is improper under the applicable venue statutes, the court must, on proper motion, either [*28 USC § 1406(a)*; *see Johnson v. Payless Drug Stores NW, Inc. (9th Cir 1991) 950 F2d 586, 587-588*]:

- Dismiss the action.

- Transfer the action to a proper district or division if the transfer is in the interest of justice.

Dismissal pursuant to *28 USC § 1406(a)*, which is without prejudice, is not favored by the courts [*see, e.g., Friedman v. Revenue Mgmt. of N.Y., Inc. (SDNY 1993) 839 F Supp 203, 206*]. When an action is brought in a district where venue is improper, the court may transfer the action to a district where it could have originally been brought, even if the defendant has moved for a dismissal and not a transfer [*28 USC § 1406(a)*; *see Minnette v. Time Warner (2d Cir 1993) 997 F2d 1023, 1026*].

The court may dismiss without prejudice if transfer is not in the interests of justice [*see, e.g., King v. Russell (9th Cir 1992) 963 F2d 1301, 1304 , cert. denied, 507 US 913 (1993)* (plaintiff harassing defendant with litigation in remote

forum); *Wood v. Santa Barbara Chamber of Commerce, Inc. (9th Cir 1983) 705 F2d 1515, 1523 , cert. denied, 465 US 1081 (1984)* (forum shopping)].

2.58[6] Requirements for Transferor Court.

2.58[6][a] Transferor Must Have Subject Matter Jurisdiction. A court generally does not have the authority to transfer an action under *28 USC § 1406(a)* if the court lacks subject matter jurisdiction over the action, and must dismiss the action [*Grand Blanc Educ. Ass'n v. Grand Blanc Bd. of Educ. (6th Cir 1980) 624 F2d 47, 49*].

If the lack of subject matter jurisdiction is because a federal statute vests exclusive jurisdiction in a specified court, transfer to that court may be available under *28 USC § 1631*. For further discussion, see *2.61*.

2.58[6][b] Transferor Need Not Have Personal Jurisdiction. When the district court where the action was originally filed lacks personal jurisdiction over the defendants, the court may still transfer the action to a proper forum under Section 1406(a) [*Goldlawr, Inc. v. Heiman (1962) 369 US 463, 466, 82 S Ct 913, 8 L Ed2d 39* ; *see Cameron v. Thornburgh (DC Cir 1993) 983 F2d 253, 257*].

2.58[7] Requirements for Transferee Court.

2.58[7][a] Proper Venue Under Applicable Transfer Statutes. The requirements for jurisdiction in the transferee court must be satisfied at the time that the action was originally filed, unless it is an action against multiple defendants and the claims involving those for whom the requirements were not met at the time of the original filing have either been settled or dismissed [*Hoffman v. Blaski (1960) 363 US 335, 342-343, 80 S Ct 1084, 4 L Ed2d 1254*].

If one or more defendants for whom venue would be improper in the transferee district are only indirectly connected to the action, the court may sever the action as to those defendants and transfer the remainder of the action unless it would cause the same issues to be litigated in two places [*see Wyndham Assocs. v. Bintliff (2d Cir 1968) 398 F2d 614, 618 , cert. denied, 393 US 977 (1968)* ; *Sunbelt Corp. v. Noble, Denton & Assocs., Inc. (3d Cir 1993) 5 F3d 28, 33-34*].

2.58[7][b] Personal Jurisdiction Over Defendants Must Exist Independently. Proper venue and personal jurisdiction over the defendants must exist independently in the transferee court [*see Volkswagen de Mexico, S.A. v. Germanischer Lloyd (SDNY 1991) 768 F Supp 1023, 1028-1029*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersImproper Venue TransfersCivil ProcedureVenueMotions to TransferInterests of Justice

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2.59 Actions May Be Transferred to Courts With Exclusive Subject Matter Jurisdiction.

An action mistakenly filed in a federal court without subject matter jurisdiction may be transferred [*28 USC § 1631*; *Christianson v. Colt Indus. Operating Corp. (1988) 486 US 800, 818, 108 S Ct 2166, 100 L Ed2d 811* ; *Miller v. Hambrick (9th Cir 1990) 905 F2d 259, 262*]. This includes actions filed in District Court rather than in Bankruptcy Court, the Court of Federal Claims, or the Federal Circuit.

There is a split of authority as to whether Section 1631 permits transfer for other purposes. The Ninth Circuit has held that Section 1631 transfer is proper when the court lacked personal jurisdiction [*Miller v. Hambrick (9th Cir 1990) 905 F2d 259, 262*], proper venue [*see International Bhd. of Elec. Workers v. I.C.C. (7th Cir 1987) 832 F2d 91, 92*], or in rem admiralty jurisdiction [*United States v. American River Transp. Inc. (CD Ill 1993) 150 FRD 587, 591*].

The transfer must be in the interests of justice, such as when the expiration of the statute of limitations precludes refiling [*Martin v. Nickels & Dimes, Inc. (D Haw 1992) 804 F Supp 83, 85-86*].

Cross Reference:

17 Moore's Federal Practice, see *§§ 111.50 -111.55* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive JurisdictionCivil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersGeneral Overview

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1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.60

2.60 Dismissal Under Doctrine of Forum Non Conveniens: Alternative Foreign Forum.

2.60[1] Procedure Is Used in Exceptional Circumstances. Forum non conveniens is a common law doctrine that permits a court to dismiss an action that is properly before it if both of the following requirements are met [*American Dredging Co. v. Miller (1994) 510 US 443, 447-448, 114 S Ct 981, 127 L Ed2d 285* ; *Dole Food Co. v. Watts (9th Cir 2002) 303 F3d 1104, 1118-1120*]:

- An adequate alternative forum exists in another country.
- The balance of the relevant private and public interest factors favors dismissal

Forum non conveniens is "an exceptional tool to be employed sparingly, [not a] ... doctrine that compels plaintiffs to choose the optimal forum for their claim." [*Ravelo Monegro v. Rosa (9th Cir 2000) 211 F3d 509, 514*].

If no adequate alternative forum exists, the court has no discretion to dismiss the action [*Ceramic Corp. of Am. v. Inka Mar. Corp. (9th Cir 1993) 1 F3d 947, 949* ; *Murray v. British Broad. Corp. (2d Cir 1996) 81 F3d 287, 292*].

A federal treaty may preclude the doctrine of forum non conveniens [*see, e.g., Hosaka v. United Airlines, Inc. (9th Cir 2002) 305 F3d 989, 994* (Warsaw Convention provides exclusive remedy for passengers injured in international travel)]. A treaty may also require greater deference to a foreign plaintiff's choice of forum [*see, e.g., Ioannidis/Riga v. M/V Sea Concert (D Or 2001) 132 F Supp2d 847, 861-862*]. See *2.60[5][b]* (deference to foreign plaintiff's choice of forum).

2.60[1A] Procedure May Justify Dismissal Without Resolving Jurisdictional Issues. A district court may dismiss an action based on forum non conveniens without resolving whether it has subject matter jurisdiction or personal jurisdiction, if the court determines, based on "considerations of convenience, fairness, and judicial economy," that a foreign tribunal is the more suitable arbiter of the merits of the case. [*Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp. (2007) 549 US 422, 127 S Ct 1184, 167 L Ed2d 15, 22, 26*].

Cross Reference:

Discussion of forum non conveniens, see 17 *Moore's Federal Practice, §§ 111.70 -111.78* (Matthew Bender 3d ed.).

2.60[2] Bringing Motion to Dismiss Under Doctrine of Forum Non Conveniens.

2.60[2][a] Motion Must Be Brought in Reasonable Time. A motion for dismissal on the grounds of forum non conveniens should be made within a reasonable time after the defendant becomes aware of the facts that form the basis for the motion [*see Lony v. E.I. Du Pont de Nemours & Co. (3d Cir 1991) 935 F2d 604, 607*].

Cross Reference:

Discussion of forum non conveniens, see 17 *Moore's Federal Practice, §§ 111.90 -111.91* (Matthew Bender 3d ed.).

2.60[2][b] Proving Dismissal Is Warranted. The party moving to dismiss based on forum non conveniens bears the burden of establishing [*American Dredging Co. v. Miller (1994) 510 US 443, 447-448, 114 S Ct 981, 127 L Ed2d 285* ; *Dole Food Co. v. Watts (9th Cir 2002) 303 F3d 1104, 1118-1120* ; *Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd. (9th Cir 1995) 61 F3d 696, 699*]:

- That an adequate alternative forum exists.
- That the balance of the relevant private and public interest factors favors dismissal.

Strategic Point:

This showing must overcome the great deference afforded plaintiffs because a showing of convenience by a party who has sued in his or her home forum will usually outweigh the inconvenience the defendant may have shown [*Contact Lumber Co. v. P.T. Moges Shipping Co. (9th Cir 1990) 918 F2d 1446, 1449*].

The applicable standard is whether the defendant has made a clear showing of facts that establish such oppression and vexation of the defendant as to be out of proportion to the plaintiff's convenience [*see Cheng v. Boeing Co. (9th Cir 1983) 708 F2d 1406, 1410 , cert. denied, 464 US 1017 (1983)*].

2.60[2][c] Claims May Be Separated. Although infrequently exercised, district courts have the authority to retain some claims and dismiss others pursuant to a motion for dismissal based on forum non conveniens [*see Scottish Air Int'l, Inc. v. British Caledonian Group, PLC (2d Cir 1996) 81 F3d 1224, 1234-1235*].

2.60[3] Determining Adequacy of Alternative Forum. Even if particular causes of action or certain desirable remedies are not available in a foreign forum, that forum will usually be adequate so long as: (1) it permits litigation of the subject matter and provides adequate procedural safeguards, and (2) the remedy available in the alternative forum is not so inadequate as to constitute no remedy at all [*Ceramic Corp. of Am. v. Inka Mar. Corp (9th Cir 1993) 1 F3d 947, 949*].

A foreign forum may be found to be adequate even if:

- The alternative forum has less favorable substantive law [*Piper Aircraft Co. v. Reyno (1981) 454 US 235, 254 n22, 102 S Ct 252, 70 L Ed2d 419* ; *see Gonzalez v. Chrysler Corp. (5th Cir 2002) 301 F3d 377, 380-383 , cert. denied, 538 US 1012 (2003)*].
- The alternative forum has less favorable procedural law [*Piper Aircraft Co. v. Reyno (1981) 454*

US 235, 254 n18, 102 S Ct 252, 70 L Ed2d 419 (stricter standards for treatment of claim for relief; less generous standard for award of attorney's fees); *see Lockman Found. v. Evangelical Alliance Mission (9th Cir 1991) 930 F2d 764, 768* (lack of jury trial and different discovery procedures)].

- The array of remedies in the alternative forum is less than in the federal forum [*Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd. (9th Cir 1995) 61 F3d 696, 703* ; *see, e.g., In re Air Crash Over the Taiwan Strait on May 25, 2002 (CD Cal 2004) 331 F Supp2d 1176, 1184-1185* (lack of strict product liability as claim for relief did not render Taiwan an inadequate forum)].

A foreign forum may be found to be inadequate if:

- The litigation cannot proceed [*Piper Aircraft Co. v. Reyno (1981) 454 US 235, 254 n22, 102 S Ct 252, 70 L Ed2d 419* ; *see Mercier v. Sheraton Int'l Inc. (1st Cir 1992) 981 F2d 1345, 1350* , *cert. denied, 508 US 912 (1993)*].

- The defendant is not amenable to service of process in the alternative forum, though the defendant can remedy this by submitting to personal jurisdiction [*see Leetsch v. Freedman (9th Cir 2001) 260 F3d 1100, 1103-1104* ; *see also Dole Food Co. v. Watts (9th Cir 2002) 303 F3d 1104, 1118-1119*].

- No remedy is available to the plaintiff [*see El-Fadl v. Central Bank of Jordan (DC Cir 1996) 75 F3d 668, 677-678* (absolute bar); *see also Ceramic Corp. of Am. v. Inka Mar. Corp. (9th Cir 1993) 1 F3d 947, 949-950* (automatic dismissal in foreign court)].

- The plaintiff fears retaliation if he or she goes to the alternative forum [*see Mujica v. Occidental Petroleum Corp. (CD Cal 2005) 381 F Supp2d 1134, 1143*].

- Egregious litigation delays exist in the alternative forum's judicial system [*see, e.g., Bhatnagar v. Surrendra Overseas Ltd. (3d Cir 1995) 52 F3d 1220, 1227-1229*].

- The plaintiff is unable to join a necessary third party in the alternative forum [*see In re Air Crash Disaster Near New Orleans (5th Cir 1987) 821 F2d 1147, 1168* , *vacated and remanded on other grounds sub nom. Pan Am. World Airways, Inc. v. Lopez (1989) 490 US 1032, 109 S Ct 1928, 104 L Ed2d 400*].

A foreign forum is rarely inadequate [Tuazon v. R.J. Reynolds Tobacco Co. (9th Cir 2006) 433 F3d 1163, 1178-1180; *Lueck v. Sundstrand Corp. (9th Cir 2001) 236 F3d 1137, 1143*]. When the court has doubts about the adequacy of the foreign forum, the court should condition dismissal on the foreign court's acceptance of the case [*Leetsch v. Freedman (9th Cir 2001) 260 F3d 1100, 1103-1104*].

2.60[4] Determining Convenience of Parties: Public and Private Interests Must Be Balanced. Once the adequacy of an alternative foreign forum has been established, the court must balance the private and public interests to determine whether the convenience of the parties and the ends of justice would best be served by dismissing the action [*Lueck v. Sundstrand Corp. (9th Cir 2001) 236 F3d 1137, 1145-1147*].

The private interest factors that the court must weigh in considering whether to dismiss an action on forum non conveniens grounds include the following [*see Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd. (9th Cir 1995) 61 F3d 696, 703*]:

- The relative ease of access to sources of proof [*see Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd. (9th Cir 1995) 61 F3d 696, 703* ; *In re* Air Crash Over the Taiwan Strait on May 25, 2002 *(CD Cal*

2004) 331 F Supp2d 1176, 1194-1197].

- The relative ability of the forums to compel the attendance of significant unwilling witnesses at trial [*see, e.g., Mujica v. Occidental Petroleum Corp. (CD Cal 2005) 381 F Supp2d 1134, 1150-1152* ; *In re* Air Crash over the Taiwan Strait on May 25, 2002 *(CD Cal 2004) 331 F Supp2d 1176, 1197-1200*].

- The defendant's inability to implead a necessary third party [*see Allstate Life Ins. Co. v. Linter Group, Ltd. (2d Cir 1993) 994 F2d 996, 1002 , cert. denied, 510 US 945 (1993)*].

- The relative cost of obtaining the presence of willing witnesses [*see Blanco v. Banco Indus. de Venezuela, S.A. (2d Cir 1993) 997 F2d 974, 982*].

- The financial hardship to the plaintiff from having to bring the action in the alternative forum [*Murray v. British Broad. Corp. (2d Cir 1996) 81 F3d 287, 292-293* ; *but see In re Air Crash Over the Taiwan Strait on May 25, 2002 (CD Cal 2004) 331 F Supp2d 1176, 1201* (potential cost of translation services, unavailability of pretrial discovery and alternative dispute resolution services, and scarcity of contingent fee representation outweighed by ease of access to proof, amenability of witnesses to compulsory process, and lower cost of bringing willing witnesses to trial)].

- The location of the defendant's assets affecting the ability of the plaintiff to enforce a judgment [*see Baumgart v. Fairchild Aircraft Corp. (5th Cir 1993) 981 F2d 824, 836 n13 , cert. denied, 508 US 973 (1993)*].

The public interest factors that the court must weigh in considering whether to dismiss an action on forum non conveniens grounds include the following [*see Piper Aircraft Co. v. Reyno (1981) 454 US 235, 241, 102 S Ct 252, 70 L Ed2d 419* ; *see also Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd. (9th Cir 1995) 61 F3d 696, 703*]:

- The congestion of the district court contemplating dismissal [*see Piper Aircraft Co. v. Reyno (1981) 454 US 235, 241, 102 S Ct 252, 70 L Ed2d 419*].

- The interest in resolving a local controversy in a local forum and the burden of jury duty upon those citizens with less of an interest [*see Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd. (9th Cir 1995) 61 F3d 696, 704* ; *In re* Air Crash Over the Taiwan Strait on May 25, 2002 *(CD Cal 2004) 331 F Supp2d 1176, 1203-1204* (jurisdiction most closely associated with crash in Taiwan of aircraft operated by Taiwanese airline is Taiwan)].

- The likelihood that the district court will have to apply foreign law [*Scottish Air Int'l, Inc. v. British Caledonian Group, PLC (2d Cir 1996) 81 F3d 1224, 1234-1235*].

2.60[5] Deference Is Given to Plaintiff's Choice of Forum.

2.60[5][a] American Citizen or Resident As Plaintiff. When the plaintiff is an American citizen or resident, federal courts give the plaintiff's choice of forum significant deference [Tuazon v. R.J. Reynolds Tobacco Co. (9th Cir 2006) 433 F3d 1163, 1178].

2.60[5][b] Foreign Plaintiff. A court ordinarily gives a foreign plaintiff less deference when determining whether to dismiss an action based on forum non conveniens grounds [*see Ravelo Monegro v. Rosa (9th Cir 2000) 211 F3d 509, 513-514 , cert. denied, 531 US 1112 (2001)*]. This rule is based on an assumption that a United States forum is not the most convenient forum for a foreign plaintiff [*Piper Aircraft Co. v. Reyno (1981) 454 US 235, 255-256, 102 S Ct 252, 70 L Ed2d 419*].

To successfully move for a forum non conveniens dismissal, the defendant must overcome the presumption in favor of the plaintiff's choice of forum [*see Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd. (9th Cir 1995) 61 F3d 696, 698-699* ; *see also R. Maganlal & Co. v. M.G. Chem. Co. (2d Cir 1991) 942 F2d 164, 168*].

2.60[6] Exemptions for Special Venue Provisions. The doctrine of forum non conveniens does not apply to actions arising under certain federal statutes that have special venue provisions, if there is some indication that Congress intended to reject the application of the doctrine with respect to those actions [*see Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd. (9th Cir 1995) 61 F3d 696, 700*].

2.60[7] Effect of Forum Selection Clauses. When an action is brought in a United States district court contrary to a mandatory forum selection clause, normal forum non conveniens analysis does not apply. Rather, the forum selection clause ordinarily controls, absent a strong showing that it should not be enforced [*M/S Bremen v. Zapata Off-Shore Co. (1972) 407 US 1, 15, 92 S Ct 1907, 32 L Ed2d 513*].

When the forum selection clause is permissive, regular forum non conveniens analysis applies [*Blanco v. Banco Indus. de Venezuela, S.A. (2d Cir 1993) 997 F2d 974, 979-980*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueForum Non Conveniens

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Kendall, Seeborg, Shartsis, Smith

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Unit 2 First Steps
CHAPTER 2 Determining Forum (Jurisdiction and Venue)
VII. ANALYZING MULTIDISTRICT LITIGATION

1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.61

2.61 CHECKLIST: Multidistrict Litigation.

The following checklist serves as a guide for determining whether the Multidistrict Litigation statute applies to a particular action. If the statute applies, the checklist helps determine which procedure must be followed. Thorough review of the Multidistrict Litigation Rules is essential.

☐ Determine whether the statute applies. The multidistrict litigation statute authorizes the Judicial Panel on Multidistrict Litigation to transfer to a single district court for coordination and consolidation the pretrial proceedings of civil actions pending in different judicial districts if:

- ○ The actions involve one or more common questions of fact;
- ○ Transfer would provide for the convenience of the parties and witnesses; and
- ○ Transfer would promote the just and efficient conduct of the actions.

Discussion:
See *§ 2.62*

☐ Review the Multidistrict Litigation Rules thoroughly, particularly with respect to:

- ○ Form of papers and proof of service.
- ○ All requests for action by written motions.
- ○ Hearings.

- ○ Tag-Along actions.
- ○ Remands.

Discussion:
See *§§ 2.63*, *2.65*, *2.68*, *2.70*, *2.73*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMultidistrict LitigationCivil ProcedureVenueMultiparty LitigationCivil ProcedurePretrial MattersConsolidation of Actions

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2.62 Understanding Multidistrict Litigation Procedure.

2.62[1] Multidistrict Litigation Statute. The Judicial Panel on Multidistrict Litigation is authorized to transfer to a single district court for coordination and consolidation the pretrial proceedings of civil actions pending in different judicial districts if all of the following requirements are met [*28 USC § 1407*; *see In re Cessna Aircraft Distributorship Antitrust Litig. (JPML 1978) 460 F Supp 159, 161-162* ; *In re Women's Clothing Antitrust Litig. (JPML 1978) 455 F Supp 1388, 1390-1391*]:

- The proceedings involve one or more common questions of fact [*see In re Aircraft Accident at Barrow (JPML 1979) 474 F Supp 996, 999* ; *In re Mutual Fund Sales Antitrust Litig. (JPML 1973) 361 F Supp 638, 640*].

- Transfer would provide for the convenience of the parties and witnesses [*see In re Vernitron Sec. Litig. (JPML 1978) 462 F Supp 391, 393-394*].

- Transfer would promote the just and efficient conduct of the actions [*see In re Food Lion, Inc. (4th Cir 1996) 73 F3d 528, 532* ; *In re Air Crash Disaster Near Chicago (JPML 1979) 476 F Supp 445, 447*].

Strategic Point:

For purposes of transfer under the Multidistrict Litigation statute, the term "civil action" is given the broadest interpretation and encompasses any action that is not a criminal action, is pending in federal district court, and is a suit of a civil nature [*In re* Cintas Corp. Overtime Pay Arbitration Litigation (JPML 2006) 444 F Supp2d 1353, 1355 (motions to compel arbitration were "civil actions" subject to transfer)].

A transferee court may not hear the trial of a case that has been transferred to it for "coordinated or consolidated" pretrial proceedings by the Judicial Panel on Multidistrict Litigation. Specifically, a transferee court lacks authority to

entertain a *28 USC § 1404(a)* transfer motion to keep the case for trial [*Lexecon v. Milberg, Weiss, Bershad, Hynes & Lerach (1998) 523 US 26, 40-41, 118 S Ct 956, 140 L Ed2d 62*].

2.62[2] Transferring Actions. A transfer proceeding may be initiated by a motion filed with the panel or by the panel itself [*28 USC § 1407(c)*]. After notice to the affected parties, a hearing is held to determine whether a transfer should be ordered [*28 USC § 1407(c)*].

A case may be transferred only if the transferor court has subject-matter jurisdiction over the action [*see Glasstech, Inc. v. AB Kyro OY (Fed Cir 1985) 769 F2d 1574, 1576-1577*].

The panel may transfer to any district, despite personal jurisdiction objections [*28 USC § 1407*; *see In re Ivy (2d Cir 1990) 901 F2d 7, 9*]. Transfer to any district is permissible and does not violate the due process minimum contacts test because the question is whether the parties had minimum contacts within the United States as a whole [*see Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co. (1987) 484 US 97, 111, 108 S Ct 404, 98 L Ed2d 415*].

2.62[3] Factors Considered in Determining Transferee District. In determining the district to which the actions should be transferred, the panel may assess the following factors:

- The defendants' common location [*see In re "Factor VIII or IX Concentrate Blood Prods." Liab. Litig. (JPML 1993) 853 F Supp 454, 455*].

- The location of documents and witnesses necessary to the actions [*see In re Air Crash Disaster Near Coolidge, Ariz. on May 6, 1971 (JPML 1973) 362 F Supp 572, 573*].

- The centrality of the location for the convenience of the parties and witnesses [*see In re Wheat Farmers Antitrust Class Action Litig. (JPML1973) 366 F Supp 1087, 1088*].

- The district in which the broader-based and earliest actions were filed [*see In re Regents of the Univ. of Cal. (Fed Cir 1992) 964 F2d 1128, 1136*].

- The district that has the most cases pending [*see In re Republic National-Realty Equities Sec. Litig. (JPML 1974) 382 F Supp 1403, 1407*].

- The district in which a significant defendant has a bankruptcy pending [*see In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig. (JPML 1990) 130 FRD 475, 476*].

- The congestion of the potential transferee forum's docket [*see In re Peruvian Rd. Litig. (JPML 1974) 380 F Supp 796, 798*].

- Which judge or judges are most familiar with the issues involved [*see In re Plywood Antitrust Litig. (JPML 1974) 376 F Supp 1405, 1407*].

As few as two cases may warrant transfer under the multidistrict litigation transfer statute. However, when the number of cases proposed to be transferred is relatively small, an important factor in determining whether to transfer is the complexity of the issues involved [*see In re Clark Oil & Ref. Corp. Antitrust Litig. (JPML 1973) 364 F Supp 458, 458* ; *In re Ortho Pharm. "Lippes Loop" Prods. Liab. Litig. (JPML 1979) 447 F Supp 1073, 1074* ; *In re Magic Marker Sec. Litig. (JPML 1979) 470 F Supp 862, 865*].

2.62[4] Claims May Be Separated. The panel has the authority to separate any claim, crossclaim, counterclaim or third-party claim from the rest of the action and remand the separate part [*28 USC § 1407(a)*; *see In re 1980 Decennial*

Census Adjustment Litig. (JPML 1981) 506 F Supp 648, 650-651 ; *In re Uranium Indus. Antitrust Litig. (JPML 1979) 466 F Supp 958, 964*]. The panel has no authority to separate issues [*see In re A.H. Robbins Co. "Dalkon Shield" IUD Prod. Liab. Litig. (JPML 1985) 610 F Supp 1099, 1101*].

2.62[5] Remanding Actions. The panel must transfer to the transferor court actions that have not been terminated in the transferee court at or before the pre-trial proceedings are concluded [*28 USC § 1407(a)*].

A transferee court may not hear the trial of a case that has been transferred to it for "coordinated or consolidated" pretrial proceedings by the Judicial Panel on Multidistrict Litigation [*Lexecon v. Milberg Weiss Bershad Hynes & Lerach (1998) 523 US 26, 40-41, 118 S Ct 956, 140 L Ed2d 62*].

2.62[6] Reviewing Transfer Orders. A transfer order issued by the Panel is reviewable only by extraordinary writ issued by the court of appeals. An order denying transfer is not appealable [*28 USC § 1407(e)*; *see 28 USC § 1651(a)*; *see, e.g., In re New York City Mun. Sec. Litig. (2d Cir 1978) 572 F2d 49, 51*].

A petition for writ of mandamus to review an order of the panel must be filed in the court of appeals having jurisdiction over the district in which the hearing on transfer is to be held [*28 USC § 1407(e)*].

Cross References:

Form of motion for multidistrict litigation treatment, see *§ 2.93*.

17 Moore's Federal Practice, see *§§ 112.02*, *112.04* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMultidistrict LitigationCivil ProcedureVenueMultiparty Litigation

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2.63 Practicing Before Judicial Panel on Multidistrict Litigation.

2.63[1] Rules of Procedure. The panel has prescribed its own rules of procedure [*28 USC § 1407(f)*; *Multidistrict R 1.1-16.1*].

2.63[2] Admission to Practice Before Panel and in Transferor District. Every member in good standing of the Bar of any district court may practice law before the panel. Further, any attorney of record in any action transferred to another district may continue to represent his or her client in any district court to which the action is transferred [*Multidistrict Rule 1.4*].

2.63[3] Filing Papers With Panel.

2.63[3][a] File in Washington, D.C. Papers filed with the panel must be filed with the Clerk of the Panel at Clerk of the Panel, Judicial Panel on Multidistrict Litigation, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Room G-255, North Lobby, Washington, D.C. 20002-8004 [Multidistrict Rule 5.11].

2.63[3][b] Originals and Copies Must Be Filed. An original and four copies of all papers must be submitted for filing with the Clerk of the Panel except only the original of the following documents need be filed [Multidistrict Rule 5.12(a)]:

- Proof of service.
- Notice of appearance.
- Status notice.
- Notice of opposition.
- Notice of related action.

- Application for an extension of time.
- Notice of presentation or waiver of oral argument.

The text of Rule 5.12(a) actually requires 11 copies, not four, but pursuant to an order filed April 19, 2005, Rule 5.12(a) was "partially suspended insofar as papers submitted for filing requiring an original and eleven copies shall be reduced to four copies along with an original."

When only an original document needs to be filed, the document may be faxed to the panel office with the prior approval of the Clerk [Multidistrict Rule 5.12(d)].

A copy of a motion for transfer filed with the panel must also be filed in each district court that will be affected by the motion. Copies of a motion for remand must be filed in the transferee district court in which any action affected by the motion is pending [Multidistrict Rule 5.12(c)].

2.63[3][c] Content and Format Must Adhere to Rule 7.1. Rule 7.1 prescribes the content and format of pleadings, including a limit of 20 pages for each brief [*Multidistrict Rule 7.1*].

2.63[3][d] Computer Disk Must Be Filed and May Be Served. Whenever an original paper and 11 copies are required to be submitted for filing to the Clerk of the Panel pursuant to Multidistrict Rule 5.12(a), and when a party is represented by counsel, one copy of that paper must also be submitted on a 31/2 inch disk in WordPerfect for Windows [Multidistrict Rule 5.13(a), (b)].

The disk must contain the entire paper exclusive of computer non-generated exhibits, and the disk label must include [Multidistrict Rule 5.13(a)]:

- "MDL #_____".
- An abbreviated version of the MDL descriptive title, or other appropriate descriptive title, if not yet designated by the panel.
- The identity of the type of paper being filed.
- The name of the counsel who signed the paper.
- The first named represented party on the paper.

Counsel may serve copies of the disk on the parties; however, a paper copy must also be served with the disk. The proof of service must indicate service of the paper in both paper and electronic format [Multidistrict Rule 5.13(b), (c)].

A party may be relieved from the requirement of filing an electronic version of the paper by submitting a written application for a waiver, in a timely manner in advance of submission of the paper. Any party seeking a waiver must certify to one of the following in the application [Multidistrict Rule 5.13(d)]:

- That compliance with the Rule would impose undue hardship.
- That the text of the paper is not available on disk.
- That other unusual circumstances preclude compliance with the requirement.

2.63[3][e] Proof of Service. All filed papers must include a proof of previous or simultaneous service on all other parties in all actions involved in the litigation and must be made as provided in *Fed R Civ P 5* and *6* [Multidistrict Rules 5.12(a), *5.2(a)*].

The proof of service must indicate the following [*Multidistrict Rule 5.2(a)*]:

- The complete name and address of each person served.
- The party represented by that person.
- Why any person a party named in a constituent complaint was not served.

If a party is not represented by counsel, the proof of service must indicate the name of the party and the party's last known address. Copies of the proof of service must be sent to each person included within the proof of service [*Multidistrict Rule 5.2(a)*].

The proof of service pertaining to a motion to transfer must certify that copies have been mailed or delivered to each district court in which an action is pending that will be affected by the motion. The proof of service pertaining to a motion for remand must certify that a copy of the motion has been mailed or otherwise delivered to the transferee district court in which any action affected by the motion is pending [*Multidistrict Rule 5.2(b)*].

Cross Reference:

Discussion of service, see Ch. 5, Formatting, Serving, and Filing Papers, *§§ 5.15 -5.23*.

2.63[4] Notice of Appearance Is Required Within 11 Days. Within 11 days of the filing of a motion to transfer, an order to show cause, or a conditional transfer order, each party or designated attorney must file a written notice of appearance. The notice must state the name and address of the attorney designated to receive service of all papers relating to the practice before the panel. Only one attorney may be designated by each party [*Multidistrict Rule 5.2(c)*].

Based on the notices of appearance, the Clerk will prepare a Panel Service List that must be used for service of all papers thereafter [Multidistrict Rule 5.2(d)].

Cross References:

Form of motion for multidistrict litigation treatment, see *§ 2.93*.

17 Moore's Federal Practice, see *§ 112.03* (Matthew Bender 3d ed.).

2.63[5] Action Must Be Requested by Written Motion. All requests for action by the panel must be made by written motion. Every motion must be accompanied by [*Multidistrict Rule 7.2(a)*]:

- A brief supporting the motion and setting forth:
- The background of the litigation.
- The factual and legal contentions of the movant in concisely stated separate portions of the brief with citations of applicable authority.
- A schedule setting forth:
- The complete, unshortened name of each action involved.

- The district court in which the action is pending.
- The civil action number of each action.
- The name of the judge assigned each action, if known.

Cross Reference:

Format and content requirements, see *§ 2.63[3][c]*.

2.63[6] Respond to Motion Within 20 Days. Once a motion is filed with the panel, all other parties must file a response within 20 days. If a party does not respond to the motion, that party is deemed to have acquiesced to the action requested in the motion [*Multidistrict Rule 7.2(c)*]. Within 5 days after the end of the 20-day response period, the moving party may file a single brief in reply to any opposition [*Multidistrict Rule 7.2(d)*].

Responses to allegations must be made in numbered paragraphs corresponding to the number of the paragraph of the motion to which the responsive paragraph is directed. Each responsive paragraph must admit or deny wholly or in part the allegation of the motion and contain the respondent's version of the subject matter when the allegation is not wholly admitted [*Multidistrict Rule 7.1(b)*].

2.63[7] Respond to Orders to Show Cause Within 20 Days. When the panel initiates transfer proceedings, the Clerk will serve a show cause order on all parties involved directing them to show cause why the action or actions should not be transferred for coordinated or consolidated pretrial proceedings [*Multidistrict Rule 7.3(a)*].

Any party or counsel served with an order to show cause must notify the panel of any other federal district court actions related to the litigation encompassed by the show cause order. This notification must be made for additional actions pending at the time of the issuance of the show cause order, and whenever new actions are filed [*Multidistrict Rule 7.3(a)*].

Any party may file a response to the show cause order within 20 days of filing unless the order provides otherwise. Failure to respond is treated as a party's acquiescence to the action contemplated in the order [*Multidistrict Rule 7.3(b)*].

2.63[8] Corporate Disclosure Statement Must Be Filed. Any nongovernmental corporate party to a matter before the panel must file a statement identifying all its parent corporations and listing any publicly held company that owns 10 percent or more of the party's stock [*Multidistrict Rule 5.3(a)*]. The statement must be filed within 11 days of the filing of a motion to transfer or remand, an order to show cause, or a motion to vacate a conditional transfer order or a conditional remand order [*Multidistrict Rule 5.3(b)*].

Once a party files a corporate disclosure statement, the party must update the statement to reflect any change in the information on the statement within 11 days of the filing of any subsequent motion to transfer or remand, order to show cause, or motion to vacate a conditional transfer order or a conditional remand order [*Multidistrict Rule 5.3(c)*].

Cross Reference:

17 Moore's Federal Practice, see *§ 112.03* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMultidistrict LitigationCivil ProcedureVenueMultiparty Litigation

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2.64 Applying for Extension of Time.

An application to extend the time to file a pleading or perform an act required by the Rules of the Judicial Panel on Multidistrict Litigation must [*Multidistrict Rule 6.2*]:

- Be in writing.
- Request a specific number of additional days.

The Clerk of the Panel will evaluate the application [*Multidistrict Rule 6.2*]:

- In relation to the impact on the panel's calendar.
- On the basis of the reasons set forth in support of the application.

Only in exceptional circumstances will an extension of time be granted to file a notice of opposition to either a conditional transfer order or a conditional remand order [*Multidistrict Rule 6.2*; *see 2.92*].

Cross Reference:

17 Moore's Federal Practice, see *§ 112.03[7]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMultidistrict LitigationCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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2.65 Hearings.

2.65[1] Scheduling. Whenever an action to transfer cases for coordinated or consolidated pretrial proceedings, or to remand previously transferred cases, is being contemplated, the panel will specify the time, place and subject matter for a hearing and notify counsel of all parties involved [*28 USC § 1407(c)*; *Multidistrict Rule 16.1(a)*].

2.65[2] Hearing Sessions and Oral Argument. Each party filing a motion or a response to a motion or order of the panel under *Multidistrict Rules 7.2*, *7.3*, *7.4* or *7.6* may file a separate statement with the motion or response setting forth reasons why oral argument should, or should not, be heard [*Multidistrict Rule 16.1(b)*]. These statements are limited to one page [*Multidistrict Rule 16.1(b)*].

No transfer or remand determination regarding any action pending in the district court will be made by the panel without a hearing if any party timely opposes the transfer or remand unless the panel determines that either of the following is true [*Multidistrict Rule 16.1(c)*]:

- The dispositive issues have been authoritatively decided.

- The facts and legal arguments are adequately presented in the briefs and the record, and the decisional process would not be significantly aided by oral argument.

Unless the panel orders to the contrary, all other matters, such as a motion for reconsideration, will be considered and determined on the basis of the papers filed [*Multidistrict Rule 16.1(c)*].

If oral argument is scheduled, the Clerk of the Panel may require counsel for all parties who wish to make or waive oral argument to file and serve notice to that effect within a stated time in conformity with Multidistrict Rules 5.12 and *5.2* [*Multidistrict Rule 16.1(d)*; *see* Multidistrict Rules 5.12, *5.2*]. Failure to file and serve the notice is deemed a waiver [*Multidistrict Rule 16.1(d)*]. If oral argument is scheduled but not attended by a party, the matter will not be rescheduled and that party's position will be treated as if submitted on the papers [*Multidistrict Rule 16.1(d)*].

2.65[3] Appearances for Oral Argument. Except for leave by the panel on a showing of good cause, only parties

that have filed a motion or written response to a motion will be allowed to appear and present oral argument [*Multidistrict Rule 16.1(e)*].

All counsel supporting transfer or remand and all counsel opposing transfer or remand must confer separately before the hearing to organize their arguments and select representatives to present all views without duplication [*Multidistrict Rule 16.1(f)*].

Unless otherwise ordered by the panel, a maximum of 20 minutes is allotted for oral argument in each matter. The time will be equally divided between the varying view points [*Multidistrict Rule 16.1(g)*].

Hearings at which oral testimony is presented are discouraged; oral testimony is received only on notice, motion, and order of the panel [*Multidistrict Rule 16.1(h)*].

Cross Reference:

17 Moore's Federal Practice, see *§ 112.03[4]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMultidistrict LitigationCivil ProcedurePretrial MattersGeneral Overview

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2.66 Governing Substantive Law.

In multidistrict litigation that has been transferred to a central forum for coordinated or consolidated pretrial proceedings, the transferee court must apply the substantive state law of the transferor district including its choice of law rules [*see In re Lou Levy & Sons Fashions (2d Cir 1993) 988 F2d 311, 313*].

In general, when a transferred claim arises under federal law the transferee court will apply the law of the transferee forum [*see In re Korean Air Lines Disaster of Sept. 1, 1983 (DC Cir 1987) 829 F2d 1171, 1176 , aff'd on other grounds sub nom. Chan v. Korean Air Lines, 490 US 122 (1989)*].

Cross Reference:

17 Moore's Federal Practice, see *§ 112.07[2]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMultidistrict LitigationCivil ProcedureFederal & State InterrelationshipsChoice of LawForum & Place

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2.67 Effect of Transfer Order.

A transfer (or remand) order is effective once it is filed with the transferee district court [*Multidistrict Rule 1.5*].

After transfer, the transferor court is divested of jurisdiction to decide pending matters [*see In re Plumbing Fixture Cases (JPML 1968) 298 F Supp 484, 495* ; *see also In re Joint E. & S. Dists. Asbestos Litig. (EDNY, SDNY 1993) 152 FRD 15, 17*]. The transferee judge may modify, expand, or vacate prior orders issued by the transferor courts and has authority to decide all pretrial motions [*see In re Plumbing Fixture Cases (JPML 1968) 298 F Supp 484, 489* ; *In re TMJ Implants Prods. Liab. Litig. (D Minn 1995) 872 F Supp 1019, 1024*].

Distinguish:

After the filing of a motion to transfer an action before the panel, but before an order issues, the district court in which the action is pending retains its jurisdiction to decide pretrial motions [*Multidistrict Rule 1.5*]. The district court has the discretion either to stay the action while the motion to transfer is pending or to reach the merits of the motion. For example, in deciding whether to reach the merits of a motion to remand, the court can first consider whether the jurisdictional issue appears factually or legally difficult. If it does, the court can determine whether identical or similar jurisdictional issues have been raised in other cases that have been or may be transferred. If both requirements are satisfied, a stay should issue [*see* Strong v. Merck & Co. (ND Cal 2005) 2005 US Dist LEXIS 2413, at *6-*9 ; *Conroy v. Fresh Del Monte Produce, Inc. (ND Cal 2004) 325 F Supp2d 1049, 1053*].

Cross Reference:

17 Moore's Federal Practice, see *§§ 112.04*, *112.06* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.68 Transferring Tag-Along Actions.

A "tag-along action" is a civil action pending in a district court and involving common questions of fact with actions previously transferred under the multidistrict litigation statute [*Multidistrict Rule 1.1*; *see also Multidistrict Rules 7.4*, *7.5*].

Whether the panel will transfer a tag-along action depends on whether the requirements for transfer under the multidistrict litigation statute are met. Because the panel has already made a determination to transfer actions involving "common questions of fact," it is likely that the panel will transfer the tag-along action [*see In re General Motors Class E Stock Buyout Sec. Litig. (JPML 1988) 696 F Supp 1546, 1546-1547* ; *In re Stirling Homex Corp. Sec. Litig. (JPML 1977) 442 F Supp 547, 548-550*].

Strategic Point:

Parties opposing the transfer of a claimed tag-along action may argue that an action is not suitable for transfer because the case is far along in discovery or that their case raises questions that are sufficiently distinct from those in the transferred actions [*see In re Four Seasons Sec. Laws Litig. (JPML 1973) 362 F Supp 574, 575*].

Cross References:

17 Moore's Federal Practice, see *§ 112.03[5]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.69 Terminating Action.

The transferee judge has the authority to decide all pretrial motions, including motions that may be dispositive of an action [*see In re "Agent Orange" Prod. Liab. Litig. (EDNY 1984) 597 F Supp 740, 751-752 , aff'd in part, rev'd in part on other grounds, 818 F2d 145 (2d Cir 1987) , cert. denied, 484 US 1004 (1987)*]. Actions terminated in the transferee court are not remanded to the transferor court. In this situation, the clerk of the transferee court notifies the panel of the termination and retains the original files and records unless otherwise directed [*Multidistrict Rule 7.6(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMultidistrict Litigation

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2.70 Remanding Action.

2.70[1] Requesting Remand. The panel will consider remand of each transferred action or any separable claim, crossclaim, counterclaim, or third-party claim at or before the conclusion of coordinated or consolidated pretrial proceedings [*Multidistrict Rule 7.6(c)*]:

- On motion of any party.
- At the suggestion of the transferee district court.
- On the panel's own initiative, by either:
- Entry of an order to show cause;
- A conditional remand order; or
- Other appropriate order.

The panel will remand an action before the completion of all pretrial proceedings only on a showing of good cause [*In re South Cent. States Bakery Prods. Antitrust Litig. (JPML 1978) 462 F Supp 388, 390* ; *see In re Integrated Res., Inc. Real Estate Ltd. P'ship Sec. Litig. (SDNY 1994) 851 F Supp 556, 562*].

The panel is ordinarily reluctant to order remand absent a suggestion of remand from the transferee district court [*Multidistrict Rule 7.6(d)*].

2.70[2] Severing Claims Before Remand. The panel may sever and remand claims, crossclaims, counterclaims or third-party claims in the interest of judicial economy [*see, e.g., In re IBM Peripheral EDP Devices Antitrust Litig. (JPML 1976) 407 F Supp 254, 255*].

2.70[3] Moving for Remand. If remand is sought by motion of a party, the motion must be accompanied by an

affidavit reciting the following [*Multidistrict Rule 7.6(d)*]:

- Whether the moving party has requested a suggestion of remand from the transferee district court; how the court responded to any request; and if no request was made, why.

- Whether all common discovery and other pretrial proceedings have been completed in the action sought to be remanded, and, if not, what remains to be done.

- Whether all orders of the transferee district court have been satisfactorily complied with, and, if not, what remains to be done.

- A copy of the transferee district court's final pretrial order, if that order has been entered.

2.70[4] Respond to Order to Show Cause Within 20 Days. When an order to show cause why an action or actions should not be remanded is entered, any party may file a response within 20 days of the filing of the order unless otherwise provided for in the order. Any party may file a reply brief limited to new matters within five days of the filing of a party's response to the order to show cause. The failure to respond to an order to show cause is treated as acquiescence to the remand [*Multidistrict Rule 7.6(e)*].

2.70[5] Authority of Transferor Court After Remand. After remand, the transferor judge has complete control of the action from the point of remand forward. However, the transferor judge is not permitted to modify orders issued by the transferee judge [*see In re Food Lion, Inc. (4th Cir 1996) 73 F3d 528, 532-533* ; *see also 28 USC § 1407*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMultidistrict LitigationCivil ProcedurePretrial MattersConferencesPretrial Orders

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2.71 Transferee Court Cannot Retain Action for Trial.

A transferee court may not hear the trial of a case that has been transferred to it for "coordinated or consolidated" pretrial proceedings by the Judicial Panel on Multidistrict Litigation. Specifically, a transferee court lacks authority to entertain a *28 USC § 1404(a)* transfer motion to keep the case for trial. Congress would have to amend the statute if it determined that multidistrict litigation cases should be consolidated for trial [*Lexecon v. Milberg Weiss Bershad Hynes & Lerach (1998) 523 US 26, 40-41, 118 S Ct 956, 140 L Ed2d 62*].

Cross Reference:

17 Moore's Federal Practice, see *§ 112.03[6]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMultidistrict Litigation

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2.72 Conditional Remand Orders.

2.72[1] Opposing Conditional Remand Orders. When the panel has been advised by the transferee district judge or otherwise that the pretrial proceedings are concluded or that remand is otherwise appropriate, the panel will issue a conditional remand order [*Multidistrict Rule 7.6(f)(i)*]. A conditional remand order does not become effective until filed with the transferee court [*Multidistrict Rule 7.6(f)(iv)*].

The Clerk must serve the order on each party, but wait 15 days to file the order with the transferee court to allow each party an opportunity to file a notice of opposition [*Multidistrict Rule 7.6(f)(iii)*].

If the Clerk receives a notice of opposition within the 15 days, the Clerk will not file the conditional remand order until further order of the panel [*Multidistrict Rule 7.6(f)(ii)*].

2.72[2] Timing of Opposition. On receipt of a conditional remand order, a party opposing remand must act within the following limits:

- 15 days from the issuance of the order to file a notice of opposition [*Multidistrict Rule 7.6(f)(ii)*].

- 15 days from the filing of its notice of opposition to file a motion to vacate the conditional remand order and supporting brief [*Multidistrict Rule 7.6(f)(iii)*].

If the opposing party fails to file a timely motion to vacate, the failure is treated as a withdrawal of the opposition and the Clerk will file the conditional remand order with the transferee district court [*Multidistrict Rule 7.6(f)(iii)*].

Cross Reference:

17 Moore's Federal Practice, see *§ 112.03[6]* (Matthew Bender 3d ed.).

Legal Topics:

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

Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMultidistrict LitigationCivil ProcedurePleading & PracticeMotion PracticeTime Limitations

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2.73 Designating Record After Remand Order.

When the parties receive a remand order from the Clerk, the parties must provide the clerk of the transferee court with the following [*Multidistrict Rule 7.6(g)*]:

- A designation of the contents of the record to be remanded, composed of those parts of the files and records necessary for all proceedings to be conducted following remand.

- Copies of any pleading or other matter filed to enable the clerk to comply with the order to remand.

Cross Reference:

17 Moore's Federal Practice, see *§ 112.03[6]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.74 CHECKLISTS: Analyzing Arbitration Requirements and Alternative Dispute Resolution (ADR) Options.

2.74[1] Initial Considerations.

☐ Determine if parties have entered into a pre-dispute arbitration agreement, either as part of an underlying contract between them or as a separate document.

Discussion:
See *§ 2.75[2]*

☐ If action concerning dispute has been filed in district court, and no pre-dispute arbitration agreement exists, review court annexed ADR options required or available for cases in litigation in the particular district.

Authority:
28 USC §§ 651-658

Discussion:
See *§ 2.75[1]*; Ch. 32, Court Annexed ADR

☐ If parties do not have pre-dispute arbitration agreement, consider contacting opposing party to agree to mediate or arbitrate dispute.

Discussion:
See *§ 2.75[3]*

☐ If parties have pre-dispute arbitration agreement, or are considering agreeing to arbitrate dispute:

○ Determine whether agreement is within scope of Federal Arbitration Act (FAA); and

○ Consider impact of FAA on decision to arbitrate dispute.

Authority:
9 USC §§ 1-16

Discussion:
See *§ 2.79*

☐ If agreement is within scope of FAA:

○ Determine if particular dispute is arbitrable under existing agreement, including potential statutory claims, if any; and

○ Consider whether court involvement may be required to determine arbitrability.

Discussion:
See *§§ 2.78*, *2.79*

2.74[2] Enforcing Arbitration Agreement.

☐ If court action is not pending, and arbitration of dispute pursuant to parties' agreement is desired, make demand for arbitration, in accordance with provisions of agreement.

Discussion:
See *§§ 2.77*, *2.80[1]*

☐ If court action concerning arbitrable dispute is pending, move to stay court action.

Authority:
9 USC § 3

Discussion:
See *§ 2.80[2]*

☐ If court action concerning arbitrable dispute is pending, or opposing party does not comply with demand for arbitration, move to compel arbitration.

Authority:
9 USC § 4

Discussion:
See *§ 2.80[3]*

2.74[3] Attacking Arbitration Agreement.

☐ If opposing party is requesting court to enforce arbitration agreement, consider available contract law defenses, distinguishing between defenses that may be raised against the underlying contract and defenses that affect the arbitration provision itself.

Discussion:
See *§ 2.81*

☐ To avoid arbitration of dispute, oppose enforcement of agreement by court on grounds that:

○ The entire contract between the parties that contains the arbitration agreement is void under state contract law; or

○ The arbitration provision itself is unenforceable under state contract law.

Discussion:
See *§ 2.81[3]*

☐ If arbitration agreement appears enforceable, determine whether argument can be made to court that opposing party waived the right to seek arbitration by showing:

○ Opposing party had knowledge of existing right to compel arbitration;

○ Opposing party engaged in actions inconsistent with that existing right; and

○ Party asserting existence of waiver suffered prejudice because of the waiving party's inconsistent acts.

Authority:
United Computer Sys., Inc. v. AT&T Corp. (9th Cir 2002) 298 F3d 756, 765

Discussion:
See *§ 2.82*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral Overview

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2.75 Options and Strategy.

2.75[1] Arbitration or Other ADR May Be Required or Available for Cases in Litigation. Federal district courts are required to devise, implement, and administer an alternative dispute resolution (ADR) program to be used in civil actions [*28 USC §§ 651-658*]. As a result, a civil suit filed in any of the district courts may be subject to referral for some type of ADR process during the course of litigation.

Each district in California has developed its own ADR program, which may include arbitration, early neutral evaluation, mediation, or settlement conferences.

Finding and Investigating ADR Practitioners Using Online Resources:

Many resources are available online for finding and investigating potential arbitrators, mediators, and neutrals. For example, helpful resources at *lexis.com* include:

- Legal tab> Reference> Biographies> Biographies.
  - Sample Search: To find biographical information about a particular ADR practitioner, try this NAME segment search of the Biographies file: *name (First Name/3 Last Name)*
- News & Business tab> Combined Sources> News, All (English, Full Text)
  - Sample Search: To find news articles about an ADR practitioner, search the News, All (English, Full Text) file using this format: *First Name/3 Last Name*

Cross References:

Discussion of court annexed ADR programs in the four California federal districts, see Ch. 32, Court

Annexed ADR.

Detailed discussion of advantages and limitations of various ADR procedures, 3 Moore's Federal Practice, see *§ 16.53* (Matthew Bender 3d ed.).

2.75[2] Arbitration, Instead of Litigation, May Be Required by Existing Pre-Dispute Agreement. Parties may agree, often as part of an underlying contract, to submit any disputes that might arise between them to arbitration instead of litigation [*see Wolsey, Ltd. v. Foodmaker, Inc. (9th Cir 1998) 144 F3d 1205, 1208*]. An agreement may provide for either binding arbitration, which results in a final decision without court litigation, or nonbinding arbitration, which attempts to resolve the dispute before going to court [*see Wolsey, Ltd. v. Foodmaker, Inc. (9th Cir 1998) 144 F3d 1205, 1208*].

If the parties to a dispute are also parties to a contract, counsel should review the contract to determine the existence and scope of any arbitration provision, and the arbitral forum to be used, if specified.

2.75[3] Parties May Agree to Mediate or Arbitrate After Dispute Arises. Arbitration is a dispute resolution process designed, at least in theory, to respond to the wishes of the parties more flexibly and expeditiously than the federal courts' uniform rules of procedure allow [*Kyocera Corp. v. Prudential-Bache Trade Servs., Inc. (9th Cir 2003) 341 F3d 987, 988*].

If no pre-dispute arbitration agreement exists between parties, the parties may nonetheless agree to mediate or arbitrate after a dispute has arisen [*see General Motors Corp. v. Pamela Equities Corp. (5th Cir 1998) 146 F3d 242, 246*].

Strategic Point:

Although seemingly more expeditious and less costly than filing a court action, a post-dispute agreement to engage in ADR, without court involvement, also has the potential for abuse by an opponent seeking delay. Any post-dispute agreement should be carefully drafted to address issues such as the potential running of the statute of limitations. In addition, there can be enforcement problems, without court involvement, if one party backs out.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods

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2.76 Judicial Review of Arbitration Decisions Is Limited.

Arbitration is intended to be simpler, speedier, and more flexible than litigation [*see Kyocera Corp. v. Prudential-Bache Trade Servs., Inc. (9th Cir 2003) 341 F3d 987, 998*]. When the parties seek expedited judicial review of an arbitration award under the Federal Arbitration Act [*see 2.79*], the Act provides the exclusive grounds for vacatur, modification, or correction of the award, regardless of the parties' agreement to the contrary [*Hall St. Assocs. v. Mattel, Inc. (2008) 552 US 576, 128 S Ct 1396, 170 L Ed2d 254, 263-265* ; *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc. (9th Cir 2003) 341 F3d 987, 1000* ; *see 9 USC §§ 10, 11* (grounds for modification or vacatur of arbitration award)].

Strategic Points:

Although the Federal Arbitration Act does not permit the parties to expand the scope of review by agreement [*Hall St. Assocs. v. Mattel, Inc. (2008) 552 US 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254, 263-265*], federal law does not preclude "more searching review based on authority outside the [federal] statute," including state statutory or common law [*Hall St. Assocs. v. Mattel, Inc. (2008) 552 US 576, 128 S Ct 1396, 170 L Ed2d 254, 266* ; *see, e.g.*, Comedy Club, Inc. v. Improv West Assocs. (9th Cir 2009) 553 F3d 1277, 1281 (arbitrator's "manifest disregard of the law" remains valid ground for vacatur of arbitration award under Federal Arbitration Act, *9 USC § 10(a)(4)*]. It also remains an open question whether the district court can specify the scope of review when it orders arbitration [*see Hall St. Assocs. v. Mattel, Inc. (2008) 552 US 576, 128 S Ct 1396, 170 L Ed2d 254, 266-268*].

The Federal Arbitration Act alone does not provide a basis for subject matter jurisdiction. A litigant seeking federal court review of an arbitration award must specify in the petition an independent basis for federal jurisdiction [*Luong v. Circuit City Stores, Inc. (9th Cir 2004) 368 F3d 1109, 1111*]. For example, an independent basis is provided when a petition to vacate an arbitration award alleges that the award was rendered in "manifest disregard of federal law" [*Luong v. Circuit City Stores, Inc. (9th Cir 2004) 368 F3d 1109, 1112* ; *see Greenberg v. Bear, Stearns & Co. (2d Cir 2000) 220 F3d 22, 27* , *cert. denied*, *531 US 1075 (2001)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods

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2.77 Parties May Specify Rules for Conduct of Arbitration.

Commercial arbitration agreements are enforced according to their terms and according to the intentions of the parties [*First Options of Chicago, Inc. v. Kaplan (1995) 514 US 938, 947, 115 S Ct 1920, 131 L Ed2d 985*]. The parties may specify in the agreement the rules under which the arbitration will be conducted [*Volt Info. Scis., Inc. v. Board of Trs. (1989) 489 US 468, 479, 109 S Ct 1248, 103 L Ed2d 488*].

Example:

The rules of the American Arbitration Association (AAA) were incorporated into the parties' arbitration agreement. The rules gave the arbitrators broad discretion to allocate fees and expenses among the parties. When one party became unable to pay its pro-rata share of the administrative fees, it was within the arbitrators' discretion, under the rules, to require the other party to advance the administrative fees before allowing the arbitration to proceed [*Lifescan, Inc. v. Premier Diabetic Servs., Inc. (9th Cir 2003) 363 F3d 1010, 1012*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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2.78 Determining Whether Dispute Is Arbitrable Under Existing Agreement.

2.78[1] State Contract Law Determines Whether Parties Agreed to Arbitrate. Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to arbitrate [*Steelworkers v. Warrior & Gulf Navigation Co. (1960) 363 US 574, 582, 80 S Ct 1347, 4 L Ed2d 1409*].

When determining the existence and validity of an agreement to arbitrate, federal courts apply ordinary state-law principles that govern the formation of contracts [*First Options of Chicago, Inc. v. Kaplan (1995) 514 US 938, 944, 115 S Ct 1920, 131 L Ed2d 985*].

Consider:

General contract and agency principles (e.g., incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel) apply in determining the enforcement of an arbitration agreement by or against nonsignatories [*Comer v. Micor, Inc. (9th Cir 2006) 436 F3d 1098, 1101*]. The Ninth Circuit has extended the concept of equitable estoppel of third parties in the arbitration context only in two narrowly defined circumstances [*see Mundi v. Union Sec. Life Ins. Co. (9th Cir 2009) 555 F3d 1042, 1046* (credit life insurer that was not signatory to arbitration clause in loan agreement signed by insured borrower and by lender could not compel insured's widow, on equitable estoppel grounds, to arbitrate her claim that insurer had engaged in bad faith action by refusing to pay policy proceeds to lender on insured's death)]. First, a nonsignatory may be held to an arbitration clause when the nonsignatory "knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement" [*Comer v. Micor, Inc. (9th Cir 2006) 436 F3d 1098, 1102*]. Second, a signatory may be required to arbitrate a claim brought by a nonsignatory "because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations" [*Comer v. Micor, Inc. (9th Cir 2006) 436 F3d 1098, 1102*].

Cross Reference:

Formation of enforceable contract under California law, see 13 California Forms of Pleading and

Practice, Ch. 140, Contracts (Matthew Bender).

2.78[2] Court, Not Arbitrator, Decides Arbitrability. The question of arbitrability of a dispute is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise [*AT&T Techs., Inc. v. Communications Workers (1986) 475 US 643, 649, 106 S Ct 1415, 89 L Ed2d 648*].

When a party seeks to compel an arbitration, the court has two roles [*Simula, Inc. v. Autoliv, Inc. (9th Cir 1999) 175 F3d 716, 719-721*]:

- To determine whether a valid agreement to arbitrate exists.
- If a valid agreement exists, to decide whether the agreement encompasses the dispute at issue.

Consider:

The precise language of the arbitration provision determines whether the agreement encompasses the dispute at issue.

Examples:

- The phrase "claims arising in connection with this agreement" included any dispute having its genesis in the contract, including claims based on statute or tort [*Simula, Inc. v. Autoliv, Inc. (9th Cir 1999) 175 F3d 716, 720-725*].
- The phrase "claims arising out of" or "claims arising under" without reference to "claims relating to the agreement" covered only disputes relating to the interpretation and performance of the contract itself [*Tracer Research Corp. v. National Envtl. Servs. Co. (9th Cir 1994) 42 F3d 1292, 1295*].

Cross Reference:

Discussion of compelling arbitration, see *§ 2.80[3]*.

2.78[3] Question of Arbitrability Has Limited Scope. The phrase "question of arbitrability" is applicable only in the kind of narrow circumstance where [*Howsam v. Dean Witter Reynolds, Inc. (2002) 537 US 79, 83-84, 123 S Ct 588, 154 L Ed2d 491*]:

- Contracting parties would likely have expected a court to have decided the gateway matter;
- The parties are not likely to have thought that they had agreed that an arbitrator would do so; and
- Reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Questions that do not fit within the narrow class of "arbitrability" questions are to be decided by the arbitrator, not the court [*Green Tree Fin. Corp. v. Bazzle (2003) 539 US 444, 123 S Ct 2402, 156 L Ed2d 414, 421-424*].

2.78[4] Arbitrator, Not Court, Decides Procedural Questions Regarding Arbitration. Procedural questions that grow out of a dispute and bear on its final disposition are presumptively for the arbitrator to decide [*Howsam v. Dean Witter Reynolds, Inc. (2002) 537 US 79, 84, 123 S Ct 588, 154 L Ed2d 491*]. Thus, the arbitrator, not the court, should decide issues of whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met [*see Howsam v. Dean Witter Reynolds, Inc. (2002) 537 US 79,*

85, 123 S Ct 588, 154 L Ed2d 491].

Examples:

- The question of whether a dispute was time-barred under the National Association of Securities Dealers Code of Arbitration Procedure was presumptively a matter for the arbitrator, not the court, to decide [*Howsam v. Dean Witter Reynolds, Inc. (2002) 537 US 79, 84-85, 123 S Ct 588, 154 L Ed2d 491*].

- Whether a contract permitted class arbitrations concerned neither validity of the arbitration clause nor its applicability to the underlying dispute. The question was therefore not for the court to decide [*Green Tree Fin. Corp. v. Bazzle (2003) 539 US 444, 123 S Ct 2402, 156 L Ed2d 414, 421-424*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsContracts LawContract Conditions & ProvisionsArbitration Clauses

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2.79 Federal Arbitration Act Provides Mechanism to Move Parties Into Arbitration.

2.79[1] FAA Establishes Policy Favoring Arbitration. The purpose of the Federal Arbitration Act (FAA) [*9 USC §§ 1-16*] is to encourage arbitration and to move the parties to an arbitrable dispute out of court and into arbitration [*Southland Corp. v. Keating (1984) 465 US 1, 7, 104 S Ct 852, 79 L Ed2d 1* ; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp. (1983) 460 US 1, 22, 103 S Ct 927, 74 L Ed2d 765*]. The FAA manifests a federal policy favoring arbitration [*Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 US 20, 24, 111 S Ct 1647, 114 L Ed2d 26* ; *see, e.g., 14 Penn Plaza LLC v. Pyett (2009) ___ US ___, 129 S Ct 1456, 173 L Ed2d 398, 420* (collective-bargaining agreement provision that clearly and unmistakably requires union members to arbitrate claims asserted under Age Discrimination in Employment Act is enforceable as matter of federal law)].

The FAA was enacted to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate and to place such agreements on the same footing as other contracts [*Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 US 20, 24, 111 S Ct 1647, 114 L Ed2d 26* ; *Volt Info. Scis., Inc. v. Board of Trs. (1989) 489 US 468, 474, 109 S Ct 1248, 103 L Ed2d 488*].

2.79[1A] FAA Does Not Necessarily Preempt California Law. The FAA does not preempt state law if the state law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally [*see Shroyer v. New Cingular Wireless Servs. (9th Cir 2007) 498 F3d 976, 987* (expressly and conclusively rejecting argument that California law is preempted by FAA)]. However, the FAA preempts state law that specifically applies to arbitration agreements [*Perry v. Thomas (1987) 482 US 483, 493, n 9, 107 S Ct 2520* ; *96 L Ed2d 426* ("state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue" is preempted by FAA)].

2.79[2] FAA Applies to Contracts Involving Interstate Commerce. The FAA provides that a written arbitration agreement in a maritime transaction or a contract involving interstate commerce, whether entered into prior to or after a dispute between the parties arises, is valid, irrevocable, and enforceable, except upon such grounds as exist at law or equity for the revocation of any contract [*9 USC § 2*].

2.79[3] FAA Provides Procedural Rules for Court Proceedings Related to Arbitration. The FAA provides procedural rules for the proceedings in federal court to:

- Stay a pending suit involving an issue referable to arbitration under an arbitration agreement [*9 USC § 3*].

- Petition for an order compelling arbitration pursuant to an arbitration agreement [*9 USC § 4*].

- Apply for appointment of an arbitrator [*9 USC § 5*].

- Apply to confirm, vacate, modify, or correct an arbitration award [*9 USC §§ 9, 10, 11*].

The Federal Rules of Civil Procedure apply only to the extent that matters of procedure are not provided for under the FAA [*Fed R Civ P 81(a)(6)(B)*].

2.79[4] Statutory Claims May Be Arbitrable Under FAA.

2.79[4][a] Claims Are Arbitrable in Absence of Contrary Congressional Intent. Arbitration agreements are enforceable under the FAA even where statutory claims are asserted, unless there is a clear Congressional intent to preclude arbitration [*Shearson/American Express, Inc. v. McMahon (1987) 482 US 220, 227, 107 S Ct 2332, 96 L Ed2d 185*].

2.79[4][b] Various Statutory Claims Held Arbitrable. Claims under various federal statutes have been found arbitrable under the FAA, pursuant to an enforceable arbitration agreement between the parties, including:

- Sherman Act, *15 USC § 1 et seq.* [*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (1985) 473 US 614, 640, 105 S Ct 3346, 87 L Ed2d 444*].

- Section 10(b) of the Securities Exchange Act of 1934, *15 USC § 78j(b)* [*Shearson/American Express, Inc. v. McMahon (1987) 482 US 220, 238, 107 S Ct 2332, 96 L Ed2d 185*].

- Section 12(2) of the Securities Act of 1933, *15 USC § 77l(a)(2)* [*Rodriguez de Quijas v. Shearson/American Express, Inc. (1989) 490 US 477, 485, 109 S Ct 1917, 104 L Ed2d 526*].

- Racketeering Influenced and Corrupt Organizations Act (RICO), *18 USC § 1961 et seq.* [*Shearson/American Express, Inc. v. McMahon (1987) 482 US 220, 238-239, 107 S Ct 2332, 96 L Ed2d 185*].

- Age Discrimination in Employment Act (ADEA), *29 USC § 621 et seq.* [*14 Penn Plaza LLC v. Pyett (2009) ___ US ___, 129 S Ct 1456, 173 L Ed2d 398, 420* ; *Gilmer v. Interstate/Johnson Lane Corp.(1991) 500 US 20, 26-27, 111 S Ct 1647, 114 L Ed2d 26*].

- Title VII of the Civil Rights Act of 1964, *42 USC § 2000e et seq.* [*EEOC v. Luce, Forward, Hamilton & Scripps (9th Cir 2003) 345 F3d 742, 747-753*].

- Fair Labor Standards Act, *29 USC § 201 et seq.* [*Kuehner v. Dickinson & Co. (9th Cir 1996) 84 F3d 316, 319-320*].

- Employee Retirement Income Security Act (ERISA), *29 USC § 1001 et seq.* [*Fabian Fin. Servs. v. The Kurt H. Volk, Inc. Profit Sharing Plan (CD Cal 1991) 768 F Supp 728, 733-734*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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2.80 Enforcing Arbitration Agreement Within Scope of FAA.

2.80[1] Make Demand for Arbitration Pursuant to Agreement. A party seeking to enforce an arbitration agreement should make a demand for arbitration in accordance with the terms of the agreement. The method of making the demand may be stated in the agreement or in the rules of the arbitration service provider specified in the agreement. Any rules specified in the agreement should be reviewed for requirements such as form of the demand, time limitations, and forum fee deposits.

2.80[2] Move to Stay Pending Action, If Any.

2.80[2][a] Court Must Grant Stay If Issue Is Referable to Arbitration. If any suit or proceeding is brought on any issue referable to arbitration under an arbitration agreement, a party may move to stay the trial of the action until an arbitration has been had in accordance with the terms of the agreement [*9 USC § 3*].

If the court is satisfied that the issue involved in the suit or proceeding is referable to arbitration, the court must stay the pending action, providing the applicant for the stay is not in default in proceeding with the arbitration [*9 USC § 3*].

2.80[2][b] Order Refusing Stay Is Appealable; Order Granting Stay Is Not. An order refusing to stay the trial of an action until an arbitration has been had in accordance with the terms of the parties' agreement is appealable [*9 USC § 16(a)(1)(A)*].

Generally, an appeal cannot be taken from an interlocutory order granting the stay of an action to permit an arbitration in accordance with the parties' agreement [*9 USC § 16(b)(1)*; *see 28 USC § 1292(b)* (circumstances when appeal may be taken from interlocutory orders not otherwise appealable)].

Cross References:

Application of final judgment rule to arbitration orders, see 19 *Moore's Federal Practice, § 202.11[7].*
Review of interlocutory order concerning arbitration proceedings, see 19 *Moore's Federal Practice, § 203.12* (Matthew Bender 3d ed.).

2.80[3] Move to Compel Arbitration, If Necessary.

2.80[3][a] Petition Must Be Made to Court That Would Otherwise Have Jurisdiction. If one party to a dispute fails, neglects, or refuses to arbitrate in accordance with a written arbitration agreement, the other party may petition for an order directing that the arbitration proceed in the manner provided for in the agreement [*9 USC § 4*].

Warning:

The FAA does not create an independent basis for federal subject matter jurisdiction [*Southland Corp. v. Keating (1984) 465 US 1, 16, fn. 9, 104 S Ct 852, 79 L Ed2d 1*]. The petition must be brought in state court unless the matter is already pending in a federal court having subject matter jurisdiction, or an independent basis for federal jurisdiction, such as diversity of citizenship, exists [*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp. (1983) 460 US 1, 25, n32, 103 S Ct 927, 74 L Ed2d 765*].

A district court, in deciding whether it have subject-matter jurisdiction over a petition to compel arbitration under the FAA [*9 USC § 4*] may "look through" the petition to the underlying substantive controversy to determine whether the substantive conflict between the parties arises under federal law. However, the court may not look past a state-law complaint over which the court does not have jurisdiction to base jurisdiction on a completely preempted counterclaim [*Vaden v. Discover Bank (2009) ___ US ___, 129 S Ct 1262, 173 L Ed2d 206, 218-219* ("Nor can federal jurisdiction rest upon an actual or anticipated counterclaim.")].

Distinguish:

If a complaint purports to rely on state law but in actuality is governed by law that is exclusively federal, then that complaint will still arise under federal law despite not appearing to do so on its face. This is referred to as the "complete preemption doctrine" [*see Vaden v. Discover Bank (2009) ___ US ___, 129 S Ct 1262, 173 L Ed2d 206, 219*].

Example:

Petitioner credit cardholder sought certiorari review of a circuit court decision affirming the district court's grant of respondent bank's petition under *9 USC § 4* to compel arbitration of the cardholder's counterclaims that were raised in the bank's state court action seeking to collect on the cardholder's debt.

The Supreme Court held that a federal court could "look through" a petition to compel arbitration to determine whether it was predicated on a controversy that "arose under" federal law. However, the Court held that, in keeping with the well-pleaded complaint rule, a federal court could not entertain a petition to compel arbitration based on the contents of a counterclaim when the whole controversy between the parties did not qualify for federal-court adjudication. Therefore, the bank's state-law claim on the credit card debt could not be litigated in federal court; and the bank's petition to compel arbitration was dismissed. [*Vaden v. Discover Bank (2009) ___ US ___, 129 S Ct 1262, 173 L Ed2d 206, 218-219*].

Cross Reference:

Complete preemption, *see § 2.07[2][d]*.

A petition in federal court must be filed in the district which, if not for the arbitration agreement, would have jurisdiction in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties [*9 USC § 4*]. Service must be made in the manner provided by the Federal Rules of Civil Procedure [*9 USC § 4*]. The opposing party must be given five days' notice in writing of the petition [*9 USC § 4*].

Cross Reference:

Service of papers under Federal Rules, see Ch. 5, Formatting, Serving, and Filing Papers, *5.15 -5.23*.

2.80[3][b] Court Must Order Arbitration If Agreement Is Not in Issue. If, after the hearing on the petition, the court is satisfied that the making of the arbitration agreement or the failure to comply is not in issue, the court must order the parties to proceed to arbitration in accordance with the agreement [*9 USC § 4*]. The hearing and proceedings, under the arbitration agreement, must be within the district in which the petition is filed [*9 USC § 4*].

2.80[3][c] Court Must Determine Arbitrability of Dispute If Agreement Is in Issue. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the agreement is in issue, the court must proceed summarily to the trial of the matter [*9 USC § 4*].

Except in cases of admiralty, the party in default may demand a jury trial of the issue [*9 USC § 4*]. If the jury finds that no agreement in writing for arbitration was made or that there is no default as to such agreement, the proceeding must be dismissed [*9 USC § 4*]. If the jury finds that an agreement in writing for arbitration was made or that there is a default, the court must summarily order the parties to proceed with the arbitration in accordance with the agreement [*9 USC § 4*].

2.80[3][d] Order Denying Petition Is Appealable; Order Granting Petition Is Not. An order denying a petition to compel arbitration in accordance with the parties' agreement is appealable [*9 USC § 16(a)(1)(B)*].

Generally, an appeal cannot be taken from an interlocutory order directing an arbitration to proceed in accordance with the parties' agreement [*9 USC § 16(b)(2)*; *see 28 USC § 1292(b)* (circumstances when appeal may be taken from interlocutory orders not otherwise appealable)].

Example:

An employee filed a state court action for wrongful termination. The employer removed the action to federal court and moved to compel arbitration. Two different arbitration provisions directed arbitration in two different forums. The district court determined that the agreement providing for one forum was not properly executed, but the other arbitration provision was enforceable. The district court therefore ordered arbitration, albeit not in the "first-choice" forum requested by the employer. The order, which denied arbitration in the "first-choice" forum, was not appealable because it compelled arbitration in the alternative forum [*Bushley v. Credit Suisse First Boston (9th Cir 2004) 360 F3d 1149, 1153-1154*].

Cross References:

Application of final judgment rule to arbitration orders, see 19 *Moore's Federal Practice, § 202.11[7]*.
Review of interlocutory order concerning arbitration proceedings, see 19 *Moore's Federal Practice, § 203.12* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & Exceptions

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2.81 Attacking Arbitration Agreement.

2.81[1] Arbitration Agreements Must Be Evaluated Under State Contract Law. The FAA provides that written arbitration agreements are valid, irrevocable, and enforceable, except on such grounds as exist at law or equity for the revocation of any contract [*9 USC § 2*].

The court must apply ordinary state law principles that govern the formation of contracts to determine the validity of an arbitration agreement [*Ingle v. Circuit City Stores, Inc. (9th Cir 2003) 328 F3d 1165, 1170*]. State law cannot impose requirements on arbitration agreements that are not required for other contracts [*see Doctor's Assocs., Inc. v. Casarotto (1996) 517 US 681, 687, 116 S Ct 1652, 134 L Ed2d 902*].

2.81[2] Contract Defenses Are Available. An arbitration agreement is evaluated as any other contract, and generally applicable contract defenses, such as fraud, duress, or unconscionability may render the agreement unenforceable [*Doctor's Assocs., Inc. v. Casarotto (1996) 517 US 681, 687, 116 S Ct 1652, 134 L Ed2d 902*].

Cross References:

Contract defenses under California law, see 13 California Forms of Pleading and Practice, Ch. 140, Contracts and 17 California Forms of Pleading and Practice, Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake (Matthew Bender).

2.81[3] Court Determines Challenges to Existence or Validity of Arbitration Provisions. When contract defenses are raised that challenge the existence or validity of an arbitration agreement, the court must decide the issue [*see 9 USC §§ 2, 4*; *Nagrampa v. Mailcoups, Inc. (9th Cir 2006) 469 F3d 1257, 1264* (en banc) (validity of franchise agreement's arbitration clause, under California law, was for federal court, and not arbitrator, to resolve)].

Example:

An employee was required to sign an arbitration agreement before the employer would consider her employment application. The court evaluated the validity of the arbitration agreement under California state law principles of procedural and substantive unconscionability. The agreement was adhesive and permeated with oppressive and one-sided provisions with respect to coverage of claims, the statute of

limitations, class claims, a filing fee, cost-splitting, remedies, and the employer's unilateral power to terminate or modify the agreement. The court concluded that the agreement was wholly unenforceable [*Ingle v. Circuit City Stores, Inc. (9th Cir 2003) 328 F3d 1165, 1180* ; *see also Geoffroy v. Washington Mutual Bank (SD Cal 2007) 484 F Supp2d 1115, 1121-1123* (bank's signature card arbitration provision was adhesive agreement that was procedurally and substantively unconscionable)].

If the arbitration agreement is part of an underlying contract, the court determines defenses asserting that:

- The contract between the parties, which includes the arbitration provision, is void [*Three Valleys Mun. Water Dist. v. E.F. Hutton (9th Cir 1991) 925 F2d 1136, 1140-1141*]; or

Example:
Plaintiffs claimed that a contract containing an arbitration provision was void because the signatory to the contract did not have the authority to bind his principals. The issue was for the court to decide [*Three Valleys Mun. Water Dist. v. E.F. Hutton (9th Cir 1991) 925 F2d 1136, 1140-1141*].

- A contract exists between the parties, but the arbitration provision itself is unenforceable [*Prima Paint Corp. v. Flood & Conklin Mfg. Co. (1967) 388 US 395, 403-404, 87 S Ct 1801, 18 L Ed2d 1270*].

Example:
Plaintiff subcontractors claimed that contractor's agreements with them were a fraudulent scheme to avoid making full payment for their work. Plaintiffs claimed that arbitration provisions in the contract were part of the fraud, because they required arbitration in another state. The issue of the enforceability of the arbitration provision was for the court to decide. If the court found that the arbitration provisions were unenforceable because of fraud, the dispute could not be subject to arbitration [*Moseley v. Electronic & Missile Facilities, Inc. (1963) 374 US 167, 170-171, 83 S Ct 1815, 10 L Ed2d 818*].

2.81[4] Arbitrators Determine Other Challenges to Underlying Contract. When a party seeks to enforce an arbitration agreement, a challenge to the validity of the contract as a whole, and not the arbitration clause, is for the arbitrator to decide, regardless of whether the challenge is brought in state or federal court [*Buckeye Check Cashing, Inc. v. Cardegna (2006) 546 US 440, 448, 126 S Ct 1204, 163 L Ed2d 1038* ; *Prima Paint Corp. v. Flood & Conklin Mfg. Co. (1967) 388 US 395, 402-404, 87 S Ct 1801, 18 L Ed2d 1270*].

This rule also applies when a state statute refers a dispute initially to an administrative forum rather than a court [*Preston v. Ferrer (2008) 552 US 346, 128 S Ct 978, 169 L Ed 2d 917, 929*].

Example:
A California attorney invoked the arbitration provision in his contract with a judge, who appeared as "Judge Alex" on a television network program. The attorney sought management fees that he was allegedly owed under the contract. The judge responded by filing a petition with the California Labor Commission, alleging that the contract was invalid and unenforceable under the California Talent Agencies Act (TAA) [*Cal Lab Code § 1700 et seq.*] because Preston had acted as a talent agent without the license required by the TAA. However, the administrative nature of the TAA proceedings did not change the analysis. "When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative" [*Preston v. Ferrer (2008) 552 US 346, 128 S Ct 978, 169 L Ed 2d 917, 923*].

Thus, courts may not consider challenges to a contract's validity or enforceability as defenses against arbitration [*Prima Paint Corp. v. Flood & Conklin Mfg. Co. (1967) 388 US 395, 404, 87 S Ct 1801, 18 L Ed2d 1270*]. An

arbitration clause may thus be enforced even though the rest of the contract is later held to be invalid [*Buckeye Check Cashing, Inc. v. Cardegna (2006) 546 US 440, 448 . 126 S Ct 1204, 163 L Ed2d 1038* ; *Republic of Nicaragua v. Standard Fruit Co. (9th Cir 1991) 937 F2d 469, 476*].

Example:

A party brought an action in court, seeking to rescind a contract on the ground of fraud in the inducement and to stay an arbitration, brought by the other party, pursuant to an arbitration provision in the contract. Because the fraud claim went only to the underlying contract, and not to the arbitration provision, the rescission issue was for the arbitrators to decide [*Prima Paint Corp. v. Flood & Conklin Mfg. Co. (1967) 388 US 395, 402-404, 87 S Ct 1801, 18 L Ed2d 1270*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & Exceptions

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Unit 2 First Steps
CHAPTER 2 Determining Forum (Jurisdiction and Venue)
VIII. ANALYZING ARBITRATION REQUIREMENTS AND ADR OPTIONS

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2.82 Waiving Right to Seek Arbitration.

Either party to an arbitration agreement can waive its right to seek arbitration [*Britton v. Co-op Banking Group (9th Cir 1990) 916 F2d 1405, 1412-1413*]. Although the waiver may be express or implied, merely engaging in action inconsistent with an arbitration provision does not, in itself, constitute waiver [*ATSA of Cal., Inc. v. Continental Ins. Co. (9th Cir 1983) 702 F2d 172, 175*].

Example:

Party that filed pleadings and engaged in discovery before seeking arbitration did not waive its right to arbitration when the opposing party was unable to show that it was prejudiced by any of the actions that may have been inconsistent with arbitration [*ATSA of Cal., Inc. v. Continental Ins. Co. (9th Cir 1983) 702 F2d 172, 175*].

Arbitration rights are subject to constructive waiver only if [*United Computer Sys., Inc. v. AT&T Corp. (9th Cir 2002) 298 F3d 756, 765*]:

- The waiving party had knowledge of an existing right to compel arbitration;
- The waiving party engaged in actions inconsistent with that existing right; and
- The opposing party suffered prejudice because of the waiving party's inconsistent acts.

Example:

The first two conditions for a waiver of right to arbitration were satisfied when a party filed a state court complaint requesting declaratory judgment with respect to parties' rights and obligations under the arbitration clause and requesting a jury trial and $16 million in damages. Filing of the lawsuit rather than paying an administrative fee to the AAA to commence arbitration was also inconsistent with terms of arbitration clause. However, third condition was not satisfied. Opposing party was unable to show prejudice, despite its claim that it had incurred substantial costs in litigation, because the request for damages and jury trial never got past the pleading stage [*United Computer Sys., Inc. v. AT&T Corp. (9th Cir 2002) 298 F3d 756, 765*].

Distinguish--Breach of Contract:

Under California contract law, a party who breaches the arbitration agreement by, for example, refusing to participate in a properly initiated arbitration, cannot later enforce the arbitration agreement because of that breach. In response to a motion to compel arbitration, the party who initially sought arbitration but then was forced to litigate need not show that the elements of constructive waiver of the right to arbitrate have been satisfied [*see, e.g., Brown v. Dillard's, Inc. (9th Cir 2005) 430 F3d 1004, 1010-1013*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionArbitrationsWaivers

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Unit 2 First Steps
CHAPTER 2 Determining Forum (Jurisdiction and Venue)
IX. MOVING TO DISQUALIFY JUDGE

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2.83 CHECKLIST: Moving to Disqualify Judge.

☐ Determine ground(s) for disqualification of judge, if any:

○ Judge has personal bias or prejudice either against the party seeking disqualification or in favor of any adverse party.

Authority:
28 USC §§ 144, 455(b)(1)

Discussion:
See *§§ 2.85[1], 2.86[2]*

○ Judge's impartiality might reasonably be questioned.

Authority:
28 USC § 455(a)

Discussion:
See *§ 2.86[1]*

○ Judge or lawyer associated with judge's private law practice was involved in the matter under any of the following circumstances:

☐ In private practice, the judge served as a lawyer in the matter in controversy;

☐ A lawyer with whom the judge previously practiced law served, during their association, as a lawyer concerning the matter; or

☐ The judge or such lawyer has been a material witness concerning the matter in controversy.

Authority:
28 USC § 455(b)(2)

Discussion:
See *§ 2.86[3]*

○ Judge, while in government employment and in such capacity:

☐ Participated as counsel, adviser or material witness concerning the proceeding; or

☐ Expressed an opinion concerning the merits of the particular case in controversy.

Authority:
28 USC § 455(b)(3)

Discussion:
See *§ 2.86[4]*

○ Judge, individually or as a fiduciary, or judge's spouse or minor child residing in judge's household:

☐ Has a financial interest in the subject matter in controversy or in a party to the proceeding; or

☐ Has any other interest that could be substantially affected by the outcome of the proceeding.

Authority:
28 USC § 455(b)(4)

Discussion:
See *§ 2.86[5]*

○ Judge or judge's spouse, or person within third degree of relationship to either, or spouse of such person:

☐ Is a party to the proceeding, or an officer, director, or trustee of a party [*28 USC § 455(b)(5)(i)*];

☐ Is acting as a lawyer in the proceeding [*28 USC § 455(b)(5)(ii)*];

☐ Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding [*28 USC § 455(b)(5)(iii)*]; or

☐ Is to the judge's knowledge likely to be a material witness in the proceeding [*28 USC § 455(b)(5)(iv)*].

Authority:
28 USC § 455(b)(5)

Discussion:
See *§ 2.86[6]*

☐ Determine appropriate procedure to raise issue of disqualification:

○ By filing affidavit and motion pursuant to *28 USC § 144* to disqualify district court judge because of bias or prejudice.

Authority:
28 USC § 144

Discussion:
See *§ 2.84[2][a]*

○ By raising issue of disqualification, without or without filing formal motion, for ground(s) specified in *28 USC § 455*.

Authority:
28 USC § 455

Discussion:
See *§ 2.84[2][b]*

☐ If moving to disqualify judge because of bias or prejudice pursuant to *28 USC § 144*, prepare and file timely motion with:

○ Affidavit stating facts and reasons for disqualification.

○ Certificate of counsel.

Authority:
28 USC § 144

Discussion:
See *§§ 2.85[2], [3]*

Form:
See *§ 2.94*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ If seeking recusal of judge pursuant to *28 USC § 455*, raise issue of disqualification in timely manner by oral or written suggestion to court, if appropriate under the circumstances.

Authority:
28 USC § 455

Discussion:
See *§§ 2.87*, *2.88*

☐ If seeking recusal of judge pursuant to *28 USC § 455*, and formal motion is appropriate under the circumstances, or judge fails to recuse himself or herself after oral or written suggestion, prepare and file motion for disqualification.

Authority:
28 USC § 455

Discussion:
See *§ 2.87*

Form:
See *§ 2.94*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsFederal JudgesCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of PartialityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsRule of NecessityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaivers

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CHAPTER 2 Determining Forum (Jurisdiction and Venue)
IX. MOVING TO DISQUALIFY JUDGE

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2.84 Options and Strategy.

2.84[1] No Peremptory Challenges. Under California law, a state court judge may be disqualified either for cause [*CCP § 170.1*] or by peremptory challenge [*CCP § 170.6*]. In federal court, a judge may be disqualified only for cause, under either *28 USC § 144* or *455*.

Judge's Perspective:

Disqualification of a judge in federal court is not a common event. There obviously can be risks if the disqualification is not handled in a courteous way and with good cause. Unlike in state court, disqualification is not viewed as a common occurrence by federal judges, and so it needs to be well thought out and done with diplomacy.

Investigating Judges Using Online Resources.

Many resources are available online for investigating judges. These resources can help you find information and cases pertaining to your assigned judge. For example, helpful resources at lexis.com include:

- Legal tab> Reference> Law> Judicial Staff Directory.
  - Sample Search: For biographical information on a judge currently sitting on a federal bench, use a NAME segment search: *name (First Name/3 Last Name)*.
- Legal tab> Reference> Biographies> Biographies.
  - Sample Search: For biographical information on a particular judge, use a NAME segment search: *name (First Name/3 Last Name)*.

- Legal tab> Federal Legal--U.S.> Federal Courts By Circuit> Federal Cases by Circuit> 9th Circuit--US Court of Appeals Cases & Bankruptcy Appellate Panel.

  - Sample Search: For appellate decisions on a judge's rulings in a particular procedural setting or on a particular substantive topic, use the HISTORY segment with the judge's last name in this format plus words for finding the specific topic, for example: summary judgment and history *(First Name/3 Last Name/3 j or judge or hon!)*.

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

  - Sample Search: For news articles on a particular judge, try a simple search: *First Name/3 Last Name*.

2.84[1A] Disqualification Is Possible Under Due Process Clause. The Due Process Clause incorporates the common law rule that a judge must recuse himself or herself when the judge has a direct, personal, substantial pecuniary interest in a case [*Caperton v. A.T. Massey Coal Co. (2009) ___ U.S. ___, 129 S Ct 2252, 173 L Ed2d 1208, 1217*]. The common-law rule, however, did not require disqualification for personal bias or prejudice; those matters were left to statutes or codes of judicial conduct [*Caperton v. A.T. Massey Coal Co. (2009) ___ U.S. ___ 129 S Ct 2252, 173 L Ed2d 1208, 1217*].

Example:
Disqualification for personal bias or prejudice under *28 USC § 455(b)(1)*, see *§ 2.86[2]*.

However, the Supreme Court has identified additional circumstances that, as an objective matter, require recusal under the Due Process Clause:

- When a judge has an indirect financial interest in a case [*Tumey v. Ohio (1927) 273 US 510, 523, 47 S Ct 437, 71 L Ed 749* ; *see, e.g.*, *Ward v. Monroeville (1972) 409 US 57, 60, 93 S Ct 80, 34 L Ed2d 267*].

- In the context of criminal contempt proceedings [*In re Murchison (1955) 349 US 133, 137, 75 S Ct 623, 99 L Ed 942*].

- When a person with a personal stake in a particular case has a significant and disproportionate influence, while the case is pending, in the election of the judge to the court that would decide the case [*Caperton v. A.T. Massey Coal Co. (2009) 129 S Ct 2252, 173 L Ed2d 1208, 1223-1224*].

Absent a finding of actual bias, the court's inquiry is objective. The court asks not whether the judge is actually, subjectively biased, but whether the average judge in his or her position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias" [*Caperton v. A.T. Massey Coal Co. (2009) ___ U.S. ___ 129 S Ct 2252, 173 L Ed2d 1208, 1221*].

2.84[2] Disqualification Is Possible Under Two Statutory Provisions.

2.84[2][a] 28 USC § 144 Provides Procedure for Disqualification of District Court Judge or Magistrate Judge for Bias or Prejudice. *28 USC § 144* provides that a party may move for disqualification of a judge on the ground of personal bias or prejudice [*28 USC § 144*]. The statute applies only to district court judges and magistrate judges and provides only one ground for disqualification [*28 USC § 144*].

Cross References:

Discussion of grounds for disqualification common to both statutes and determination of which statute to use, see *2.84[3]*. Discussion of procedure for disqualification under *28 USC § 144*, see *2.85*. Discussion of use of broader recusal statute to disqualify judge, see *§§ 2.84[2][b], 2.86 -2.90*.

2.84[2][b] 28 USC § 455 Contains Recusal Provisions Applicable to All Federal Judges, Magistrate Judges, and Justices. *28 USC § 455* is a recusal statute that applies to any justice, judge, or magistrate judge of the United States in any proceeding [*28 USC § 455(a)*].

For purposes of *28 USC § 455*, "proceeding" includes pretrial, trial, appellate review, or other stages of litigation [*28 USC § 455(d)(1)*].

Although *28 USC § 455* specifies numerous circumstances when recusal is required, it does not contain a procedure for enforcement of its provisions. The statute is deemed to be self-enforcing on the part of the judge [*United States v. Sibla (9th Cir 1980) 624 F2d 864, 867-868*].

Nevertheless, if a judge does not recuse himself as required by *28 USC § 455*, a party may move for disqualification on the grounds specified in that statute [*In re Bernard (9th Cir 1994) 31 F3d 842, 843*].

Cross References:

Discussion of grounds for disqualification common to both statutes and determination of which statute to use, see *2.84[3]*. Discussion of grounds for recusal under *28 USC § 455*, see *2.86*. Discussion of moving for disqualification pursuant to *28 USC § 455*, see *§ 2.87*.

2.84[3] Determining Which Statute to Use When Grounds Exist Under Both. Both *28 USC §§ 144* and *455* provide for disqualification or recusal of a district court judge on the grounds of personal bias or prejudice [*see 28 USC §§ 144, 455(b)(1)*]. The test for disqualification based on personal bias or prejudice is the same under both statutes [*United States v. Conforte (9th Cir 1980) 624 F2d 869, 880*]. The party seeking disqualification must do so in a timely manner under either statute [*Molina v. Rison (9th Cir 1989) 886 F2d 1124, 1131* ; *see 2.85[2][a], 2.88*].

Proceeding under *28 USC § 455* may give the party seeking disqualification the opportunity to raise the issue without a formal motion. If, under the circumstances of the case, there is a possibility that the judge would recuse himself or herself, the party seeking disqualification may raise the issue of bias or prejudice informally by an oral or written suggestion without filing a formal motion. The party may then move for disqualification if the judge fails to recuse himself or herself [*In re Bernard (9th Cir 1994) 31 F3d 842, 843*].

However, a motion to disqualify a judge pursuant to *28 USC § 455* may be heard by the challenged judge, unless a local rule provides for assignment of the motion to another judge for hearing [*In re Bernard (9th Cir 1994) 31 F3d 842, 843*]. If a motion is necessary, the party seeking disqualification should consider filing a motion for disqualification under *28 USC § 144*, if possible, because the statute requires that the motion be heard by a judge other than the judge being challenged [*28 USC § 144*]. Raising the issue of disqualification pursuant to *28 USC § 144* requires filing a motion and affidavit [*28 USC § 144*].

The party seeking disqualification should also consider whether any of the grounds specified under *28 USC § 455(b)(2)-(5)* exist, in addition to the alleged personal bias or prejudice. A motion for disqualification on the grounds of personal bias or prejudice must be supported by specific facts and reasons for the belief that such bias or prejudice exists [*Berger v. United States (1921) 255 US 22, 33-34, 41 S Ct 230, 65 L Ed 481* ; *Grimes v. United States (9th Cir 1968) 396 F2d 331, 333*].

If grounds for recusal exist as specified in *28 USC § 455(b)(2)-(5)*, because the judge or a relative of the judge has some financial or other interest, or involvement or prior involvement in the matter, disqualification is mandatory, even

without any evidence of actual bias [*see Mangini v. United States (9th Cir 2003) 314 F3d 1158, 1161*].

Cross References:

Discussion of procedure for disqualification under *28 USC § 144*, see *§ 2.85*. Discussion of use of *28 USC § 455* to disqualify judge, see *§§ 2.84[2][b], 2.86 -2.90*.

12 Moore's Federal Practice, Ch. 63, Inability of a Judge to Proceed (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsFederal JudgesCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of PartialityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial InterestsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaivers

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Unit 2 First Steps
CHAPTER 2 Determining Forum (Jurisdiction and Venue)
IX. MOVING TO DISQUALIFY JUDGE

1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.85

2.85 Procedure to Disqualify Judge Under 28 USC § 144.

2.85[1] Party May Move to Disqualify Judge Because of Bias or Prejudice. A party to any proceeding in district court may move to disqualify the judge before whom the proceeding is pending on the ground that the judge has a personal bias or prejudice either against the moving party or in favor of any adverse party [*28 USC § 144*].

The test for disqualification based on personal bias or prejudice is the same under both *28 USC §§ 144* and *455(b)(1)* [*United States v. Conforte (9th Cir 1980) 624 F2d 869, 880*].

To constitute grounds for disqualification, the personal bias or prejudice generally must stem from an extrajudicial source [*Liteky v. United States (1994) 510 US 540, 544-545, 114 S Ct 1147, 127 L Ed2d 474* ; *Pesnell v. Arsenault (9th Cir 2008) 2008 US App LEXIS 19552, at *12-*13* (no abuse of discretion in denying plaintiff's recusal motion when he did not argue that presiding judge should be disqualified based on *Liteky* standard of "bias developed outside a judicial proceeding")]. Adverse judicial rulings alone do not constitute a valid basis for disqualification based on alleged bias or prejudice [*Liteky v. United States (1994) 510 US 540, 556, 114 S Ct 1147, 127 L Ed2d 474*].

Cross References:

Discussion of *28 USC § 455(b)(1)*, see *2.86[2]*.

Nature and scope of impartiality requirement, see 12 *Moore's Federal Practice, § 63.20*. "Extrajudicial source" factor, see 12 *Moore's Federal Practice, § 63.21* (Matthew Bender 3d ed.).

2.85[2] Motion Must Be Supported by Affidavit.

2.85[2][a] Affidavit Must Be Timely and Sufficient. A party asserting bias of a district judge under *28 USC § 144* must file an affidavit raising the issue, accompanied by a certificate of counsel stating that the affidavit is made in good faith. The affidavit must be "timely" [*28 USC § 144*; *Molina v. Rison (9th Cir 1989) 886 F2d 1124, 1131*].

Although *28 USC § 144* provides that the affidavit must be filed not less than 10 days before the beginning of the term

at which the proceeding is to be heard, that specific requirement has no effect because terms of court have been abolished [*see 28 USC § 138*].

Timing:

There is no specific "timely" period to be satisfied under *28 USC § 144* [*Tenants & Owners in Opposition to Redevelopment (ND Cal 1972) 338 F Supp 29, 32*]. Nevertheless, a motion for disqualification should be filed with reasonable promptness after the ground for the motion is ascertained [*Preston v. United States (9th Cir 1991) 923 F2d 731, 733*].

Example--Timely Filing:

While reading some documents filed in connection with a pending motion, a judge realized that a company in which he owned stock, although not a party to the lawsuit, would be affected by the outcome of the litigation. The court then gave each of the parties an opportunity to file an affidavit to disqualify the judge under *28 USC § 144*. The case had been pending for over six months. Under the circumstances, the plaintiff's affidavit was timely filed [*California v. Kleppe (CD Cal 1977) 431 F Supp 1344, 1348*].

Example--Untimely Filing:

A pro se plaintiff moved to disqualify the presiding judge 16 months after the alleged grounds for disqualification arose to avoid dismissal of his case on the merits. The motion to disqualify was not timely [*Wood v. McEwen (9th Cir 1981) 644 F2d 797, 802*].

2.85[2][b] Affidavit Must State Facts and Reasons for Disqualification. The affidavit must state the facts and reasons for the belief that the bias or prejudice exists [*28 USC § 144*]. The affidavit must be definite as to time, place, and incidents [*Berger v. United States (1921) 255 US 22, 33-34, 41 S Ct 230, 65 L Ed 481* ; *Grimes v. United States (9th Cir 1968) 396 F2d 331, 333*].

Example:

On appeal, the defendant in a class action for securities fraud argued that the district judge should have disqualified himself because he had voluntarily withdrawn from a partially related criminal trial, allegedly on the ground that he had already held the defendant in contempt in a related civil proceeding. The fact of the prior contempt ruling had long been known to the defendant, and he had failed to file an affidavit under *28 USC § 144* in the district court specifying the facts showing bias or prejudice. Without an affidavit containing specific allegations, neither the prior adverse rulings of the judge nor his participation in a related or prior proceeding was sufficient to require disqualification [*Davis v. Fendler (9th Cir 1981) 650 F2d 1154, 1163*].

2.85[2][c] Each Party May File Only One Affidavit in Any Case. A party may file only one affidavit in any case [*28 USC § 144*].

2.85[3] Affidavit Must Be Accompanied by Certificate of Counsel. The affidavit must be accompanied by a certificate of counsel of record stating that it is made in good faith [*28 USC § 144*].

2.85[4] Initial Determination of Sufficiency of Affidavit.

2.85[4][a] Challenged Judge May Make Initial Determination of Sufficiency. The challenged judge may only review the affidavit to determine if it is legally sufficient, that is, timely filed and stating facts and reasons indicating bias or prejudice [*United States v. Montecalvo (9th Cir 1976) 545 F2d 684, 685*]. The judge against whom the affidavit is filed cannot determine the truth or falsity of the facts stated in the affidavit [*United States v. Montecalvo (9th Cir 1976) 545 F2d 684, 685*].

2.85[4][b] LOCAL PRACTICE: CD Cal Requirements--Disqualification of Magistrate Judge. In the Central

District of California, a motion to disqualify a magistrate judge pursuant to *28 USC § 144* or *455* must be made to the assigned district judge. If no district judge has been assigned, the matter must be handled by the appropriate duty district judge. A copy of the motion must be submitted to the assigned magistrate judge. The magistrate judge cannot proceed with the matter until the motion has been determined. If the district judge denies the motion, the case must proceed as originally assigned. If the district judge grants the motion, the case must be returned to the clerk for assignment to a different magistrate judge [*CD Cal Civ LR 72-5*].

2.85[5] Procedure After Initial Determination of Sufficiency.

2.85[5][a] Motion Must Be Assigned to Another Judge for Hearing. A judge other than the challenged judged must be assigned to hear the motion for disqualification [*28 USC § 144*].

2.85[5][b] LOCAL PRACTICE: CD Cal Requirements--Random Assignment of Disqualification Motion. In the Central District of California, whenever a motion is made to disqualify a judge in any civil case, the motion is transferred to the clerk for random assignment to another judge. If the motion is granted, the case is returned to the clerk for random assignment in the same manner as the original case assignment [CD Cal Gen Order 224, 4.0].

2.85[5][c] LOCAL PRACTICE: ND Cal Requirements--Reference of Disqualification Request to Another Judge. In the Northern District of California, whenever an affidavit of bias or prejudice directed at a judge of the court is filed pursuant to *28 USC § 144*, and the judge has determined not to recuse himself or herself and found that the affidavit is neither legally insufficient nor interposed for delay, the judge must refer the request for disqualification to the clerk for random assignment to another judge [*ND Cal Civ LR 3-15*].

2.85[6] Effect of Insufficiency of Affidavit. If the challenged judge determines that the affidavit is insufficient, the motion for disqualification is denied. The matter remains pending before the challenged judge, but the party seeking disqualification can seek immediate appellate review by a filing a petition for a writ of mandamus [*see In re Cement Antitrust Litig. (9th Cir 1982) 673 F2d 1020, 1025*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsFederal JudgesCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of PartialityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial InterestsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaivers

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Unit 2 First Steps
CHAPTER 2 Determining Forum (Jurisdiction and Venue)
IX. MOVING TO DISQUALIFY JUDGE

1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.86

2.86 Circumstances When Recusal Is Required Under 28 USC § 455.

2.86[1] Judge's Impartiality Might Reasonably Be Questioned. A judge must disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned [*28 USC § 455(a)*; *see Focus Media, Inc. v. NBC (9th Cir 2004) 378 F3d 916, 929*]. For purposes of *28 USC § 455*, "proceeding" includes pretrial, trial, appellate review, or other stages of litigation [*28 USC § 455(d)(1)*].

The purpose of this requirement is to avoid even the appearance of partiality [*Liljeberg v. Health Servs. Acquisition Corp. (1988) 486 US 847, 860, 108 S Ct 2194, 100 L Ed2d 855*]. Recusal is required even when a judge lacks actual knowledge of the facts indicating his or her interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge [*Liljeberg v. Health Servs. Acquisition Corp. (1988) 486 US 847, 860-861, 108 S Ct 2194, 100 L Ed2d 855*]. An objective test is employed. The question is whether a reasonable person with knowledge of all the facts would perceive a significant risk that the judge will resolve the case on a basis other than the merits [*Clemens v. United States Dist. Court (9th Cir 2005) 428 F3d 1175, 1178*], with the reasonable person being a "well-informed, thoughtful observer," as opposed to a "hypersensitive or unduly suspicious person" [*Clemens v. United States Dist. Court (9th Cir 2005) 428 F3d 1175, 1178* , citing *In re Mason (7th Cir 1990) 916 F2d 384, 386*]. Matters not ordinarily sufficient to require recusal under 28 USC § 455(a) include [*Clemens v. United States Dist. Court (9th Cir 2005) 428 F3d 1175, 1178-1179* ; *see Nichols v. Alley (10th Cir 1995) 71 F3d 347, 351*]:

- Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters.
- Previous expression of an opinion on a point of law.
- Prior adverse rulings in the proceeding.
- Familiarity with a party or the proceeding.

- Baseless personal attacks on or suits against the judge by a party.

- Media reports such as quotes attributed to the judge or others which purport to be factual but are in fact false or materially inaccurate or misleading.

- Threats or other attempts to intimidate the judge.

Cross Reference:

Nature and scope of impartiality requirement, see 12 *Moore's Federal Practice, § 63.20* (Matthew Bender 3d ed.).

2.86[2] Judge Has Personal Bias or Prejudice. A judge must disqualify himself or herself if he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding [*28 USC § 455(b)(1)*].

The "personal bias or prejudice" test for disqualification is the same under both *28 USC §§ 144* and *455(b)(1)* [*United States v. Conforte (9th Cir 1980) 624 F2d 869, 880*].

To constitute grounds for disqualification, the personal bias or prejudice generally must stem from an extrajudicial source, not from conduct or rulings made during the course of the proceeding [*Liteky v. United States (1994) 510 US 540, 544-545, 114 S Ct 1147, 127 L Ed2d 474* ; *Focus Media, Inc. v. NBC (9th Cir 2004) 378 F3d 916, 930*].

Example:

Plaintiffs alleged that at the pretrial conference the judge stated that he had seen better cases before and that the case did not impress him. The judge also chided plaintiffs' counsel and threatened him with contempt for pursuing a line of questioning that counsel had been told not to pursue. In response to the plaintiffs' motion for judgment n.o.v., the judge said he was not overly impressed with the plaintiffs' case on liability. Although the appellate court characterized the judge's conduct as "heavy-handed" and "regrettable," it did not constitute prejudicial misconduct or grounds for recusal [*Pau v. Yosemite Park & Curry Co. (9th Cir 1991) 928 F2d 880, 885*].

Partiality that develops during the course of the proceedings can be the basis of recusal only when the judge displays a deep-seated favoritism for or antagonism against a party that would render fair judgment impossible [*Bayliss v. Barnhart (9th Cir 2005) 427 F3d 1211, 1215-1216* ; *F.J. Hanshaw Enters. v. Emerald River Dev., Inc. (9th Cir 2001) 244 F3d 1128, 1145*]. Clashes between the court and counsel do not, in themselves, constitute a basis for disqualification [*Bayliss v. Barnhart (9th Cir 2005) 427 F3d 1211, 1215-1216* (ALJ's statements attributing misconduct to plaintiff's counsel were not so extreme as to show ALJ could not render fair judgment); *Focus Media, Inc. v. NBC (9th Cir 2004) 378 F3d 916, 931* ; *In re Spirtos (Bankr CD Cal 2003) 298 BR 425, 431*].

Cross Reference:

"Extrajudicial source" factor, see 12 *Moore's Federal Practice, § 63.21* (Matthew Bender 3d ed.).

2.86[3] Judge or Lawyer Associated With Judge's Private Law PracticeServed As Lawyer or Witness in Controversy. A judge must disqualify himself or herself if [*28 USC § 455(b)(2)*]:

- In private practice, the judge served as a lawyer in the matter in controversy;

- A lawyer with whom the judge previously practiced law served, during their association, as a lawyer concerning the matter; or

- The judge or such lawyer has been a material witness concerning the matter in controversy.

Cross Reference:

Prior involvement with matter in controversy as basis for disqualification, see 12 *Moore's Federal Practice, § 63.30* (Matthew Bender 3d ed.).

2.86[4] Judge Participated in Matter While in Government Employment. A judge must disqualify himself or herself if he or she served in governmental employment and in such capacity [*28 USC § 455(b)(3)*]:

- Participated as counsel, adviser, or material witness concerning the proceeding; or

- Expressed an opinion concerning the merits of the particular case in controversy.

Cross Reference:

Prior involvement with matter in controversy while serving in governmental employment as basis for disqualification, see 12 *Moore's Federal Practice, § 63.30[4]* (Matthew Bender 3d ed.).

2.86[5] Judge, Spouse, or Minor Child Has Financial or Other Interest in Matter.

2.86[5][a] Disqualification Is Required for Interest As Either Individual or Fiduciary. A judge must disqualify himself or herself if the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household [*28 USC § 455(b)(4)*]:

- Has a financial interest in the subject matter in controversy or in a party to the proceeding; or

- Has any other interest that could be substantially affected by the outcome of the proceeding.

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian [*28 USC § 455(d)(3)*].

Consider:

To assist the district judge in determining the existence of any disqualifying financial interest, *Fed R Civ P 7.1* requires corporate parties to make certain disclosures. Any nongovernmental corporate party to an action or proceeding in a district court must file two copies of a statement that either (1) identifies any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock, or (2) states that there is no such corporation. The two copies of the disclosure statement must be filed with the party's first appearance, pleading, petition, motion, response, or other request addressed to the court. In addition, the party must promptly file a supplemental disclosure statement whenever there is any change in the required information [*Fed R Civ P 7.1*].

2.86[5][b] "Financial Interest" Means Legal or Equitable Interest. "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party [*28 USC § 455(d)(4)*].

Exceptions:

- Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund [*28 USC § 455(d)(4)(i)*].

- An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization [*28 USC § 455(d)(4)(ii)*].

- The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest [*28 USC § 455(d)(4)(iii)*].

- Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities [*28 USC § 455(d)(4)(iv)*].

Cross Reference:

Financial interest defined, see 12 *Moore's Federal Practice, § 63.31[2]* (Matthew Bender 3d ed.).

2.86[5][c] Judge Has Responsibility to Inform Self of Financial Interests. A judge must inform himself or herself about his or her personal and fiduciary financial interest, and must make a reasonable effort to inform himself or herself about the personal financial interests of his or her spouse and minor children residing in his or her household [*28 USC § 455(c)*].

2.86[6] Judge or Judge's Relative Has Involvement in Proceeding. A judge must disqualify himself or herself if the judge or judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

- Is a party to the proceeding, or an officer, director, or trustee of a party [*28 USC § 455(b)(5)(i)*];

- Is acting as a lawyer in the proceeding [*28 USC § 455(b)(5)(ii)*];

- Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding [*28 USC § 455(b)(5)(iii)*]; or

- Is to the judge's knowledge likely to be a material witness in the proceeding [*28 USC § 455(b)(5)(iv)*].

Exception:

The "rule of necessity" is an exception to the requirement of disqualification under 28 USC § 455(b)(5)(i). Under the rule of necessity, a judge is not disqualified to try a case because of a personal interest in the matter at issue if the case cannot be heard otherwise [United States v. Will (1980) 449 US 200, 213, 101 S Ct 471, 66 L Ed 2d 392; Ignacio v. Judges of the U.S. Court of Appeals for the Ninth Circuit (9th Cir 2006) 453 F3d 1160, 1163-1165 (rule of necessity applied when plaintiff indiscriminately sued all judges of Ninth Circuit)].

The degree of relationship is calculated according to the civil law system [*28 USC § 455(d)(2)*].

If the judge or judge's relative has such involvement in the proceeding, disqualification is required, even absent any evidence of actual bias [*Mangini v. United States (9th Cir 2003) 314 F3d 1158, 1161*].

Example:

Disqualification of a judge was mandatory when the judge's brother-in-law was a lawyer with the law firm representing a party, and the brother-in-law had communicated on behalf of the firm with an expert

witness in the case. The brother-in-law was the spouse of the judge's sister, a person within the third degree of relationship to the judge, and his involvement in the case constituted professional work, not mere clerical tasks [*Mangini v. United States (9th Cir 2003) 314 F3d 1158, 1161*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsFederal JudgesCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of PartialityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial InterestsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaivers

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IX. MOVING TO DISQUALIFY JUDGE

1-2 MB Practice Guide: Fed Pretrial Civ Proc in CA 2.87

2.87 If Judge Does Not Recuse Self, Party May Move for Disqualification.

Although the statute does not specify a procedure for disqualification, a party may move for disqualification pursuant to *28 USC § 455* if a judge fails to recuse himself or herself [*In re Bernard (9th Cir 1994) 31 F3d 842, 843*].

Strategic Point--Moving Party:

A motion to disqualify a judge pursuant to *28 USC § 455* may be heard by the challenged judge, unless a local rule provides for assignment of the motion to another judge for hearing [*In re Bernard (9th Cir 1994) 31 F3d 842, 843*]. If a motion is necessary, the party seeking disqualification should consider filing a motion for disqualification under *28 USC § 144*, if possible, because the statute requires that the motion be heard by a judge other than the judge being challenged [*28 USC § 144*].

Cross Reference:

Discussion of motion pursuant to *28 USC § 144*, see *§ 2.85*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsFederal JudgesCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of PartialityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial InterestsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaivers

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2.88 Disqualification Under 28 USC § 455 Must Be Sought in Timely Manner.

There is no "per se" rule as to what constitutes a timely motion under *28 USC § 455* [*Preston v. United States (9th Cir 1991) 923 F2d 731, 733*]. However, the party seeking recusal must file a motion with reasonable promptness after the ground for the motion is ascertained [*Preston v. United States (9th Cir 1991) 923 F2d 731, 733*].

Example:

The plaintiffs filed a motion for recusal 18 months after the case was transferred to the judge. Plaintiffs did not claim actual bias. Plaintiffs based the motion on *28 USC §§ 455(a)* and *(b)(2)*, alleging that before being appointed to the bench, the judge had been "of counsel" to a law firm which represented an entity that would be affected by the outcome of the case. Plaintiffs also alleged that they did not learn of the association until 10 days before the motion was filed. Under the circumstances, the motion was timely [*Preston v. United States (9th Cir 1991) 923 F2d 731, 733-734*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of PartialityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial InterestsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaivers

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2.89 Grounds for Disqualification Generally Cannot Be Waived.

No judge may accept from the parties to the proceeding a waiver of any ground for disqualification enumerated under *28 USC § 455(b)* [*28 USC § 455(e)*]. When the ground for disqualification arises only under *28 USC § 455(a)*, waiver may be accepted, if it is preceded by a full disclosure on the record of the basis for disqualification [*28 USC § 455(e)*].

Cross References:

Discussion of grounds for disqualification under *28 USC § 455(b)*, see *2.86[2] -[6]*. Discussion of ground for disqualification under *28 USC § 455(a)*, see *§ 2.86[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of PartialityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial InterestsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaivers

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2.90 Circumstances Under Which Judge May Divest Self of Interest to Avoid Disqualification.

If a judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that the provides the grounds for disqualification [*28 USC § 455(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of PartialityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial InterestsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaivers

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2.91 Notice of Motion and Motion to Transfer Venue for Convenience.

[*attorney's name and California Bar number*]
_____
[*attorney's street address*]
_____
[*city, state, and zip code*]
_____
[*phone number*]
_____
[*fax number*]
_____
[*attorney's e-mail address*]
_____
Attorney for [*party's status and name*]
_____

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

[*name*] _____ _____ _____	)))))	Civil Action No. _____ _____ NOTICE OF MOTION AND MOTION TO

___,	)	TRANSFER VENUE FOR CONVENIENCE
Plaintiff	)	
vs.	)	Date of Hearing:
[*name*]	)	_____
_____		_____
_____		Time of Hearing:
_____		_____
___,		_____
Defendant		Courtroom No.
		_____
		_____

_____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on [*date*] _____ at [*time of day*] _____, or as soon thereafter as counsel may be heard, [*party's status and name*] _____ will move this Court, at the United States Courthouse located at [*address of court*] _____, Courtroom [*courtroom number*] _____, for an order:

(1) Pursuant to *28 USC § 1404(a)*, transferring this action to the United States District Court for the _____ [*name of district, if any, e.g.*, Central] District of _____ [*state in which district located, e.g.*, California] on the grounds that the transfer will be in the interest of justice, and this alternative venue will be more convenient for the witnesses and parties to this action; and

(2) Granting DEFENDANT, _____ [*party, e.g.*, Mary Jones] any and all other incidental relief as may be appropriate.

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of [*name*] _____, [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.

Dated: _____

Respectfully submitted,

[*signature of attorney*] _____

[*typed or printed name of attorney*] _____

[*firm name, if applicable*] _____

Attorney for [*party's status and name*] _____

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
28 USC § 1404

Timing:
See *§ 2.57[4]*

Discussion:
See *§ 2.57*

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2.92 Order Granting Motion for Transfer of Venue.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

[*name*] _____ _____ _____ ___, Plaintiff vs. [*name*] _____ _____ _____ ___, Defendant _____	))))))) 	Civil Action No. _____ _____ ORDER GRANTING MOTION FOR TRANSFER OF VENUE

In consideration of the motion of DEFENDANT,

_____ [*party, e.g.,* Mary Jones] seeking transfer of this action to the United States District Court for the [*name of district, if any*] _____ District of [*state in which district located*] _____, the court has considered the motion and any response, the arguments of counsel in those papers [*optional:* and at oral argument], and all pleadings and other papers on file in this action, and has concluded that transfer of this action to that venue would be in the interest of justice and for the convenience of the parties and witnesses. Therefore,

IT IS ORDERED that the motion of DEFENDANT, _____ [*party, e.g.,* Mary Jones] to transfer this action to the United States District Court for the [*name of district, if any*] _____ District of [*state in which district located*] _____ is GRANTED.

IT IS FURTHER ORDERED that this action be removed from the docket of this Court and transferred to the United States District Court for the [*name of district, if any*] _____ District of [*state in which district located*] _____ for any and all further proceedings.

[*date*] _____

[*signature of District Judge*] _____

[*typed or printed name of District Judge*] _____

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
28 USC § 1404

Discussion:
See *§ 2.57*

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2.93 Motion for Multidistrict Litigation Treatment.

Notice of Motion and Motion for Multidistrict Litigation Treatment.

Before the Judicial Panel on Multidistrict Litigation:

_____

	)	
	)	MDL Docket No.
In re	)	_____
_____	)	_____
_____	)	
_____		
___		
_____		

[*Insert descriptive title of case*]

[*Party designation and name of moving party*] _____ in the civil action entitled [*caption of action in district court*] _____ pending in the United States District Court for the [*name of district, if any*] _____ District of [*state in which district located*] _____, requests that the action, along with the other civil actions listed in the accompanying schedule, be accorded multidistrict litigation treatment. In

support of this motion, the movant states:

1. _____ [*Allege, in separately numbered paragraphs (Multidistrict Rule 7.1(a)), the factual allegations justifying multidistrict litigation treatment of the cases to be transferred, including (28 USC § 1407):*

(1) Specifying the common questions of fact;

(2) Explaining how transfer would be in the interests of convenience of the parties and witnesses, or would promote the just and efficient conduct of the action].

This motion is based on the accompanying Brief and Schedule of Cases dated [*date*] _____, and on all of the pleadings and papers on file in the actions to be given multidistrict litigation treatment.

Dated: _____

Respectfully submitted,

[*signature of attorney*] _____

[*typed or printed name of attorney*] _____

[*firm name, if applicable*] _____

Attorney for [*party's status and name*] _____

[*Attach suporting brief and schedule of cases*.]

[*Attach certificate of service*.]

NOTES.

Authority:
28 USC § 1407; Multidistrict Rules 5.11, 5.12, 5.13, *5.2*, *7.1*, *7.2*

Multidistrict Litigation Procedure:
See *§ 2.62*

Filing Papers with Panel:
See *§ 2.63*

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2.94 Notice of Motion and Motion to Disqualify Judge.

Motion to Disqualify Judge.
[*attorney's name and California Bar number*]
_____
[*attorney's street address*]
_____
[*city, state, and zip code*]
_____
[*phone number*]
_____
[*fax number*]
_____
[*attorney's e-mail address*]
_____
Attorney for [*party's status and name*]
_____
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

[*name*] _____ _____ _____	))))))	Civil Action No. _____ _____ NOTICE OF MOTION AND MOTION TO DIS-

___,	)	QUALIFY JUDGE
Plaintiff	)	
vs.	)	Date of Hearing:
[*name*]	)	_____
_____		_____
_____		Time of Hearing:
_____		_____
___,		_____
Defendant		Courtroom No.
		_____
		_____

_____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on [*date*] _____ at [*time of day*] _____, or as soon thereafter as counsel may be heard, [*party's status and name*] _____ will move this Court, at the United States Courthouse located at [*address of court*] _____, Courtroom [*courtroom number*] _____, for an order, pursuant to _____ [*28 USC § 144 or specify subsection of 28 USC § 455, e.g., 28 USC § 455(b)(1)*] to disqualify the Honorable Judge [*name*] _____ in this case.

[*EITHER*]

The Honorable Judge [*name*] _____ should be disqualified because he/she has a personal bias or prejudice against _____ [*moving party, e.g.,* Defendant Mary Jones].

As more fully explained in the Affidavit of [*name*] _____ filed with this motion, the Honorable Judge [*name*] _____ has [*state facts indicating bias or prejudice*] _____.

[*AND/OR*]

The Honorable Judge [*name*] _____ should be disqualified because his/her impartiality might reasonably be questioned.

As more fully explained in the Affidavit of [*name*] _____ filed with this motion, the Honorable

Judge [*name*] _____ has [*state facts indicating reasons impartiality might be questioned*]

_____

[*AND/OR*]

The Honorable Judge [*name*] _____ should be disqualified because _____ [while in private practice, he/she served as a lawyer in the matter in controversy *or* a lawyer with whom the judge previously practiced law served, during their association, as a lawyer concerning the matter in controversy *or* the judge has been a material witness concerning the matter in controversy *or* a lawyer with whom the judge previously practiced law has been a material witness concerning the matter in controversy].

As more fully explained in the Affidavit of [*name*] _____ filed with this motion, [*state facts in support of grounds for motion*]

_____

[*AND/OR*]

The Honorable Judge [*name*] _____ should be disqualified because he/she served in governmental employment and in such capacity

_____

[participated in the particular matter in controversy *or* expressed an opinion concerning the merits of the particular matter in controversy].

As more fully explained in the Affidavit of [*name*] _____ filed with this motion, [*state facts in support of grounds for motion*]

_____

[*AND/OR*]

The Honorable Judge [*name*] _____ should be disqualified because _____ [he/she individually *or* he/she, as a fiduciary, *or* his/her spouse *or* his/her minor child residing in his/her household] has

_____

[a financial interest in the subject matter in controversy *or* a financial interest in a party to the proceeding *or* an interest that could be substantially affected by the outcome of the proceeding].

As more fully explained in the Affidavit of [*name*] _____ filed with this motion, [*state facts in support of grounds for motion*]

_____

[*AND/OR*]

The Honorable Judge [*name*] _____ should be disqualified because _____ [he/she *or* his/her spouse *or specify person within third degree of relationship to judge or judge's spouse, or the spouse of such person*] is a(n) _____ [party to the proceeding *or* officer of a party to the proceeding *or* director of a party to the proceeding *or* trustee of a party to the proceeding].

As more fully explained in the Affidavit of [*name*] _____ filed with this motion, [*state facts in support of grounds for motion*]

_____

[*AND/OR*]

The Honorable Judge [*name*] _____ should be disqualified because

_____

[he/she *or* his/her spouse *or specify person within third degree of relationship to judge or judge's spouse, or the spouse of such person*] is acting as a lawyer in the proceeding.

As more fully explained in the Affidavit of [*name*] _____ filed with this motion, [*state facts in support of grounds for motion*]

_____

[*AND/OR*]

The Honorable Judge [*name*] _____ should be disqualified because

_____

[he/she *or* his/her spouse *or specify person within third degree of relationship to judge or judge's spouse, or the spouse of such person*] has an interest that could be substantially affected by the outcome of the proceeding.

As more fully explained in the Affidavit of [*name*] _____ filed with this motion, [*state facts in support of grounds for motion*]

_____

[*AND/OR*]

The Honorable Judge [*name*] _____ should be disqualified because _____ [he/she *or* his/her spouse *or specify person within third degree of relationship to judge or judge's spouse, or the spouse of such person*] is likely to be a material witness in the proceeding.

[*CONTINUE*]

This motion is timely made in that [*state facts indicating that motion is being filed with reasonable promptness after ground(s) for motion was/were ascertained*]

_____

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of [*name*] _____, [*add, if appropriate:* the accompanying Certificate of Counsel,] [*add, if appropriate:* the accompanying Memorandum of] Points and Authorities,] and the pleadings and papers on file in this action.

Dated: _____

Respectfully submitted,

[*signature of attorney*] _____

[*typed or printed name of attorney*] _____

[*firm name, if applicable*] _____

Attorney for [*party's status and name*] _____

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service.*]

NOTES.

Authority:
28 USC §§ 144, 455

Disqualification of Judge Under 28 USC § 144:
See *§ 2.85*

Disqualification of Judge Under 28 USC § 455:
See *§ 2.86 -2.88*

Timing:
See *§ 2.85[2][a], 2.88*

Related Form of Affidavit of Bias or Prejudice:
See 11 *Bender's Federal Practice Forms, Form 63:50* (Matthew Bender)

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X. FORMS

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2.95 Local District Court Forms.

Local district court forms relating to matters addressed in this chapter are listed below.

Central District

Settlement Procedure Selection: Notice Request and Order (ADR-01)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Click here to view image.

Stipulation Regarding Selection of Attorney Settlement Officer (ADR-02)

Click here to view image.

Attorney Settlement Officer Proceeding Report (ADR-03)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

ADR Pilot Program Questionnaire (ADR-09)

Click here to view image.

Statement of Consent to Proceed Before a United States Magistrate Judge Pursuant to Title 28 USC § 636(c) (CIV-11)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Eastern District

Notice, Consent, and Order of Reference--Exercise of Jurisdiction by a United States Magistrate Judge (AO 85)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Notice of Availability of VDRP

Stip and Order

NOTICE OF AVAILABILITY OF VOLUNTARY DISPUTE RESOLUTION

Pursuant to the findings and directives of Congress in *28 U.S.C. §§ 651 et seq.*, and in recognition of the economic burdens and delay in the resolution of disputes that can be imposed by full formal litigation, Local Rule 271 governs the referral of certain actions to the Voluntary Dispute Resolution Program ("VDRP") at the election of parties. Plaintiff or removing party is to provide all other parties with copies of the notice at the time service is effected or, for parties already served, no more than fourteen (14) days after receiving notice from the Court. After filing of the original complaint or removal action, any party who causes a new party to be joined in the action shall promptly serve a copy of the notice on the new party.

It is the Court's intention that the VDRP shall allow the participants to take advantage of a wide variety of alternative dispute resolution methods. These methods may include, but are not limited to, mediation, negotiation, early neutral evaluation and settlement facilitation. The specific method or methods employed will be determined by the Neutral and the parties.

PLEASE TAKE NOTICE that pursuant to Local Rule 271, this Local Rule applies to all civil actions pending before any District Judge or Magistrate Judge in this District except that actions in the following categories are exempt from presumptive inclusion: (i) prisoner petitions and actions, including habeas corpus petitions, (ii) actions in which one of the parties is appearing pro se, (iii) voting rights actions, (iv) social security actions, (v) deportation actions, (vi) Freedom of Information Act actions, and (vii) actions involving the constitutionality of federal, state or local statutes or ordinances. The fact that a case falls in a category that is exempt from presumptive applicability of this Local Rule neither (1) precludes the parties to such a case from agreeing to participate in an Alternative Dispute Resolution ("ADR") process, nor (2) deprives the Court of authority to compel participation in an appropriate ADR proceeding.

Parties may elect Voluntary Dispute Resolution with the Court indicating that all parties to the action agree to submit the action to VDRP pursuant to Local Rule 271. Actions may not be assigned to VDRP over the objection of a party. (Copy of sample stipulation attached hereto.) At the time of filing, a copy of the stipulation shall be provided to the

VDRP Administrator designated below:

Linda Martinez, Administrator
Voluntary Dispute Resolution Program
United States District Court
501 I Street, Suite 4-200
Sacramento, CA 95814
(916) 930-4280

Click here to view image.

Stipulation and Order to Elect Referral of Action to Voluntary Dispute Resolution (VDRP) Pursuant to Local Rule 271

Click here to view image.

Northern District

Notice of Need for ADR Phone Conference

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Stipulation and (Proposed) Order Selecting ADR Process

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Consent to Proceed before a Magistrate Judge

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Declination to Proceed before a Magistrate Judge and Request for Reassignment

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Southern District

Consent to Exercise of Jurisdiction by a United States Magistrate Judge and Order of Reference

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Cross Reference:

Automated HotDocs(R) and PDF versions of these forms may be accessed and filled in from the online version of this publication, and are also available at www.LexisOne.com/forms.

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Unit 2 First Steps
CHAPTER 3 Removing a State Court Case to Federal Court

1-3 MB Practice Guide: Fed Pretrial Civ Proc in CA 3.syn

§ 3.syn Synopsis to Chapter 3: Removing a State Court Case to Federal Court

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Unit 2 First Steps
CHAPTER 3 Removing a State Court Case to Federal Court
I. STRATEGY

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3.01 Scope.

This chapter covers:

- Objectives and strategy for removal [*see 3.02*].
- Analyzing a case to determine whether it is removable [*see 3.03 -3.15*].
- Removing a case [*see 3.16 -3.21*].
- Remanding a case [*see 3.23 -3.33*].

Core Statutes: *28 USC §§ 1441-1447.*

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Unit 2 First Steps
CHAPTER 3 Removing a State Court Case to Federal Court
I. STRATEGY

1-3 MB Practice Guide: Fed Pretrial Civ Proc in CA 3.02

3.02 Objective and Strategy.

In a state court civil action, the case's potential for removal will often be an important consideration for the parties. The basic test for removal is whether the case could have been originally brought in federal court [*see 28 USC § 1441*]. Counsel must evaluate each case in light of the two basic categories of federal court jurisdiction: federal question jurisdiction and jurisdiction based on diversity of citizenship.

When the defendant resides or is otherwise located outside of the state where the action is brought, the prospect of removal takes on added importance. Strategically, the defendant may seek to eliminate a "home court advantage" sometimes associated with state court. An out-of-state defendant may also seek to transfer the case to a federal venue in another locality, which requires that the defendant first remove, and then rely on federal transfer statutes.

Failure to comply with the strict statutory deadlines may result in waiver of removal rights, so timing should be a key concern for any party seeking removal [*see 3.06*, *3.20*].

Parties will want to consider how removal will affect the timing of the case disposition. Differences between state and federal practice may affect the pace of the proceedings. Also, the relative congestion of federal and state court dockets may be a consideration, particularly for defendants who seek a speedy disposition.

Strategic Point--Defendant:

It may take longer to get a trial date in the federal courts, However, the motion calendars in the federal courts are less crowded, and the federal judges have more law clerk support. Also, the federal courts may be better prepared and able to handle complex pretrial motions.

Cross Reference:

Discussion of jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue).

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalElementsFederal VenueCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalWaivers

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3.03 CHECKLISTS: Initial Considerations for Defendants and Plaintiffs Relating to Removal.

3.03[1] Defendant's Checklist: Evaluating Case for Removal.

☐ Ascertain whether removal would be desirable for the client.

○ **Federal rules.** Are the procedures or evidentiary rules available in federal court more advantageous to the client?

○ ***Erie*** **Doctrine.** Under the *Erie* doctrine, certain federal rules are applied, rather than their state counterparts, when hearing a state claim based on diversity jurisdiction. A defendant should investigate whether any such procedural differences would be significant to the case.

○ **Local practice.** Consider advantages and disadvantages of federal local practice.

○ **Familiarity.** Litigants often choose the forum where they are more comfortable or more experienced. Conversely, a defendant may consider whether the federal forum would be a more difficult venue for plaintiff's counsel.

○ **Jury trials.** In some cases, it is more likely that a matter could be tried to a jury in federal court than it would in state court.

○ **Jury pools.** The populations within federal districts, particularly large districts, are often demographically distinct from those in the encompassed state districts. Defendants contemplating a jury trial should consider whether the federal jury pool is likely to be

more favorable to the case than its state counterpart.

- **Jury unanimity.** Federal civil juries must be unanimous, while state juries need only reach a three-fourths verdict in California state courts. Consider whether this point might favor the plaintiff or the defendant.

- **Interlocutory appeals.** The right to seek interlocutory appeals may differ in federal and state courts.

- **Docket congestion.** Consider relative congestion in state and federal court civil dockets.

- **Geography.** The federal courthouse may be more convenient to the defendant or to defense counsel.

- **Alternative dispute resolution.** Consider relative availability of mandatory alternative dispute resolution procedures.

- **Transfer.** Consider availability within federal court system to seek transfer to more convenient forum in different state.

- **Assignment of single judge.** A single assigned judge in federal court may mean more familiarity with the case, greater speed to trial, etc., than the various duty judges who may be involved with a case in state court.

- **Peremptory challenge of judge.** In state court, litigants are entitled to a single peremptory challenge against the assigned judge. In federal court, judges may only be disqualified for cause, which is a very difficult standard to meet.

- **Judge's interpretation of law.** If state law has not been clearly defined by the state courts, consider whether federal courts have previously interpreted the state law and whether that interpretation is favorable compared to the likely interpretation by a state court judge.

- **Remand.** Check to ensure that grounds for remand are nonexistent or minimal.

☐ Ascertain whether removal is possible:

- Was case originally filed in state court?

Authority:
28 USC §§ 1441(a), 1446(a)

Discussion:

See *§ 3.07*

○ Is there federal question jurisdiction?

Authority:
28 USC § 1441

Discussion:
See *§ 3.09*

○ Is there diversity jurisdiction?

Authority:
28 USC §§ 1332, *1441*

Discussion:
See *§ 3.10*

○ If other than a qualified class action, will all defendants join?

Authority:
28 USC §§ 1446(b), *1453(b)*

Discussion:
See *§ 3.12*

○ Can removal notice be timely filed?

Authority:
28 USC § 1446(b)

Discussion:
See *§§ 3.06*, *3.20*

○ Do particular removal statutes apply?

Discussion:
See *§ 3.13*

○ Is there a valid forum selection clause?

Authority:
Pelleport Investors, Inc. v. Budco Quality Theatres, Inc. (9th Cir 1984) 741 F2d 273, 279-280

Discussion:
See *§ 3.06[2]*

○ Have defendants already submitted to state court jurisdiction?

Discussion:
See *§ 3.06[3]*

3.03[2] Plaintiff's Checklist: Determining Whether Removal May Be Prevented.

☐ A state court plaintiff may strategically choose to prevent removal by doing the following:

○ **Avoiding federal law claims.** Allege only state statutes and avoid raising in complaint any claims arising under federal law. If claims are in area of arguable preemption by federal statute, complaint should allege that claims are outside the statute's preemptive scope.

○ **Choosing defendants strategically.** Join legitimate nondiverse or local defendants. If using Doe defendants, plaintiff should conduct discovery to identify and serve unnamed defendants, whose presence will then be considered for diversity purposes.

○ **Limiting demand for damages.** If case other than a qualified class action would depend on diversity of parties for federal jurisdiction, demand less than $75,000.

○ **Serving defendants strategically.** Serve defendant least likely to remove first and stagger service thereafter to other defendants.

Authority: *28 USC §§ 1331*, *1332*, *1441*, *1446*

Discussion: See *§§ 3.09*, *3.10*, *3.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalElementsFederal VenueCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalWaivers

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Unit 2 First Steps
CHAPTER 3 Removing a State Court Case to Federal Court
II. ANALYZING CASE FOR REMOVAL

1-3 MB Practice Guide: Fed Pretrial Civ Proc in CA 3.04

3.04 Removal Allows Defendant to Transfer Case From State to Federal Court.

3.04[1] Removal Available If Case Could Have Been Brought in Federal Court. Removal statutes permit defendants to transfer an action originally filed in state court to the federal district court for the district and division in which the state action is pending. Defendants may invoke removal jurisdiction *only when the case could have originally been brought in federal court*. Removal is usually accomplished under the general removal statute, which provides for removal based on federal question or diversity jurisdiction [*28 USC § 1441*].

3.04[2] Several Key Restrictions Apply Under General Removal Statute. The general removal statute includes the following restrictions on removal [*28 USC § 1441*]:

- Only civil actions brought in state court may be removed.
- The district courts must have original jurisdiction over the action.
- Only the defendant or all defendants may remove.
- The action must be removed to the federal district court for the district and division in which the state action is pending.

3.04[3] Special Removal Statutes Allow for Removal in Other Special Circumstances. Removal is also available under certain special circumstances specified in other statutes [*see 28 USC §§ 1441-1445*; *see also 3.13*].

Warning:

Because removal statutes are construed strictly, counsel must ensure that all statutory requirements are met, whatever type of removal is chosen [*see 28 USC §§ 1441-1447*; *see also Hofler v. Aetna US Health Care, Inc. (9th Cir 2002) 296 F3d 764, 767* (quoting *Ethridge v. Harbor House Rest. (9th Cir 1988) 861 F2d 1389, 1393)*].

Legal Topics:

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Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalElementsFederal VenueCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalWaivers

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Unit 2 First Steps
CHAPTER 3 Removing a State Court Case to Federal Court
II. ANALYZING CASE FOR REMOVAL

1-3 MB Practice Guide: Fed Pretrial Civ Proc in CA 3.05

3.05 Removal Can Be Based on Either Federal Question or Diversity Jurisdiction.

3.05[1] Federal Question Cases. A federal question action based on a claim or right arising under the Constitution, treaties, or laws of the United States is removable without regard to the citizenship or residence of the parties, or the amount in controversy [*see 28 USC §§ 1331, 1441(b)*]. The federal law under which a claim arises must be a direct and essential element of the plaintiff's claim for relief [*see King County v. Rasmussen (9th Cir 2002) 299 F3d 1077, 1082 , cert. denied, 538 US 1057 (2003)*].

When a federal question action is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed. The district court may determine all issues in the case, or may exercise its discretion to remand all matters in which state law predominates [*28 USC § 1441(c)*].

Cross References:

Determination of whether court has federal question jurisdiction, see *§ 3.09*. General discussion of federal question jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), *§§ 2.03 -2.09*.

3.05[2] Diversity Cases: Resident Defendant Bars Removal in Most Cases. A diversity action is usually removable only if both the following are true [*28 USC § 1441(b)*]:

- Complete diversity exists between the parties.
- None of the parties in interest properly joined and served as defendant is a citizen of the state where the action is pending.

However, complete diversity is not required in class actions or mass actions governed by the Class Action Fairness Act of 2005 [*see 28 USC § 1332(d)*]. Note that the Class Action Fairness Act applies to civil actions "commenced" on or after February 18, 2005, and for purposes of CAFA retroactivity, "commenced" means the date the complaint is filed, not the date the case is removed [*Bush v. Cheaptickets, Inc. (9th Cir 2005) 425 F3d 683, 689* ; *see also Pritchett v. Office Depot, Inc. (10th Cir 2005) 420 F3d 1090, 1094*]. For purposes of determining CAFA's effective date, an action

is commenced under California law when the original complaint in the action is filed, irrespective of any relation back analysis [*Progressive W.Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1016-1017* ; see *McAtee v. Capital One, F.S.B. (9th Cir 2007) 479 F3d 1143, 1148* (any amendment of original complaint does not change action's commencement date for purpose of CAFA's effective date)]. Further, an amendment to a cross-complaint in California state court (a counterclaim in federal court) does not commence an action under the CAFA as of the date of the amendment [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1015-1016*].

Cross References:

Determination of whether court has diversity jurisdiction, see *§ 3.10*. Removal in multi-defendant action under Class Action Fairness Act of 2005, see *§ 3.18[4][b]*. General discussion of diversity jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), *§§ 2.10 -2.25*. Discussion of minimal diversity required under Class Action Fairness Act of 2005, see Ch. 2, Determining Forum (Jurisdiction and Venue), *§ 2.24A*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3.06 Right of Removal Can Be Waived.

3.06[1] Waiver by Untimely Removal. A defendant may waive the right to remove an action by failing to file a removal notice within the statutory time limit [*see 28 USC § 1441(b)*].

Timing:

A defendant must act quickly to preserve removal rights. The general time limit is 30 days after defendant's receipt of the initial pleading, or 30 days after the defendant's receipt of any other paper indicating that the case has become removable [*28 USC § 1446(b)*].

Cross Reference:

Time limits for removal, see *§ 3.20*.

3.06[2] Waiver by Forum Selection Clauses.

3.06[2][a] Forum Selection Clauses Are Enforceable. A defendant may contractually waive the right to remove a case in a forum selection clause [*see Pelleport Investors, Inc. v. Budco Quality Theatres, Inc. (9th Cir 1984) 741 F2d 273, 279-280*].

Domestic and international forum selection clauses are prima facie valid and enforceable unless found to be unjust or unreasonable, or obtained by fraud or overreaching [*see Pelleport Investors, Inc. v. Budco Quality Theatres, Inc. (9th Cir 1984) 741 F2d 273, 279-280*].

3.06[2][b] Waiver Must Be Clear and Unequivocal. The waiver must be clear and unequivocal and contain language mandating a particular forum as the exclusive forum to resolve disputes [*see Northern Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co. (9th Cir 1995) 69 F3d 1034, 1036-1038*].

Distinguish:

Language conferring jurisdiction on a state court is more in the nature of a geographic limitation and

does not constitute waiver [*see Hunt Wesson Foods, Inc. v. Supreme Oil Co. (9th Cir 1987) 817 F2d 75, 76-78*].

3.06[2][c] Party Asserting Waiver Will Have Burden of Proof. The party asserting waiver has the burden of proof on all material provisions of the waiver agreement [*Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co. (9th Cir 1991) 940 F2d 550, 553*].

3.06[2][d] Effect on Other Defendants. If a defendant waives the right to remove through a forum selection clause, other defendants who are not parties to the agreement may be barred from removing the action when removal must be joined by all defendants [*see 3.12*].

3.06[2][e] Standard of Review Is Abuse of Discretion. The Ninth Circuit reviews a district court's refusal to enforce a forum selection clause under an abuse of discretion standard, rather than a de novo standard [*Pelleport Investors, Inc. v. Budco Quality Theatres, Inc. (9th Cir 1984) 741 F2d 273, 280 n4*].

3.06[3] Waiver by Submitting to State Court Jurisdiction. A defendant may waive the right to remove an action by taking actions in the state court that clearly and unequivocally manifest submission to state court jurisdiction (and the abandonment of the right to a federal forum) once it appears that the case is removable [*see RTC v. Bayside Developers (9th Cir 1994) 43 F3d 1230, 1236* ; *see also Akin v. Ashland Chem. Co. (10th Cir 1998) 156 F3d 1030, 1036* , *cert. denied*, *526 US 1112 (1998)*].

Distinguish:

Merely filing a responsive pleading does not invoke the state court's jurisdiction so as to constitute a waiver of the right to remove. A defensive action to avoid the automatic entry of an adverse judgment does not manifest an intent to litigate in state court, and accordingly, does not waive the right to remove [*Acosta v. Direct Merchants Bank (SD Cal 2002) 207 F Supp2d 1129, 1132* (citing **Moore's**); *see California Republican Party v. Mercier (CD Cal 1986) 652 F Supp 928, 931*]. Likewise, neither filing form interrogatories nor requesting an extension of time to respond to discovery constitutes litigation on the merits [*Foley v. Allied Interstate, Inc. (CD Cal 2004) 312 F Supp2d 1279, 1284*].

The following have been found to constitute voluntary participation in state court proceedings seeking affirmative relief, waiving the right to remove:

- Filing a permissive cross-complaint [*see Acosta v. Direct Merchants Bank (SD Cal 2002) 207 F Supp2d 1129, 1132* (citing **Moore's**)].

  Distinguish:

  Filing a permissive cross-complaint will not waive removal if it was not "unequivocally apparent" that the action was removable at the time the cross-complaint was filed [Mattel, Inc. v. Bryant (CD Cal 2005) 2005 US Dist LEXIS 3568, at *20 (citing **Moore's**)].

- Filing a third-party complaint [*see California Republican Party v. Mercier (CD Cal 1986) 652 F Supp 928, 931*].

- Seeking a continuance without notifying the plaintiff or the state court of an intention to remove the case in the interim [*see Chicago Title & Trust Co. v. Whitney Stores, Inc. (ND Ill 1984) 583 F Supp 575, 577*].

- Moving in state court to compel arbitration [*McKinnon v. Doctor's Assocs., Inc. (ED Mich 1991) 769 F Supp 216, 220*].

Distinguish:

A defendant may file an answer in state court, raise affirmative defenses, and seek removal if removal is otherwise timely [*see Brown v. Sasser (MD Ala 2000) 128 F Supp2d 1345, 1347-1348*].

Cross Reference:

Defendant's waiver of right to remove, see 16 *Moore's Federal Practice, § 107.18* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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3.07 Action Must Be Originally Filed in State Court.

Only civil actions originally filed in state court and pending in state court may be removed [*28 USC §§ 1441(a), 1446(a)*].

The term *state* includes the District of Columbia, and the term *state court* includes the superior court of the District of Columbia [*28 USC § 1451*].

For purposes of removal, the term *state court* does not include Native American tribal courts [*Becenti v. Vigil (10th Cir 1990) 902 F2d 777, 780*].

The Ninth Circuit has adopted a black letter rule based on the plain language of the general removal statute and holds that even a court-like proceeding conducted by a state administrative agency is not subject to removal [*Oregon Bureau of Labor & Indus. ex rel. Richardson v. US W. Communications Inc. (9th Cir 2002) 288 F3d 414, 417-420*].

Distinguish:

The United States Supreme Court has held that a case may be removed if it (1) contains claims that local administrative action violates federal law and also (2) contains state law claims for deferential on-the-record review of administrative findings [*City of Chicago v. International Coll. of Surgeons (1997) 522 US 156, 168-172, 118 S Ct 523, 139 L Ed2d 525* ; *see BNSF Ry. Co. v. O'Dea (9th Cir 2009) 572 F3d 785, 791* (district courts have diversity jurisdiction to review state and local agency administrative decisions, either on the record or de novo, when those appeals are in state trial courts)].

Proceedings that are merely collateral to an action pending in state court may not be removed if the underlying claim is litigated in state court [*Armistead v. C&M Transp., Inc. (1st Cir 1995) 49 F3d 43, 46*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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3.08 Removability Is Determined When Removal Notice Is Filed.

Removal jurisdiction in a federal question case is determined by the complaint as of the time that the removal notice is filed [*see O'Halloran v. University of Washington (9th Cir 1988) 856 F2d 1375, 1378-1379*]. A post-removal amendment to the complaint has no significance in determining removal jurisdiction [*Williams v. Costco Wholesale Corp. (9th Cir 2006) 471 F3d 975, 976* ; *Abada v. Charles Schwab & Co., Inc. (9th Cir 2002) 300 F3d 1112, 1116-1117*], even when the amendment adds federal claims [*Deutsch v. Turner Corp. (9th Cir 2003) 324 F3d 692, 718-719, n22*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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3.09 Case May Be Subject to Removal If District Court Has Original Federal Question Jurisdiction.

3.09[1] Federal Question Actions Are Removable by Defendant. If the plaintiff initiates a federal question action in state court, the defendant may remove the case to federal court [*28 USC § 1441(a)*; *see Caterpillar, Inc. v. Williams (1987) 482 US 386, 392 n6, 107 S Ct 2425, 96 L Ed2d 318* ; *see also 28 USC § 1331*].

Federal question actions are removable without regard to the citizenship or residence of the parties (or the amount in controversy) [*see 28 USC § 1441(b)*].

Cross References:

Discussion of federal question jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), *§§ 2.03 -2.09*.

Removal in federal question cases, see 16 *Moore's Federal Practice, § 107.14[3]*.

3.09[2] Analyzing Federal Question Jurisdiction.

3.09[2][a] Action Must Arise Under Federal Law. The district courts have original jurisdiction of civil actions arising under the Constitution, treaties, or laws of the United States [US Const, art III, § 2; *see 28 USC § 1331*; *see also Wayne v. DHL Worldwide Express (9th Cir 2002) 294 F3d 1179, 1183-1185*]. The federal law under which a claim arises must be a direct and essential element of the plaintiff's claim for relief [*see King County v. Rasmussen (9th Cir 2002) 299 F3d 1077, 1082 , cert. denied, 538 US 1057 (2003)*].

Federal question jurisdiction extends to cases in which either of the following is true [*see Mobil Oil Corp. v. City of Long Beach (9th Cir 1985) 772 F2d 534, 538-540*]:

- Federal law creates the claim for relief;
- Plaintiff's right to relief depends on the resolution of a substantial issue of federal law.

For federal question jurisdiction to arise under a state law claim, that state law claim must necessarily raise a federal issue that is actually disputed and substantial and the federal court must be able to address the question without disrupting "any congressionally approved balance of federal and state judicial responsibilities" [*Grable & Sons Metal Prods. v. Darue Eng'g & Mfg. (2005) 545 US 308, 314, 125 S Ct 2363, 162 L Ed2d 257*]. A federal cause of action is not a necessary condition for exercising jurisdiction over state-law claims that implicate significant federal issues [*Grable & Sons Metal Prods. v. Darue Eng'g & Mfg. (2005) 545 US 308, 316, 125 S Ct 2363, 162 L Ed2d 257*].

3.09[2][b] Applying Well-Pleaded Complaint Rule. Under the well-pleaded complaint rule, federal question jurisdiction exists only when a federal question is presented on the face of the plaintiff's well-pleaded complaint [*Aetna Health Inc. v. Davila (2004) 542 US 200, 207, 124 S Ct 2488, 159 L Ed2d 312* ; *Beneficial Nat'l Bank v. Anderson (2003) 539 US 1, 6, 123 S Ct 2058, 156 L Ed2d 1* ; *Caterpillar, Inc. v. Williams (1987) 482 US 386, 392-393, 107 S Ct 2425, 96 L Ed2d 318* ; *see Abada v. Charles Schwab & Co., Inc. (9th Cir 2002) 300 F3d 1112, 1116-1119*].

The artful pleading doctrine, an exception or corollary to the well-pleaded complaint rule, provides that a plaintiff may not defeat removal by omitting to plead necessary federal questions. If a court finds that a plaintiff has "artfully pleaded" claims, removal is proper even if no federal question appears on the face of the complaint [*Rivet v. Regions Bank (1998) 522 US 470, 475, 118 S Ct 921, 139 L Ed2d 912* ; *see California ex rel. Lockyer v. Dynegy, Inc. (9th Cir 2004) 375 F3d 831, 838-843* ; *Balcorta v. Twentieth Century-Fox Film Corp. (9th Cir 2000) 208 F3d 1102, 1107*]. The Ninth Circuit limits the application of the artful pleading doctrine to situations in which federal law not only displaces state law but also confers a federal remedy [*Hunter v. United Van Lines (9th Cir 1984) 746 F2d 635, 642-643 , cert. denied, 474 US 1014 (1985)*].

3.09[2][c] Removing Claim Over Which State Court Did Not Have Jurisdiction Is Permissible. A federal district court may adjudicate any claim in an action removed by a defendant, even if the state court where the action was filed lacked subject matter jurisdiction over the claim [*28 USC § 1441(b)*].

3.09[2][d] Removing Case Based on Federal Defense Impermissible. A case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if that defense is anticipated in the plaintiff's complaint, and even when both parties concede that the federal defense is the only question in issue [*Beneficial Nat'l Bank v. Anderson (2003) 539 US 1, 6, 123 S Ct 2058, 156 L Ed2d 1* ; *Caterpillar, Inc. v. Williams (1987) 482 US 386, 398-399, 107 S Ct 2425, 96 L Ed2d 318* ; *Franchise Tax Bd. v. Construction Laborers Vacation Trust (1983) 463 US 1, 10, 103 S Ct 2841, 77 L Ed2d 420* ; *see Abada v. Charles Schwab & Co., Inc. (9th Cir 2002) 300 F3d 1112, 1116-1119*].

Example--Federal Defense of Claim Preclusion:

Removal may not be predicated on a defendant's assertion that a prior federal judgment disposed of the entire matter and thus bars plaintiffs from later pursuing a state-law based case [*Rivet v. Regions Bank (1998) 522 US 470, 472, 118 S Ct 921, 139 L Ed2d 912*].

Distinguish:

If a federal defense is applicable, it can be asserted in the state proceedings [*Rivet v. Regions Bank (1998) 522 US 470, 472, 118 S Ct 921, 139 L Ed2d 912*].

3.09[2][e] Removing Case Based on Defendant's Federal Question Counterclaim Impermissible. A defendant may not remove a case solely based on a federal question counterclaim or cross-complaint [*Caterpillar, Inc. v. Williams (1987) 482 US 386, 399, 107 S Ct 2425, 96 L Ed2d 318*].

3.09[3] Removing Entire Case Based on Federal Question Claim.

3.09[3][a] Based on Supplemental Jurisdiction. If a removable claim presents a federal question and is part of a case including related state law claims, the entire case may ordinarily be removed based on the court's supplemental jurisdiction [*28 USC §§ 1367, 1441(c)*; *see Caterpillar, Inc. v. Williams (1987) 482 US 386, 393, 107 S Ct 2425, 96 L Ed2d 318*].

When a defendant removes a case in which the plaintiff has alleged transactionally related state and federal claims or causes of action and the federal claims are resolved or dismissed, the district court retains discretion to exercise supplemental jurisdiction over the remaining state law claims [*28 USC § 1367(c)(3)*; *Carlsbad Tech. v. HIF Bio (2009) ___ US ___, 129 S Ct 1862, 173 L Ed2d 843, 849-850]* .

Cross References

Effect of post removal changes in the case, see *§ 3.30*. Nature and scope of supplemental jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), *§§ 2.26 -2.30*.

3.09[3][b] Based on Section 1441(c). Whenever a separate and independent federal question claim or cause of action is joined with claims or causes of action that are otherwise not removable, the entire case may be removed. The district court has discretion to determine all issues or to remand all issues in which state law predominates [*28 USC § 1441(c)*].

To be separate and independent, the asserted claims must have arisen from different sets of acts that are not transactionally related [*American Fire & Cas. Co. v. Finn (1951) 341 US 6, 12-14, 71 S Ct 534, 95 L Ed 702* ; *see Eyak Native Village v. Exxon Corp. (9th Cir 1994) 25 F3d 773, 781-782 , cert. denied, 513 US 943 (1994)*].

3.09[3][c] Comparing Removal Based on Supplemental Jurisdiction and Removal Based on Section 1441(c). Certain procedural requirements for removal turn on whether the additional defendants are supplemental parties or parties to a separate and independent claim under *28 USC § 1441(c)* as follows [*see Port of New York Auth. v. Eastern Airlines, Inc. (EDNY 1966) 259 F Supp 142, 145*]:

Basis of Removal	Defendants Who Must Join in Removal Notice	Timing of Removal Notice
1441(c)	Only defendants named in federal question claim	Within 30 days after complaint first received by a federal question defendant
Supplemental jurisdiction	All defendants	Within 30 days after complaint first received by any defendant

3.09[4] Removing Cases Entirely Preempted by Federal Law.

3.09[4][a] When Exclusive Federal Remedy Exists. When Congress provides for an exclusive federal remedy, federal courts will usually have exclusive jurisdiction. An action may be removed if the asserted claim has been completely preempted by federal law, even if no federal claim for relief appears on the face of the complaint [*see Aetna Health Inc. v. Davila (2004) 542 US 200, 207-208, 124 S Ct 2488, 159 L Ed2d 312* ; *Caterpillar, Inc. v. Williams (1987) 482 US 386, 393, 107 S Ct 2425, 96 L Ed2d 318* ; *see also California ex rel. Lockyer v. Dynegy, Inc. (9th Cir 2004) 375 F3d 831, 838-843*]. The complete preemption doctrine operates as a corollary to the well-pleaded complaint rule, and may permit removal even when the state remedy sought by the plaintiff is not available in federal court [*Caterpillar, Inc. v. Williams (1987) 482 US 386, 391 n4, 107 S Ct 2425, 96 L Ed2d 318*].

Complete preemption occurs only when Congress intends not only to preempt a certain amount of state law, but also intends to transfer jurisdiction of the subject matter from state to federal court [*see Metropolitan Life Ins. Co. v. Taylor (1987) 481 US 58, 66-67, 107 S Ct 1542, 95 L Ed2d 55*]. In other words, Congress must clearly manifest an intent to convert state-law claims into federal question claims [*Holman v. Laulo-Rowe Agency (9th Cir 1993) 994 F2d*

666, 668]. Complete preemption occurs only when the federal statute has "extraordinary preemptive power", a conclusion that courts reach reluctantly [*Hofler v. Aetna US Health Care, Inc. (9th Cir 2002) 296 F3d 764, 767* ; *see, e.g., Ange v. Templer (ND Cal 2006) 418 F Supp2d 1169, 1173* ("Internet is not a talisman bestowing federal jurisdiction")].

The complete preemption doctrine has been applied primarily in cases arising under the following federal statutes [*Caterpillar, Inc. v. Williams (1987) 482 US 386, 393, 107 S Ct 2425, 96 L Ed2d 318*]:

- The Labor Management Relations Act (LMRA) [*see Textile Workers Union v. Lincoln Mills (1957) 353 US 448, 456-457, 77 S Ct 912, 1 L Ed2d 972* ; *Dahl v. Rosenfeld (9th Cir 2003) 316 F3d 1074, 1078* ; *see also 29 USC § 185*; *3.09[4][b]*].

- The Employee Retirement Income Security Act (ERISA) [*Aetna Health Inc. v. Davila (2004) 542 US 200, 213-214, 124 S Ct 2488, 159 L Ed2d 312* ; *Toumajian v. Frailey (9th Cir 1998) 135 F3d 648, 654-655* ; *see Clorox Co. v. United States Dist. Court (9th Cir 1985) 779 F2d 517, 521* ; *see also 29 USC § 1144*; *3.09[4][c]*].

However, the Supreme Court has held that the National Bank Act completely preempts state-law usury claims [*Beneficial Nat'l Bank v. Anderson (2003) 539 US 1, 123 S Ct 2058, 156 L Ed2d 1* ; *see also* Cross-Country Bank v. Klussman (ND Cal 2004) 2004 US Dist LEXIS 7835, at *10-*11 ; *12 USC §§ 85, 86*].

The Ninth Circuit has held that state law claims based on the illegal copying of copyrighted material are completely preempted by the Copyright Act [*see Dielsi v. Falk (CDCal 1996) 916 F Supp 985, 991-993* (conversion of television script); *see also 17 USC § 301*]. Likewise, state law claims to enforce obligations that squarely fall within the exclusive jurisdiction provision of the Natural Gas Act are completely preempted [*California ex rel. Lockyer v. Dynegy, Inc. (9th Cir 2004) 375 F3d 831, 838-843*], as are state law tort actions for damages predicated upon the filing of an involuntary bankruptcy petition [*In re Miles (9th Cir 2005) 430 F3d 1083, 1091-1092*].

The following statutes do not create a basis for federal jurisdiction under the complete preemption doctrine:

- The Airline Deregulation Act [*Wayne v. DHL Worldwide Express (9th Cir 2002) 294 F3d 1179, 1184* ; *see also 49 USC § 41713*].

- The Federal Crop Insurance Act [*Holman v. Laulo-Rowe Agency (9th Cir 1993) 994 F2d 666, 668-669* ; *see also 7 USC §§ 1501-1524*].

- The Federal Medicare program [*Hofler v. Aetna US Health Care, Inc. (9th Cir 2002) 296 F3d 764, 768*].

- The Federal Communications Act [*Enns v. NOS Communs. (In re NOS Communs.) (9th Cir 2007) 495 F3d 1052, 1058-1059* (Federal Communications Act, *47 USC § 151 et seq.*, does not completely preempt state-law claims concerning billing for telecommunications services)].

- The Federal Food, Drug, and Cosmetic Act (FDCA) [*Wyeth v. Levine (2009) ___ US ___, 129 S Ct 1187, 173 L Ed2d 51, 61* (Federal Food, Drug, and Cosmetic Act, *21 USC § 301 et seq.*, provides that state law would only be invalidated on "direct and positive conflict" with FDCA); *Riegel v. Medtronic, Inc. (2008) 552 US 312, 128 S Ct 999, 169 L Ed2d 892, 914* (collecting state cases)].

- The Railway Labor Act (RLA), *45 USC § 151 et seq.* [*Moore-Thomas v. Alaska Airlines, Inc. (9th Cir 2009) 553 F3d 1241, 1243, 1246* (resolving intra-circuit conflict about whether RLA completely

preempts state law claims)].

- The Securities Litigation Uniform Standards Act of 1998 (SLUSA), *15 USC § 77p(b)* [*Madden v. Cowen Co. (9th Cir 2009) 556 F3d 786, 790* (SLUSA precludes rather than preempts state law claims, because it does not displace state law claims with federal law, but makes some state law claims nonactionable through class action device in federal as well as state court)].

3.09[4][b] Determining Whether Claim Arises Under Labor Management Relations Act. An action arises under LMRA when a state law claim is substantially dependent on the interpretation of a collective bargaining agreement [*Caterpillar, Inc. v. Williams (1987) 482 US 386, 394-395, 107 S Ct 2425, 96 L Ed2d 318*].

The following actions have been held to not be preempted because they did not require the interpretation of a collective bargaining agreement:

- State law privacy claims based on the secret videotaping of unionized employees [*see Cramer v. Consolidated Freightways, Inc. (9th Cir 2001) 255 F3d 683, 689-694*].

- An employee's state law reasonable accommodation claim. The claim was not preempted because the employee did not need to rely on the provisions of the collective bargaining agreement to enforce the parallel, independent, and more extensive reasonable accommodation duties established by state law [*Humble v. Boeing (9th Cir 2002) 305 F3d 1004, 1008-1012*].

- An employee's claim that he was not paid premium wage rates for overtime work. The claim was based entirely on state law; the issue was not *how* the overtime rates were calculated but whether the *result* of the calculation complies with California law [*Gregory v. SCIE, LLC (9th Cir 2003) 317 F3d 1050, 1052-1054*].

3.09[4][c] Determining Whether Claim Arises Under Employee Retirement Income Security Act. Any state law relating to an employee benefit plan as described by ERISA is preempted [*29 USC § 1144(a)*].

A plaintiff's complaint is deemed to state a federal ERISA case if one or more of the plaintiff's claims is characterized as seeking [*see Aetna Health Inc. v. Davila (2004) 542 US 200, 221, 124 S Ct 2488, 159 L Ed2d 312* ; *Toumajian v. Frailey (9th Cir 1998) 135 F3d 648, 654-655*]:

- To recover benefits due under the terms of an ERISA plan [*see, e.g., Cleghorn v. Blue Shield (9th Cir 2005) 408 F3d 1222, 1225-1227*];

- To enforce rights under the terms of an ERISA plan; or

- To clarify rights to future benefits under the terms of an ERISA plan.

In short, ERISA preempts any claims relating to the administration of benefits, considered a fiduciary act, under a plan regulated by ERISA [*Aetna Health Inc. v. Davila (2004) 542 US 200, 218, 221, 124 S Ct 2488, 159 L Ed2d 312*].

ERISA preemption of state laws is broad [*Aetna Health Inc. v. Davila (2004) 542 US 200, 209, 124 S Ct 2488, 159 L Ed2d 312* ("the ERISA civil enforcement mechanism is one of those provisions with such 'extraordinary preemptive power' that it 'converts an ordinary state common law complaint into a federal claim' ")]. ERISA preempts a state law claim that can reasonably be characterized as a claim under ERISA's civil enforcement provisions [*Toumajian v. Frailey (9th Cir 1998) 135 F3d 648, 654-655*]. Under Ninth Circuit precedent, confirmed by the Supreme Court, a state law claim is preempted only if it encroaches on relationships regulated by ERISA [*Geweke Ford v. St. Joseph's Omni*

Preferred Care, Inc. (9th Cir 1997) 130 F3d 1355, 1358-1359]. ERISA's comprehensive legislative scheme includes an integrated system of procedures for enforcement, and is essential to accomplish Congress's purpose of creating a comprehensive statute for the regulation of employee benefit plans. Any state law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with congressional intent and is preempted [*Aetna Health Inc. v. Davila (2004) 542 US 200, 209, 124 S Ct 2488, 159 L Ed2d 312*]. If a plaintiff's claims are outside ERISA's civil enforcement provision, the complete preemption argument fails and the district court lacks subject matter jurisdiction [*Buster v. Greisen (9th Cir 1997) 104 F3d 1186, 1188-1189 , cert. denied, 522 US 981 (1997)*].

ERISA does not preempt state law suits based on the following:

- The alleged tort of negligent misrepresentation brought by a third-party health provider against an ERISA plan administrator [*The Meadows v. Employers Health Ins. (9th Cir 1995) 47 F3d 1006, 1011* ; *see Buster v. Greisen (9th Cir 1997) 104 F3d 1186, 1188 , cert. denied, 522 US 981 (1997)*].

- The allegation that accountants were negligent in establishing and administering a pension plan [*Toumajian v. Frailey (9th Cir 1998) 135 F3d 648, 654-655*].

- The alleged tort of invasion of privacy by private investigators hired by the plan administrator [*Dishman v. UNUM Life Ins. Co. (9th Cir 2001) 269 F3d 974, 983-984*].

- The underlying negligence constituting medical maltreatment by a person who can be deemed to be a treating physician or the physician's employer [*Aetna Health Inc. v. Davila (2004) 542 US 200, 221, 124 S Ct 2488, 159 L Ed2d 312* ; *see Pegram v. Herdrich (2000) 530 US 211, 120 S Ct 2143, 147 L Ed2d 164*].

- A breach of contract claim brought by an insurer against an insured for reimbursement of benefits [*Providence Health Plan v. McDowell (9th Cir 2004) 385 F3d 1168, 1172-1173* ; *Carpenters Health & Welfare Trust v. Vonderharr (9th Cir 2004) 384 F3d 667, 672*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalWaivers

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 2 First Steps
CHAPTER 3 Removing a State Court Case to Federal Court
II. ANALYZING CASE FOR REMOVAL

1-3 MB Practice Guide: Fed Pretrial Civ Proc in CA 3.10

3.10 Case May Be Subject to Removal If District Court Has Original Diversity Jurisdiction.

3.10[1] Removing on Basis of Diversity Jurisdiction.

3.10[1][a] Case Must Meet Amount in Controversy and Diversity of Citizenship Requirements. A defendant may be able to remove a case if the case could have originally been brought in federal court on the basis of diversity jurisdiction [*28 USC § 1441(a)*; *see Mutuelles Unies v. Kroll & Linstrom (9th Cir 1992) 957 F2d 707, 712*].

A district court has diversity jurisdiction over any civil action in which the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and the action is between [*28 USC § 1332(a)*]:

- Citizens of different states [*see Mutuelles Unies v. Kroll & Linstrom (9th Cir 1992) 957 F2d 707, 712*].
- Citizens of a state and citizens or subjects of a foreign state [*see 28 USC § 1603(a)*].
- Citizens of different states, with foreign citizens or subjects as additional parties.
- A foreign state as plaintiff and citizens of a state or different states as defendants.

Under the Class Action Fairness Act of 2005 [*see* 109 PL 2, 199 Stat 4], a district court also has diversity jurisdiction over certain class actions in which the matter in controversy exceeds the sum or value of $5 million, exclusive of interest and costs, and diversity of citizenship exists between any member of a class of plaintiffs and any defendant [*28 USC § 1332(d)(2)*]. Note that the Class Action Fairness Act applies to civil actions "commenced" on or after February 18, 2005, and for purposes of CAFA retroactivity, "commenced" means the date the complaint is filed, not the date the case is removed [*Bush v. Cheaptickets, Inc. (9th Cir 2005) 425 F3d 683, 689* ; *see also Pritchett v. Office Depot, Inc. (10th Cir 2005) 420 F3d 1090, 1094*]. For purposes of determining CAFA's effective date, an action is commenced under California law when the original complaint in the action is filed, irrespective of any relation back analysis [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1016-1017* ; *see McAtee v. Capital One, F.S.B. (9th Cir 2007) 479 F3d 1143, 1148* (any amendment of original complaint does not change action's commencement date for

purpose of CAFA's effective date)]. Further, an amendment to a cross-complaint in California state court (a counterclaim in federal court) does not commence an action under the CAFA as of the date of the amendment [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1015-1016*].

Cross References:

Discussion of diversity jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), *§§ 2.10 -2.25*.

Removal in diversity of citizenship cases, see 16 *Moore's Federal Practice, § 107.14[2]* (Matthew Bender 3d ed.).

3.10[1][b] Removal Not Permitted If Any Defendant Is Citizen of State in Which Action Is Filed. Removal based on general diversity jurisdiction is permissible only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which the action is filed [*28 USC § 1441(b)*].

Exception:

A qualified class action may be removed without regard to whether any defendant is a citizen of the state in which the action is brought [*28 USC § 1453(b)* (applicable to civil actions commenced on or after February 18, 2005)]. For discussion of the minimal diversity required under the Class Action Fairness Act of 2005, see Ch. 2, Determining Forum (Jurisdiction and Venue), *§ 2.24A*.

Strategic Point--Defendant:

The forum defendant rule contained in 28 USC § 1441(b) is procedural, not jurisdictional. Therefore, a violation of the forum defendant rule is a waivable defect if not objected to within 30 days and cannot form the basis for a district court's *sua sponte* remand order [Lively v. Wild Oats Mkts., Inc. (9th Cir 2006) 456 F3d 933, 935-936].

3.10[1][c] Removal Not Permitted in Domestic Relations Cases. Diversity jurisdiction does not apply to domestic relations cases. This exception is narrow and encompasses only cases involving the issuance of a divorce, alimony (spousal support) or child custody [*Ankenbrandt v. Richards (1992) 504 US 689, 707-717, 112 S Ct 2206, 119 L Ed2d 468* ; *see Peterson v. Babbitt (9th Cir 1983) 708 F2d 465, 466* (jurisdiction should be declined when primary issue concerns status of parent and child or spouses)].

3.10[1][d] Removal Not Permitted in Probate Cases. Federal courts lack diversity jurisdiction over probate cases and may not probate a will or administer an estate [*Markham v. Allen (1946) 326 US 490, 494, 66 S Ct 296, 90 L Ed 256*].

3.10[2] Satisfying Complete Diversity Requirement.

3.10[2][a] Consider Citizenship of All Named Defendants. The citizenship of all *named* defendants is relevant for purposes of diversity jurisdiction.

A named defendant does not have to negate the existence of a potential defendant whose presence would destroy diversity. If an entity is neither named nor joined as a defendant, it cannot be deemed a real party in interest whose presence would destroy diversity [*Lincoln Prop. Co. v. Roche (2005) 546 US 81, 84, 126 S Ct 606, 163 L Ed 2d 415*]. That some defendants have not been served is irrelevant [*see Preaseau v. Prudential Ins. Co. of Am. (9th Cir 1979) 591 F2d 74, 78-79* ; *Republic W. Ins. Co. v. International Ins. Co. (ND Cal 1991) 765 F Supp 628, 629*]. The determination of citizenship for diversity purposes is governed by federal rather than state law [*see Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group (9th Cir 1987) 823 F2d 302, 304 , overruled on other grounds*,

Partington v. Gedan (9th Cir 1991) 923 F2d 686].

The citizenship of defendants sued under fictitious names, such as "Doe" defendants, is disregarded for diversity jurisdiction purposes [*28 USC § 1441(a)*; *Soliman v. Philip Morris, Inc. (9th Cir 2002) 311 F3d 966, 971*].

Intervention as of right under *Fed R Civ P 24(a)(2)* [*see 14.06, 14.07*] by a non-diverse party does not destroy diversity jurisdiction unless the intervenor was an indispensable party under *Fed R Civ P 19(b)* [*see 4.46[2]*] when the plaintiff filed the complaint [*see* Mattel, Inc. v. Bryant (CD Cal 2005) 2005 US Dist LEXIS 3568, at *30-*37].

The citizenship of nominal, sham, or fraudulently joined defendants is irrelevant for diversity jurisdiction purposes [*see Pullman Co. v. Jenkins (1939) 305 US 534, 537, 59 S Ct 347, 83 L Ed 334* ; *see also Morris v. Princess Cruises, Inc. (9th Cir 2001) 236 F3d 1061, 1066-1067*].

A defendant seeking to establish that another, nondiverse defendant has been fraudulently joined must show one or both of the following [*see Morris v. Princess Cruises, Inc. (9th Cir 2001) 236 F3d 1061, 1066-1067* ; *see also Ritchey v. Upjohn Drug Co. (9th Cir 1998) 139 F3d 1313, 1316-1318* , *cert. denied, 525 US 963 (1998)*]:

- No possibility exists that the plaintiff will be able to establish a cause of action against the nondiverse defendant in state court;
- The plaintiff's pleadings of jurisdictional facts constitute outright fraud.

Strategic Points--Defendant:

Named defendants have no obligation to disclose the identity of Doe defendants before discovery [*see Newcombe v. Adolf Coors Co. (9th Cir 1998) 157 F3d 686, 690-691*] or to negate the existence of a potential defendant whose presence would destroy diversity [*see Lincoln Prop. Co. v. Roche (2005) 546 US 81, 84, 126 S Ct 606, 163 L Ed 2d 415*]. Further, defendants should move for an order under *Fed R Civ P 12(b)(6)* to dismiss the suit against any sham parties to eliminate the duty to serve those parties with copies of all process.

Strategic Point--Plaintiff:

Plaintiffs should conduct discovery to identify and serve unnamed defendants as soon as practicable to ensure that the identification of any diversity destroying defendant is known before the defendant seeks removal [*see Lincoln Prop. Co. v. Roche (2005) 546 US 81, 86, 94, 126 S Ct 606, 163 L Ed 2d 415*].

Warning:

Alleging fraudulent joinder can potentially damage a defendant's case. Sanctions may be imposed for improper removal if the co-defendant is not fraudulently joined; the plaintiff's case may be strengthened by a finding of some possibility of recovery; and the removal may delay the resolution of a weak case in state court.

3.10[2][b] Timing of Determination of Diversity. For removal purposes, diversity of citizenship must be shown to exist at both of the following times [*see Pullman Co. v. Jenkins (1939) 305 US 534, 538, 59 S Ct 347, 83 L Ed 334* ; *see also Dolch v. United Cal. Bank (9th Cir 1983) 702 F2d 178, 181*]:

- At the time that the lawsuit is commenced;

- At the time of removal.

If complete diversity exists between all named plaintiffs and all named defendants at the time of removal, the fact that complete diversity would not exist if some other entity had been named as a defendant does not prevent removal [*see Lincoln Prop. Co. v. Roche (2005) 546 US 81, 84, 126 S Ct 606, 163 L Ed 2d 415*]. The plaintiff can, however, attempt to join additional defendants after removal under *28 USC § 1447(e)* to destroy diversity and have the case remanded bearing in mind that a change in citizenship following removal does not divest the federal district court of jurisdiction. The joinder of a defendant who is a resident of the forum state after removal also does not divest the federal district court of jurisdiction if complete diversity remains [*Spencer v. United States Dist. Court (9th Cir 2004) 393 F3d 867, 870*]. However, the addition of a nondiverse party after removal may require remand [*see 28 USC § 1447(e)*; *Yniques v. Cabral (9th Cir 1993) 985 F2d 1031, 1035-1036 , overruled on other grounds, McDowell v. Calderon (9th Cir 1999) 197 F3d 1253, 1255*].

Cross Reference:

Joinder of additional defendants to destroy subject matter jurisdiction, see *§ 3.24*.

The Supreme Court has crafted a narrow exception to this timing rule. If a case is improperly removed but the jurisdictional requirements are satisfied by the time the judgment is entered, the judgment is valid [*Caterpillar, Inc. v. Lewis (1996) 519 US 61, 73-77, 117 S Ct 467, 136 L Ed2d 437*].

Cross Reference:

Dropping nondiverse defendant after case is filed, see *§ 3.20[4][a]*.

3.10[2][c] Proving Diversity. A defendant seeking removal based on diversity jurisdiction has the burden of establishing diversity [*Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group (9th Cir 1987) 823 F2d 302, 304 , overruled on other grounds, Partington v. Gedan (9th Cir 1991) 923 F2d 686*].

A case is removable on diversity grounds if the initial pleading setting forth the claim for relief alleges facts indicating diversity [*see 28 USC § 1446(b)*]. Only the citizenship of named defendants is relevant. A named defendant does not need to negate the existence of a potential defendant whose presence would destroy diversity [*Lincoln Prop. Co. v. Roche (2005) 546 US 81, 84, 126 S Ct 606, 163 L Ed 2d 415*].

If the initial complaint does not disclose the citizenship of the parties, the case is not removable unless the defendant can prove the existence of diversity. A defendant may rely on amending pleadings, motions, orders, or other papers that indicate diversity to support allegations of diversity jurisdiction [*see 28 USC § 1446(b)*]. A defendant is also entitled to present facts showing joinder is fraudulent, including facts outside the complaint [*Ritchey v. Upjohn Drug Co. (9th Cir 1998) 139 F3d 1313, 1318 , cert. denied, 525 US 963 (1998)* ; *Meisel v. Allstate Indem. Co. (ED Cal 2005) 357 F Supp2d 1222, 1226*].

Strategic Point:

The view that the first 30-day period for removal applies when the initial pleading provides a "clue" as to removability [*see Kaneshiro v. North Am. Co. for Life & Health Ins. (D Haw 1980) 496 F Supp 452, 460*], has been rejected by the 9th Circuit: no duty is imposed on potential movants to investigate potential reasons for removal [*Harris v. Bankers Life & Cas. Co. (9th Cir 2005) 425 F3d 689, 695-696*].

Example:

Corporate defendants met their burden by submitting affidavits of knowledgeable company officials specifying the state of incorporation and providing statistics showing the number of corporate employees, income, sales, and the location of top management [*United Computer Sys., Inc. v. AT&T Corp. (9th Cir 2002) 298 F3d 756, 763*].

Cross Reference:

For further discussion of satisfying the complete diversity requirement, see Ch. 2, Determining Forum (Jurisdiction and Venue), *§ 2.10[2]*.

3.10[3] Satisfying Amount in Controversy Requirement.

3.10[3][a] Amount in Controversy Must Exceed $75,000 in Most Cases. To support diversity jurisdiction, the amount in controversy must usually exceed $75,000, exclusive of interest and costs [*28 USC § 1332(a)*]. The test to determine the amount in controversy is not the sum that is ultimately awarded to the plaintiff, but the sum that is demanded by the plaintiff when the complaint is filed [*St. Paul Mercury Indem. Co. v. Red Cab Co. (1938) 303 US 283, 289-290, 58 S Ct 586, 82 L Ed 845* ; *see Chabner v. United of Omaha Life Ins. Co. (9th Cir 2000) 225 F3d 1042, 1046 n3* ; *see also US Bank Nat'l Ass'n v. Belle (SD Cal 2008) 2008 US Dist LEXIS 41014, at *5* (*plaintiff's* claim in complaint filed in state court, not combined claims of both parties, must exceed $75,000)].

Exception:

In multistate class actions for which the Class Action Fairness Act of 2005 requires minimal, rather than complete, diversity [*see* 109 PL 2, 199 Stat 4], the matter in controversy must exceed the sum or value of $5 million, exclusive of interest and costs [*28 USC § 1332(d)(2)*]. Claims of individual class members are aggregated to determine whether this jurisdictional amount is met [*28 USC § 1332(d)(6)*]. When the plaintiff has pled an amount in controversy less than $5 million, the defendant seeking removal must prove with "legal certainty" that CAFA's jurisdictional amount is met [*Lowdermilk v. U.S. Bank Nat'l Ass'n (9th Cir 2007) 479 F3d 994, 998*]. Note that the Class Action Fairness Act applies to civil actions "commenced" on or after February 18, 2005, and for purposes of CAFA retroactivity, "commenced" means the date the complaint is filed, not the date the case is removed [*Bush v. Cheaptickets, Inc. (9th Cir 2005) 425 F3d 683, 689* ; *see also Pritchett v. Office Depot, Inc. (10th Cir 2005) 420 F3d 1090, 1094*]. For purposes of determining CAFA's effective date, an action is commenced under California law when the original complaint in the action is filed, irrespective of any relation back analysis [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1016-1017* ; *see McAtee v. Capital One, F.S.B. (9th Cir 2007) 479 F3d 1143, 1148* (any amendment of original complaint does not change action's commencement date for purpose of CAFA's effective date)]. Further, an amendment to a cross-complaint in California state court (a counterclaim in federal court) does not commence an action under the CAFA as of the date of the amendment [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1015-1016*].

Strategic Point--Defendant

If the other elements of jurisdiction are present, such as complete diversity, and at least one named plaintiff satisfies the amount in controversy requirement, the entire case may be removable. Supplemental jurisdiction can be exercised over the claims of other plaintiffs in the case, even if those claims are for less than the jurisdictional amount [*see Exxon Mobil Corp. v. Allapattah Servs., Inc. (2005) 545 US 546, 549, 125 S Ct 2611, 162 L Ed2d 502*].

Cross Reference:

Nature and scope of supplemental jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue),

§§ 2.26 -2.30.

Although federal law determines the amount in controversy, federal courts look to state law in a diversity case to determine the nature and amount of damages [*Horton v. Liberty Mut. Ins. Co. (1961) 367 US 348, 352-353, 81 S Ct 1570, 6 L Ed2d 890*].

3.10[3][b] Application of "Either Viewpoint" Rule to Ascertain Amount in Controversy. Under the "either viewpoint" rule, the test for determining the amount in controversy is the pecuniary result to either party that the judgment would directly produce [*McCauley v. Ford Motor Co. (9th Cir 2001) 264 F3d 952, 958*].

Example:

When the value of a plaintiff's potential recovery is below the jurisdictional amount, but the potential cost to the defendant of complying with the injunction exceeds that amount, it is the latter that represents the amount in controversy for jurisdictional purposes [*McCauley v. Ford Motor Co. (9th Cir 2001) 264 F3d 952, 958*].

The Ninth Circuit will apply the "either viewpoint" rule to determine the amount in controversy in actions for equitable relief by individuals, and in class action cases in which the plaintiffs have a common and undivided interest in the injunctive relief [*McCauley v. Ford Motor Co. (9th Cir 2001) 264 F3d 952, 959*].

Distinguish:

When a plaintiff asserts separate and distinct claims for injunctive relief in a class action, the test is the cost to the defendants of an injunction running in favor of the plaintiff [*McCauley v. Ford Motor Co. (9th Cir 2001) 264 F3d 952, 959*].

Strategic Point:

Defense counsel should conduct a reasonable, good-faith investigation as to the amount in controversy before seeking removal, to avoid exposure to potential Rule 11 sanctions [*see Fed R Civ P 11*; Ch. 33, Rule 11 Sanctions]. Counsel should consider requesting a stipulation from the plaintiff that damages do not exceed the jurisdictional minimum.

3.10[3][c] Timing of Determination of Amount in Controversy. The amount in controversy is determined based on the plaintiff's complaint at the time that the notice of removal is filed [*see Pullman Co. v. Jenkins (1939) 305 US 534, 537, 59 S Ct 347, 83 L Ed 334* ; *see also Gaus v. Miles, Inc. (9th Cir 1992) 980 F2d 564, 566*].

Warning:

After an action has been removed, a plaintiff cannot defeat diversity jurisdiction by voluntarily reducing his or her claim below the jurisdictional amount [*St. Paul Mercury Indem. Co. v. Red Cab Co. (1938) 303 US 283, 292, 58 S Ct 586, 82 L Ed 845* ; Strong v. Merck & Co. (ND Cal 2005) 2005 US Dist LEXIS 2413, at *13].

3.10[3][d] Proving Amount in Controversy. A defendant seeking removal based on diversity jurisdiction bears the burden of proving the amount in controversy by a preponderance of the evidence [*see Sanchez v. Monumental Life Ins. Co. (9th Cir 1996) 102 F3d 398* , 403-404; *Gaus v. Miles, Inc. (9th Cir 1992) 980 F2d 564, 566-567*]. The defendant may prove that the amount in controversy exceeds $75,000 in one of two ways [*Piazza v. EMPI, Inc. (ED Cal 2008) 2008 US Dist LEXIS 28136, at *40-*41]* :

- By demonstrating that it is facially apparent that the claims are likely above $75,000; or

- By setting forth the facts in controversy--"preferably in the removal petition, but sometimes by affidavit"--that support a finding of the requisite amount.

The burden of proving the amount in controversy remains on the defendant in a case removed under the Class Action Fairness Act of 2005 (CAFA) [*see Abrego v. Dow Chem. Co. (9th Cir 2006) 443 F3d 676, 685* ; *see also Serrano v. 180 Connect, Inc. (9th Cir 2007) 478 F3d 1018, 1019* (proponent of federal jurisdiction bears the burden of proving CAFA removal jurisdiction, while party seeking remand bears burden of proving exceptions)]. When plaintiff fails to plead a specific amount of damages, the defendant "must prove by a preponderance of the evidence that the amount in controversy requirement has been met" [*Abrego v. Dow Chem. Co. (9th Cir 2006) 443 F3d 676, 683* ; *see Lowdermilk v. U.S. Bank Nat'l Ass'n (9th Cir 2007) 479 F3d 994, 998* (when the plaintiff does not specify an amount of damages in class action lawsuit, for removal purposes "Defendant must prove by a preponderance of the evidence that the damages claimed exceed $5,000,000")]. If the complaint alleges damages in excess of the amount-in-controversy requirement, that requirement is presumptively satisfied unless "it appears to a 'legal certainty' that the claim is actually for less than the jurisdictional minimum" [*Abrego v. Dow Chem. Co. (9th Cir 2006) 443 F3d 676, 683 n.8*]. When the plaintiff has pled damages less than the jurisdictional amount, the defendant must prove with "legal certainty" that CAFA's jurisdictional amount is met in order to remove the case under the CAFA [*see Lowdermilk v. U.S. Bank Nat'l Ass'n (9th Cir 2007) 479 F3d 994, 998* ; *see, e.g., Nelson v. Bic USA, Inc. (SD Cal 2008) 2008 US Dist LEXIS 27366, at *11-*12* (applying "legal certainty" standard, rather than preponderance of evidence standard, in deciding amount in controversy when plaintiff expressly specified class damages to be $1,000 less than CAFA jurisdictional threshold, but noting that defendant was entitled to attempt to show that actual amount placed in controversy exceeded jurisdictional amount)].

Removal is proper if it is facially apparent from the complaint that the amount in controversy exceeds the jurisdictional minimum. If the claim appears to have been made in good faith, then the sum claimed by the plaintiff controls for removal purposes unless it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed [*Singer v. State Farm Mut. Auto Ins. (9th Cir 1997) 116 F3d 373, 375* ; *see St. Paul Mercury Indem. Co. v. Red Cab Co. (1938) 303 US 283, 288-290, 58 S Ct 586, 82 L Ed 845*]. A removing defendant has a heavy burden in rebutting this presumption [*see Boyer v. Snap-on Tools Corp. (3d Cir 1990) 913 F2d 108, 110-112 , cert. denied, 498 US 1085 (1991)*].

Strategic Point--Plaintiff:

Federal jurisdiction can generally be avoided by suing for less than the jurisdictional amount.

If the jurisdictional amount is not alleged in the complaint or is not facially apparent, federal courts look to the removal notice and may require post-removal evidence relevant to the amount in controversy at the time of removal to determine whether the case is removable [*Singer v. State Farm Mut. Auto Ins. (9th Cir 1997) 116 F3d 373, 377* ; *see Kroske v. U.S. Bank Corp. (9th Cir 2005) 432 F3d 976, 980* (district court properly considered plaintiff's interrogatory responses and emotional distress damage awards in similar cases in determining amount in controversy); *Valdez v. Allstate Ins. Co. (9th Cir 2004) 372 F3d 1115, 1117* (in determining amount in controversy, court may consider facts, removal notice, and any "summary-judgment-type evidence relevant to the amount in controversy at the time of removal")]. *28 USC § 1446(b)* provides that "if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which or has become removable." The "paper in the case" rule requires that only official documents filed in the underlying state court matter be used as a basis for removal, and not documents filed in other cases [*Hudson v. Pinkerton Sec. Servs. (ND Cal 2004) 2004 US Dist. LEXIS 19491, at *8-*11* ; *Phillips v. Allstate Ins. Co. (CD Cal 1989) 702 F Supp 1466, 1468-1469* ("Almost without exception, [courts] have held that the paper required in [section] 1446 must be a part of the underlying suit rather than an outside development in removal jurisdiction")].

Example:

In a class action alleging that wireless subscribers in California suffered losses as a result of incurring unauthorized charges in their cellular telephone bills from, or on behalf of, defendant, defendant could not rely on a declaration submitted by plaintiff's class counsel as part of a separate action brought against a different defendant to meet its burden of showing the amount in controversy [*Walker v. Motricity Inc. (ND Cal 2009) 627 F Supp2d 1137, 1142]* .

The notice of removal must allege underlying facts supporting federal jurisdiction; conclusory allegations are insufficient [*Valdez v. Allstate Ins. Co. (9th Cir 2004) 372 F3d 1115, 1117* ; *Gaus v. Miles, Inc. (9th Cir 1992) 980 F2d 564, 566-567*]. Allegations on information and belief do not constitute proof by a preponderance of the evidence [*Valdez v. Allstate Ins. Co. (9th Cir 2004) 372 F3d 1115, 1117*].

Under California law, in a complaint for actual or punitive damages for personal injury or wrongful death, the amount of damages sought may not be stated [*CCP § 425.10(b)*]. Therefore, to remove a California personal injury case, the defendant must make a showing by a preponderance of the evidence produced that the amount in controversy exceeds the jurisdictional amount [*Singer v. State Farm Mut. Auto Ins. (9th Cir 1997) 116 F3d 373, 376*].

Strategic Point--Defendant:

Under California law, in a personal injury case, the defendant may at any time request a statement of damages [*see CCP § 425.11*]. First serve a request for a statement of damages. If the plaintiff alleges more than the jurisdictional amount, then file your notice of removal [*see 28 USC § 1446(b)* (notice of removal to be filed within 30 days after date on which defendant receives a copy of a pleading, motion, order, or other paper from which it may be first ascertained that case has become removable)].

Strategic Point--Plaintiff:

To avoid removal of your personal injury case, allege less than the jurisdictional amount of damages in your statement of damages.

Cross Reference:

Further discussion of satisfying the amount in controversy requirement, see Ch. 2, Determining Forum (Jurisdiction and Venue), *§ 2.21*.

3.10[4] Minimal Diversity Under Multiparty, Multiforum Trial Jurisdiction Act of 2002.

3.10[4][a] "Minimal Diversity" Rule Confers Original Federal Court Jurisdiction in Civil Cases Arising From Catastrophic Accidents. The Multiparty, Multiforum Trial Jurisdiction Act of 2002 [*see* 107 PL 273, § 11020, 116 Stat 1758, 1829 (effective Nov. 2, 2002)] provides for original jurisdiction of certain civil actions involving minimal diversity between adverse parties when at least 75 natural persons have died in a single accident at a discrete location [*28 USC § 1369(a)*].

Cross Reference:

15 Moore's Federal Practice, see *§ 102.25* (Matthew Bender 3d ed.).

3.10[4][b] Removal in Minimal Diversity Cases. Notwithstanding the general rules on diversity-jurisdiction-based removal [*28 USC § 1441(b)*; see *3.10*], a defendant in a state-court civil action may remove an action to federal district court if either [*28 USC § 1441(e)(1)*]:

- The action could have been brought under the district court's minimal diversity jurisdiction provision [*28 USC § 1369*]; or

- The defendant is a party to an action that is or could have been brought under the district court's minimal diversity jurisdiction, even if the action could not have been brought in a district court as an original matter.

Cross Reference:

Removal under Section 1441(e), see 16 *Moore's Federal Practice, § 107.11[4]* (Matthew Bender 3d ed.).

The action is removable if it arises from the same accident as the state court action, even if it could not have been originally brought in district court. If an action is removable, it must be removed to the district court for the district and division embracing the place where the action is pending [*28 USC § 1441(e)(1)*].

3.10[5] Minimal Diversity Under Class Action Fairness Act of 2005. Under the Class Action Fairness Act of 2005 [*see* 109 PL 2, 199 Stat 4], a district court has diversity jurisdiction over certain multistate class actions in which the matter in controversy exceeds the sum or value of $5 million, exclusive of interest and costs, and diversity of citizenship exists between any member of a class of plaintiffs and any defendant [*28 USC § 1332(d)(2)*]. A defendant in a qualifying class action filed in state court may remove that action to federal district court without regard to whether any defendant is a citizen of the state in which the action is brought [*28 USC § 1453(b)*]. Note that the Class Action Fairness Act applies to civil actions "commenced" on or after February 18, 2005, and for purposes of CAFA retroactivity, "commenced" means the date the complaint is filed, not the date the case is removed [*Bush v. Cheaptickets, Inc. (9th Cir 2005) 425 F3d 683, 689* ; *see also Pritchett v. Office Depot, Inc. (10th Cir 2005) 420 F3d 1090, 1094*]. For purposes of determining CAFA's effective date, an action is commenced under California law when the original complaint in the action is filed, irrespective of any relation back analysis [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1016-1017* ; see *McAtee v. Capital One, F.S.B. (9th Cir 2007) 479 F3d 1143, 1148* (any amendment of original complaint does not change action's commencement date for purpose of CAFA's effective date)]. Further, an amendment to a cross-complaint in California state court (a counterclaim in federal court) does not commence an action under the CAFA as of the date of the amendment [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1015-1016*].

Cross References:

Discussion of minimal diversity required under the Class Action Fairness Act of 2005, see Ch. 2, Determining Forum (Jurisdiction and Venue), *§ 2.24A*.

15 Moore's Federal Practice, see *§ 102.26* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalWaivers

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3.11 Determining Who Can Remove.

3.11[1] Right of Removal Generally Limited.

3.11[1][a] Defendants. Under the general removal statute, only defendants may remove a civil action from a state to a federal court for the district and division within which the action is pending [*28 USC §§ 1441(a), 1446(a)*].

3.11[1][b] Plaintiff May Not Remove As Defendant. Federal law determines whether a party is a defendant, prevailing over a state court's characterization or alignment of the parties [*Chicago, Rock Island & Pac. R.R. Co. v. Stude (1954) 346 US 574, 580, 74 S Ct 290, 98 L Ed 317*].

District courts will not recharacterize a plaintiff as a defendant for removal purposes, even if state law characterizes the plaintiff as defendant under the following circumstances [*Shamrock Oil & Gas Corp. v. Sheets (1941) 313 US 100, 107, 61 S Ct 868, 85 L Ed 1214*]:

- When the plaintiff is defending a counterclaim (cross-complaint).
- When the plaintiff is defending against a crossclaim by a co-plaintiff.

The Class Action Fairness Act (CAFA) of 2005 [*see* 109 PL 2, 119 Stat 12] does not create an exception to the longstanding rule that a plaintiff/cross-defendant could not remove an action to federal court [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1017-1018*].

Cross Reference:

Discussion of minimal diversity requirement under Class Action Fairness Act of 2005, see Ch. 2, Determining Forum (Jurisdiction and Venue), 2.24A.

3.11[1][c] Third-Party Defendants. Whether a third-party defendant has the power to remove cases to federal court is an unsettled issue in the Ninth Circuit [*see O'Halloran v. Univ. of Wash., (9th Cir 1988) 856 F2d 1375, 1381* ; *Bonner v. Fuji Photo Film (ND Cal 2006) 461 F Supp2d 1112, 1116*]. However, the trend in the circuit's courts appears

to be that third-party defendants may not remove under *28 USC § 1441(a)* or *(c)* [*see, e.g., Bonner v. Fuji Photo Film (ND Cal 2006) 461 F Supp2d 1112, 1116 n. 1* ; *Ciolino v. Ryan (ND Cal 2003) 2003 US Dist LEXIS 11639, at *9-*10, *21* (although the Ninth Circuit has not yet addressed the "interesting question" of whether third-party defendants can remove under § 1441(a), weight of authority suggests that they cannot; additionally, court refuses to depart from the "nearly overwhelming body of authority" that § 1441(c) does not give a third-party defendant the right to remove)]. One district court has sanctioned removal by third-party defendants, but only if the removal is based on a cause of action in the third-party complaint that is "separate and independent" from the other claims in the case [*see Southland Corp. v. Estridge (CD Cal 1978) 456 F Supp 1296, 1301*].

Strategic Point:

Special removal statutes [*see § 3.13*] may provide an independent basis for a third-party defendant to remove the case [*see California v. Keating (9th Cir 1993) 986 F2d 346, 348*].

Cross References:

Discussion of third-party actions generally, see Ch. 12, Third-Party Actions.

Removal by third-party defendants, see 16 *Moore's Federal Practice, § 107.11[1][b][iv]* (Matthew Bender 3d ed.).

3.11[1][d] Defendant Intervenor. An action may be removable by an intervening defendant if the following other removal requirements are met [*Hopkins Erecting Co. v. Briarwood Apartments (ED Ky 1981) 517 F Supp 243, 248* (citing **Moore's**)]:

- The original action would have been removable;
- The time for removing the action has not expired [*see 3.17*];
- The original defendants join in the notice of removal, or may be disregarded for removal purposes [*see 3.10*].

Cross Reference:

Discussion of intervention generally, see Ch. 14, Intervention.

Removal by defendant intervenor, see 16 *Moore's Federal Practice, § 107.11[1][b][v]* (Matthew Bender 3d ed.).

3.11[2] Statutory Right of Specific Plaintiffs to Remove. The general removal statute does not permit plaintiffs to remove an action that they filed in state court [*28 USC § 1441(a)*; *Shamrock Oil & Gas Corp. v. Sheets (1941) 313 US 100, 107, 61 S Ct 868, 85 L Ed 1214*].

However, special removal statutes permit certain plaintiffs to remove state court actions under specified circumstances, such as the following:

- The Resolution Trust Corporation (RTC) is the plaintiff seeking removal [*12 USC § 1441a(l)(3)*; *see 3.13[6]*];
- The Federal Deposit Insurance Corporation (FDIC) is the plaintiff seeking removal [*12 USC § 1819(b)(2)(B)*; *see 3.13[7]*];

- The district court has jurisdiction under *28 USC § 1334* (bankruptcy-related proceedings) [*28 USC § 1452(a)*; *see 3.13[8]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalElementsProper TransferorsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalWaivers

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
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Unit 2 First Steps
CHAPTER 3 Removing a State Court Case to Federal Court
II. ANALYZING CASE FOR REMOVAL

1-3 MB Practice Guide: Fed Pretrial Civ Proc in CA 3.12

3.12 All Defendants Must Join in Notice of Removal in Most Cases.

3.12[1] Except in Qualified Class Action, All Defendants Must Join in Notice of Removal. All defendants must usually join in the notice of removal [*28 USC § 1446(b)*]. An exception exists for class actions that qualify for minimal diversity jurisdiction; in such a class action, any defendant may remove the action without the consent of all other defendants [*28 USC § 1453(b)* (applicable to civil actions commenced on or after February 18, 2005)].

3.12[2] Failure of Defendants to Join Defeats Removal. When defendants must join in the notice of removal, the failure of one defendant to join in the removal notice constitutes a procedural defect that precludes removal [*28 USC § 1446(b)*; *see Wisconsin Dep't of Corrs. v. Schacht (1998) 524 US 381, 393, 118 S Ct 2047, 141 L Ed2d 364* (citing *Chicago, Rock Island & Pac. R.R. Co. v. Stude (1954) 346 US 574, 580, 74 S Ct 290, 98 L Ed 317*); *see also Parrino v. FHP, Inc. (9th Cir 1998) 146 F3d 699, 703 , cert. denied, 525 US 1001 (1998)*].

If the first served defendants fail to remove a state court action within 30 days, later served defendants cannot remove. Defendants served after removal may either accept the federal forum or move to remand [*28 USC § 1446(b)*; *see McAnally Enters., Inc. v. McAnally (CD Cal 2000) 107 F Supp2d 1223, 1226-1228* (adopting majority "first-served" rule)].

Cross Reference:

Defendants' option to remove, see 16 *Moore's Federal Practice, § 107.11[1]* (Matthew Bender 3d ed.); *see also § 3.20[3].*

It appears that in the Ninth Circuit, third-party defendants may not remove under *28 USC § 1441(a)* or *(c)* [*see, e.g., Bonner v. Fuji Photo Film (ND Cal 2006) 461 F Supp2d 1112, 1116 n. 1* ; Ciolino v. Ryan (ND Cal 2003) 2003 US Dist LEXIS 11639, at *9-*10, *21].

Cross Reference:

Discussion of removal by third-party defendants, see *3.11[1][c].*

3.12[3] Failure of All Defendants to Join Is Waivable Defect. The failure of all defendants to join the removal notice is a procedural defect that is deemed waived unless objected to within 30 days [*Parrino v. FHP, Inc. (9th Cir 1998) 146 F3d 699, 703 , cert. denied, 525 US 1001 (1998)*].

Example:

A defendant's failure to join in a removal notice until almost two months after service of the complaint was curable by joinder. Because the defect was cured before entry of judgment, reversal and remand were not warranted [*Parrino v. FHP, Inc. (9th Cir 1998) 146 F3d 699, 703 , cert. denied, 525 US 1001 (1998)*].

3.12[4] In Special Cases, Not All Defendants Need Join. The requirement that all defendants join the removal notice has several exceptions.

- **Unserved defendants.** Any defendant who was not served with state court process need not join in the removal notice [*Salveson v. Western States Bankcard Ass'n (9th Cir 1984) 731 F2d 1423, 1429*].

- **Improperly served defendants.** Improperly served defendants need not join in the removal notice [*Salveson v. Western States Bankcard Ass'n (9th Cir 1984) 731 F2d 1423, 1429*].

- **Nominal parties.** Nominal or formal parties, being neither necessary nor indispensable, are not required to join in the removal notice [*see Navarro Sav. Ass'n v. Lee (1980) 446 US 458, 461, 100 S Ct 1779, 64 L Ed2d 425*].

- **Statutory removal.** If removal is based on specific statutory authorization, only the statutorily authorized defendants must join in the removal notice [*Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co. (9th Cir 1981) 644 F2d 1310, 1314-1315* (federal officer removal)].

In all cases, the removal notice must expressly explain the absence or nonjoinder of any codefendants [*P.P. Farmers' Elevator Co. v. Farmers Elevator Mut. Ins. Co. (7th Cir 1968) 395 F2d 546, 548* (citing **Moore's**)].

Strategic Point:

With regard to statutory removal, the presence of an independent basis for removal, such as federal question jurisdiction, does not require that all defendants join in the removal notice [*Akin v. Ashland Chem. Co. (10th Cir 1998) 156 F3d 1030, 1034-1035 , cert. denied, 526 US 1112 (1998)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisCases Involving Federal OfficersCivil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalElementsProper TransferorsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalWaivers

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Unit 2 First Steps
CHAPTER 3 Removing a State Court Case to Federal Court
II. ANALYZING CASE FOR REMOVAL

1-3 MB Practice Guide: Fed Pretrial Civ Proc in CA 3.13

3.13 Special Removal Statutes Permit Removal in Certain Types of Cases, or by Certain Types of Parties.

3.13[1] Actions Brought Against Federal Agencies and Officers.

3.13[1][a] Who May Remove Action. A civil action brought in state court against any of the following types of defendants may be removed by the defendant to the federal district court in the district and division where the action is pending:

- The United States or any of its agencies or officers sued in an official or individual capacity for any act under color of law of that office [*28 USC § 1442(a)(1)*];
- A property holder whose title is derived from an officer of the United States, when the state court action or prosecution affects the validity of any law of the United States [*28 USC § 1442(a)(2)*];
- Any officer of the courts of the United States, for any act under color of office or in the performance of his or her duties [*28 USC § 1442(a)(3)*];
- Any officer of either the House of Representatives or the Senate, for any act in the discharge of official duties [*28 USC § 1442(a)(4)*].

3.13[1][b] Original Federal Jurisdiction Not Required Apart From Statute. The statutory authorization for federal officer removal is independent of general removal procedures and does not require that the federal court have original federal jurisdiction apart from the statute [*Mesa v. California (1989) 489 US 121, 124-125, 128, 134-138, 109 S Ct 959, 103 L Ed2d 99* ; *see Fung v. Abex Corp. (ND Cal 1992) 816 F Supp 569, 572-573* ; *see also Mir v. Fosburg (9th Cir 1980) 646 F2d 342, 344*].

28 USC § 1442, unlike *28 USC § 1441*, allows removal to federal court even if the action could not have been commenced in federal court. However, according to the Ninth Circuit, § 1442 merely allows the federal government to remove a case to federal district court; it does not determine whether the court has jurisdiction to hear it [*State Eng'r v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians of Nev. (9th Cir 2003) 339 F3d 804, 809*]. Therefore, if

there are specific jurisdictional bars elsewhere that prevent a district court from asserting jurisdiction, the general removal provision cannot overcome the jurisdictional defect [*State Eng'r v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians of Nev. (9th Cir 2003) 339 F3d 804, 809*].

3.13[1][c] Federal Official Defendant. To remove a state court case, a federal official defendant must do all of the following [*Mesa v. California (1989) 489 US 121, 124-125, 128, 134-136, 109 S Ct 959, 103 L Ed2d 99*]:

- Establish that he or she is a federal officer or was acting under the direction of a federal officer;
- Raise a colorable federal defense to the plaintiff's claims;
- Show a causal nexus between the acts performed under color of office and the plaintiff's claims.

A defendant seeking to remove on the basis that he or she was acting under the direction of a federal officer must show that a federal officer had direct and detailed control over the defendant. Federal contractors sued for acts on behalf of a federal agency can establish that they acted under the direction of a federal officer for removal purposes under this statute [*see Durham v. Lockheed Martin Corp. (9th Cir 2006) 445 F3d 1247, 1250-1251*].

Whether a defendant is a person acting under a federal officer is a mixed question of law and fact [*International Primate Prot. League v. Tulane Educ. Fund (1991) 500 US 72, 86-89, 111 S Ct 1700, 114 L Ed2d 134*].

A private party may qualify for federal officer removal under certain circumstances. In the context of the federal officer removal statute, "acting under" must refer to a relationship that involves "acting in a certain capacity, considered in relation to one holding a superior position or office." Typically, the relationship involves "subjection, guidance, or control." In addition, the private person's action must involve an effort to help carry out the duties of the federal superior [*Watson v. Philip Morris Cos. (2007) 551 US 142, 127 S Ct 2301, 168 L Ed2d 42, 49-50]* .

Example:

A tobacco company defendant was not entitled to remove a case involving its testing of cigarettes for tar and nicotine merely because the Federal Trade Commission mandated the testing, dictated the testing method, and monitored and supervised the testing. Simply complying with the law does not give a private person the right to remove a case under *28 USC § 1442*. Compelling an industry to engage in a particular act suggests regulation, not the delegation or direction that would justify removal [*Watson v. Philip Morris Cos. (2007) 551 US 142, 127 S Ct 2301, 168 L Ed2d 42, 53]* .

The Ninth Circuit uses a four factor test to determine if a private party qualifies for federal officer removal [*see Durham v. Lockheed Martin Corp. (9th Cir 2006) 445 F3d 1247, 1251*]:

- Its actions were taken under the direction of a federal officer.
- The party has a federal defense to the plaintiff's claims.
- The party can demonstrate a causal nexus between the plaintiff's claims and the acts allegedly performed by the defendant under orders of a federal officer.
- The party can demonstrate that it is a "person" within the meaning of *28 USC § 1442* (in the Ninth Circuit, "person" includes a corporation).

A court-appointed bankruptcy trustee is deemed an officer of the court for removal purposes [*see In re Serrato (9th Cir 1997) 117 F3d 427, 428*].

The Ninth Circuit permits federal officers to remove an action in which they are merely stakeholders or garnishees [*see Nationwide Investors v. Miller (9th Cir 1986) 793 F2d 1044, 1046-1047*].

Strategic Point--Defendant:

Removal as a federal officer defendant under *28 USC § 1442(a)(1)* has three distinct advantages. First, not all defendants need join in the removal notice [*see 13.12[4]*]. Second, although removal statutes are generally strictly construed with any doubt as to the right of removal resolved in favor of remanding to state court, when federal officers and their agents seek removal under *28 USC § 1442(1)*, that statute is interpreted broadly in favor of removal [*see Durham v. Lockheed Martin Corp. (9th Cir 2006) 445 F3d 1247, 1252*]. Third, the defendant's 30 days to remove begins when the plaintiff discloses sufficient facts for federal officer removal, even if the defendant was previously aware of a different basis for removal [*Durham v. Lockheed Martin Corp. (9th Cir 2006) 445 F3d 1247, 1253*].

Cross Reference:

Federal officer removal, see 16 *Moore's Federal Practice, § 107.15[1].*

3.13[1][d] "Under Color of Office" Requirement. "Under Color of Office" requires both of the following [*Willingham v. Morgan (1969) 395 US 402, 405-407, 89 S Ct 1813, 23 L Ed2d 396*]:

- The federal-official defendant claimed to be acting under federal authority to enforce federal law.
- A causal connection exists between the federal-official defendant's act and the state court lawsuit.

3.13[1][e] Entire Action Removed. In general, when a federal official removes a case, the entire case is removed, even if the action involves claims that are not otherwise removable [*see Dillon v. Mississippi Military Dep't (5th Cir 1994) 23 F3d 915, 918-919*].

3.13[1][f] Retaining Case After Dismissal of Federal Agency or Officer. A district court has discretion to retain jurisdiction and adjudicate a case following the dismissal of the federal officer or agency that initially removed the case [*Nebraska v. Bentson (9th Cir 1998) 146 F3d 676, 678*]. Courts will ordinarily remand the case absent compelling reasons to retain the case [*see District of Columbia v. Merit Systems Prot. Bd. (DC Cir 1985) 762 F2d 129, 133*].

3.13[2] Actions Brought Against Members of Armed Forces. A member of the armed forces may remove a case based on acts committed under color of office or concerning which he or she claims any right, title, or authority under federal law respecting the armed forces or under the law of war [*28 USC § 1442a*].

The scope of removal jurisdiction under this statutory authority is similar to that of federal officer and agency removal [*see 3.13[1]*].

3.13[3] Civil Rights Actions.

3.13[3][a] Defendants in Certain Civil Rights Cases May Remove. Removal in certain civil rights cases is permissible to protect persons against state actions instituted to hamper the enforcement of federal civil rights laws [*Greenberg v. Veteran (2d Cir 1989) 889 F2d 418, 421-422*].

The following civil actions or criminal prosecutions may be removed [*28 USC § 1443*]:

- Actions in which the defendant is denied or cannot enforce his or her civil rights in state court [*see 3.13[3][b]*].

- Actions in which the defendant is being sued for an act he or she committed under color of authority derived from a law providing for equal rights, or for refusing to do an act on the ground that it would be inconsistent with that law [*see 3.13[3][c]*].

Consider:

Removal under this restrictive basis is increasingly unusual. If the complaint underlying the state court action alleges violations of rights under federal civil rights laws, the case may be removable under the general removal statute, relying on federal question jurisdiction [*see 28 USC § 1441(a)*; *Harris v. Birmingham Bd. of Educ. (11th Cir 1987) 817 F2d 1525, 1526-1527*].

3.13[3][b] Enforcement of Civil Rights. A defendant who is denied or cannot enforce his or her civil rights in state court may remove a state civil or criminal action in restricted circumstances [*28 USC § 1443(1)*; *City of Greenwood v. Peacock (1966) 384 US 808, 824-828, 86 S Ct 1800, 16 L Ed2d 944*].

To support removal, the defendant must show the following [*Georgia v. Rachel (1966) 384 US 780, 790-792, 86 S Ct 1783, 16 L Ed2d 925* ; *Hewitt v. City of Stanton (9th Cir 1986) 798 F2d 1230, 1233*]:

- The right allegedly denied the defendant arises under a federal law providing for specific civil rights stated in terms of racial equality.

- The defendant is denied or cannot enforce the specified federal rights in the state court.

Removal is unavailable if the defendant did not rely on the federal civil rights law in committing the act, or if the defendant's conduct is not protected by the federal law [*see City of Greenwood v. Peacock (1966) 384 US 808, 824-828, 86 S Ct 1800, 16 L Ed2d 944*].

3.13[3][c] Acts Under Color of Authority Derived From Civil Rights Laws. A defendant sued for performing acts under color of authority derived from any civil rights laws, or charged with refusing to perform an act because it would be inconsistent with civil rights laws, may remove a state civil or criminal action to federal court in restricted circumstances [*28 USC § 1443(2)*; *Greenberg v. Veteran (2d Cir 1989) 889 F2d 418, 421*].

Removal on this basis is restricted to federal laws providing civil rights defined in terms of racial equality [*City of Greenwood v. Peacock (1966) 384 US 808, 826-828, 86 S Ct 1800, 16 L Ed2d 944*].

A federal officer or agent is only permitted to remove on this basis if the defendant is sued for performing official duties in violation of federal civil rights laws [*City of Greenwood v. Peacock (1966) 384 US 808, 826-828, 86 S Ct 1800, 16 L Ed2d 944*].

A state officer or agent is only permitted to remove on this basis if the defendant is sued for refusing to act in violation of federal civil rights laws [*see White v. Wellington (2d Cir 1980) 627 F2d 582, 586*].

Cross Reference:

Removal of civil rights cases, see 16 *Moore's Federal Practice, § 107.15[3]* (Matthew Bender 3d ed.).

3.13[4] Civil Actions Against Foreign States.

3.13[4][a] Foreign State May Remove Case. Any civil action brought in a state court against a foreign state may be removed by the foreign state to the district court for the district and division embracing the location where the action is pending [*28 USC § 1441(d)*]. Removal by a foreign state encompasses the entire action, including otherwise nonremovable claims [*see Chuidian v. Philippine Nat'l Bank (9th Cir 1990) 912 F2d 1095, 1098-1099 , aff'd on other grounds, 976 F2d 561 (9th Cir 1992)*].

In multiple-defendant actions, a foreign state may remove the entire action without the consent or joinder of other defendants [*Chuidian v. Philippine Nat'l Bank (9th Cir 1990) 912 F2d 1095, 1098-1099* , *aff'd on other grounds*, *976 F2d 561 (9th Cir 1992)*].

A defendant who is the alter ego of a foreign state, or an organ of a foreign state under the Foreign Sovereign Immunities Act, may be entitled to remove [*see EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd. (9th Cir 2003) 322 F3d 635, 639-649* , *cert. denied*, *540 US 1003 (2003)* ; *see also Sugar Corp. of Puerto Rico v. Environeering, Inc. (DPR 1981) 520 F Supp 996, 998-999*]. However, indirect or tiered majority ownership by a foreign state is insufficient to qualify an entity as a foreign state entitled to removal [*Gates v. Victor Fine Foods (9th Cir 1995) 54 F3d 1457, 1462* , *cert. denied*, *516 US 869 (1995)*].

After removal, the action must be tried without a jury, even if aright to a jury trial existed in state court [*28 USC § 1441(d)*].

3.13[4][b] Timing for Removal. The foreign state must file the removal notice within 30 days after receiving a copy of the initial pleading. The 30-day period may be extended for cause shown [*28 USC §§ 1441(d)*, *1446(b)*].

Factors to be evaluated in considering an extension include the purpose of the removal statute, the extent of any prior activity of the defendant in state court, the likelihood of prejudice to the parties, and the relative equities [*Refco, Inc. v. Galadari (SDNY 1991) 755 F Supp 79, 83-84*].

Cross Reference:

Removal of civil actions against foreign states, see 16 *Moore's Federal Practice, § 107.15[4]* (Matthew Bender 3d ed.).

3.13[5] Foreclosure Actions Against United States. A state court action brought against the United States seeking to quiet title to, foreclose a mortgage or other lien on, or partition or condemn real or personal property on which the United States claims a mortgage or other lien may be removed by the United States [*28 USC § 1444*; *see 28 USC § 2410*; *see also Hood v. United States (9th Cir 1958) 256 F2d 522, 525*].

28 USC § 2410 waives the federal government's immunity so that private parties can secure the government's presence in court when necessary to quiet title or resolve the priority of liens or mortgages. This waiver is narrowly construed, and only applies when the issue concerns the priority of an existing government mortgage or other security interest [*Hussain v. Boston Old Colony Ins. Co. (5th Cir 2002) 311 F3d 623, 629-630*]. However, the waiver is read more expansively when the priority of a government lien is in dispute and the issue is whether the statute applies to the type of relief sought [*see United States v. Coson (9th Cir 1961) 286 F2d 453, 457*].

In foreclosure suits involving multiple defendants, the United States may remove the entire action without the consent or joinder of the other defendants [*see Chrysler First Fin. Servs. Corp. v. Greenfield (SD Fla 1991) 753 F Supp 939, 941*].

3.13[6] Resolution Trust Corporation Cases.

3.13[6][a] Scope of Removal. The Resolution Trust Corporation (RTC) is expressly authorized to remove any state court actions, suits, or proceedings in which the RTC is a party [*12 USC § 1441a*(*l*)(3)]. If the RTC is a party, the entire case is deemed to arise under federal law and the district courts have original federal question jurisdiction over every claim in the entire action [*12 USC § 1441a*(*l*)(1); *Brockman v. Merabank (9th Cir 1994) 40 F3d 1013, 1015-1016* ; *see California v. Keating (9th Cir 1993) 986 F2d 346, 348-349*]. Therefore, district courts have no discretion to remand claims, even after the RTC settles or is dismissed from the case [*Brockman v. Merabank (9th Cir 1994) 40 F3d*

1013, 1015-1017].

The RTC is deemed substituted into the case on the filing of a copy of the order appointing the RTC as conservator or receiver, or on the filing of another pleading that informs the court of the appointment [*see RTC v. Bayside Developers (9th Cir 1994) 43 F3d 1230, 1236* , *as amended*, 1994 US App LEXIS 34619 (9th Cir 1995) ; *see also McCarthy Western Constructors, Inc. v. Phoenix Resort Corp. (9th Cir 1991) 951 F2d 1137, 1140-1141* (removal notice filed in state court adequately informs court)].

3.13[6][b] Time for Removal. The RTC must remove either [*see 12 USC § 1441a*(*l*)(3)]:

- Within 30 days after the RTC is served as a party in any capacity; or
- Within 90 days after being substituted as a party.

However, courts have permitted the RTC to remove at any stage in the proceedings before the judgment becomes final, even when the case is on appeal, as long as the state appellate proceedings have not been exhausted [*see RTC v. Bayside Developers (9th Cir 1994) 43 F3d 1230, 1236-1237* , *as amended*, *1994 US App LEXIS 34619 (9th Cir 1995)* ; *see also RTC v. BVS Dev., Inc. (9th Cir 1994) 42 F3d 1206, 1211* (RTC removal from state appellate court)].

3.13[6][c] Venue. The RTC may remove to any of the following districts [*12 USC § 1441a*(*l*)(3); *see Hellon & Assoc., Inc. v. Phoenix Resort Corp. (9th Cir 1992) 958 F2d 295, 298*]:

- The district in which the state action is pending.
- The District of Columbia district court.
- If the case arises out of RTC actions relating to an institution for which a receiver has been appointed, the district encompassing the institution's principal place of business.

A district court may transfer venue for the convenience of the parties [*see 28 USC § 1404*; *see also Piekarski v. Home Owners Sav. Bank (DDC 1990) 743 F Supp 38, 43*].

3.13[6][d] Appeal of Remand. If the case is remanded, the RTC may seek appellate review of the remand [*12 USC § 1441a*(*l*)(3)(C)].

Cross Reference:

Further discussion of removal in RTC cases, see 16 *Moore's Federal Practice, § 107.15[6]* (Matthew Bender 3d ed.).

3.13[7] Federal Deposit Insurance Corporation Cases.

3.13[7][a] Scope of Removal. In general, all civil actions involving the Federal Deposit Insurance Corporation (FDIC) in any capacity are deemed to arise under the laws of the United States [*12 USC § 1819(b)(2)(A)*].

The FDIC is expressly authorized to remove any action, suit, or proceeding filed in state court against the FDIC, or in which the FDIC is a substituted as a party, except in any of the following circumstances [*12 USC § 1819(b)(2)(B), (D)*]:

- The FDIC is acting in its capacity as a receiver of a state insured depository institution by the exclusive appointment by state authorities, and is a party other than a plaintiff.
- The case involves only the preclosing rights against the state insured depository institution or

obligations owing to depositors, creditors, or stockholders by that institution.

- The case involves the interpretation of only state law.

3.13[7][b] Time for Removal. The FDIC must remove the action within 90 days after the date the action is filed against the FDIC or the FDIC is substituted as a party [*12 USC § 1819(b)(2)(B)*].

3.13[7][c] Appeal of Remand. If the case is remanded, the FDIC may seek appellate review of the remand [*12 USC § 1819(b)(2)(C)*].

3.13[8] Claims Related to Bankruptcy Cases.

3.13[8][a] Any Party May Remove Related Claims. Any party to a state court claim or cause of action that falls within bankruptcy jurisdiction may remove that claim or cause of action (but not the entire civil action unless the district court has independent jurisdiction over the other claims) to the district court where the related bankruptcy action is pending [*28 USC § 1452(a)*; *see 28 USC § 1334(b)*].

All civil proceedings arising under the Bankruptcy Code and all claims and causes of action arising in or related to bankruptcy proceedings fall within bankruptcy jurisdiction [*28 USC § 1334(b)*]. Federal courts broadly define when a lawsuit is related to a bankruptcy case [*In re Fietz (9th Cir 1988) 852 F2d 455, 457*]. A lawsuit is related to a bankruptcy case when the outcome of the lawsuit could conceivably affect an estate being administered in bankruptcy [*see In re Dow Corning (6th Cir 1996) 86 F3d 482, 489-495 , cert. denied, 519 US 1071 (1997)*].

3.13[8][b] Exception for Proceeding Before Tax Court or Civil Action to Enforce Police or Regulatory Power of Government Unit. The rule permitting parties to remove civil actions arising under the Bankruptcy Code, or arising in or related to cases under the Bankruptcy Code, does not apply to [*28 USC § 1452(a)*]:

- A proceeding before the United States tax court; or

- A civil action by a governmental unit to enforce that unit's police or regulatory power [*see, e.g., City & County of San Francisco v. PG & E Corp. (9th Cir 2006) 433 F3d 1115*].

3.13[8][c] Exception for Mandatory Abstention. A federal court must abstain from exercising its jurisdiction, on timely motion by any party, if all of the following are shown [*28 USC § 1334(c)(2)*]:

- The state court action is based on a state law claim or cause of action;

- That claim or cause of action is related to a bankruptcy core proceeding (as defined in *28 USC § 157(b)(2)*);

- Federal courts would not have jurisdiction but for the bankruptcy claim;

- The matter can be adjudicated in a timely manner in a state court of appropriate jurisdiction.

Mandatory abstention does not apply unless there is a parallel state court proceeding [*In re Lazar (9th Cir 2001) 237 F3d 967, 981-982 , cert. denied, 534 US 992 (2001)*]. Further, mandatory abstention does not apply to personal injury or wrongful death claims against the debtor; however, in the mass tort context, mandatory abstention does apply to personal injury or wrongful death claims against non-debtor co-defendants even if these defendants have contribution claims against the debtor [*28 USC § 157(b)(4), (5)*; *see, e.g., In re Dow Corning (6th Cir 1996) 86 F3d 482, 489-495 , cert. denied, 519 US 1071 (1997)*].

3.13[8][d] Party Seeking Removal Must Serve and File Verified Notice. The party seeking removal must file a verified notice, in the bankruptcy court in the district where the civil action is pending, containing the following [*Fed R Bankr P 9027(a)*]:

- A short, plain statement of the facts that entitle the party to remove;
- A statement of whether the proceeding is a core or noncore proceeding (as defined in *28 USC § 157(b)(2)*); and if the proceeding is noncore, whether the applicant consents to the entry of final orders by the bankruptcy judge;
- A copy of all process and pleadings in the action.

Promptly after filing the notice with the district court, the party seeking removal must serve a copy of the notice on all parties and on the state court [*Fed R Bankr P 9027(b), (c)*].

3.13[8][e] Timing of Notice If Bankruptcy Action Filed Before Civil Action. The time for filing a removal notice depends on whether the bankruptcy or civil action was filed first. If the bankruptcy action was filed first, the notice must be filed before the earlier of [*Fed R Bankr P 9027(a)(3)*]:

- Thirty days after receipt of the initial pleading that contains a civil claim or cause of action that the party seeks to remove; or
- Thirty days after receipt of the summons, if the initial pleading for the civil claim or cause of action was filed with the court but not served with the summons.

3.13[8][f] Timing of Notice If Civil Action Filed Before Bankruptcy Action. If the civil action was filed first, the notice must be filed before the latest of [*Fed R Bankr P 9027(a)(2)*]:

- Ninety days after the order for relief in the bankruptcy action; or
- Thirty days after the order terminating the stay, providing that the civil action was stayed under the Bankruptcy Code; or
- In a Chapter 11 reorganization, 30 days after a trustee is qualified, but no more than 180 days after the order for relief.

3.13[8][g] Party May File Verified Statement After Notice of Removal. Any party who has filed a pleading in connection with the removed claim or cause of action may file a verified statement within 10 days of the filing of the removal notice with the district court that must [*Fed R Bankr P 9027(e)(3)*]:

- Admit or deny any allegation in the removal notice as to whether the proceeding is core or noncore;
- Give or withhold consent to the entry of final orders by the bankruptcy judge in noncore proceedings.

3.13[8][h] District Court Has Discretion to Remand. After removal, the district court has broad discretion to remand the removed claim or cause of action based on any equitable ground [*28 USC § 1452(b)*].

The factors that the court will consider in determining whether to remand include [*see In re Dow Corning (6th Cir 1996) 86 F3d 482, 489-495 , cert. denied, 519 US 1071 (1996)* ; *see also In re Lazar (9th Cir 2001) 237 F3d 967, 981-982 , cert. denied, 534 US 992 (2001)*]:

- Whether remand would prevent duplication or uneconomical use of judicial resources;
- The effect of the remand on the administration of the bankruptcy estate;
- Whether the case involves questions of state law better addressed by a state court;
- Comity and judicial economy;
- Prejudice to involuntarily removed parties;
- The effect of bifurcating the action, including whether remand will increase or decrease possibility of inconsistent results;
- The predominance of state law issues and nondebtor parties;
- The expertise of the court in which the action originated.

Cross Reference:

Removal and remand of bankruptcy cases, Collier on Bankruptcy, see § 3.07 (Matthew Bender 15th ed.).

3.13[9] Fair Labor Standards Act. Actions under the Fair Labor Standards Act (FLSA) are removable [*Breuer v. Jim's Concrete of Brevard, Inc. (2003) 538 US 691, 694-700, 123 S Ct 1882, 155 L Ed2d 923*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisCases Involving Federal OfficersCivil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalWaivers

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3.14 Some Types of Actions Are Statutorily Nonremovable.

The following actions are not removable to federal court:

- **Actions against railroads.** A civil action against a railroad, or its receivers or trustees, arising under the Federal Employer's Liability Act (FELA) [*28 USC § 1445(a)*];

- **Actions against common carriers.** A civil action against a common carrier, or its receivers or trustees, to recover damages for delay, loss or injury of shipments arising under federal statutes regulating carriers [*see 49 USC §§ 11706, 14706*] unless the amount in controversy exceeds $10,000, exclusive of interest and costs [*28 USC § 1445(b)*];

- **Workers' compensation actions.** A civil action in any state court arising under that state's workers' compensation laws [*28 USC § 1445(c)*]. *Workers' compensation laws* are defined as statutorily created insurance systems entitling employees to specified benefits for work-related injuries without regard to fault; federal law determined whether an action arises under state workers' compensation laws [*see Arthur v. E.I. DuPont de Nemours & Co. (4th Cir 1995) 58 F3d 121, 125*]. This bar has been deemed procedural and subject to waiver [*Vasquez v. North County Transit Dist. (9th Cir 2002) 292 F3d 1049, 1060-1062* (citing **Moore's**)];

- **Securities claims.** A civil action based on claims arising under the Securities Act of 1933 [*15 USC § 77v(a)*; *see Emrich v. Touche Ross & Co. (9th Cir 1988) 846 F2d 1190*].

Cross Reference:

Types of nonremovable actions, see 16 *Moore's Federal Practice, § 107.17* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalNonremovable ActionsCivil ProcedureRemovalProceedingsGeneral OverviewCivil

ProcedureRemovalWaivers

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3.15 Removal by State Can Waive Sovereign Immunity.

A state's act of removing a lawsuit from state court to federal court waives its *Eleventh Amendment* immunity, at least in the context of state law claims to which the state has explicitly waived sovereign immunity from state court proceedings [*Lapides v. Board of Regents (2002) 535 US 613, 623-624, 122 S Ct 1640, 152 L Ed2d 806* ; *see US Const, amend XI*].

Interpreting the *Lapides* case, the Ninth Circuit has held that a state that removes a case to federal court waives its *Eleventh Amendment* immunity as to *all* claims in the case, including federal law claims and claims asserted after removal [*Embury v. King (9th Cir 2004) 361 F3d 562, 566*].

A state also waives its sovereign immunity from state law claims by joining a co-defendant's motion to remove the case to federal court [*Bank of Lake Tahoe v. Bank of Am. (9th Cir 2003) 318 F3d 914, 916-917*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawSovereign ImmunityCivil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalWaiversConstitutional LawState AutonomyWaiverGeneral Overview

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3.16 CHECKLIST: Drafting and Filing Notice of Removal.

☐ **Draft notice of removal.** Include short and plain statement of the grounds for removal [*see 3.18[1][a]*].

○ **Federal question cases.** In cases removed based on federal question jurisdiction, allege that the case arises under federal law and identify the statutory basis for the claim [*see 3.18[1][b]*].

○ **Diversity cases.** In cases removed based on diversity jurisdiction, allege [*see 3.18[1][c]*]:

☐ Diversity:

○ Complete diversity of citizenship at the time the case was filed in state court and at the time of removal; if nondiverse state-court defendants were dismissed or abandoned before the filing of the removal notice, the notice need only allege diversity as of the time of filing the removal notice and explain why diversity is not being alleged at the time of filing the complaint.

○ In qualified class action, diversity of citizenship between any member of plaintiff class and any defendant.

☐ Facts showing that the amount in controversy requirement is met.

○ **Special statute cases.** In cases removed based on a special removal statute, identify the special removal statute and allege the jurisdictional facts supporting removal under that statute.

Authority:
28 USC §§ 1441, 1446

Discussion:
See *§ 3.18[1][d]*

Forms:
See *§§ 3.34, 3.34A*

☐ **Draft Notice of Related Cases, or Administrative Motion to Consider Whether Cases Should Be Related, and, if applicable, Notice of Pendency of Other Actions or Proceedings.** Follow requirements as provided by local district court rules.

Authority:
CD Cal Civ LR 83-1.3.1, 83-1.4, 83-1.4.1; ED Cal Gen LR 123(b); ND Cal Civ LR 3-12, 3-13; SD Cal Civ LR 40.1(e)

Discussion:
See *§ 3.18[2]*

☐ **Join all defendants in notice of removal.** All defendants served with summons in an action must join in the notice of removal.

Authority:
Hewitt v. City of Stanton (9th Cir 1986) 798 F2d 1230, 1232

Discussion:
See *§ 3.18[4]*

☐ **File notice of removal and attachments in federal court.** The notice of removal must be filed in the federal district court in the district and for the division in which the state court action is pending, together with the statutory filing fee.

○ File notice of removal with a copy of all process, pleadings, and orders served on the removing defendant in the action.

Timing:

Make sure notice is filed within 30 days after the earlier of the following:

☐ The date when the defendant receives, through service or otherwise, a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based (if that initial pleading shows the basis for removal);

☐ The date on which the *first* defendant receives a copy of a pleading, motion, or order from which it first may be ascertained that the case has become removable.

Timing:
In diversity cases, file notice no more than one year after original complaint was filed, unless case is qualified class action in which case one-year limit does not apply.

Authority:
28 USC §§ 1446, 1453

Discussion:
See *§§ 3.19[1], 3.20*

☐ **Provide notice of filing to adverse parties.** Promptly after filing a notice of removal, the defendant or defendants must give separate written notice of the filing to all adverse parties.

Authority:
28 USC § 1446(d)

Discussion:
See *§ 3.19[3]*

☐ **File notice of removal with state court clerk.** Promptly after filing a notice of removal, the defendant or defendants must file a copy of each notice of removal with the clerk of the state court where the case was originally filed.

Authority:
28 USC § 1446(d)

Discussion:
See *§ 3.19[3]*

☐ **Make any amendments to notice within statutorily mandated timeframe.** A notice of removal may be freely amended as follows:

○ Within the original 30-day notice period;

○ After the 30-day notice period if the amendment corrects defective allegations of jurisdiction, but not to add a new basis for removal jurisdiction.

Authority:
28 USC §§ 1446(b), 1653

Discussion:
See *§ 3.19[6]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalProceedingsTime LimitationsCivil ProcedureRemovalWaivers

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3.17 Notice of Removal Is Filed in District and Division Where State Action Is Pending.

A defendant seeking to remove an action from state court must file a notice of removal in the federal district court for the district and division within which the state action is pending [*28 USC § 1446(a)*].

Venue principles applying to actions originally filed in federal courts do not apply to removed actions. It is irrelevant that venue would not have been proper under the general venue statute in the district to which a case is properly removed [*28 USC § 1391*; *see Polizzi v. Cowles Magazines, Inc. (1953) 345 US 663, 665, 73 S Ct 900, 97 L Ed 1331* ; *see also Nishimoto v. Federman-Bachrach & Assoc. (9th Cir 1990) 903 F2d 709, 714 n11*].

Cross References:

Checklist, see *3.16*. Form of notice, see *§ 3.34*.

16 Moore's Federal Practice, see *§ 107.13* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalProceedingsNoticesCivil ProcedureRemovalWaivers

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3.18 Preparing Notice of Removal.

3.18[1] Contents of Notice.

3.18[1][a] Statement of Grounds. The notice of removal must contain a short and plain statement of the grounds for removal [*28 USC § 1446(a)*; *see Fed R Civ P 8(a)*; *Lupo v. Human Affairs Int'l, Inc. (2d Cir 1994) 28 F3d 269, 274*].

The defendant must plainly indicate that the requirements for federal jurisdiction are met based on one or more of the following:

- Federal question jurisdiction [*see 28 USC § 1331*; *see 3.09*].
- Diversity jurisdiction [*see 28 USC § 1332*; *see 3.10*].
- Jurisdiction based on special removal statutes [*see, e.g., 28 USC §§ 1442-1444*; *see 3.13*].

3.18[1][b] Federal Question Cases. In a case removed based on federal question jurisdiction, the removal notice must allege that the case arises under federal law and identify the statutory basis for the claim [*see 28 USC § 1441(b)*].

3.18[1][c] Diversity Cases. In a case removed based on diversity jurisdiction, the removal notice must allege the following:

- Satisfaction of diversity, i.e., either complete diversity of citizenship when the case was filed in state court and at the time of removal [*see 28 USC §§ 1332(a)*, *1441(a)*], *or* diversity of citizenship between a member of the plaintiff class and any defendant in a qualified class action [*see 28 USC § 1332(d)* (applicable to civil actions commenced on or after February 18, 2005)].
- Facts showing that the requisite amount in controversy is met [*see Gaus v. Miles, Inc. (9th Cir 1992) 980 F2d 564, 566-567*].

If nondiverse state court defendants are voluntarily dismissed or abandoned before the filing of the removal notice, the notice need only allege diversity as of the filing of the removal notice, but must explain why diversity is not being alleged as of the time of filing the complaint [*see Adams v. Lederle Lab. (WD Mo 1983) 569 F Supp 234, 243*].

Warning:

Conclusory allegations as to the amount in controversy are insufficient to establish removal jurisdiction [*Gaus v. Miles, Inc. (9th Cir 1992) 980 F2d 564, 566-567*]. The defendant must establish that the requisite jurisdictional amount is satisfied by a preponderance of the evidence [*Sanchez v. Monumental Life Ins. Co. (9th Cir 1996) 102 F3d 398, 403-404*].

3.18[1][d] Special Statute Cases. In a case removed on the basis of a special removal statute, the notice must allege the special removal statute and the requisite jurisdictional facts supporting removal under that statute.

3.18[2] LOCAL PRACTICE: Additional Statements Required to Be Served and Filed Under Local Rules.

3.18[2][a] LOCAL PRACTICE: CD Cal Requirements. When a removal notice is filed with the clerk, or as soon as known thereafter, the removing party must also file and serve a Notice of Related Cases on all parties who have appeared. The notice must state, among other requirements, whether the removed action and any action previously filed or currently pending in the Central District arise from the same or substantially identical transactions, occurrences, or events [*CD Cal Civ LR 83-1.3.1*; *see CD Cal Civ LR 83-1.3.1.1*].

Whenever a party knows or learns that a civil action filed or removed to the Central District involves all or a material part of the same subject matter and all or substantially all of the same parties as another action that is pending in any other federal or state court, the party's attorney must file a Notice of Pendency of Other Actions or Proceedings with the removal notice [*see CD Cal Civ LR 83-1.4*]. This duty continues throughout the time that the case is before the Central District [*CD Cal Civil LR 83-1.4.1*].

3.18[2][b] LOCAL PRACTICE: ED Cal Requirements. Whenever counsel has reason to believe that an action or proceeding on file or about to be filed is related to another action on file (whether or not dismissed or otherwise terminated), counsel must promptly file and serve on all known parties to each related action or proceeding a Notice of Related Cases [*ED Cal Gen LR 123(b)*].

3.18[2][c] LOCAL PRACTICE: ND Cal Requirements. Whenever a party knows or learns that an action filed in or removed to the Northern District is (or the party believes that the action may be) related to an action that is or was pending in the Northern District [*see ND Cal Civ LR 3-12(a)*], the party must promptly file in the earliest-filed case an Administrative Motion to Consider Whether Cases Should Be Related [*ND Cal Civ LR 3-12(b)*]. The motion must comply with *ND Cal Civ LR 7-11* [*ND Cal Civ LR 3-12(b)*], and contain the title and case number of each apparently related case and a brief statement of the relationship of the actions showing why they are substantially related [*ND Cal Civ LR 3-12(d)*]. A copy together with proof of service must be served on all known parties to each apparently related action, and a copy must be lodged with the assigned judge in each apparently related case [*ND Cal Civ LR 3-12(b)*]. Any response, in opposition to or support of the motion, must be filed in the earliest filed case, comply with *ND Cal Civ LR 7-11*, specifically address whether the cases are related, be served on all parties, and be lodged with all judges identified in the motion. If the motion identifies more than two potentially related cases, and a party contends that not all of those cases are related, the response must address whether any of the cases are related to each other [*ND Cal Civ LR 3-12(e)*]. When a judge believes a case pending before that judge is related to another case, the judge may refer the case to a judge assigned to the earliest-filed case to consider whether the cases are related, and send a copy of the referral to all parties to all affected cases. The parties may then file a response. A judge may also order the parties to file a motion to consider whether the cases are related [*ND Cal Civ LR 3-12(c)*].

Whenever a party knows or learns that an action filed or removed to the Northern District involves all or a material part of the same subject matter and all or substantially all of the same parties as another action that is pending in any other federal or state court, the party must promptly file a Notice of Pendency of Other Action or Proceeding with the court and serve a copy of the notice on all opposing parties in the pending action [*ND Cal Civ LR 3-13(a)*]. Any party may serve and file a statement supporting or opposing the notice within 14 days after service of the notice [*ND Cal Civ LR 3-13(c)*].

3.18[2][d] LOCAL PRACTICE: SD Cal Requirements. Whenever counsel has reason to believe that an action or proceeding on file or about to be filed is related to another pending action or proceeding in state or federal court, whether pending, dismissed or otherwise terminated, counsel must promptly file and serve on all known parties to each related action or proceeding a Notice of Related Case. This duty is continuing, and applies even after the file date whenever counsel learns of a related action or proceeding [*SD Cal Civ LR 40.1(e)*].

3.18[3] Signing Pursuant to Rule 11 Required. The notice of removal must be signed pursuant to Rule 11 [*28 USC § 1446(a)*; *see Fed R Civ P 11*].

Rule 11 authorizes the imposition of sanctions if papers are filedcontaining statements that are not well grounded in fact and warranted by law [*Fed R Civ P 11*].

Cross Reference:

Discussion of Rule 11, see Ch. 33, Rule 11 Sanctions.

3.18[4] Joining of All Served Defendants Required.

3.18[4][a] All Defendants Must Consent. All defendants served with summons in an action must join in the notice of removal [*see Hewitt v. City of Stanton (9th Cir 1986) 798 F2d 1230, 1232*].

All joining defendants need not actually sign the initial notice of removal, provided that the unsigned defendants subsequently file written statements stating that they agree to removal within the statutory time for removal [*see Roe v. O'Donohue (7th Cir 1994) 38 F3d 298, 301*].

Warning:

A mere statement by the initial removing defendant that the other defendants consent to, or do not oppose, removal does not satisfy this requirement [*see Roe v. O'Donohue (7th Cir 1994) 38 F3d 298, 301*].

3.18[4][b] Exception for Defendants With Independent Right of Removal and Defendants in Qualified Class Actions. A defendant with an independent right of removal, such as a federal agency or officer, may remove the entire case without the consent of other defendants [*see, e.g., 28 USC § 1442(a)(1)*; *see also Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co. (9th Cir 1981) 644 F2d 1310, 1314-1315*].

Any defendant in a multistate class action that meets the modified diversity requirements of the Class Action Fairness Act of 2005 may remove the action without the consent of all defendants [*28 USC § 1453(b)*; *Abrego v. The Dow Chemical Co. (9th Cir 2006) 443 F3d 676, 681)]* .

Any one defendant under the Class Action Fairness Act of 2005 may remove the entire action, including claims against all defendants, regardless of whether another defendant fails to join in removal or has filed an untimely notice of removal [*United Steel v. Shell Oil Co. (9th Cir 2008) 549 F3d 1204, 1208* (defendant employer's timely removal of union's class action covered action as a whole under CAFA, including claims against co-defendant employer)].

Note that the Class Action Fairness Act applies to civil actions "commenced" on or after February 18, 2005, and for purposes of CAFA retroactivity, "commenced" means the date the complaint is filed, not the date the case is removed [*Bush v. Cheaptickets, Inc. (9th Cir 2005) 425 F3d 683, 689* ; *see also Pritchett v. Office Depot, Inc. (10th Cir 2005) 420 F3d 1090, 1094]* . For purposes of determining CAFA's effective date, an action is commenced under California law when the original complaint in the action is filed, irrespective of any relation back analysis [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1016-1017* ; *see McAtee v. Capital One, F.S.B. (9th Cir 2007) 479 F3d 1143, 1148* (any amendment of original complaint does not change action's commencement date for purpose of CAFA's effective date)]. Further, an amendment to a cross-complaint in California state court (a counterclaim in federal court) does not commence an action under the CAFA as of the date of the amendment [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1015-1016]* .

Cross References:

Checklist, see *§ 3.16*. Form of notice, see *§ 3.34*.

Discussion of minimal diversity required under the Class Action Fairness Act of 2005, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§ 2.24A*.

Procedures for removal, see 16 *Moore's Federal Practice, § 107.30[1], [2]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalProceedingsNoticesCivil ProcedureRemovalWaivers

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3.19 Notice Must Be Filed in Appropriate Court.

3.19[1] Filing in District Where State Court Action Is Pending. File the notice of removal in the federal district court in the district and for the division in which the state court action is pending [*28 USC § 1446(a)*; *Fed R Civ P 8(a)*].

3.19[2] Filing State Court Papers. File the notice with a copy of all process, pleadings, and orders served on the removing defendant in the action [*28 USC § 1446(a)*].

3.19[3] Noticing Adverse Parties and Filing Notice With State Court. Promptly after filing a notice of removal, give separate written notice of the filing to all adverse parties and file a copy of each notice with the clerk of the state court where the case was filed [*28 USC § 1446(d)*].

3.19[4] Effect of Filing Notice. Removal is effected once the copy of the removal notice served on adverse parties is filed with the court. Once the case is removed, the state court may not proceed unless and until the case is remanded [*28 USC § 1446(d)*; *see Arango v. Guzman Travel Advisors Corp. (5th Cir 1980) 621 F2d 1371, 1375 n4* (citing **Moore's**)].

3.19[5] Removal to Wrong District Does Not Deprive District Court of Subject Matter Jurisdiction. Removal of a case to the wrong district court is a procedural defect that does not deprive the district court of subject matter jurisdiction [*see Peterson v. BMI Refractories (11th Cir 1997) 124 F3d 1386, 1388-1394*].

3.19[6] Amending Notice of Removal. A notice of removal may be freely amended as follows:

- Within the original 30-day notice period [*see 28 USC 1446(b)*; *see 3.20*]; or

- After the 30-day period if the amendment corrects defective allegations of jurisdiction, but not to add a new basis for removal jurisdiction [*see 28 USC § 1653*; *Arco Envtl. Remediation, L.L.C. v. Department of Health & Envtl. Quality (9th Cir 2000) 213 F3d 1108, 1117*].

3.19[7] Filing Fee. A statutory filing fee must accompany the filing of the notice [*see 28 USC § 1914(a)*].

Cross References:

Checklist, see *3.16*. Form of notice, see *3.35*. Form, Declaration of Filing of Notice of Removal in State Court, § 3.36.

Removal procedure, see 16 *Moore's Federal Practice, § 107.30* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalProceedingsNoticesCivil ProcedureRemovalWaivers

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3.20 Notice of Removal Must Be Timely Filed.

3.20[1] File Notice Within 30 Days of Receipt of Papers Indicating Removability. File the notice of removal within 30 days after the earlier of the following [*28 USC § 1446(b)*]:

- The date on which you receive, through service or otherwise, a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, if that initial pleading shows the basis for removal;

- The date on which you receive a copy of a pleading, motion, order, or other paper from which it may be first ascertained that the case has become removable, but in no event more than one year after the original complaint was filed in a diversity case.

If the complaint is initially removable, the defendant must remove within 30 days. If subsequent events reveal the existence of diversity jurisdiction after the complaint has been served, a defendant must remove within 30 days after it has ascertained the basis for removal. In addition, removal must take place within one year of the commencement of the action [*Johnson v. America Online, Inc. (ND Cal 2003) 280 F Supp2d 1018, 1027*].

Exception:
The one-year limit does not apply if the case is a multistate class action subject to the modified diversity requirements of the Class Action Fairness Act of 2005 [*28 USC § 1453(b)* (applicable to civil actions commenced on or after February 18, 2005)].

Strategic Point:

A case is removable when "examination of the four corners of the applicable pleadings" reveals a basis for removal. There is no duty to make further inquiry and the defendant's subjective knowledge is irrelevant [*Harris v. Bankers Life & Cas. Co. (9th Cir 2005) 425 F3d 689, 694*]. The Ninth Circuit has rejected the view that a duty is imposed on potential movants to investigate potential reasons for removal

[*Harris v. Bankers Life & Cas. Co. (9th Cir 2005) 425 F3d 689, 695*].

Subsequent notices of removal are not barred. If an action is remanded following an initial removal because of a lack of subject matter jurisdiction, a second notice of removal may be filed if events subsequent to the remand demonstrate jurisdiction [*see* Mattel, Inc. v. Bryant (CD Cal 2005) 2005 US Dist LEXIS 3568, at *14-*16].

3.20[2] Formal Service Required When Case Initially Removable. If the case is removable based on an initial pleading, formal service is required to begin the 30-day removal period [*Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc. (1999) 526 US 344, 347-349, 119 S Ct 1322, 143 L Ed2d 448*].

3.20[3] Multiple Defendants Present Special Problems. District courts in the Ninth Circuit are split on whether the 30-day removal period begins for all defendants when service is effected on any defendant (the "first-served" rule) or whether each defendant has 30 days from date it was served (the "last served" rule) [*cf. McAnally Enterprises Corp. v. McAnally (CD Cal 2000) 107 F Supp2d 1223, 1227-1229* (applying first served regardless of whether second defendant is served later or is added later); *Varney v. Johns-Manville Corp. (ND Cal. 1987) 653 F Supp 839, 840* (adopting first-served rule) with Drew v. Equifax Information Servs. (ND Cal May 4, 2007) 2007 U.S. Dist. LEXIS 35586, at *3 n.1 (following trend in ND Cal and applying last served rule); *Bonner v. Fuji Photo Film (ND Cal 2006) 461 F Supp2d 1112, 1117-1118* (strongly reaffirming last-served rule, quoting **Moore's**); *Ford v. New United Motors Mfg. Inc (ND Cal 1994) 857 F Supp 707, 710*]. While the Ninth Circuit has expressed no opinion to date "on the propriety of either rule" [*United Comp. Sys. v. AT&T Corp. (9th Cir 2002) 298 F3d 756, 763 n 4*], the movement in other districts, inside and outside the Ninth Circuit, is towards the later-served rule [*see Coleman v. Assurant, Inc. (D Nev 2007) 463 F Supp2d 1164, 1168*].

Exception:

In a class action subject to the modified diversity requirements of the Class Action Fairness Act of 2005, any defendant may remove the action without the consent of all defendants [*28 USC § 1453(b)* (applicable to civil actions commenced on or after February 18, 2005)]. Because there is no unanimity requirement in such a case, the failure of the first-served defendant to file a removal notice within 30 days of service would not preclude a subsequently served defendant from removing the action. A timely notice of removal by one defendant under the Class Action Fairness Act of 2005 removes the entire action, including claims against all defendants, regardless of whether another defendant fails to join in removal or has filed an untimely notice of removal [*United Steel v. Shell Oil Co. (9th Cir 2008) 549 F3d 1204, 1208]* .

Warning:

There is a growing trend outside the Ninth Circuit against the unanimity rule with multiple defendants. These circuits permit later-served defendants 30 days from the date of service of the complaint to file a removal notice with the unanimous consent of their codefendants, even though the first-served co-defendants did not file a removal notice within 30 days [*see, e.g., Brierly v. Alusuisse Flexible Packaging, Inc. (6th Cir 1999) 184 F3d 527, 532-533 , cert. denied, 528 US 1076 (1999)* (citing ***Moore's**); Marano Enters. v. Z-Teca Restaurants, L.P. (8th Cir 2001) 254 F3d 753, 755-757* ; *see also Coleman v. Assurant, Inc. (D Nev 2007) 463 F Supp2d 1164, 1168* (collecting cases)].

3.20[4] Removal May Be Based on Subsequent Pleadings and Other Papers.

3.20[4][a] Voluntary Acts of Plaintiff After Initial Pleading May Make Case Subject to Removal. When a case is not removable based on the plaintiff's initial pleading, it may become removable at a later date if the plaintiff voluntarily acts to create federal jurisdiction by:

- Dismissing any nondiverse defendants [*28 USC § 1446*, Commentary on 1988 Revision of Section

1446; *see California v. Keating (9th Cir 1993) 986 F2d 346, 348-349*].

- Changing his or her citizenship, thereby creating diversity [*see De Bry v. Transamerica Corp. (10th Cir 1979) 601 F2d 480, 486-488* (citing **Moore's**)].

- Increasing the amount of damages prayed for, thereby satisfying the jurisdictional minimum [*Tokarz v. Texaco Pipeline, Inc. (ND Ill 1993) 856 F Supp 403, 404 n2*].

- Amending the complaint to include a claim based on federal law [*see Leffall v. Dallas Indep. Sch. Dist. (5th Cir 1994) 28 F3d 521, 525-526*].

Warning:

Because the plaintiff is the master of the complaint, only the plaintiff's voluntary changes can make a case removable [*Self v. General Motors Corp. (9th Cir 1978) 588 F2d 655, 656-659*].

3.20[4][b] Thirty-Day Period Triggered by Paper Indicating That Case Is Removable. If a case is not initially removable, the 30-day period during which the defendant must file the removal notice begins to run when the defendant receives a copy of an amended pleading, motion, order, or other paper from which it may be ascertained that the case is removable [*28 USC § 1446(b)*]. *Other paper* is any other document that is part and parcel of the state court proceedings and that has its origin and existence by virtue of state court processes [*Phillips v. Allstate Ins. Co. (CD Cal 1989) 702 F Supp 1466, 1468-1469* (only papers filed in case trigger removal period)]. Thus, *other paper* may include the following:

- Correspondence between the parties [*Cohn v. Petsmart, Inc. (9th Cir 2002) 281 F3d 837, 840* (demand letter for $100,000); *Carter v. Building Material & Constr. Teamster's Union (ND Cal 1996) 928 F Supp 997, 998-1000* (receipt of courtesy copies of summons and complaint with letter inviting settlement discussions in lieu of filing)].

- Discovery depositions [*Riggs v. Continental Baking Co. (ND Cal 1988) 678 F Supp 236, 238*].

- Answers to written interrogatories [*Durham v. Lockheed Martin Corp. (9th Cir 2006) 445 F3d 1247, 1251* .

To constitute *other paper,* the paper must give the defendant notice of the grounds of removal. There is no requirement that the paper reveal an alteration in the *facts* supporting federal jurisdiction. For example, a defendant may remove a case when its discovery of the grounds of federal jurisdiction is belated because the facts disclosing those grounds were inadequately or mistakenly stated in the complaint [*Harris v. Bankers Life & Cas. Co. (9th Cir 2005) 425 F3d 689, 695-696* ; *see Lovern v. General Motors Corp. (4th Cir 1997) 121 F3d 160, 162*].

Strategic Point--Federal Officer Removal:

Under *28 USC § 1442(1)*, a federal officer defendant's 30 days to remove begins when the plaintiff discloses sufficient facts for federal officer removal, even if the defendant was previously aware of a different basis for removal [*Durham v. Lockheed Martin Corp. (9th Cir 2006) 445 F3d 1247, 1253*].

3.20[4][c] One-Year Limit in Diversity Cases Other Than Qualified Class Actions. An action may not be removed more than one year after the original complaint was filed in diversity cases, even if diversity is voluntarily created by the plaintiff [*28 USC § 1446(b)*].

Exception:

The one-year limit does not apply in a multistate class action case governed by the modified diversity

requirements of the Class Action Fairness Act of 2005 [*28 USC§ 1453(b)* (applicable to civil actions commenced on or after February 18, 2005)].

Cross Reference:

One-year limitation in diversity cases, see 16 *Moore's Federal Practice, § 107.30[3][a][iii]* (Matthew Bender 3d ed.).

3.20[5] Removing After State Court Judgment. A case may be removed after judgment has been entered by a state court but before the case is finally determined through the state appellate process, provided that other applicable time limitations are met [*see, e.g., RTC v. Bayside Developers (9th Cir 1994) 43 F3d 1230, 1236-1237* (removal proper when judgment subject to appellate review in state courts, at any point before highest state court enters final judgment)].

Cross References:

Checklist, see *3.16*. Form of notice, see *3.35*. Form of declaration, see *§ 3.36*.

Effect of prior state court orders on removal, see 16 *Moore's Federal Practice, § 107.31[3]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalProceedingsNoticesCivil ProcedureRemovalProceedingsTime Limitations

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3.21 Federal District Court Advances Case After Removal Notice Filed in State Court.

3.21[1] Jurisdiction Shifts to Federal Court. Once a copy of the notice of removal is filed with the clerk of the state court in which the action is pending, jurisdiction to advance the case lies with the federal district court. The state court is divested of jurisdiction and must stop all proceedings unless and until the case is remanded [*28 USC § 1446(d)*].

3.21[2] State Court Orders Remain in Effect Until Modified. The district court takes the case on removal exactly as the case stood in state court before removal. All state court pleadings, discovery, orders, and proceedings are presumed valid [*see Salveson v. Western States Bankcard Ass'n (ND Cal 1981) 525 F Supp 566, 578 , aff'd in part, rev'd in part, 731 F2d 1423 (9th Cir 1984)* ; *see also Miller v. Steloff (SDNY 1988) 686 F Supp 91, 93*].

State court rulings remain in effect until modified or supplanted by the federal court [*see Granny Goose Foods, Inc. v. Brotherhood of Teamsters (1974) 415 US 423, 437, 94 S Ct 1113, 39 L Ed2d 435* ; *see also Nealey v. Transportacion Maritima Mexicana, S.A. (9th Cir 1980) 662 F2d 1275*]. The district court has the same authority to reconsider interlocutory orders as the state court [*Preaseau v. Prudential Ins. Co. of Am. (9th Cir 1979) 591 F2d 74, 78-79*].

Circumstances that may warrant reconsideration of state court decisions include the following:

- When a procedural issue determined in state court is subsequently governed by a Federal Rule of Civil Procedure [*see Redfield v. Continental Cas. Co. (7th Cir 1987) 818 F2d 596, 605*];

- When a decision in state court is clearly erroneous [*see Quinn v. Aetna Life & Cas. Co. (2d Cir 1980) 616 F2d 38, 40*].

3.21[3] Federal Rules Govern Procedural Issues. The Federal Rules of Civil Procedure govern all procedural issues after removal, including service of process on unserved or improperly served defendants [*Fed R Civ P 81(c)*; *28 USC § 1448*; *Willy v. Coastal Corp. (1992) 503 US 131, 134-135, 112 S Ct 1076, 117 L Ed2d 280* ; *Nealey v. Transportacion Maritima Mexicana, S.A. (9th Cir 1980) 662 F2d 1275, 1279-1282*].

3.21[4] In Diversity Case, State Law Governs Substantive Issues. If the case was removed based on diversity jurisdiction, the law of the state (including choice of law provisions) in which the action was originally filed governs substantive issues [*Erie R.R. Co. v. Tompkins (1938) 304 US 64, 78, 58 S Ct 817, 82 L Ed 1188*].

3.21[5] Second Answer Need Not Be Prepared and Filed. The defendant is not required to file another answer if an answer has been filed in state court [*Fed R Civ P 81(c)(2)*].

3.21[6] Renewed Jury Demand Not Ordinarily Required. Under the Federal Rules, if either party formally requested a jury in state court before removal, that request need not be renewed in federal court [*Fed R Civ P 81(c)(3)(A)*; *see Mondor v. United States Dist. Court (9th Cir 1990) 910 F2d 585, 586*]. If a case is removed from a state that does not require an express jury demand, no demand is required in federal court unless the district court specifically requests an express jury demand [*Fed R Civ P 81(c)(3)(A)*].

3.21[7] LOCAL PRACTICE: Requesting Jury Trial After Removal.

3.21[7][a] LOCAL PRACTICE: CD Cal Requirements. In removed cases in which a jury trial was not demanded in state court and the matter is not at-issue at the time of removal, the demand for jury trial must be filed within 10 days after service of the last responsive pleading addressed to an issue triable by right by right by a jury. If the matter is at issue at the time of removal, the jury demand must be filed (1) within 10 days after the filing of the notice of removal if the demand is made by the removing party, or (2) within 10 days service of filing of the notice of removal if the demand is made by a party other than the removing party [*CD Cal Civ LR 38-2*].

3.21[7][b] LOCAL PRACTICE: ED Cal, ND Cal, and SD Cal Requirements--No Specific Rule. The local rules for the Eastern, Northern, and Southern Districts of California contain no express rule regarding jury demand after removal; therefore, the provisions of *Fed R Civ P 81(c)* apply [*see 3.21[4]*].

Cross Reference:

Demanding a jury, see Ch. 13, Demanding a Jury Trial, see *§ 13.04[6][b]*.

3.21[8] Subsequent Transfer of Removed Case. If a case is removed to the wrong district or division, the court may dismiss the case or transfer it to the proper district [*28 USC §§ 1404(a), 1406(a)*; *see Kreimerman v. Casa Veerkamp, S.A. de C.V. (5th Cir 1994) 22 F3d 634, 644-645 , cert. denied, 513 US 1016 (1994)*].

After proper removal, a case may be transferred to another district for the convenience of the parties and the witnesses [*see 28 USC § 1404(a)*; *see also Hollis v. Florida State Univ. (11th Cir 2001) 259 F3d 1295, 1300* (citing **Moore's**)].

Cross References:

Transfer to another district, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.57 -2.59*

Change of venue generally, see 17 Moore's Federal Practice, Ch. 111, Change of Venue (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalProceedingsNoticesCivil ProcedureRemovalProceedingsTime Limitations

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3.22 All State Court Proceedings Before Removal Remain in Effect.

All state court injunctions and orders, as well as other state court proceedings occurring before removal, remain in effect after removal until dissolved or modified by the district court. Similarly, all bonds, undertakings, or security given by a party before removal remain valid and effectual following removal [*28 USC § 1450*].

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3.23 CHECKLIST: Moving for Remand

☐ Ascertain whether client would benefit from case being remanded to state court.

☐ Ascertain whether there is a basis for remand.

- ○ Lack of subject matter jurisdiction.
  - ☐ Consider joining a nondiverse party to destroy federal subject matter jurisdiction based on diversity.

    Warning:
    If you seek to join nondiverse parties after removal, the court has discretion to deny joinder and retain the action [*28 USC § 1447(e)*].

☐ If appropriate, given expected dollar value of case, consider amending complaint to reduce damages below $75,000 to destroy diversity jurisdiction.

☐ **Multistate class action removed on basis of minimal diversity:** If case is multistate class action that was removed based on minimal diversity, consider grounds for challenging removal:

- ○ **Discretionary declination of jurisdiction:** If more than one-third, but fewer than two-thirds, of members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed, district court

may decline jurisdiction.

○ **Mandatory declination of jurisdiction:** If more than two-thirds of members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed, district court may be required to decline jurisdiction.

○ Procedural defect in removal, e.g.:

☐ Defendant's failure to file notice of removal in time permitted by *28 USC § 1446(b)*;

☐ Failure by all defendants to join in or assent to removal.

○ Abstention.

○ Forum selection clause.

Authority:
28 USC §§ 1332(d)(3), (4), 1447(c); *Quackenbush v. Allstate Ins. Co. (1996) 517 US 706, 714-715, 116 S Ct 1712, 135 L Ed2d 1* ; *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc. (9th Cir 1984) 741 F2d 273, 279-280*].

Discussion:
See *§§ 3.24*, *3.26*, *3.26A*

Timing:
If grounds for remand exist, determine when motion must be filed.

○ Motion based on jurisdictional defect can be made at any time.

○ Motion based on procedural defect must be made within 30 days of filing of removal notice.

Authority:
28 USC § 1447(c)

Discussion:
See *§ 3.27*

☐ Prepare motion for order remanding removed action to state court.

○ Clearly state basis for motion.

○ Include request for costs and attorney's fees incurred as result of removal.

○ Timely file and serve motion.

Authority:
28 USC § 1447

Discussion:
3.26, 3.27, 3.29

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Form:
See *§ 3.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsAppellate ReviewCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural DefectsCivil ProcedureRemovalProceedingsGeneral Overview

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3.24 Plaintiff May Seek Remand by Joining Additional Defendants to Destroy Federal Subject Matter Jurisdiction.

3.24[1] Use of Joinder to Destroy Subject Matter Jurisdiction. A plaintiff seeking to have a removed case remanded to the state forum that he or she previously selected may attempt to join additional defendants in order to destroy federal subject matter jurisdiction based on diversity [*28 USC § 1447(e)*]. If the district court permits the joinder, and federal subject matter jurisdiction in the case is thereby destroyed, the district court will remand the case to state court [*28 USC § 1447(c)*; *see, e.g., Vu v. Ortho-Mcneil Pharmaceutical, Inc. (ND Cal 2009) 602 F Supp2d 1151, 1153* (fraudulent joinder "is a term of art" used to describe non-diverse defendant who has been joined to action solely to defeat federal diversity jurisdiction)].

Judge's Perspective:
If the attempt fails, the plaintiff may have generated a lack of credibility with the judge. Most judges don't appreciate it when either side tries to manipulate jurisdiction.

3.24[2] Court Has Discretion to Deny or Permit Joinder. If the plaintiff seeks to join additional defendants whose presence would destroy subject matter jurisdiction after removal, the district court may either [*28 USC § 1447(e)*]:

- Deny joinder; or
- Permit joinder and remand the action.

In determining whether to permit joinder, the court will consider the following factors:

- The application of *Fed R Civ P 19*, governing joinder of persons [*see Lopez v. General Motors Corp. (9th Cir 1983) 697 F2d 1328, 1332* ; *see* Ch. 10, Adding, Dropping, and Substituting Parties].
- The plaintiff's motive for seeking joinder of a nondiverse defendant [*see Yniques v. Cabral (9th Cir 1993) 985 F2d 1031, 1035* , *disapproved on other grounds, McDowell v. Calderon (9th Cir 1999) 197*

F3d 1253, 1255].

- Whether a delay in seeking joinder is unexplained or unjustifiable [*see Lopez v. General Motors Corp. (9th Cir 1983) 697 F2d 1328, 1332*].

- Whether the statute of limitations would bar an action against the new defendant in state court if joinder is denied [*Carnegie-Mellon Univ. v. Cohill (1988) 484 US 343, 351-354, 108 S Ct 614, 98 L Ed2d 720*].

- The relative strength of the claim [*see Goodman v. Travelers Ins. Co. (ND Cal 1983) 561 F Supp 1111, 1113*].

- Whether the plaintiff will be significantly injured if the amendment is disallowed [*Mayes v. Rapoport (4th Cir 1999) 198 F3d 457, 462-463*].

- Any other factor bearing on the equities [*Mayes v. Rapoport (4th Cir 1999) 198 F3d 457, 462-463*].

Cross References:

Procedure for amending pleadings, see Ch. 9, Amending and Supplementing Pleadings, see *§§ 9.03 -9.11*.

Addition of nondiverse parties, see 16 *Moore's Federal Practice, § 107.41[2][d]* (Matthew Bender 3d ed.).

Judge's Perspective:

The judge has much discretion here, and judges differ widely. Sometimes, the courts are influenced by how heavy the docket is. But generally, most judges conform to the guideline that if jurisdiction exists, the case should stay in federal court. But it does happen that judges will empathize with a plaintiff's choice of forum and try to balance the equities.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsAppellate ReviewCivil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural DefectsCivil ProcedureRemovalProceedingsGeneral Overview

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3.25 Procedure for Remand May Be Initiated by Judge or by Party.

3.25[1] Sua Sponte Remand by Court. A removed action may be remanded sua sponte by the court [*see 28 USC § 1447(c)*].

Circuit courts are split on whether a district court may sua sponte remand a case based on a *procedural defect,* as opposed to lack of subject matter jurisdiction. The Ninth Circuit permits such a remand within the 30-day remand period [*Maniar v. FDIC (9th Cir 1992) 979 F2d 782, 785-786*].

Distinguish:
Outside of the Ninth Circuit, the predominant view disallows sua sponte procedural remands [*see, e.g., Page v. City of Southfield (6th Cir 1995) 45 F3d 128, 132-134*].

3.25[2] Motion by Party. A removed action may be remanded on motion by any of the parties [*see 28 USC § 1447(c)*]. Remand is ordinarily sought by plaintiffs.

Warning:
A removing defendant who subsequently moves for remand may be subject to sanctions for improper removal [*see Napoleon Hardwoods, Inc. v. Professionally Designed Benefits, Inc. (7th Cir 1993) 984 F2d 821, 822* ; *see 3.26*].

Cross References:
Form of notice of motion and motion, see *§ 3.37*.

Remand following removal, see 16 *Moore's Federal Practice, § 107.41[1]* (Matthew Bender 3d ed.).

Legal Topics:

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

Civil ProcedureRemovalPostremoval RemandsAppellate ReviewCivil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural DefectsCivil ProcedureRemovalProceedingsGeneral Overview

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3.26 Grounds for Motion to Remand Include Lack of Subject Matter Jurisdiction, Procedurally Defective Removal, Abstention, and Provision in Forum Selection Clause.

3.26[1] Statutory Grounds. The key statutory grounds for remand are [*28 USC § 1447(c)*]:

- Lack of subject matter jurisdiction, including both diversity jurisdiction and federal question jurisdiction; and
- Procedurally defective removal.

3.26[2] Nonstatutory Grounds. Nonstatutory grounds for remand include:

- Abstention [*see Quackenbush v. Allstate Ins. Co. (1996) 517 US 706, 714-715, 116 S Ct 1712, 135 L Ed2d 1*].
- Enforcement of a forum selection clause [*see Pelleport Investors, Inc. v. Budco Quality Theatres, Inc. (9th Cir 1984) 741 F2d 273, 279-280* ; *Comerica Bank v. Whitehall Specialties, Inc. (CD Cal 2004) 352 F Supp2d 1077, 1080*].

3.26[3] Crowded Docket Is Not a Proper Ground for Remand. A federal court may not remand a removed case over which the court would otherwise have jurisdiction solely because of a crowded court docket [*Thermtron Prods., Inc. v. Hermansdorfer (1976) 423 US 336, 351, 96 S Ct 584, 46 L Ed2d 542* , *overruled on other grounds* by *Quackenbush v. Allstate Ins. Co. (1996) 517 US 706, 714-715, 116 S Ct 1712, 135 L Ed2d 1]* .

3.26[4] Futility Exception May Provide Ground for Refusal to Remand. A court may refuse to remand a case of uncertain federal jurisdiction based on the futility exception, such as when the state court would dismiss the claims with prejudice [*Deutsch v. Turner Corp. (9th Cir 2003) 324 F3d 692, 718-719, n22*].

Cross Reference:

Grounds for remand, see 16 *Moore's Federal Practice, §§ 107.41, 107.44[2]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural DefectsCivil ProcedureRemovalProceedingsGeneral OverviewContracts LawContract Conditions & ProvisionsForum Selection Clauses

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3.26A Additional Grounds for Remand of Class Action Subject to Modified Diversity Requirements of Class Action Fairness Act of 2005.

3.26A[1] District Court May Decline Jurisdiction When More Than One-Third, But Less Than Two-Thirds, of Plaintiffs Are Citizens of State Where Action Was Originally Filed. A district court may decline to exercise jurisdiction over a class action that meets the modified diversity requirements of the Class Action Fairness Act of 2005 in the interests of justice when more than one-third but fewer than two-thirds of themembers of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed. In deciding whether to decline to exercise its jurisdiction, the district court must consider whether [*28 USC § 1332(d)(3)* (applicable to civil actions commenced on or after February 18, 2005)]:

- The claims asserted involve matters of national or interstate interest.
- The claims asserted will be governed by the laws of the state in which the action was originally filed or by the laws of other states.
- The class action was pleaded in a manner that sought to avoid federal jurisdiction.
- The action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants.
- The number of citizens of the state in which the action was originally filed in all proposed plaintiff classes is substantially larger than the number of citizens from any other state, and the citizenship of other members is dispersed among a substantial number of states.
- During the three-year period before the action was filed, any other class action asserting the same or similar claims on behalf of the same or other persons has been filed.

3.26A[2] In Some Cases, District Court Must Decline Jurisdiction When More Than Two-Thirds of Plaintiffs Are Citizens of State Where Action Was Originally Filed. A district court *must* decline to exercise

jurisdiction over a class action that meets the modified diversity requirements of the Class Action Fairness Act of 2005 when two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state where the action was originally filed [*28 USC § 1332(d)(4)(B)* (applicable to civil actions commenced on or after February 18, 2005)]. A district court also *must* decline to exercise jurisdiction over such a class action when [*28 USC § 1332(d)(4)(A)* (applicable to civil actions commenced on or after February 18, 2005)]:

- More than two-thirds or more of the members of all proposed plaintiff classes in the aggregate are citizens of the state where the action was originally filed;

- During the three-year period before the action was filed, no other class action asserting the same or similar factual allegations against any of the defendants on behalf of the same persons has been filed;

- Principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state where the action was originally filed; and

- At least one defendant is a citizen of the state where the action was originally filed, is one from whom significant relief is sought by members of the plaintiff class, and is one whose alleged conduct forms a significant basis for the claims asserted.

Cross Reference:

Discussion of class actions subject to the modified diversity requirements of the Class Action Fairness Act of 2005, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§ 2.24A*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural DefectsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureClass ActionsGeneral Overview

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Unit 2 First Steps
CHAPTER 3 Removing a State Court Case to Federal Court
IV. MOVING FOR REMAND TO STATE COURT AFTER REMOVAL

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3.27 Timing of Motion to Remand Depends on Motion Grounds.

3.27[1] Motion Based on Jurisdictional Defects May Be Made at Any Time. A motion for remand based on lack of subject matter jurisdiction may be made at any time by either the court or any of the parties [*see 28 USC § 1447(c)*; *Jordan v. Potter (SD Cal 2008) 2008 US Dist LEXIS 56325, at *6* (§ 1447(c)'s 30-day limitation did not apply because plaintiff moved to remand on jurisdictional grounds)].

A federal district court must remand a case whenever it appears before final judgment that the court lacks subject matter jurisdiction over the case [*28 USC § 1447(c)*; *see Parker, PPA v. Della Rocco (2d Cir 2001) 252 F3d 663, 666-667*].

3.27[2] Motion Based on Procedural Defects Must Be Made Within 30 Days. A motion for remand based on procedural defects must be made within 30 days of the filing of the removal notice or the defect is deemed waived [*28 USC § 1447(c)*; *Northern Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co. (9th Cir 1995) 69 F3d 1034, 1036-1038*].

Example:

Plaintiff's failure to move for remand within 30 days of removal waived any procedural defects in the removal, and defendant's failure to remove within the one-year time limit in *28 USC § 1446(b)* was a procedural--not a jurisdictional--defect [*Jackson v. Wal-Mart Stores, Inc. (ND Cal 2008) 588 F Supp2d 1085, 1086-1087* ; *but see Perez v. General Packer, Inc. (CD Cal 1992) 790 F Supp 1464, 1471* ("the one-year rule [in § 1446(b)] is a jurisdictional rule and its violation a jurisdictional defect")].

The 30-day period runs from the day that the removal notice was filed, not from the date that the plaintiff was served with the notice, and is not extended if the notice is served by mail [*28 USC § 1447(c)*; *see Pavone v. Mississippi Riverboat Amusement Corp. (5th Cir 1994) 52 F3d 560, 566* ; *In re* Edward Jones Holders Litig. (CD Cal 2006) 453 F Supp2d 1210, 1212-1213].

3.27[3] Waiver of Objection. If a motion to remand based on procedural defect is filed after the 30-day period and the defendant does not raise the issue of untimeliness, the defect of untimeliness is waived and remand is permissible [*Student A. v. Metcho (ND Cal 1989) 710 F Supp 267, 269*].

Cross Reference:

Time for making motion for remand, see 16 *Moore's Federal Practice, § 107.41[1][d]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural DefectsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalProceedingsTime Limitations

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3.28 Burden of Proof When Removal is Contested.

Once a plaintiff files a motion for remand, the defendant must prove that the basis for removal was proper [*see Gaus v. Miles, Inc. (9th Cir 1992) 980 F2d 564, 566* ; *see also B., Inc. v. Miller Brewing Co. (5th Cir 1981) 663 F2d 545, 547-550*].

Depending on the claims in the complaint, the Ninth Circuit has identified "at least three different burdens of proof that might be placed on a removing defendant" attempting to prove federal jurisdictional requirements have been met [*Guglielmino v. McKee Foods Corp. (9th Cir 2007) 506 F3d 696, 699]* . First, when a state court complaint "alleges on its face an amount in controversy sufficient to meet the federal jurisdictional threshold," then the requirement is "presumptively satisfied" unless plaintiff can show "to a legal certainty" they cannot actually recover that amount [*Guglielmino v. McKee Foods Corp. (9th Cir 2007) 506 F3d 696, 699* (citing *Sanchez v. Monumental Life Ins. Co. (9th Cir 1996) 102 F3d 398, 402)]* . Second, when the amount in controversy is "unclear or ambiguous" on the face of the state court complaint, defendant must show by a "preponderance of the evidence" that the amount in controversy exceeds the jurisdictional amount [*Guglielmino v. McKee Foods Corp. (9th Cir 2007) 506 F3d 696, 699* (citing *Sanchez v. Monumental Life Ins. Co. (9th Cir 1996) 102 F3d 398, 404)]* . This standard also applies to state court complaints that do not specify a particular amount in controversy and are removed subject to Class Action Fairness Act (CAFA) [*Guglielmino v. McKee Foods Corp. (9th Cir 2007) 506 F3d 696, 699* (citing *Abrego v. Dow Chem. Co. (9th Cir 2006) 443 F3d 676, 683)]* . Third, in the CAFA context, when a state court complaint affirmatively alleges an amount in controversy less than the jurisdictional threshold, defendants must prove "with legal certainty" that the jurisdictional threshold under CAFA is met [*Guglielmino v. McKee Foods Corp. (9th Cir 2007) 506 F3d 696, 699* (citing *Lowdermilk v. U.S. Bank Nat'l Ass'n (9th Cir 2007) 479 F3d 994, 994)]* . However, the party seeking remand bears the burden of proving exceptions to CAFA removal jurisdiction [*Serrano v. 180 Connect, Inc. (9th Cir 2007) 478 F3d 1018, 1021]* .

Cross Reference:

For discussion of additional grounds for removal for cases brought under the Class Action Fairness Act of 2005, see *§ 3.26A*.

In general, when ruling on a motion to remand, the court looks to the plaintiff's complaint, as it is stated at the time of removal, and the defendant's notice of removal to determine the propriety of removal [*see Miller v. Grgurich (9th Cir*

1985) 763 F2d 372, 373].

In the Ninth Circuit, it is considered perfectly appropriate for a plaintiff to seek remand by amending the complaint to remove the federal claims following removal [*see Baddie v. Berkeley Farms, Inc. (9th Cir 1995) 64 F3d 487, 491* (nothing manipulative about decision to drop federal claims, and there would be little to be gained in judicial economy by forcing plaintiffs to abandon their federal causes of action before filing in state court); Chow v. Hirsch (ND Cal 1999) 1999 US Dist LEXIS 3010, at *12-*13 (not improper for plaintiff to make a strategic decision to concentrate on state law claims in an attempt to have them heard in state court); *see also Payne v. Parkchester N. Condos (SDNY 2001) 134 F Supp2d 582, 584-585* (noting split of authority on this point and discussing both rationales)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural DefectsCivil ProcedureRemovalProceedingsGeneral Overview

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3.29 Moving for Costs and Attorney's Fees.

Counsel who has succeeded in remanding a case to state court may move for attorney's fees, costs (including filing fees, process service fees, and similar fees), and any actual expenses incurred as a result of the removal [*28 USC § 1447(c)*; *see Gotro v. R & B Realty Group (9th Cir 1995) 69 F3d 1485, 1486-1488*].

There is no presumption in favor of an award of attorney's fees. Absent unusual circumstances, attorney's fees may be awarded only when the removing party lacked an objectively reasonable basis for seeking removal; if such an objectively reasonable basis existed, attorney's fees may not be awarded. The district court does, however, have discretion to depart from this rule in unusual circumstances [*Martin v. Franklin Capital Corp. (2005) 546 US 132, 126 S Ct 704, 163 L Ed 2d 547, 555-556*].

An award of costs and attorney's fees for improper removal is reviewable under an abuse of discretion standard [*see Martin v. Franklin Capital Corp. (2005) 546 US 132, 126 S Ct 704, 163 L Ed 2d 547, 555-556* ; *see, e.g.,* Patel v. Del Taco, Inc. (9th Cir 2006) 446 F3d 996, 999-1000].

Cross Reference:

Award of costs and attorney's fees, see 16 *Moore's Federal Practice, § 107.41[3]* (Matthew Bender 3d ed.).

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3.30 Effect of Post-Removal Changes in Case.

3.30[1] Federal Claims Dismissed, State Claims Remaining. When state law claims are removed based on supplemental jurisdiction in conjunction with a federal question claim and the federal claim is resolved or dismissed, the district court retains discretion to exercise supplemental jurisdiction over the remaining state law claims [*28 USC § 1367(c)(3)*; *Carlsbad Tech. v. HIF Bio (2009) ___ US ___, 129 S Ct , 1862, 173 L Ed2d 843, 849-850* ; *Executive Software N. Am., Inc. v. United States Dist. Court (9th Cir 1994) 24 F3d 1545, 1548-1550 , overruled on other grounds by Cal. Dep't of Water Res. v. Powerex Corp. (9th Cir 2008) 533 F3d 1087, 1093]* .

If the federal question is eliminated relatively soon after removal, it is ordinarily preferable to remand the case rather than dismiss the case [*Carnegie-Mellon Univ. v. Cohill (1988) 484 US 343, 357, 108 S Ct 614, 98 L Ed2d 720* ; *Baddie v. Berkeley Farms, Inc. (9th Cir 1995) 64 F3d 487, 490-491*].

The district court's decision on retaining jurisdiction of state claims is reviewed for abuse of discretion [*see Carlsbad Tech. v. HIF Bio (2009) ___ US ___, 129 S Ct 1862, 173 L Ed2d 843, 849-850* ("[T]the [district] court's exercise of its discretion under § 1367(c) is not a jurisdictional matter. Thus, the court's determination may be reviewed for abuse of discretion, but may not be raised at any time as a jurisdictional defect."); *Harrell v. 20th Century Ins. Co. (9th Cir 1991) 934 F2d 203, 205*].

3.30[2] Only Third-Party Claims Remain. The district court retains jurisdiction over surviving third-party claims if the following claims are settled:

- The federal claim on which jurisdiction is based [*Dery v. Wyer (2d Cir 1959) 265 F2d 804, 808*].

- The main claim on which diversity jurisdiction depends [*Hill v. Rolleri (9th Cir 1980) 615 F2d 886, 888-889*].

3.30[3] Post-Removal Reduction in Amount in Controversy Cannot Deprive Federal Court of Jurisdiction. If the plaintiff voluntarily reduces the amount in controversy below the jurisdictional minimum after removal, the district court retains jurisdiction [*St. Paul Mercury Indem. Co. v. Red Cab Co. (1938) 303 US 283, 290-292, 58 S Ct*

586, 82L Ed 845 ; *see Hill v. Rolleri (9th Cir 1980) 615 F2d 886, 888-889*].

3.30[4] Addition of Parties. If the plaintiff seeks to join nondiverse parties after removal, the district court has discretion to either [*28 USC § 1447(e)*]:

- Deny joinder and retain action or;
- Permit joinder and remand.

The joinder of a nondiverse party after removal destroys diversity jurisdiction. A district court may retain jurisdiction if the case could have originally been filed in federal court under an independent basis for federal jurisdiction [*Morris v. Princess Cruises, Inc. (9th Cir 2001) 236 F3d 1061, 1066-1067*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural DefectsCivil ProcedureRemovalProceedingsGeneral Overview

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3.31 Remand Shifts Jurisdiction to State Court.

Once a certified copy of a remand order is mailed to the state court, the district court is divested of jurisdiction and the state court has jurisdiction to proceed with the case [*28 USC § 1447(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural DefectsCivil ProcedureRemovalProceedingsGeneral Overview

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3.32 Reconsideration After Remand Order.

Once a district court certifies a remand order to the state court, the district court is divested of jurisdiction and may take no further action on the case [*28 USC § 1447(c)*; *Seedman v. United States Dist. Court (9th Cir 1988) 837 F2d 413, 414*].

When a remand order is based on a defect in removal procedure or a lack of subject matter jurisdiction, district courts are barred from reconsidering the order following certification [*see 28 USC § 1447(d)*; *Seedman v. United States Dist. Court (9th Cir 1988) 837 F2d 413, 414*]. However, the district court may correct any errors before certifying the remand to state court [*Bucy v. Nevada Const. Co. (9th Cir 1942) 125 F2d 213, 217-218*].

When a remand order is based on nonstatutory grounds, the district court may reconsider the order until the state court receives a certified copy of the remand order [*Seedman v. United States Dist. Court (9th Cir 1988) 837 F2d 413, 414*].

The Ninth Circuit has suggested that only the certification of a statutory remand order to state court divests federal courts of jurisdiction [*see Seedman v. United States Dist. Court (9th Cir 1988) 837 F2d 413, 414*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural DefectsCivil ProcedureRemovalProceedingsGeneral Overview

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3.33 Appellate Review of Remand Order.

3.33[1] Orders Denying Remand. The denial of a motion to remand is not a final order and is ordinarily not subject to immediate appellate review. Appellate review is generally deferred until a final judgment or other appealable order is entered [*see O'Halloran v. University of Washington (9th Cir 1988) 856 F2d 1375, 1378-1379*].

Example:

If an appeal from the denial of remand is joined with an appeal from an order granting or denying a preliminary injunction, an appellate court may review the denial of remand without waiting for final judgment or certification [*O'Halloran v. University of Washington (9th Cir 1988) 856 F2d 1375, 1378-1379* ; *Takeda v. Northwestern Nat'l Life Ins. Co. (9th Cir 1985) 765 F2d 815, 818* (reviewing refusal to remand with propriety of a preliminary injunction appropriate to prevent waste of judicial resources)].

Exception:

A court of appeals may accept an appeal from a district court order denying remand of a class action subject to the modified diversity requirements of the Class Action Fairness Act of 2005. A party seeking to appeal such an order must comply with the requirements of *Fed R App P 5* [*Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc. (9th Cir 2006) 435 F3d 1140, 1145*]. The application for review must be made within ten court days after the entry of the order [*28 USC § 1453(c)(1)* (applicable to civil actions commenced on or after February 18, 2005); *see Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc. (9th Cir 2006) 435 F3d 1140, 1145-1146* (noting drafting error in statute)]. The court of appeals must render a decision within 60 days (70 days if an extension of time for good cause is granted) of the date on which the appeal is filed [*28 USC § 1453(c)(2),(3)* (applicable to civil actions commenced on or after February 18, 2005)]. For discussion of class actions subject to the modified diversity requirements of the Class Action Fairness Act of 2005, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§ 2.24A*.

Assuming that an order denying remand is reviewable before final judgment, the mechanism for review is limited to appeal, despite earlier circuit case law that indicated that mandamus was the proper procedure in certain circumstances [

Cal. Dep't of Water Res. v. Powerex Corp. (9th Cir 2008) 533 F3d 1087, 1093-1096 (district court's discretionary decision to decline supplemental jurisdiction is properly challenged pursuant to appeal, rather than in petition for writ of mandamus; "We conclude that *Moses H. Cone* should guide our review or remands to state court, and, on the authority of *Quackenbush*, we override circuit precedents that instruct otherwise."); *see Quackenbush v. Allstate Insurance Co. (1996) 517 US 706, 709, 116 S Ct 1712, 135 L Ed2d 1 (1996)* (finding abstention-based remand is appealable under *28 USC § 1291*); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp. (1983) 460 US 1, 8 n.6, 103 S Ct 927, 74 L Ed2d 765* ("a court of appeals has no occasion to engage in extraordinary review by mandamus 'in aid of [its] jurisdictio[n],' *28 U.S.C. § 1651*, when it can exercise the same review by a contemporaneous ordinary appeal")].

If a judge issuing an order denying remand believes that the order involves a controlling question of law as to which substantial grounds exist for a difference of opinion and an immediate appeal would materially advance the ultimate termination of the litigation, the judge may certify the order for immediate appellate review [*28 USC § 1292(b)*].

3.33[2] Orders Granting Remand.

3.33[2][a] Remand Based on Procedural Defect or Lack of Subject Matter Jurisdiction Is Not Reviewable. Remand orders based on a lack of subject matter jurisdiction or a defect in removal procedure are not reviewable on appeal or otherwise [*Quackenbush v. Allstate Ins. Co. (1996) 517 US 706, 711-712, 116 S Ct 1712, 135 L Ed 2d 1* (decided under 1988 version of *28 USC § 1447(c)*)], even if the remand is erroneous [*28 USC § 1447(d)*; *Thermtron Prods., Inc. v. Hermansdorfer (1976) 423 US 336, 343, 96 S Ct 584, 46 L Ed2d 542 , overruled on other grounds* by *Quackenbush v. Allstate Ins. Co. (1996) 517 US 706, 714-715, 116 S Ct 1712, 135 L Ed2d 1* ; *Seedman v. United States Dist. Court (9th Cir 1988) 837 F2d 413, 414* (sua sponte remand based on untimely removal cannot be vacated even if based on clerical error)].

Exceptions:

An order remanding a case to state court pursuant to *28 USC § 1443* is reviewable on appeal [*28 USC § 1447(d)*]. Section 1443 removal is available in certain types of civil rights cases [*see 3.13[3]*].

An order remanding pendent state law claims on discretionary grounds is not pursuant to *28 USC § 1447(c)*, and therefore is a reviewable order [*Cal. Dep't of Water Res. v. Powerex Corp. (9th Cir 2008) 533 F3d 1087, 1091*]. Further, a remand based on declining to exercise supplemental jurisdiction over state-law claims under *28 USC § 1367(c)* is not a remand for lack of subject-matter jurisdiction and therefore is not barred from appellate review by *28 USC § 1447(c), (d)*. The district court's decision whether to exercise its statutory supplemental jurisdiction over the state-law claims (*see 28 USC § 1367(a), (c)*) after dismissing every claim over which it has original jurisdiction is purely discretionary [*Carlsbad Tech. v. HIF Bio (2009) ___ US ___, 129 S Ct 1862, 173 L Ed2d 843, 849-850* (court's determination may be reviewed for abuse of discretion, but may not be raised as jurisdictional defect)].

A court of appeals may accept an appeal from a district court order granting remand of a class action subject to the modified diversity requirements of the Class Action Fairness Act of 2005. The application for review must be made within seven court days after the entry of the order [*28 USC § 1453(c)(1)* (applicable to civil actions commenced on or after February 18, 2005); *see Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc. (9th Cir 2006) 435 F3d 1140, 1145-1146* (noting drafting error in statute)], and a party seeking to appeal such an order must comply with the requirements of *Fed R App P 5* [*Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc. (9th Cir 2006) 435 F3d 1140, 1145*]. The court of appeals must render a decision within 60 days (70 days if an extension of time for good cause is granted) of the date on which the appeal is filed [*28 USC § 1453(c)(2),(3)* (applicable to civil actions commenced on or after February 18, 2005)]. For discussion of class actions subject to the modified diversity requirements of the Class Action Fairness Act of 2005, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§ 2.24A*.

An order remanding a case removed under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), *28 USC § 2679(d)(2)*, is reviewable on appeal. The Westfall Act's provision for removal based on the Attorney General's scope-of employment certification, *28 USC § 2679(d)(2)*, prevails over *28 USC § 1447(d)*'s general prohibition on appellate review of remand orders [*Osborn v. Haley (2007) 549 US 225, 127 S Ct 881, 166 L Ed2d 819, 839* (Attorney General's certification that federal employee sued for wrongful or negligent conduct was acting within scope of his office conclusively establishes federal forum's jurisdiction and precludes remand to state court based on appellate court's disagreement with AG's scope-of-employment determination)].

The bar to appellate review of remand orders based on lack of subject matter jurisdiction applies even if the case were properly removed in the first instance, that is, even if jurisdiction existed at the time of removal [*Powerex Corp. v. Reliant Energy Servs. (2007) 551 US 224, 127 S Ct 2411, 168 L Ed2d 112, 121* (when district court remands properly removed case because it nonetheless lacks subject matter jurisdiction, remand is covered by *28 USC § 1447(c)* and thus shielded from review by *28 USC § 1447(d)*)]. Further, appellate review of the district court's characterization of its remand as based on lack of subject-matter jurisdiction is limited to confirming that the characterization was "colorable" [*Powerex Corp. v. Reliant Energy Servs. (2007) 551 US 224, 127 S Ct. 2411, 168 L Ed2d 112, 122]* .

The bar against appellate review of remands applies not only to remands under the general removal statute, but also to remands made in cases removed under any other statute as well [*see Things Remembered, Inc. v. Petrarca (1995) 516 US 124, 128, 116 S Ct 494, 133 L Ed2d 461* ; *see also Powerex Corp. v. Reliant Energy Servs. (2007) 551 US 224, 127 S Ct 2411, 168 L Ed2d 112, 125* (order remanding case removed under Foreign Sovereign Immunities Act of 1976 is not appealable); *Kircher v. Putnam Funds Trust (2006) 547 US 633, 648, 126 S Ct 2145, 165 L Ed 2d 92* (order remanding case removed under Securities Litigation Uniform Standards Act of 1998 (SLUSA) is not appealable); *FISLIC v. Frumenti Dev. Corp. (9th Cir 1988) 857 F2d 665, 669*].

3.33[2][b] Remand Based on Joinder of Non-Diverse Defendants Is Not Reviewable. The bar against appellate review of remands applies when remand results from the joinder of non-diverse defendants under *28 USC § 1447(e)* [*Stevens v. Brink's Home Sec., Inc. (9th Cir 2004) 378 F3d 944, 948-949* ; *see 3.24*].

3.33[2][c] Remand Based on Substantive Decision Apart From Jurisdictional Issue Is Subject to Review. Remands based on a substantive decision apart from the jurisdictional issue are subject to review [*Pelleport Investors, Inc. v. Budco Quality Theatres, Inc. (9th Cir. 1984) 741 F2d 273, 276-277* (section 1447(d) does not foreclose review of remanding district court's substantive determination on enforceability of forum selection clause)].

Distinguish:

If resolving the substantive legal question is necessary to determine jurisdiction, this exception does not apply [*Lyons v. Alaska Teamsters Employer Serv. Corp. (9th Cir 1999) 188 F3d 1170, 1173, n3* (finding that ERISA did not preempt action and jurisdictional finding not reviewable)].

3.33[2][d] Remand Based on Discretionary Decline of Jurisdiction Is Subject to Review. A remand based on a district court's discretionary decline of jurisdiction is not insulated from appellate review [*Quackenbush v. Allstate Ins. Co. (1996) 517 US 706, 711-712, 116 S Ct 1712, 1720, 135 L Ed2d 1* ; *City of Tuscon v. US West Communications, Inc. (9th Cir 2002) 284 F3d 1128, 1131*].

Exception:

A district court's discretionary decline of jurisdiction over a class action subject to the modified diversity requirements of the Class Action Fairness Act of 2005 is specifically subject to appellate review [*see 28 USC § 1453(c)* (applicable to civil actions commenced on or after February 18, 2005)].

3.33[2][e] Remand Based on Events Occurring After Time of Removal Is Subject to Review. When a district

court bases its remand decision not on a lack of subject matter jurisdiction at the time of the removal itself, but on a lack of subject matter jurisdiction due to *later occurring events*, *28 USC § 1447(c)* does not apply, and the restriction on appellate review in *28 USC § 1447(d)* does not apply either [*Reddam v. KPMG LLP (9th Cir 2006) 457 F3d 1054, 1058-1059* (district court expressly declared that it had jurisdiction at time of removal; court's subsequent remand based on arbitrator's post-removal refusal to arbitrate subject to appellate review)].

3.33[3] Standard of Review Is De Novo. Because the grant or denial of remand is a question of federal subject matter jurisdiction and statutory construction, appellate review is de novo [*see Cantrell v. Great Republic Ins. Co. (9th Cir 1989) 873 F2d 1249, 1252-1255*].

Cross Reference:

Appellate review of remand order, see 16 *Moore's Federal Practice, § 107.44* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsAppellate ReviewCivil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural DefectsCivil ProcedureRemovalProceedingsGeneral Overview

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V. FORMS

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3.34 Notice of Removal.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	NOTICE OF REMOVAL
	)	
	)	

To the Clerk of the United States District Court for the _____ District of _____ [*state in which district located*]:

DEFENDANT, _____ [*name, e.g.*, Mary Jones], files this Notice of Removal under *28 USC §§ 1441*, *1446* and *Federal Rules of Civil Procedure, Rule 81(c)*.

STATEMENT OF FACTS ENTITLING DEFENDANT TO REMOVAL

1. The action pending in the Superior Court of the State of California in and for the _____ [county *or* city and county] of _____, entitled _____ [*state caption of action in state court*], Docket No. _____ [*insert docket or case designation assigned by state court*] was commenced on _____ [*date*].

2. Copies of the pleadings and other papers served on the removing defendants in the above-described action are appended to this Notice of Removal as required by *28 USC § 1446*.

[*If removal is based on presence of federal question:*]

3. As the appended record demonstrates, the action pending in the state court is a civil action within the original federal question jurisdiction of the federal district courts under _____ [*specify statutory basis for original federal question jurisdiction over action, e.g., 28 USC § 1331 or one of the many specific grants of federal question jurisdiction. If only a separate and independent claim is within federal jurisdiction under § 1331, so state*].

4. Because the state court action is one within the federal question jurisdiction of the federal district courts, the action is removable to federal court without regard to the citizenship of the parties under *28 USC § 1441 (a), (b)*. [*Alternatively, if removal is based on the presence of separate and independent claim cognizable under 28 USC § 1331, state that entire case is removable as provided in 28 USC § 1441(c).*]

[*OR, if removal is based on diversity jurisdiction:*]

3. As the appended record demonstrates, the action pending in the state court is a civil action within the original diversity jurisdiction of the federal district courts under *28 USC § 1332(a)* because there is complete diversity of citizenship between the litigants, and the amount in controversy exceeds $75,000.

a. CITIZENSHIP. _____ [*Party designation and name of state court plaintiff*] is a citizen of the State of _____ [*allege citizenship of plaintiff; for an individual, identify state of domicile; for a corporation, identify both state of incorporation and state of principal place of business, e.g.,* Delaware, its State of incorporation, and of California, its principal place of business], while _____ [*party designation and name of defendant seeking removal*] is a citizen of the State of _____ [*allege citizenship of defendant; for an individual, identify state of domicile; for a corporation, identify both state of incorporation and state of principal place of business, e.g.,* Texas, which is both its State of incorporation and its principal place of business].

[*Optional, add if presence of nondiverse defendant should be ignored based on fraudulent joinder:*]

The complaint also names _____ [*name of codefendant*] who is a citizen of the same state as the plaintiff. However, the citizenship of this defendant should be disregarded for purpose of determining removal jurisdiction based on the fact that no possibility exists that the plaintiff can establish liability against this defendant for the following reasons: _____ [*specify*].

[*CONTINUE*]

[*Optional, add if removal based on changes after complaint filed:*]

When this state-court complaint was originally filed, complete diversity was lacking because _____ [*specify, e.g.,* Plaintiff John Smith and Defendant Mary Jones were citizens of the same state]. On _____ [*date*], complete diversity was created as a result of _____ [*specify, e.g.,* Plaintiff John Smith's voluntary settlement and dismissal of the nondiverse defendant].

[*CONTINUE*]

b. AMOUNT IN CONTROVERSY. The amount in controversy in the action exceeds $75,000 exclusive of interest and costs in that _____ [*allege facts sufficient to show that the amount in controversy exceeds the $75,000 jurisdictional minimum*].

c. SERVICE OF PROCESS. _____ [*For each party served in action, state date that service of process was made*.]

4. Because the state court action is one within the diversity jurisdiction of the federal district courts, the action is removable to federal court under *28 USC § 1441(a)* and *(b)* because no defendant is a citizen of the State of California.

[*OR, if removal is based on special removal statute:*]

3. As the appended record demonstrates, _____ [*state circumstances bringing case within special removal statute, e.g.,* the action pending in the state court is a civil action brought against a foreign state].

4. The state court action therefore is removable to the federal district court under _____ [*specify special removal statute relied on, e.g., 28 USC § 1441(d)*].

[*CONTINUE*]

5. Removal to this district court is proper under *28 USC § 1441(a)* because the _____ [*specify state court in which action is pending*] is geographically located within this court's district. [*If removal is under a special removal statute that permits removal to a district other than that encompassing the state court, state that removal to the particular district is proper under that statute*.]

6. Removal is timely under *28 USC § 1446(b)* because this Notice of Removal is filed within 30 days of _____ [*specify event triggering right of removal, e.g., service of process of complaint stating claim within federal jurisdiction, or, dismissal of sole nondiverse defendant*]. _____ [*If removal is based on diversity, add:* Removal is also timely because this Notice of Removal is filed not more than one year after the action was commenced in the state court.]

7. Removal is proper under *28 USC § 1446(b)* because _____ [*state facts necessary to show that all defendants who must consent to decision to remove have done so, e.g.,* all defendants have joined in this Notice of Removal, or those defendants who have not joined in this Notice of Removal have not been served with process or are mere nominal parties not required to join].

_____ [*date*]
Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*name and designation of party*]

[*Each served defendant must join in notice of removal; therefore, if there are multiple defendants, add a signature block for the attorney for each defendant.*]

NOTES.

Authority:
28 USC §§ 1441, 1446

Timing:
See *§ 3.20*

Drafting Notice:
See *§ 3.18*

Related Form of Notice to Adverse Parties:
See *§ 3.35*

Related Declaration:
See *§ 3.36*

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3.34A Notice of Removal of Class Action Under Class Action Fairness Act of 2005.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*)]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
on behalf of _____	)	
[himself *or* herself] and all others similarly situated,	)	
Plaintiffs	)	Civil Action No. _____
vs.	)	NOTICE OF REMOVAL
_____ [*name*],	)	
Defendant	)	
	)	
	)	

To the Clerk of the United States District Court for the _____ District of _____ [*state*

in which district located]:

DEFENDANT, _____ [*name*], files this Notice of Removal under *28 USC §§ 1441*, *1446*, *1453* and *Federal Rules of Civil Procedure, Rule 81(c)*.

STATEMENT OF FACTS ENTITLING DEFENDANT TO REMOVAL

1. The action pending in the Superior Court of the State of California in and for the _____ [county *or* city and county] of _____, entitled _____ [*state caption of action in state court*], Docket No. _____ [*insert docket or case designation assigned by state court*] was commenced on _____ [*date*].

2. Copies of the pleadings and other papers served on the removing defendant in the above-described action are appended to this Notice of Removal as required by *28 USC § 1446*.

3. As the appended record demonstrates, the action pending in the state court is a civil action within the original diversity jurisdiction of the federal district courts under *28 USC § 1332(d)* because there is diversity of citizenship between a member of the class of plaintiffs and a defendant, and the amount in controversy exceeds $5,000,000.

a. CITIZENSHIP. _____ [*name of state court plaintiff*] is a member of the plaintiff class and is a citizen of the State of _____ [*allege citizenship of plaintiff; for an individual, identify state of domicile; for a corporation, identify both state of incorporation and state of principal place of business, e.g.,* Delaware, its State of incorporation, and of California, its principal place of business], while defendant _____ [*name of defendant seeking removal*] is a citizen of the State of _____ [*allege citizenship of defendant; for an individual, identify state of domicile; for a corporation, identify both state of incorporation and state of principal place of business, e.g.,* Texas, which is both its State of incorporation and its principal place of business].

b. AMOUNT IN CONTROVERSY. The amount in controversy in the action exceeds $5,000,000 exclusive of interest and costs in that _____ [*allege facts sufficient to show that the amount in controversy exceeds the $5,000,000 jurisdictional minimum*].

c. SERVICE OF PROCESS. _____ [*For each party served in action, state date that service of process was made*.]

d. NUMBER OF MEMBERS OF ALL PROPOSED PLAINTIFF CLASSES. The class of unnamed plaintiffs exceeds 100 in number within the meaning of *28 USC § 1332(d)(5)(B)*.

e. PRIMARY DEFENDANT. The primary defendant is not a State, State official, or other governmental entity within the meaning of *28 USC § 1332(d)(5)(A)*.

4. Because the state court action is one within the diversity jurisdiction of the federal district courts under *28 USC § 1332(d)*, the action is removable to federal court under *28 USC § 1453* regardless of whether any defendant is a citizen of California.

5. Removal to this district court is proper under *28 USC § 1441(a)* because the _____ [*specify state court in which action is pending*] is geographically located within this court's district.

6. Removal is timely under *28 USC § 1446(b)* because this Notice of Removal is filed within 30 days of _____ [*specify event triggering right of removal, e.g., service of process of complaint stating claim within federal jurisdiction*].

7. Because the state court action is one within the diversity jurisdiction of the federal district courts under *28 USC § 1332(d)*, the action is removable to federal court under *28 USC § 1453* by defendant _____ [*name of defendant seeking removal*] without the consent of other defendants.

[*Optional*]

8. Removal by one defendant under *28 USC § 1453(b)* removes the entire action, including claims against all defendants [*United Steel v. Shell Oil Co. (9th Cir 2008) 549 F3d 1204, 1208]* .

_____ [*date*]

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*name and designation of party*]

NOTES.

Authority:
28 USC §§ 1332, *1441*, *1446*, *1453*

Timing:
See *§ 3.20*

Drafting Notice:
See *§ 3.18*

Related Form of Notice to Adverse Parties:
See *§ 3.35*

Related Declaration:
See *§ 3.36*

Forms for Removal and Remand in Large Multistate Class Actions:
See 5 *Bender's Federal Practice Forms, Forms 23:200-23:206* (Matthew Bender)

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Unit 2 First Steps
CHAPTER 3 Removing a State Court Case to Federal Court
V. FORMS

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3.35 Notice to Adverse Parties of Filing of Notice of Removal.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	NOTICE TO ADVERSE PARTIES
	)	OF FILING OF NOTICE OF REMOVAL
	)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice under the provisions of *28 USC § 1446(d)* that on _____ [*date*],

_____ [*party filing removal notice, e.g.,* Defendant Mary Jones] filed with the Clerk of this Court at the United States Courthouse, located at _____ [*address of court*], the attached Notice of Removal to accomplish the removal of the action pending in the Superior Court of the State of California in and for the _____ [county *or* city and county] of _____, entitled _____ [*state caption of action in state court*], Docket No. _____ [*insert docket or case designation assigned by state court*], commenced on _____ [*date of commencement of state action*], to the United States District Court for the _____ [*specify district*] District of California. A copy of the Notice of Removal also has been filed with the Clerk of the _____ [*specify state court in which action is pending*]. Under *28 USC §§ 1441*, *1446* and *Federal Rules of Civil Procedure, Rule 81(c)*, this action now will be placed on the docket of this District Court for further proceedings.

_____ [*date*]

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*name and designation of party*]

NOTES.

Authority:

28 USC § 1446

Notice to Adverse Parties:

See *§ 3.19[3]*

Timing:

See *§ 3.20*

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Unit 2 First Steps
CHAPTER 3 Removing a State Court Case to Federal Court
V. FORMS

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3.36 Declaration of Filing Notice of Removal in State Court.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	DECLARATION OF FILING NOTICE OF RE-
	)	MOVAL IN STATE COURT
	)	

I, _____ [*name of declarant*], declare as follows:

1. I am the _____ [*identify declarant, e.g.,* attorney of record for Defendant John Smith] in this action.

2. On _____ [*date of filing notice of removal in state court*], as required by *28 USC § 1446(d)*, I filed with the Clerk of the Superior Court of the State of California in and for the _____ [county *or* city and county] of _____, a copy of the Notice of Removal filed in this court on _____ [*date*] in order to provide notice to that court of the removal of this action.

I declare under penalty of perjury _____ [*if executed outside the United States or its territories, insert:* under the laws of the United States of America] that the foregoing is true and correct.

Executed on _____ [*date*].

_____ [*signature of declarant*]

_____ [*typed name*]

NOTES.

Authority:
28 USC § 1446

Related Forms of Notice of Removal:
See *§§ 3.34*, *3.34A*

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CHAPTER 3 Removing a State Court Case to Federal Court
V. FORMS

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3.37 Notice of Motion and Motion for Order Remanding Removed Action to State Court.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER REMANDING REMOVED ACTION TO
_____ [*name*],	)	STATE COURT
Defendant	)	
	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as counsel may be heard, _____ [*specify moving party, e.g.*, Plaintiff John Smith] will move this Court, at the United States Courthouse, located at _____ [*address of court*], Courtroom _____ [*number*], for an order:

(a) pursuant to *28 USC § 1447(c)*, remanding this action to the _____ [*specify state court from which action was removed*] on the ground that _____ [*state basis of motion, e.g.*, the District Court is without jurisdiction over the action, *or* the removal of the action was untimely *or* the removal of the action was otherwise procedurally defective];

(b) pursuant to *28 USC § 1447(c)*, awarding costs and attorney's fees to _____ [*specify moving party, e.g.*, Plaintiff John Smith] for the expenses incurred as a result of the removal; and

(c) granting _____ [*specify moving party, e.g.*, Plaintiff John Smith] such other incidental relief as may be appropriate.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,
_____ [*signature of attorney*]
_____ [*typed or printed name of attorney*]
_____ [*firm name, if applicable*]
Attorney for_____[*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service*]

NOTES.

Authority:
28 USC § 1447

Grounds for Motion:
See *§ 3.26*

Timing of Motion:
See *§ 3.27*

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Unit 2 First Steps
CHAPTER 4 Determining Parties to the Action

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§ 4.syn Synopsis to Chapter 4: Determining Parties to the Action

4.01 Scope.

4.02 Objective and Strategy.

4.03 CHECKLIST: Applying Permissive Party Joinder Rule.

4.04 Selecting Initial Parties to Action.

4.04[1] Federal Rules Encourage Liberal Joinder of Parties and Claims.

4.04[2] Three-Part Test for Joinder of Plaintiffs.

4.04[3] Three-Part Test for Joinder of Defendants.

4.04[4] Each Party Must Meet Minimum Qualifications.

4.05 No Numerical Limits on Permissive Joinder of Parties.

4.05[1] Practical Considerations May Limit Ability to Join All Parties.

4.05[2] Practical Difficulties May Be Compounded by Rule That Each Joined Party May Join All Available Claims Against Opponents.

4.05[3] Court May Order Separate Trials to Resolve Problems Created by Excessive Joinder of Parties and Claims.

4.05[4] Parties May Opt for Representative Proceeding, Such as Class Action, Rather Than Joining All Parties.

4.06 Limitations on Joinder of United States As Defendant.

4.06[1] Sovereign Immunity Prohibits Claims Against United States Except to Extent United States Waives Immunity.

4.06[2] United States Has Made Limited, Statutory Waivers of Immunity.

4.06[2][a] Tucker Act Waives Immunity for Monetary Actions Not Sounding in Tort.

4.06[2][b] Tort Claims Act Waives Immunity, But Requires Administrative Claims to Precede Suits.

4.07 Motion Procedures for Objecting to Misjoinder of Parties.

4.07[1] Party May Object to Party Joinder by Motion; Court May Address Joinder Sua Sponte.

4.07[2] Party May Bring Motion to Drop Party.

4.07[3] Party May Bring Motion to Sever.

4.08 Remedies for Misjoinder of Parties.

4.08[1] Misjoinder of Parties Is Not Ground for Dismissal.

4.08[2] Court May Order Severance.

4.08[3] Court May Drop or Add Parties at Any Time.

4.09 CHECKLIST: Assuring Action Brought by Real Party in Interest.

4.10 CHECKLIST: Raising Objections to Real Party Status.

4.11 Real-Party-in-Interest Requirement Calls for Particular Kind of Standing.

4.11[1] Actions Must Be Prosecuted by Real Party in Interest, Legal Owner of Claim.

4.11[2] Requirement Overlaps With General Standing Requirement.

4.11[3] Plaintiff's Failure to Meet Requirement May Be Waived by Failure to Object.

4.12 Executor, Administrator, Guardian, and Statutory Representative May Sue As Real Party in Interest.

4.13 United States May Litigate As Real Party Representative.

4.14 United States Is Real Party in Interest With Respect to Claims Regarding United States Properties or Interests.

4.15 Determining Real Party Status in Assigned Claims.

4.15[1] Assignee Acquiring Fully Assigned Claim Is Real Party.

4.15[2] Assignee May Be Real Party in Interest Even When Assignor Receives Some Benefit of Litigation.

4.15[3] Assignments for Purpose of Creating Diversity Jurisdiction Are Ineffective for That Purpose.

4.15[4] Assigning Claims Against United States.

4.15[4][a] Assignment of Claims Act Generally Prohibits Assignment of Matured Claims Against United States.

4.15[4][b] Anti-Assignment Act Generally Prohibits Assignments of Rights Under Contracts With United States.

4.16 Procedures for Raising Objections to Real Party Status.

4.16[1] Defendant May Assert Affirmative Defense.

4.16[2] Court May Raise Lack of Real Party in Interest.

4.16[3] Defendant May Bring Motion Addressing Real Party Status.

4.17 Bringing Motion to Compel Joinder of Real Party in Interest.

4.18 Bringing Motion to Drop Party As Not Real Party in Interest.

4.19 Dismissing Action for Real Party Defect.

4.19[1] Dismissal Is Not Usual Remedy for Lack of Real Party in Interest.

4.19[2] Courts Are Generally Lenient in Allowing Cure.

4.19[2][a] Courts Favor Offering Opportunity to Cure Defect.

4.19[2][b] If Curing Defect Is Impossible, Court May Immediately Dismiss.

4.19[2][c] If Failure to Prosecute in Name of Real Party Is Not Honest Mistake, Court May Immediately Dismiss.

4.19[3] Ratification As Cure Requires Ratifying Party to Authorize Action and to Agree to Be Bound by Result.

4.19[4] Joinder or Substitution of Real Party Cures Defect.

4.19[5] Ratification, Joinder, Substitution Relate Back to Original Complaint.

4.19[6] Dismissal Proper After Reasonable Time Passes and Defect Not Cured.

4.20 CHECKLIST: Determining Which State's Laws Govern Capacity to Sue and Be Sued.

4.21 CHECKLIST: Determining Capacity of Minor Under California Law.

4.22 CHECKLIST: Determining Capacity of Incompetent Under California Law.

4.23 CHECKLIST: Determining Capacity of Decedent's Representative Under California Law.

4.24 CHECKLIST: Determining Capacity of Business Entities Under California Law.

4.25 CHECKLIST: Challenging Plaintiff's Lack of Capacity.

4.26 Capacity to Sue and Be Sued in Federal Court Depends on State Law.

4.27 Pleading Capacity Is Not Required, Except When Required to Plead Jurisdiction.

4.28 Determining Capacity of Individual Litigant.

4.28[1] Individuals Have Capacity to Sue or Be Sued Unless They Are Under Disability.

4.28[2] Determining Capacity of Minors Under California Law.

4.28[2][a] Minor Must Sue Through Guardian or Guardian Ad Litem.

4.28[2][b] Minor Has Capacity to Be Sued, but Court Will Appoint Guardian.

4.28[2][c] Emancipated Minor Has Full Capacity, Even Without Guardian.

4.28[2][d] Minor 12 Years Old or Older Has Capacity to Seek or Defend Against Harassment and Violence Injunctions.

4.28[2][e] Neither Minors Nor Guardians May Appear Pro Se.

4.28[3] Determining Capacity of Incompetent Persons Under California Law.

4.28[3][a] Incompetent Must Sue Through Conservator or Guardian Ad Litem.

4.28[3][b] Incompetent Has Capacity to Be Sued in Many Cases, but Court Will Appoint Guardian.

4.29 Determining Capacity of Decedents and Decedents' Representatives Under California Law.

4.29[1] Personal Representative or Successor in Interest May Bring Decedent's Cause of Action.

4.29[2] Cause of Action Against Decedent May Be Asserted Against Personal Representative or Successor in Interest.

4.29[3] Estate Itself May Not Be Party.

4.30 Determining Capacity of Public Corporations.

4.30[1] Capacity of Corporation Determined by Law of State Where Organized.

4.30[2] Determining Capacity of California Corporations.

4.30[2][a] California Corporations Have Same Capacity as Natural Persons.

4.30[2][b] Dissolved California Corporations Have Limited Capacity.

4.30[2][c] Merged Corporation Loses Right to Bring Suit.

4.30[2][d] California Corporation's Rights to Sue and Defend Suits May Be Suspended by Failure to File or Pay Tax.

4.31 Determining Capacity of Partnerships, Associations, and Sole Proprietorships.

4.31[1] Capacity of Partnerships and Associations Determined by Law of State Where District Court Sits.

4.31[2] In California, Partnership May Sue or Be Sued in Partnership Name.

4.31[2][a] Partnership Name Suits Permitted, but Strategic Considerations May Make Partners Advisable Additional Parties.

4.31[2][b] Compliance With Fictitious Name Statute May Be Prerequisite to Partnership Name Suit.

4.31[3] In California, Unincorporated Association May Sue and Be Sued Under Common Name.

4.31[4] In California, Sole Proprietorship Does Not Have Existence Separate From Owner.

4.32 Determining Capacity of Limited Liability Entities.

4.32[1] Capacity of Limited Liability Entities Determined by Law of State Where District Court Sits.

4.32[2] In California, Limited Liability Company May Sue or Be Sued.

4.32[3] In California, Limited Partnerships and Limited Liability Partnerships Have Same Capacity to Sue and Be Sued As General Partnerships.

4.33 Determining Capacity of Nationally Chartered Corporations.

4.33[1] Federally Chartered Corporation.

4.33[2] Corporation Chartered by District of Columbia.

4.34 Determining Capacity of State and Local Public Entities.

4.34[1] Capacities of State and Local Public Entities Determined by Law of State Where District Court Sits.

4.34[2] State of California and California "Public Entities" Have Capacity to Sue and Be Sued.

4.34[3] State Public Entities May Be Sued Only to Extent They Have Waived Immunity.

4.34[4] Liability of California and California Public Agencies Is Subject to Numerous Statutory Limits.

4.34[5] Administrative Claim May Be Prerequisite to Suit.

4.34[6] Eleventh Amendment Immunity May Preclude Suit.

4.35 Determining Capacity of Representatives Litigating State-Law Claims.

4.36 Challenging Capacity Defect.

4.36[1] Capacity Defect Should Be Raised in Responsive Pleadings.

4.36[2] Capacity Defect May Be Raised by Motion to Dismiss.

4.37 Determining Proper Representatives for Persons Lacking Legal Capacity.

4.37[1] Previously Appointed Representative May Sue for or Defend Minor or Incompetent.

4.37[2] Minor or Incompetent May Sue by Next Friend or Guardian Ad Litem.

4.37[3] Court May Appoint Guardian Ad Litem for Minor or Incompetent Who Has Been Sued.

4.37[4] Court Must Hold Incompetency Hearing for Persons Not Previously Adjudged Incompetent.

4.38 LOCAL PRACTICE: CD Cal--Actions Involving Minors and Incompetents.

4.38[1] Court Must Approve Settlement or Compromise.

4.38[2] Court Sets Attorney's Fees.

4.38[3] All Monies Paid to Minor or Incompetent Placed in Blocked Account.

4.39 LOCAL PRACTICE: ED Cal--Actions Involving Minors and Incompetents.

4.39[1] Appointment of Representative or Guardian.

4.39[2] Court Approval Required for Settlement or Compromise.

4.39[3] Disclosure of Attorney's Interest Required.

4.39[4] Court Holds Full Hearing on Proposed Compromise.

4.39[5] Disbursement of Monies or Property Made According to State Law.

4.40 LOCAL PRACTICE: SD Cal--Actions Involving Minors or Incompetents.

4.40[1] Court Order Required for Settlement or Compromise.

4.40[2] Disbursement of Monies or Property Made According to State Law.

4.40[2][a] California Law Applicable for California Resident.

4.40[2][b] Certified Copy of Guardianship Letters Must Be Filed With Clerk.

4.40[2][c] Ex Parte Petition for Review and Approval Must Be Submitted.

4.40[2][d] Approval of Settlement by Magistrate Judge.

4.40[2][e] Submission of Proposed Order.

4.40[2][f] Rules for Distribution, Withdrawals, and Disbursements.

4.41 CHECKLIST: Applying Compulsory Joinder Rule.

4.42 Objective and Strategy: Compulsory Joinder Limits Plaintiff's Ability to Shape Litigation.

4.42[1] Absent Persons With Interest in Subject of Litigation Must Be Protected.

4.42[2] Court Should Assure That Judgment Provides Complete, Effective Relief to Parties.

4.42[3] Compulsory Joinder Rule Limits Power of Plaintiff to Determine Parties to Lawsuit.

4.43 Certain Unjoined Persons or Entities Are Considered "Required Parties."

4.43[1] Person Whose Absence Will Prevent Complete Relief to Existing Parties Is Required Party.

4.43[2] Absent Person Who Has Interest in Subject of Action That May Be Prejudiced by Judgment Is Required Party.

4.43[2][a] Absent Person Must Have Interest in Litigation.

4.43[2][b] Absent Person May Waive Interest.

4.43[2][c] Absent Person's Interest Must Be Legally Protectable, but Need Not Be Property Interest.

4.43[2][d] Absent Person's Interest May Be Adequately Represented by Existing Party.

4.43[3] Absent Person Who Has Interest in Subject Matter of Action and Might Bring Subsequent Action Resulting in Multiple or Inconsistent Obligations for Existing Party Is Required Party.

4.43[3][a] Absent Person's Interest in Litigation May Threaten Inconsistent Obligations for Existing Party.

4.43[3][b] Only Possibility of Inconsistent Obligations, Not Inconsistent Adjudications, Establishes Required Party Status.

4.43[4] Whenever Any of the Three Tests Are Satisfied, Absent Person Is Required Party.

4.44 Claimant's Pleading Must Address All Parties Required to Resolve Claim.

4.45 Court Will Order Joinder of Any Required Party.

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Unit 2 First Steps
CHAPTER 4 Determining Parties to the Action
I. STRATEGY

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4.01 Scope.

This chapter covers:

- Permissive joinder of parties [*see 4.03 -4.08*].
- Joinder of claims and remedies under *Fed R Civ P 18* [*see 4.05[2]*].
- Misjoinder and nonjoinder of parties under *Fed R Civ P 21* [*see 4.08*].
- Real parties in interest under *Fed R Civ P 17(a)* [*see 4.09 -4.19*].
- Capacity to sue and be sued [*see 4.20 -4.40*].
- Compulsory joinder under *Fed R Civ P 19* [*see 4.41 -4.51*].
- Interpleader [*see 4.52 -4.60*; *Form: 4.61*].

Core Rules:
Fed R Civ P 17-22.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderMisjoinderCivil ProcedurePartiesJoinderPermissive JoinderCivil ProcedurePartiesReal Parties in InterestGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaimsCivil ProcedureJoinder of Claims & RemediesRemedies

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4.02 Objective and Strategy.

A plaintiff's initial selection of the proper parties for the suit is one of the most critical, and often overlooked or underappreciated factors shaping the litigation itself and its possible result. Although defendants may add additional parties by moving to compel joinder under Rule 19 [*see Fed R Civ P 19(a)*], and by bringing third-party claims against non-parties [*see Fed R Civ P 14(a)*], those rights are limited. A plaintiff has primary responsibility for selecting the proper parties. The plaintiff's initial choice may have profound consequences if the court's jurisdiction depends on diversity of citizenship [*see 28 USC § 1332*]. The plaintiff's choice may also affect venue [*see 28 USC § 1391*].

The plaintiff must consider whether all the required parties plaintiff are present. Plaintiff must have the standing to seek the relief that is the object of the litigation. The plaintiff must also be the "real party in interest" [*see Fed R Civ P 17(a)*].

The plaintiff also has the initial responsibility to sue the proper defendants. The plaintiff must sue all of the defendants who are liable for and who have the ability to provide the relief sought. Failure to join necessary parties who are also indispensable parties may result in the dismissal of the action [*see Fed R Civ P 12(b)(7), 19(b)*]. In addition, an unsuccessful attempt to obtain a judgment against the wrong parties may distort the litigation, resulting in an unfavorable judgment that may have issue or claim preclusion consequences for any subsequent suit against the proper parties.

On the other hand, the plaintiff may not sue any and all persons who might conceivably be liable. The presence of too many unnecessary defendants makes the lawsuit cumbersome and may delay its resolution. Furthermore, suing a defendant without a reasonable legal and factual investigation into that defendant's potential liability may result in sanctions, even if suing such a defendant does not amount to malicious prosecution [*see 28 USC § 1927*; *Fed R Civ P 11(b), (c)*].

Investigating Potential Parties Using Online Resources:

Investigation of existing and potential adversaries (and perhaps allied parties) who may have been parties in other litigation can be greatly facilitated by information and leads from online resources. For example, helpful resources at *lexis.com* include:

- Legal tab> Cases-U.S.> Federal & State Court Cases-After 1944, Combined

  - Sample Search: To learn about other litigation in which the person or entity was a party, try a NAME segment search of the case law: *name (First Name/3 Last Name)*.

- Public Records tab> Find Filings> Civil & Criminal Filings and Regulatory Actions> Combined State Civil Filings

  - Sample Search: To learn about other litigation in state courts in which the person or entity is a party, try a NAME segment search of the docket filings: *name (First Name/3 Last Name)*.

- Public Records tab> Find Filings> Civil & Criminal Filings and Regulatory Actions> Combined U.S. District Courts> U.S. District Courts, Civil Filings (Full Docket)

  - Sample Search: To learn about other litigation in federal courts in which the person or entity is a party, try a name search of the docket filings.

- News & Business> Company & Financial> Company Profiles & Directories> Individual Publications> LexisNexis(R) Corporate AffiliationsTM

  - Sample Searches: Determine Corporate parent/subsidiary relationships, including Directors and Officers by searching the Directory of Corporate Affiliations online. A product search may be performed, such as search: *brand/business(Tylenol)*. A company search follows this format: *company(lexisnexis)*.

Detailed Discussion/Forms:

4 Moore's Federal Practice, Ch. 17, Plaintiff and Defendant; Capacity; Public Officers; Ch. 18, Joinder of Claims; Ch. 19, Required Joinder of Parties; Ch. 20, Permissive Joinder of Parties; Ch. 21, Misjoinder and Nonjoinder of Parties; Ch. 22, Interpleader (Matthew Bender 3d ed.).

5 Bender's Federal Practice Forms, Rule 17, Plaintiff and Defendant; Capacity; Public Officers; Rule 18, Joinder of Claims; Rule 19, Required Joinder of Parties; Rule 20, Permissive Joinder of Parties; Rule 21, Misjoinder and Nonjoinder of Parties; Rule 22, Interpleader (Matthew Bender).

Cross References:

For related topical coverage, see the following chapters:

- Ch. 8, Answers and Responsive Motions Under Rule 12.
- Ch. 9, Amending and Supplementing Pleadings.
- Ch. 10, Adding, Dropping, and Substituting Parties.
- Ch. 12, Third-Party Actions.

- Ch. 14, Intervention.
- Ch. 18, Consolidation and Separate Trials.
- Ch. 20, Class Actions.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 4 Determining Parties to the Action
II. STRUCTURING LITIGATION THROUGH PERMISSIVE JOINDER OF PARTIES

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4.03 CHECKLIST: Applying Permissive Party Joinder Rule.

☐ Attempt to create most economical and efficient proceeding by joining all possible parties in single proceeding.

☐ If the parties in question are plaintiffs, make sure proposed plaintiffs:

- ○ Assert right to relief jointly, severally, or in the alternative.
- ○ Assert claims that arise out of same transaction, occurrence, or series of transactions or occurrences.
- ○ Have claims that raise question of law or fact common to all proposed plaintiffs.

Authority:
Fed R Civ P 20(a)

Discussion:
See *§§ 4.04[1], [2]*

☐ If the parties in question are defendants, make sure proposed defendants:

- ○ Will be liable jointly, severally, or in the alternative.

○ Are responding to claims arising out of the same transaction, occurrence, or series of transactions or occurrences.

○ Have liabilities that present question of law or fact common to all proposed defendants.

Authority:
Fed R Civ P 20(a)

Discussion:
See *§§ 4.04[1], [3]*

☐ Consider practical difficulties raised by joining parties to action, including whether:

○ Additional parties will delay resolution of proceedings.

○ Additional parties will join additional claims, further expanding suit.

○ Scope of suit will include so many claims and parties that it will become confusing to jury.

○ Scope of suit will include so many claims and parties that discovery becomes too cumbersome and expensive.

○ Court may negate efficiencies of joinder by ordering separate trial.

Authority:
Fed R Civ P 18, 20(b)

Discussion:
See *§ 4.05*

☐ Consider jurisdictional limitations on joinder of parties, including:

○ Joinder of opposing party who is citizen of same state will destroy subject matter jurisdiction in those cases founded on diversity of jurisdiction.

○ Governmental defendants may have sovereign immunity or related defenses, including:

☐ Sovereign immunity defense of United States;

☐ Waiver of sovereign immunity by United States may be conditioned on filing of administrative claim prior to initiating lawsuit;

☐ Sovereign immunity defense of State of California;

☐ Administrative claim prerequisite for suits against State of California, and all California governmental entities, even when sovereign immunity waived;

☐ State of California's *Eleventh Amendment* immunity from money damage suits in federal court;

☐ Limits on suits against foreign governments and foreign governmental entities imposed by Foreign Sovereign Immunities Act.

Authority:
US Const, amend XI; *28 USC §§ 1330*, *1332*, *1346*, *1602* et seq., *2671* et seq.; *Gov Code § 900 et seq*.

Discussion:
See *§§ 4.06*, *4.34*

☐ Consider venue issues.

Authority:
28 USC § 1391 et seq.

Discussion:
Ch. 2, Determining Forum (Jurisdiction and Venue), §§ *2.48- 2.60*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.04 Selecting Initial Parties to Action.

4.04[1] Federal Rules Encourage Liberal Joinder of Parties and Claims. Plaintiffs are granted broad discretion to determine the structure of their actions. Subject to jurisdictional constraints, the federal rules encourage plaintiffs to bring all interested parties together in a single action [*United Mine Workers v. Gibbs (1966) 383 US 715, 724, 86 S Ct 1130, 16 L Ed2d 218* ("joinder of claims, parties, and remedies is strongly encouraged"); *see Fed R Civ P 20(a)*].

4.04[2] Three-Part Test for Joinder of Plaintiffs. Various plaintiffs may be joined together in a single action if all of the following are true [*Fed R Civ P 20(a)*]:

- The plaintiffs claim relief against the defendant or defendants jointly, severally, or in the alternative;
- The plaintiffs' claims arise out of the same transaction, occurrence, or series of transactions and occurrences; and
- There is at least one question of fact or law common to all of the plaintiffs that will arise in the action.

Every plaintiff need not be interested in obtaining all requested relief. If joinder is proper under the three-part test, the action may proceed and the court may render judgment for one or more plaintiffs according to each plaintiff's rights to relief [*Fed R Civ P 20(a)(1)*].

4.04[3] Three-Part Test for Joinder of Defendants. Various defendants (and, in admiralty actions, any vessels, cargo, or other property subject to in rem jurisdiction) may be joined together in a single action if all of the following are true [*Fed R Civ P 20(a)*]:

- A right to relief is asserted against all defendants jointly, severally, or in the alternative;
- The plantiffs' claims arise out of the same transaction, occurrence, or series of transactions and occurrences; and

- There is at least one question of fact or law common to all of the defendants that will arise in the action.

Every defendant need not be interested in defending against all requested relief. If joinder is proper under the three-part test, the action may proceed and the court may render judgment against one or more defendants according to each defendant's liabilities [*Fed R Civ P 20(a)(3)*].

4.04[4] Each Party Must Meet Minimum Qualifications. Even if joinder of a party would otherwise meet the appropriate three-part test, the Federal Rules limit who may and may not be a party. Under the Rules, every party must meet certain minimum qualifications, such as capacity to sue or be sued, and each party bringing an action must be the real party in interest [*see Fed R Civ P 17(a), (b)*].

Cross References:

Determining real parties in interest status, see *§§ 4.09 -4.19*; assessing capacity of named parties, see *§ 4.20 -4.40*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderPermissive JoinderCivil ProcedurePartiesReal Parties in InterestGeneral OverviewCivil ProcedureJoinder of Claims & RemediesLiberal Joinder

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4.05 No Numerical Limits on Permissive Joinder of Parties.

4.05[1] Practical Considerations May Limit Ability to Join All Parties. There is no numerical limit on the number of parties plaintiff or defendant that a plaintiff may join in an action, provided that each joined party meets the appropriate three-part test for permissive joinder [*see Fed R Civ P 20(a)* ("Persons may join ... "; "Persons may be joined ... ")].

Consider:

At some point, joinder of all plaintiffs or defendants reaches the limits of practicality. It may become impossible, or economically unworkable, to effect service on a multitude of defendants, or to depose all of the parties, or even to conduct an effective pretrial conference, let alone a trial. Plaintiffs in such a situation may want to consider filing their claims as a class action, which allows for an efficient adjudication of numerous claims.

Cross References:

Discussion of separate trials, see Ch. 18, Consolidation and Separate Trials. Discussion of class actions, see Ch. 20, Class Actions.

4.05[2] Practical Difficulties May Be Compounded by Rule That Each Joined Party May Join All Available Claims Against Opponents. Once properly joined, parties may join as many claims, legal, equitable, or maritime, as they have against a defending party. There are no procedural restrictions on the number or type of claims a party may assert in a single case [*see Fed R Civ P 18(a)*]. Furthermore, even if a claim is valid or cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action even though the court will grant relief in that action only in accordance with the relative substantive rights of the parties [*Fed R Civ P 18(b)*].

Example:

A plaintiff may join a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money [*Fed R Civ P 18(b)*].

Thus it is not only the sheer number of parties that may render joinder legally permissible but impractical. Each joined

party may add additional, unrelated claims to the action, making the action less manageable.

4.05[3] Court May Order Separate Trials to Resolve Problems Created by Excessive Joinder of Parties and Claims. If legally proper joinder results, as a practical matter, in embarrassment, undue delay, or expense, the court may grant a separate trial, or make any other, similar order [*Fed R Civ P 20(b)*]. There are no fixed standards as to when a separate trial is proper. The matter is left to the discretion of the court [*see, e.g., Hanley v. First Investors Corp. (ED Tex 1993) 151 FRD 76, 80, n6* ("decision balances convenience and judicial economy with the competing concerns of prejudice and juror confusion")].

Courts also have authority to bifurcate a trial for convenience or to avoid prejudice [*Fed R Civ P 42(b)*]. Bifurcated trials of liability and damages issues are the most common example of bifurcation orders, but virtually any issue or issues may be bifurcated or tried separately [*see, e.g., Davis & Cox v. Summa Corp. (9th Cir 1985) 751 F2d 1507, 1517* (counterclaim for legal malpractice bifurcated from original claim for attorney's fees)]. Bifurcation is forbidden only when it would interfere with a party's right to a jury trial [*Fed R Civ P 42(b)*].

Cross Reference:

Separate trials under Rule 42(b), see *Ch. 18, Consolidation and Separate Trials, § 18.21 -18.38*.

4.05[4] Parties May Opt for Representative Proceeding, Such as Class Action, Rather Than Joining All Parties. The Federal Rules recognize a number of forms of representative actions, in which a few representative parties litigate on behalf of a much larger group. The most obvious form of representative action is the class action, which was specifically designed to permit representative plaintiffs or defendants to litigate on behalf of those similarly situated when "the class is so numerous that joinder of all members is impracticable" [*see Fed R Civ P 23(a)*; *see also Fed R Civ P 23(b), (c)* (standards for when class actions are permitted and when they may be certified as class actions)].

The Federal Rules also recognize representative actions in a couple of specialized situations. Corporate shareholder litigation asserting the rights of the corporation need not be asserted individually by each shareholder. Rule 23.1 recognizes a form of representative action, the shareholder derivative action, in these situations [*see Fed R Civ P 23.1*]. Similarly, each member of an unincorporated association need not be joined as a party in a suit brought by or against such an association. Rule 23.2 sets the terms on which the action may be prosecuted or defended by a few representative parties on behalf of all members of the association [*see Fed R Civ P 23.2*].

Cross Reference:

Discussion of class actions, see Ch. 20, Class Actions.

Discussion of actions under Rules 23.1 and 23.2, see 5 Moore's Federal Practice, Chs. 23.1, Derivative Actions, 23.2, Actions Relating to Unincorporated Associations (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.06 Limitations on Joinder of United States As Defendant.

4.06[1] Sovereign Immunity Prohibits Claims Against United States Except to Extent United States Waives Immunity. Absent waiver, sovereign immunity protects the United States from being joined as a defendant, even if joinder would satisfy permissive party joinder requirements [*see United States v. Shaw (1940) 309 US 495, 500-501, 60 S Ct 659, 84 L Ed 888*].

4.06[2] United States Has Made Limited, Statutory Waivers of Immunity.

4.06[2][a] Tucker Act Waives Immunity for Monetary Actions Not Sounding in Tort. Pursuant to the Tucker Act, the United States has waived its sovereign immunity in monetary actions not sounding in tort [*see 28 USC §§ 1346(a), 1491(a)*]. District courts have original jurisdiction, concurrent with the United States Court of Federal Claims, of the following types of claims [*28 USC § 1346(a)*]:

- Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

- Any civil action or claim against the United States, not exceed-ing $10,000 in amount, founded either on the Constitution, any Act of Congress, or any regulation of an executive department.

- Any civil action or claim against the United States based on any express or implied contract with the United States.

- Any civil action or claim against the United States for liquidated or unliquidated damages in cases not sounding in tort.

Exception--Procurement Contract Cases:
The district courts do *not* have jurisdiction of any civil action or claim against the United States founded

on any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort that are subject to administrative claim resolution procedures set out in the Contract Disputes Act of 1978 [*28 USC § 1346(a)(2)*; *see 41 USC §§ 607(g)(1)*, *609(a)(1)* (relevant sections of Contract Disputes Act)].

4.06[2][b] Tort Claims Act Waives Immunity, But Requires Administrative Claims to Precede Suits. The United States has waived sovereign immunity for tort claims. Generally speaking, the United States is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances" [*28 USC § 2674*]. There are, however, a few significant differences in the liability of the United States as compared with private individuals [*28 USC § 2674*]:

- The United States is never liable for punitive damages. If the claim is for wrongful death, and if the controlling state law allows *only* punitive damages for wrongful death, the United States is still not liable for punitive damages. The state law is preempted, and the United States is liable for compensatory damages only.

- The United States is never liable in tort for prejudgment interest.

- If the United States is liable on account of the conduct of United States agent or officer, and if that agent or officer has judicial or legislative immunity from liability, the United States is immune to the same extent as its agent or officer. The same is true for employees of the Tennessee Valley Authority: the United States shares any immunity that TVA employees may have.

Before the United States may be sued for a tort claim, the plaintiff must submit an administrative claim to the appropriate federal agency. The right to sue the United States in federal court for tort claims arises only after the agency denies the claim or fails to rule on the claim within six months after it is filed [*28 USC § 2675(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderPermissive JoinderPublic Contracts LawGovernmental ImmunitiesConsent to be SuedPublic Contracts LawGovernmental ImmunitiesSovereign ImmunityTortsPublic Entity LiabilityImmunityJudicial Immunity

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4.07 Motion Procedures for Objecting to Misjoinder of Parties.

4.07[1] Party May Object to Party Joinder by Motion; Court May Address Joinder Sua Sponte. A party may object to misjoinder of parties by means of a motion. The court also may address misjoinder of parties sua sponte. There is no deadline on addressing party joinder. Subject to a pretrial order setting a deadline for addressing such matters or for filing motions generally [*see Fed R Civ P 16*], a party may make a motion or a court may make an order on party joinder matters "at any time" [*see Fed R Civ P 21*].

Cross Reference:

Dropping a party, see Ch. 10, Adding, Dropping, and Substituting Parties, see *§§ 10.10 -10.14*.

4.07[2] Party May Bring Motion to Drop Party. Rule 21 expressly contemplates a court order dropping or adding parties [*see Fed R Civ P 21*]. A motion to add parties is probably suitable only for a violation of the compulsory joinder rule [*see Fed R Civ P 19(a)*]. If an opposing party has improperly joined a party under the permissive joinder rule [*see Fed R Civ P 20*], however, a motion to drop the improperly joined party appears to be the motion contemplated by Rule 21.

Cross References:

Dropping a party by motion, see Ch. 10, Adding, Dropping, and Substituting Parties, see *§ 10.11[2][a]*.

Form of motion to drop some defendants as not proper parties in a civil rights action, see 5 *Bender's Federal Practice Forms, Form 21:31* (Matthew Bender).

4.07[3] Party May Bring Motion to Sever. Rule 21 authorizes a court to sever claims by or against improperly joined parties into a separate action. This is an alternative to an order simply dropping an improperly joined party, and is available so long as no substantial rights will be prejudiced by the severance [*Fed R Civ P 21*]. Therefore, if a separate action is an appropriate remedy for improper permissive joinder, an opposing party may bring a motion to sever the parties on the ground of misjoinder [*see, e.g., Coughlin v. Rogers (9th Cir 1997) 130 F3d 1348, 1349* (motion to sever plaintiffs on ground of misjoinder)].

Cross Reference:

Discussion of severance of claims, see Ch. 10, Adding, Dropping, and Substituting Parties, see *§ 10.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderMisjoinderCivil ProcedurePartiesJoinderPermissive Joinder

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CHAPTER 4 Determining Parties to the Action
II. STRUCTURING LITIGATION THROUGH PERMISSIVE JOINDER OF PARTIES

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4.08 Remedies for Misjoinder of Parties.

4.08[1] Misjoinder of Parties Is Not Ground for Dismissal. Misjoinder of parties is not a ground for dismissal of an action [*Fed R Civ P 21*].

Distinguish:

If a party has *failed to join* an indispensable party (that is, a party whose joinder is required by the compulsory joinder rule), the court may dismiss the action [*see Fed R Civ P 12(b)(7), 19(b)*].

Cross Reference:

Applying compulsory joinder rule, see *§§ 4.41 -4.51*.

4.08[2] Court May Order Severance. If a defendant has been joined improperly, one of the steps that the court may take is to sever the claims by or against that party, so that these claims may be prosecuted a separate action [*Fed R Civ P 21*].

Distinguish--Severance and Separate Trials:

Although the terms are often used interchangeably, orders for separate trials or bifurcation of issues [*see Fed R Civ P 20(b), 42(b)*] differ from orders of severance. There is only one action when a court orders separate or bifurcated trials. Usually, a party may appeal only from the final judgment in the case as a whole [*see 28 USC § 1291*]. In contrast, an order of severance creates an entirely separate action for the severed claim. There is an appealable final judgment in both the original action dealing with the remaining claims and a separate appealable judgment in the new, severed action [*see, e.g., United States v. O'Neil (5th Cir 1983) 709 F2d 361, 366-368* ; In re Paris Air Crash of March 3, 1974 *(CD Cal 1975) 69 FRD 310, 318*].

4.08[3] Court May Drop or Add Parties at Any Time. Parties may move to drop or add parties, or the court may drop or add parties on its own motion, at any time. In doing so, however, the court may impose "just terms" [*Fed R Civ P 21*].

Cross Reference:

Procedure for adding and dropping parties, see Ch. 10, Adding, Dropping, and Substituting Parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
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III. DETERMINING REAL PARTY IN INTEREST STATUS

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4.09 CHECKLIST: Assuring Action Brought by Real Party in Interest.

☐ Ensure that person who sues is person who owns claim or property in dispute.

Authority:
Fed R Civ P 17(a)

Discussion:
See *§ 4.11[1]*

☐ If representative signed contract, bring action in name of representative, rather than ultimate beneficiary, if representative is one of the following:

- ○ Executor.
- ○ Administrator.
- ○ Guardian.
- ○ Bailee.
- ○ Trustee of an express trust.
- ○ Party with whom or in whose name a contract has been made for the benefit of

another.

○ A party so authorized by statute to sue on claim for benefit of another.

Authority:
Fed R Civ P 17(a)

Discussion:
See *§ 4.12*

☐ If federal statute authorizes United States to enforce claims, rights, or benefits owing to another, bring action in the name of the United States, making sure that complaint clearly alleges statutory right.

Authority:
Fed R Civ P 17(a)

Discussion:
See *§ 4.13*

☐ If claim or right has been validly assigned, bring action in name of assignee rather than assignor, making sure that complaint clearly alleges fact of assignment of a claim.

Authority:
See *Fed R Civ P 17(a)*, Committee Note of 1966

Discussion:
See *§ 4.15*

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.10 CHECKLIST: Raising Objections to Real Party Status.

☐ Assert plaintiff's failure to qualify as real party in interest by pleading affirmative defense in responsive pleadings.

Authority:
Fed R Civ P 8(c)

Discussion:
See *§ 4.16[1]*

☐ In addition to, or as alternative to, pleading affirmative defense, move to dismiss an action for plaintiff's failure to prosecute in name of the real party in interest.

Authority:
Fed R Civ P 12(b)(6); *U-Haul Int'l, Inc. v. Jartran, Inc. (9th Cir 1986) 793 F2d 1034, 1037*

Discussion:
See *§§ 4.16[3], 4.17 -4.19*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePartiesReal Parties in InterestGeneral OverviewCivil ProcedurePartiesReal Parties in InterestAssigneesCivil ProcedurePartiesReal Parties in InterestSubrogees

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4.11 Real-Party-in-Interest Requirement Calls for Particular Kind of Standing.

4.11[1] Actions Must Be Prosecuted by Real Party in Interest, Legal Owner of Claim. Actions must be prosecuted in the name of the real party in interest [*Fed R Civ P 17(a)*]. This means that the only persons who may assert claims in federal court actions are the legal owners of the claims asserted [*see, e.g., United Healthcare Corp. v. American Trade Ins. Co. (8th Cir 1996) 88 F3d 563, 569* ("rule requires that the party who brings an action actually possess, under the substantive law, the right sought to be enforced")].

4.11[2] Requirement Overlaps With General Standing Requirement. The general standing requirement for persons asserting claims in federal courts is established by the "case and controversy" requirement of the United States Constitution [*see* US Const, art III, § 2]. Article III standing requires that the plaintiff have a personal stake in the litigation--that is, the plaintiff must have suffered some real or substantial injury [*see, e.g., United States v. City & County of San Francisco (9th Cir 1992) 979 F2d 169, 171*]. In addition, the injury suffered by the plaintiff must be traceable to the conduct of the defendant that is complained of, and the injury must have the potential to be remedied by a judgment of the court [*see, e.g., Central Ariz. Water Conservation Dist. v. EPA (9th Cir 1993) 990 F2d 1531, 1538* , *cert. denied, 510 US 828 (1993)*].

The real-party-in-interest requirement addresses the same basic concern as the Article III standing requirement, requiring that the plaintiff have a personal stake in the controversy. In addition, the real-party-in-interest requirement requires a *legal entitlement* to assert the claim in question [*see, e.g., Elk Grove Unified Sch. Dist. v. Newdow (2004) 542 US 1, 15-18, 124 S Ct 2301, 159 L Ed2d 98* (noncustodial father barred under state law from suing as child's next friend lacked standing to challenge school board policy); *Whelan v. Abell (DC Cir 1992) 953 F2d 663, 672* , *cert. denied sub nom. Toomey v. Whelan, 506 US 906 (1992)* (shareholder of corporation may or may not have sufficient injury to satisfy Article III standing, but law may give right to sue to corporation rather than to shareholders)].

4.11[3] Plaintiff's Failure to Meet Requirement May Be Waived by Failure to Object. Failure to raise a timely objection to a real-party-in-interest violation constitutes a waiver of the objection [*United States v. Callahan (9th Cir 1989) 884 F2d 1180, 1183 n4* , *cert. denied sub nom. Esto, Inc. v. Callahan, 493 US 1094 (1990)* (defendant/crossclaimant could not raise objection for first time on appeal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedurePartiesReal Parties in InterestGeneral OverviewCivil ProcedurePartiesReal Parties in InterestAssigneesCivil ProcedurePartiesReal Parties in InterestSubrogees

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4.12 Executor, Administrator, Guardian, and Statutory Representative May Sue As Real Party in Interest.

The following representative parties may sue in their own names [*Fed R Civ P 17(a)*]:

- Executors.
- Administrators.
- Guardians.
- Bailees.
- Trustees of an express trust.
- Parties with whom or in whose name a contract has been made for the benefit of another.
- Parties statutorily authorized to sue in their own names.

These representative parties need not join the ultimate beneficiaries as parties, even though they might ultimately benefit from or be bound by the judgment in the action [*Fed R Civ P 17(a)*; *see, e.g., Board of Natural Resources v. Brown (9th Cir 1993) 992 F2d 937, 942* (suit by trustees for federal land-grant trusts and Washington State school districts)].

Example--Decedents' Estates:
A suit on behalf of a decedent's estate must be brought by the estate's trustee, administrator or executor as the real party in interest [Estate of Migliaccio v. Midland Nat'l Life Ins. Co. (CD Cal 2006) 436 F Supp2d 1095, 1100-1101].

Example--Trustees:
A trustee of an express trust may sue, or be sued, as a real party in interest. The trust beneficiaries need not be joined [*see Navarro Sav. Ass'n v. Lee (1980) 446 US 458, 465, 100 S Ct 1779, 64 L Ed2d 425*].

Example--Labor Unions:

A labor union may sue and defend on behalf of the group of employees it represents [*see 29 USC § 185(b)* (Labor Management Relations Act)]. Typically, unions act as real parties in actions involving collective-bargaining agreements [*see 11 USC § 1114(c)(1)* (in bankruptcy proceedings, labor union may act as real party regarding retiree benefits under collective bargaining agreement); *see also United Steelworkers of Am. v. Rawson (1990) 495 US 362, 368-369, 110 S Ct 1904, 109 L Ed2d 362*].

Example--Bankruptcy Proceedings:

Bankruptcy trustees may sue or defend as real parties in interest on behalf of the bankruptcy estate [*see Fed R Bankr P 6009* (permitting trustee to litigate on behalf of bankruptcy estate)]. A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise any objections and may appear and be heard on any issue in a case under *11 USC § 1101 et seq*. (reorganization in bankruptcy) [*11 USC § 1109(b)*].

Example--Employers in Workers' Compensation Cases:

In certain narrowly defined circumstances, employers are the real parties in interest in cases involving their employees [*see 33 USC § 933(b)* (in action against third parties, for limited time, employers may be real parties under Longshoremen's and Harbor Workers' Compensation Act)].

Cross Reference:

Representative as authorized to sue on behalf of another, see 4 *Moore's Federal Practice, § 17.10[3]* (Matthew Bender 3d ed).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesTrusteesCivil ProcedurePartiesReal Parties in InterestGeneral OverviewCivil ProcedurePartiesReal Parties in InterestAssigneesCivil ProcedurePartiesReal Parties in InterestSubrogees

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4.13 United States May Litigate As Real Party Representative.

When a United States statute so provides, an action for the use or benefit of another must be brought in the name of the United States [*Fed R Civ P 17(a)*]. For example, Miller Act actions brought on behalf of laborers on or materials suppliers to public works projects must be brought in the name of the United States [*see 40 USC § 3133(b)(3)(A)* ("A civil action ... must be brought ... in the name of the United States for the use of the person bringing the action")].

Similarly, private individuals may prosecute "qui tam" actions on behalf of the United States against those who have submitted "false claims" against the United States. The United States and the private individual split the proceeds if the action is successful [*see 31 USC §§ 3729*, *3730*]. The statutes are clear, however, that such a private qui tam action must "be brought in the name of the [United States] Government" [*31 USC § 3730(b)(1)*].

Cross Reference:

Actions required to be captioned in name of United States, see 4 *Moore's Federal Practice, § 17.10[3][e]* (Matthew Bender 3d ed).

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.14 United States Is Real Party in Interest With Respect to Claims Regarding United States Properties or Interests.

Rule 17(a), discussed above, providing for the United States to appear as the real party in interest in a *representative* capacity when a statute so authorizes, does not limit the situations in which the United States is the real party in interest. The United States is the real party in interest, regardless of any authorizing statute, as to claims regarding United States properties or interests [*United States v. Weyerhaeuser Co. (D Or 1991) 765 F Supp 643, 646*].

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4.15 Determining Real Party Status in Assigned Claims.

4.15[1] Assignee Acquiring Fully Assigned Claim Is Real Party. The assignee of a claim validly assigned becomes the real party in interest with respect to that claim. The assignee may sue in its own name without joining the assignor who has given up all rights in the claim [*see Fed R Civ P 17(a)*, Committee Note of 1966].

4.15[2] Assignee May Be Real Party in Interest Even When Assignor Receives Some Benefit of Litigation. An assignment of a claim may be valid to make the assignee the real party in interest with respect to that claim even when the assignor has retained an interest. An assignment of a claim does not become invalid or fail to make the assignee the real party even when the assignor makes the assignment in anticipation of litigation and intends to receive some benefits of the litigation in return for the assignment [*see Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau (9th Cir 1983) 701 F2d 1276, 1282* (assigned antitrust claims eventually ruled to be invalid)].

Example:

A group of individual pharmacists may transfer individual antitrust claims to their trade association with the understanding that the trade association will return benefits to the individual pharmacists if the litigation of the claims is successful. The trade association becomes the real party in interest as the result of such an assignment [*see Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau (9th Cir 1983) 701 F2d 1276, 1282* (assigned antitrust claims eventually ruled to be invalid)].

4.15[3] Assignments for Purpose of Creating Diversity Jurisdiction Are Ineffective for That Purpose. As assignment may be effective to change the real party in interest in a case; but the citizenship of the assignee may be ignored in determining diversity of citizenship if the assignment was collusive and made for the purpose of establishing jurisdiction. Diversity jurisdiction may not be established through assignment of a claim [*28 USC § 1359*].

Cross Reference:

Discussion of requirements for diversity jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.10 -2.25*.

Courts have set out a number of factors in deciding whether an assignment is improper or collusive. Among these

factors are [*see Attorneys Trust v. Videotape Computer Prods., Inc. (9th Cir 1996) 93 F3d 593, 595-596*]:

- Were there good business reasons for the assignment?
- Did the assignee have a prior interest in the item or was the assignment timed to coincide with commencement of litigation?
- Was any consideration given by the assignee?
- Was the assignment partial or complete?
- Was there an admission that the motive was to create jurisdiction?

Broadly speaking, if an assignment is entire, not partial, there is a good chance that the court will find it proper. If the assignment is truly absolute and complete, courts will rarely be concerned about motive. On the other hand, if an assignment is partial, the court is more likely to find that it is an improper or collusive transfer, because the prior owner still has an interest [*see Attorneys Trust v. Videotape Computer Prods., Inc. (9th Cir 1996) 93 F3d 593, 595-596*].

Furthermore, diversity-creating transfers between related corporate entities will raise a presumption that the transfer is collusive. These assignments will not create diversity jurisdiction unless the assignor and assignee rebut the presumption with proof of a legitimate business reason that justifies the assignment regardless of jurisdictional considerations [*Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A. (9th Cir 1994) 20 F3d 987, 992* ; *Yokeno v. Mafnas (9th Cir 1992) 973 F2d 803, 811*].

4.15[4] Assigning Claims Against United States.

4.15[4][a] Assignment of Claims Act Generally Prohibits Assignment of Matured Claims Against United States. The Assignment of Claims Act generally prohibits assignment of claims against the United States [*see 31 USC § 3727*; *see, e.g., Cadwalder v. United States (9th Cir 1995) 45 F3d 297, 298*]. Consequently, the assignee of a claim against the United States frequently is not the real party in interest.

4.15[4][b] Anti-Assignment Act Generally Prohibits Assignments of Rights Under Contracts With United States. A party to a contract with the United States may not assign any rights under that contract, at least not without the express consent of the United States [*41 USC § 15* (Anti-Assignment Act)]. Therefore, even if claims under the contract are not mature at the time of the assignment, and even if the claim arises after the assignment, the assignee does not become the real party in interest on a claim arising under an improperly assigned contract.

Legal Topics:

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4.16 Procedures for Raising Objections to Real Party Status.

4.16[1] Defendant May Assert Affirmative Defense. A defendant may object to the plaintiff's failure to prosecute in the name of the real party as an affirmative defense in its responsive pleadings [*see Fed R Civ P 8(c)*].

Cross References:

Assertion of affirmative defenses, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.10*.

Provision in answer alleging that plaintiff not real party in interest, see 5 *Bender's Federal Practice Forms, Form 17:20* (Matthew Bender 3d ed.).

4.16[2] Court May Raise Lack of Real Party in Interest. Rule 17 does not expressly authorize courts to raise real party objections [*see Fed R Civ P 17(a)*; *Hartmann v. Prudential Ins. Co. of Am. (7th Cir 1993) 9 F3d 1207, 1214*]. Nonetheless, the majority of courts that have considered the question have authorized courts to act sua sponte [*see, e.g., Weissman v. Weener (7th Cir 1993) 12 F3d 84, 85-86* ; *see also Tse-Ming Cheung v. Youth Orchestra Found. of Buffalo (2d Cir 1990) 906 F2d 59, 61*]. Courts should have this option under their authority "to secure the just, speedy, and inexpensive determination of every action and proceeding" [*see Fed R Civ P 1*].

Cross Reference:

Discussion of courts acting sua sponte on real party objections, see 4 *Moore's Federal Practice, § 17.12[2][b]* (Matthew Bender 3d ed.).

4.16[3] Defendant May Bring Motion Addressing Real Party Status. In lieu of, or in addition to, pleading an affirmative defense, a defendant may bring a motion to compel the existing plaintiffs to join a real party in interest [*see Fed R Civ P 19(a), 21*]. A defendant may bring a motion to drop an existing plaintiff who is not a real party in interest [*see Fed R Civ P 21*].

Although dismissal is not available initially as a remedy for lack of real-party-in-interest status, if the

real-party-in-interest defect has been raised in a clear and timely fashion, and if the plaintiff refuses to remedy that defect, a motion to dismiss [*see Fed R Civ P 12(b)(1), (6)*] or for summary judgment [*see Fed R Civ P 56*] may be appropriate.

Cross References:

Motion to compel joinder, see *4.17*. Motion to drop party, see *4.18*. Motion to dismiss, see *4.19*. Discussion of adding and dropping parties, see Ch. 10, Adding, Dropping, and Substituting Parties, see *§§ 10.04 -10.14*. Discussion of summary judgment motions, see Ch. 29, Summary Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.17 Bringing Motion to Compel Joinder of Real Party in Interest.

A real party in interest is a person whose absence leaves the defendant "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations" [*Fed R Civ P 19(a)(1)(B)(ii)*]. A court must order the joinder of such persons whenever it is feasible [*Fed R Civ P 19(a)*]. Therefore, it is appropriate for a defendant to move under Rules 19 and 21 to compel the existing plaintiff to join the real party in interest [*see Fed R Civ P 19(a), 21*].

Strategic Point--Early Motion Avoids Waiver.

A motion to compel joinder is preferable to merely pleading the absence of the real party in interest as an affirmative defense. A motion has the potential to compel a ruling on the issue at an early stage in the proceedings. If the party asserting the absence of the real party in interest from the litigation waits too long, the objection to the absence of the real party in interest may be waived [*see, e.g., Whelan v. Abell (DC Cir 1992) 953 F2d 663, 672*].

Cross References:

Adding persons as parties to existing action, see *Ch. 10, Adding, Dropping, and Substituting Parties, 10.04 -10.09*.

Motion by defendant to bring in additional plaintiff, see 5 Bender's Federal Practice Forms, Form 21:25. Motion to substitute real party in interest, see 5 *Bender's Federal Practice Forms, Form 17:3*. Motion to join insurer as real party in interest, see 5 *Bender's Federal Practice Forms, Form 17:4*. Order granting motion to substitute real party in interest, see 5 *Bender's Federal Practice Forms, Form 17:31* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.18 Bringing Motion to Drop Party As Not Real Party in Interest.

The presence of a plaintiff who is not a real party in interest adds nothing to the litigation except undue confusion and complications, and potential delay and expense. Assuming that the real party in interest is present, it should be possible to move under for an order "dropping" the unnecessary parties from the action [*see Fed R Civ P 21* ("Parties may be dropped ... by order of the court on motion of any party"); *see also Elk Grove Unified Sch. Dist. v. Newdow (2004) 542 US 1, 124 S Ct 2301, 159 L Ed2d 98, 111-113* (noncustodial father barred under state law from suing as child's next friend had no standing to challenge school board policy)].

Consider:

The only conceivable grounds for "dropping" the non-real-party plaintiff is that the non-real-party plaintiff is asserting a claim on which he, she, or it is not entitled to relief. In most cases, it will be more efficient to simply bring the motion as a motion to dismiss under Rule 12(b)(6) [*see Fed R Civ P 12(b)(6)*]. On the other hand, motions to dismiss are generally limited to matters appearing on the face of the complaint. Submitting extensive affidavits or declarations runs the risk of turning a simple motion to dismiss into a full-blown summary judgment motion [*see Fed R Civ P 12(d)* ("If ... matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56")]. Therefore, a Rule 21 motion might have procedural advantages when facts beyond the pleading must be presented for the court to rule on the question.

Strategic Point--Early Motion Avoids Waiver:

Even if a motion to drop is not the most appropriate form of motion that can be filed, it is preferable to merely pleading the non-real-party status of certain plaintiff's as an affirmative defense. A motion has the potential to compel a ruling on the issue at an early stage in the proceedings. If the party asserting the non-real-party status of certain plaintiffs waits too long to litigate this issue, the objection to the absence of the real party in interest may be waived [*see, e.g., Whelan v. Abell (DC Cir 1992) 953 F2d 663, 672*].

Cross References:

Bringing a Rule 12(b)(6) motion, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.21*. Dropping parties, Ch. 10, Adding, Dropping, and Substituting Parties, *§§ 10.10 -10.14*.

Motion to drop some plaintiffs as not real parties in interest, see 5 *Bender's Federal Practice Forms, Form 21:30* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.19 Dismissing Action for Real Party Defect.

4.19[1] Dismissal Is Not Usual Remedy for Lack of Real Party in Interest. A court will *not* dismiss an action simply because it is not prosecuted in the name of the real party in interest. Instead, after an "objection" to the absence of the real party in interest, the court will grant the plaintiffs a "reasonable" amount of time. Within the reasonable amount of time allowed, the existing plaintiffs must cure the problem either by securing ratification from the real party in interest of commencement of the action by the current plaintiff or by joinder or substitution of the real party in interest [*Fed R Civ P 17(a)*; *see, e.g., U-Haul Int'l, Inc. v. Jartran, Inc. (9th Cir 1986) 793 F2d 1034, 1040*].

Cross References:

Failure to prosecute in name of real party as not grounds for immediate dismissal, see 4 *Moore's Federal Practice, § 17.12[1]* (Matthew Bender 3d).

Conditional dismissal order--action dismissed unless real party ratifies or is joined, see 5 *Bender's Federal Practice Forms, Form 17:30* (Matthew Bender).

4.19[2] Courts Are Generally Lenient in Allowing Cure.

4.19[2][a] Courts Favor Offering Opportunity to Cure Defect. Courts favor allowing real party defect cures [*see Dunmore v. U.S. (9th Cir 2004) 358 F3d 1107, 1112-1113* ; *Capobianco v. Trew (9th Cir BAP 2000) 248 BR 833, 839* ; *Fed R Civ P 17(a)*, Committee Note of 1966]. The opportunity to cure the defect within a reasonable period avoids forfeitures [*see, e.g., Goodman v. United States (9th Cir 2002) 298 F3d 1048, 1053*].

4.19[2][b] If Curing Defect Is Impossible, Court May Immediately Dismiss. Rule 17(a)'s admonition to refrain from dismissals until there has been an opportunity to cure does not apply when it is apparent that it is impossible to cure a real party defect. For example, if correcting the real party defect by joining or substituting the real party would destroy diversity jurisdiction, the action should be dismissed immediately for a futile "cure" [*see, e.g., Naartex Consulting Corp. v. Watt (DC Cir 1983) 722 F2d 779, 794-795 , cert. denied, 467 US 1210 (1984)*].

4.19[2][c] If Failure to Prosecute in Name of Real Party Is Not Honest Mistake, Court May Immediately

Dismiss. When the failure to prosecute in the name of the real party in interest is not an honest mistake, the court retains its discretion to simply dismiss and not give an opportunity for a cure [*see United States ex rel. Wulff v. CMA, Inc. (9th Cir 1989) 890 F2d 1070, 1074*].

Example:

One plaintiff who knew it was not the real party in interest (because it knew it had not yet obtained an assignment of the claim in question) deliberately filed an action in its own name anyway in an attempt to toll the statute of limitations on the claim. The court concluded that a suit commenced by a stranger to the claim was not effective to toll limitations on the claim. This problem could not be "cured" later by obtaining an assignment of the claim after the fact. Rule 17(a)'s requirement for a reasonable opportunity to effect a cure for was not permitted to delay the dismissal of this action [*United States ex rel. Wulff v. CMA, Inc. (9th Cir 1989) 890 F2d 1070, 1074*].

4.19[3] Ratification As Cure Requires Ratifying Party to Authorize Action and to Agree to Be Bound by Result. A failure to prosecute an action in the name of the real party in interest may be cured if the real party in interest "ratifies" the prosecution of the action by the current plaintiff [*Fed R Civ P 17(a)*]. In this context, a proper ratification requires the real party in interest to [*Mutuelles Unies v. Kroll & Linstrom (9th Cir 1992) 957 F2d 707, 712*]:

- Authorize continuation of the action by the current plaintiff; and
- Agree to be bound by the result of the lawsuit.

The better practice is that the ratification be reflected in a written, signed document that is filed with the court [*see, e.g., ICON Group, Inc. v. Mahogany Run Dev. Co. (3d Cir 1987) 829 F2d 473, 478* ; *Clarkson Co. v. Rockwell Int'l Corp. (ND Cal 1977) 441 F Supp 792, 797*].

4.19[4] Joinder or Substitution of Real Party Cures Defect. Failure to prosecute an action in the name of the real party in interest may be cured if the current plaintiff joins the real party in interest or substitutes the real party in interest as plaintiff in his or her stead [*Fed R Civ P 17(a)*].

Strategic Point--Plaintiff:

As a practical matter, cure by joinder will be most effective when the existing plaintiff is also at least a part owner of the claims being asserted or when the absent real party in interest agrees to join the action voluntarily.

Theoretically, as a necessary party, the court may order the joinder of the real party in interest even if the real party refuses to do so voluntarily. The court may name the reluctant real party as a defendant or an involuntary plaintiff [*see Fed R Civ P 19(a)*].

Consider:

When a party has initiated an action with no legal right to do so, most courts will not permit that party to compel the real party to litigate a claim involuntarily.

Cross References:

Substitution of parties, see Ch. 10, Adding, Dropping, and Substituting Parties, see *§§ 10.15 -10.22*.

Motion to substitute real party in interest, see 5 *Bender's Federal Practice Forms, Form 17:3*. Motion to join insurer as real party in interest, see 5 *Bender's Federal Practice Forms, Form 17:4* (Matthew Bender).

4.19[5] Ratification, Joinder, Substitution Relate Back to Original Complaint. The ratification, joinder, or substitution has the same effect as if the action had been commenced in the name of the real party in interest [*Fed R Civ P 17(a)*; *see, e.g., Goodman v. United States (9th Cir 2002) 298 F3d 1048, 1054* (in wrongful death suit, substitution of surviving spouse in place of estate of deceased was treated as if action was originally filed by proper party)]. Consequently, for statute of limitations purposes, the cure of the real-party-in-interest defect is an amendment of a pleading that "relates back" to the date of the original complaint [*see Fed R Civ P 15(c)(1)(B)*].

A real party in interest can join, be substituted for, or ratify the filing by the existing plaintiff in order to take advantage of this relation-back rule and thus preserve the claim from the statute of limitations [*see, e.g., Mutuelles Unies v. Kroll & Linstrom (9th Cir 1992) 957 F2d 707, 712* (if real party ratifies action by existing plaintiff in order to preserve claim from statute of limit)].

Exception--Action Deliberately Filed by Person Who Knows He or She Is Not Real Party in Interest:

When there is *no* good faith mistake by plaintiff as to the proper real party in interest, the original filing will not toll the statute of limitations. There will be no valid claim to relate back to, and the failure to state a valid claim cannot be "cured" by a subsequent joinder, substitution, or ratification of the real party in interest [*United States ex rel. Wulff v. CMA, Inc. (9th Cir 1989) 890 F2d 1070, 1074-1075* ; *see, e.g., Feist v. Consolidated Freightways Corp. (ED Pa 1999) 100 F Supp2d 273, 275-276* , *aff'd mem., 216 F3d 1075 (3d Cir 2000)* (bankrupt plaintiff brought action knowing that claim belonged to bankruptcy trustee); *Lans v. Gateway 2000, Inc. (DDC 1999) 84 F Supp2d 112, 117-123* , *aff'd on other grounds sub nom. Lans v. Digital Equip. Corp., 252 F3d 1320 (Fed Cir 2001)* (individual brought patent action knowing that he had assigned patent to his company)].

Cross Reference:

Discussion of relation back of amendments, see Ch. 9, Amending and Supplementing Pleadings, see *§§ 9.12 -9.14*.

4.19[6] Dismissal Proper After Reasonable Time Passes and Defect Not Cured. If the real party defect has been called to the plaintiff's attention by means of a timely "objection," and if a reasonable time has passed without a cure of the real party defect, the court should dismiss the action [*see Fed R Civ P 17(a)*]. A plaintiff who is not a real party in interest is asserting a claim that belongs to someone else. In these circumstances, the plaintiff fails to state a claim on which the court may grant the plaintiff relief [*see Fed R Civ P 12(b)(6)*; *see, e.g., U-Haul Int'l, Inc. v. Jartran, Inc. (9th Cir 1986) 793 F2d 1034, 1037*].

If the plaintiff has not cured the real party defect because joinder or substitution of the real party destroys diversity subject-matter jurisdiction, a defendant may move to dismiss on the additional grounds of lack of subject-matter jurisdiction [*see Fed R Civ P 12(b)(1)*]. A motion to dismiss for lack of jurisdiction may be asserted at any stage in the proceedings [*Fed R Civ P 12(h)(3)*].

Cross References:

Motion to dismiss for lack of subject matter jurisdiction, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.17*.

Motion to dismiss on ground that plaintiff is not real party in interest, see 5 *Bender's Federal Practice Forms, Form 17:1* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePartiesReal

Parties in InterestGeneral OverviewCivil ProcedurePartiesReal Parties in InterestAssigneesCivil ProcedurePartiesReal Parties in InterestSubrogees

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1-4 MB Practice Guide: Fed Pretrial Civ Proc in CA 4.20

4.20 CHECKLIST: Determining Which State's Laws Govern Capacity to Sue and Be Sued.

☐ Determine the capacity of an individual to sue or be sued (other than an individual who sues or is sued in a representative capacity) under the law of the individual's domicile.

Authority:
Fed R Civ P 17(b)

Discussion:
See *§ 4.28[1]*

☐ Determine the capacity of a corporation to sue or be sued according to the law under which it was organized.

Authority:
Fed R Civ P 17(b)

Discussion:
See *§ 4.30*

☐ Determine the capacity of parties other than individuals or corporations under the law of the state in which the district court is held, with two exceptions:

○ Partnerships or unincorporated associations not permitted to sue or be sued in their own names under law of forum state may sue or be sued in the partnership or association name when litigation concerns a substantive right created by federal statutes or by the

United States Constitution.

- Receivers appointed by federal courts have the capacity specified in *28 USC §§ 754*, *959(a)*, regardless of law of forum state.

Authority:
Fed R Civ P 17(b)

Discussion:
See *§§ 4.26*; *4.29*, *4.31 -4.35*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentatives

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4.21 CHECKLIST: Determining Capacity of Minor Under California Law.

☐ Determine age of proposed plaintiff or defendant.

☐ If proposed plaintiff is less than 18 years of age, determine whether the minor has capacity to sue because:

○ The minor is emancipated.

○ The minor is suing for injunctive relief or protective orders relating to harassment or workplace or family violence.

Authority:
CCP § 372(b)(1); *Fam Code §§ 6500, 7000 et seq.*

Discussion:
See *§§ 4.28[2][c], [d]*

☐ If proposed minor plaintiff lacks capacity, determine whether the minor has a guardian of his or her estate, or if a guardian ad litem has already been appointed.

☐ If proposed minor plaintiff lacks capacity and has no guardian, seek appointment of a guardian ad litem.

Authority:
CCP §§ 372(a), 373(a); *Fam Code § 6601*

Discussion:
See *§ 4.28[2][a]*

☐ If proposed defendant is less than 18 years of age, determine whether minor may be held liable for relief sought, noting that:

○ Minors are generally liable for their torts, but not for punitive damages unless, at time of act, minor was capable of appreciating wrongfulness or his or her actions.

○ Minors are generally liable for their contractual obligations, but minor may disaffirm contractual obligations except when:

☐ Statute expressly authorizes contracts by minors.

☐ Contract was for necessities of life for minor or minor's family.

Authority:
Fam Code §§ 6500, 6600, 6700 et seq.

Discussion:
See *§ 4.28[2][b]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.22 CHECKLIST: Determining Capacity of Incompetent Under California Law.

☐ Analyze whether proposed plaintiff is incompetent, considering whether:

- ○ Proposed plaintiff has been ruled incompetent; or
- ○ Proposed plaintiff is substantially unable to manage his or her financial resources or resist fraud or undue influence.

Authority:
CC § 39(b)

Discussion:
See *§ 4.28[3][a]*

☐ If proposed plaintiff is incompetent, determine whether a conservator of the estate or a guardian ad litem has been appointed.

- ○ If guardian or conservator has been appointed, bring action through guardian or conservator.
- ○ If guardian or conservator has not been appointed to date, seek appointment of a guardian ad litem.

Authority:
CCP § 372(a)

Discussion:
See *§ 4.28[3][a]*

☐ Analyze whether proposed defendant is incompetent by considering whether:

○ Proposed defendant has been ruled incompetent; or

○ Proposed defendant is substantially unable to manage his or her financial resources or resist fraud or undue influence.

Authority:
CC § 39(b)

Discussion:
See *§ 4.28[3][a]*

☐ If proposed defendant is incompetent, determine whether he or she may be held liable for relief sought in action, considering:

○ Persons entirely without understanding cannot make contracts or conveyances, but can be held liable for reasonable value of necessities of life for incompetent or incompetent's family.

○ Persons who have been subject to conservatorship may make not contracts or conveyances until they have been restored to capacity.

○ Persons who are of unsound mind, but not subject to a conservatorship and not entirely without understanding may make contracts or conveyances, but those contracts or conveyances are subject to rescission.

○ Persons of unsound mind are liable for torts committed, but not for exemplary damages unless, at the time of the tortious actions, the person in question was capable of knowing that his or her actions were wrongful.

Authority:
CC §§ 39-41

Discussion:
See *§ 4.28[3][b]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.23 CHECKLIST: Determining Capacity of Decedent's Representative Under California Law.

☐ If decedent had a claim that existed as of his or her death and if that claim survives death, bring the action in the name of:

- ○ The decedent's personal representative; or
- ○ If no representative has been appointed, the decedent's successor in interest.

☐ Understand distinction between survival action and wrongful death action:

Authority:
CCP §§ 377.30, 377.60, 377.62

Discussion:
See *§ 4.29[1]*

☐ If plaintiff had a claim against a defendant who has died, and if the claim survives the death of the defendant, bring the action against:

- ○ The decedent's personal representative; or
- ○ To the extent permitted by statute, the decedent's successor in interest.

Prerequisite--Claim Filing:

Actions may not be brought against the representative until the plaintiff complies with the provisions of the California Probate Code and files a claim against the estate. The filing and rejection of such a claim by the estate is a prerequisite to suit.

Authority:

CCP § 377.40; *Prob Code § 9351*

Discussion:

See *§ 4.29[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-4 MB Practice Guide: Fed Pretrial Civ Proc in CA 4.24

4.24 CHECKLIST: Determining Capacity of Business Entities Under California Law.

☐ If proposed party is corporation:

○ Determine whether proposed party is California corporation so that it may sue and be sued to same extent as natural person.

Authority:
Corp Code §§ 105, 207; see *CCP § 17*

Discussion:
See *§ 4.30[2]*

○ If the corporation has been dissolved, confirm that the action is within the scope of winding up the corporate affairs.

Authority:
Corp Code § 2010

Discussion:
See *§ 4.30[2][b]*

○ If the corporation has been merged, confirm that the action is brought in the name of the surviving corporation.

Authority:
J.C. Peacock, Inc. v. Hasko (1960) 184 CA2d 142, 150, 7 CR 490

Discussion:
See *§ 4.30[2][c]*

☐ If proposed party is partnership:

○ For proposed partnership plaintiff, consider whether suit in partnership name seeks to enforce account or contract right and, if so, assure that suit is possible by assuring compliance with the fictitious business name statute.

Prerequisite to Capacity of Partnership--Fictitious Business Name Statute Compliance: Partnerships may sue or be sued in the partnership name. A partnership may not seek to collect an account or sue on a contract made in its name, however, unless the partnership has complied with the fictitious business name statute.

Authority:
B&P Code § 17918; *CCP § 369.5(a)*; *Corp Code § 16307(a)*

Discussion:
See *§ 4.31*

○ For proposed partnership defendant (other than limited liability partnership), determine whether to sue:

☐ Partnership itself, as entity;

☐ Individual partners;

☐ Both individual partners and partnership itself.

Authority:
CCP § 369.5(b); *Corp Code §§ 16306(a)*, *16307*

Discussion:
See *§ 4.31*

☐ If proposed party is unincorporated association, confirm, that unincorporated association may maintain action on account or contract made in association's name by assuring that business (or assignee of business) has complied with fictitious business name filing requirements.

Prerequisite to Capacity of Association--Fictitious Business Name Statute Compliance: Unincorporated associations may sue or be sued in their common name. An unincorporated association may not seek to collect an account or sue on a contract made in its name, however, unless the partnership has complied with the fictitious business name statute.

Authority:

B&P Code § 17918; *CCP § 369.5(a)*

Discussion:
See *§ 4.31[3]*

☐ If proposed party is business run as a sole proprietorship, owner is the proper party.

Authority: *Burger v. Kuimelis (ND Cal 2004) 325 F Supp2d 1026, 1033* ; *Providence Washington Ins. Co. v Valley Forge Ins. Co. (1996) 42 CA4th 1194, 1199-1200, 50 CR2d 192*

Discussion: See *§ 4.31[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-4 MB Practice Guide: Fed Pretrial Civ Proc in CA 4.25

4.25 CHECKLIST: Challenging Plaintiff's Lack of Capacity.

☐ If complaint alleges facts positively asserting plaintiff's capacity, specifically deny those facts.

Authority:
Fed R Civ P 8(b)

Discussion:
See *§ 4.36[1]*

☐ Regardless of whether complaint positively asserts plaintiff's capacity, allege lack of capacity as affirmative defense.

Authority:
Fed R Civ P 8(c), 12(b)

Discussion:
See *§ 4.36[1]*

☐ Consider raising capacity defect by motion, including:

○ Motion to dismiss for failure to state claim.

○ Motion to compel joinder or substitution of proper parties.

Authority:

Fed R Civ P 12(b)(6), 19, 21; Thomas v. Humfield (5th Cir 1990) 916 F2d 1032, 1033

Discussion:
See *§ 4.36[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.26 Capacity to Sue and Be Sued in Federal Court Depends on State Law.

Capacity to sue or be sued concerns a litigant's legal authority or power to litigate [*see generally American Nat'l Red Cross v. S.G. (1992) 505 US 247, 248, 112 S Ct 2465, 120 L Ed2d 201* (Court considered whether Red Cross' charter provision of power to sue and be sued conferred basis for federal court jurisdiction as well as capacity)].

Rule 17(b) makes state law the general determinant in matters of capacity to sue and be sued in federal court. Rule 17(b) explains which state's law applies to which types of parties, and specifies only a few exceptions in which state laws on capacity are ignored [*see Fed R Civ P 17(b)*].

Example--Minors and Incompetents:
Most states, including California, have statutes prohibiting minors and incompetents from suing in state court. Such statutes typically require that minors and incompetents sue through a guardian [*see, e.g., CCP § 372 et seq.*]. These capacity statutes apply in federal court actions [*see Fed R Civ P 17(b)*].

Example--Deceased Persons:
Most states, including California, have statutes prohibiting state court suits from being brought directly against deceased persons. Such statutes typically require claims against deceased persons to be brought against the representative of the deceased or his or her successor in interest [*see, e.g., CCP § 377.40*]. These capacity statutes apply in federal court actions [*see Fed R Civ P 17(b)*].

Exceptions:
Circumstances in which capacity to sue or be sued does *not* depend on state law include:

- **Partnerships and Associations Suing on Federal Claims.** A partnership or other unincorporated association may sue or be sued in its common name for purposes of enforcing (for or against it) a substantive right existing under the Constitution or laws of the United States. In these cases it is irrelevant that a partnership or association might lack capacity to sue or be sued under state law [*Fed R Civ P 17(b)*].

- **Receivers Appointed by Federal Courts.** A receiver appointed by a federal court has the capacity

to sue or be sued in a court of the United States as provided by *28 USC § 754* (receivers in possession of property located in more than one judicial district) and *28 USC § 959(a)* (receivers sued for their acts or transactions concerning receivership property).

- **Prisoner Civil Rights Suits.** Prisoners who lack capacity under state laws may still pursue civil rights suits in federal court [*see, e.g., McCollum v. Mayfield (ND Cal 1955) 130 F Supp 112, 116*]

- **Actions Under FAA.** Federal Arbitration Act cases [*see 9 USC § 1 et seq*.] may be litigated by persons or entities who lack capacity under state law [*see, e.g., O & Y Landmark Assoc. v. Nordheimer (DDC 1989) 725 F Supp 578, 581* (partnership that lacked capacity to sue under state law could sue to enforce FAA rights)].

- **Enemy Aliens.** During wartime, the Trading With the Enemy Act limits the capacity of nonresident enemies to bring suit in any court, state or federal [*see 50 USC App § 7(b)* (Trading With the Enemy Act)]. This is true even if war was declared after the filing of the action [*Ex parte Colonna (1942) 314 US 510, 511, 62 S Ct 373, 86 L Ed 379*]. The Act does not limit the capacity to defend suits brought in courts [*see 50 USC App § 7(b)*].

Cross Reference:

Rule 17 as prescribing which law governs litigant's capacity, see 4 *Moore's Federal Practice, § 17.20* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesCapacity of PartiesTrustees

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4.27 Pleading Capacity Is Not Required, Except When Required to Plead Jurisdiction.

The plaintiff's complaint need not include allegations in the complaint specifically asserting the plaintiff's capacity to sue or the defendant's capacity to be sued. If any party is an organization, the plaintiff's complaint need not address the legal existence of that organization. All of these matters will be presumed [*see Fed R Civ P 9(a)*]. If the defendant has objections to the capacity of any party, the defendant must raise those objections by pleading or by motion, or the objections are waived [*see Fed R Civ P 8(b), (c), 12(b),(h); see, e.g., E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co. (2d Cir 1998) 160 F3d 925, 935-936*].

Exception:

There is one, limited exception to the general rule that a plaintiff's complaint need not include allegations as to the capacity or legal existence of the parties. Every federal court complaint must contain a statement of the basis for the court's jurisdiction [*Fed R Civ P 8(a)(1)*]. If the court's jurisdiction depends on some fact that establishes the capacity or legal existence of the parties, this fact must be pleaded despite the general rule excusing pleading of capacity [*Fed R Civ P 9(a)*].

Cross Reference:

Required allegations in complaints, see Ch. 6, Drafting the Summons and Complaint, see *§§ 6.07 -6.09*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesCapacity of PartiesTrustees

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4.28 Determining Capacity of Individual Litigant.

4.28[1] Individuals Have Capacity to Sue or Be Sued Unless They Are Under Disability. The capacity of an individual to sue or be sued in federal courts, other than an individual suing or being sued in a representative capacity, is determined by the law of the individual's domicile [*Fed R Civ P 17(b)*]. California law presumes that adult individuals may sue or be sued, and provides exceptions only for minors and incompetent persons [*see CCP § 372*]. Since the time that the original California Codes were enacted in 1872, California law has rejected the common-law disabilities of married women [*see CCP §§ 370, 372*].

Individuals who conduct business under a fictitious name [*see B&P Code § 17900(a)* (definition of "fictitious business name")] may have an obstacle to suing on business-related claims. Failure to file and publish a fictitious name statement, as required by the statutes governing fictitious business names [*see B&P Code §§ 17910, 17915, 17917*], suspends the right of the business to bring any action on any contract made, or transaction had, in the fictitious business name in any court of California until the fictitious business name statement has been executed, filed, and published [*B&P Code § 17918*].

4.28[2] Determining Capacity of Minors Under California Law.

4.28[2][a] Minor Must Sue Through Guardian or Guardian Ad Litem. Under California law, any person under 18 years of age is a "minor" [*Fam Code § 6500*]. A minor may enforce his or her legal rights by civil action or other legal proceedings in the same manner as an adult, except that a guardian must conduct the action or proceeding [*Fam Code § 6601*]. A party who is a minor must appear either by a guardian of his or her estate [*see Prob Code § 1500 et seq.*], or by a guardian ad litem appointed by the court in which the action is pending or by a judge of that court [*see CCP § 372(a)*].

4.28[2][b] Minor Has Capacity to Be Sued, but Court Will Appoint Guardian. A plaintiff may sue a minor for a tort in the minor's own name. Minors are liable for their torts. Minors are not liable for punitive damages unless there is a showing that the minor was capable of appreciating the wrongfulness of his or her actions at the time the actions were taken [*Fam Code § 6600*], but there is no obstacle to suing a minor for compensatory damages.

In most cases, a plaintiff may also sue a minor on a contractual obligation. Minors are generally liable for contractual obligations [*Fam Code § 6700*].

Exceptions--When Plaintiff May Not Sue Minor on Contractual Obligation:

Contracts made by minors attempting to delegate power, attempting to transfer real property, or attempting to transfer personal property not in the immediate possession of the minor are never enforceable [*Fam Code § 6701*].

Drawback:

Even when a contract obligation is nominally enforceable, suing minors for contractual obligations may be unproductive. Minors may disaffirm contractual obligations [*Fam Code § 6710*]. There are only two exceptions to the ability to disaffirm. A minor may not disaffirm a contract if a statute authorizes minors to make the type of contract in question [*Fam Code § 6711*]. In the absence of a statute, the only type of contract that a minor may not disaffirm is a contract made for the reasonable value of necessities of life furnished to a minor or the minor's family [*Fam Code § 6712*].

To the extent just described, a minor, at least technically, has the capacity to be sued. The plaintiff has no responsibility to seek a guardian of the minor's estate or to seek a guardian ad litem before bringing suit. Nonetheless, the court will allow a minor to appear and defend only through a guardian and will appoint a guardian ad litem for that purpose, if needed [*see CCP § 372(a)* ("When a minor ... is a party, that person shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending")].

4.28[2][c] Emancipated Minor Has Full Capacity, Even Without Guardian. A person who would otherwise be a minor is considered to be over the age of majority for all purposes, including the capacity to sue and be sued in his or her own name [*Fam Code § 7050(e)(4)*], if he or she is "emancipated" [*see Fam Code § 7050 et seq.*]. A minor becomes emancipated by satisfying one or more of the following conditions [*Fam Code § 7002*]:

- The minor has entered into a valid marriage;
- The minor is on active duty with the armed forces; or
- The minor has received a court order under the procedures authorized in the California Family Code for a court to issue a "declaration of emancipation" [*see Fam Code § 7110 et seq.*].

4.28[2][d] Minor 12 Years Old or Older Has Capacity to Seek or Defend Against Harassment and Violence Injunctions. A minor 12 years of age or older may appear without a guardian, counsel, or guardian ad litem to request or oppose a request for the following [*see CCP § 372(b)(1)*]:

- An injunction or temporary restraining order, or both, to prohibit harassment [*see CCP § 527.6*];
- An injunction or temporary restraining order, or both, against violence or a credible threat of violence in the workplace [*see CCP § 527.8*];
- A protective order pursuant to the Domestic Violence Prevention Act [*see Fam Code § 6200 et seq.*]; or
- A protective order in connection with proceedings under the Uniform Parentage Act [*see Fam Code §§ 7710, 7720*].

Even though a minor has full capacity in these matters, the court may appoint a guardian ad litem to assist the minor [*CCP § 372(b)(1)*].

4.28[2][e] Neither Minors Nor Guardians May Appear Pro Se. A minor may not appear pro se because, as explained above, he or she must appear through a guardian [*see CCP § 372(a)*].

A guardian appears and sues or defends as a representative. Therefore, a guardian may not appear pro se, and must always retain a lawyer [*see Johns v. County of San Diego (9th Cir 1997) 114 F3d 874, 876*].

4.28[3] Determining Capacity of Incompetent Persons Under California Law.

4.28[3][a] Incompetent Must Sue Through Conservator or Guardian Ad Litem. Under California law, an incompetent person is one who is "substantially unable to manage his or her financial resources or resist fraud or undue influence" [*see CC § 39(b)* (such persons are subject to presumption that they are of unsound mind); *Prob Code § 1801(b)* (such persons are subject to conservatorship for their estates)]. Incompetents lack capacity to sue. An incompetent must sue through his or her conservator, if one has been appointed. The court must appoint a guardian ad litem for an incompetent if there is no conservator [*see CCP § 372(a)*].

4.28[3][b] Incompetent Has Capacity to Be Sued in Many Cases, but Court Will Appoint Guardian. A plaintiff may sue an incompetent person in tort. A person "of unsound mind," regardless of the degree of mental impairment, is civilly liable for his or her torts. The incompetent person is not liable for punitive damages, however, unless there is a showing that, at the time of the tortious conduct, the incompetent was capable of knowing that his or her actions were wrongful [*CC § 41*].

A plaintiff may also sue an incompetent on contract obligations in some circumstances. A person who is "entirely without understanding" cannot make a valid contract of any kind. At most, he or she is liable in quantum meruit for the reasonable value of necessities of life furnished to the incompetent or his or her family [*CC § 38*]. Similarly, if a person has been formally adjudicated as incompetent and subjected to a conservatorship by court order [*see Prob Code § 1800 et seq.*], the conservatee cannot make valid contracts [*CC § 40*]. The only enforceable contracts that a conservatee may make are contracts for the reasonable value of the necessities of life for the conservatee, his or her spouse and minor children, or his or her domestic partner [*see Prob Code § 1871(d)*].

An adult person of unsound mind who is not entirely without understanding, and who has not been the subject of a judicial decree, has the power to make contracts and may be sued on them [*see CC § 39(a)*]. However, suing on these contractual obligations may not be productive. These contracts are subject to rescission [*CC § 39(a)*; *see CC § 1688 et seq.* (grounds for and conditions of recission of contracts generally)].

To the extent just described, an incompetent person, at least technically, has the capacity to be sued. The plaintiff has no responsibility to seek a conservator for the incompetent's estate or to seek a guardian ad litem before bringing suit. Nonetheless, the court will allow the incompetent to appear and defend only through a conservator and, if one has not been appointed, the court will appoint a guardian ad litem for that purpose [*CCP § 372(a)* ("When ... an incompetent person, or a person for whom a conservator has been appointed, is a party, that person shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesCapacity of PartiesTrustees

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4.29 Determining Capacity of Decedents and Decedents' Representatives Under California Law.

4.29[1] Personal Representative or Successor in Interest May Bring Decedent's Cause of Action. All of a decedent's property, including a cause of action that survives the decedent's death [*see CCP § 377.30*], passes to the devisees of the decedent's last will. If there is no will, the property passes to the decedent's heirs at law [*Prob Code § 7000*]. The decedent's personal representative may commence an action on a cause of action that survives the decedent's death. If there is no personal representative, the decedent's successor in interest may commence the action [*see CCP § 377.30*].

An action commenced on a cause of action that survives the decedent's death is called a "survival action." This action is limited to claims that the decedent could have asserted had he or she not died, and it does not include "wrongful death" claims. Wrongful death claims are those owned by the decedent's heirs or surviving domestic partner. These claims seek recovery for the losses suffered by the heirs or the surviving domestic partner as a result of the death. Therefore, a wrongful death claim is owned by the surviving heirs or surviving domestic partner of the deceased, and must be brought directly by them and *not* by the decedent's personal representative [*CCP § 377.60*]. Nonetheless, it is common to consolidate survival and wrongful death actions in a single proceeding, despite the fact that the plaintiffs in each action differ [*see CCP § 377.62*].

4.29[2] Cause of Action Against Decedent May Be Asserted Against Personal Representative or Successor in Interest. A plaintiff may assert a cause of action against the decedent that survives the decedent's death by asserting the cause of action against the decedent's personal representative or, to the extent permitted by statute, against the decedent's successor in interest [*see CCP § 377.40*]. However, the plaintiff may not commence the action until the plaintiff timely files a probate claim against the decedent's estate [*Prob Code § 9351*; *see Prob Code § 9000 et seq.* (creditor claims procedures)].

4.29[3] Estate Itself May Not Be Party. Under California law, an estate is not an entity and may not be a party to an action. It is neither a natural nor an artificial person. It is merely a name to indicate the sum total of the assets and liabilities of a decedent, an incompetent, or a bankrupt [*see Tanner v. Estate of Best (1940) 40 CA2d 442, 445, 104 P2d 1084* ; *see also Goodman v. United States (9th Cir 2002) 298 F3d 1048, 1054* (bringing suit in name of estate was error, although substituting proper party, which related back to date of filing of original complaint, was permitted)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesCapacity of PartiesTrustees

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4.30 Determining Capacity of Public Corporations.

4.30[1] Capacity of Corporation Determined by Law of State Where Organized. The capacity of a corporation to sue or be sued is be determined by the law of the state where the corporation was organized [*Fed R Civ P 17(b)(2) see, e.g., Louisiana-Pac. Corp. v. ASARCO, Inc. (9th Cir 1993) 5 F3d 431, 434* ; *Levin Metals Corp. v. Parr-Richmond Terminal Co. (9th Cir 1987) 817 F2d 1448, 1451*].

Exception--Statute May Provide for Suit Regardless of Capacity.
Federal statutes can authorize suits regardless of the capacity of a corporation under state law. For example, corporations lacking capacity under state law may nevertheless be prosecuted for violations of federal hazardous waste regulations [*see, e.g., 42 USC § 9607(a)* (CERCLA)].

Distinguish--Corporation Suing in Representative Capacity:
The rule that the law of the state of organization governs capacity to sue and be sued applies when a corporation is suing to assert its own rights. It does *not* apply to a corporation suing as a representative of another. When a party, either individual or corporate, sues in a representative capacity, the law of the state in which the federal district court sits determines capacity to sue or be sued [*Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc. (ND Cal 1998) 23 F Supp2d 1151, 1153-1154*].

Investigating Potential Parties Using Online Resources:

Investigation of existing and potential corporate adversaries (and perhaps allied parties) can be greatly facilitated by information and leads from online resources. For example, helpful resources at *lexis.com* include:

- News & Business tab>Company & Financial>Company Profiles & Directories>Individual Publications> LexisNexis(R) Corporate AffiliationsTM
  - Sample Search: To determine corporate parent/subsidiary relationships, including

directors and officers, search the Directory of Corporate Affiliations online. A product search may be performed, such as search: *brand/business(Tylenol)* A company search follows this format: *company(lexisnexis)*.

Cross References:

Capacity of party suing as representative, see *§ 4.35*.

Capacity of corporation to litigate on its own behalf, see 4 *Moore's Federal Practice, § 17.26[1]* (Matthew Bender 3d ed.).

4.30[2] Determining Capacity of California Corporations.

4.30[2][a] California Corporations Have Same Capacity as Natural Persons. Because a corporation is considered a person and (in most cases) has the powers of a natural person under California law, it has the same capacity to sue and be sued in any court as does a natural person [*Corp Code § 105*; *see CCP § 17*; *Corp Code § 207*].

Cross References:

Capacity of corporations under California law, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 5.14*.

Allegations of corporate capacity under California law, see 3 California Forms of Pleading and Practice, Ch. 20, Allegations Commonly Used (Matthew Bender).

4.30[2][b] Dissolved California Corporations Have Limited Capacity. A dissolved corporation has a capacity to sue and defend, and otherwise continues to exist, but only for the limited purpose of winding up its affairs [*see Corp Code § 2010(a)*]. An action or proceeding to which a corporation is a party does not abate on account of the dissolution of the corporation or the proceedings for winding up and dissolution [*Corp Code § 2010(b)*].

California law permits suits against a former corporation's shareholders only if the claim asserted in the suit arose prior to dissolution [*Corp Code § 2011(a)*; *see, e.g., Levin Metals Corp. v. Parr-Richmond Terminal Co. (9th Cir 1987) 817 F2d 1448, 1451* (suit dismissed because statute creating cause of action not enacted until after dissolution, even if harm caused during period corporation existed)].

Cross Reference:

Form of stipulation to substitute stockholders as defendants in place of dissolved corporation, see 5 *Bender's Federal Practice Forms, Form 17:42* (Matthew Bender).

4.30[2][c] Merged Corporation Loses Right to Bring Suit. A merged corporation loses its corporate existence and may not bring suit in its former, pre-merger, name [*see J.C. Peacock, Inc. v. Hasko (1960) 184 CA2d 142, 150, 7 CR 490*]. However, when a statutory merger becomes effective, the surviving corporation automatically succeeds, without further transfer, to all the rights and property of the disappearing corporation [*see Corp Code § 1107(a)*].

4.30[2][d] California Corporation's Rights to Sue and Defend Suits May Be Suspended by Failure to File or Pay Tax. A California corporation's rights, powers, and privileges, including its ability to sue or defend suits, are suspended for failure to pay corporate taxes [*see* R&T Code § 23301]. The suspension is not automatic, however. The suspension takes effect only when the Franchise Tax Board transmits the name of the tax-delinquent corporation to the Secretary of State [*see* R&T Code § 23302]. If this has not been done, the corporation will continue to have the capacity to sue and defend, even though the corporation may, in fact, have failed to pay its taxes [*see Ogden Martin Sys. v. San Bernardino (9th Cir 1991) 932 F2d 1284, 1290* ; *Mediterranean Exps., Inc. v. Superior Court (1981) 119 CA3d 605, 615, 617-618, 174 CR 169*].

A similar suspension may occur for the failure to file a tax return as applies for the failure to actually pay corporate taxes. Except for the purpose of filing an application for exempt status, or amending the articles of incorporation as necessary either to perfect the application or to set forth a new name, and subject to R&T Code § 23301.6 (suspension or forfeiture of powers of foreign taxpayer for failure to file return), the corporate powers, rights, and privileges of a California corporation may be suspended if the taxpayer fails to file a tax return required by Corporation Tax Code [*see* R&T Code § 23301.5].

A similar suspension may occur for the failure to file annual informational statement. A California corporation must file initial and annual statements setting out information about, among other things, its officers, directors, and business practices [*see Corp Code § 1502*]. Failure to file this statement will result ultimately in the suspension of corporate rights, powers, and privileges [*see Corp Code § 2205*]. A corporation suspended for failure to file this statement is disabled from participating in any litigation activities to the same extent as a corporation suspended for failure to pay taxes under *R&T Code § 23301* [*Palm Valley Homeowners Ass'n v. Design MTC (2000) 85 CA4th 553, 560, 102 CR2d 350*].

Tax suspensions are not permanent. It would be error to immediately dismiss an action filed by a suspended corporation or to immediately enter a default against it. Although the action or defense is abated when a California corporation's capacity is suspended, a California corporation may revive its capacity and should be given a reasonable opportunity to do so. For example, a California corporation may pay its taxes, and the appropriate penalties, and when it does so, it will be restored to full capacity [*R&T Code § 23305a*]. The restoration is without prejudice to any claims or defenses that have arisen in the interim, however [*see Electronic Equip. Express, Inc. v. Donald H. Seiler & Co. (1981) 122 CA3d 834, 843, 176 CR 239*].

Example:

If a corporation's claim becomes barred by limitations while the suspension is in place, the revivor does not remedy this defense to the previously suspended corporation's claim [*see Electronic Equip. Express, Inc. v. Donald H. Seiler & Co. (1981) 122 CA3d 834, 843, 176 CR 239*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.31 Determining Capacity of Partnerships, Associations, and Sole Proprietorships.

4.31[1] Capacity of Partnerships and Associations Determined by Law of State Where District Court Sits. Capacity of partnerships and associations to sue or be sued is determined by the law of the state in which the district court is held [*Fed R Civ P 17(b)(3)*].

If, under the relevant state law, a partnership or unincorporated association lacks capacity to sue or be sued, it still may sue or be sued in its common name for the purpose of enforcing (for or against it) a substantive right existing under the Constitution or laws of the United States [*Fed R Civ P 17(b)(3)(A)*]. This provision is moot for the federal district court located in California because, as discussed below, California law permits partnerships and associations to sue and be sued in their own names.

Cross Reference:

Capacity of partnerships and unincorporated associations, see 4 *Moore's Federal Practice, § 17.26[4]* (Matthew Bender 3d ed.).

4.31[2] In California, Partnership May Sue or Be Sued in Partnership Name.

4.31[2][a] Partnership Name Suits Permitted, but Strategic Considerations May Make Partners Advisable Additional Parties. Any partnership may sue or be sued in the name that it has assumed or by which it is known [*CCP § 369.5(a)*; *Corp Code § 16307(a)*]. However, there are a number of reasons for a plaintiff to sue both the partnership and individual partners:

- To acquire jurisdiction over a partnership, a plaintiff must designate the partnership as a defendant. Naming only the individual partners in the complaint is insufficient [*Epstein v. Frank (1981) 125 CA3d 111, 119-120, 177 CR 831* ; *Hildebrand v. Stonecrest Corp. (1959) 174 CA2d 158, 169, 344 P2d 378*].

- A judgment against a partnership is not automatically a judgment against individual partners, even though partners are jointly and severally liable for all obligations of a general partnership. Therefore,

because individual partners may be made parties in such actions, it may be strategically advantageous to name individual partners and obtain a judgment against them at the same time as obtaining a judgment against the partnership. Judgments against individual partners for partnership debts do not automatically reach the nonpartnership assets of individual partners until partnership assets prove insufficient. However, at this point, it may be convenient to have a judgment against individual partners already established [*see CCP § 369.5(b)*; *Corp Code §§ 16306(a)*, *16307*].

There are also very practical reasons *not* to join individual partners as parties. Joinder of individual partners makes sense when the number of partners is small and when there is a risk that the partnership may be unable to respond to a judgment (or might make itself unable to respond to a judgment) in the case. Joinder of all of the individual partners may be counterproductive when the number of individual partners is large. A large number of parties is sure to complicate the litigation, particularly if the basis for federal court jurisdiction is diversity of citizenship. Furthermore, when there is no real risk that the partnership assets will be insufficient to satisfy a possible judgment in the case, a plaintiff must always consider that suing individual partners does make the suit more "personal," which can create a more entrenched defensive posture.

4.31[2][b] Compliance With Fictitious Name Statute May Be Prerequisite to Partnership Name Suit. A partnership that is transacting business under a fictitious business name may not maintain any action on or on account of any contract made, or transaction had, in the fictitious business name in any state court until a fictitious business name statement has been executed, filed, and published [*B&P Code § 17918*].

Cross Reference:

Capacity of partnerships under California law, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 5.13*.

4.31[3] In California, Unincorporated Association May Sue and Be Sued Under Common Name. In California, unincorporated associations, whether or not organized for profit, are treated like general partnerships to the extent that they may sue and be sued in the name they have assumed or by which they are known [*see CCP § 369.5(a)*]. However, as with general partnerships, compliance with the fictitious business name statute may be a prerequisite to maintaining a suit in the association's name [*see B&P Code § 17918*].

Although a corporation retains limited capacity to sue and be sued after dissolution, an unincorporated association ceases to exist completely when it is dissolved. It may not sue and may not even be named as a defendant [*see Oliver v. Swiss Club Tell (1963) 222 CA2d 528, 537, 35 CR 324*].

Cross Reference:

Capacity of unincorporated association, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 5.16*.

4.31[4] In California, Sole Proprietorship Does Not Have Existence Separate From Owner. In California, a sole proprietorship is not an entity legally separate from its owner [*Providence Washington Ins. Co. v. Valley Forge Ins. Co. (1996) 42 CA4th 1194, 1199-1200, 50 CR2d 192*]; the use of a fictitious business name does not create a separate legal entity [*Pinkerton's, Inc. v. Superior Court (1997) 49 CA4th 1342, 1348, 57 CR2d 356*]. A sole proprietorship, therefore, lacks the capacity to sue or be sued separately from the owner [*see Burger v. Kuimelis (ND Cal 2004) 325 F Supp2d 1026, 1033*]. The pleading may indicate that the owner does business under a fictitious business name, e.g., "JANE DOE dba JD INSURANCE SERVICES."

Legal Topics:

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

Civil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesCapacity of PartiesTrustees

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4.32 Determining Capacity of Limited Liability Entities.

4.32[1] Capacity of Limited Liability Entities Determined by Law of State Where District Court Sits. Capacity of limited liability companies, limited liability partnerships, and limited partnerships to sue or be sued is determined by the law of the state in which the district court is held [*Fed R Civ P 17(b)(3)*].

4.32[2] In California, Limited Liability Company May Sue or Be Sued. A California limited liability company may sue or be sued, to the same extent as any other entity [*Corp Code § 17003(b)*]. However, both foreign and domestic limited liability companies are similar to corporations in that they are subject to suspension of their capacity to sue and be sued for any failure the pay the required taxes imposed by the State of California on such entities [*see R&T Code § 23305.5*].

4.32[3] In California, Limited Partnerships and Limited Liability Partnerships Have Same Capacity to Sue and Be Sued As General Partnerships. California Limited Liability Partnerships have the same capacity to sue and be sued as general partnerships because they are governed by the same laws as are general partnerships [*see Corp Code § 16111*]. The same is true of limited partnerships. General partners in a limited liability partnership are treated similarly to partners in a general partnership [*see Corp Code § 15643*]. The law governing the capacity of a partnership to sue and be sued [*see CCP § 369.5(a)*; *Corp Code § 16307(a)*], also applies to limited partnerships [*see Corp Code §§ 15722*, *16111*].

Cross Reference:

Discussion of capacity of partnerships, see *§ 4.31*.

Distinguish:

The principal differences between general partnerships on one hand, and limited partnerships and limited liability partnerships on the other, concern the propriety of joining partners as additional parties in actions by or against limited partnerships or limited liability partnerships:

- As noted, general partners in a limited partnership are treated just like limited partners in a general

partnership [*see Corp Code § 15643*]. Limited partners, however, are not individually liable for partnership obligations and, therefore, are not proper parties to suits against limited partnerships. The only exceptions are for limited partners who are named as general partners in the partnership's registration certificate or limited partners who, contrary to their purported status as limited partners, participate in the control of the business [*see Corp Code § 15632*].

- Individual partners only rarely need to be made parties to suits against limited liability partnerships unless the individual partner in question is a tortfeasor. Individual partners in limited liability partnerships, unlike partners in a general partnership, are not personally liable for the debts, obligations, or liabilities of the partnership [*Corp Code § 16306(c)*].

Cross References:

Capacity of limited liability companies, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 5.15*.

Allegations of limited liability company's capacity under California law, see 3 California Forms of Pleading and Practice, Ch. 20, Allegations Commonly Used (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.33 Determining Capacity of Nationally Chartered Corporations.

4.33[1] Federally Chartered Corporation. The capacity of a corporation created by federal statute or chartered by another federal corporation is governed by the law under which it was organized [*see American Nat'l Red Cross v. S.G. (1992) 505 US 247, 258-260, 112 S Ct 2465, 120 L Ed2d 201*]. In the absence of a restriction in the charter, capacity of these corporations is presumed in federal court [*see Keifer & Keifer v. Reconstruction Fin. Corp. (1939) 306 US 381, 394-396, 59 S Ct 516, 83 L Ed 784*].

Cross Reference:

Capacity of governmental corporations, see 4 *Moore's Federal Practice, § 17.26[3]* (Matthew Bender 3d ed.).

4.33[2] Corporation Chartered by District of Columbia. The District of Columbia is treated as a state, so a government corporation formed under the general corporation law of the District of Columbia has the same capacity as any other corporation formed under that law [*see Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp. (1922) 258 US 549, 570, 42 S Ct 386, 66 L Ed 762*].

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4.34 Determining Capacity of State and Local Public Entities.

4.34[1] Capacities of State and Local Public Entities Determined by Law of State Where District Court Sits. The capacity of states and local public entities to sue and be sued depends on the law of the state in which the district court is held [*see Fed R Civ P 17(b)(3)*].

4.34[2] State of California and California "Public Entities" Have Capacity to Sue and Be Sued. By statute, the State of California and "public entities" in California may sue and be sued [*Gov Code § 945*]. The statutory definition of "public entity" includes the State of California itself, the Regents of the University of California, a county, city, district public authority, public agency, and any other political subdivision or public corporation in California [*Gov Code § 811.2*].

Distinguish--Not All Public Agencies Are "Public Entities":

A local government agency may lack the capacity to sue or be sued. For example, although the County of Los Angeles is a "public entity" with the capacity to sue and be sued, the Sheriff's Department of Los Angeles County is not. Furthermore, a complaint against the county for actions of an agency such as the Sheriff's Department must sufficiently show why the county is liable for the actions of the agency, and not just state conclusory allegations [*see Garcia v. County of Los Angeles (CD Cal 1984) 588 F Supp 700, 707* (motion to dismiss granted, with leave to amend to show liability of county for actions of Sheriff's Department as agent)].

4.34[3] State Public Entities May Be Sued Only to Extent They Have Waived Immunity. The State of California has sovereign immunity, and it has imposed immunity from suit on its political subdivisions and agencies by statute. Therefore, California and California public agencies may be sued only to the extent that they have waived immunity [*see Gov Code § 814 et seq.*].

4.34[4] Liability of California and California Public Agencies Is Subject to Numerous Statutory Limits. State statutes may limit the liability of the State of California and its public agencies. For example, a public entity is never liable for any damages caused by the issuance, refusal to issue, suspension, or revocation of a license [*Gov Code § 818.4*]. Also, even if California or a California public agency is liable for compensatory damages, it is never liable for

punitive damages [*Gov Code § 818*].

Warning:

The nature, extent, and circumstances under which liability may be imposed on the State of California and its public agencies is a matter of statute [*Gov Code § 815*]. Review the California Tort Claims Act [*Gov Code § 810 et seq*.] before bringing suit against a California public entity.

Cross Reference:

Statutory limits on public entity's liability, see 40 California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers (Matthew Bender).

4.34[5] Administrative Claim May Be Prerequisite to Suit. For most types of claims, neither the State of California nor a California public entity may be sued unless and until an administrative claim specified in *Gov Code § 900 et seq*. is presented to and ruled on by the State or public entity [*see Gov Code § 900 et seq*.]. There are statutory exceptions to the claims requirements for certain types of claims [*see Gov Code § 905*]. In addition, the courts have recognized a few non-statutory exceptions. For example, a plaintiff may pursue a civil rights actions under *42 USC § 1983* without first filing an administrative claim [*Williams v. Horvath (1976) 16 C3d 834, 837-842, 129 CR 453*]. Similarly, a plaintiff may pursue a claim for employment discrimination under the California Fair Employment and Housing Act [*see Gov Code § 12900 et seq*.] without first filing an administrative claim under *Gov Code § 900 et seq*. [*see, e.g., Garcia v. Los Angeles Unified Sch. Dist. (1985) 173 CA3d 701, 710-711, 219 CR 544* (FEHA procedures have other administrative prerequisites that serve same purpose)].

Cross Reference:

Claims requirements, see 40 California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers (Matthew Bender).

4.34[6] Eleventh Amendment Immunity May Preclude Suit. The State of California's capacity to be sued in California state courts is not a waiver of its *Eleventh Amendment* protection from money damage suits in *federal* courts. The *Eleventh Amendment* limits the judicial power of federal courts over states [*see US Const, amend XI*].

Courts have consistently interpreted the *Eleventh Amendment* to preclude suits directly against a state in federal court [*Edelman v. Jordan (1974) 415 US 651, 662-663, 94 S Ct 1347, 39 L Ed2d 662*]. The *Eleventh Amendment does* permit suits against state officers for injunctive relief, but not for damages [*Ex parte Young (1908) 209 US 123, 150-160, 28 S Ct 441, 52 L Ed 714*]. Suits against state officers for conduct in the officer's official or representative capacity are deemed to be against the state itself, and are barred by the *Eleventh Amendment* [*Ex parte New York (1921) 256 US 490, 500-501, 41 S Ct 588, 65 L Ed 1057*].

Exception:

The only exception to *Eleventh Amendment* immunity occurs when a federal statute deliberately and expressly authorizes a recovery of damages against a state and the statute is enacted pursuant to Congress's power to enforce the *US Const, amend XIV* [*Seminole Tribe v. Florida (1996) 517 US 44, 55, 116 S Ct 1114, 134 L Ed2d 252*]. For example, Congress has authorized federal court damage actions against states for violations of the Family and Medical Leave Act [*Nevada Dep't of Human Res. v. Hibbs (2003) 538 US 721, 725, 123 S Ct 1972, 155 L Ed2d 953*]. And Congress has specified that states do not have sovereign immunity under the Government Employee Rights Act, *42 USC § 2000e-16a* [*Dellmuth v. Muth (1989) 491 US 223, 230, 109 S Ct 2397, 105 L Ed2d 181* ; *Alaska v. EEOC (9th Cir 2009) 564 F3d 1062, 1068-1069* (state sovereign immunity was not a defense in employment discrimination action brought by state employees)].

Cross Reference:

Discussion of *Eleventh Amendment*, 17A Moore's Federal Practice, Ch. 123, Access to Courts: Eleventh Amendment and State Sovereign Immunity (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsSovereign ImmunityGeneral OverviewCivil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesCapacity of PartiesTrusteesTortsPublic Entity LiabilityImmunityGeneral Overview

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Unit 2 First Steps
CHAPTER 4 Determining Parties to the Action
IV. ASSESSING CAPACITY OF NAMED PARTIES

1-4 MB Practice Guide: Fed Pretrial Civ Proc in CA 4.35

4.35 Determining Capacity of Representatives Litigating State-Law Claims.

The capacity of a party litigating a state-law claim on behalf of another is governed by the law of the state in which the district court is held [*see Fed R Civ P 17(b)*].

Example--Corporations Acting As Fiduciaries:

Corporations often serve in representative capacities as trustees or guardians. The capacity of a corporation litigating on behalf of another is determined by the law of the forum state, even though the capacity of a corporation to sue and be sued is normally determined by the law of the state in which it was organized [*Fed R Civ P 17(b)*]. The general rule for corporate capacity (the rule that capacity is determined by the state of organization) only applies when the suit is on behalf of or against the corporation in its own right. If a corporation is a party as a representative of the rights and obligations of other persons, the "default" provision of the rule (the rule that capacity is determined by the law of the state in which the court sits) applies [*Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc. (ND Cal 1998) 23 F Supp2d 1151, 1153-1154* (corporation suing on behalf of its members, rather than suing for its own rights)].

Example--State Officers:

The capacity of a state representative litigating a state law claim on behalf of a governmental body is determined by the law of the state in which the court sits [*see, e.g., Moore v. Mitchell (1930) 281 US 18, 24, 50 S Ct 175, 74 L Ed 673*].

Cross Reference:

Capacity of party suing on behalf of another, see 4 *Moore's Federal Practice, § 17.22* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesCapacity of PartiesTrustees

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4.36 Challenging Capacity Defect.

4.36[1] Capacity Defect Should Be Raised in Responsive Pleadings. Because the plaintiff will rarely need to plead the capacity of any party to the suit [*see Fed R Civ P 9(a)(1)* ("a pleading need not allege ... a party's capacity to sue or be sued [or] a party's authority to sue or be sued in representative capacity")], it is unlikely that the plaintiff will do so. However, if the plaintiff has affirmatively pleaded the capacity of any party and a responding party disagrees with the facts pleaded, the answer must specifically deny the allegations of capacity [*see Fed R Civ P 8(b), 12(b)*] or the allegations will be admitted [*Fed R Civ P 8(b)(6)*].

Even if a denial-of-capacity allegation is not required, and in addition to a denial-of-capacity allegation if one is made, a responding party disputing the capacity of another party to sue or be sued should plead any lack of capacity affirmatively, as an affirmative defense. A lack of capacity might well be categorized as a matter of "avoidance" within the meaning of Rule 8(c) and, therefore, it needs to be pleaded [*see Fed R Civ P 8(c)*]. Affirmative defenses that are not raised in a responsive pleading or in a motion to dismiss may be waived [*see, e.g., Venters v. City of Delphi (7th Cir 1997) 123 F3d 956, 968* (limitations defense waived by failure to plead it)].

Regardless of whether its is labeled an affirmative defense or otherwise, Rule 9(a) explicitly requires that when a party desires to raise an issue either as to the legal existence of a party or an issue as to the capacity any party to sue or be sued (or to sue or be sued in a representative capacity), the party desiring to raise the issue must do so "by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge" [*Fed R Civ P 9(a)(2)*]. Thus, a party wishing to object to the capacity of a party must make an affirmative-defense-like pleading, and must, in fact, plead the objection more specifically than is required for most affirmative defenses [*cf. Zotos v. Lindbergh Sch. Dist. (8th Cir 1997) 121 F3d 356, 360* (limitations defense may be pleaded generally, without any specific details)].

Warning :

Failure to make the required "specific denial" as to any objections to a party's capacity waives those objections [*see, e.g., Summers v. Interstate Tractor & Equip Co (9th Cir 1972) 466 F2d 42, 50*].

Cross Reference:

Drafting answer, see Ch. 8, Answers and Responsive Motions Under Rule 12, §§ 8.06- 8 .13.

4.36[2] Capacity Defect May Be Raised by Motion to Dismiss. In lieu of or in addition to pleading capacity defects, defendants may object to plaintiff's lack of capacity in a motion to dismiss for failure to a state claim on which relief may be granted [*see Fed R Civ P 12(b)(6)*; *see, e.g., Thomas v. Humfield (5th Cir 1990) 916 F2d 1032, 1033* (district court dismissed some defendants for plaintiff's failure to serve summons and other defendants for plaintiff's failure to state claim)].

Cross References:

Motion to dismiss under Rule 12(b)(6), see Ch. 8, Answers and Responsive Motions Under Rule 12, 8 .21. Noticed motion procedure, see Ch. 26, Pretrial Motion Practice.

Forms of motion to dismiss for lack of capacity to sue, see 5 Bender's Federal Practice Forms, § 17:40. Form of motion to dismiss for lack of capacity to be sued, see 5 Bender's Federal Practice, Form 17:41 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesCapacity of PartiesTrustees

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4.37 Determining Proper Representatives for Persons Lacking Legal Capacity.

4.37[1] Previously Appointed Representative May Sue for or Defend Minor or Incompetent. Whenever a minor or incompetent person already has a duly appointed representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person [*Fed R Civ P 17(c)*].

4.37[2] Minor or Incompetent May Sue by Next Friend or Guardian Ad Litem. A minor or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem appointed by the court in which the action is pending for the purpose of representing the minor or incompetent [*Fed R Civ P 17(c)(2)*].

4.37[3] Court May Appoint Guardian Ad Litem for Minor or Incompetent Who Has Been Sued. If a minor or incompetent is sued, the court must appoint a guardian ad litem or take other steps needed for the protection of the minor or incompetent [*Fed R Civ P 17(c)*; *see* United States v. 30. *64 Acres of Land (9th Cir 1986) 795 F2d 796, 805*].

4.37[4] Court Must Hold Incompetency Hearing for Persons Not Previously Adjudged Incompetent. Before appointing a guardian ad litem on the basis of a party's incompetence, federal courts must hold a competency hearing for persons not previously adjudged incompetent. Because representation by a guardian ad litem deprives a party of the right to control the litigation, due process requires some type of hearing. Representation by a guardian ad litem does not prevent the party's day in court, however, so a full adversary hearing is not required [*see Thomas v. Humfield (5th Cir 1990) 916 F2d 1032, 1034*].

A federal court does not have to follow all of the procedures that a state court might follow in determining competency. In particular, in considering whether a party is mentally competent, the federal court need not follow state mental competency procedures. Minimal due process must be granted, which usually requires notice and a hearing of some kind, but nothing else [*Thomas v. Humfield (5th Cir 1990) 916 F2d 1032, 1034*].

Cross Reference:

Motion for appointment of guardian ad litem, see 5 *Bender's Federal Practice Forms, Form 17:50 et seq*. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesCapacity of PartiesTrustees

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4.38 LOCAL PRACTICE: CD Cal--Actions Involving Minors and Incompetents.

4.38[1] Court Must Approve Settlement or Compromise. The Central District forbids the parties in an action involving a minor or incompetent from settling or dismissing an action without court approval [*CD Cal Civ LR 83-5.1*]. The procedures for seeking court approval follow, as far as is practicable, California state court procedures for approval of compromises and dismissals of actions involving minors or incompetents [*see CD Cal Civ LR 83-5.2*; *see also CCP § 372*; Cal Rule Ct, Rule 3.1384 (state court procedures)].

4.38[2] Court Sets Attorney's Fees. In all actions involving a claim of minor or incompetent, the court will set the amount of fees payable to the minor's or incompetent's attorney. This applies regardless of whether the case is resolved by settlement or judgment after trial [*CD Cal Civ LR 83-5.3*].

4.38[3] All Monies Paid to Minor or Incompetent Placed in Blocked Account. All monies or other property paid to a minor or incompetent must be paid into the registry of the court and deposited by the clerk of the court into an interest-bearing account. The court may order payment of the money into some other form of blocked account, however [*CD Cal Civ LR 83-5.4*].

All monies or property deposited in this fashion may be disbursed only in accordance with a court order [*CD Cal Civ LR 83-5.5*]. The procedure for seeking a disbursal order is the same as followed in California state courts. In fact, the Central District has expressly adopted the California Probate Code provisions for disbursal applications made by California residents and foreign nationals. Disbursal applications by residents of other states must follow similar, local law [*CD Cal Civ LR 83-5.5.1*; *see Prob Code § 3600 et seq*. (California procedures for disbursement of funds paid to minors or persons with specified disabilities pursuant to judgment)].

Warning:

The California Probate Code provisions for disbursement of funds have been amended to replace the term "incompetent person" with "person with a disability." A "person with a disability" includes a person for whom a conservator may be appointed, a person with a developmental disability, and persons meeting specified federal definitions of disability [*Prob Code § 3603* ("person with a disability"

defined); *see Prob Code § 3600 et seq*.].

Before a guardian, conservator, or custodian of a minor or incompetent receives and funds or property, the guardian, conservator, or custodian must [*CD Cal Civ LR 83-5.6*]:

- File certified copies of a state court order appointing the guardian, conservator, or custodian; and
- File a certificate by the state court attesting that the guardian, conservator, or custodian has filed a surety bond in a sum at least equal to the amount of money or value of property to be disbursed.

The certificate of bond requirement may be excused if the guardian or custodian is a corporate guardian authorized by state law to so act [*CD Cal Civ LR 83-5.6.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesCapacity of PartiesTrustees

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1-4 MB Practice Guide: Fed Pretrial Civ Proc in CA 4.39

4.39 LOCAL PRACTICE: ED Cal--Actions Involving Minors and Incompetents.

4.39[1] Appointment of Representative or Guardian. The Eastern District requires the attorney representing a minor or incompetent person to either present appropriate evidence of the appointment of a representative for the minor or incompetent person under state law or to make a motion for the appointment of a guardian ad litem by the court. An attorney representing a minor or incompetent plaintiff must do so at the commencement of the action. An attorney representing a minor or incompetent defendant must do so at the time of the initial appearance in the action [*ED Cal Civ LR 202(a)*].

4.39[2] Court Approval Required for Settlement or Compromise. No claim by or against a minor or incompetent person may be settled or compromised absent a court order approving the settlement or compromise [*ED Cal Civ LR 202(b)*].

When the minor or incompetent is being represented by a representative appointed pursuant to state law, the settlement or compromise must first be approved by the state court having jurisdiction over the personal representative. State court approval is proved by filing a copy of the state court order and all supporting and opposing documents with the court considering approval of the settlement or compromise. The only exception to prior state court approval is when the action is one over which federal courts have exclusive jurisdiction [*ED Cal Civ LR 202(b)(1)*].

In actions in which the minor or incompetent is *not* being represented by a representative appointed pursuant to state law, the parties must file a motion for an order of approval of the proposed settlement or compromise. The motion will be calendared for a hearing. The motion must, at the very least, disclose [*ED Cal Civ LR 202(b)(2)*]:

- The age and sex of the minor or incompetent;
- The nature of the causes of action to be settled or compromised;
- The facts and circumstances out of which the causes of action arose, including the time, place, and persons involved;

- The manner in which the compromise amount or other consideration was determined; and

- Whatever additional information may be required to enable the court to determine the fairness of the settlement or compromise.

If the action involves a personal injury claim, additional requirements apply. The motion seeking approval of a proposed settlement or compromise must disclose [*ED Cal Civ LR 202(b)(2)*]:

- The nature and extent of the injury with sufficient particularity to inform the court whether the injury is temporary or permanent; and

- If reports of physicians or other similar experts have been prepared, copies of those reports.

The court may also require the filing of experts' reports, even when none have previously been prepared. The court may order the parties to secure additional experts' reports, if that is appropriate under the circumstances. Reports protected by an evidentiary privilege may be submitted in a sealed condition to be reviewed by the court in camera, with notice of submission to all parties [*ED Cal Civ LR 202(b)(2)*].

4.39[3] Disclosure of Attorney's Interest Required. When the minor or incompetent is represented by an attorney, an action may not be settled or compromised until the attorney discloses [*ED Cal Civ LR 202(c)*]:

- By whom he or she was formally employed;

- The terms under which he or she was employed;

- Whether the attorney became involved in the application at the instance of the party against whom the causes of action are asserted, directly or indirectly;

- Whether the attorney has any relationship to an opposing party; and

- Whether the attorney has received or expects to receive any compensation and, if so, from whom, and the amount.

4.39[4] Court Holds Full Hearing on Proposed Compromise. In the Eastern District, a hearing on a proposed compromise or settlement of claim involving a minor or incompetent is never excused and is never pro forma. The following persons must be present at the hearing unless the court excuses their presence for good cause shown [*ED Cal Civ LR 202(d)*]:

- The representative of the minor or incompetent; and

- The minor or incompetent himself or herself.

In addition to the material submitted with the motion, the Court may require the testimony of any appropriate expert, as well as the submission of other evidence relating to the application [*ED Cal Civ LR 202(d)*].

4.39[5] Disbursement of Monies or Property Made According to State Law. Whenever money or property is recovered on behalf of a minor or incompetent, the money or property will be disbursed [*ED Cal Civ LR 202(e)*]:

- To the representative of the minor or incompetent, pursuant to state law on a showing that the representative is, in fact, the duly qualified representative under state law; or

- In another manner permitted by state law;

- Pursuant to some other order that the court deems proper for the protection of the minor or incompetent person.

Warning:

The California Probate Code provisions for disbursement of funds have been amended to replace the term "incompetent person" with "person with a disability." A "person with a disability" includes a person for whom a conservator may be appointed, a person with a developmental disability, and persons meeting specified federal definitions of disability [*Prob Code § 3603* ("person with a disability" defined); *see Prob Code § 3600 et seq*.].

Applications for orders authorizing interim disbursements will be heard by the appropriate state court judge or by the assigned magistrate judge [*ED Cal Civ LR 202(f)*; *see ED Cal Mag LR 302(c)(14)*]. If a state court judge makes an order concerning interim disbursements, the party seeking the disbursement must file a copy of the order with the clerk, with an additional copy to the assigned magistrate judge. The magistrate judge will review the state court order in the same manner that a district judge or magistrate judge would review a state court order approving a settlement or compromise [*ED Cal Civ LR 202(f)*; *see ED Cal Civ LR 202(b)(1)* (review of state court order approving settlement or compromise)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesCapacity of PartiesTrustees

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4.40 LOCAL PRACTICE: SD Cal--Actions Involving Minors or Incompetents.

4.40[1] Court Order Required for Settlement or Compromise. In the Southern District, no action by or on behalf of a minor or incompetent may be settled, compromised, voluntarily discontinued, dismissed, or terminated without a court order or judgment. All settlements and compromises must be reviewed by a magistrate judge before any order of approval will issue. The parties may, with district judge approval, consent to magistrate judge jurisdiction under *28 USC § 636(c)* for entry of an order approving the entire settlement or compromise [*SD Cal Civ LR 17.1(a)*].

4.40[2] Disbursement of Monies or Property Made According to State Law.

4.40[2][a] California Law Applicable for California Resident. Money or property recovered by a minor or incompetent who is a California resident is not paid directly to the minor or incompetent. The money or property will be paid and disbursed in accordance with the requirements of California law on the subject [*SD Cal Civ LR 17.1(b.1)*]. In essence, this means that it will be paid only to a duly appointed guardian or conservator of the estate of the minor or incompetent or, if there is no guardian or conservator, deposited with the county treasurer, or placed in a special needs trust or in some other form of blocked account [*see generally Prob Code § 3600 et seq*.].

Distinguish:

If the minor or incompetent is not a California resident, disbursement will be made under the restrictions of the relevant state law that are similar to those of California law [*SD Cal Civ LR 17.1(b.1)*].

Warning:

The California Probate Code provisions for disbursement of funds have been amended to replace the term "incompetent person" with "person with a disability." A "person with a disability" includes a person for whom a conservator may be appointed, a person with a developmental disability, and persons meeting specified federal definitions of disability [*Prob Code § 3603* ("person with a disability" defined); *see Prob Code § 3600 et seq*.].

4.40[2][b] Certified Copy of Guardianship Letters Must Be Filed With Clerk. Disbursements to the guardian may not be made until a certified copy of guardianship letters and a state court certificate are filed with the clerk. The

certificate must verify that the guardian has filed a surety bond in an amount to be determined by the court [*SD Cal Civ LR 17.1(b.2)*].

4.40[2][c] Ex Parte Petition for Review and Approval Must Be Submitted. Before the court approves any settlement or judgment that calls for money or property to be disbursed to a trust for a minor or an incompetent, the party requesting approval of a settlement or disbursement of money or property to the trust must submit a copy of the trust documents to a magistrate judge on an ex parte petition for review and approval. The ex parte petition for approval of the terms of the trust should [*SD Cal Civ LR 17.1(b.4.a)*]:

- Identify the petitioner;
- Describe the terms and total amount of the settlement and the amount to go into the trust;
- Explain the circumstances giving rise to the settlement or judgment, and a general description of the plaintiff's injuries and needs;
- Suggest the amount of bond;
- Make the allegations required by California law if the trust is a "special needs trust" under California law [*see Prob Code § 3604(b)*]; and
- Set out any other information that may be required for the court's approval.

4.40[2][d] Approval of Settlement by Magistrate Judge. If the minor or incompetent is a resident of some other state, the magistrate judge may require approval of the form of the documents by an appropriate state judge in the jurisdiction where the minor or incompetent resides. The parties may also consent to magistrate judge jurisdiction to approve the entire settlement under *28 USC § 636(c)*. When the parties consent to magistrate judge jurisdiction to approve the entire settlement, the approval of the trust documents and the settlement may be consolidated in one properly noticed hearing [*SD Cal Civ LR 17.1(b.3)*].

4.40[2][e] Submission of Proposed Order. Prior to approval of trust terms, the attorney for the petitioner must submit a proposed order that complies with all requirements of the Local Rules of the Southern District and California law [*i.e., Prob Code § 3600 et seq.*]. The proposed order must include [*SD Cal Civ LR 17.1(b.4.b.i), (b.4.b.ii)*]:

- An order for the appropriate bond; and
- An order that the first accounting, if required, be filed within one year of the establishment of the trust with the San Diego Superior Court. If the recipient of the money or property is not a California resident, the accounting shall be made to the appropriate court in the jurisdiction where the minor or incompetent resides.

If the proposed order is for the approval of the terms of a "special needs trust," the proposed order must also include [*SD Cal Civ LR 17.1(b.4.b.iii)*]:

- A statement that the petitioner will provide proof that all liens have been satisfied prior to the establishment of the trust by the court;
- A statement that the "court makes no specific finding or order with respect to whether the special needs trust for the benefit of _____ [*petitioner's name*] satisfies or complies with applicable federal laws or regulations";

- All of the terms of the proposed trust, which must be fully set out in the text of the order itself and not merely as an attachment; and

- A direction to the parties to proceed with settlement approval hearings or the entry of judgment as appropriate.

4.40[2][f] Rules for Distribution, Withdrawals, and Disbursements. Even if the trust document is approved, distribution to the trust is still contingent on filing a copy of the executed trust document, as approved by the court, along with the trustee's certification that any court-ordered surety bond is in force [*SD Cal Civ LR 17.1(b.4.c)*].

After distribution of property or money to the approved trust, any withdrawals or disbursements from the trust must be made in accordance with the procedures and applicable laws of the relevant state [*SD Cal Civ LR 17.1(b.4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesCapacity of PartiesTrustees

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V. APPLYING COMPULSORY JOINDER RULE

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4.41 CHECKLIST: Applying Compulsory Joinder Rule.

☐ Determine whether absent person or entity is required party by applying either of following two tests:

○ Does the court have the power or ability to grant complete relief among those already parties, in the absence of the person or entity under consideration?

○ Does the absent person or entity claim an interest relating to the subject of the action and, if so:

☐ Is the absent person or entity so situated that the disposition of the action in his, her, or its absence may, a practical matter, impair or impede the person's or entity's ability to protect that interest? or

☐ Is the absent person or entity so situated that the disposition of the action in his, her, or its absence may leave any of the existing parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest?

Authority:
Fed R Civ P 19(a)(1)(A), (B)

Discussion:
See *§ 4.43*

☐ For each claim asserted in pleadings:

- ○ State name of each required person or entity who has not been joined as a party; and
- ○ Allege reasons why required person or entity has not been joined.

Authority:
Fed R Civ P 19(c)

Discussion:
See *§ 4.44*

☐ Analyze whether court may compel joinder of required party by considering:

- ○ Whether absent person or entity is subject to service of process;
- ○ Whether absent person or entity may be subjected to the personal jurisdiction of the court in which the action is pending;
- ○ Whether joinder of absent person will destroy basis for court's subject matter jurisdiction by, for example, destroying complete diversity of citizenship; and
- ○ Whether absent person or entity will have valid objection to venue of suit that will lead to dismissal, even if joined.

Authority:
Fed R Civ P 19(a)

Discussion:
See *§ 4.46[1]*

☐ If absent person or entity is required party and if absent person or entity may be joined, party should analyze whether to make motion to amend pleadings, to add parties, or to compel joinder, considering:

- ○ Judgment will not bind absent persons or entities.
- ○ Whether judgment that does not bind absent persons or entities will be prejudicial or force future litigation.
- ○ Whether judgment that does not bind absent persons or parties will actually lead to risk of inconsistent obligations imposed in future litigations.
- ○ Whether separate litigation involving absent persons or entities will actually be preferable and

render present suit quicker and less expensive.

○ Whether court will raise question of absent persons or entities even if parties fail to make motion to effect joinder.

Authority:
Fed R Civ P 19(a), (b)

Discussion:
See *§§ 4.45, 4.51*

☐ If absent person or entity is required party, but may not be joined, consider whether court may proceed with action, considering extent to which:

○ Judgment rendered without joinder of absent person or entity will prejudice absent person or entity.

○ Judgment rendered without joinder of absent person or entity will prejudice those already parties.

○ Prejudice to absent person or entity, or to those already parties, might be lessened or avoided by:

☐ Protective provisions in the judgment;

☐ Shaping of relief; or

☐ Other protective court orders.

○ Judgment rendered without joinder of absent person or entity will be adequate.

○ Plaintiff will have adequate remedy if present action is dismissed.

Authority:
Fed R Civ P 19(b)

Discussion:
See *§ 4.46[2]*

☐ Analyze whether to make motion to dismiss for failure to join indispensable party by marshaling arguments against possibility that court may proceed with case without joinder of absent persons or entities.

Authority:
Fed R Civ P 19(b)

Discussion:
See *§ 4.46[2]*

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable Parties

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Unit 2 First Steps
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4.42 Objective and Strategy: Compulsory Joinder Limits Plaintiff's Ability to Shape Litigation.

4.42[1] Absent Persons With Interest in Subject of Litigation Must Be Protected. The compulsory joinder rule, Rule 19, is designed to assure that all persons with an interest in the subject matter of an action are joined as parties, at least to the extent needed to protect the interests of persons or entities that, for one reason or another, have not been initially joined in the action [*see Fed R Civ P 19(a)*; *see also Carroll v. Nakatani (9th Cir 2003) 342 F3d 934, 945*].

4.42[2] Court Should Assure That Judgment Provides Complete, Effective Relief to Parties. In addition to protecting the interests of persons or entities absent from the action, the compulsory joinder rule, Rule 19, assures that any judgment rendered in the action provides complete and effective relief to the parties. In this context, complete and effective relief means a judgment that prevents multiple and repetitive lawsuits [*see Fed R Civ P 19*, Committee Note of 1966; *see, e.g., Control Components, Inc. v. Atlantic Richfield Co. (CD Cal 1977) 439 F Supp 654, 656*].

4.42[3] Compulsory Joinder Rule Limits Power of Plaintiff to Determine Parties to Lawsuit. The compulsory joinder rule limits the power of plaintiffs to determine who will and will not be parties in lawsuits they institute. It does so in order to serve: (1) the interests of the present defendants; (2) the interests of potential but absent plaintiffs and defendants; and (3) the social interest in the orderly, expeditious administration of justice [*see U-Haul Int'l, Inc. v. Jartran, Inc. (9th Cir 1986) 793 F2d 1034, 1039*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory Joinder

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4.43 Certain Unjoined Persons or Entities Are Considered "Required Parties."

4.43[1] Person Whose Absence Will Prevent Complete Relief to Existing Parties Is Required Party. The court will order joinder of a person or entity when, in the person's entity's absence, the court may not grant complete relief to those already parties to the action [*Fed R Civ P 19(a)(1)(A)*]. The "complete relief" clause of Rule 19(a) addresses the court's and the parties' interest in comprehensive resolution of a controversy and the desire to avoid multiple lawsuits regarding the same claim [*see Altmann v. Republic of Austria (CD Cal 2001) 142 F Supp2d 1187, 1210 , aff'd, 317 F3d 954 (9th Cir 2002) , aff'd on other grounds, 541 US 677, 124 S Ct 2240, 159 L Ed2d 1 (2004)* ; *Northrop Corp. v. McDonnell Douglas Corp. (9th Cir 1983) 705 F2d 1030, 1043 , cert. denied, 464 US 849 (1983)*].

The plaintiff's inability to state a direct cause of action against the party sought to be joined does not prevent joinder when joinder is necessary to effect complete relief between the parties [*EEOC v. Peabody W. Coal Co. (9th Cir 2005) 400 F3d 774, 781*].

Distinguish:

Complete relief does not mean all relief that the court *might* grant if all permissible persons and entities were to be joined. In this context, complete relief addresses only the relief that the court may grant "between the persons already parties, not as between a party and the absent person whose joinder is sought" [*see Altmann v. Republic of Austria (CD Cal 2001) 142 F Supp2d 1187, 1210 , aff'd, 317 F3d 954 (9th Cir 2002) , aff'd on other grounds, 541 US 677, 124 S Ct 2240, 159 L Ed2d 1 (2004)*]. The effect a decision may have on the absent party is not material in determining whether the court may grant relief that is "complete" [*see* Sanguinetti v. Viewlogic Sys. (ND Cal 1996) 1996 US Dist LEXIS 1219, at *8]. In this context, the court is concerned only that, as among those already parties, the relief that it grants is "complete," or "meaningful," and not "hollow" [*see Fed R Civ P 19*, Committee Note of 1966; *Disabled Rights Action Comm. v. Las Vegas Events, Inc. (9th Cir 2004) 375 F3d 861, 879-880*].

4.43[2] Absent Person Who Has Interest in Subject of Action That May Be Prejudiced by Judgment Is Required Party.

4.43[2][a] Absent Person Must Have Interest in Litigation. A person or entity is a required party if he, she, or it

claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may, as a practical matter, impair or impede his, her, or its ability to protect that interest [*Fed R Civ P 19(a)(1)(B)(i)*; *see, e.g., Cachil Dehe Band of Wintun Indians v. California (9th Cir 2008) 547 F3d 962, 976* (Indian tribe, party to compact with California, could proceed to litigate size of total license pool without joining other compacting tribes, because those tribes had no protectable interest in size of license pool); *Dalrada Fin. Corp. v. All Staffing, Inc. (SD Cal 2008) 2008 US Dist LEXIS 54297, at *9-*11* (fact that that defendants may have mistakenly sent W-2 information sought by plaintiff to third parties did not support mandatory joinder of those parties, because their possession of this potentially relevant evidence had no bearing on obligations defendants allegedly owed to plaintiff)]. The interest must be more than a financial stake and more than speculation about a future event [*Makah Indian Tribe v. Verity (9th Cir 1990) 910 F2d 555, 558*].

Example--Action Concerning Validity of Contract:

In an action concerning the validity of a contract, all of the parties to the contract will have rights that may be affected by the judgment in the case. All of the parties are, therefore, required parties [*see Wilbur v. Locke (9th Cir 2005) 423 F3d 1101, 1114* (all parties to contract are necessary in litigation seeking to "decimate" that contract); *Northrop Corp. v. McDonnell Douglas Corp. (9th Cir 1983) 705 F2d 1030, 1044* (strangers to contract are rarely necessary parties)].

Distinguish--Action With Possible Future Effect on Contract:

All parties to a contract are not required parties merely because the action may have some future effect on performance by a party [*see Disabled Rights Action Comm. v. Las Vegas Events, Inc. (9th Cir 2004) 375 F3d 861, 881-882* (arena owner not necessary party in action seeking to enjoin production companies from staging rodeo at arena without complying with ADA)].

4.43[2][b] Absent Person May Waive Interest. Because required party status is contingent on an initial requirement that the absent party claim a legally protected interest relating to the subject matter of the action [*United States v. Bowen (9th Cir 1999) 172 F3d 682, 689* ; *Northrop Corp. v. McDonnell Douglas Corp. (9th Cir 1983) 705 F2d 1030, 1043*], facts may prove that an absent person's theoretical interest does not, in fact, exist.

A party who is aware of an action and who chooses not to join in it, need not be considered a required party because the absent person's actions show that he, she, or it does not claim an interest in the litigation [*see Blumberg v. Gates (CD Cal 2001) 204 FRD 453, 455-456* ; *see, e.g., Altmann v. Republic of Austria (CD Cal 2001) 142 F Supp2d 1187, 1211 , aff'd, 317 F3d 954 (9th Cir 2002) , aff'd on other grounds, 541 US 677, 124 S Ct 2240, 159 L Ed2d 1 (2004)*].

4.43[2][c] Absent Person's Interest Must Be Legally Protectable, but Need Not Be Property Interest. The rule does not require that the absent person's interest in the subject matter of the action amount to a property right in the due process sense. The rule requires only an "interest" that will be impaired by the litigation "as a practical matter" [*see Fed R Civ P 19(a)(1)(B)(i)*; *see American Greyhound Racing, Inc. v. Hull (9th Cir 2002) 305 F3d 1015, 1023-1024* ("[i]t is the party's *claim* of a protectable interest that makes its presence necessary") (emphasis in original)].

4.43[2][d] Absent Person's Interest May Be Adequately Represented by Existing Party. In determining whether a party's ability to protect its interest will be impaired or impeded, a court may conclude that the interests of the absent parties will be adequately protected or represented by an existing party [*see, e.g., Washington v. Daley (9th Cir 1999) 173 F3d 1158, 1167* ; *Southwest Ctr. for Biological Diversity v. Babbitt (9th Cir 1998) 150 F3d 1152, 1153-1154*].

Courts will consider the following factors [*see Shermoen v. United States (9th Cir 1992) 982 F2d 1312, 1318 , cert. denied, 509 US 903 (1993)*]:

- Whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments;

- Whether the existing party is capable of and willing to make such arguments; and

- Whether the absent party would offer any necessary element to the proceedings that the existing party would neglect to offer.

4.43[3] Absent Person Who Has Interest in Subject Matter of Action and Might Bring Subsequent Action Resulting in Multiple or Inconsistent Obligations for Existing Party Is Required Party.

4.43[3][a] Absent Person's Interest in Litigation May Threaten Inconsistent Obligations for Existing Party. A person or entity is a required party if he, she, or it claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may leave any current party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest [*Fed R Civ P 19(a)(1)(B)(ii)*].

Example:

The risk that a nonjoined person's absence might create inconsistent obligations for existing parties arises in cases involving the allocation of a limited fund in which absent parties may claim an interest [*see, e.g., United States ex rel. Morongo Band of Mission Indians v. Rose (9th Cir 1994) 34 F3d 901, 908* ; *Makah Indian Tribe v. Verity (9th Cir 1990) 910 F2d 555, 559*].

4.43[3][b] Only Possibility of Inconsistent Obligations, Not Inconsistent Adjudications, Establishes Required Party Status. In this context, "incon-sistent obligations" occur only when a party is unable to comply with one court's order without breaching another court's order concerning the same incident. In contrast, the fact that a party may be subject to "inconsistent adjudications" does *not* establish that the absent person is a necessary party. A party may be subject to a series of suits arising out the same occurrence or transaction. The fact that the defendant may obtain different results in different cases does not establish that absent persons are required parties. Only a substantial possibility of inconsistent obligations, not inconsistent adjudications, shows that absent persons are required parties [*see, e.g., Blumberg v. Gates (CD Cal 2001) 204 FRD 453, 455* ; *see also Altmann v. Republic of Austria (CD Cal 2001) 142 F Supp2d 1187, 1212-1213* , *aff'd, 317 F3d 954 (9th Cir 2002)* , *aff'd on other grounds, 541 US 677, 124 S Ct 2240, 159 L Ed2d 1 (2004)*].

Example:

An absent tortfeasor who is jointly and severally liable to the plaintiff is not considered required in an action between plaintiff and another tortfeasor [*see, e.g., Temple v. Synthes Corp. (1990) 498 US 5, 7, 111 S Ct 315, 112 L Ed2d 263*].

4.43[4] Whenever Any of the Three Tests Are Satisfied, Absent Person Is Required Party. As noted above, there are three definitions of a "required party" [*Fed R Civ P 19(a)*]:

- A person in whose absence complete relief cannot be accorded among those already parties [*see 4.43[1]*]; or

- A person who claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may:

  - As a practical matter impair or impede the person's ability to protect that interest [*see 4.43[2]*]; or

  - Leave any of the persons already parties subject to a substantial risk of incurring

double, multiple, or otherwise inconsistent obligations by reason of the claimed interest [*see 4.43[3]*].

Rule 19 phrases these three definitions of a "required party" in the disjunctive [*see Fed R Civ P 19(a)*]. Thus an absent person is a required party if he, she, or it meets any one of the three definitions [*see, e.g., Yellowstone County v. Pease (9th Cir 1996) 96 F3d 1169, 1172 , cert. denied, 520 US 1209 (1997)*].

The inquiry under Rule 19 is "a practical one and fact specific" [*Washington v. Daley (9th Cir 1999) 173 F3d 1158, 1165*]. Thus, the question of whether an absent person is a required party under Rule 19 must be made in light of the particular circumstances of each case [*Northern Alaska Envtl. Ctr. v. Hodel (9th Cir 1986) 803 F2d 466, 468*].

Legal Topics:

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4.44 Claimant's Pleading Must Address All Parties Required to Resolve Claim.

Any pleading that asserts a claim for relief must [*Fed R Civ P 19(c)*]:

- State the names, if known to the pleader, of any persons or entities not joined as parties who meet any one of the definitions of a required party; and

- State the reasons why the plaintiff failed to join each required party who has not been joined.

Legal Topics:

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4.45 Court Will Order Joinder of Any Required Party.

4.45[1] Joinder Required When Feasible. If an absent person or entity meets one of the definitions of a "required party," and if joinder is feasible, Rule 19 requires the court to order the absent person or entity joined as a party [*Fed R Civ P 19(a)(2)*; Sanguinetti v. Viewlogic Sys. (ND Cal 1996) 1996 US Dist LEXIS 1219, at *8]. Joinder is required whenever [*Fed R Civ P 19(a)(1)*]:

- The absent person is subject to service of process; and
- Joinder of the absent person will not deprive the court of jurisdiction over the subject matter of the action.

4.45[2] Required Party Plaintiff Who Refuses to Join May Be Made Defendant or Involuntary Plaintiff. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant or, in a proper case, an involuntary plaintiff [*Fed R Civ P 19(a)(2)*].

Cross Reference:

Discussion of methods for raising failure to join necessary or indispensable party, see *§ 4.49*.

4.45[3] If Joined Party Properly Objects to Venue, That Party Must Be Dismissed. If the absent person or entity joined as a required party objects to venue, and if joinder of that required party would render the venue of the action improper, the court must then dismiss the otherwise required party [*Fed R Civ P 19(a)(3) see Fed R Civ P 12(b)(3)* (objecting to venue in responsive pleading or motion)].

Drawback:

If the action proceeds in the absence of the dismissed party, the dismissed party will not be bound by results of the suit [*see Martin v. Wilks (1989) 490 US 755, 761-762, 109 S Ct 2180, 104 L Ed2d 835* ; *see also 4.45*].

Cross Reference:

Objecting to venue, Ch. 2, Determining Forum (Jurisdiction and Venue), see *§ 2.58*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.46 Determining Whether Required Party Who Cannot Be Joined Is Indispensable.

4.46[1] If Joinder of Required Party Is Not Feasible, Court Must Determine If Action May Proceed or Must Be Dismissed. Even if an absent person or entity meets one of the definitions of a required party, it may not be feasible to join that absent person or entity as a party. Rule 19(a) lists three reasons why joinder may not be feasible [*see Fed R Civ P 19(a)*]:

- Because the absent person or entity is beyond the range of process, so that the he, she, or it may not be served with service of process;

- Because the court's subject matter jurisdiction is founded on diversity of citizenship, and the absent person or entity is a citizen of the same state as an opposing party, so that joinder would destroy complete diversity of citizenship between all plaintiffs and all defendants;

- Because the absent person or entity has a legitimate objection to venue so that the court would, under the terms of Rule 19(a), be required to dismiss the required party.

Other reasons may preclude joinder of a required party [*see, e.g., Republic of the Philippines v. Pimentel (2008) 553 US 851, 128 S Ct 2180, 171 L Ed2d 131, 144-145* (foreign sovereign entities were entitled to immunity); *Wilbur v. Locke (9th Cir 2005) 423 F3d 1101, 1114* (Indian tribe that was party to contract had sovereign immunity)].

Example:

When sovereign immunity is asserted, and the claims of the sovereign are not frivolous, the court must order dismissal of the action when there is a potential for injury to the interests of the absent sovereign. In a case in which a person asserts frivolous claims, a court may have leeway under both *Fed R Civ P 19(a)(1)*, defining required parties, and *Fed R Civ P 19(b)*, addressing when a suit may go forward nonetheless, to disregard the frivolous claim [*Republic of the Philippines v. Pimentel (2008) 553 US 851, 128 S Ct 2180, 171 L Ed2d 131, 144-146* (action should have been dismissed)].

Whenever it is not feasible to join an absent person or entity that would otherwise be considered a required party, the

court must determine whether, "in equity and good conscience," the action should proceed among the parties before it, or whether it should be dismissed, the absent person being thus regarded as indispensable [*Fed R Civ P 19(b)*; *see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp. (9th Cir 2006) 464 F3d 885, 890-891].

4.46[2] Court Considers Several Factors in Determining Whether Action May Proceed in Absence of Required Party.

4.46[2][a] Determination Is Fact Sensitive. The determination as to whether the action must proceed or must be dismissed because the absentee is "indispensable" is fact-sensitive [*see Republic of the Philippines v. Pimentel (2008) 553 US 851, 128 S Ct 2180, 171 L Ed2d 131, 149-150* ; *Kescoli v. Babbitt (9th Cir 1996) 101 F3d 1304, 1309* ; *Makah Indian Tribe v. Verity (9th Cir 1990) 910 F2d 555, 558*].

The four factors discussed below [*see 4.46[2][b] -[e]*] are the factors specifically enumerated in Rule 19(b) [*see Fed R Civ P 19(b)*]. These factors are not exclusive. Courts may consider all the circumstances surrounding the litigation [*Fed R Civ P 19*, Committee Note of 1966; *see Virginia Surety Co. v. Northrop Grumman Corp. (9th Cir 1998) 144 F3d 1243, 1247*].

4.46[2][b] Extent of Prejudice Is a Factor. The first factor that the court will consider is the extent to which any judgment rendered in the person's absence might be prejudicial to the absent person or to those already parties [*Fed R Civ P 19(b)(1)*]. The prejudice that the court considers must be tangible. A mere theoretical possibility of prejudice will not result in a conclusion that the absent person is so "indispensable" that the action must be dismissed [*see Provident Tradesmens Bank & Trust Co. v. Patterson (1968) 390 US 102, 124-125, 88 S Ct 733, 19 L Ed2d 936*]. The prejudice factor largely duplicates the considerations that made the absent person a necessary party (i.e., a protectable interest in the subject matter of the action that will be impaired or impeded by the party's absence or that may subject existing party to inconsistent obligations) [*see American Greyhound Racing, Inc. v. Hull (9th Cir 2002) 305 F3d 1015, 1024-1025*].

4.46[2][c] Protective Provisions in Judgment Are a Factor. The second factor that the court will consider is the extent to which the court might avoid prejudice to the absentee or the existing parties by protective provisions in the judgment, by the shaping of relief, or other measures [*Fed R Civ P 19(b)(2)*; *see, e.g., Northrop Corp. v. McDonnell Douglas Corp. (9th Cir 1983) 705 F2d 1030, 1046*].

Example--Limiting Relief to Money Damages:

Rather than rescind a contract in which an absentee may have an interest, the court may limit the relief in the case to monetary damages [*see, e.g., Campbell v. Triangle Corp. (ED Pa 1972) 56 FRD 480, 482*].

Example--Requiring Posting of Security:

If a fund is in dispute, the court may order the parties to retain or post security in an amount sufficient to cover the claim of the absentee [*see Provident Tradesmens Bank & Trust Co. v. Patterson (1968) 390 US 102, 115 , 88 S Ct 733, 19 L Ed2d 936*].

4.46[2][d] Ability to Provide Adequate and Meaningful Relief Is a Factor. The third factor that the court will consider is whether a judgment rendered in the person's absence will be adequate [*Fed R Civ P 19(b)(3)*]. This factor also overlaps with the factors considered in determining whether the absentee is a required party. The inability of the court to provide complete relief among current parties is one of the defining characteristics of a required party [*Fed R Civ P 19(a)*].

This factor is also, in effect, the other side of the coin of the second factor [*see 4.46[2][c]*]. If, in order to avoid prejudice, the court must so shape and limit its judgment it may not provide the existing parties any meaningful relief, and the judgment may not resolve any significant aspects of the controversy. Thus, this factor addresses the public stake in settling disputes as a whole, rather than piecemeal, whenever possible [*see Republic of the Philippines v. Pimentel*

(2008) 553 US 851, 128 S Ct 2180, 171 L Ed2d 131, 148-149 ; *Provident Tradesmens Bank & Trust Co. v. Patterson (1968) 390 US 102, 111, 88 S Ct 733, 19 L Ed2d 936*].

4.46[2][e] Consequence to Plaintiff of Dismissal Is a Factor. The fourth factor that the court must consider is whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder [*Fed R Civ P 19(b)(4)*].

Example:

If a state court can join all of the required parties, there is no reason to try to shape or limit relief in a federal court proceeding. The federal court action should be dismissed in favor of an action in a more suitable forum [*see, e.g., Aguilar v. Los Angeles County (9th Cir 1985) 751 F2d 1089, 1094* , *cert. denied*, *471 US 1125 (1985)*].

An alternative forum may not exist if the plaintiff's refiling in the other forum will be fruitless because the action will be barred by the statute of limitations. In this respect, state law may provide a savings or tolling clause that recognizes the prior federal court filing, and thus preserves the action from dismissal on limitations grounds [*see Jenkins v. Reneau (6th Cir 1983) 697 F2d 160, 163*]. In most cases, if there is no alternative forum for the plaintiff, this will weigh heavily against dismissal. However, no single factor is dispositive. An action may be dismissed for failure to join an indispensable party even if the plaintiff lacks any other forum in which to bring the action [*see, e.g., Presidential Comm'n on Good Gov't v. United States Dist. Court (9th Cir 2002) 309 F3d 1143, 1152-1153*].

Legal Topics:

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4.47 Application of Compulsory Joinder Rules to Indian Tribes.

4.47[1] Indian Tribes' Sovereign Immunity Prevents Joinder. As a general rule, Indian tribes enjoy sovereign immunity from private lawsuits [*see Santa Clara Pueblo v. Martinez (1978) 436 US 49, 58, 98 S Ct 1670, 56 L Ed2d 106* ; *EEOC v. Karuk Tribe Hous. Auth. (9th Cir 2001) 260 F3d 1071, 1075*]. Thus, even when Indian tribes are required parties, it is not feasible to join them unless they waive their immunity. Any waiver of sovereign immunity must be unequivocal, and may not be implied [*Kescoli v. Babbitt (9th Cir 1996) 101 F3d 1304, 1310* (tribe's participation in administrative proceeding does not waive tribal immunity in action filed by another party seeking review of agency's decision)].

4.47[2] In Ninth Circuit, Tribes' Sovereign Immunity Does Not Extend to Suits by United States. In the Ninth Circuit, a tribe's sovereign immunity does not extend to suits brought by the federal government [*EEOC v. Peabody W. Coal Co. (9th Cir 2005) 400 F3d 774, 781* ; *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist. (9th Cir 2002) 276 F3d 1150, 1162-1163 , cert. denied, 537 US 820 (2002)*]. Therefore, in a suit brought by the United States, if an Indian tribe is an required party, the court must order joinder as it would for any other required party whose joinder is feasible [*see Fed R Civ P 19(a)*].

4.47[3] When Indian Tribe Is Required Party, Dismissal Does Not Automatically Result From Inability to Join Tribe As Party. At least in the Ninth Circuit, when an Indian tribe is a required party, the tribe's sovereign immunity may foreclose the possibility of joinder, but not any possibility that an action could proceed in the absence of the tribe. In the Ninth Circuit, the court must engage in the balancing test, weighing the same sorts of factors as it would for any other required party in determining whether to proceed with the action with the current parties or to dismiss for lack of an indispensable party [*see, e.g., American Greyhound Racing, Inc. v. Hull (9th Cir 2002) 305 F3d 1015, 1025* ; *Stock West Corp. v. Lujan (9th Cir 1993) 982 F2d 1389, 1398* ; *Taylor v. BIA (SD Cal 2004) 325 F Supp2d 1117, 1121*].

With regard to the fourth factor (whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder) [*see 4.46[2][e]*], however, the Ninth Circuit has regularly held that the tribal interest in immunity outweighs the lack of an alternative remedy or forum for the plaintiffs [*see Wilbur v. Locke (9th Cir 2005) 423 F3d 1101, 1115* ; *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist. (9th Cir 2002) 276 F3d 1150,*

1162 , cert. denied, 537 US 820 (2002) ; *Taylor v. BIA (SD Cal 2004) 325 F Supp2d 1117, 1122*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.48 Exceptions to and Limits on Compulsory Joinder Rule.

4.48[1] Exception for Actions Enforcing Public Rights.

4.48[1][a] Little Need for Compulsory Joinder Rules in Public Rights Cases. The need to join a required party or face possible dismissal if joinder is not possible is limited in actions seeking to protect or enforce "public rights" [*see American Greyhound Racing, Inc. v. Hull (9th Cir 2002) 305 F3d 1015, 1025*]. In cases in which private citizens challenge governmental conduct in order to protect or enforce public rights, the representative status of the parties means that there is little scope or need for the traditional rules governing the compulsory joinder of parties [*see, e.g., National Licorice Co. v. NLRB (1940) 309 US 350, 363, 60 S Ct 569, 84 L Ed 799* ; *Kettle Range Conservation Group v. United States (9th Cir 1998) 150 F3d 1083, 1087*].

4.48[1][b] Exception Limited to Cases That Transcend Private Interests of Litigants. To qualify for the "public rights" exception, the litigation must transcend the private interests of the litigants and seek to vindicate a public right [*Kescoli v. Babbitt (9th Cir 1996) 101 F3d 1304, 1311* ; *American Greyhound Racing, Inc. v. Hull (9th Cir 2002) 305 F3d 1015, 1026* (public-rights exception did not apply when litigation by racetrack owners was aimed directly at Indian tribes and their gaming, rather than affecting them incidentally)].

4.48[1][c] Exception Limited to Cases Where Absent Third Parties Are Left Free to Assert Legal Rights. The exception may apply only when absent third parties are left free to assert whatever legal rights they might have acquired [*National Licorice Co. v. NLRB (1940) 309 US 350, 366, 60 S Ct 569, 84 L Ed 799* ; *Kettle Range Conservation Group v. United States (9th Cir 1998) 150 F3d 1083, 1087*].

Example:

The public-rights exception will apply when the litigation seeks only control of governmental conduct, and does not interfere with contractual or other legal rights that absent third parties may have obtained from the government [*see, e.g., Conner v. Burford (9th Cir 1988) 848 F2d 1441, 1460* ; *accord Makah Indian Tribe v. Verity (9th Cir 1990) 910 F2d 555, 559, n6*].

The public-rights exception will never apply in a case in which a court's ruling might destroy an absentee's legal

entitlement [*see, e.g., Shermoen v. United States (9th Cir 1992) 982 F2d 1312, 1319*].

4.48[2] Compulsory Joinder Is Subject to Class Actions Rule. Rule 19, which requires joinder of all required parties, and dismissal of actions when unjoinable required parties are indispensable, is not designed for actions that are representative in nature. The point of a class action is that certain present, joined parties will represent all the members of a class of person who are similarly situated. Proceeding in the absence of joining each class member is permitted because class actions are permitted only when class membership is so numerous that individual joinder is impracticable [*see Fed R Civ P 23(a), (b)*]. Because compulsory joinder would be meaningless in class actions in which only a few parties represent the interest of an entire class, Rule 19 explicitly states that its requirements are "subject to" the provisions of the class actions rule, Rule 23 [*Fed R Civ P 19(d)*]. Thus, in a class action, a court may order compulsory joinder of parties under Rule 19 only to the extent that it does not conflict with the class action provisions [*see, e.g., Shimkus v. Gersten Cos. (9th Cir 1987) 816 F2d 1318, 1321*].

Cross Reference:

Discussion of class actions, see Ch. 20, Class Actions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedureClass ActionsVoluntary Dismissals

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4.49 Raising Failure to Join Required or Indispensable Party.

4.49[1] Absence of Required Party Should Be Pleaded As Defense. Failure to join a required party should usually be raised by motion [*see § 4.49[2]*]. However, in the absence of a motion, or in addition to a motion, a party also should plead an opponent's failure to join a required party in order to preserve that "defense" from a possible claim of waiver. It is not clear whether an opponent's failure to join a "required" party whose joinder is feasible [*see Fed R Civ P 19(a)*] constitutes a matter of "avoidance or affirmative defense" within the meaning of Rule 8(c) [*see Fed R Civ P 8(c)*]. However, Rule 12(h)(2) strongly implies that an opponent's failure to join an indispensable party [*see Fed R Civ P 19(b)*] *is* a "defense" that normally should be pleaded. Rule 12(h)(1) sets out the normal rule that defenses that may be made the subject of a Rule 12(b) motion are waived unless raised by motion or included in a responsive pleading [*see Fed R Civ P 12(h)(1)*]. Rule 12(h)(2) creates an exception to the normal waiver rule of Rule 12(h)(1), providing that a plaintiff's failure to join a required party is *not* waived by the defendant's failure to make a Rule 12(b) motion or plead it [*see Fed R Civ P 12(h)(2)*]. Therefore, this implies that the cautious practitioner should treat the absence of required or indispensable parties as a "defense," and plead it whenever it is not raised by motion, or even in addition to raising it by motion.

4.49[2] Defendant May Bring Motion to Dismiss If Indispensable Party Is Not Joined. A defendant may move to dismiss an action on the ground that the plaintiff has failed to join a party required to be joined under Rule 19 [*Fed R Civ P 12(b)(7)*].

Distinguish--Dismissal Available When "Indispensable," As Opposed to "Required," Parties Not Joined.
Rule 19 requires the joinder of "required" parties [*see Fed R Civ P 19(a)*], but dismissal is not the proper or usual remedy for the mere failure to join a required party [*see Fed R Civ P 21*]. If it is feasible to join an absent required party, the court may simply order the joinder [*see Fed R Civ P 19(a), 21*]. However, when an absent required party is considered indispensable (i.e., when it would not be equitable to proceed in his, her, or its absence) [*see Fed R Civ P 19(b)*], the nonjoinder will justify dismissal [*see Shermoen v. United States (9th Cir 1992) 982 F2d 1312, 1317-1318* ; Sanguinetti v. Viewlogic Sys. (ND Cal 1996) 1996 US Dist LEXIS 1219, at *6].

Timing:

The district court has discretion to consider the timeliness of a dismissal if it appears that the defendant is interposing its dismissal request for its own defensive purposes, rather than to protect the absent party's interests [*Fireman's Fund Ins. Co. v. National Bank of Coops. (9th Cir 1996) 103 F3d 888, 896* ; *Fed R Civ P 19*, Committee Note of 1966 ("when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person and is not seeking vicariously to protect the absent person against a prejudicial judgment ..., his undue delay in making the motion can properly be counted against him as a reason for denying the motion"); *see also Provident Tradesmens Bank & Trust Co. v. Patterson (1968) 390 US 102, 116, 88 S Ct 733, 19 L Ed2d 936* (appellate court should not "throw away a valid judgment just because it did not theoretically settle the whole controversy")].

4.49[3] Party May Bring Motion to Compel Joinder. A party may raise an opposing party's failure to join a required party in a motion for an order to compel joinder [*Fed R Civ P 19(a)* (if person who is "required" party has not been joined, "the court must order that the person be made a party")].

When joinder of the absentee is feasible, a motion to dismiss for failure to join a party may be treated like an implied motion to compel joinder [*see* Sanguinetti v. Viewlogic Sys. (ND Cal 1996) 1996 US Dist LEXIS 1219, at *7].

4.49[4] Party May Bring Motion to Add Parties. Although this procedure is used infrequently, any party may move to add parties, including required and indispensable parties [*Fed R Civ P 21* "On motion or on its own, the court may at any time, on just terms, add or drop a party")].

Cross Reference:

Adding parties, see Ch. 10, Adding, Dropping, and Substituting Parties, see *§§ 10.04 -10.09*.

4.49[5] Failure to Assert Absence of Indispensable Party by Way of Motion or in Pleadings Does Not Waive Objection. If an unjoinable required party may be considered indispensable, that is a defense to the claim. However, unlike ordinary defenses, a party does not waive this defense by the failure to plead it or assert it in a motion. The failure to join an indispensable party may be raised at any time, including at trial on the merits [*Fed R Civ P 12(h)(2)*]. The absence of an indispensable party is sufficiently important that it may be raised at any stage of the proceed-ings, even sua sponte or on appeal [*see Provident Tradesmens Bank & Trust Co. v. Patterson (1968) 390 US 102, 111, 88 S Ct 733, 19 L Ed2d 936* ; *McCowen v. Jamieson (9th Cir 1984) 724 F2d 1421, 1424*].

Strategic Point:

Although the absence of an indispensable party may be raised at any time, it is preferable to raise it in a timely fashion, preferably in a pre-answer motion under Rule 12(b) [*see § 4.49[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties

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4.50 Curing Absence of Required Party.

4.50[1] If Joinder Is Feasible, Joinder Cures Party Defect. A failure to join a required party whose joinder is feasible is not grounds for dismissal. Parties will be given an opportunity to join a required absentee [*see Fed R Civ P 21*]. The court may cure the failure to join a required party by ordering the joinder of a required party either on motion or sua sponte [*see Fed R Civ P 19(a)*, *21*].

4.50[2] Absentee May Be Joined by Devices Other Than Motion for Joinder.

4.50[2][a] Absentee May Join Voluntarily Through Intervention. The absentee who has an interest in the subject matter of the action that may be prejudiced by a judgment in the action is not at the mercy of the existing parties to the action. A party with an interest in the litigation may intervene of right if that interest may be impaired and will not be adequately protected by the existing parties [*see Fed R Civ P 24(a)*].

Cross Reference:

Intervention by required party, see Ch. 14, Intervention. Party as not compelled to intervene, see *§ 14.02[2][a]*. Intervention of right, see *§ 14.07*.

4.50[2][b] Existing Claimants May Amend Pleadings. Rather than move to join the absentee, the party asserting the claim to which the absentee is a required party may move to amend a pleading to add the party. Motions to amend are highly favored and will be granted unless the amendment is futile or causes prejudice to an opposing party [*see Fed R Civ P 15(a)(2)* ("The court should freely give leave when justice so requires")].

Cross Reference:

Amending pleadings to join required party, see Ch. 9, Amending and Supplementing Pleadings, see *§§ 9.05*, *9.14[3]*, *9.21[1]*.

4.50[2][c] Parties Defending Claim May Bring in Required Party Through Impleader. Parties defending a claim to which the absentee is a required party may be able to prevent prejudice to their interests by joining the absentee through impleader. A defendant may bring in an absentee who is or may be liable to the defendant for all or part of the

defendant's liability on the plaintiff's claim [*see Fed R Civ P 14(a)*]. A plaintiff facing a counterclaim may implead an absentee on similar grounds [*see Fed R Civ P 14(b)*].

Cross Reference:

Impleading an absent party, see Ch. 12, Third-Party Actions, see *§§ 12.02 -12.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties

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4.51 Absentees Not Bound by Judgment.

If the action proceeds in the absence of a required party, the absentee is not bound by the results of the suit. They do not suffer claim preclusion (res judicata) or issue preclusion (collateral estoppel), even if they knew of the suit and could have intervened [*see Martin v. Wilks (1989) 490 US 755, 761-762, 109 S Ct 2180, 104 L Ed2d 835* ; Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp. (9th Cir 2006) 464 F3d 885, 893-894].

Cross Reference:

Claim preclusion as binding only parties in prior action and those in privity with them, see 18 *Moore's Federal Practice, § 131.40* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

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4.52 CHECKLIST: Interpleading Conflicting Claims.

☐ Determine whether interpleader would be useful, considering:

○ Whether potential plaintiff (or defendant facing counterclaim or crossclaim) holds money or property; and

○ Whether more than one person or entity is asserting conflicting claims to money or property held by the potential plaintiff.

Authority:
28 USC § 1335; *Fed R Civ P 22*

Discussion:
See *§ 4.53*

☐ Assess the value of money or property held by the potential plaintiff (or defendant facing counterclaim or crossclaim).

☐ Confirm that claims or potential claims against money or property held by potential plaintiff are:

○ Truly adverse to property or rights held by potential plaintiff; and

○ Truly adverse to each other.

Authority:
28 USC § 1335(b); *Fed R Civ P 22*

Discussion:
See *§ 4.54*

☐ Analyze whether interpleader of claimants or potential claimants should proceed under interpleader statutes or Rule 22, noting that:

○ Statutory interpleader has a minimal amount-in-controversy requirement, while rule interpleader requires traditional jurisdictional basis such as federal question or complete diversity of citizenship and a $75,001 minimum amount in controversy.

Authority:
28 USC § 1335(a); *Fed R Civ P 22*

Discussion:
See *§§ 4.55*, *4.56*

○ Statutory interpleader requires diversity of citizenship between any two conflicting claimants, while rule interpleader requires either federal question or complete diversity of citizenship between all plaintiffs and all defendants.

Authority:
28 USC §§ 1331, *1332*, *1335(a)(1)*; *Fed R Civ P 22*

Discussion:
See *§§ 4.55*, *4.56*

○ Statutory interpleader permits nationwide service of process, while rule interpleader requires service of process under Rule 4, which is usually subject to narrow territorial limits.

Authority:
28 USC § 2361; *Fed R Civ P 4*, *22*

Discussion:
See *§§ 4.55*, *4.57*

○ Statutory interpleader has special venue rule permitting action where any claimant resides, while venue in rule interpleader is governed by normal venue rules for all civil actions.

Authority:
28 USC §§ 1391, *1397*; *Fed R Civ P 22*

Discussion:
See *§§ 4.55*, *4.58*

☐ Draft interpleader complaint and serve process on all potential claimants.

Standard Procedure Checklist:
Ch. 6, Drafting the Summons and Complaint, see *§ 6.03*

Form:
See *§ 4.61*

☐ Consider deposit of money or property in dispute with court, noting that:

- ○ Deposit with court is mandatory in statutory interpleader cases.
- ○ Deposit with court is voluntary or subject to court order in rule interpleader cases.

Authority:
28 USC § 1335(a)(2); *Fed R Civ P 22*

Discussion:
See *§ 4.59[1]*

☐ Preclude independent actions undertaken or threatened by interpleader claimants by pursuing:

- ○ TRO and preliminary injunctions prior to judgment in interpleader case.
- ○ Permanent injunction as part of relief in interpleader action.

Authority:
28 USC § 2361

Discussion:
See *§ 4.59[2]*

☐ If entire "stake" is deposited with court and liability for entire stake is conceded, consider moving for discharge, leaving adverse claimants to litigate among themselves.

Discussion:
See *§ 4.59[3]*

☐ If stakeholder has deposited entire "stake," makes no claim to any part of "stake," and seeks discharge, consider seeking discretionary award of attorney's fees as well, noting:

- ○ Award is purely discretionary.
- ○ Award is appropriate only for plaintiff who is innocent stakeholder who played no part in creating dispute.
- ○ Award is appropriate only for stakeholder who assisted parties by interpleading disputed money or

property promptly.

○ Award is limited strictly to reasonable amount needed to put property and disputing claimants properly before court.

Authority:
28 USC § 1335; *Fed R Civ P 22*

Discussion:
See *§§ 4.59[3]*, *[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders

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4.53 Options and Strategies for Interpleading Conflicting Claims.

4.53[1] Purpose of Interpleader Is to Settle Conflicting Claims to Stake. Interpleader is a procedural device used by parties who are stakeholders. Parties in possession of money or property need not litigate competing claims to the money or property piecemeal. This may subject the stakeholder to conflicting or multiple liabilities. Instead, interpleader allows the party in possession of the disputed money or property to join, or interplead, all competing claimants in a single action, forcing them to determine who and to what extent each claimant has a valid claim to the money or property [*see 28 USC § 1335*; *Fed R Civ P 22*; *see also State Farm Fire & Cas. Co. v. Tashire (1967) 386 US 523, 534-535, 87 S Ct 1199, 18 L Ed2d 270* ; *Minnesota Mut. Life Ins. Co. v. Ensley (9th Cir 1999) 174 F3d 977, 980* ; *Bianchi v. Walker (9th Cir 1998) 163 F3d 564, 569 , cert. denied, 528 US 814 (1999)*].

4.53[2] "Stakeholder" Plaintiff May Sue All Who Claim Interest in Stake. A stakeholder forces all competing claimants to resolve their claims is by suing all claimants [*see, e.g., Cripps v. Life Ins. Co. of N. Am. (9th Cir 1992) 980 F2d 1261, 1263* (multiple claimants to insurance benefits)]. This suit may take several forms [*see Texas v. Florida (1939) 306 US 398, 406-407, 59 S Ct 563, 83 L Ed 817*]:

- *"True" or "strict" interpleader*. In "true" or "strict" interpleader, the "stakeholder" is purely that. The stakeholder makes no claim against any part of the money or property in dispute. The stakeholder brings the competing claimants into court by initiating the suit, deposits the disputed money or property with the court, gets discharged of any further liability to the claimants, and lets the claimants litigate among themselves.

- *Proceedings "in the nature of interpleader*." Under modern practice, interpleader is not limited to "true" or "strict" interpleader. In proceedings "in the nature of" interpleader, the stakeholder may be one of the competing claimants. Nonetheless, the stakeholder may initiate an interpleader suit against all competing claimants and force the claims to be resolved in a single action. In actions other than "strict" or "true" interpleader, the extent to which the stakeholder may be compelled to deposit the disputed money or property with the court (or post a bond in lieu of a deposit) depends, to some extent, on whether the stakeholder initiates "statutory" or "rule" interpleader [*compare 28 USC § 1335 with Fed R Civ P 22*].

Cross References:

Distinctions between "statutory" and "rule" interpleader, see *§§ 4.55 -4.58*. Form of complaint in interpleader, see *§ 4.61*. Preparing a complaint, see Ch. 6, Drafting the Summons and Complaint.

4.53[3] Defendant Faced With Multiple Liability May Also Assert Interpleader. Usually, a person faced with conflicting claims to a stake initiates interpleader as a plaintiff. However, a defendant exposed to similar liability may obtain interpleader by way of crossclaim or counterclaim [*Fed R Civ P 22(a)(2) see, e.g., Bianchi v. Walker (9th Cir 1998) 163 F3d 564, 569*].

Cross Reference:

Answer to complaint for money with counterclaim for interpleader, see 5 *Bender's Federal Practice Forms, Form 22:20* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders

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4.54 Interpleader Requires Conflicting Claims to Specific Fund or Property.

4.54[1] Claims Must Be Against Specific Fund or Property. Interpleader lies only when there is some specific "stake." Interpleader is not, for example, a substitute for bankruptcy proceedings. A tortfeasor may not claim that it has only a fixed amount of money, deposit that amount of money with the court, and force all persons with tort claims to litigate in a single action [*see Farmers Irrigating Ditch & Reservoir Co. v. Kane (10th Cir 1988) 845 F2d 229, 232*]. Claims against the general assets of a party, rather than specific, identifiable property, are not properly resolved by means of interpleader [*Murphy v. Travelers Ins. Co. (5th Cir 1976) 534 F2d 1155, 1159*].

4.54[2] Claims Must Be Adverse to Each Other. Interpleader lies only to resolve *competing* claims against a specific fund or property, claims that may result in conflicting liabilities [*see 28 USC § 1335(a)(1)* ("adverse claimants ... may claim entitlement to money or property); *Fed R Civ P 22(a)(1)* ("claims that may expose a plaintiff to double or multiple liability" for same money or property)]. Interpleader's protection against double or multiple liability is protection only against double or multiple liability that is unjustifiable because the plaintiff has but a single obligation. If the plaintiff could legally and properly be found liable to all of the defendants, there is no basis for interpleader [*Bradley v. Kochenash (2d Cir 1995) 44 F3d 166, 168*].

Cross Reference:

Requirement that claims be adverse to stake and to each other, see 4 *Moore's Federal Practice, § 22.03[1][d]* (Matthew Bender 3d ed.).

4.54[3] So Long As Claims Are Adverse, They Need Not Arise From Common Origin or Title. A defendant in an interpleader action may not object to interpleader on the ground that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another [*28 USC § 1335(b)*; *Fed R Civ P 22(a)(1)(A)*]. Nor may a defendant in an interpleader action deny that the claims in dispute are not adverse merely because the plaintiff denies liability in whole or in part to any or all of the claimants [*Fed R Civ P 22(a)(1)(B)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.55 Stakeholder May Initiate "Statutory" or "Rule" Interpleader Proceedings.

4.55[1] Distinction Between "Statutory" and "Rule" Interpleader. A stakeholder may seek interpleader under two distinct authorizations [*see, e.g., Texas v. Florida (1939) 306 US 398, 406-407, 59 S Ct 563, 83 L Ed 817*]:

- "Statutory" interpleader [*see 28 USC §§ 1335, 1397, 2361*].
- "Rule" interpleader [*see Fed R Civ P 22*].

4.55[2] Two Types of Interpleader Supplement Rather Than Displace Each Other. Both statutory and rule interpleader exist simultaneously. Neither supersedes or displaces the other. Rule 22 explicitly states that it does not limit permissive joinder under Rule 20 and that it does not supersede or limit the remedy provided by the interpleader statutes [*Fed R Civ P 22(b)*; *see 28 USC §§ 1335, 1397, 2361* (interpleader statutes)]. Rule 22 has, in fact, been interpreted to incorporate the remedies provided under the federal interpleader statutes and other statutes [*see Nevada Eighty-Eight, Inc. v. Title Ins. Co. of Minn. (D Nev 1990) 753 F Supp 1516, 1528*].

4.55[3] Party Must Establish Right to Interpleader Under One Authorization or the Other. A party must establish the right to interpleader proceedings under either statutory or rule interpleader. Although the purpose and outcome of the two procedures is identical, there are, as explained below, significant differences in the requirements for establishing subject matter jurisdiction, service of process, and venue under each authorization for interpleader proceedings [*see, e.g., Commercial Union Ins. Co. v. United States (DC Cir 1993) 999 F2d 581, 584*]. Therefore, a party must establish subject matter jurisdiction, select venue, and serve process *consistently* under one authorization or the other.

However, a party's pleadings do not constitute an irrevocable and binding choice as to whether the action will proceed under statutory or rule interpleader. Even if the complaint asserts the wrong basis for jurisdiction, the court will retain jurisdiction of the action if the complaint can be construed to confer jurisdiction under either statutory or rule interpleader [*see Truck-a-Tune v. Re (D Conn 1993) 856 F Supp 77, 80 , aff'd on other grounds, 23 F3d 60 (2d Cir 1994)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders

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4.56 Subject Matter Jurisdiction Requirements for Interpleader.

4.56[1] Statutory Interpleader Actions.

4.56[1][a] Special Jurisdiction Standards Apply in Statutory Interpleader Actions. Subject matter jurisdiction for statutory interpleader has several unique features. The court has subject matter jurisdiction in a statutory interpleader action under criteria of minimal amount of controversy [*see 4.56[1][b]*] and minimal diversity among claimants [*see 4.56[1][c]*].

4.56[1][b] Minimal Amount in Controversy. For subject matter jurisdiction in a statutory interpleader action, the stakeholder must have custody or possession of money or property valued at $500 or more, or must have issued a note, bond, certificate, policy of insurance, or other instrument valued at $500 or more, or must have provided for the delivery or payment or the loan of money or property valued at $500 or more, or have given a written or unwritten obligation in the amount of $500 [*28 USC § 1335(a)*].

4.56[1][c] Minimal Diversity Among Claimants. For subject matter jurisdiction in a statutory interpleader action there must be diversity of citizenship. However, unlike in other civil cases founded on diversity of citizenship, complete diversity of citizenship between all plaintiffs and defendants is not required [*cf. 28 USC § 1332*]. Instead, in a statutory interpleader action, there is diversity of citizenship if there are two or more adverse *claimants* to the money or property in dispute that are citizens of different states [*28 USC § 1335(a)(1)*; *see Cripps v. Life Ins. Co. of N. Am. (9th Cir 1992) 980 F2d 1261, 1265*]. The citizenship of other claimants may be disregarded if any two claimants are diverse [*Mt. Hawley Ins. Co. v. FSLIC (CD Cal 1987) 695 F Supp 469, 472 , citing State Farm Fire & Cas. Co. v. Tashire (1967) 386 US 523, 530, 87 S Ct 1199, 18 L Ed2d 270*].

There is authority suggesting that diversity could be established absent diversity among defendants, if an interested stakeholder and one or more of the defendant/claimants were diverse [*see Mt. Hawley Ins. Co. v. FSLIC (CD Cal 1987) 695 F Supp 469, 473 , citing Treinies v. Sunshine Mining Co. (1939) 308 US 66, 70-72, 60 S Ct 44, 84 L Ed 85* (court should examine citizenship of parties between whom there was a real controversy regarding entitlement to stake)].

The adverse claimants may be those with potential, as well as actual, claims [*see Minnesota Mut. Life Ins. Co. v. Ensley (9th Cir 1999) 174 F3d 977, 980*]. However, only defendants who have been served may be counted for jurisdictional purposes. A party cannot create diversity by naming as a defendant a party who is not in fact brought into the lawsuit by service of process [*see Cripps v. Life Ins. Co. of N. Am. (9th Cir 1992) 980 F2d 1261, 1266*].

Cross Reference:

Discussion of jurisdiction for statutory interpleader, see 4 *Moore's Federal Practice, § 22.04[2][b]* (Matthew Bender 3d ed.).

4.56[2] Rule Interpleader Actions.

4.56[2][a] Normal Jurisdiction Standards Apply in Rule Interpleader Actions. Rule 22 does not independently confer subject matter jurisdic-tion [*see Fed R Civ P 82* (federal rules do not extend or limit jurisdiction of district courts)]. Therefore, for a district court to have subject matter jurisdiction of a Rule 22 interpleader action, the plaintiff must establish one of the traditional, statutory bases for jurisdiction [*see, e.g., Gelfgren v. Republic Nat'l Life Ins. Co. (9th Cir 1982) 680 F2d 79, 81* ; *Stockton Christian Life Ctr. v. United States (ED Cal 2001) 172 F Supp2d 1292, 1294*]. These may include federal question jurisdiction [*see 4.56[2][b]*], diversity of citizenship [*see 4.56[2][c]*] or a special statutory grant of jurisdiction [*see 4.56[2][d]*].

4.56[2][b] Federal Question Jurisdiction. The district courts have jurisdiction over actions over civil actions arising under the laws or Constitution of the United States [*28 USC § 1331*]. In most civil actions, the federal question must be apparent from the face of the complaint, and may not depend on a defense that might be asserted by a defendant [*see Rivet v. Regions Bank (1998) 522 US 470, 475, 118 S Ct 921, 139 L Ed2d 912*].

In an rule interpleader action, the principal dispute is between defendants. Therefore, district courts do have jurisdiction over rule interpleader actions that do not state a federal question on the face of a well pleaded complaint, provided that the stakeholder's right to relief necessarily depends on the resolution of a substantial question of federal law [*see Commercial Nat'l Bank v. Demos (7th Cir 1994) 18 F3d 485, 488 , citing Morongo Band of Mission Indians v. California State Bd. of Equalization (9th Cir 1988) 858 F2d 1376* ; *see also Chilkat Indian Village v. Johnson (9th Cir 1989) 870 F2d 1469, 1474*].

Cross References:

Jurisdiction based on federal question jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.03 -2.09*.

4.56[2][c] Diversity of Citizenship. District courts have jurisdiction over actions in which there is complete diversity of citizenship between all plaintiffs on the one hand and all defendants on the other, and the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs [*28 USC § 1332(a)*].

When the nominal "plaintiff," the stakeholder, has no interest in the proceedings and is discharged after depositing the disputed money or property with the court, the citizenship of this nominal "plaintiff" controls. Diversity jurisdiction is not lost even when the plaintiff stakeholder is discharged from the litigation [*see, e.g., Leimbach v. Allen (4th Cir 1992) 976 F2d 912, 917 , cert. denied, 507 US 935 (1993)*].

Cross References:

Jurisdiction based on diversity of citizenship, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.10 -2.25*.

Discussion of jurisdiction for rule interpleader, see 4 *Moore's Federal Practice, § 22.04[2][a]* (Matthew Bender 3d ed.).

4.56[2][d] Special Statutory Grant of Jurisdiction. Numerous federal statutes grant district courts exclusive or concurrent subject matter jurisdiction in particular types of cases. Interpleader jurisdiction may be established through application of these jurisdictional statutes. For example, district courts have jurisdiction of actions under ERISA and interpleader is a cognizable action under ERISA [*see Aetna Life Ins. Co. v. Bayona (9th Cir 2000) 223 F3d 1030, 1034*].

Cross References:

Jurisdiction based on federal statutory grant, see 4 *Moore's Federal Practice, §§ 104.40 -104.56* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders

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Unit 2 First Steps
CHAPTER 4 Determining Parties to the Action
VI. USING INTERPLEADER TO RESOLVE CONFLICTING CLAIMS

1-4 MB Practice Guide: Fed Pretrial Civ Proc in CA 4.57

4.57 Service of Process in Interpleader Actions.

4.57[1] Special Nationwide Service of Process Authorization for Statutory Interpleader Actions. In statutory interpleader actions, a district court may issue its process for service on all claimants anywhere in the United States [*28 USC § 2361*]. This is considered a substantial advantage for statutory interpleader actions [*see, e.g., Perkins State Bank v. Connolly (5th Cir 1980) 632 F2d 1306, 1310-1311*].

Service of process under this statute establishes the court's personal jurisdiction over the claimants even if they do not have minimum contacts with the forum where the action is proceeding. However, the personal jurisdiction so established is strictly limited. Nationwide service of process established personal jurisdiction *only* for claims concerning the money or property interpleaded. Thus, courts will *not* exercise personal jurisdiction over claimants on related claims that might be asserted by way of crossclaim [*see, e.g., Gaines v. Sunray Oil Co. (8th Cir 1976) 539 F2d 1136, 1142* ; *Hagan v. Central Ave. Dairy (9th Cir 1950) 180 F2d 502, 503-504* ; *Carolina Cas. Ins. Co. v. Mares (ED Va 1993) 826 F Supp 149, 154*].

4.57[2] Normal Service of Process Limits in Rule Interpleader Actions. There is no provision in Rule 22 providing for nationwide service of process [*see Fed R Civ P 22*]. Thus rule interpleader actions are limited by the standard personal jurisdiction and service of process rules [*see Fed R Civ P 4*].

Cross Reference:

Discussion of requirements for service of summons, see Ch. 7, Service of Summons.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders

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VI. USING INTERPLEADER TO RESOLVE CONFLICTING CLAIMS

1-4 MB Practice Guide: Fed Pretrial Civ Proc in CA 4.58

4.58 Venue in Interpleader Actions.

4.58[1] Special Venue Provisions for Statutory Interpleader Actions. Venue for a statutory interpleader action lies in the judicial district in which one or more of the claimants reside [*28 USC § 1397*]. In some respects, this is easier to satisfy than the normal venue rules for actions in which jurisdiction is founded on diversity of citizenship or on a federal question. The judicial district in which any single claimant resides is a proper venue. On the other hand, the statutory interpleader venue provision does not provide any alternative venues, such as venue in the district where the claim arose or where the property in dispute is located. Such alternatives *are* available under the normal venue rules [*see 28 USC § 1391(a), (b)*].

4.58[2] Normal Venue Provisions for Rule Interpleader Actions. Rule 22 does not provide special venue rules for interpleader actions [*see Fed R Civ P 22*]. It could not do so, in any event, because the federal rules may not create or alter statutory provisions governing jurisdiction or venue [*see Fed R Civ P 82*]. Therefore, because jurisdiction in most rule interpleader cases will be founded on diversity of citizenship or a federal question, venue will be proper in [*28 USC § 1391(a), (b)*]:

- A judicial district in which any defendant resides, if all defendants reside in the same state;
- A judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or where a substantial part of the property in dispute is located; or
- A judicial district in which any defendant is subject to personal jurisdiction, or in which any defendant "may be found" for non-diversity cases, if, but only if, neither of the first two venue alternatives is available.

Cross Reference:

Discussion of venue rules, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.48 -2.60*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders

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4.59 First Stage of Interpleader Proceedings: Obtaining Ruling on Propriety of Interpleader.

4.59[1] Depositing Disputed Property With Court.

4.59[1][a] Deposit Mandatory in Statutory Interpleader Actions. In order to invoke the statutory interpleader jurisdiction, the plaintiff must deposit the disputed money or property into the registry of the court [*28 USC § 1335(a)(2)*; *see Fed R Civ P 67* (procedural provisions governing deposits in court)].

Cross References:

Deposit in court, see Ch. 19, Preliminary Injunctions, TROs, and Other Provisional Remedies, see *§§ 19.139 -19.156*.

Motion to permit deposit into registry of court, see 5 *Bender's Federal Practice Forms, Form 22:40* (Matthew Bender).

The only alternative to a deposit is for the stakeholder to post a bond, payable to the clerk of the court, in the amount and with whatever sureties that the court or judge may deem proper. The bond must be conditioned on the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy [*28 USC § 1335(a)(2)*]. The court may not waive this requirement or proceed with statutory interpleader in the absence of the required deposit or bond [*see, e.g., In re Sinking of the M/V Ukola (1st Cir 1986) 806 F2d 1, 5* (deposit requirement is jurisdictional)].

Cross Reference:

Form of bond in lieu of deposit, see 5 *Bender's Federal Practice Forms, Form 22:42* (Matthew Bender).

The amount of the required deposit or bond is the amount in dispute [*Unigard Mut. Ins. Co. v. Abbott (9th Cir 1984) 732 F2d 1414, 1418*]. Most courts agree that this means that the amount of the deposit is the maximum that the claimants contend they could recover from the money or property in the stakeholder's possession [*see, e.g., National Union Fire Ins. Co. v. Ambassador Group, Inc. (EDNY 1988) 691 F Supp 618, 621*]; although the stakeholder may

never be required to deposit or post a bond for more than the available assets in the stakeholder's possession [*Ashton v. Josephine Bay & C. Michael Paul Found., Inc. (2d Cir 1990) 918 F2d 1065, 1070*]. Furthermore, the stakeholder need not deposit any funds or post bond for the amount set out in a counterclaim [*see Wayzata Bank & Trust Co. v. A & B Farms (8th Cir 1988) 855 F2d 590, 593*].

If the money or property is actually deposited with the court, the money or property will be invested in an interest-bearing account or instrument [*Fed R Civ P 67*]. Therefore, if the plaintiff posts a bond in lieu of depositing the money or property, the court may set the amount of the bond to include projected interest, or may award interest against the stakeholder as part of the final judgment, in order to prevent unjust enrichment of a stakeholder who did not make a deposit of the disputed money or property [*see, e.g., Unigard Mut. Ins. Co. v. Abbott (9th Cir 1984) 732 F2d 1414, 1419*].

4.59[1][b] Deposit Optional in Rule Interpleader Actions. Rule interpleader does not require the plaintiff to deposit the stake with the court [*see Fed R Civ P 22*; *see also Gelfgren v. Republic Nat'l Life Ins. Co. (9th Cir 1982) 680 F2d 79, 81-82* (in contrast to statutory interpleader, "a deposit is not a jurisdictional requirement to rule 22(1) interpleader")]. Nonetheless, the stakeholder or any claimant may make a noticed motion requesting an order authorizing such a deposit [*see Fed R Civ P 67*]. In the Eastern District, leave of court to make a deposit is automatically granted "in all interpleader actions" by virtue of a local rule [*ED Cal Gen LR 150(a)*].

Cross Reference:

Deposit in court, see Ch. 19, Preliminary Injunctions, TROs, and Other Provisional Remedies, see *§§ 19.139 -19.156*.

A deposit made in a rule interpleader action is usually equal to the amount in controversy. The amount in controversy, however, is determined by the stakeholder, rather than by the claimants [*see, e.g., Nationwide Mut. Ins. Co. v. Eckman (D Del 1983) 555 F Supp 775, 778*].

4.59[2] Enjoining Independent Actions Seeking Share of Stake.

4.59[2][a] Statute Authorizes Injunction in Statutory Interpleader Cases. As a matter of statute, a district court hearing a statutory interpleader action may restrain the claimants from filing or proceeding with any other state or federal court case affecting the money or property in dispute in the interpleader action (at least until further order of the court) [*28 USC § 2361*]. The "Anti-Injunction Act," which otherwise precludes federal courts from enjoining state court proceedings, does not bar injunctions in statutory interpleader actions. There is an exception to the Anti-Injunction Act for injunctions expressly authorized by federal statute, and the injunction authorization in the interpleader statutes falls within this exception [*see 28 USC § 2283* (Anti-Injunction Act)].

Cross Reference:

Discussion of Anti-Injunction act, see Ch. 19, Preliminary Injunctions, TROs, and Other Provisional Remedies, see *§ 19.16*.

4.59[2][b] General Equitable Authorization for Injunction in Rule Interpleader Cases. Rule 22 provides no express authorization for an injunction of other proceedings [*see Fed R Civ P 22*], and the courts that have considered the question have concluded that the statutory provision for interpleader injunctions [*see 28 USC § 2361*] applies only in statutory interpleader actions [*see, e.g., U.S. Indus., Inc. v. Laborde (DPR 1992) 794 F Supp 454, 459*]. Nevertheless, courts have concluded that, even in rule interpleader actions, they have general equitable powers to enjoin other proceedings seeking control of the disputed money or property [*see, e.g., General Ry. Signal Co. v. Corcoran (7th Cir 1991) 921 F2d 700, 707*].

The biggest obstacle to injunctions against state court proceedings is the Anti-Injunction Act [*see 28 USC § 2283*]. That

statute, which otherwise precludes federal court from enjoining state court proceedings, does contain two exception for injunctions needed (1) "in aid of" or to preserve federal court jurisdiction or (2) to effectuate federal court judgments [*28 USC § 2283*]. Permitting independent litigation by interpleader claimants during the pendency of the interpleader proceeding would defeat the very purpose of the interpleader proceedings [*see, e.g., Geler v. National Westminster Bank (SDNY 1991) 763 F Supp 722, 728*]. Therefore, courts have allowed injunctions against state court proceedings on the grounds that the injunctions are need to preserve federal court jurisdiction [*see, e.g., General Ry. Signal Co. v. Corcoran (7th Cir 1991) 921 F2d 700, 707*] and to effectuate federal court judgments [*see Truck-a-Tune v. Re (D Conn 1993) 856 F Supp 77, 81, n10 , aff'd on other grounds, 23 F3d 60 (2d Cir 1994)*].

Cross Reference:

Discussion of Anti-Injunction act, see Ch. 19, Preliminary Injunctions, TROs, and Other Provisional Remedies, see *§ 19.16*.

4.59[2][c] Injunction Limited to Claims Against Stake. The court's power to enjoin other proceedings is limited to claims asserted against the money or property in dispute (the "stake"). An injunction may not be asserted against a claim addressed at some other right or property [*State Farm Fire & Cas. Co. v. Tashire (1967) 386 US 523, 533, 87 S Ct 1199, 18 L Ed2d 270*].

4.59[2][d] Injunction Is Discretionary; Court May Defer to State Court Proceedings. Injunctions are equitable remedies and are always a matter of discretion, rather than of right. Even in statutory interpleader, where there is a statutory authorization for an injunction, the grant of an injunction is discretionary [*see 28 USC § 2361* ("district court *may* ... enter its order restraining ... [emphasis added])].

Furthermore, the court need not give precedence to a federal interpleader proceeding. Even if a district court has jurisdiction over an interpleader proceeding, it may abstain from exercising that jurisdiction by staying the proceeding when an already existing action obviates the need for the interpleader proceeding [*see, e.g., United States Fire Ins. Co. v. Asbestospray, Inc. (3d Cir 1999) 182 F3d 201, 211* ("federal courts should defer to parallel state proceedings that pre-date the interpleader, especially where, as here, the proceedings have resulted in judgments (or settlements in principle)"); *NY Life Distribs., Inc. v. Adherence Group, Inc. (3d Cir 1995) 72 F3d 371, 379 , cert. denied sub nom. Gerasolo v. Adherence Group Inc., 517 US 1209 (1996)* ("district courts have traditionally assumed that they possess broad equitable discretion to decline jurisdiction over a statutory interpleader lawsuit where in their view there is a pending state proceeding that obviates the need for the federal action")].

4.59[3] Seeking Discharge for Stakeholder.

4.59[3][a] Disinterested Stakeholder Normally Entitled to Discharge. As noted above, in "true" or "strict" interpleader proceedings, the stakeholder claims no interest in the money or property at stake in the action. Therefore, if a truly disinterested stakeholder deposits the disputed money or property with the court, the stakeholder should be dismissed from the action and discharged from liability at that stage of the proceedings, before the court adjudicates the merits of the disputed claims to the money or property [*see Commercial Nat'l Bank v. Demos (7th Cir 1994) 18 F3d 485, 487*]. Although not strictly required in every case, the stakeholder will usually bring a motion for discharge in order to bring this issue to the attention of the court.

A court need not delay or deny dismissal and discharge for a truly disinterested stakeholder, unless the stakeholder has some independent ground of liability to one or more of the claimants or unless the stakeholder has failed to deposit the property with the court or comply with some other prerequisite to interpleader jurisdiction. The only reasons that a court might normally consider denying or even delaying dismissal and discharge to a truly disinterested stakeholder arise when the court concludes that the stakeholder has acted in bad faith in some way, including failing to bring the interpleader action in a timely manner [*see Mendez v. Teachers Ins. & Annuity Ass'n & Coll. Ret. Equities Fund (2d Cir 1992) 982 F2d 783, 787*].

Cross Reference:

Motion to discharge plaintiff in interpleader action, see 5 *Bender's Federal Practice Forms, Form 22:50* (Matthew Bender).

4.59[3][b] Stakeholder Who Claims Interest or Denies Liability Must Not Be Discharged. In interpleader proceedings other than "true" or "strict" liability proceedings, the stakeholder claims an interest in the money or property in dispute, or denies liability to pay all or a part of the stake to one of more of the claimants. In these proceedings, the stakeholder must remain to litigate the merits of the claims to the money or property that constitute the stake, and should not be dismissed or discharged, even if the stakeholder has deposited the entire stake with the court [*see, e.g., Texas v. Florida (1939) 306 US 398, 406-407, 59 S Ct 563, 83 L Ed 817*].

4.59[4] Seeking Costs and Attorney's Fees on Discharge of Stakeholder.

4.59[4][a] Court Has Discretion to Award Fees. Neither the interpleader statutes nor the interpleader rule authorize an award of fees to a stakeholder who has been discharged [*see 28 USC §§ 1335, 1397, 2361*; *Fed R Civ P 22*]. Nonetheless, traditional equity practice, and modern federal practice, permits such an award in both statutory and rule interpleader (provided the stakeholder qualifies for discharge because the stakeholder claims no interest in the stake and has deposited it promptly with the court). No party has a right to such an award, however. The grant of an award of attorney's fees is completely discretionary [*see, e.g., Chase Manhattan Bank v. Mandalay Shores Coop. Hous. Ass'n (11th Cir 1994) 21 F3d 380, 382-383*].

4.59[4][b] Award Appropriate Only for Stakeholder Who Has Acted Equitably and Promptly. An award of attorney's fees is appropriate only if the discharged stakeholder has acted equitably and promptly. Any suggestion of bad faith on the part of the stakeholder is sufficient grounds to deny an award [*see, e.g., Emcasco Ins. Co. v. Davis (WD Ark 1990) 753 F Supp 1458, 1464-1465* (insurer improperly resorted to interpleader in attempt to avoid duty to defend insured); *Nationwide Mut. Ins. Co. v. Eckman (D Del 1983) 555 F Supp 775, 782* (insurer unduly delayed seeking interpleader)].

Some courts have denied fees to insurers seeking interpleader on the ground that fees paid to determine the proper recipient of insurance proceeds are properly chargeable to the insurer as a normal cost of doing business [*see, e.g., Sun Life Assurance Co. v. Thomas (WD Mich 1990) 735 F Supp 730, 733*]. Not all courts accept this reasoning, however [*see, e.g.,* Transamerica Premier Ins. Co. v. Growney (10th Cir 1995) 1995 US App 31836, at *4-*5 (unreported appellate case; generally not citable)].

4.59[4][c] Amount of Fee Award Should Be Modest. The costs and fees awarded to a disinterested stakeholder should not be substantial. The award is made at an early stage in the proceedings, after the stakeholder has done little more than file and serve a pleading, deposited the disputed money or property with the court, and made a motion for discharge. There is rarely justification for a substantial fee award because the stakeholder should not have been required to conduct complex legal research, participate in discovery, or prepare for trial in any way [*see, e.g., Johnson v. Electrolux Corp. (D Conn 1991) 763 F Supp 1181, 1189*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders

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Unit 2 First Steps
CHAPTER 4 Determining Parties to the Action
VI. USING INTERPLEADER TO RESOLVE CONFLICTING CLAIMS

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4.60 Second Stage of Proceedings: Ordinary Pretrial and Trial of Conflicting Claims.

After a court determines, in the first stage of litigation, that interpleader is proper and, if appropriate, discharges the stakeholder, interpleader proceedings reach a second stage that is similar to any other civil litigation in federal court. The goal of the second stage is adjudication or settlement of the merits of the conflicting claims to the stake and the distribution of the stake to the competing claimants accordingly [*see, e.g., Truck-a-Tune v. Re (D Conn 1993) 856 F Supp 77, 79*]. Because the interpleader proceedings have eliminated the race to the courthouse, the court's power to distribute the stake to the claimants is not limited to all-or-nothing determinations. The court may award proportional shares when appropriate [*see, e.g., Commercial Union Ins. Co. v. United States (DC Cir 1993) 999 F2d 581, 588-589*].

Unlike the preliminary, equitable determinations made in the first stage of the proceedings, the competing claimants may assert a right to a jury trial concerning their rights to the stake whenever a jury trial is permitted for the types of claims being asserted [*see, e.g., Hyde Props. v. McCoy (6th Cir 1974) 507 F2d 301, 305*]. Of course, a claimant's right to a jury trial depends on the claimant's assertion of that right in a timely and proper manner.

Cross References:

Availability of jury trial, see Ch. 13, Demanding a Jury Trial, see *§ 13.04[2]*.

Discussion of litigation of entitlement to res or property, see 4 *Moore's Federal Practice, § 22.03[2]* (Matthew Bender 3d ed).

Form of decree or order after trial in interpleader, see 5 *Bender's Federal Practice Forms, Forms 22:70, 22:71* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders

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Unit 2 First Steps
CHAPTER 4 Determining Parties to the Action
VII. FORMS

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4.61 Complaint for Interpleader.

Tom Doe (California Bar number 987654)
100 North Main St., Suite 200
Farallon City, California 90000
Phone: 555-555-5555
Fax: 555-555-5556
E-mail address: tomdoe@uvwxyz.net
Attorney for Plaintiff John Smith

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

John Smith, Plaintiff,	)	NO. _____
vs.	)	
Mary Jones, Defendant.	)	COMPLAINT FOR INTERPLEADER
	)	JURISDICTION
	)	
	)	

[*Alternative One. Statutory interpleader*]

1. This court has jurisdiction of this interpleader action under *28 USC § 1335(a)*:

a. The interpleader stake described below is in the _____ [possession *or* custody] of plaintiff.

b. The interpleader stake described below has a value of $500 or more.

2. Several claimants have or might assert claims to the interpleader stake and at least two of those claimants are of diverse citizenship under *28 USC § 1332*:

a. _____ [*Identify claimant, e.g.,* Defendant Mary Jones is an individual who is a resident of the State of California].

b. _____ [*Identify claimant, e.g.,* Defendant ABC Corporation is a corporation organized and operating under the laws of the State of Oregon, with its principal place of business in Portland, Oregon].

3. Plaintiff _____ [has deposited *or* will move the court for leave to deposit and intends to deposit] the interpleader stake in the registry of the court as required by *28 USC § 1335(a)(2)*.

[*Alternative Two. Rule interpleader*]

1. This interpleader proceeding is commenced under the provisions of *Federal Rules of Civil Procedure, Rule 22*.

2. The parties to this action are:

a. _____ [*Identify plaintiff, e.g.*, Plaintiff XYZ Corporation is a corporation organized and operating under the laws of the State of California with its principal place of business in Farallon City, California].

b. _____ [*Identify first claimant, e.g.,* Defendant Mary Jones is an individual residing in and a citizen of the State of Nevada].

c. _____ [*Identify second claimaint, e.g.,* Defendant Susan Johnson is an individual residing in and a citizen of the State of Utah].

3. This court has subject matter jurisdiction over this interpleader proceeding because _____ [*grounds for jurisdiction, e.g.,* there is complete diversity of citizenship between plaintiff and all defendants, and the amount in controversy in this action exceeds the sum of $75,000, exclusive of interest and costs].

[*CONTINUE*]

THE INTERPLEADER STAKE AND ADVERSE CLAIMS

4. This property is within plaintiff's possession or control: _____ [*describe fund or other property at issue, including valuation of fund or property*].

5. The following persons claim all or a portion of this property:

a. _____ [*Identify claimant*] asserts entitlement to _____ [*identify claim*, e.g., $95,000, with interest from June 1, 2004] on the grounds that _____ [*state basis for claim*].

b. _____ [*Identify claimant*] asserts entitlement to _____ [*identify claim*, e.g., $135,000, with interest from June 1, 2004] on the grounds that _____ [*state basis for claim*].

[*Alternative One. Strict interpleader*]

6. Plaintiff asserts no interest or claim of any kind in the property described above, and has no interest in which claimant receives all or any portion of the property described above.

[*Alternative Two. Action in nature of interpleader*]

7. Plaintiff contends that plaintiff is entitled to _____ [*specify, e.g.*, custodial and management fees in the sum of $10,000] and asserts that plaintiff's claim is superior in right to any of the claims of the defendants.

[*CONTINUE*]

8. The claims asserted by the defendants are adverse to each other and to the property described above. Plaintiff could not satisfy the defendants' claims without incurring double or multiple liabilities, so that equity should permit the plaintiff to interplead this property and have this court resolve the true ownership and distribution of the property described above.

DEMAND FOR JUDGMENT

Plaintiff prays that:

A. This court permit plaintiff to interplead the "stake" or property described in this complaint and have the court resolve all competing claims to that property.

B. This court enjoin the defendants from commencing or pursuing any other action in any other court to pursue a claim for the stake or property described in this complaint.

[*Alternative One. True interpleader*]

C. This court dismiss and discharge plaintiff from any and all further liability to the defendants with respect to the stake or property described in this complaint, and that the plaintiff be awarded its costs and reasonable attorney's fees in the amount of $_____.

[*Alternative Two. Action in nature of interpleader*]

C. This court award plaintiff its share of the stake or property described in this complaint in a sum not less than $_____ and deny liability to defendant[s] accordingly.

[*CONTINUE*]

D. This court grant plaintiff any and all other relief to which plaintiff may be entitled.

_____ [*date*]

_____ [*signature of attorney*]

_____ [*typed or printed name*]

_____ [*firm name, if applicable*]

Attorney for _____

[*Comply with any format requirements for complaints under local rules; see Ch. 6, Drafting the Summons and Complaint*.]

NOTES.

Authority:
28 USC §§ 1335, 1397, 2361; Fed R Civ P 22

Using Interpleader to Resolve Conflicting Claims:
See *§§ 4.52 -4.60*

Drafting Complaint:
See Ch. 6, Drafting the Summons and Complaint, see *§§ 6.01 -6.17*.

Preparing Summons:
See Ch. 6, Drafting the Summons and Complaint, see *§§ 6.18 -6.21*.

Service of Summons:
See Ch. 7, Service of Process

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Unit 3 Pleading Stage
CHAPTER 5 Formatting, Serving, and Filing Papers

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§ 5.syn Synopsis to Chapter 5: Formatting, Serving, and Filing Papers

5.01 Scope.

5.02 Objective and Strategy.

5.03 CHECKLIST: Formatting Pleadings, Motions, and Other Papers.

5.04 Formatting Pleadings, Motions, and Other Papers.

5.04[1] Formatting Rules Apply to Pleadings, Motions, and Other Papers.

5.04[2] Local Rules Should Be Consulted.

5.04[3] Individual Judge's Standing Orders Should Be Consulted.

5.05 Formatting Civil Cover Sheet and Cover Page.

5.05[1] Federal Rules Silent on Civil Cover Sheet and Cover Page.

5.05[2] Civil Cover Sheet and Cover Page Used for Court Administration.

5.05[3] LOCAL PRACTICE: Civil Cover Sheet and Cover Page.

5.05[3][a] LOCAL PRACTICE: CD Cal Requirements.

5.05[3][b] LOCAL PRACTICE: ED Cal Requirements.

5.05[3][c] LOCAL PRACTICE: ND Cal Requirements.

5.05[3][d] LOCAL PRACTICE: SD Cal Requirements.

5.06 LOCAL PRACTICE: Formatting Heading.

5.06[1] LOCAL PRACTICE: CD Cal Requirements.

5.06[2] LOCAL PRACTICE: ED Cal Requirements.

5.06[3] LOCAL PRACTICE: ND Cal Requirements.

5.06[4] LOCAL PRACTICE: SD Cal Requirements.

5.07 Formatting Caption.

5.07[1] Name of Court.

5.07[2] LOCAL PRACTICE: Name of Court.

5.07[2][a] LOCAL PRACTICE: CD Cal Requirements.

5.07[2][b] LOCAL PRACTICE: ED Cal Requirements.

5.07[2][c] LOCAL PRACTICE: ND Cal Requirements.

5.07[2][d] LOCAL PRACTICE: SD Cal Requirements.

5.07[3] Title of Action.

5.07[4] LOCAL PRACTICE: Title of Action.

5.07[4][a] LOCAL PRACTICE: CD Cal Requirements.

5.07[4][b] LOCAL PRACTICE: ED Cal Requirements.

5.07[4][c] LOCAL PRACTICE: ND Cal Requirements.

5.07[4][d] LOCAL PRACTICE: SD Cal Requirements.

5.07[5] Docket Number.

5.07[6] LOCAL PRACTICE: Docket Number.

5.07[6][a] LOCAL PRACTICE: CD Cal Requirements.

5.07[6][b] LOCAL PRACTICE: ED Cal Requirements.

5.07[6][c] LOCAL PRACTICE: ND Cal Requirements.

5.07[6][d] LOCAL PRACTICE: SD Cal Requirements.

5.07[7] Designation.

5.07[8] LOCAL PRACTICE: Designation.

5.07[8][a] LOCAL PRACTICE: CD Cal Requirements.

5.07[8][b] LOCAL PRACTICE: ED Cal Requirements.

5.07[8][c] LOCAL PRACTICE: ND Cal Requirements.

5.07[8][d] LOCAL PRACTICE: SD Cal Requirements.

5.08 Formatting Body of Pleading.

5.08[1] Body of Pleading.

5.08[2] LOCAL PRACTICE: Body of Pleading.

5.08[2][a] LOCAL PRACTICE: CD Cal Requirements.

5.08[2][b] LOCAL PRACTICE: ED Cal Requirements.

5.08[2][c] LOCAL PRACTICE: ND Cal Requirements.

5.08[2][d] LOCAL PRACTICE: SD Cal Requirements.

5.09 Formatting Body of Motion.

5.09[1] Body of Motion.

5.09[2] LOCAL PRACTICE: Body of Motion.

5.09[2][a] LOCAL PRACTICE: CD Cal Requirements.

5.09[2][b] LOCAL PRACTICE: ED Cal Requirements.

5.09[2][c] LOCAL PRACTICE: ND Cal Requirements.

5.09[2][d] LOCAL PRACTICE: SD Cal Requirements.

5.10 Formatting Signature Block.

5.10[1] Signature Is Required.

5.10[2] LOCAL PRACTICE: Signature Block.

5.10[2][a] LOCAL PRACTICE: CD Cal Requirements.

5.10[2][b] LOCAL PRACTICE: ED Cal Requirements.

5.10[2][c] LOCAL PRACTICE: ND Cal Requirements.

5.10[2][d] LOCAL PRACTICE: SD Cal Requirements.

5.10[3] Electronic or Facsimile Signature May Be Allowed or Required.

5.10[4] LOCAL PRACTICE: Electronic or Facsimile Signature.

5.10[4][a] LOCAL PRACTICE: CD Cal Requirements.

5.10[4][b] LOCAL PRACTICE: ED Cal Requirements.

5.10[4][c] LOCAL PRACTICE: ND Cal Requirements.

5.10[4][d] LOCAL PRACTICE: SD Cal Requirements.

5.11 Determining Page Limitations for Pleadings, Motions, and Other Papers.

5.11[1] Federal Rules Do Not Set Page Limitations.

5.11[2] LOCAL PRACTICE: Page Limitations.

5.11[2][a] LOCAL PRACTICE: CD Cal Requirements.

5.11[2][b] LOCAL PRACTICE: ED Cal Requirements.

5.11[2][c] LOCAL PRACTICE: ND Cal Requirements.

5.11[2][d] LOCAL PRACTICE: SD Cal Requirements.

5.12 Formatting Exhibits.

5.12[1] Exhibits May Be Attached.

5.12[2] LOCAL PRACTICE: Exhibits.

5.12[2][a] LOCAL PRACTICE: CD Cal Requirements.

5.12[2][b] LOCAL PRACTICE: Eastern District Requirements.

5.12[2][c] LOCAL PRACTICE: ND Cal Requirements.

5.12[2][d] LOCAL PRACTICE: SD Cal Requirements.

5.12A Privacy Protection for Filings Made With the Court

[1] Certain Personal Information Must Be Redacted From Filings.

[2] Certain Information Is Exempt From Redaction Requirement.

5.13 General Formatting Requirements for All Pleadings, Motions, and Other Papers.

5.13[1] LOCAL PRACTICE: CD Cal Requirements.

5.13[2] LOCAL PRACTICE: ED Cal Requirements.

5.13[3] LOCAL PRACTICE: ND Cal Requirements.

5.13[4] LOCAL PRACTICE: SD Cal Requirements.

5.14 Clerk May Not Reject Improperly Formatted Papers.

5.15 CHECKLIST: Serving Pleadings, Motions, And Other Papers.

5.16 Determining Who Must Receive Service.

5.17 Serving Pleadings.

5.17[1] Serving Complaint or Initial Pleading.

5.17[2] Serving Pleading After Original Complaint.

5.17[3] LOCAL PRACTICE: Serving Pleadings.

5.17[3][a] LOCAL PRACTICE: CD Cal Requirements.

5.17[3][b] LOCAL PRACTICE: ED Cal Requirements.

5.17[3][c] LOCAL PRACTICE: ND Cal Requirements.

5.17[3][d] LOCAL PRACTICE: SD Cal Requirements.

5.18 Serving Written Motions.

5.18[1] Written Motions Must Be Served.

5.18[2] Supporting or Opposing Papers Must Be Served With Written Motions.

5.18[3] LOCAL PRACTICE: Serving Written Motions and Supporting or Opposing Papers.

5.18[3][a] LOCAL PRACTICE: CD Cal Requirements.

5.18[3][b] LOCAL PRACTICE: ED Cal Requirements.

5.18[3][c] LOCAL PRACTICE: ND Cal Requirements.

5.18[3][d] LOCAL PRACTICE: SD Cal Requirements.

5.19 Serving Discovery Papers.

5.19[1] Service on Each Party Required.

5.19[2] Court May Waive Service of Discovery Papers.

5.20 Serving Other Papers.

5.21 Serving Orders.

5.22 Permissible Methods of Service.

5.22[1] Service by Hand Delivery.

5.22[2] LOCAL PRACTICE: Service by Hand Delivery.

5.22[2][a] LOCAL PRACTICE: Central District Requirements.

5.22[2][b] LOCAL PRACTICE: ED Cal Requirements.

5.22[2][c] LOCAL PRACTICE: ND Cal Requirements.

5.22[2][d] LOCAL PRACTICE: SD Cal Requirements.

5.22[3] Service by U.S. Mail.

5.22[4] LOCAL PRACTICE: Service by U.S. Mail.

5.22[4][a] LOCAL PRACTICE: CD Cal Requirements.

5.22[4][b] LOCAL PRACTICE: ED Cal Requirements.

5.22[4][c] LOCAL PRACTICE: ND Cal Requirements.

5.22[4][d] LOCAL PRACTICE: SD Cal Requirements.

5.22[5] Service by Alternate Delivery Methods, Including Electronic Service.

5.22[5][a] Consent to Alternative Delivery Methods.

5.22[5][b] Completing Alternative Forms of Service.

5.22[6] LOCAL PRACTICE: Service by Alternative Delivery Methods, Including Electronic Service.

5.22[6][a] LOCAL PRACTICE: CD Cal Requirements.

5.22[6][b] LOCAL PRACTICE: ED Cal Requirements.

5.22[6][c] LOCAL PRACTICE: ND Cal Requirements.

5.22[6][d] LOCAL PRACTICE: SD Cal Requirements.

5.22[7] Service by Leaving Paper With Clerk of Court.

5.22[8] Waiver of Service.

5.22[9] LOCAL PRACTICE: Waiver of Service.

5.22[9][a] LOCAL PRACTICE: CD Cal Requirements.

5.22[9][b] LOCAL PRACTICE: ED Cal Requirements.

5.22[9][c] LOCAL PRACTICE: ND Cal Requirements.

5.22[9][d] LOCAL PRACTICE: SD Cal Requirements.

5.23 Proof of Service.

5.23[1] Rule 5 Requires Proof of Service.

5.23[2] LOCAL PRACTICE: Proof of Service.

5.23[2][a] LOCAL PRACTICE: CD Cal Requirements.

5.23[2][b] LOCAL PRACTICE: ED Cal Requirements.

5.23[2][c] LOCAL PRACTICE: ND Cal Requirements.

5.23[2][d] LOCAL PRACTICE: SD Cal Requirements.

5.24 CHECKLIST: Filing Pleadings, Motions, and Other Papers.

5.25 General Filing Requirements.

5.25[1] Requirements Under the Federal Rules.

5.25[2] LOCAL PRACTICE: General Filing Requirements.

5.25[2][a] LOCAL PRACTICE: CD Cal Requirements.

5.25[2][b] LOCAL PRACTICE: ED Cal Requirements.

5.25[2][c] LOCAL PRACTICE: ND Cal Requirements.

5.25[2][d] LOCAL PRACTICE: SD Cal Requirements.

5.26 LOCAL PRACTICE: Filing Requirements for Motions.

5.26[1] LOCAL PRACTICE: CD Cal Requirements.

5.26[2] LOCAL PRACTICE: ED Cal Requirements.

5.26[3] LOCAL PRACTICE: ND Cal Requirements.

5.26[4] LOCAL PRACTICE: SD Cal Requirements.

5.27 Filing Requirements for Discovery Material.

5.27[1] Filing Not Permitted Until Papers Used in Proceeding or Court Has Ordered Filing.

5.27[2] LOCAL PRACTICE: Filing Requirements for Discovery Matters.

5.27[2][a] LOCAL PRACTICE: CD Cal Requirements.

5.27[2][b] LOCAL PRACTICE: ED Cal Requirements.

5.27[2][c] LOCAL PRACTICE: ND Cal Requirements.

5.27[2][d] LOCAL PRACTICE: SD Cal Requirements.

5.27A LOCAL PRACTICE: ED Cal--Time of Filing.

5.27A[1] Electronic Filing Is Complete When Attorney Receives System-Generated Notice.

5.27A[2] Document Is Deemed Filed on Particular Day If Filed Before Midnight.

5.27A[3] Internet Filings May Be Made 24 Hours a Day.

5.27A[4] Portable Electronic Media May Be Submitted During Business Hours.

5.27A[5] Filing Is Permitted on Next Business Day Following Technical Failure of Court's Site.

5.28 Filing Corporate Disclosure Statement.

5.28[1] Rule 7.1 Requires Corporate Disclosure Statement.

5.28[2] LOCAL PRACTICE: Identifying Interested Parties.

5.28[2][a] LOCAL PRACTICE: CD Cal Requirements.

5.28[2][b] LOCAL PRACTICE: ED Cal Requirements.

5.28[2][c] LOCAL PRACTICE: ND Cal Requirements.

5.28[2][d] LOCAL PRACTICE: SD Cal Requirements.

5.29 CHECKLIST: Electronic or Facsimile Filing of Pleadings and Motions.

5.30 Local Rules May Permit or Require Electronic or Facsimile Filing.

5.31 LOCAL PRACTICE: Electronic or Facsimile Filing of Pleadings and Motions.

5.31[1] LOCAL PRACTICE: CD Cal Requirements.

5.31[2] LOCAL PRACTICE: ED Cal Requirements.

5.31[3] LOCAL PRACTICE: ND Cal Requirements.

5.31[4] LOCAL PRACTICE: SD Cal Requirements.

5.32 Caption With Heading.

5.33 Signature Block.

5.34 Corporate Disclosure Statement.

5.35 Central District of California, Notice of Interested Parties.

5.36 Northern District of California, Certification of Interested Entities or Persons.

5.37 Certificate of Service.

5.38 Certificate of Service by U.S. Mail.

5.39 Consent to Electronic Service.

5.40 Notice of Motion and Motion to Dispense With Service of Pleadings.

5.41 Order Dispensing With Service of Pleadings.

5.42 Notice of Motion and Motion to Compel Filing of Papers.

5.43 Order Compelling Filing of Papers.

5.44 Local District Court Forms.

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Unit 3 Pleading Stage
CHAPTER 5 Formatting, Serving, and Filing Papers
I. STRATEGY

1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.01

5.01 Scope.

This chapter covers:

- Formatting pleadings, motions, and other papers [*see 5.03 -5.14*; *Form: 5.32*].
- Serving pleadings, motions, and other papers [*see 5.15 -5.23*; *Forms: 5.37 -5.41*].
- Filing pleadings, motions, and other papers [*see 5.24 -5.28*; *Forms: 5.39*, *5.40*].
- Electronic or Facsimile Filing [*see 5.29 -5.31*].

Core Rules:
Fed R Civ P 5, *7*, *7.1*, *10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePleading & PracticeService of ProcessSummonsIssuanceCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 5 Formatting, Serving, and Filing Papers
I. STRATEGY

1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.02

5.02 Objective and Strategy.

Pleadings consist of the complaint, the answer, a reply to a counterclaim, an answer to a crossclaim, a third-party complaint, and a third-party answer [*Fed R Civ P 7(a)*]. Motions are applications to the court for orders, which must be made in writing unless made during a hearing or at trial [*Fed R Civ P 7(b)*]. All pleadings and motions, along with other papers (such as briefs, affidavits, and exhibits, etc.), have formal requirements. The Federal Rules and the local rules require that these documents meet certain standards in their appearance, the manner in which they are served, and how they are filed with the court. In addition, individual judges may have their own standing orders regarding pleadings, motions, and other papers.

Detailed Discussion/Forms:

1 Bender's Federal Practice Forms, Rule 5, Serving and Filing Pleadings and Other Papers (Matthew Bender).

1 Bender's Federal Practice Forms, Rule 7, Pleadings Allowed; Form of Motions and Other Papers; Rule 7.1 Disclosure Statement (Matthew Bender).

4 Bender's Federal Practice Forms, Rule 10, Form of Pleadings (Matthew Bender).

1 Federal Litigation Guide, Ch. 6, Voluntary Dismissals and Dismissals for Failure to Prosecute; Ch. 7, Injunctions (Matthew Bender).

2 Federal Litigation Guide, Ch. 23, Discovery of Experts (Matthew Bender).

1 Moore's Federal Practice, Ch. 5, Service and Filing of Pleadings and Other Papers (Matthew Bender 3d ed.).

2 Moore's Federal Practice, Ch. 7, Pleadings Allowed; Form of Motions and Other Papers; Ch. 7.1, Disclosure Statement; Ch. 10, Form of Pleadings; Ch. 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions (Matthew Bender 3d ed.).

1 Moore's Manual: Federal Practice and Procedure, Ch. 10, Plaintiff's Pleadings (Matthew Bender).

Cross Reference:

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 5 Formatting, Serving, and Filing Papers
II. FORMATTING PLEADINGS, MOTIONS, AND OTHER PAPERS

1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.03

5.03 CHECKLIST: Formatting Pleadings, Motions, and Other Papers.

☐ Identify official forms and consider using as guide to drafting pleadings, motions, and other papers.

Authority:
Fed R Civ P 84

Discussion:
See *§ 5.04*

Forms:
See *§ 5.44*; Fed R Civ P Appendix of Forms, Forms 10-61

☐ Review format requirements for pleadings under local rules of court.

Authority:
Fed R Civ P 83(a)

Discussion:
See *§§ 5.04 -5.14*

Forms:
See *§§ 5.32 -5.43*

☐ Review formatting requirements, including:

○ Essential components of pleading, motion, or other paper:

- [ ] Heading.
- [ ] Caption.
- [ ] Designation.
- [ ] Signature and signature block.
- [ ] Body of document.
  - ○ Separate numbered paragraphs.
  - ○ Separate counts.
- [ ] Page limitations.
- [ ] General document requirements:
  - ○ Type of paper.
  - ○ Margins, spacing, lines per page.
  - ○ Quotations.
  - ○ Typeface and fonts.
  - ○ Pagination.
  - ○ Footers.
  - ○ Prepunched holes.
  - ○ Binding.
  - ○ Citation to authorities.

○ Format of exhibits and attachments:

- [ ] Size limitations.

☐ Legibility.

☐ Pagination.

☐ Fastening.

Authority:
Fed R Civ P 5, 7, 10, 11

Discussion:
See *§§ 5.06 -5.13*

☐ Prepare civil cover sheet or cover page.

Authority:
CD Cal Civ LR 3-1; *ED Cal Civ LR 200*; *ND Cal Civ LR 3-2(a)*; *SD Cal Civ LR 3.1*

Discussion:
See *§ 5.05*

Form:
See *§ 5.44*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 5 Formatting, Serving, and Filing Papers
II. FORMATTING PLEADINGS, MOTIONS, AND OTHER PAPERS

1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.04

5.04 Formatting Pleadings, Motions, and Other Papers.

5.04[1] Formatting Rules Apply to Pleadings, Motions, and Other Papers. Pleadings consist of the complaint, the answer, a reply to a counterclaim, an answer to a crossclaim, a third-party complaint, and a third-party answer [*Fed R Civ P 7(a)*]. Motions are applications to the court for orders, which must be made in writing unless made during a hearing or at trial [*Fed R Civ P 7(b)*]. The formal requirements concerning the form of pleadings also apply to motions and other papers, though only to the format [*Fed R Civ P 7(b)(2)*; *see, e.g.*, *Swanson v. United States (9th Cir 1996) 87 F3d 339, 345* (reach of *Fed R Civ P 10(c)* provision permitting the adoption by reference of material cannot be extended by Rule 7(b)(2) to include adoption of substantive material in other papers)].

The official forms contained in the Appendix of Forms to the Federal Rules of Civil Procedure serve as suggestions for drafting pleadings and other papers [*Fed R Civ P 84*].

In addition, the United States District Courts offer their own forms or require certain forms to be used. These forms may be obtained by the clerk's office or by downloading them from each court's website:

- United States District Court for the Central District of California: www.cacd.uscourts.gov.
- United States District Court for the Eastern District of California: www.caed.uscourts.gov.
- United States District Court for the Northern District of California: www.cand.uscourts.gov.
- United States District Court for the Southern District of California: www.casd.uscourts.gov.

Cross References:

See *§ 5.44*.

5.04[2] Local Rules Should Be Consulted. Local rules of the district courts need to be consulted because they often impose additional and specific requirements over the Federal Rules. These local rules should be consulted before

drafting any pleadings, motions, or papers.

5.04[3] Individual Judge's Standing Orders Should Be Consulted. Some individual judges may have standing orders, which set forth the particular requirements to be followed in cases pending before them. Counsel should inquire about standing orders, especially regarding the following:

- Courtesy copies.
- Page limits.
- Table of contents.
- Form of stipulations.
- Electronic copies.
- Fax submissions.

Consider:

District court judges have broad discretion to depart from local rules, including service requirements, if it makes sense to do so and substantial rights are not at stake [*Nunley v. Los Angeles (9th Cir 1995) 52 F3d 792, 795*]. Normally, a party must make an appropriate application for any departure. If a particular judge routinely deviates from an otherwise applicable rule requirement, the deviation should be published in the judge's standing order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.05

5.05 Formatting Civil Cover Sheet and Cover Page.

5.05[1] Federal Rules Silent on Civil Cover Sheet and Cover Page. The Federal Rules are silent as to a cover page but all the local rules set some requirements. In addition, individual judges' standing orders should be consulted [*see 5.04[3]*].

5.05[2] Civil Cover Sheet and Cover Page Used for Court Administration. The sheet is usually available from the court clerk or may be downloaded from the court's website (*see also 5.44*). The information is for the benefit of the clerk and the administration of the court's caseload, and is not served on opposing parties [*CD Cal Civ LR 3-1*; *ED Cal Civ LR 200*; *ND Cal Civ LR 3-2(a)*; *SD Cal Civ LR 3.1*; *see Wall v. National R.R. Passenger Corp. (9th Cir 1983) 718 F2d 906, 909* ; *Richmond, F. & P.R. Co. v. Intermodal Servs., Inc. (ED Va 1981) 508 F Supp 804, 807* (civil cover sheets neither pleading nor motion and not part of filed court papers)].

5.05[3] LOCAL PRACTICE: Civil Cover Sheet and Cover Page.

5.05[3][a] LOCAL PRACTICE: CD Cal Requirements. All civil actions presented to the clerk for filing must be accompanied by a Civil Cover Sheet, in duplicate, completed, and signed by the attorney or party representing the matter. For matters pursuant to *28 USC § 1338* jurisdiction (regarding patents, plant variety protection, copyrights and trademarks), the clerk must be provided at the time of filing with the original and two copies of the required notice to the Patent and Trademark Office in patent, plant variety protection and trademarkmatters and the original and four copies of the required notice in copyright matters. The clerk has available the copies of the Civil Cover Sheet and the required forms of notice to the Patent and Trademark Office [*CD Cal Civ LR 3-1*].

Warning:

Counsel who are aware of an earlier filed related case must also file a Notice of Related Case [*CD Cal Civ LR 83-1.3*].

5.05[3][b] LOCAL PRACTICE: ED Cal Requirements. Every complaint, amended complaint, or other document initiating a civil action must be accompanied by a completed civil cover sheet, on a form available from the Clerk and on the court's web site. The civil sheet requirement is for administrative purposes only and matters appearing

only on the civil cover sheet have no cognizable effect in the action [*ED Cal Civ LR 200*].

Warning:

Counsel who are aware of an earlier-filed related case must also file a Notice of Related Case [*ED Cal Gen LR 123*].

Cross References:

A copy of the Eastern District's Civil Cover Sheet (CV-71) may be downloaded from the court's web site: www.caed.uscourts.gov. *See also § 5.44*.

Cross References:

A copy of the Eastern District's Civil Cover Sheet (JS-44) may be downloaded from the court's web site: www.caed.uscourts.gov. *See also § 5.44*.

Ch. 6, Drafting the Summons and Complaint, see *§ 6.20*.

5.05[3][c] LOCAL PRACTICE: ND Cal Requirements. Every complaint, petition, or other paper initiating a civil action must be filed with a completed civil cover sheet on a form approved by the Court [*ND Cal Civ LR 3-2(a)*].

Warning:

Counsel who are aware of an earlier filed related case must also file an Administrative Motion to Consider Whether Cases Should Be Related or Notice of Pendency of Other Action or Proceeding [*ND Cal Civ LR 3-12*, *3-13*].

Cross References:

A copy of the Northern District's Civil Cover Sheet (JS-44) may be downloaded from the court's web site: www.cand.uscourts.gov. *See also § 5.44*.

Ch. 6, Drafting the Summons and Complaint, see *§ 6.20*.

5.05[3][d] LOCAL PRACTICE: SD Cal Requirements. For administrative purposes only, every complaint, petition, or other paper initiating a civil action or proceeding must be accompanied by a completed civil cover sheet. Immediately below the docket number, one or more of the following categories most nearly descriptive of the subject matter of the action or proceeding, must be indicated [*SD Cal Civ LR 3.1*]:

- Admiralty-Maritime claims (except Jones Act);
- Antitrust;
- Contract;
- Copyright/Trademark/Unfair Competition;
- Patent;
- Labor Relations;
- Tax;

- Tort/Personal Injury (including Jones Act)/Property Damage/Fraud/Other (specify);
- Government Collection/Forfeiture/Penalty;
- Civil Rights;
- Land Condemnation;
- Habeas Corpus;
- Review of Administrative Action;
- Federal Securities; and
- Miscellaneous (specify).

For each motion and any opposition and reply to a motion, there must be a cover page, with the space opposite the caption below the case number, indicating the name of the judicial office, the courtroom number, and the date and time of the hearing [*SD Cal Civ LR 5.1(j.4)*].

- Name of the judicial officer;
- Courtroom number; and
- Date and time of the hearing.

Cross References:

A copy of the Southern District's Civil Cover Sheet (JS-44) may be downloaded from the court's web site: www.casd.uscourts.gov. See also, *§ 5.44*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.06

5.06 LOCAL PRACTICE: Formatting Heading.

5.06[1] LOCAL PRACTICE: CD Cal Requirements. On the first page of any pleading, motion, or other paper, beginning on line 1 at the left margin, set forth the name, California bar number, (or, when the attorney is a registered legal service attorney appearing pursuant to *CD Cal Civ LR 83-2.3.5*, the bar number and jurisdiction where the attorney is admitted to practice), office address (or residence address if no office is maintained), the telephone and facsimile numbers, and the e-mail address of the attorney or a party appearing pro se. The e-mail address must be placed immediately beneath the name of the attorney. Immediately beneath, identify the party on whose behalf the document is filed. This information must be single-spaced and must be presented for each attorney or pro se party who joins in the presentation of the document [*CD Cal Civ LR 11-3.8(a)*].

The space between lines 1 and 7 to the right of center of the page must be left blank for use by the court clerk [*CD Cal Civ LR 11-3.8(b)*].

Cross Reference:

Form, see *§ 5.32* for entire caption, including heading.

5.06[2] LOCAL PRACTICE: ED Cal Requirements. The name, address, telephone number, and the California State Bar membership number of all counsel and the specific identification of the party represented by name and interest in the litigation must appear in the upper left-hand corner of the first page of the pleading, motion, or other paper. In a multiparty representation, however, reference may be made to the signature page for the complete list of parties represented [*ED Cal Gen LR 131(a)*].

If multiple attorneys from a single law firm, organization, public entity, agency, or department are listed as counsel, one of the listed attorneys must be designated as counsel for service. That designation may be made in the heading of the complaint, or by filing and serving a document entitled "Designation of Counsel for Service," stating the name, address, and telephone number of the designated counsel for service, and signed by that counsel [*ED Cal Gen LR 182(c)(1)*]. If no designation of counsel for service has been made, the clerk of the court may select the attorney for service from the heading on the first page of the initial document or from the signature block [*ED Cal Gen LR 182(c)(2)*].

Cross Reference:

Form, see *§ 5.32* for entire caption, including heading.

5.06[3] LOCAL PRACTICE: ND Cal Requirements. In the upper left-hand corner of the first page of the each paper presented for filing, the name, address, telephone number, facsimile ("fax") telephone number, e-mail address, and state bar number of the attorney presented the paper for filing must appear (a pro se party must comply with the name, address, telephone number, facsimile number, and e-mail address requirements). This information must be accompanied by the name of the party represented and that party's status in the litigation. In multi-party actions or proceedings, reference may be made to the signature page for the complete list of parties represented [*ND Cal Civ LR 3-4(a)(1)*].

Cross Reference:

Form, see *§ 5.32* for entire caption, including heading.

5.06[4] LOCAL PRACTICE: SD Cal Requirements. On the first page of every pleading, motion, or other paper, the name, address, and telephone number of the attorney appearing for a party or of an individual appearing pro se, must be printed or typewritten in the space to the left of the page's center and beginning at line one. Attorneys appearing for a party must also include their California State Bar Number. The space to the right of the of the page's center must be reserved for the clerk's filing stamp [*SD Cal Civ LR 5.1(j.1)*].

Cross Reference:

Form, see *§ 5.32* for entire caption, including heading.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePartiesSelf-RepresentationPleading Standards

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Unit 3 Pleading Stage
CHAPTER 5 Formatting, Serving, and Filing Papers
II. FORMATTING PLEADINGS, MOTIONS, AND OTHER PAPERS

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5.07 Formatting Caption.

5.07[1] Name of Court. Every pleading, motion, or other paper must contain a caption, which includes the name of the court, the title of the action, the file number, and a designation of the type of pleading or paper [*Fed R Civ P 10(a)*]. The court is the district court in which the pleading is initially filed or the action is pending [*28 USC § 1391*], unless the case has been transferred by the Court [*see 28 USC § 1404(a)*], or a motion to change venue was granted [*28 USC § 1404(b)*], or the case was transferred temporarily from one district court to another by the judicial panel on multi-district litigation [*28 USC § 1407(a)*].

Cross Reference:

Form, see *§ 5.32* for entire caption.

5.07[2] LOCAL PRACTICE: Name of Court.

5.07[2][a] LOCAL PRACTICE: CD Cal Requirements. The name of the court must be centered on or below line 8 of the first page of the every pleading, motion, or other document [*CD Cal Civ LR 11-3.8(c)*].

5.07[2][b] LOCAL PRACTICE: ED Cal Requirements. The title of the court must appear on every pleading, motion, or other paper, following the counsel identification, beginning on the eighth line of the first page, unless additional space is required for counsel identification [*ED Cal Gen LR 133(g)*].

5.07[2][c] LOCAL PRACTICE: ND Cal Requirements. The title of the court, along with the appropriate division or location, must appear on the first page of each pleading, motion, or other paper, beginning on the eighth line of the page, unless additional space is required for counsel identification [*ND Cal Civ LR 3-4(a)(3)(A)*]. In consolidated cases under *Fed R Civ P 42*, the caption of each paper must denote the lead case number above all the consolidated case numbers but duplicated originals are not required for associated cases [*ND Cal Civ LR 3-4(b)*].

5.07[2][d] LOCAL PRACTICE: SD Cal Requirements. The title of the court must begin at or below line 8 of the first page of every pleading, motion, or other paper [*SD Cal Civ LR 5.1(j.2)*].

5.07[3] Title of Action. The caption of every pleading must contain the title of the action [*Fed R Civ P 10(a)*]. This applies to motions and other papers requiring captions [*Fed R Civ P 7(b)(2)*]. In initial pleadings, the names of all parties must be included in the caption [*cf. Yeseta v. Baima (9th Cir 1988) 837 F2d 380, 383* (sufficient identification in body of complaint)]. Initial pleadings consist of:

- Complaint [*Fed R Civ P 10(a)*].
- Third-Party Complaint [*Fed R Civ P 14(a)*].
- Motion and accompanying pleading requesting intervention [*Fed R Civ P 24(c)*; *Ferdik v. Bonzelet (9th Cir 1992) 963 F2d 1258, 1261-1262*].

In all other pleadings, motions, and other papers, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties, such as "et al." [*Fed R Civ P 10(a)*].

In special circumstances, a fictitious name may be used by an individual plaintiff to proceed anonymously to protect privacy interests or to avoid physical harm, as long as the court is assured that the plaintiff is a real and aggrieved party [*Doe v. Advanced Textile Corp. (9th Cir 2000) 214 F3d 1058, 1067-1068*].

A plaintiff may proceed under a pseudonym only "when nondisclosure of the party's identity is necessary to protect a person from harassment, injury, ridicule, or personal embarrassment" [American-Arab Anti-Discrimination Comm. v. Ridge (CD Cal 2003) 2003 US Dist LEXIS 25100, at *23-*24]. Courts have permitted plaintiffs to use pseudonyms (1) when identification creates a risk of retaliatory physical or mental harm; (2) when anonymity is necessary to protect privacy in a sensitive and highly personal manner; and (3) when the anonymous party is compelled to admit his or her intention to engage in illegal conduct, creating a risk of criminal prosecution [American-Arab Anti-Discrimination Comm. v. Ridge (CD Cal 2003) 2003 US Dist LEXIS 25100, at *24].

A defendant may be named fictitiously as "John Doe" if the plaintiff cannot ascertain the name of the defendant at the time of the filing [*see, e.g., Gillespie v. Civiletti (9th Cir. 1980) 629 F2d 637, 642* (court allowed complaint against unnamed police officer defendants when discovery would likely disclose defendants' true identities)].

Cross References:

Forms, see *§ 5.32* for entire caption. Discussion on the use of fictitious names, see Ch. 6, Drafting the Summons and Complaint, see *§ 6.06[4]*.

5.07[4] LOCAL PRACTICE: Title of Action.

5.07[4][a] LOCAL PRACTICE: CD Cal Requirements. The names of the parties must be single-spaced and placed below the title of the court, to the left of center. If the parties are too numerous to fit on the first page of the initial pleading, the names may be continued on successive pages in the same space. In all documents following the initial pleadings, only the first-named parties on each side need to appear [*CD Cal Civ LR 11-3.8(d)*].

5.07[4][b] LOCAL PRACTICE: ED Cal Requirements. The title of the action must appear following attorney identification and the title of the court [*ED Cal Gen LR 133(g)*].

5.07[4][c] LOCAL PRACTICE: ND Cal Requirements. The title of the action must appear on the first page of the paper presented for filing and should appear on the left side below the name of the court [*ND Cal Civ LR 3-4(a)(3)(B)*].

5.07[4][d] LOCAL PRACTICE: SD Cal Requirements. The title of the action must appear on the first page of every document, below and to the left of the title of the court. If the parties are too numerous for all to be named on the

first page, the names of the parties may be carried onto the successive pages [*SD Cal Civ LR 5.1(j.3)*].

5.07[5] Docket Number. The caption of every pleading must set forth the "file number" of the case [*Fed R Civ P 10(a)*]. This applies to motions and other papers requiring captions [*Fed R Civ P 7(b)(2)*]. The number is often called the docket number, index number, or case number. When the initial pleading is filed, the clerk of the court will assign a docket number to the case. In federal civil cases, these numbers are assigned consecutively [*Fed R Civ P 79(a)*]. In initial pleadings, the caption should be prepared to leave a space in which the court clerk can stamp or indicate the docket number of the action. Because local rules may regulate the assignment of file numbers, the numbers may vary among the district courts [*see Fed R Civ P 83(a)*].

5.07[6] LOCAL PRACTICE: Docket Number.

5.07[6][a] LOCAL PRACTICE: CD Cal Requirements. The docket number of the case must be placed to the right of the center of the page and immediately opposite the names of the parties. Immediately below the docket number must be a concise description of the nature of the document, followed by the time and place of the hearing on the matter to which the paper is addressed [*CD Cal Civ LR 11-3.8(e)*].

Cross Reference:

Form, see *§ 5.32* for entire caption.

5.07[6][b] LOCAL PRACTICE: ED Cal Requirements. The file number of the action, followed by the initials of the judge and Magistrate Judge to whom it is currently assigned, must appear on the initial page for each document following the attorney identification and court title [*ED Cal Gen LR 133(g)*].

Cross Reference:

Form, see *§ 5.32* for entire caption.

5.07[6][c] LOCAL PRACTICE: ND Cal Requirements. The case number of the action must appear followed by the initials of the assigned district judge or magistrate judge and if applicable, the initials of the magistrate judge to whom the action is referred for discovery or other pretrial activity [*ND Cal Civ LR 3-4(a)(3)(C)*].

Cross Reference:

Form, see *§ 5.32* for entire caption.

5.07[6][d] LOCAL PRACTICE: SD Cal Requirements. In the space to the right of center, the number of the action, a brief designation of the document's nature, mention of any notice of motion or affidavits or memorandum in support, and a demand for jury trial, if any, must appear [*SD Cal Civ LR 5.1(j.3)*].

Cross Reference:

Form, see *§ 5.32* for entire caption.

5.07[7] Designation. The caption of a pleading must contain a designation as found in *Fed R Civ P 7(a)* [*Fed R Civ P 10(a)*]. A motion or other paper with a caption must also contain a designation such as "motion," "affidavit," etc. [*Fed R Civ P 10(a)*; *Fed R Civ P 7(b)(2)*]. Pleadings are designated in the federal courts as follows [*Fed R Civ P 7(a)*]:

- Complaint.
- Answer to a complaint.
- Answer to a counterclaim.

- Answer to a crossclaim.
- Third-party complaint.
- Third-party answer.

Local rules have format requirements as to how pleadings, motions, and other documents must be designated.

5.07[8] LOCAL PRACTICE: Designation.

5.07[8][a] LOCAL PRACTICE: CD Cal Requirements. Immediately below the docket number must appear a concise description of the nature of the document (notice of motion, memorandum in support or opposition, etc.). Immediately below the description must appear the date and time of any hearing on the matter to which the paper is addressed [*CD Cal Civ LR 11-3.8(e)*]. A complaint or petition must state the nature of the action or proceeding [*CD Cal Civ LR 11-3.8(f)*]. A class action must be designated as a class action [*CD Cal Civ LR 23-1*].

Cross Reference:

Discussion of class actions requirements, see Ch. 20, Class Actions, see *§§ 2.08 -2.13*.

5.07[8][b] LOCAL PRACTICE: ED Cal Requirements. For initial pleadings in admiralty and maritime, the designation "In Admiralty" must follow the name of the court [ED Cal Adm LR 510(a)]. If one or more claims at law are presented, the initial pleading must be designated "At law and In admiralty" [ED Cal Adm LR 510(a)].

5.07[8][c] LOCAL PRACTICE: ND Cal Requirements. Each paper (except exhibits) filed with the court must bear a footer on the lower margin of each page stating the title of the paper ("Complaint," etc.) or some clear and concise abbreviation of it [*ND Cal Civ LR 3-4(c)(3)*].

A complaint or Notice of Removal Action seeking review of federal agency determinations in immigration cases, Privacy Act cases, or Administrative Procedure Act cases must include, under the title of the document, whichever is applicable, either "Immigration Case," "Privacy Act Case," or "Administrative Procedure Act Case" [*ND Cal Civ LR 3-4(a)(4)*]. In United States debt collection cases, the first page of the complaint must identify the action by using the words "Debt Collection Case" [*ND Cal Civ LR 16-6(a)*].

A complaint, counterclaim or crossclaim sought to be maintained in a class action must bear the legend "Class Action" on the first page below the title below the title describing the paper as a complaint, counterclaim, or crossclaim [*ND Cal Civ LR 3-4(a)(5)*].

Cross Reference:

Discussion of class actions requirements, see Ch. 20, Class Actions, see *§§ 2.08 -2.13*.

5.07[8][d] LOCAL PRACTICE: SD Cal Requirements. In the space to the right of center, a brief designation of the document's nature must appear following the title of the court and the title of the action [*SD Cal Civ LR 5.1(j.3)*].

For each motion and any opposition and reply to a motion, there must be a cover page, with the space opposite the caption below the case number, indicating the name of the judicial office, the courtroom number, and the date and time of the hearing [*SD Cal Civ LR 5.1(j.4)*].

Cross References:

Form of the entire caption, see *§ 5.32*. Forms of all types of designations, see 4 *Bender's Federal*

Practice Forms, Forms 10:1-10:30 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & Interpretation

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5.08 Formatting Body of Pleading.

5.08[1] Body of Pleading. The body of the pleading contains the averments of the claim or defense. The requirements of the averments are as follows [*Fed R Civ P 10(b)*]:

- Must be made in separate, numbered paragraphs [*see Gonzales v. Wing (NDNY 1996) 167 FRD 352, 355 , aff'd, 1997 US App LEXIS 12289 (2d Cir 1997)*].
- Contents of each numbered paragraph must be limited to a statement of a single set of circumstances.
- Each claim founded on a separate transaction or occurrence must be made in a separate count, whenever a separate count would facilitate clear presentation.
- Each defense, other than a denial, founded on a separate transaction or occurrence, must be stated as a separate defense, whenever a separation would facilitate clear presentation [*see also Bautista v. Los Angeles County (9th Cir 2000) 216 F3d 837, 840* (quoting **Moore's**)].

Consider:

Even if separate counts are not required, using them is often desirable. A claim can be set our either as a "count" or as a "claim for relief." Separate claims or counts are used routinely to separately state claims that are based on different legal theories as well as on separate transactions. If more than one transaction or occurrence is involved, each would be stated by transaction and by theory of recovery. Pleadings will serve the purpose of sharpening and limiting issues only if claims based on one theory of recovery are set forth separately from those based on another theory of recovery [*see, e.g., Windsor v. Federal Executive Agency (MD Tenn 1983) 614 F Supp 1255, 1258 , aff'd without opinion, 767 F2d 923 (6th Cir 1985)*]. If a single count or claim is based on more than one transaction, a court might grant a motion to require that each claim based on on a separate transaction be separately pleaded, particularly if it is confusing.

Failure to comply with the technical requirements of *Fed R Civ P 10(b)* does not necessary serve as a basis for dismissal, especially if technical deficiencies can be remedied easily [*Amous v. Trustmark Nat'l Bank (ND Miss 2000)*

195 FRD 607, 609 ; *Benschoter v. Hardy (ED Mich 2001) 202 FRD 216, 219*].

5.08[2] LOCAL PRACTICE: Body of Pleading.

5.08[2][a] LOCAL PRACTICE: CD Cal Requirements. The Central District has no specific local rule governing the format of the body of a pleading.

5.08[2][b] LOCAL PRACTICE: ED Cal Requirements. The Eastern District has no specific local rule governing the format of the body of a pleading.

5.08[2][c] LOCAL PRACTICE: ND Cal Requirements. The Northern District has no specific local rule governing the format of the body of a pleading.

5.08[2][d] LOCAL PRACTICE: SD Cal Requirements. Averments in any pleading seeking relief must be made in numbered paragraphs, each of which must be limited, as far as is practicable, to a statement of a single set of circumstances. Responsive pleadings must contain numbered paragraphs, each of which corresponds to the paragraph to which it is directed [*SD Cal Civ LR 5.1(k)*].

Cross References:

General requirements for pleadings (papers, fonts, margins, etc.), see *§ 5.13*. Discussion of page limitations, see *§ 5.11*.

For applicable motions, see 4 *Bender's Federal Practice Forms, Forms 10:50- 10:53* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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5.09 Formatting Body of Motion.

5.09[1] Body of Motion. There are no formal formatting requirements in the Federal Rules for motions. However, the body of a motion must [*Fed R Civ P 7(b)*]:

- Be in writing, unless made during hearing or trial.
- State the grounds with particularity.
- Set forth the relief or order sought.

5.09[2] LOCAL PRACTICE: Body of Motion.

5.09[2][a] LOCAL PRACTICE: CD Cal Requirements. In all cases not listed as exempt in Local Rule 16-11, and except in connection with discovery motions (which are governed by LR 27-1 through 37-4), and except in connection with applications for temporary restraining orders, counsel contemplating the filing of any motion must first contact opposing counsel to discuss thoroughly, *preferably in person,* the substance of the contemplated motion and any potential resolution. If the parties are unable to reach a resolution that eliminates the necessity for a hearing, counsel for the moving party must include in the notice of motion a statement to the following effect [*CD Cal Civ LR 7-3*]: "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on (date)."

The notice of motion must contain a concise statement of the relief or court action that the movant seeks [*CD Cal Civ LR 7-4*]. There must be served and filed with the notice of motion (a) a brief but complete supporting memorandum and the points and authorities on which the moving party may rely; and (b) the evidence on which the moving party will rely in support of the motion [*CD Cal Civ LR 7-5*].

5.09[2][b] LOCAL PRACTICE: ED Cal Requirements. The Eastern District has no specific local rule governing the format of the body of a motion.

5.09[2][c] LOCAL PRACTICE: ND Cal Requirements. The motion must be filed in one document, not

exceeding 25 pages in length [*ND Cal Civ LR 7-2(b)*]. In the first paragraph of the motion, there must be notice of the motion, including date and time of the hearing [*ND Cal Civ LR 7-2(b)(2)*]. In the second paragraph, there must be a concise statement of what relief or action the movant seeks [*ND Cal Civ LR 7-2(b)(3)*]. The succeeding paragraphs must contain points and authorities in support of the motion [*ND Cal Civ LR 7-2(b)(4)*; *ND Cal Civ LR 7-4(a)*]. Every motion must be accompanied by an affidavit or a declaration [*ND Cal Civ LR 7-2(d)*; *ND Cal Civ LR 7-5(b)*], along with a proposed order unless excused by the judge who will hear the motion [*ND Cal Civ LR 7-2(c)*].

Example:

The affidavit or declaration should have the appropriate references to the record. Moreover, extracts from depositions, interrogatory answers, requests for admissions, and other evidentiary matters must be appropriately authenticated by an affidavit or declaration [*Republic W. Ins. Co. v. Fireman's Fund Ins. Co. (ND Cal 2003) 241 F Supp2d 1090, 1095*].

5.09[2][d] LOCAL PRACTICE: SD Cal Requirements. Each motion or other request for ruling by the court must be accompanied by a separate motion and notice of motion and another separate document captioned "Memorandum of Points and Authorities in support of [the motion]." When appropriate, a separate statement of material facts must be supplied [*SD Cal Civ LR 7.1(f.1)*].

Cross References:

General requirements for pleadings (papers, fonts, margins, etc.), see *5.13*. Discussion of page limitations, see *5.11*. Discussion of pretrial motion requirements, see Ch. 26, Pretrial Motion Practice, see *§§ 26.12 -26.36*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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5.10 Formatting Signature Block.

5.10[1] Signature Is Required. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's individual name, or by the party if not represented by counsel [*Fed R Civ P 11(a)*; *see Giebelhous v. Spindrift Yachts (9th Cir 1991) 938 F2d 962, 966* (signature is more than simply a typewritten name)]. The filed document must bear the original signature [Perea v. California (ED Cal 2000) 2000 US Dist LEXIS 22528, at *2]. Each paper must state the signer's address, e-mail address, and telephone number [*Fed R Civ P 11(a)*], so if that information is not in the heading, it must appear in the signature block.

Warning:

An unsigned pleading, motion, or other paper may be stricken if the omission is not promptly corrected after being called to the attention of the person whose signature is required [*Fed R Civ P 11(a)*].

The signature on a pleading, motion, or other paper certifies among other things, that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, that (1) the document is not being presented for any improper purpose; (2) the claims, defenses, other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) its allegations or defenses and facts are supported by the evidence; and (4) the denials of factual contentions are warranted on the evidence, or if specifically identified, are reasonably bases on a lack of information and belief [*Fed R Civ P 11(b)*].

5.10[2] LOCAL PRACTICE: Signature Block.

5.10[2][a] LOCAL PRACTICE: CD Cal Requirements. All documents, except declarations, must be signed by the attorney for the party or by the party appearing pro se. The name of the person signing the pleading, motion, or other paper, must be typed below the signature line [*CD Cal Civ LR 11-1*]. If the person signing the document is a member of a law firm, the firm's name should also be indicated [*CD Cal Civ LR 83-2.5.2*].

5.10[2][b] LOCAL PRACTICE: ED Cal Requirements. The name of the person signing the pleading, motion,

or other paper must be clearly typed below the signature line [*ED Cal Gen LR 131(b)*].

5.10[2][c] LOCAL PRACTICE: ND Cal Requirements. The Northern District has no specific local rule governing the formatting of the signature block.

5.10[2][d] LOCAL PRACTICE: SD Cal Requirements. The name of the person signing the pleading, motion, or other paper must be clearly typed below the signature line [*SD Cal Civ LR 5.1(j.5)*].

Cross References:

Form of signature block, see *§ 5.33*. Discussion of the consequences of signing a complaint, see *Ch. 6, Drafting the Summons and Complaint, 6.14[4]*. Coverage of sanctions, see Ch. 33, Rule 11 Sanctions and Ch. 34, Other Sanction Provisions.

5.10[3] Electronic or Facsimile Signature May Be Allowed or Required. A district court, by local rule, may permit or require pleadings, motions, and other papers to be filed, signed, or verified by electronic means. A local rule may require electronic filing only if it allows for reasonable exceptions [*Fed R Civ P 5(d)(3)*].

5.10[4] LOCAL PRACTICE: Electronic or Facsimile Signature.

5.10[4][a] LOCAL PRACTICE: CD Cal Requirements. Documents may not be transmitted by facsimile directly to the clerk for filing but copies of facsimile documents are accepted for filing, provided that they are legible. The original of any faxed document, including the original signature of the attorney, party, or declarant, must be maintained by the filing party until the conclusion of the case, including any applicable appeal period, subject to being produced on order of the court [*CD Cal Civ LR 11-2*].

5.10[4][b] LOCAL PRACTICE: ED Cal Requirements.

Appearance of electronic signature. If a document is submitted via portable electronic media, signatures must appear either as a facsimile of the original in a scanned document placed on portable electronic media, or on a separate, scanned signature page if the document was published to.pdf and then placed on portable electronic media. If the signature is submitted on a separate scanned page, the docket will reflect the submission of the signature page [*ED Cal Gen LR 131(b)*]. Documents that are normally signed by more than one attorney may be prepared by obtaining approval from any other attorney to state that the other attorney has authorized submission of the document on his or her behalf. The submitting attorney must place the other attorney's signature on the electronic filing by using "/s/ counsel's name (as authorized on _____ date)." Alternatively, the submitting attorney may obtain the original signatures from all attorneys who are filing the document, scan the signature page(s) only and file it as an attachment to the document with an explanation on the signature page of the filed document [*ED Cal Gen LR 131(e)*].

Attorney's electronic signature. Anything filed using an attorney's name, login and password will be deemed to have been signed by that attorney [*ED Cal Gen LR 131(c)*]. An objection to the authenticity of an attorney's electronic signature generally must be made within 21 days of receipt of a notice of electronic filing, but may be made at a later time for good cause shown by an attorney exercising due diligence [*ED Cal Gen LR 131(d)*].

Non-attorney's electronic signature. When a document, such as an affidavit, must be signed by one not an attorney of record in the case, it may be submitted in electronic format bearing a "/s/" and the person's name on the signature line along with a statement that the submitting attorney has a signed original, e.g., "/s/ John Smith (original signature retained by attorney Mary Doe)." The submitting attorney has the duty to then maintain the original. This procedure may also be followed when a hybrid electronic/paper document is filed, i.e., the conventionally served document may also contain an annotated signature in lieu of the original [*ED Cal Gen LR 131(f)*].

Warning:

A Case Management/Electronic Case Files (CM/ECF) docketing and filing system took effect in the Eastern District on January 3, 2005. Unless specifically excused, electronic filing of all documents is mandatory for attorneys [*see ED Cal Gen LR 133(a)*]. A user's manual is available for download on the district's web site: www.caed.uscourts.gov.

Facsimile signatures. An image of an original manual signature appearing on a facsimile copy filed with the court in accordance with local rule constitutes an original signature for all purposes [*ED Cal Gen LR 133(e)(1)*].

Warning:

Do not fax documents directly to the clerk's office or chambers without an express order to do so. Documents faxed to the clerk or to chambers will not be filed, lodged, received, returned, or acknowledged absent an express order of the court [*ED Cal Gen LR 133(e)(4)*].

5.10[4][c] LOCAL PRACTICE: ND Cal Requirements. In lieu of filing an original document under *ND Cal Civ LR 5-1(a)*, a party or a party's agent may file with the court a facsimile copy of the original document. For purposes of the rule, the image of the original manual signature appearing on the fax copy filed pursuant to the rule will constitute an original signature for all court purposes [*ND Cal Civ LR 5-2*].

Under *Fed R Civ P 5(e)*, the clerk will accept in certain actions documents filed, signed, or verified by electronic means that are consistent with General Order No. 45 ("Electronic Case Filing"), found at the court's website: www.cand.uscourts.gov [*ND Cal Civ LR 5-4*]. In cases subject to the Electronic Case Filing rules, all papers must be served electronically [*ND Cal Civ LR 5-5(b)*; *see also* General Order No. 45].

5.10[4][d] LOCAL PRACTICE: SD Cal Requirements.

Facsimile signature. The image of the original manual signature on a facsimile copy constitutes an original signature for all court purposes. The original signed document may not be substituted except by court order. The original signed document must be maintained by the attorney of record for a period of no less than the maximum allowable time to complete the appellate process. On request, the original document must be provided to other parties for review [*SD Cal Civ LR 5.3(d)*]. The party sending a facsimile must maintain a transmission record from the fax machine sending the fax stating the telephone number of the receiving machine, the number of pages sent, the transmission time, and an indication of errors in transmission [*SD Cal Civ LR 5.3(e)*].

Electronic signature of registered user. The attorney's user log-in and password required to electronically file documents serves as that attorney's signature. The name of the attorney must be preceded by an "s/" and typed in the space where the signature would otherwise appear [SD Cal Electronic Case Filing Admin Policies & Procedures Manual 2(f)(1)].

Non-registered signatories. If an original document requires the signature of a non-registered signatory, the filing party must scan and electronically file the document and must retain the original document for five years from the date the document is signed, or for one year after all time periods for appeal have expired, whichever is greater. The original paper document must be provided to the court on request [SD Cal Electronic Case Filing Admin Policies & Procedures Manual 2(f)(2)].

Cross Reference:

Coverage of electronic or facsimile filing, see *§§ 5.29 -5.31*.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.11

5.11 Determining Page Limitations for Pleadings, Motions, and Other Papers.

5.11[1] Federal Rules Do Not Set Page Limitations. The Federal Rules do not establish page limitations for pleadings, motions, or other papers. However, the local rules do set some page limitations. In addition, individual judges' standing orders should be consulted [*see 5.04[3]*].

5.11[2] LOCAL PRACTICE: Page Limitations.

5.11[2][a] LOCAL PRACTICE: CD Cal Requirements. No brief may exceed 25 pages in length, excluding indices and exhibits, unless permitted by order of the judge [*CD Cal Civ LR 11-6*]. Any memorandum of points and authorities or any brief exceeding 10 pages, excluding exhibits, must be accompanied by an indexed table of contents setting forth headings or subheadings contained in the body of the brief and by an indexed table of cases, statutes, rules, and other authorities cited in the brief [*CD Cal Civ LR 11-8*]. Appendices may not include any matters that properly belong in the body of the memorandum or brief [*CD Cal Civ LR 11-7*].

5.11[2][b] LOCAL PRACTICE: ED Cal Requirements. Briefs exceeding 15 pages in length must be accompanied by an indexed table of contents related to the heading or subheadings and by an indexed table of statutes, rules, ordinances, cases, and other authorities cited [*ED Cal Gen LR 133(k)*].

5.11[2][c] LOCAL PRACTICE: ND Cal Requirements. A motion must be a "one filed document" not exceeding 25 pages in length [*ND Cal Civ LR 7-2(b)*]. Briefs or memoranda filed with opposition papers may not exceed 25 pages of text and the reply brief or memorandum may not exceed 15 pages of text. The only exception is on the court's express order, made on the party's request, which must be made before the due date [*ND Cal Civ LR 7-4(b)*].

5.11[2][d] LOCAL PRACTICE: SD Cal Requirements. Briefs or memoranda in support of or in opposition to a motion may not exceed 25 pages in length without leave of the judge who will hear the motion. No reply memorandum may exceed 10 pages without leave of the judge. Briefs and memoranda exceeding 10 pages must contain a table of contents and a table of authorities cited [*SD Cal Civ LR 7.1(h)*; *see also Nunley v. Los Angeles (9th Cir 1995) 52 F3d 792, 795* (opposition memorandum failed to include table of contents)].

Warning:

Page limitations should not be considered as establishing minimum limits. Counsel should consider the length of the paper in relation to the nature of the issues addressed.

Cross References:

Motion requirements, see Ch. 26, Pretrial Motion Practice, see *§§ 26.12 -26.36*.

See also 1 *Bender's Federal Practice Forms, Form 7:222* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.12

5.12 Formatting Exhibits.

5.12[1] Exhibits May Be Attached. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion [*Fed R Civ P 10(c)*]. The rule is permissive in nature; there is no requirement to attach documents [*Hirata Corp. v. J.B. Oxford & Co. (SD Ind 2000) 193 FRD 589*]. Certain written instruments attached to pleadings may be considered part of the pleading [*Fed R Civ P 10(c)*]. Generally, affidavits and declarations are not allowed as pleading exhibits unless they form the basis of the complaint [*see United States v. Ritchie (9th Cir 2003) 342 F3d 903, 908*].

When evaluating a motion to dismiss, a court may consider documents attached to the complaint [*Fed R Civ P 10(c)*; *see also* Norm Thompson Outfitters, Inc. v. Starcrest Prods. (D Or 2004) 2004 US Dist LEXIS 8383, at *3].

Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim, and a defendant may offers these documents in a motion to dismiss [*see, e.g., Van Buskirk v. CNN (9th Cir 2002) 284 F3d 977, 980* ("Under the 'incorporation by reference' rule of this Circuit, a court may look beyond the pleadings without converting the Rule 12(b)(6) motion into one for summary judgment"); *United States v. Ritchie (9th Cir 2003) 342 F3d 903, 908*].

Cross Reference:

Discussion of motions to dismiss, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§§ 8.14 -8.22*.

Judicial determination of the effect of an exhibit prevails over the pleader's denomination of the exhibit [*Ott v. Home Sav. & Loan Ass'n (9th Cir 1958) 265 F2d 643, 646 n1*].

5.12[2] LOCAL PRACTICE: Exhibits.

5.12[2][a] LOCAL PRACTICE: CD Cal Requirements. Nonpaper physical exhibits may not be attached to any document. A nonpaper physical exhibit must be placed in a secure container identified by the case name and number,

and the name, address and telephone number of the submitting party, and lodged with a separately filed Notice of Lodging [*CD Cal Civ LR 11-5.1*]. CM/ECF users must first file electronically a Notice of Manual Filing setting forth the reason(s) why the exhibit cannot be filed electronically and present the Notice of Electronic Filing with the exhibits to be lodged [CD Cal Civ LR 11-5.1]. A paper exhibit, unless compliance is impracticable, must be scanned and electronically filed with the document to which it relates and must be numbered at the bottom of each page consecutively to the principal document [*CD Cal Civ LR 11-5.2*]. The exhibit number must be placed immediately above or below the page number on each page of the exhibit. Exhibits must be tabbed in sequential order [*CD Cal Civ LR 11-5.3*]. Exhibits must not exceed 8 1/2 x 11 inches in size and should be scanned and electronically filed whenever practicable. Exhibits that are too large to scan shall be folded in such a manner as not to exceed an 8 1/2 x 11 inch sheet, and filed as paper exhibits. CM/ECF users must file electronically a Notice of Manual Filing setting forth the reason(s) why the exhibit cannot be filed electronically and present the Notice of Electronic Filing with the exhibits to be filed or lodged [CD Cal Civ LR 11-5.4]. An exhibit smaller than 81/2 x 11 inches must be attached to an 81/2 x 11 inch sheet [*CD Cal Civ LR 11-5.5*].

5.12[2][b] LOCAL PRACTICE: Eastern District Requirements. Unless otherwise permitted or required to be filed in paper format by local rule, all pretrial exhibits must be submitted in electronic format [*ED Cal Gen LR 138(c)(1)*]. Absent special circumstances, exhibits that are black and white documents should be scanned in black and white with a scanner configured at 200 dots per inch, if possible. Documents in color in their original form, such as photographs, may be scanned in color [*ED Cal Gen LR 138(c)(2)*].

Warning:

If many color exhibits will be filed, you must seek special procedures for filing at the time of the scheduling conference or from the court at a reasonable time before the due date of the filing. Special filing procedures for color exhibits may include an exemption from the usual electronic size of a filed document or filing in paper [*ED Cal Gen LR 138(c)(2)*].

While there is no presumptive page limit on exhibits submitted in electronic format, voluminous scanned attachments and exhibits may have to be divided into separate attachments. Current size limits for documents submitted through CM/ECF can be found through the Court Information link on the Court's CM/ECF Welcome Page [*ED Cal Gen LR 138(c)(1)*].

When submission of exhibits must be in paper format due to exceptional circumstances, the attorney must apply to the court for an exemption from the electronic submission requirement. The application must be filed no later than seven days before the filing is due. If the application is granted and exhibits are submitted in paper form, the exhibits must be filed and served and the attorney must also electronically file a one-page.pdf document entitled "Notice of attachment" which refers to the electronically filed document related to the exhibits, states that the exhibits are being filed in paper, and specifies the date of the order permitting filing in paper. Finally, the attorney must also file a CD-ROM or other appropriate media containing the filed exhibits for the clerk's office use [*ED Cal Gen LR 138(d)*].

5.12[2][c] LOCAL PRACTICE: ND Cal Requirements. The Northern District has no specific local rule governing the format of exhibits.

5.12[2][d] LOCAL PRACTICE: SD Cal Requirements.

Paper filing. Unless compliance is impracticable, exhibits must be paged in consecutive numerical order, and each page must show the exhibit number either immediately above or below the page number. Unless the physical nature of the exhibit render it impracticable, exhibits must be attached to the documents to which they belong and must be readable without detaching the exhibits from the accompanying document. Each document containing exhibits must have, as a cover page to the exhibits, a table of contents indicating the page number of each of the succeeding exhibits. If exhibits are tabbed, the tabs must be at the bottom and not at the sides [*SD Cal Civ LR 5.1(e)*].

Cross Reference:

4 *Bender's Federal Practice Forms, Form 10:73* (Matthew Bender).

Electronic filing. Exhibits must be submitted electronically as attachments. Exhibits over a certain length must be submitted in multiple segments. Each document containing exhibits must have, as a cover page to the exhibits, a table of contents indicating the page number of each of the succeeding exhibits. A party may seek leave for the non-electronic filing of exhibits which are not convertible to electronic form [SD Cal Electronic Case Filing Admin Policies & Procedures Manual 2(k)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.12A

5.12A Privacy Protection for Filings Made With the Court

[1] Certain Personal Information Must Be Redacted From Filings. In compliance with the E-Government Act of 2002 and *Fed R Civ P 5.2*, federal courts must make electronic filings--as well as paper filings that are scanned into electronic form--available online through the courts' websites. However, electronic filing and storage create privacy concerns, since court filings frequently contain personal information such as social-security or bank account numbers.

Unless the court orders otherwise, filings that contain an individual's social-security number, taxpayer identification number, date of birth, the name of an individual known to be a minor, or a financial-account number, may include only [*Fed R Civ P 5.2(a)*]:

- the last four digits of a social-security number or taxpayer identification number;
- the year of an individual's birth;
- the minor's initials; and
- the last four digits of the financial-account number.

The court may issue a protective order requiring redaction of additional information or limiting remote electronic access to a particular filing [*Fed R Civ P 5.2(e)*].

The redaction requirement applies to both electronic and paper filings, and includes trial exhibits filed with the court [*Fed R Civ P 5.2*, Advisory Committee Note of 2007]. The court may order that a filing be made under seal without redaction [*Fed R Civ P 5.2(d)*]. A party also has the option of filing an unredacted copy under seal; the copy must be kept as part of the court record [*Fed R Civ P 5.2(f)*].

A redacted filing may be filed together with a reference list that identifies and specifies a unique identifier for each item [*Fed R Civ P 5.2(g)*]. The list is filed under seal and may be identified as of right.

Cross Reference:

Discussion of redaction requirement, *see* Vol. 1, *Moore's Federal Practice, §§ 5.2.02 -5.2.06* (Matthew Bender 3d ed.).

[2] Certain Information Is Exempt From Redaction Requirement. The redaction requirement does not apply to the following information [*Fed R Civ P 5.2(b)*]:

- a financial-account number that identifies the subject property in a forfeiture proceeding;
- the official record of an administrative, agency, or state-court proceeding;
- the record of a court or tribunal proceeding that was not subject to the redaction requirement when originally filed;
- social-security appeals and immigration cases [*see Fed R Civ P 5.2(c)*], or filings under seal [*Fed R Civ P 5.2(d)*];
- a pro se filing in a habeas corpus action.

A party waives Rule 5.2 protection by filing his or her own information without redaction and not under seal [*Fed R Civ P 5.2(h)*].

Cross Reference:

Discussion of exceptions to redaction requirement, *see* Vol. 1, *Moore's Federal Practice, §§ 5.2.02 -5.2.06* (Matthew Bender 3d ed.).

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1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.13

5.13 General Formatting Requirements for All Pleadings, Motions, and Other Papers.

5.13[1] LOCAL PRACTICE: CD Cal Requirements.

Paper. All pleadings, motions, and other papers, must be submitted on opaque, unglazed, white paper (includes recycled paper) not less than 13-point weight. The paper must be 81/2 by 11 inches, numbered on the left margin with no more than 28 lines per page. Only one side of the paper may be used. The lines of each page must be double spaced and numbered consecutively with line 1 beginning at least one inch below the top edge of the paper [*CD Cal Civ LR 11-3.2*].

Pagination. All documents must be numbered consecutively at the bottom of each page [*CD Cal Civ LR 11-3.3*].

Typeface. A proportionally spaced type face or a monospaced typeface may be used. A proportionally spaced face must be 14-point or larger unless the court orders otherwise. A monospaced face may not contain more than 101/2 characters per inch [*CD Cal Civ LR 11-3.1.1*].

Printing. All pleadings, motions, and other papers, including exhibits, presented for filing with the court, must be typewritten or printed, or prepared by a photocopying or other duplicating process that will produce clear and permanent copies equally legible to printing, in black or dark blue ink [*CD Cal Civ LR 11-3.1*].

Original and Copies. The original must be labeled as the original and consist entirely of the original pages, except as otherwise allowed by the local rules (such as exhibits that consist of copies). All copies are to be clearly identified as such. [*CD Cal Civ LR 11-3.4*].

Pre-Punching, Riders, and Backing of Documents. All documents presented for filing or lodging in paper format, and mandatory chambers copies of electronic case filings, must be prepunched with two normal-size holes (approximately 1/4" diameter), centered 23/4 inches apart, 1/2 to 5/8 inches from the top edge of the document. All pages must be firmly bound at the top and backed. The backing may not extend more than one inch below the pages bound and must have the short title of the document typed in the lower right-hand corner [*CD Cal Civ LR 11-3.5*].

Spacing. The typing or printing on the document must be double spaced, including citations and quotations [*CD Cal Civ LR 11-3.6*]. However, footnotes may be single spaced [*CD Cal Civ LR 11-3.6.1*], as may real property descriptions [*CD Cal Civ LR 11-3.6.2*], and corporate surety bonds on printed forms if they comply generally with the space requirements of the rule [*CD Cal Civ LR 11-3.6.3*].

Quotations. Quotations from cited cases or other authorities more than one sentence in length must be clearly indented not less than 5 spaces nor more than 20 spaces [*CD Cal Civ LR 11-3.7*].

Citation to authorities:

- All citations to Acts of Congress must include a parallel citation to the United States Code by title and section [*CD Cal Civ LR 11-3.9.1*].

- All citations to regulations must include a citation to the Code of Federal Regulations by title and section, and the date of the promulgation of the regulation [*CD Cal Civ LR 11-3.9.2*].

- The initial citation of any United States Supreme Court case must include parallel citations to the United States Reports, Lawyer's Edition, and Supreme Court Reporter. Federal Reporter, Federal Supplement, or Federal Rules Decisions citations must be used when available. Initial state court citations must include both the official reports and any regional reporter published, but California parallel citations may be limited to the official reports and California Reporter [*CD Cal Civ LR 11-3.9.3*].

Redaction of personal data identifiers. Except as specifically excluded by rule from this requirement, parties must refrain from including, or when inclusion is necessary, partially redact the following personal data identifiers from all documents, exhibits, and attachments filed with the court [*CD Cal Civ LR 79-5.4*]:

- If an individual's social security number must be included, only the last four digits of that number should be used.

- If a minor child must be mentioned, only the initials of that child should be used.

- If an individual's date of birth must be included, only the year should be used.

- If a financial account is relevant, it should be identified by name or type of account and the financial institution where maintained, and only the last four digits of the account number should be indicated.

Exception--Social Security Cases and Specified Documents:

All social security cases are excluded from the redaction requirement. In addition, all of the following documents are not to be included in the public case file and are excluded from the redaction requirement: unexecuted summonses or warrants, supporting applications, and affidavits; pretrial bail reports; presentence investigation reports; statements of reasons in the judgment of conviction; juvenile records; documents containing identifying information about jurors or potential jurors; financial affidavits filed in seeking representation pursuant to the Criminal Justice Act; ex parte requests for authorization of investigative, expert, or other services pursuant to the Criminal Justice Act, and sealed documents [*CD Cal Civ LR 79-5.4*].

When a party must file a document containing any of the listed personal data identifiers, that filing must comply with one of the three following methods of protecting that sensitive and private information [*CD Cal Civ LR 79-5.4*]:

- A redacted version of the document excluding those identifiers may be filed.

- A redacted version of the document with unique identifiers (e.g., A, B, C) used in place of the personal data identifiers, along with a reference list filed under seal that indicates the correspondence between the unique identifiers and the personal data identifiers may be filed.

Cross Reference:

Discussion of Central District requirements for filing document under seal, see *§ 22.44[2][a]*.

If a redacted version is filed, counsel must maintain the unredacted document, exhibit, or attachment in his or her office pending further order of the court or resolution of the action, including appeal, if any. Counsel must, at the request of opposing counsel or parties, provide a copy of the complete document [*CD Cal Civ LR 79-5.4*].

Warning:

The responsibility for redacting or placing under seal any document, exhibit, or attachment that contains a personal data identifier rests *solely* with counsel and the parties. This responsibility extends to court forms. Counsel must carefully review any such document, exhibit, or attachment: a failure to redact or place under seal as required may subject counsel and client to the full disciplinary power of the court [*CD Cal Civ LR 79-5.4*].

5.13[2] LOCAL PRACTICE: ED Cal Requirements.

Electronically filed documents. Documents electronically filed must be created and formatted to comply in appearance and presentation, both in an electronic format and when printed, with the requirements for conventionally filed paper documents [*ED Cal Gen LR 130(a)*; *see ED Cal Gen LR 130(b)* (requirements for conventionally filed documents)].

Paper. All documents presented for conventional filing must be on white, unglazed opaque paper of good quality with numbered lines in the left margin, 81/2 by 11 inches in size. All documents must be flat and unfolded (except when necessary for presentation of exhibits) [*ED Cal Gen LR 130(a), (b)*].

Printing. Matter contained in documents must be presented by typewriting, printing, photographic, or offset reproduction, or other clearly legible process, without erasures or interlining that materially defaces the document [*ED Cal Gen LR 130(a), (b)*].

Double-Spacing. Documents must be double-spaced except for the identification of counsel, title of the action, category headings, footnotes, quotations, exhibits, and descriptions of real property [*ED Cal Gen LR 130(a), (c)*].

Quotations. Quotations of more than 50 words must be indented [*ED Cal Gen LR 130(a), (c)*].

Pagination. Each page of a document must be numbered consecutively at the bottom and contain a brief description of the document on the same line [*ED Cal Gen LR 130(a), (d)*].

Binding; Prepunching. All documents presented for conventional filing must be bound at the top left corner and prepunched with two holes (approximately 1/4" diameter), centered 23/4" apart, 1/2 to 5/8" from the top edge of the document [*ED Cal Gen LR 130(b)*].

Citation to authorities. The local rules require citations in papers as follows [*ED Cal Gen LR 133(i)*]:

- Citation of federal cases must be to the United States Supreme Court Reports, Federal Reports, Federal Supplement, or Federal Rules Decisions, if so reported, and must indicate the court and the year of decision.

- Citations to federal statutes must be to the United States Code, if so codified.

- Citations to federal administrative rules must be to the Code of Federal Regulations, if so codified, or to the Federal Register, if published in it.

- Citations to California cases must be to the official California Reports.

- Citation of other state cases must be to the National Reporter System, showing state and year of decision.

- Other parallel citations may be added. If a case, statutory, or regulatory authority is relied on that has not been reported, published, or codified in any of the foregoing references, or that is not available through Lexis/Westlaw, a copy of that authority must be appended to the brief or other document in which it is cited. The requirement includes, but is not limited to, the Statutes at Large, the Public laws of the United States, the California Administrative Code, administrative regulations not contained in the Code of Federal Regulations or the Federal Register, and decisions and other matters published in specialized reporter services.

Redaction of personal data identifiers. Parties must omit, or when inclusion is necessary, partially redact the following personal data identifiers from all pleadings, documents, and exhibits, whether filed electronically or in paper, unless the court orders otherwise [*ED Cal Gen LR 140(a)*]:

- If a minor child is mentioned, use only the initials of the child when federal or state law require the use of initials or when the specific identity of the minor is not necessary to the case or document.

- Financial accounts should be identified by name or type of account and the financial institution where maintained but only the last four digits of the account number should be included.

- Only the last four digits of an individual's social security number should be used.

- For date of birth, only the year should be used.

Information must also be redacted when federal law requires redaction [*ED Cal Gen LR 140(a)(vi)*]. If the court orders, a reference list may be filed with a filing that contains redacted information. The reference list identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each redacted item. The reference list must be filed under seal [*ED Cal Gen LR 140(c)*].

Cross Reference:

Discussion of Eastern District requirements for filing document under seal, see *§ 22.44[2][d]*.

5.13[3] LOCAL PRACTICE: ND Cal Requirements.

Paper. All papers presented for filing (except for reporter transcripts), must be on top-centered, two-hole punched, 81/2 inch by 11 inch white opaque paper of original or recycled bond quality with numbered lines, and must be flat, unfolded (unless necessary for the presentation of exhibits), without back or cover, and firmly bound at the top [*ND Cal Civ LR 3-4(c)(1)*].

Double-spacing; lines per line. Text must be on one side only and must be double spaced with no more than 28 lines per page, except for the identification of counsel, title of the case, footnotes, and quotations [*ND Cal Civ LR 3-4(c)(2)*].

Typeface and size. Typewritten text may be no less than standard pica or 12-point type in the Courier font or equivalent, spaced 10 characters per horizontal inch. Printed text produced on a computer or word processor may be proportionally spaced, provided the type may not be smaller than 12-point standard font (e.g., Times New Roman). The text of footnotes and quotations must also conform to these font requirements [*ND Cal Civ LR 3-4(c)(2)*].

Footer. Each paper (except exhibits) filed with the court must bear a footer on the lower margin of each page stating the title of the paper ("Complaint," etc.) or some clear and concise abbreviation of it. Once the court assigns a case number to the action, the case number must be included in the footer [*ND Cal Civ LR 3-4(c)(3)*].

Citation to authorities. Unless the assigned judge directs otherwise, all papers must include [*ND Cal Civ LR 3-4(d)*]:

- A parallel citation to the United States Code by title, section, and date if there is a citation to an Act of Congress.
- A citation to the Code of Federal Regulations by title and sections, and the date of the promulgation of the regulation, if there is a city to a U.S. regulation.
- A citation to the a U.S. Reports, Lawyer's Edition, or Supreme Court Reporter must be used if available. For cases not yet available in those formats but available electronically, the citation must indicate the database, year, and any screen or page numbers, if assigned.
- A citation to other federal court reporters (Federal Reporter, Federal Supplement, or Federal Rules Decisions) unless an alternative reporting service is widely available. For cases not yet available in those formats but available electronically, the citation must indicate the database, year, and any screen or page numbers, if assigned.
- A citation to either a state court reporter or an official regional reporting services. For cases not available in those formats but available electronically, the citation must indicate the database, year, and any screen or page numbers, if assigned.

Some citations prohibited. Any order or opinion designated as "NOT FOR CITATION," under LR 7-13 or similar rule of any other issuing court, may not be cited, either in written submission or oral argument, unless relevant under the doctrines of law of the case, res judicata, or collateral estoppel [*ND Cal Civ LR 3-4(e)*; *ND Cal Civ LR 7-14*].

Redaction of personal data identifiers. Parties must refrain from including, or must redact when inclusion is necessary, the following personal data identifiers from all pleadings and other papers filed in the public file in civil actions, including exhibits, whether filed electronically or in paper, unless otherwise ordered by the court [*ND Cal Civ LR 3-17(a)(1)*]:

- If an individual's social security number must be included, only the last four digits of that number should be used.
- If a minor child is mentioned, only the initials of the child should be used.
- If an individual's date of birth must be included, only the year should be used.

- If financial account numbers are relevant, only the last four digits of those numbers should be included.

A party wishing to file a document containing any of these personal data identifiers may file an unredacted document or a reference list under seal pursuant to ND Cal Gen Order 62, pending revision of *ND Cal Civ LR 79-5*. The reference list must contain the complete personal data identifiers and the redacted identifiers used in their place in the public filing. The unredacted document or reference list which will be retained by the court as part of the record. A redacted copy must be filed for the public file [*ND Cal Civ LR 3-17(d)*].

Cross Reference:

Discussion of Northern District requirements for filing document under seal, see *§ 22.44[2][b]*.

5.13[4] LOCAL PRACTICE: SD Cal Requirements.

Paper. Documents filed in paper format must be flat and unfolded, without backing sheet, typed on one side of the document, or prepared by means of a duplicating process on opaque, unglazed white paper, and must be letter size.

Printing; Fonts. Printed text, produced on a word processor or other computer, may be proportionally spaced, provided the type is no smaller than 12-point standard font (e.g., Times New Roman). The text of footnotes and quotations must also conform to these font requirements [*SD Cal Civ LR 5.1(a)*].

Double-Spacing; One side of page. Each document must be double spaced on one side of the document [*SD Cal Civ LR 5.1(a)*].

No Interlineations. There must not be any erasures or interlineations on the document unless they are noted by the clerk or judge by marginal initials at the time of filing [*SD Cal Civ LR 5.1(c)*].

Quotations. Quotations in excess of three lines must be indented and single spaced [*SD Cal Civ LR 5.1(a)*].

Binding; Prepunching. All documents presented for filing in paper format must be firmly bound at the top and prepunched with two normal-size holes (approximately 1/4" diameter), centered 23/4" apart, 1/2 to 5/8" from the top edge of the document [*SD Cal Civ LR 5.1(d)*].

Citations. When citing Acts of Congress, the corresponding United States Code citations must be cited. When regulations are cited, the appropriate citations to the Code of Federal Regulations, including code number, page, section, and the date of the regulation's promulgation, must be included [*SD Cal Civ LR 5.1(l)*].

Compliance. Unless a waiver is first obtained from the court, the clerk will not file any document that does not comply with the requirements of the local rules. The document will be endorsed as "lodged" until approved by the court [*SD Cal Civ LR 5.1(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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CHAPTER 5 Formatting, Serving, and Filing Papers
II. FORMATTING PLEADINGS, MOTIONS, AND OTHER PAPERS

1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.14

5.14 Clerk May Not Reject Improperly Formatted Papers.

The clerk may not refuse to file a paper solely because it is not presented in proper form as required by the Federal rules or by any local rule or practice [*Fed R Civ P 5(d)(4)*; *see Fed R Civ P 83(a)(2), (b)*]. *Fed R Civ P 5(d)(4)* mandates that the clerk accept documents despite technical violation [*McClellon v. Lone Star Gas Co. (5th Cir 1995) 66 F3d 98, 101* ; *Dielsi v. Falk (CD Cal 1996) 916 F Supp 985, 990*].

Warning:

Keep in mind, however, that the court may reject papers on this basis, or sanction counsel for failing to follow format requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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CHAPTER 5 Formatting, Serving, and Filing Papers
III. SERVING PLEADINGS, MOTIONS, AND OTHER PAPERS

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5.15 CHECKLIST: Serving Pleadings, Motions, And Other Papers.

☐ Determine if service is required.

○ If the court lacks personal jurisdiction over a party, service of the summons and complaint or of an initial pleading on a new party to be added to the action is governed by *Fed R Civ P 4*. These pleadings are:

☐ Complaints;

☐ Counterclaims against the plaintiff and a new party to be served on the new party;

☐ Crossclaims against a new party;

☐ Amended complaints asserting a claim against a party over whom the court has no jurisdiction;

☐ Amended complaints against a party who is in default for failure to appear, if the amendments to the complaint add new or additional claims for relief against the party in default.

○ After personal jurisdiction is established by service of summons and complaint, service must be made on each of parties for these pleadings:

☐ Answers and amended answers;

☐ Complaints in joinder;

☐ Crossclaims against parties in the proceedings;

☐ Amended complaints that contain no new or additional claims for relief against a party who has previously appears, unless the party is in default (if in default, amended complaint must be served as required by *Fed R Civ P 4*).

☐ For seizure actions, service on person having custody or possession of property at the time of its seizure, if no person is named as a defendant.

Authority:
Fed R Civ P 4, *5(a)*, *13(a)*, *(g)*

Discussion:
See *§ 5.17*

☐ Determine who must receive service of pleadings, motions, and other papers. Service must be made on:

○ Party if not represented by counsel.

○ Attorney for a represented party unless the court orders service on the party.

○ Attorney of record for class action.

Authority:
Fed R Civ P 5(b)

Discussion:
See *§ 5.16*

☐ Determine when written motion must be served and who must be served.

○ Every written motion must be served on each party, except:

☐ Motions that may be heard ex parte.

☐ With regard to parties who are in default for failure to appear.

○ Affidavits in support of or opposition to the motion must also be served on each party.

Authority:
Fed R Civ P 5

Discussion:
See *§ 5.18*

☐ Determine what discovery papers must be served on parties.

○ Every discovery paper required to be served on a party must be served on all parties who have made an appearance.

○ Service is required for:

☐ Notice to take deposition before filing action.

☐ Notice to take deposition on oral examination.

☐ Deposition on written questions.

☐ Interrogatories.

☐ Answers to interrogatories.

☐ Requests for production of documents, electronically stored information, and things.

☐ Written responses to requests for production of documents, electronically stored information, and things.

☐ Requests for entry on land for inspection and other purposes.

☐ Requests for admissions.

☐ Responses to requests for admission.

○ Court may waive service if there are numerous parties.

Authority:
Fed R Civ P 5, 27(a)(2), 30(b), 31(a)(3), 33(a), (b)(2), 34(a)(1), (a)(2), 34(b), 36(a)

Discussion:
See *§ 5.19*

☐ Determine what other papers must be served on all parties. Except for those parties in default for failure to appear, all parties must be served:

- ○ Written notices.
- ○ Appearances.
- ○ Demands.
- ○ Offers of judgment.
- ○ Designations of record on appeal.
- ○ Trial memoranda.
- ○ Settlement offers.
- ○ Writs of garnishment.
- ○ Grand jury investigations.
- ○ Affidavits in support of motion.
- ○ Substitutions of parties due to death of a party.
- ○ Federal disclosure statements, if important to proceedings.

Authority:
Fed R Civ P 5, 6(c), 10, 25(a), 38(b)

Discussion:
See *§ 5.20*

☐ Determine who must be served with orders.

- ○ Every order required by its terms to be served on a party must be served on all parties.
- ○ An order does not need to be served on a party in default for failure to appear.

Authority:
Fed R Civ P 5(a)

Discussion:

See *§ 5.21*

☐ Decide on a permissible method of service.

○ Service by hand delivery may be made by:

☐ Handing papers to the attorney or to the party if pro se.

☐ Leaving papers at the attorney's office or pro se party's office with a clerk or other person in charge of the office.

☐ If no one is in charge, leaving papers in a conspicuous place in the office.

☐ If office is closed or the person to be served has no office, leaving the paper at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

○ Service by U.S. Mail may be made by:

☐ Mailing a copy of the paper to the attorney or the pro se party at the last known address for the attorney or the pro se party.

☐ Service is complete when the document is placed in the custody of the U.S. Postal Service or dropped into a post office box.

☐ Nonreceipt or nonacceptance of the paper has no effect on validity of service.

☐ If nonreceipt can be proved, court has discretion to extend any applicable response period pertaining to the served paper.

○ Service may be made by alternative delivery methods (including electronic service) if:

☐ Person being served has provided written consent to alternative method of delivery (including electronic service).

☐ Local rule authorizes court's transmission facility to make service and if party consents in writing to the alternative method.

○ Service by leaving paper with clerk of court may be made if attorney's address or the party's address is unknown.

Authority:

Fed R Civ P 5(b)

Discussion:
See *§§ 5.22[1] -[7]*

☐ Determine possibility of service being waived.

○ If there is a large number of defendants, court, on motion or its own initiative, may order that:

☐ Service of the pleadings and replies of the defendants do not need to be made as between the defendants.

☐ Any crossclaims, counterclaims, or matter constituting avoidance or affirmative defense contained in a crossclaim, or counterclaim will be denied or avoided by all other parties and the filing of the pleading and service on the plaintiff constitutes notice to all parties.

○ If party was not served with a particular paper but appears and contests issues raised in that paper, service may perhaps be waived by court order if the party later raises lack of service.

Authority:
Fed R Civ P 5(a), (c)

Discussion:
See *§ 5.22[8]*

☐ Timely file certificate of service with court.

○ Except for discovery and mandatory disclosure papers, all papers following the complaint that are required to be served must be filed with the court, along with a certificate of service, within reasonable period of time.

○ Certificate of service, at a minimum, must contain:

☐ Date of service;

☐ Manner of service; and

☐ Certificate by the serving party that service of the pleading or paper was made.

Authority:
Fed R Civ P 5(d)

Discussion:
See *§ 5.23*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsIssuance

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5.16 Determining Who Must Receive Service.

Fed R Civ P 5 requires service on all parties [*Fed R Civ P 5(b)*; *see, e.g., Buchanan v. Sherrill (10th Cir 1995) 51 F3d 227, 228* ; *Lehman v. Kornblau (EDNY 2001) 206 FRD 345, 346-347, aff'd sub nom.* Lehman v. Doe (2d Cir 2003) 2003 US App LEXIS 9809 , *cert. denied, 540 US 1219 (2004)* (rule does not apply to nonparties)]. In general, the following must receive service of pleadings, motions, and other papers:

- **Pro se party.** If a party is not represented by an attorney, service must be made directly on the pro se party [*see* Fed R *Civ 5(b)*].

- **Party represented by counsel.** If a party is represented by an attorney, service of all pleadings and papers other than the summons and complaint must be directed to the party's attorney, unless the court orders otherwise [*Fed R Civ P 5(b)(1)*; *McKinney v. Waterman S.S. Corp. (1st Cir 1991) 925 F2d 1, 5* ; *cf. Irwin v. Department of Veterans Affairs (1990) 498 US 89, 93, 111 S Ct 453, 112 L Ed2d 435* (no material difference between service received by attorney or by attorney's office)].

- **Party represented by multiple counsel.** Service on any one of the counsel constitutes valid service [*see Buchanan v. Sherrill (10th Cir 1995) 51 F3d 227, 228*].

- **Class actions.** Service must be made on the attorney of record [*see United States v. Pend Oreille Pub. Util. Dist. No. 1 (9th Cir 1994) 28 F3d 1544, 1553 , cert. denied, 514 US 1015 (1995)*].

Warning:

Deadlines for filing are not met by service without filing [*Galerie v. M & T Bank Corp. (NDNY 1998) 183 FRD 363, 364* (serving pleadings on adversaries does not satisfy filing or filing deadlines)]. For filing requirements, see *5.24 -5.30*.

Cross Reference:

Ch. 7, Service of Summons.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessSummonsIssuance

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5.17 Serving Pleadings.

5.17[1] Serving Complaint or Initial Pleading. Service of the summons and complaint or of an initial pleading on a new party to be added to the action is governed by *Fed R Civ P 4*, which applies when the court lacks personal jurisdiction over a party [*Fed R Civ P 4*]. Rule 4 pleadings are:

- Complaints;
- Counterclaims against the plaintiff and a new party, which must be served on the new party [*see Fed R Civ P 13(a)*];
- Crossclaims against a new party [*see Fed R Civ P 13(g)*];
- Amended complaints asserting a claim against a party over whom the court has no jurisdiction [*see Fed R Civ P 5(a)*];
- Amended complaints against a party who is in default for failure to appear, if the amendments to the complaint add new or additional claims for relief against the party in default [*Fed R Civ P 5(a)*].

Cross Reference:

Discussion of service of summons and *Fed R Civ P 4*, see Ch. 7, Service of Summons.

5.17[2] Serving Pleading After Original Complaint. After personal jurisdiction is established by service of the summons and complaint, service of subsequent pleadings must be served on each of the parties [*Fed R Civ P 5(a)*].

These pleadings are:

- Answers and amended answers;

- Complaints in joinder;
- Crossclaims against parties in the proceedings;
- Amended complaints that contain no new or additional claims for relief against a party who has previously appeared, unless party is in default.

An amended complaint may be served under *Fed R Civ P 5* in the same manner as any other pleading if the original complaint is properly served and the defendants appeared in the first instance [*Employee Painters' Trust v. Ethan Enters. (9th Cir 2007) 480 F3d 993, 995-996*]. However, if the party is in default for failure to appear and the pleadings assert new or additional claims for relief, then an amended complaint must be served under *Fed R Civ P 4* [*Fed R Civ P 5(a)*].

Exception:
The court may dispense with service on all parties if there are numerous defendants [*Fed R Civ P 5(a)*].

In an action begun by seizure of property, in which no person needs to be or is named as a defendant, any service required to be made before the filing of an answer, claim, or appearance must be made on the person having custody or possession of the property at the time of its seizure [*Fed R Civ P 5(a)*].

5.17[3] LOCAL PRACTICE: Serving Pleadings.

5.17[3][a] LOCAL PRACTICE: CD Cal Requirements. Complaints (including third-party complaints, counterclaims, and crossclaims) and other initiating documents in civil cases must be served in the traditional manner on paper rather than electronically [*CD Cal Civ LR 3-2*]. All manually filed civil initiating documents must be e-mailed in PDF format within 24 hours to the civil intake mailbox for the appropriate Court Division [*CD Cal Civ LR 3-2*].

Except as otherwise provided by court order or if required by federal treaties or statutes, process may not be presented to the United States Marshal for service [*CD Cal Civ LR 4-2*].

Exception:
The Marshal must serve process on behalf of the government, or an officer or agency of the government [*CD Cal Civ LR 4-3*].

5.17[3][b] LOCAL PRACTICE: ED Cal Requirements. Unless a party expressly waives service, copies of all documents submitted to the court must be served on all parties to the action, except that no service need be made on parties in default for failure to appear unless the paper involved asserts new or additional claims for relief against the defaulting parties [*ED Cal Gen LR 135(d)*].

Under the Case Management/Electronic Case Files (CM/ECF) docketing and filing system which took effect in the Eastern District on January 3, 2005, and which is generally mandatory for attorneys, conventional service is required when a party is in pro propria persona, or when counsel has not consented to electronic service [*ED Cal Gen LR 135(b)*]. Otherwise, service of electronic documents, including pleadings other than the complaint, is by the "Notice of Electronic Filing" [*see ED Cal Gen LR 135(a)*]. There is no electronic service of a complaint [*ED Cal Gen LR 135(g)(1)*]. A user's manual for the CM/ECF system is available for download on the district's web site: www.caed.uscourts.gov.

Cross Reference:
Discussion of electronic service, see *§ 5.22[6][b]*.

5.17[3][c] LOCAL PRACTICE: ND Cal Requirements. The ND Cal has no specific local rule governing the

serving of pleadings.

5.17[3][d] LOCAL PRACTICE: SD Cal Requirements. Service of an amended complaint, counterclaim, crossclaim, or third-party complaint, must be made on each new party to the litigation, whether or not multiple parties are represented by a single attorney. Service of all other pleadings authorized by *Fed R Civ P 5* is complete when served on the attorney for a party. If an attorney represents multiple parties, service of one copy of a pleading, other than an amended complaint, an amended counterclaim, or an amended third-party complaint, constitutes service on all parties represented by that attorney, unless the court orders otherwise [*SD Cal Civ LR 4.1(d)*; *see Fed R Civ P 5*].

Cross References:

Service on defendants of different capacities, see Ch. 7, Service of Summons, *§§ 7.27 -7.31*. Further discussion of serving the summons and complaint, see Ch. 6, Drafting the Summons and Complaint, *§ 6.19*. See also Ch. 8, Answers and Responsive Motions Under Rule 12, *§ 8.13*; Ch. 11, Counterclaims, Crossclaims, and Replies, *§§ 11.21*, *11.39*, *11.51*; Ch. 9, Amending and Supplementing Pleadings, *§ 9.11[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessSummonsIssuance

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5.18 Serving Written Motions.

5.18[1] Written Motions Must Be Served. Every written motion, except for one that may be heard ex parte, must be served on each of the parties who have appeared in the proceeding, except for those in default for failure to appear [*Fed R Civ P 5(a)*].

5.18[2] Supporting or Opposing Papers Must Be Served With Written Motions. Affidavits supporting or opposing a motion must also be served on each party in accordance with *Fed R Civ P 5*.

5.18[3] LOCAL PRACTICE: Serving Written Motions and Supporting or Opposing Papers.

5.18[3][a] LOCAL PRACTICE: CD Cal Requirements. Unless otherwise provided by rule or court order, every motion must be presented by written notice of motion. The notice of motion must be filed with the clerk and served on each of the parties electronically or, if excepted from electronic filing, either by deposit in the mail or by personal service [*CD Cal Civ LR 6-1*].

Timing--Notice of Motion and Moving Papers:

If mailed, the notice of motion must be served not later than 31 days before the Motion Day designated in the notice. If served personally, or electronically, the notice of motion must be served not later than 28 days before the Motion Day designated in the notice. The Court may order a shorter time [*CD Cal Civ LR 6-1*; *see also CD Cal Civ LR 78-1* (Motion Days)].

5.18[3][b] LOCAL PRACTICE: ED Cal Requirements. Except as otherwise provided by the local rules, or as ordered or allowed by the district court, all motions must be noticed on the motion calendar of the assigned judge or magistrate judge. The moving party must file with the clerk a notice of motion, motion, accompanying briefs, affidavits, if appropriate, and copies of all documentary evidence that the moving party intends to submit in support of the motion [*ED Cal Civ LR 230(b)*].

Motions that are defectively noticed must be filed, but not set for hearing. The clerk must immediately notify the moving party of the defective notice and of the next available dates and time for proper notice and the moving party

must file and serve a new notice of motion setting forth a proper time and date [*ED Cal Civ LR 230(b)*].

Timing--Opposition:

Opposition to the granting of a motion must be in writing and must be filed in duplicate with the clerk not less than 14 days before the hearing date. Opposition must be accompanied by proof of personal service on opposing counsel not less that 14 days before the (noticed or continued) hearing date. A responding party who has no opposition to the granting of the motion must serve and file a statement to that effect, specifically designating the motion in question. A party who opposes a motion must timely file its opposition in order to be entitled to be heard in opposition to the motion at oral arguments [*ED Cal Civ LR 230(c)*; *see ED Cal Gen LR 135*].

Timing--Reply:

Not less than seven days before the date of hearing, the moving party may serve and file a reply to any opposition filed by a responding party [*ED Cal Civ LR 230(d)*].

Any counter-motion or other motion that a party may desire to make that is related to the general subject matter of the original motion must be served and filed with the clerk in the manner and on the date prescribed for the filing of opposition. If a counter-motion or other related motion is filed, the court may continue the hearing on the original and all related motions so as to give all parties reasonable opportunity to serve and file oppositions and replies to all pending motions [*ED Cal Civ LR 230(e)*].

Motions include all motions, applications, petitions, or other requests made to the Court for orders or other judicial activity [*ED Cal Gen LR 101*].

Under the Case Management/Electronic Case Files (CM/ECF) docketing and filing system which took effect in the Eastern District on January 3, 2005, and is generally mandatory for attorneys, conventional service is required for the complaint [*see ED Cal Gen LR 135(g)(1)*], or when a party is in pro propria persona, or when counsel has not consented to electronic service [*ED Cal Gen LR 135(b)*]. Otherwise, service of electronic documents, including motions, is by the "Notice of Electronic Filing" [*see ED Cal Gen LR 135(a)*]. A user's manual for the CM/ECF system is available for download on the district's web site: www.caed.uscourts.gov.

Cross Reference:

Discussion of electronic service, see *§ 5.22[6][b]*.

5.18[3][c] LOCAL PRACTICE: ND Cal Requirements. Except as otherwise ordered or permitted by the assigned judge or by the local rules, all motions (except those made during the course of a trial or hearing) must be filed, served, and noticed in writing on the motion calendar of the assigned judge for hearing not less than 35 days after service of the motion [*ND Cal Civ LR 7-2(a)*].

Factual contentions made in support or opposition to the motion must be supported by an affidavit or declaration and by appropriate references to the record. Extracts from depositions, interrogatories, answers, requests for admission and other evidentiary matters must be appropriately authenticated by an affidavit or declaration [*ND Cal Civ LR 7-5*].

An affidavit or declaration must contain only facts, must conform as much as possible to the requirements of *Fed R Civ P 56(e)*, and must avoid conclusions and arguments [*ND Cal Civ LR 7-5(b)*; *Reiffin v. Microsoft Corp. (ND Cal 2003) 270 F Supp2d 1132, 1144* (court may strike all or part of declaration that fails to comply)].

Any opposition to a motion must be served and filed not less than 21 days before the hearing date [*ND Cal Civ LR 7-3(a)*]. The opposition may include a proposed order, affidavits, or declarations, as well as a brief or memorandum

under *ND Cal Civ LR 7-4*. Briefs or memoranda under *ND Cal Civ LR 7-4(b)* may not exceed 25 pages of text [*ND Cal Civ LR 7-3(a)*].

If the party against whom the motion is directed does not oppose the motion, that party must file with the court a Statement of Nonopposition within the time for filing and serving any opposition [*ND Cal Civ LR 7-3(b)*].

Any reply to an opposition must be served and filed by the moving party not less than 14 days before the hearing date. The reply may include affidavits or declarations, as well as a supplemental brief or memorandum under *ND Cal Civ LR 7-4*. Under *ND Cal Civ LR 7-4(b)*, the reply brief or memorandum may not exceed 15 pages of text [*ND Cal Civ LR 7-3(c)*].

5.18[3][d] LOCAL PRACTICE: SD Cal Requirements. A "motion" includes all motions, applications, petitions, or other requests made for judicial action [*SD Cal Civ LR 1.1(e.16)*], including orders to show cause [*SD Cal Civ LR 7.1(a)*]. Motions are determined on the moving papers and oral argument, but a judge may, in his or her discretion, decide a motion without oral argument [*SD Cal Civ LR 7.1(d.1)*].

Unless the court shortens the 28-day rule as otherwise specified in *SD Cal Civ LR 7.1(e.6)* (Social Security cases), any notice of motion, application or notice of other matter requiring the court's ruling, plus all necessary supporting documents, will require a minimum filing date of 28 days before the date for which the matter is noticed [*SD Cal Civ LR 7.1(e)*].

Example:

The notice of motion and supporting documents for a motion to be heard on a Monday must be filed and served no later than the fourth Monday before the Monday hearing. If the fourth Monday before the Monday hearing is a holiday, however, then the notice of motion and supporting documents are due five Fridays before the hearing [*SD Cal Civ LR 7.1(e.1)*].

Timing--Opposition:

Except as otherwise specified in *SD Cal Civ LR 7.1(e.1)*, each party opposing a motion, application, or order to show cause, must file that opposition or statement of nonopposition with the clerk and serve the movant or the movant's attorney no later than 14 calendar days before the noticed hearing [*SD Cal Civ LR 7.1(e.2)*].

Example:

For a motion to be heard on a Monday, the opposition papers must be filed and served no later than two Mondays before the noticed hearing [*SD Cal Civ LR 7.1(e.2)*].

Except as otherwise specified in *SD Cal Civ LR 7.1(e.1)*, any reply memorandum must be filed and served not later than seven days before the date for which the matter is noticed [*SD Cal Civ LR 7.1(e.3)*].

Example:

For a Monday hearing, the reply papers must be filed and served no later than by the Monday before the hearing. If the Monday before the Monday hearing is a holiday, however, then the reply papers would be due two Fridays before the hearing [*SD Cal Civ LR 7.1(e.3)*].

For those parties not required or authorized by the court to file and serve motions and oppositions electronically using the Case Management/Electronic Filing System, unless otherwise provided by order of the court, the 60-day, 28-day, and 14-day periods of notice set forth in *SD Cal Civ LR 7.1(e.1)*, *SD Cal Civ LR 7.1(e.2)*, and *SD Cal Civ LR 7.1(e.6)* are increased for purposes of mail service on opposing parties or counsel by three days. The extension of time for service does not extend court filing deadlines, and *Fed R Civ P 6(d)*, which extends the time within which an act may or

must be done, does not apply to the notice periods for service of motions and opposition by mail under the local rule [*SD Cal Civ LR 7.1(e.4)*].

Cross References:

Discussion of electronic filing, see *§ 5.31[4]*. Ch. 26, Pretrial Motion Practice, see *§ 26.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessSummonsIssuance

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5.19 Serving Discovery Papers.

5.19[1] Service on Each Party Required. Every discovery paper required to be served on a party must be served on all parties who have made an appearance in the proceeding, unless the court orders otherwise [*Fed R Civ P 5(a)*]. The federal rules require the following discovery papers to be served:

- Notice to take deposition before action is filed [*Fed R Civ P 27(a)(2)*];
- Notice to take deposition on oral examination [*Fed R Civ P 30(b)(1)*];
- Deposition on written questions [*Fed R Civ P 31(a)(3)*];
- Interrogatories [*Fed R Civ P 33(a)*];
- Answers to interrogatories [*Fed R Civ P 33(b)(2)*];
- Requests for production of documents, electronically stored information, and things [*Fed R Civ P 34(a)(1)*];
- Written responses to requests for production of documents, electronically stored information, and things [*Fed R Civ P 34(b)*];
- Requests for entry on land for inspection and other purposes [*Fed R Civ P 34(a)(2)*];
- Requests for admissions [*Fed R Civ P 36(a)*];
- Responses to requests for admission [*Fed R Civ P 36(a)*].

Although not required, service of subpoenas issued with regard to discovery are frequently served on all counsel.

Cross References:

Ch. 22, Regulation of Discovery by Stipulation or Motion; Ch. 23, Methods of Discovery.

5.19[2] Court May Waive Service of Discovery Papers. Service of every paper relating discovery is required to be served on every party unless the court otherwise orders [*Fed R Civ P 5(a)*].

Cross References:

Ch. 22, Regulation of Discovery by Stipulation or Motion; Ch. 23, Methods of Discovery.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessSummonsIssuanceCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewCivil ProcedureDiscoveryGeneral Overview

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CHAPTER 5 Formatting, Serving, and Filing Papers
III. SERVING PLEADINGS, MOTIONS, AND OTHER PAPERS

1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.20

5.20 Serving Other Papers.

Under Rule 5(a), the following must be served on all parties, except for those parties in default for failure to appear [*Fed R Civ P 5(a)*]:

- Written notices [*see, e.g., Smiga v. Dean Witter Reynolds, Inc. (2d Cir 1995) 766 F2d 698, 702 , cert. denied, 475 US 1067 (1986)*].
- Appearances.
- Demands [*see Fed R Civ P 38(b)*].
- Offers of judgment [*see Fed R Civ P 68*].
- Designations of record on appeal [*see Fed R App P 10*].
- "Similar papers," examples of which include:
  - Trial memoranda [*see In re Segal (EDNY 1994) 163 BR 677, 679*].
  - Offer to Allow Judgment under *Fed R Civ P 68* [*see Magnuson v. Video Yesteryear (9th Cir 1996) 85 F3d 1424, 1429*].
  - Writ of garnishment [*NLRB v. E.D.P. Med. Computer Sys. (2d Cir 1993) 6 F3d 951, 957*].
  - Substitution of parties due to death of a party [*Fed R Civ P 25(a)*].
  - Death certificates, if important to proceedings [*United States v. Miller Bros.*

Constr. Co. (10th Cir 1974) 505 F2d 1031, 1034].

- Federal disclosure statements, if important to proceedings [*Burton v. G.A.C. Fin. Co. (5th Cir 1976) 525 F2d 961, 963*].

Cross Reference:

Service of motion papers, see Ch. 26, Pretrial Motion Practice, *§ 26.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessProofCertificatesCivil ProcedurePleading & PracticeService of ProcessSummonsIssuanceCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral Overview

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5.21 Serving Orders.

Every order required by its terms to be served on a party must be served on all parties, except for those in default for failure to appear [*Fed R Civ P 5(a)*]. An "order" is considered any directive by the court other than a judgment, including oral, telephonic, written, and electronic directives [*see, e.g., ED Cal Gen LR 101*].

Cross Reference:

Preparing orders, see Ch. 26, Pretrial Motion Practice, *§ 26.55*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessSummonsIssuanceCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial Orders

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5.22 Permissible Methods of Service.

5.22[1] Service by Hand Delivery. The following methods are proper for service by hand delivery [*Fed R Civ P 5(b)(2)*]:

- Handing the papers to the attorney, or the party, if unrepresented;
- Leaving the papers at the attorney's office or if the party is unrepresented, at the party's office, with a clerk or other person in charge of the office [*see Irwin v. Department of Veterans Affairs (1990) 498 US 89, 93, 111 S Ct 453, 112 L Ed2d 435* (no material difference between service on attorney or on attorney's office)];
- If no one is in charge, leaving the papers in a conspicuous place in the office;
- If the office is closed or the person to be served has no office, leaving the paper at the person's dwelling house or usual place of abode with some person of suitable age and discretion residing there.

Cross References:

Form of certificate of service, see *§ 5.37*.

5.22[2] LOCAL PRACTICE: Service by Hand Delivery.

5.22[2][a] LOCAL PRACTICE: Central District Requirements. The Central District has no specific local rule governing service by hand delivery.

5.22[2][b] LOCAL PRACTICE: ED Cal Requirements. Service of all documents authorized to be served in accordance with *Fed R Civ P 5* is complete when served on the attorney for the party, if the party has appeared and is represented by an attorney. If an attorney represents multiple parties, service of one copy on the attorney constitutes service on all parties represented by the attorney, unless the court orders otherwise. If multiple attorneys represent the same party or parties, service must be made on all attorneys, unless the court orders otherwise [*ED Cal Gen LR 135(b)*].

Under the Case Management/Electronic Case Files (CM/ECF) docketing and filing system which took effect in the Eastern District on January 3, 2005, and which is generally mandatory for attorneys, conventional service, including service by hand delivery, is required only for the complaint [*see ED Cal Gen LR 135(g)(1)*], or when a party is in pro propria persona, when counsel has not consented to electronic service [*ED Cal Gen LR 135(b)*]. Otherwise, service of electronic documents is by the "Notice of Electronic Filing" [*see ED Cal Gen LR 135(a)*]. A user's manual for the CM/ECF system is available for download on the district's web site: www.caed.uscourts.gov.

Cross References:

Discussion of electronic service, see *§ 5.22[6][b]*. Form of certificate of service, see *§ 5.37*.

5.22[2][c] LOCAL PRACTICE: ND Cal Requirements. Under the local rules or by court order, whenever a pleading or other paper must be served on the attorney or on the party by a certain date or time, the serving party may comply by actually hand delivering the pleading or paper within the meaning of *Fed R Civ P 5(b)* on or before the deadline. Delivery to a party may be made by private or commercial delivery service or electronically, such as by electronic mail or facsimile transmission [*ND Cal Civ LR 5-5(b)*].

Cross Reference:

Form of certificate of service, see *§ 5.37*.

5.22[2][d] LOCAL PRACTICE: SD Cal Requirements. With regard to serving motions, unless otherwise provided by order of the court, the 60-day, 28-day, and 14-day periods of notice set forth in *SD Cal Civ LR 7.1(e.1)*, *(e.2)*, and *(e.6)* are increased for purposes of mail service on opposing parties or counsel by three days [*SD Cal Civ LR 7.1(e.4)*].

Warning:

The extension of time for service does not extend court filing deadlines [*SD Cal Civ LR 7.1(e.4)*]. Further, *Fed R Civ P 6(d)*, extending the time within which an act may or must be done, does not apply to the notice period for service of motions and oppositions by mail under the local rule [*SD Cal Civ LR 7.1(e.4)*].

5.22[3] Service by U.S. Mail. Service by U.S. Mail is made by mailing a copy of the paper to the attorney or the pro se party at the last known address for the attorney or party [*Fed R Civ P 5(b)(2)(C)*; *see Irwin v. Department of Veterans Affairs (1990) 498 US 89, 93, 111 S Ct 453, 112 L Ed2d 435* (no material difference between service on attorney or on attorney's office)].

Service is complete when the document is placed in the custody of the U.S. Postal Service or dropped into a post office box, not at the time of receipt. Nonreceipt or nonacceptance of the papers has no effect on the validity of the service [*Fed R Civ P 5(b)(2)(C)*].

Example:

An answer placed in a mailbox on the service deadline date is timely served, even though the envelope is not postmarked until the next day, and received until two days later [*Greene v. WCI Holdings Corp. (2d Cir 1998) 136 F3d 313, 315 , cert. denied, 525 US 983 (1998)*].

If nonreceipt can be proved, it is within the court's discretion to extend any applicable response period pertaining to the served paper [*Fed R Civ P 6(b)*].

Distinguish:

Service by mail means service by the U.S. Postal Service. It does not include mail service by a private

delivery company [*see, e.g., Magnuson v. Video Yesteryear (9th Cir 1996) 85 F3d 1424, 1431-1432*]. Note, however, that local rules may allow service by private delivery or fax [*see, e.g., ND Cal Civ LR 5-5(a)(1)* (delivery to a party may be made by private or commercial delivery service)]. See *5.22[5]*.

5.22[4] LOCAL PRACTICE: Service by U.S. Mail.

5.22[4][a] LOCAL PRACTICE: CD Cal Requirements. The Central District has no specific local rule governing service by U.S. Mail.

Cross Reference:

Form, see *§ 5.38*, Certificate of Service by U.S. Mail.

5.22[4][b] LOCAL PRACTICE: ED Cal Requirements. The Eastern District has no specific local rule governing service by U.S. Mail.

Cross Reference:

Form, see *§ 5.38*, Certificate of Service by U.S. Mail.

Under the Case Management/Electronic Case Files (CM/ECF) docketing and filing system which took effect in the Eastern District on January 3, 2005, and which is generally mandatory for attorneys, conventional service, including service by U.S. Mail, is required only for the complaint [*see ED Cal Gen LR 135(g)(1)*], or when a party is in pro propria persona, or when counsel has not consented to electronic service [*ED Cal Gen LR 135(b)*]. Otherwise, service of electronic documents is by the "Notice of Electronic Filing" [*see ED Cal Gen LR 135(a)*]. A user's manual for the CM/ECF system is available for download on the district's web site: www.caed.uscourts.gov.

Cross Reference:

Discussion of electronic service, see *§ 5.22[6][b]*.

5.22[4][c] LOCAL PRACTICE: ND Cal Requirements. Under the local rules or by court order, whenever a pleading or other paper must be served on the attorney for a party or on the party by a certain date or time, the serving party may comply by mailing the pleading or paper three days before the deadline. Service by mail may not be used if a local rule requires delivery of a pleading or paper [*ND Cal Civ LR 5-5(a)(2)*].

Cross Reference:

Form of certificate of summons by U.S. Mail, see *§ 5.38*.

5.22[4][d] LOCAL PRACTICE: SD Cal Requirements. The SD Cal has no specific local rule governing service by U.S. Mail.

Cross Reference:

Form of certificate of summons by U.S. Mail, see *§ 5.38*.

5.22[5] Service by Alternate Delivery Methods, Including Electronic Service.

5.22[5][a] Consent to Alternative Delivery Methods. If the person being served has provided written consent to an alternative method of delivery, including electronic means, service may be made by that method of delivery. Service by fax is not valid, however, without written consent, and a fax will not be deemed service by mail or personal delivery [*see, e.g., Salley v. Board of Governors, Univ. of N. Carolina (MDNC 1991) 136 FRD 417*]. If authorized by local rule and consented to in writing, a party may make service through the court's transmission facilities [*Fed R Civ P 5(b)(3)*].

5.22[5][b] Completing Alternative Forms of Service. Service by electronic means is complete on transmission [*Fed R Civ P 5(b)(2)(E)*]. If the party making service by electronic means learns that the attempted service did not reach the person to be served, however, service is not complete [*Fed R Civ P 5(b)(2)(E)*]. Service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery [*Fed R Civ P 5(b)(2)(F)*].

5.22[6] LOCAL PRACTICE: Service by Alternative Delivery Methods, Including Electronic Service.

5.22[6][a] LOCAL PRACTICE: CD Cal Requirements. When a document is filed electronically, a Notice of Electronic Filing (NEF) is automatically generated by the Case Management/Electronic Case Files (CM/ECF) system and sent by e-mail to all attorneys in the case who are registered as CM/ECF Users and have consented to electronic service. Service by this electronic NEF constitutes service under the Federal Rules of Civil Procedure for all attorneys who have consented to electronic service. Attorneys not registered for the CM/ECF system or who did not consent to electronic service must be served as otherwise provided by the Federal Rules. Documents excluded from electronic filing by General Order of the Court must be served using traditional means of service in the manner prescribed for such service in the Federal Rules [*CD Cal Civ LR 5-3.3*; *see* CD Cal Gen Order 08-02].

Example:

The district court abused its discretion in dismissing plaintiff's action for lack of prosecution, in the Central District of California in which *CD Cal Civ LR 5-4* did not authorize service by electronic means except when the judge specifically designated the case as part of the experimental filing program. Plaintiff's counsel was notified of a show cause hearing only by email, the case was not part of the experimental program, and neither plaintiff or his counsel had consented to electronic service [*Calderon v. IBEW Local 47 (9th Cir 2007) 508 F3d 883, 884*].

Cross References:

Discussion of electronic filing of pleadings and motions, see *§ 5.31[1]*. Discussion of attorney registration for electronic filing, see *§ 5.31[2]*.

5.22[6][b] LOCAL PRACTICE: ED Cal Requirements. Electronic service of attorney-filed documents. Under the Case Management/Electronic Case Files (CM/ECF) docketing and filing system which took effect in the Eastern District on January 3, 2005, and which is generally mandatory for attorneys, conventional service, including service by U.S. Mail, is required only for the complaint [*see ED Cal Gen LR 135(g)(1)*], or when a party is in pro propria persona, or when counsel has not consented to electronic service [*ED Cal Gen LR 135(b)*]. Otherwise, service of electronic documents is by the "Notice of Electronic Filing" [*see ED Cal Gen LR 135(a)*]. A user's manual for the CM/ECF system is available for download on the district's web site: www.caed.uscourts.gov.

Cross Reference:

Discussion of attorney registration for electronic filing, see *§ 5.31[2]*.

Electronic service through the "Notice of Electronic Filing." The "Notice of Electronic Filing" is a notice automatically generated by the CM/ECF system at the time a document is filed with the system. When counsel have consented to electronic service, that notice constitutes automatic service of the document on all who have consented. The notice sets forth the time of filing, the name of the parties and counsel filing the document, the type of document, the text of the docket entry, the names of the parties and/or attorneys receiving the notice, and an electronic link ("hyperlink") to the filed document that allows recipients to retrieve the document automatically [*ED Cal Gen LR 135(a)*].

Warning:

There is no electronic service of the summons and complaint. Service of the complaint must be made by

conventional means [*ED Cal Gen LR 135(g)(1)*].

Attorney consents to electronic service unless he or she opts out in registration form. Attorney registration is mandated for the CM/ECF system. Unless the attorney opts out by making that designation on the registration form, filing the registration form is consent to receive and make service electronically and a waiver of the right to receive and make service by personal service or first class mail [*ED Cal Gen LR 135(g)(1)*]. Although the Eastern District does not require attorneys to serve or accept electronic service, the court strongly encourages the use of the practice [*ED Cal Gen LR 135(g)(2)*].

5.22[6][c] LOCAL PRACTICE: ND Cal Requirements. Whenever a pleading or other paper must be served on an attorney or party, delivery to a party may be made by private or commercial delivery service or electronically, such as by facsimile transmission or electronic mail [*ND Cal Civ LR 5-5(a)(1)*].

In cases subject to the local rules or general orders regarding electronic case filing, all pleadings and papers must be electronically served in accordance with those local rules or general orders [*ND Cal Civ LR 5-5(b)*; *see* General Order No. 45 "Electronic Case Filing," available from the court's website: www.cand.uscourts.gov].

5.22[6][d] LOCAL PRACTICE: SD Cal Requirements. The Southern District has no specific local rule governing service by alternative delivery methods, including electronic service.

Cross References:

Form of consent to electronic service, see *§ 5.39*. Discussion of electronic filing, see *§§ 5.29 -5.31*.

5.22[7] Service by Leaving Paper With Clerk of Court. If the attorney's address or the party's address is unknown, service may be made by leaving the paper with the clerk of the court [*Fed R Civ P 5(b)(2)(D)*]. However, because all pleadings, written motions, and other papers must be signed by the attorney of record or the party and must include the signer's address [*Fed R Civ P 11(a)*], this provision will rarely apply.

Cross Reference:

Form Certificate of Service see *§ 5.37*.

5.22[8] Waiver of Service. If a party was not served with a particular paper but appears and contests issues raised in that paper, the court may perhaps waive the service requirement because of actual notice if the party later claims insufficient service. However, actual notice alone does not suffice, and a party must advance some other compelling circumstance, in addition to actual notice, in order for the court to excuse noncompliance with Rule 5 [*Magnuson v. Video Yesteryear (9th Cir 1996) 85 F3d 1424, 1431-1432* ; *In re* Horizon Cruises Litig. (SDNY 2002) 2002 US Dist LEXIS 8679, at *5].

If there is an unusually large number of defendants, the court, on a motion or of its own initiative, may order any or all of the following [*Fed R Civ P 5(c)*]:

- Service of the pleadings and replies of the defendants need not be made as between the defendants.

- Any crossclaims, counterclaim, or matter constituting an avoidance or affirmative defense contained in a crossclaim or counterclaim will be denied or avoided by all other parties and the filing of the pleading and service on the plaintiff constitutes due notice to all parties.

5.22[9] LOCAL PRACTICE: Waiver of Service.

5.22[9][a] LOCAL PRACTICE: CD Cal Requirements. The Central District has no specific local rule

governing waiver of service.

5.22[9][b] LOCAL PRACTICE: ED Cal Requirements. Copies of all documents submitted to the court must be served on all parties to the action, unless a party expressly waives service [*ED Cal Gen LR 135(d)*].

5.22[9][c] LOCAL PRACTICE: ND Cal Requirements. The Northern District has no specific local rule governing waiver of service.

5.22[9][d] LOCAL PRACTICE: SD Cal Requirements. The Southern District has no specific local rule governing waiver of service.

Cross References:

Form of motion to dispense with service of pleadings, see *§ 5.40*. Form of order dispensing with service of pleadings, see *§ 5.41*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessSummonsIssuanceCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral Overview

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5.23 Proof of Service.

5.23[1] Rule 5 Requires Proof of Service. Except for discovery and mandatory disclosure papers [*see 5.27*], all papers following the complaint that are required to be served must be filed with the court, along with a certificate of service. The certificate of service must be filed within a reasonable time after service [*Fed R Civ P 5(d)*]. Though the federal rule does not provide specific requirements for the certificate of service, at a minimum the certificate should contain the following [*Fed R Civ P 5(d)*]:

- Date of service [*Bowers v. E.J. Rose Mfg. Co (9th Cir 1945) 149 F2d 612, 614 , cert. denied, 326 US 753 (1945)*];
- Manner of service; and
- Certificate by the serving party that service of the pleading or paper was made.

Warning:

Marking a letter at the bottom with a mere "cc" does not satisfy the proof of service requirement [*Schwartz v. Marketing Publ'g Co. (D Conn 1994) 153 FRD 16, 20*].

5.23[2] LOCAL PRACTICE: Proof of Service.

5.23[2][a] LOCAL PRACTICE: CD Cal Requirements. Proof of service must be made by declaration of the person accomplishing the service. The declaration must include the following information [*CD Cal Civ LR 5-3.1*]:

- The day and manner of service;
- Each person served and/or each entity served;
- The title of each document served; and

- The method of service employed (e.g., personal, mail, substituted, etc.).

If the proof of service or acknowledgment of service is attached to the original document, it must be attached as the last page of the document [*CD Cal Civ LR 5-3.2*].

5.23[2][b] LOCAL PRACTICE: ED Cal Requirements. When a document is electronically filed, the Notice of Electronic Filing will list the parties who have received it [*ED Cal Gen LR 135(a)*]. If an attorney has not opted out of electronic service, the Notice of Electronic Filing is automatic service of the document and no separate proof of service is required [*see ED Cal Gen LR 135*].

Cross References:

Discussion of electronic service, see *§ 5.22[6][b]*. Discussion of electronic filing requirements, see *§ 5.31[2]*.

When service of any pleading, notice, or other paper document required to be served is made, proof of the service must be endorsed on or affixed to the original of the document when it is lodged or filed. Except for ex parte matters, a document may not be submitted for filing unless it is accompanied by proof of service. The proof of service must include the date, manner, and place of service [*ED Cal Gen LR 135(d)*].

Cross References:

Form of certificate of service, see *§ 5.37*. Form of certificate of service by U.S. Mail, see *§ 5.38*.

5.23[2][c] LOCAL PRACTICE: ND Cal Requirements. Whenever any pleading or other paper presented for filing is required (or permitted by any rule or other provision of law) to be served on any party or person, it must bear or have attached to it either (1) an acknowledgment of service by the person served or (2) a certificate of service stating the date, place, and manner of service and the names, street address or electronic address of the persons served, certified by the person who made service, under *28 USC § 1746* [*ND Cal Civ LR 5-6(a)*].

Failure to provide an acknowledgment or certificate of service is not a ground for the clerk to refuse to file a paper or pleading. However, any document may be disregarded by the judge if an adverse party timely objects on the ground of lack of service [*ND Cal Civ LR 5-6(b)*].

Exception:

Under General Order No. 45, found at the court's website: www.cand.uscourts.gov, parties are not required to include a certificate or acknowledgment of service on registered ECF users when a document is filed electronically. Notification to those parties will be provided by the court's electronic filing system [*see 5.29 -5.31*].

Following service, the original signed copy of the certificate must be filed with the court. A proof of service that is not attached to the document served must have a separate cover page [see *§ 5.05*].

Cross References:

Form of certificate of service, see *§ 5.37*. Form of certificate of service by U.S. Mail, see *§ 5.38*.

5.23[2][d] LOCAL PRACTICE: SD Cal Requirements. Proof of service of all papers required or permitted to be served, other than those for which a particular method of proof is prescribed in the federal rules, must be filed in the clerk's office promptly and in any event before action is to be taken by the court or by the parties. The proof of service must show the day and manner of service and may be (1) written acknowledgment of service, on the original of the copy served, by the attorney or person in charge of his office receiving a copy of it; (2) by certificate of a member of the

bar of the court; (3) by affidavit of the person who mailed or otherwise served the papers; or (4) by any other proof satisfactory to the court [*SD Cal Civ LR 5.2*].

If an affidavit of mailing or of service is attached to the original pleading, it must be attached underneath so that the character of the pleading is easily discernible [*SD Cal Civ LR 5.2*].

Failure to make the proof of service required does not affect the validity of the service. The court may at any time allow the proof of service to be amended or supplied unless it clearly appears that to do so would result in material prejudice to the substantial rights of any party [*SD Cal Civ LR 5.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessProofCertificatesCivil ProcedurePleading & PracticeService of ProcessSummonsIssuance

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5.24 CHECKLIST: Filing Pleadings, Motions, and Other Papers.

☐ All papers following complaint, required to be served on parties, must be filed with court.

- ○ Must be filed with a certificate of service.
- ○ Must be done within reasonable time after service.

☐ Check local rules to see if filing may or must be done electronically.

☐ Check local rules to see if additional copies need to be filed.

☐ Check local rules for filing outside of court's office hours (drop box filing).

Authority:
Fed R Civ P 5(d); *28 USC § 1914* (filing fees)

Discussion:
See *§ 5.25*

☐ Motions, including applications, petitions, and other requests, must be in writing unless made during a hearing.

☐ Check local rules for the following motion requirements:

- Memorandum in support of motion and points and authorities.
- Deadlines for filing.
- Acceptable dates and times for hearing motions.

Authority:
Fed R Civ P 7

Discussion:
See *§ 5.26*

☐ Prepare corporate disclosure statement for nongovernmental corporate parties stating either:

- Identifies parent corporation and any publicly held corporation that owns 10 percent or more of its stock.
- Indicates that there is not a parent corporation nor any publicly held corporation that owns 10 percent or more of its stock.

☐ Check local rules for proper format.

☐ File corporate disclosure statement with corporate party's first appearance, pleading, petition, motion, response, or other request.

☐ File supplemental statement if there are any subsequent changes.

Authority:
Fed R Civ P 7.1

Discussion:
See *§ 5.28*

Forms:
See *§§ 5.34 -5.36*

☐ Discovery materials may not be filed until used in proceeding or if court orders filing. These include:

- Initial disclosure under *Fed R Civ P 26(a)(1)*.
- Expert disclosures under *Fed R Civ P 26(a)(2)*.
- Depositions.

- Interrogatories and answers to interrogatories.
- Requests for documents or to permit entry on land and responses to those requests.
- Requests for admissions and answers to those requests.

Authority:
Fed R Civ P 5(d), 26(a)

Discussion:
See *§ 5.27*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessProofCertificatesCivil ProcedurePleading & PracticeService of ProcessSummonsIssuance

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5.25 General Filing Requirements.

5.25[1] Requirements Under the Federal Rules. Except for discovery and mandatory disclosure papers [*see 5.27*], all papers after the complaint, required to be served on a party, must be filed with the court, along with a certificate of service. Filing must be within a reasonable time after service [*Fed R Civ P 5(d)(1)*; *see 28 USC § 1914* (filing fees)].

5.25[2] LOCAL PRACTICE: General Filing Requirements.

5.25[2][a] LOCAL PRACTICE: CD Cal Requirements. Complaints (including third-party complaints, counterclaims, and crossclaims) and other initiating documents in civil cases must be filed, in duplicate, fees paid [*CD Cal Civ LR 3-2*]. All manually filed civil initiating documents must be e-mailed in PDF format within 24 hours to the civil intake mailbox for the appropriate Court Division [*CD Cal Civ LR 3-2*].

In those categories designated by General Order of the court, the clerk will accept in certain actions documents filed by electronic means. Documents filed properly by electronic means constitute written documents [*CD Cal Civ LR 5-4*; *see 5.29 -5.31*].

5.25[2][b] LOCAL PRACTICE: ED Cal Requirements. "Filed" means delivered into the custody of the clerk and accepted by the clerk for inclusion in the official records of the action. Documents are filed whether they are conventionally filed in paper or electronically filed [*ED Cal Gen LR 101*].

Complaint filings by attorneys in all civil actions must be performed electronically [*ED Cal Gen LR 121(d)*; *see 5.29 -5.31*].

Except as expressly authorized in advance by the court, all documents presented for filing or lodging must be delivered to the clerk along with the required filing fee. The clerk will, when appropriate, deliver the documents to the judge or magistrate judge after docketing. Original documents to be filed or lodged may not be mailed to the chambers of a judge. If a particular document is to be brought to the immediate attention of the judge or magistrate judge assigned to the action, a copy may be mailed or otherwise delivered to the chambers, but the original must be presented to the clerk.

All documents delivered to the clerk for filing or lodging in the pending action must be presented to the clerk at the office where the action is pending. Documents submitted for filing in a pending action at an incorrect office will not be accepted [*ED Cal Gen LR 133(d)(1)*; *see ED Cal Gen LR 120*, *121*].

One additional legible conformed copy of all documents to be filed or lodged must be delivered to the clerk, for the court's use. However, in actions to be heard by a district court composed of three judges, three additional legible conformed copies of a brief and supporting documents must be delivered to the clerk. [*ED Cal Gen LR 133(d)(2)*].

Warning:

A Case Management/Electronic Case Files (CM/ECF) docketing and filing system took effect in the Eastern District on January 3, 2005. Unless specifically excused, electronic filing of all documents is mandatory for attorneys [*see ED Cal Gen LR 133(a)*]. The clerk's office will not refuse to file a paper document proffered by an attorney but will scan it and notify the court that the document was filed in an improper format. An order to show cause may be issued regarding an attorney's disregard for the requirement to utilize electronic filing [*see ED Cal Gen LR 133(d)(3)*].

Cross Reference:

Discussion of electronic filing requirements, see *§ 5.31[2]*.

5.25[2][c] LOCAL PRACTICE: ND Cal Requirements. "File" means delivery to and acceptance by the clerk of a document that is approved for filing and that will be included in the official files of the court and noted in the docket of the case. Under urgent circumstances and for good cause shown, judges may accept documents for filing [*ND Cal Civ LR 1-5(e)*].

Except for a drop-box filing or a facsimile filing [*see 5.30*], the original of any document required to be filed by the federal or local rules, together with a certificate of service, must be delivered to the office of the clerk during regular business hours in the courthouse in which the chambers of the judge to whom the action has been assigned is located. Filing by electronic means under *ND Cal Civ LR 5-4* may be required in certain actions. The clerk will provide notification of any such requirement [*ND Cal Civ LR 5-1(a)*; *see 5.29 -5.31*].

An extra copy of the document filed must be marked by counsel as the copy for "Chambers," and must be submitted at the same time to the office of the clerk in the courthouse in which the chambers are located. No chambers copy of electronically filed documents need be filed unless otherwise ordered by the assigned judge. If the matter has been assigned to a magistrate judge for hearing, an additional copy designated for delivery to the magistrate judge must be delivered to the office of the clerk in the courthouse in which the chambers of the magistrate judge are located [*ND Cal Civ LR 5-1(b)*].

Warning:

If the matter has been assigned to the Eureka venue, the extra copy must be mailed to the Eureka Magistrate Judge, P.O. Box 1306, Eureka California 95502 [*ND Cal Civ LR 5-1(b)*].

Certain documents may be filed after regular hours by depositing them in a drop-box [*ND Cal Civ LR 5-1(a)*; *see ND Cal Civ LR 5-3*]. The court will maintain drop boxes at each division of the clerk's office, and the clerk will regulate the hours during which materials may be filed through the use of a drop box [*ND Cal Civ LR 5-3(b)*]. Most documents to be filed may be deposited in a clerk's office drop box, subject to the following *ND Cal Civ LR 5-3(a)*]:

- Any papers in support of or in opposition to a matter scheduled for hearing within seven days of filing may not be filed through use of a drop box;

- Initial pleadings or petitions to be filed before the assignment of a judge may be deposited for filing in a drop box at any courthouse of the district, with any applicable fee included in the form of a check;

- Except for documents in support of or in opposition to a matter scheduled for hearing within seven calendar days of filing, after regular hours of the clerk's office, a document to be filed under *ND Cal Civ LR 5-1(a)* may be filed by deposit in the clerk's office drop box at the courthouse in which the chambers of the assigned judge are located.

Before deposit of a document for filing in a drop box, the back side of the last page of the document must be stamped "Received" using the device available at the drop box. The document will be marked by the clerk as "Filed" on the same date indicated by the "Received" stamp, unless the "Received" date is a weekend or court holiday, in which case it will be marked as "Filed" on the first day following the weekend or court holiday. If the back side of the last page of the document has not been stamped "Received" with the device available at the drop box, the clerk will mark the document as "Filed" on the day the clerk emptied the drop box of the document [*ND Cal Civ LR 5-5(c)*].

5.25[2][d] LOCAL PRACTICE: SD Cal Requirements. "File" means the delivery to and acceptance by the clerk or the court clerk of a document that will be noted in the docket [*SD Cal Civ LR 1.1(e.13)*; *see SD Cal Civ LR 4.5* (fee schedule)].

Cross References:

Form of motion to compel filing of papers, see *§ 5.42*. Form of order compelling filing of papers, see *§ 5.43*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessProofCertificatesCivil ProcedurePleading & PracticeService of ProcessSummonsIssuanceCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral Overview

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5.26 LOCAL PRACTICE: Filing Requirements for Motions.

5.26[1] LOCAL PRACTICE: CD Cal Requirements. Each motion served and filed must include with the filing a brief but complete memorandum in support of the motion and the points and authorities on which the moving party will rely, along with evidence on which the moving party will rely in support of the motion [*CD Cal Civ LR 7-5*].

The court may decline to consider a motion unless it meets the requirements of *CD Cal Civ LR 7-4-7-8*. On the first page of the notice of motion and every other document filed in connection with any motion, there must be included, under the title of the document, the date and time of the motion hearing and the name of the judicial officer before whom the motion has been noticed. The notice of motion must contain a concise statement of the relief or court action the moving party seeks [*CD Cal Civ LR 7-4*].

The court may decline to consider any memorandum or other paper not filed within the deadline set by order or local rule. Failure to file any required paper or to file it within the deadline, may be deemed consent to the granting or denial of the motion [*CD Cal Civ LR 7-12*]. A party filing any document in support of, or in opposition to, any motion noticed for hearing, after the time for filing it has expired, is subject to the sanctions of *CD Cal Civ LR 83-7* and the Federal Rules of Civil Procedure [*CD Cal Civ LR 7-13*].

Cross References:

General filing requirements, see *§§ 5.13[1]*; *5.25*. See also *§§ 5.08*; *5.09*; Ch. 26, Pretrial Motion Practice, *§ 26.23*.

5.26[2] LOCAL PRACTICE: ED Cal Requirements. "Motion" includes all motions, applications, petitions, or other requests made to the court for orders or other judicial activity [*ED Cal Gen LR 101*].

Warning:

A Case Management/Electronic Case Files (CM/ECF) docketing and filing system took effect in the Eastern District on January 3, 2005. Unless specifically excused, electronic filing of all documents is mandatory for attorneys [*see ED Cal Gen LR 133(a)*]. A user's manual is available for download on the

district's web site: www.caed.uscourts.gov.

Cross References:

General filing requirements, see *§§ 5.13[2]*, *5.25[2][b]*. Discussion of electronic filing requirements, see *§ 5.31[2]*. See also *§§ 5.08*; *5.09*; Ch. 26, Pretrial Motion Practice, *§ 26.23*.

5.26[3] LOCAL PRACTICE: ND Cal Requirements. Except as otherwise ordered or permitted by the assigned judge or by the local rules, and except for motions made during the course of a trial or a hearing, all motions must be filed, served, and noticed in writing on the motion calendar of the assigned judge for hearing not less than 35 days after service of the motion [*ND Cal Civ LR 7-2(a)*].

Any opposition to a motion must be served and filed not less than 21 days before the hearing date [*ND Cal Civ LR 7-3(a)*]. The opposition may include a proposed order, affidavits, declarations, as well as a brief or memorandum under *ND Cal Civ LR 7-4*. If the party against whom the motion is directed does not oppose the motion, that party must file with the court a Statement of Nonopposition within the time for filing and serving any opposition [*ND Cal Civ LR 7-3*].

Any reply to an opposition must be served and filed by the moving party not less than 14 days before the hearing date. The reply may include affidavits or declarations, as well as a supplemental brief or memorandum under *ND Cal Civ LR 7-4* [*ND Cal Civ LR 7-3(c)*].

Except for cases for which the court has issued a temporary restraining order, a party who has filed a motion may file a notice continuing the originally noticed hearing date for that motion to a later date if no opposition has been filed and the notice of continuance is filed before the date on which the opposition is due under *ND Cal Civ LR 7-3(a)* [*ND Cal Civ LR 7-7(a)*].

After an opposition to a motion has been filed, the noticed hearing date may be continued to a subsequent date as follows [*ND Cal Civ LR 7-7(b)*]:

- When the parties affected by the motion have not previously stipulated to continue the hearing date, unless the hearing date has been specially set by the judge, the parties affected by the motion may stipulate in writing pursuant to *ND Cal Civ LR 6-1(a)* to continue the hearing date; or

- On order of the assigned judge, either on the court's own motion or pursuant to *ND Cal Civ LR 56-1*, to permit a party time to respond to papers filed under *Fed R Civ P 56(c)*.

Within seven days after service of an opposition, the moving party may file and serve a notice of withdrawal of the motion. On the filing of a timely withdrawal, the motion will be taken off the calendar. If there is no timely filing of withdrawal, the court may proceed to decide the motion [*ND Cal Civ LR 7-7(e)*].

Cross References:

General filing requirements, see *§ 5.25[2][c]*. See also *§§ 5.08*; *5.09*; Ch. 26, Pretrial Motion Practice, *§ 26.23*.

5.26[4] LOCAL PRACTICE: SD Cal Requirements. "Motion" includes all motions, applications, petitions, or other requests made for judicial action [*SD Cal Civ LR 1.1(e.16)*].

Cross References:

General filing requirements, see *§ 5.25[2][d]*. See also *§§ 5.08*; *5.09*; Ch. 26, Pretrial Motion Practice, *§ 26.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime Limitations

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5.27 Filing Requirements for Discovery Material.

5.27[1] Filing Not Permitted Until Papers Used in Proceeding or Court Has Ordered Filing. Discovery materials must not be filed with the court until they are used in the proceeding or if the court orders the filing. Only those papers after the complaint that are required to be served on a party are filed with the court [*Fed R Civ P 5(d)*; *In re NASDAQ Market-Makers Antitrust Litig. (SDNY 1996) 164 FRD 346, 351*]. Materials subject to this filing prohibition include [*Fed R Civ P 5(d)*]:

- Initial disclosures under *Fed R Civ P 26(a)(1)*.
- Expert disclosures under *Fed R Civ P 26(a)(2)*.
- Depositions.
- Interrogatories and answers to interrogatories.
- Requests for documents or to permit entry on land, and responses to those requests.
- Requests for admission, and answers to those requests.

5.27[2] LOCAL PRACTICE: Filing Requirements for Discovery Matters.

5.27[2][a] LOCAL PRACTICE: CD Cal Requirements. If a discovery request or response is required for use in a proceeding, only that part of the document that is in issue shall be filed. All these discovery documents must be held by the attorney pending use for the period specified in *CD Cal Civ LR 79-3* for the retention of exhibits, unless otherwise ordered by the court. Discovery documents lodged with the court for a motion or for a trial that are not used must be returned by the clerk to the party lodging the document at the conclusion of the motion or trial [*CD Cal Civ LR 26-2*; *see CD Cal Civ LR 26-3 et seq.* for exhibits in discovery, including numbering and designation].

5.27[2][b] LOCAL PRACTICE: ED Cal Requirements.

Depositions. Depositions taken orally or by written question, subpoenas and notices, proofs of service, and related documents are not to be filed with the clerk unless and until there is a proceeding in which the document or proof of service is at issue. Depositions are not filed through the Case Management/Electronic Case Filing system. Before or on the filing of a document making reference to a deposition, counsel relying on the deposition must ensure that a courtesy hard copy of the original of the entire deposition has been submitted to the clerk for use in chambers. Alternatively, counsel may submit an electronic copy of the deposition (in lieu of the courtesy paper copy) to the email box of the judge or magistrate judge, and concurrently email or transmit the deposition to all other parties [*ED Cal Gen LR 133(j)*; *ED Cal Civ LR 250.1(a)*; *see Fed R Civ P 30(f)*].

Interrogatories. Interrogatories, responses, and their proofs of service may not be filed with the clerk unless and until there is a proceeding in which the interrogatories or proof of service is at issue. If required in a proceeding, only that part of the set of interrogatories and answers that is in issue shall be filed [*ED Cal Civ LR 250.2(c)*].

Production of documents. Requests for production of documents, responses, and their proofs of service may not be filed with the clerk unless and until there is a proceeding in which the request, response, or proof of service is at issue. When required in a proceeding, only that part of the request for production, response, or proof of service that is at issue may be filed [*ED Cal Civ LR 250.3(c)*].

Requests for admission. Requests for admission, responses, and proofs of service may not be filed with the clerk unless and until there is a proceeding in which the document or proof of service is at issue. When required in a proceeding, only that part of the request for admission and response that is in issue may be filed [*ED Cal Civ LR 250.4(c)*].

Subpoenas duces tecum. Subpoenas duces tecum, responses and proofs of service may not be filed with the clerk unless and until there is a proceeding in which the request, response, or proof of service is at issue. When required in a proceeding, only that part of the subpoena duces tecum, response, or proof of service that is in issue may be filed [*ED Cal Civ LR 250.5(d)*].

5.27[2][c] LOCAL PRACTICE: ND Cal Requirements. The party propounding interrogatories, requests for production of documents, or requests for admission must retain the original of the discovery request and the original response. That party becomes the custodian of the materials. *Fed R Civ P 30(f)* identifies the custodian of the original transcript or recording of a deposition [*ND Cal Civ LR 26-1*].

5.27[2][d] LOCAL PRACTICE: SD Cal Requirements.

Certificate of Compliance. At the time of filing any motion with respect to *Fed R Civ P 26-37*, counsel for the moving party must serve and file a certificate of compliance with *SD Cal Civ LR 26.1* (parties have met and conferred concerning all disputes) [*SD Cal Civ LR 26.1(b)*].

Interrogatories. Unless the filing is ordered by the court on motion of a party or on its own motion, interrogatories, requests for interrogatories, requests for production and the answers to them do not need to be filed unless and until they are used in the proceedings [*SD Cal Civ LR 33.1(c)*].

Requests for admissions. Unless the filing is ordered by the court on motion of a party or on its own motion, requests for admissions and requests for production and the answers to them do not need to be filed unless and until they are used in the proceedings [*SD Cal Civ LR 36.1(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten Depositions

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5.27A LOCAL PRACTICE: ED Cal--Time of Filing.

5.27A[1] Electronic Filing Is Complete When Attorney Receives System-Generated Notice. A document filed electronically is not considered filed until the filing attorney receives a system-generated "Notice of Electronic Filing" [*ED Cal Gen LR 134(a)*].

Warning:

E-mailing a document to the clerk's office or the court is not "filing" [*ED Cal Gen LR 134(a)*].

Distinguish:

When permitted, a paper filing is complete on presentation to the clerk's office [*ED Cal Gen LR 134(a)*].

5.27A[2] Document Is Deemed Filed on Particular Day If Filed Before Midnight. A document will generally be deemed filed on a particular day if filed before midnight (Pacific Time) on that business day. However, if the time of day at which the document is filed is of the essence, the court may order that a document be filed by a time certain [*ED Cal Gen LR 134(b)*].

5.27A[3] Internet Filings May Be Made 24 Hours a Day. Filings via the Internet may be made 24 hours a day [*ED Cal Gen LR 134(b)*]. However, documents, including motions for temporary restraining orders, filed electronically after normal business hours will not be reviewed by the court until the next business day at the earliest [*ED Cal Gen LR 134(d)*].

5.27A[4] Portable Electronic Media May Be Submitted During Business Hours. Portable electronic media may be submitted over the counter at the clerk's office only during the clerk's business hours [*ED Cal Gen LR 134(b)*; *see* ED Cal Gen LR 177].

5.27A[5] Filing Is Permitted on Next Business Day Following Technical Failure of Court's Site. The Eastern District Electronic Case Files site will be deemed to have been subject to a technical failure on a given day if the site is unable to accept filings continuously or intermittently over the course of any period of time greater than two hours after 2:00 p.m. on a given day [*ED Cal Gen LR 134(c)*].

Consider:

Electronic media may be filed with the clerk's office during a time of technical failure [*ED Cal Gen LR 134(c)*].

A party may file on the next business day following a technical failure that is announced on the Eastern District web site. If the failure was not announced on the web site, the party must file the document as promptly as possible and seek appropriate relief from the court [*ED Cal Gen LR 134(c)(1)*]. However, service must still be completed in a timely manner even if filing is impossible due to a technical failure. The document must be served directly on all parties by email, overnight delivery, or other expeditious means [*ED Cal Gen LR 134(c)(2)*]

Distinguish:

Technical problems on the attorney's end are not a "technical failure" that will excuse an untimely filing. If the document cannot be filed electronically due to a technical problem on the attorney's end, the document must be filed electronically from another computer or in portable electronic media format at the clerk's office. If electronic filing is not possible in any form, the attorney may file a paper document with the clerk; the cover page must state that electronic filing was not possible due to technical reasons. The document must then be filed electronically as soon as possible [*ED Cal Gen LR 134(c)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePleading & PracticeService of ProcessProofCertificatesCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral Overview

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5.28 Filing Corporate Disclosure Statement.

5.28[1] Rule 7.1 Requires Corporate Disclosure Statement. To enable judges to make informed decisions concerning possible disqualifications based on financial interest, all nongovernmental corporate parties must file two copies of a statement that either [*Fed R Civ P 7.1(a)*]:

- Identifies any parent corporation and any publicly held corporation that owns 10 percent or more of its stock; or

- Indicates that there is not a parent corporation nor any publicly held corporation that owns 10 percent or more of its stock.

The corporate disclosure statement must be filed with the corporate party's first appearance, pleading, petition, motion, response, or other request addressed to the court [*Fed R Civ P 7.1(b)*]. In addition, corporate parties must file a supplemental statement updating any changes in the disclosure information [*Fed R Civ P 7.1(b)*].

Cross References:

Forms, see *§§ 5.34 -5.36*.

See also 1 *Bender's Federal Practice Forms, Forms 7.1:2*, *7.1:3* (Matthew Bender).

5.28[2] LOCAL PRACTICE: Identifying Interested Parties.

5.28[2][a] LOCAL PRACTICE: CD Cal Requirements. To enable the court to evaluate possible disqualification or recusal, counsel for all non-governmental parties must file with their first appearance an original and two copies of a Notice of Interested Parties, which must list all persons, associations of persons, firms, partnerships, and corporations (including parent corporations) that may have a direct, pecuniary interest in the outcome of the case, including any insurance carrier that may be liable in whole or in part, directly or indirectly, for a judgment that may be entered in the action, or for the cost of defense [*CD Cal Civ LR 7.1-1*]. Counsel is under a continuing obligation to file

an amended certification if any material change occurs in the status of interested parties (for example, through merger or acquisition, or change in carrier) which may be liable for any part of a judgment [*CD Cal Civ LR 7.1-1*].

Cross References:

Form of notice of interested parties, see *§§ 5.35*, *5.44*. Form of corporate disclosure statement, see *§ 5.34*.

5.28[2][b] LOCAL PRACTICE: ED Cal Requirements. The ED Cal has no specific local rule governing corporate or interested parties disclosure statements.

Cross Reference:

Form of corporate disclosure statement, see *§ 5.34*.

5.28[2][c] LOCAL PRACTICE: ND Cal Requirements. Each party to any civil proceeding must file a "Certification of Interested Entities or Persons" so that judges may evaluate any need for disqualification or recusal early in the course of any case. The requirement does not apply to any governmental entity or its agencies [*ND Cal Civ LR 3-16(a)*].

On making a first appearance in any proceeding before the court, a party must file the "Certification of Interested Entities or Persons" with the clerk of the court [*ND Cal Civ LR 3-16(b)*].

The certification must disclose any persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities other than the parties themselves known by the party to have either a financial interest of any kind in the subject matter in controversy or in a party to the proceeding or any other kind of interest that could be substantially affected by the outcome of the proceeding [*ND Cal Civ LR 3-16(b)(1)*]. The terms "proceeding" and "financial interest" have the meaning assigned by *28 USC § 455(d)(1)*, *(3)*, and *(4)* [*ND Cal Civ LR 3-16(b)(2)*].

If a party has no disclosure to make, that party must make a certification stating that no interest is known other than that of the named parties to the action [*ND Cal Civ LR 3-16(b)(3)*].

The certification of Interested Entities of Persons must take the form set forth in *ND Cal Civ LR 3-16(c)*. Certification must be included as a distinct section at the end of the complaint, answer, or other initial pleading [*ND Cal Civ LR 3-16(c)*].

Cross References:

Form of certification of interested entities or persons, see *§ 5.36*. Form of corporate disclosure statement, see *§ 5.34*.

5.28[2][d] LOCAL PRACTICE: SD Cal Requirements. Any non-governmental corporate party to an action in the Southern District must file a statement identifying all its parent corporations and listing any publicly held company that owns 10 percent or more of the party's stock. A party must file a separate statement entitled "Notice of Party With Financial Interest" with its initial appearance in the court and must supplement the statement within a reasonable time of any change in the information [*SD Cal Civ LR 40.2*].

Cross Reference:

Form of corporate disclosure statement, see *§ 5.34*.

Legal Topics:

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

Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofCertificatesCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial Interests

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5.29 CHECKLIST: Electronic or Facsimile Filing of Pleadings and Motions.

☐ Check local rules and general orders to see if electronic or facsimile filing is allowed or required in court or in type of case.

☐ Check local rules regarding electronic signatures.

☐ Locate fax filing agency if use of agent is required.

☐ Retain original signed document for period of no less than maximum allowable time to complete appellate process.

☐ Maintain transmission record indicating:

- ○ Telephone number of receiving machine.
- ○ Number of pages sent.
- ○ Transmission time.
- ○ Indication of errors in transmission.

Authority:

Fed R Civ P 5(d)(3)

Discussion:

See *§§ 5.30*, *5.31*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePleading & PracticeService of ProcessProofCertificatesLegal EthicsProfessional ConductElectronic Communications

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1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.30

5.30 Local Rules May Permit or Require Electronic or Facsimile Filing.

Filing by facsimile or other electronic means may be allowed or required by local rule. A local rule may require electronic filing only if it allows for reasonable exceptions. The means of filing must be consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with local rule constitutes a written paper [*Fed R Civ P 5(d)(3)*].

Example:

In the Northern District of California, "electronic filing" refers to the process of logging in to the court web site and completing a transaction that includes the uploading of the document comprising the filing to the court's system. Sending a document by email does not constitute an electronic filing [ND Cal Gen Order 45].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansLegal EthicsProfessional ConductElectronic Communications

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1-5 MB Practice Guide: Fed Pretrial Civ Proc in CA 5.31

5.31 LOCAL PRACTICE: Electronic or Facsimile Filing of Pleadings and Motions.

5.31[1] LOCAL PRACTICE: CD Cal Requirements. The Central District has authorized electronic filing of pleadings and papers. The home page for the District's electronic case filing system is at http://support.cacd.uscourts.gov/. The General Order governing electronic case filing, CD Gen Order 08-02, is at http://support.cacd.uscourts.gov/GeneralOrder/08-02.pdf. CD Gen Order 08-02 has been amended relating to mandatory chamber paper copies, effective 12/9/2008, by CD Gen Order 08-11, available at http://www.cacd.uscourts.gov/CACD/GenOrders.nsf/0/82A731FFF2D2CE4C8825751C00597489.

5.31[2] LOCAL PRACTICE: ED Cal Requirements.

Electronic filing mandatory for attorneys unless excused. In the Eastern District, electronic filing is mandatory for attorneys unless it is specifically excused by the court or by local rule [*ED Cal Gen LR 133(a)*]. In exceptional circumstances and for specific documents, an attorney may apply for permission to file paper documents [*ED Cal Gen LR 133(b)(1)*]. The application must be submitted as a stipulation [*see ED Cal Gen LR 143*], or if a stipulation cannot be obtained, as a written motion. Points and authorities are not required and no argument or hearing will normally be held. The application can also be made in scheduling conference and pretrial conference statements when the need is foreseen [*ED Cal Gen LR 133(b)(3)*]. The decision whether or not to permit paper filing is in the sole discretion of the assigned judge or magistrate judge [*ED Cal Gen LR 133(b)(1)*].

Distinguish:

Parties appearing in propria persona must file paper documents unless they have been given court permission to file electronically [*ED Cal Gen LR 133(a), (b)(2)*]. All paper filings by a party appearing in propria persona will be scanned by the clerk's office and the electronic record will become the official court record [*ED Cal Gen LR 133(a), (b)(3)*].

Exception:

Documents filed under seal should not be filed electronically. Instead, the attorney must electronically file a "Notice of Filing Sealed Document" designated as accompanying the relevant document [*ED Cal Gen LR 141(c)*].

Cross Reference:

Eastern District requirements for filing document under seal, see *§ 22.44[2][d]*.

Courtesy paper copies must be provided to chambers for documents exceeding certain length. If an electronically filed document, excluding attachments or exhibits, exceeds 25 pages, the submitting attorney must provide a courtesy paper copy to chambers. A courtesy paper copy must also be provided for attachments or exhibits that total in excess of 50 pages. The courtesy paper copy must be prominently labeled as such in capital letters on its face sheet and must be mailed or otherwise sent to the appropriate courtroom deputy clerk no later than the next business day following the electronic filing [*see ED Cal Gen LR 133(f)*].

Attorney registration for electronic filing required. All attorneys who wish to file documents in the Eastern District must be admitted to practice or admitted to appear pro hac vice. Admission to practice requires that the attorney complete an e-filing registration form and receive a username and password. Completion of the registration form permits electronic filing of documents, and unless the attorney opts out, authorizes acceptance of electronic service. This court-issued username and password will constitute the attorney's electronic signature [*ED Cal Gen LR 135(g)*].

Cross Reference:

Discussion of attorney's electronic signature, see *§ 5.10[4][b]*. Discussion of electronic service, see *§ 5.22[6][b]*.

Attorney registration for PACER required. All attorneys who wish to file documents in the Eastern District must register for PACER. PACER is the vehicle which permits access to images of the electronically filed documents maintained in the court record [*ED Cal Gen LR 135(g)*].

Cross References:

Discussion of electronic or facsimile signatures, see *§ 5.10[4][b]*. Discussion of when electronic filing is complete, see *§ 5.27A[1]*.

5.31[3] LOCAL PRACTICE: ND Cal Requirements. The clerk will accept in certain actions, documents filed, signed, or verified by electronic means that are consistent with General Order No. 45, "Electronic Case Filing," found at the court's website: www.cand.uscourts.gov. A document filed by electronic means in compliance with the local rule constitutes a written document for purposes of applying the local rules and the Federal Rules of Civil Procedure. The clerk will provide notification in any case in which documents must be filed electronically [*ND Cal Civ LR 5-4*; *see also* General Order No. 45].

Warning:

Some cases are not subject to electronic filing. Check General Order No. 45.

Cross Reference:

Discussion of electronic or facsimile signatures, see *§ 5.10[4][c]*.

Any document filed electronically must comply with the requirements for redaction of personal data identifiers [*ND Cal Civ LR 3-17*].

Cross Reference:

Northern District requirements for redaction of personal data identifiers, see *§ 5.13[3]*.

5.31[4] LOCAL PRACTICE: SD Cal Requirements.

Fax filing. A fax filing agency will file all fax-transmitted pleadings on behalf of the parties or their counsel. No document may be transmitted directly to the clerk by fax for filing; any document transmitted directly to the clerk by fax for filing will be rejected and not filed [*SD Cal Civ LR 5.3(a)*].

The fax filing agency is not an agent of the court but rather acts as the agent for the filing party. A document will be deemed to be filed when it is submitted by the fax filing agency, received in the clerk's office, and filed by the clerk. Mere transmission to or receipt by the fax filing agency will not be construed as filing [*SD Cal Civ LR 5.3(a.1)*].

The fax filing agency must meet all the technical requirements under *SD Cal Civ LR 5.1* [*SD Cal Civ LR 5.3(a.2)*]. Only plain paper (no thermal paper) facsimile machines may be used. All documents must be on 81/2 x 11-inch bond. All copies must be clear, clean, and legible, and comply with *SD Cal Civ LR 5.1* [*SD Cal Civ LR 5.3(c)*].

Counsel or the parties using a fax filing agency must ensure that additional copies necessary for filing will be reproduced by the fax filing agency, and any applicable filing fees are submitted at the time of filing [*SD Cal Civ LR 5.3(a.3)*].

The image of the original manual signature on the fax copy will constitute an original signature for all court purposes. The original signed document may not be substituted except by court order. The original signed document must be maintained by the attorney of record or the party originating the document, for a period of no less than the maximum allowable time to complete the appellate process. On request, the original document must be provided to other parties for review [*SD Cal Civ LR 5.3(d)*].

The sending party must maintain a transmission record should fax filing later becomes an issue. Such a record consists of a document printed by the sending facsimile machine stating the telephone number of the receiving machine, the number of pages sent, the transmission time, and an indication of errors in transmission [*SD Cal Civ LR 5.3(e)*].

Attorney registration for electronic filing required. As of November 1, 2006, in the Southern District, registration in the electronic case filing system is mandatory for attorneys unless leave is granted on good cause shown to file and serve paper documents [SD Cal Electronic Case Filing Admin Policies & Procedures Manual 1(f)].

Distinguish:

Unless otherwise ordered by the court, pro se litigants must submit documents for filing in legible, paper form for scanning and electronic filing by the clerk's office. A party appearing pro se may seek leave to file documents electronically [SD Cal Electronic Case Filing Admin Policies & Procedures Manual 2(a)].

Documents other than case-initiating documents and sealed documents must be filed electronically. A complaint, notice of removal, or cover sheet must be filed in paper format at the clerk's office [SD Cal Electronic Case Filing Admin Policies & Procedures Manual 2(c), (p)]. Ex parte documents for which no notice is required should be filed in paper format under seal [SD Cal Electronic Case Filing Admin Policies & Procedures Manual 2(i)]; all sealed documents must be filed and served in paper format [SD Cal Electronic Case Filing Admin Policies & Procedures Manual 2(j), (p)]. All other documents must be filed by registered users electronically except as otherwise provided in the rules or ordered by the court [SD Cal Civ LR 5.4(a); SD Cal Electronic Case Filing Admin Policies & Procedures Manual 1(b)].

Courtesy paper copies must be provided to chambers for documents exceeding 20 pages. If an electronically filed document exceeds 20 pages, including attachments and exhibits, the submitting attorney must provide the court with a courtesy paper copy [SD Cal Electronic Case Filing Admin Policies & Procedures Manual 2(e)].

Cross References:

SD Cal requirements for general formatting, see *§ 5.13[4]*. Discussion of electronic or facsimile signatures, see *§ 5.10[4][d]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePleading & PracticeService of ProcessProofCertificatesLegal EthicsProfessional ConductElectronic Communications

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Unit 3 Pleading Stage
CHAPTER 5 Formatting, Serving, and Filing Papers
VI. FORMS

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5.32 Caption With Heading.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	COMPLAINT
Defendant	)	
	)	
	)	

_____

Complaint

NOTES.

Authority:

Fed R Civ P 7, 8, 10

Drafting Heading:
See *§ 5.06*

Drafting Caption:
See *§ 5.07*

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5.33 Signature Block.

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys for _____ [*party and party status*]

_____ [*street address*]

_____ [*city, state, and zip code*]

_____ [*phone number*]

NOTES.

Authority:
Fed R Civ P 10, 11

Drafting Signature Block:
See *§ 5.10*

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5.34 Corporate Disclosure Statement.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	CORPORATE DISCLOSURE
Defendant	)	STATEMENT
	)	(*Fed R Civ P 7.1*)
	)	

_____

Corporate Disclosure Statement

_____ [*Name of party*] certifies that it is a nongovernmental corporation organized and existing under the laws of the State of _____, with its principal place of business in _____ [*city,*

state]. _____ [*Name of party*] submits the following statement of its corporate interests and affiliations as required by *Federal Rules of Civil Procedure, Rule 7.1* [and Local Rule _____], for the use of the judges of this Court:

1. _____ [*Name of party*]_____[is/is not] a publicly-held corporation or other publicly-held entity.

2. _____ [*Name of party*] does not have any parent corporation.

3. No publicly-held corporation owns 10 percent or more of _____ [*name of party*]'s stock.
Dated: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys for _____ [*party and party status*]

_____ [*street address*]

_____ [*city, state, and zip code*]

_____ [*phone number*]

NOTES.

Authority:
Fed R Civ P 7.1

Drafting Heading:
See *§ 5.06*

Drafting Caption:
See *§ 5.07*

Drafting Corporate Disclosure Statement:
See *§ 5.28*

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5.35 Central District of California, Notice of Interested Parties.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	NOTICE OF
_____ [*name*],	)	INTERESTED PARTIES
Defendant	)	(*Fed R Civ P 7.1*
	)	*CD Cal Civ LR 7.1*)
	)	

_____

Notice of Interested Parties

The undersigned, counsel of record for _____ [*name of party*], certifies that the following listed parties

may have a direct, pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal.

_____ [*List names of all such parties and identify their connection and interest*].
Dated: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys of Record for

_____ [*party and party status*]

_____ [*street address*]

_____ [*city, state, and zip code*]

_____ [*phone number*]

NOTES.

Authority:
Fed R Civ P 7.1; *CD Cal Civ LR 7.1*

Drafting Heading:
See *§ 5.06*

Drafting Caption:
See *§ 5.07*

Drafting Disclosure Statement:
See *§ 5.28[2][a]*

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5.36 Northern District of California, Certification of Interested Entities or Persons.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	CERTIFICATION OF
_____ [*name*],	)	INTERESTED ENTITIES
Defendant	)	OR PERSONS
	)	(*FED R CIV P 7.1*
	)	*ND CAL CIV LR 3-16*)
	)	

_____

Certification of Interested Entities or Persons

[*Alternative One. Interest to be certified*]

As required by Northern District of California Civil Local Rule 3-16, the undersigned certifies that the following listed persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities (1) have a financial interest in the subject matter in controversy or in a party to this proceeding or (2) have a nonfinancial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding: _____ [*list names and identify their connection and interest*].

[*Alternative Two. No interest to be certified*]

As required by Northern District of California Civil Local Rule 3-16, the undersigned certifies that as of this date, other than the named parties, there is no association of persons, firm, partnership, corporation (including parent corporation), or other entity that (1) has a financial interest in the subject matter in controversy or in a party to this proceeding or (2) has a nonfinancial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding.
Dated: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys of Record for _____

[*party and party status*]

_____ [*street address*]

_____ [*city, state, and zip code*]

_____ [*phone number*]

NOTES.

Authority:
Fed R Civ P 7.1; *ND Cal Civ LR 3-16*

Drafting Heading:
See *§ 5.06*

Drafting Caption:
See *§ 5.07*

Drafting Disclosure Statement:
See *§ 5.28[2][c]*

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5.37 Certificate of Service.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	CERTIFICATE OF SERVICE
Defendant	)	*FED R CIV P 5(d)*
	)	
	)	

_____

Certificate of Service

I certify that a true and correct copy of the attached _____ [*describe document served, e.g.,* Motion and Notice of Motion for Summary Judgment, together with all attachments, exhibits, and supporting papers],

_____ was

[*Alternative One. Delivered to attorney for party personally*]

hand delivered to _____ [*name of attorney*] the attorney for _____ [*name of party*] in this matter at _____ [*street address, city, state*] on _____ [*date of service*].

[*Alternative Two. Delivered to another person at office of attorney for party*]

hand delivered to the office of _____ [*name of attorney*], the attorney for _____ [*name of party*] in this matter, at _____ [*street address, city, state*] on _____ [*date of service*]. The papers were left with _____ [the receptionist *or* the person who appeared to be in charge *or* a person who identified _____ (himself/herself) as the _____ (clerk *or* associate) of _____ (*name of attorney*)].

[*Alternative Three. Delivered to office of attorney for party and left in conspicuous place*]

hand delivered to the office of _____ [*name of attorney*], the attorney for _____ [*name of party*] in this matter, at _____ [*street address, city, state*] on _____ [*date of service*]. At the time of delivery, there appeared to be no one in charge, and the papers were left in a conspicuous place, in particular, _____ [*specify, e.g.*, the top of the receptionist's desk *or* in a box in the front of the office specially marked: "For delivery or service of papers"].

[*Alternative Four. Delivered to attorney for party by leaving at residence*]

hand delivered to the _____ [dwelling house *or* usual place of abode] of _____ [*name of attorney*], the attorney for _____ [*name of party*] in this matter, at _____ [*street address, city, state*] on _____ [*date of service*]. At the time of delivery, _____ [*name of attorney*] was not at home and the papers were left with a _____ [*name*], a person of suitable age and discretion who resided there. Service was made at the residence of _____ [*name of attorney*] because _____ [(his *or* her) office was closed *or* (he *or* she) has no office].

[*Alternative Five. Delivered to party*]

hand delivered to _____ [*name of party*] in this matter, at _____ [*street address, city, state*] on _____ [*date of service*]. Service was made directly on _____ [*name of party*] because _____ [he/she _____ has no attorney of record in this matter *or* the court has ordered that service be made directly on _____ (*name of party*) and not on the attorney].

[*Alternative Six. Delivered to another person at office of party*]

hand delivered to the office of _____ [*name of party*], at _____ [

street address, city, state] on _____ [*date of service*]. The papers were left with _____ [the receptionist *or* the person who appeared to be in charge]. Service was made directly on _____ [*name of party*] because _____ [he/she has no attorney of record in this matter *or* the court has ordered that service be made directly on _____ (*name of party*) and not on the attorney].

[*Alternative Seven. Delivered to office of party and left in conspicuous place*]

hand delivered to the office of _____ [*name of party*], at _____ [*street address, city, state*] on _____ [*date of service*]. At the time of delivery, there appeared to be no one in charge, and the papers were left in a conspicuous place, in particular, _____ [*specify, e.g.,* the top of the receptionist's desk *or* in a box in the front of the office specially marked: "For emergency deliveries"]. Service was made directly on _____ [*name of party*] because _____ [he/she has no attorney of record in this matter *or* the court has ordered that service be made directly on _____ (*name of party*) and not on the attorney].

[*Alternative Eight. Delivered to party by leaving at residence*]

hand delivered to the _____ [dwelling house *or* usual place of abode] of _____ [*name of party*], at _____ [*street address, city, state*] on _____ [*date of service*]. At the time of delivery, _____ [*name of party*] was not at home and the papers were left with _____ [*name*], a person of suitable age and discretion who resided there. Service was made at the residence of _____ [*name of party*] because _____ [his/her office was closed *or* he/she has no office]. Service was made directly on _____ [*name of party*] because _____ [he/she has no attorney of record in this matter *or* the court has ordered that service be made directly on _____ (*name of party*) and not on the attorney].

[*Alternative Nine.*
Delivered to clerk of court because address for party or attorney not available]

hand delivered to the clerk of this court because _____ [*explain in detail why no address for party or attorney can be found, e.g.,* the plaintiff in this case has never had an attorney, appears to have disappeared, cannot be served at the address listed in the papers filed with this court, and cannot be located by any means known to me].

[*Optional. Add to make certificate declaration under penalty of perjury*]

I declare under penalty of perjury that all of the statements made in this Certificate of Service are true and correct and that if called to testify as a witness in this matter, I could and would competently testify to each of the facts set forth in the Certificate.
Dated: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys of Record for _____

[*party and party status*]

_____ [*street address*]

_____ [*city, state, and zip code*]

_____ [*phone number*]

NOTES.

Authority:
Fed R Civ P 5

Serving Pleadings:
See *§§ 5.17 -5.22*

Filing Proof of Service:
See *§ 5.23*

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5.38 Certificate of Service by U.S. Mail.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	CERTIFICATE OF SERVICE
Defendant	)	BY U.S. MAIL
	)	*FED R CIV P 5(b), (d)*
	)	

_____

Certificate of Service by U.S. Mail

I certify that, before 5:00 p.m. on _____ [*date of mailing*], I placed a true and correct copy of the attached _____ [*describe document served, e.g.,* Motion and Notice of Motion for Summary Judgment,

together with all attachments, exhibits, and supporting papers], in the United States mail, in a properly-addressed envelope, with first class postage duly paid and affixed to the envelopes, and with the envelopes addressed to:

1. _____ [*Name of attorney*]
Attorney for _____
_____ [*Address*];

2. _____ [*Name of attorney*]
Attorney for _____
_____ [*Address*];

3. _____ [*Name of unrepresented party*]
_____ [*Address*].

[*Optional. Add to make certificate declaration under penalty of perjury*]

I declare under penalty of perjury that all of the statements made in this Certificate of Service are true and correct and that if called to testify as a witness in this matter, I could and would competently testify to each of the facts set forth in the Certificate.

[*Conclude form as follows*]

This Certificate was executed on _____ [*date*] at _____ [*city, state*].

_____ [*signature*]

_____ [*typed name*]

[*Optional:* Attorney for _____ (*name and party status*)]

NOTES.

Authority:
Fed R Civ P 5

Service by U.S. Mail:
See *§§ 5.22[3], [4]*

Filing Proof of Service:
See *§ 5.23*

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5.39 Consent to Electronic Service.

CONSENT TO SERVICE BY ELECTRONIC MEANS
Fed R Civ P 5(b)(2)(D)

As counsel of record for _____ [*name of party*] in the case of _____ [*short title*], Action No. _____, proceeding in the United States District Court for the _____ District of California, I consent, in writing, to service of papers on me by electronic means. My signature below signifies that I make this written consent as required by *Rule 5(b)(2)(D) of the Federal Rules of Civil Procedure*.

In particular I consent to have papers served on me by _____ [*method of electronic service, e.g.,* attachments to an e-mail *or* posting of the documents on the _____ (*name*) website *or* by fax *or appropriate method or methods*]. Under this consent, service on _____ [*name of party*] is complete only if the documents in question are transmitted to _____ [*e-mail address, website, fax number, or whatever electronic address is appropriate*]. [*Optional, use to specify format requirements, e.g.,* Further, the documents in question must be _____ (in PDF format *or* attached as word processor files in _____ [Corel WordPerfect *or* Microsoft Word *or other word processor program*] in version _____ or higher)].

This consent commences on _____ [*date*] and extends to _____ [all papers in this action *or* all papers in connection with the pending motion for summary judgment *or* all papers dealing with discovery *or whatever scope of consent is appropriate*] until revoked by me, in writing.

_____ [*signature*]

_____ [*typed name*]

[*Optional:* Attorney for _____ (*name and party status*)]

NOTES.

Authority:
Fed R Civ P 5(b)(2)(E)

Serving by Electronic Means:
See *§ 5.22[5]*. See also *§§ 5.29*, *5.30* (Electronic Filing)

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5.40 Notice of Motion and Motion to Dispense With Service of Pleadings.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*], Plaintiff vs. _____ [*name*], Defendant	)	Civil Action No. _____
	)	NOTICE OF MOTION AND MOTION TO DISPENSE WITH SERVICE OF PLEADINGS *Fed R Civ P 5(c)*
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No: _____

_____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for the following:

(a) Pursuant to *Rule 5(c) of the Federal Rules of Civil Procedure* an order (1) that service of the pleadings on the defendants and replies to those pleadings, if any, need not be made as between the defendants; (2) that any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense be deemed denied or avoided by all other parties; and (3) that the filing of any of these types of pleadings and service of these defensive pleadings on the plaintiff shall constitute notice to all of the other parties.

(b) An order granting further relief as may be appropriate.

This motion is made on the ground that it is expressly authorized by Rule 5(c) if there is an unusually large number of defendants in the case. In this case, there are _____ [*number, e.g.,* 16] defendants. _____ [*Specify facts supporting motion, e.g.,* All of these defendants are filing stock defensive pleadings, all are naming each other in crossclaims for contribution, all are counterclaiming against the plaintiff, and all are asserting numerous but standard affirmative defenses]. A marathon of pleadings, service of pleadings, responses, and service of responses would not be helpful or productive and would impose a great burden on all of the parties to this action. All of the issues joined by the pleadings may be settled more economically and efficiently in a pretrial order made after the parties have had an opportunity to define the available evidence and the actual contentions that will be asserted at trial.]

_____ [*Name of party*] will, as required by Rule 5(c), promptly serve a copy of any order made by the court on all of the other parties to this action. _____ [*Name of party*] will serve a copy of this order on all parties by mail to the offices of the respective attorneys of record unless this court finds that some other form of notice should be given.

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 5

Waiving Service:
See *§ 5.22[8]*

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5.41 Order Dispensing With Service of Pleadings.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	ORDER DISPENSING WITH
Defendant	)	SERVICE OF PLEADINGS
	)	*Fed R Civ P 5(c)*
	)	

_____

Order Dispensing With Service of Pleadings

The motion of _____ [*name of moving party*] came on regularly for hearing on _____ [*date*]. _____ [*Name of moving party*] sought, as authorized by *Rule 5(c) of the Federal Rules of Civil Procedure*, an order dispensing with service of defensive pleadings among the defendants, an order deeming all crossclaims, counterclaims, and affirmative defenses denied, and an order deeming filing with the court and service on the plaintiff as service on all defendants. The court has considered the motion, the authorities cited, and the argument of counsel and, being fully advised,

IT IS ORDERED that:

1. Service of the pleadings of the defendants and replies to those pleadings, if any, need not be made as between the defendants.

2. Any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense is deemed denied or avoided by all other parties, including the plaintiff.

3. The filing of any of these types of pleadings and service of these defensive pleadings on the plaintiff shall constitute notice of it to all of the other parties.

4. _____ [*Name of moving party*] shall serve a copy of this order on all parties to this action, by mail, to the offices of the respective attorneys of record for the parties as authorized by *Federal Rules of Civil Procedure, Rule 5(b)* and will do so forthwith.

5. _____ [*Name of moving party*] shall file a copy of this Order with a Certificate of Service attached that shows compliance with paragraph 4 of this Order no later than _____ [*date*].
Dated: _____

_____ [*signature of judge*]

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
Fed R Civ P 5

Waiving Service:
See *§ 5.22[8]*

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5.42 Notice of Motion and Motion to Compel Filing of Papers.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO COM-
Defendant	)	PEL
	)	FILING OF SERVED PAPERS
	)	*Fed R Civ P 5(d)*

_____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for the following:

(1) Pursuant to *Rule 5(d) of the Federal Rules of Civil Procedure* [and Local Rule _____ (*number*)] an order compelling _____ [*name of opponent*] to file with the court the _____ [*name of paper, e.g.,* Response to Requests for Admission] that it served on _____ [*date*], and to have this _____ [*e.g.,* Response to Requests for Admission] stricken if he/she fails to file it with the court by _____ [*date*].

(2) An order granting further relief as may be appropriate.

The grounds for the motion are that _____ [*name of opponent*] has an obligation to file all papers that were served on the parties, and to do so within a reasonable time. _____ [*Name of moving party*] would be prejudiced if the _____ [*e.g.,* Response to Requests for Admission] is not filed with the court because _____ [*state facts showing moving party's interest in having paper filed, e.g.,* he seeks to have the _____ Court of _____ take judicial notice of this document in a related case and, under the governing evidentiary rule, a court may take judicial notice of the contents of the document only if it is filed with a court of record].

Before bringing this motion, _____ [*name of moving party*] contacted counsel for _____ [*name of opponent*] and asked him/her to file the document as required by Rule 5(d) but, to date, he/she has failed or refused to do so.

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____[*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service.*]

NOTES.

Authority:
Fed R Civ P 5

Filings Pleadings, Motions, and Other Papers:
See *§§ 5.24*, *5.25 -5.27*

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5.43 Order Compelling Filing of Papers.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	ORDER COMPELLING
Defendant	)	FILING OF SERVED PAPERS
	)	*FED R CIV P 5(d)*
	)	

_____

ORDER COMPELLING FILING OF PAPER

The motion of _____ [*name of moving party*] came on regularly for hearing on _____ [*date*]. _____ [*Name of moving party*] sought, as authorized by *Rule 5(d) of the Federal Rules of Civil Procedure*, to compel _____ [*name of opponent*] to file _____ [*name of document,* e g., the Response to Requests for Admissions] that was served on _____ [*name of moving party*] with the court but that, contrary to the requirements of Rule 5(d), has not been filed with the court within a reasonable time.

_____ [*Name of moving party*] asks that this court order that the _____ [*e.g.*, Response to Request for Admissions] be filed with the court by _____ [*date*] or be ordered stricken. The court has reviewed the motion, the authorities cited, and the argument of counsel and, being fully advised,

IT IS ORDERED that:

1. _____ [*Name of opponent*] will file the _____ [*e.g.*, Response to Request for Admissions] previously served on _____ [*name of moving party*] on _____ [*date of service*].

2. The _____ [*e.g.*, Response to Request for Admissions] must be filed with the court no later than _____ [*date*] or the paper will be deemed stricken, _____ [*name of opponent*] will be forever barred from filing any _____ [*e.g.*, Response to Request for Admissions], and _____ [*specify consequences of having paper stricken, e.g.*, the matters set out in the Request for Admissions will be deemed admitted for the purposes of this action].
Dated: _____

_____ [*signature of judge*]

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
Fed R Civ P 5

Filings Pleadings, Motions, and Other Papers:
See *§§ 5.24 -5.27*

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Unit 3 Pleading Stage
CHAPTER 5 Formatting, Serving, and Filing Papers
VI. FORMS

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5.44 Local District Court Forms.

Local district court forms relating to matters addressed in this chapter are listed below.

Central District

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Certification and Notice of Interested Parties (CV-30)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Proof of Service--Acknowledgment of Service (CV-40)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Waiver of Service of Documents from the Clerk (G-86)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Eastern District

Civil Cover Sheet (JS-44)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Northern District

Civil Cover Sheet (JS 44)

Click here to view image.

Southern District

Civil Cover Sheet (JS-44)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Declaration of Service

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Cross Reference:

Automated HotDocs(R) and PDF versions of these forms may be accessed and filled in from the online version of this publication, and are also available at www.LexisOne.com/forms.

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint

1-6 MB Practice Guide: Fed Pretrial Civ Proc in CA 6.syn

§ 6.syn Synopsis to Chapter 6: Drafting the Summons and Complaint

6.01 Scope.

6.02 Objective and Strategy.

6.03 CHECKLIST: Preparing Complaint.

6.04 Standards for Pleading Must Be Followed.

6.04[1] Notice Pleading Requirements.

6.04[1][a] Essential Elements Must Appear in Complaint.

6.04[1][b] Fair Notice of Claim Must Be Provided.

6.04[1][c] Extraneous Material Must Be Omitted.

6.04[1][d] Special Pleading Requirements Must Be Satisfied.

6.04[2] LOCAL PRACTICE: Court-Supplied Complaint Forms.

6.04[3] LOCAL PRACTICE: Format Requirements for Pleadings.

6.04[3][a] LOCAL PRACTICE: CD Cal Requirements.

6.04[3][b] LOCAL PRACTICE: ED Cal Requirements.

6.04[3][c] LOCAL PRACTICE: ND Cal Requirements.

6.04[3][d] LOCAL PRACTICE: SD Cal Requirements.

6.04[4] Avoid Consequences of Failure to Comply With Pleading Requirements.

6.04[4][a] Clerk Will Accept for Filing Complaint That Violates Format Requirements.

6.04[4][b] Court Has Power to Dismiss or Make Other Orders.

6.05 Heading of Complaint Must Identify Attorney and Plaintiff and Comply With Local Rule Requirements.

6.05[1] Attorney and Plaintiff Must Be Identified.

6.05[2] LOCAL PRACTICE: Heading of Complaint.

6.05[2][a] LOCAL PRACTICE: CD Cal Requirements.

6.05[2][b] LOCAL PRACTICE: ED Cal Requirements.

6.05[2][c] LOCAL PRACTICE: ND Cal Requirements.

6.05[2][d] LOCAL PRACTICE: SD Cal Requirements.

6.06 Caption Must Meet Specific Format Requirements.

6.06[1] Name of Court Must Be Identified.

6.06[1][a] District and Division Must Be Specified.

6.06[1][b] LOCAL PRACTICE: CD Cal Requirements.

6.06[1][c] LOCAL PRACTICE: ED Cal Requirements.

6.06[1][d] LOCAL PRACTICE: ND Cal Requirements.

6.06[1][e] LOCAL PRACTICE: SD Cal Requirements.

6.06[2] Title of Action Must Be Provided.

6.06[2][a] Parties Must Be Named in Title of Action.

6.06[2][b] Requirement That All Parties Be Named Is Construed Liberally.

6.06[2][c] LOCAL PRACTICE: CD Cal Requirements.

6.06[2][d] LOCAL PRACTICE: ED Cal Requirements.

6.06[2][e] LOCAL PRACTICE: SD Cal Requirements.

6.06[3] Use of Fictitious Name for Plaintiff Is Restricted.

6.06[3][a] Plaintiff Must Obtain Leave of Court to Use Fictitious Name.

6.06[3][b] Plaintiff's Real Name May Be Disclosed to Defendant but Kept Under Seal.

6.06[3][c] Use of Fictitious Name Is Generally Against Public Policy.

6.06[3][d] Privacy Interest May Justify Anonymous Proceeding.

6.06[3][e] Factors to Consider When Plaintiff Seeks to Plead Anonymously.

6.06[3][f] Examples of Sufficient Privacy Concerns.

6.06[3][g] Examples of Insufficient Privacy Concerns.

6.06[4] Using Fictitious Name for Defendant.

6.06[4][a] "Doe" Pleading Is Used to Sue Unknown Defendant.

6.06[4][b] Effect on Diversity Jurisdiction.

6.06[4][c] Use of Doe Pleading to Avoid Bar of Statute of Limitations on State-Law Claim.

6.06[4][d] Use of Doe Pleading to Avoid Bar of Statute of Limitations on Federal Claim.

6.06[4][e] LOCAL PRACTICE: CD Cal Requirements.

6.06[5] File Number of Action Must Be Included.

6.06[5][a] Caption Should Provide Space for File Number.

6.06[5][b] Court Clerk Will Assign File Number.

6.06[6] Pleading Must Be Designated As Complaint.

6.06[6][a] Identify Document As Complaint.

6.06[6][b] LOCAL PRACTICE: CD Cal Requirements.

6.06[6][c] LOCAL PRACTICE: ED Cal Requirements.

6.06[6][d] LOCAL PRACTICE: ND Cal Requirements.

6.06[6][e] LOCAL PRACTICE: SD Cal Requirements.

6.06[7] Jury Demand Must Be Included.

6.06[7][a] Endorse Jury Demand on Complaint.

6.06[7][b] LOCAL PRACTICE: CD Cal Requirements.

6.06[7][c] LOCAL PRACTICE: ED Cal Requirements.

6.06[7][d] LOCAL PRACTICE: ND Cal Requirements.

6.06[7][e] LOCAL PRACTICE: SD Cal Requirements.

6.06[8] LOCAL PRACTICE: Indicating Three-Judge Court.

6.06[8][a] LOCAL PRACTICE: CD Cal Requirements.

6.06[8][b] LOCAL PRACTICE: SD Cal Requirements.

6.07 Jurisdictional Allegations Must Be in Short and Plain Statement.

6.07[1] Subject Matter Jurisdiction Must Be Alleged.

6.07[1][a] Setting Forth Basis of Subject Matter Jurisdiction.

6.07[1][b] LOCAL PRACTICE: CD Cal Requirements.

6.07[1][c] LOCAL PRACTICE: ED Cal Requirements.

6.07[1][d] LOCAL PRACTICE: ND Cal Requirements.

6.07[1][e] Model Jurisdictional Allegations May Be Considered.

6.07[2] Federal Question Jurisdiction Must Be Pleaded, If Applicable.

6.07[2][a] Allege Facts to Support General Federal Question Jurisdiction.

6.07[2][b] Include Reference to Federal Law Underlying Claim.

6.07[2][c] Plead Jurisdiction Under Specific Statutory Grant of Federal Question Jurisdiction.

6.07[3] Diversity Jurisdiction Must Be Pleaded, If Applicable.

6.07[3][a] Determine Whether General Diversity Jurisdiction Is Available.

6.07[3][b] Special Diversity Jurisdiction Is Available in Mass Tort Litigation and Certain Class Actions.

6.07[3][c] Citizenship and Amount in Controversy Must Be Averred.

6.07[3][d] Complete Diversity of Citizenship Must Be Established for Most Actions.

6.07[3][e] Pleading Citizenship of Individuals.

6.07[3][f] Pleading Citizenship of Corporations.

6.07[3][g] Pleading Citizenship of Partnerships and Unincorporated Associations.

6.07[3][h] Pleading Citizenship of Political Subdivisions and Other Entities.

6.07[3][i] In General Diversity Case, Pleading Must Allege That Amount in Controversy Exceeds $75,000.

6.07[4] Admiralty or Maritime Jurisdiction Must Be Pleaded, If Applicable.

6.07[5] Supplemental Jurisdiction Must Be Pleaded, If Applicable.

6.07[5][a] Determination of Whether Supplemental Jurisdiction Is Available.

6.07[5][b] Sufficient Facts Must Be Alleged to Establish Supplemental Jurisdiction.

6.07[6] Satisfying Justiciability Requirements.

6.07[6][a] Justiciability Is Generally Not an Issue in Actions Alleging Actual Injury to Plaintiff.

6.07[6][b] Plaintiff in Declaratory Relief Action Must Establish Justiciability.

6.07[6][c] In Declaratory Relief Action, Complaint Must Allege Existence of Case or Controversy.

6.07[6][d] In Declaratory Relief Action, Complaint Must Allege Plaintiff's Standing.

6.07[7] Allegations of Personal Jurisdiction and Venue Are Not Required.

6.07[8] LOCAL PRACTICE: ND Cal--Intradistrict Assignment.

6.08 Allegations Concerning Party Status May Be Included.

6.08[1] Alleging Parties' Capacity, Authority, or Legal Existence Is Necessary Under Specific Circumstances.

6.08[2] Situations in Which Capacity Should Be Alleged.

6.08[2][a] Allege Capacity If Necessary to Establish Diversity Jurisdiction.

6.08[2][b] Allege Capacity If Necessary to Establish Federal Question Jurisdiction.

6.08[2][c] Allege Individual Capacity of State Officer in Civil Rights Action.

6.08[3] Capacity, Authority, or Legal Existence of Party May Be Challenged by Negative Averment.

6.08[4] Determining Capacity, Authority, or Legal Existence.

6.08[5] Alleging Plaintiff's Status in Shareholder Derivative Action.

6.08[6] Drafting Class Action Allegations.

6.08[6][a] Allege Required Elements.

6.08[6][b] LOCAL PRACTICE: CD Cal Requirements.

6.08[6][c] LOCAL PRACTICE: SD Cal Requirements.

6.08[7] Identifying Necessary Parties Who Have Not Been Joined or Identified.

6.09 Short and Plain Statement of Each Claim Must Be Included in Complaint.

6.09[1] Drafting Short, Plain Statement of Claim.

6.09[1][a] Short, Plain Statement of Claim Must Be Included.

6.09[1][b] Sufficient Facts Must Be Alleged to Put Defendant on Notice of Claim.

6.09[1][c] Pleading Evidentiary Facts Ordinarily Is Not Required.

6.09[1][d] Facts May Be Alleged on Information and Belief.

6.09[1][e] Complaint Need Not State Legal Theory.

6.09[1][f] Alternative and Inconsistent Legal Theories May Be Presented.

6.09[1][g] Setting Forth Legal Theory Does Not Limit Relief.

6.09[1][h] Complaint Need Not Negate Affirmative Defenses.

6.09[1][i] Allegations May Be Adopted by Reference.

6.09[1][j] Statements in Exhibit May Be Adopted by Reference.

6.09[1][k] Unattached Written Document May Be Adopted by Reference.

6.09[2] Dividing Statement of Claim Into Paragraphs.

6.09[2][a] Each Paragraph Must Be Numbered.

6.09[2][b] Each Paragraph Must Be Limited to Single Set of Circumstances.

6.09[2][c] Compound Allegations Must Be Avoided.

6.09[2][d] LOCAL PRACTICE: CD Cal--Class Action Allegations.

6.09[3] Pleading Separate Counts.

6.09[3][a] Separate Count May Be Pleaded for Each Claim Founded on Separate Transaction or Occurrence.

6.09[3][b] Separate Counts May Be Necessary When Not All Claims Apply to All Parties.

6.09[3][c] Single Count May Be Used When Sole Claim Applies to All Parties.

6.09[3][d] Defendant's Options If Complaint Does Not Allege Separate Counts.

6.10 Claims May Be Joined.

6.10[1] All of Plaintiff's Claims May Be Joined Against Proper Defendant.

6.10[2] Claims May Be Joined to Original Claim.

6.10[2][a] Claims of One Plaintiff.

6.10[2][b] Claims of Multiple Plaintiffs.

6.10[2][c] LOCAL PRACTICE: CD Cal--Copyright, Patent, or Trademark Claims of Multiple Plaintiffs.

6.10[3] Contingent Claim May Be Joined to Principal Claim.

6.10[4] Alternative, Hypothetical, and Inconsistent Claims May Be Joined.

6.10[5] Determining Whether to Omit Claims.

6.10[5][a] Procedural Rules Do Not Require Joinder.

6.10[5][b] Joining Claims to Avoid Claim Preclusion in Subsequent Suit.

6.10[6] Subject Matter Jurisdiction and Venue Must Be Proper for Each Claim.

6.10[6][a] Verify That All Claims Are Within Court's Subject Matter Jurisdiction.

6.10[6][b] Verify That Venue Is Proper for Each Claim.

6.10[7] Each Defendant Must Be Properly Joined.

6.10[8] Joining Claims Involving United States.

6.10[8][a] Sovereign Immunity Limits Assertion of Claims Against United States.

6.10[8][b] Tucker Act Effectively Limits Joinder of Claims Against United States.

6.10[8][c] Free Joinder of Claims Asserted by United States.

6.10[9] Joined Claims May Be Segregated.

6.10[9][a] Court May Order Separate Trials of Properly Joined Claims or Issues.

6.10[9][b] Dismissal or Severance of Improperly Joined Claims.

6.11 Certain Matters Must Be Specially Pleaded.

6.11[1] Pleading Special Capacity of Party.

6.11[2] Pleading Fraud or Mistake.

6.11[2][a] Fraud and Mistake Must Be Alleged With Particularity.

6.11[2][b] Particular Circumstances of Fraud Must Be Alleged.

6.11[2][c] Each Defendant's Participation in Fraud Must Be Described.

6.11[2][d] Substantive Elements of Fraud Must Be Alleged.

6.11[2][e] Fraud Is Alleged on Information and Belief When Details Are Inaccessible.

6.11[2][f] Particularity in Pleading Mixed Claims.

6.11[2][g] Consequences of Failure to Comply With Particularity Requirement.

6.11[3] Pleading Conditions of Mind.

6.11[3][a] Averring Conditions of Mind Generally.

6.11[3][b] Making General Averment of Scienter in Fraud Claim.

6.11[3][c] Defendant's Motion for More Definite Statement.

6.11[4] Alleging Fraud Under Private Securities Litigation Reform Act of 1995.

6.11[4][a] Pleading Securities Fraud Is Subject to Special Statutory Requirements.

6.11[4][b] Alleging That Particular Statement Is Misleading.

6.11[4][c] Making Allegations on Information and Belief.

6.11[4][d] Alleging Scienter With Particularity.

6.11[4][e] Alleging Loss Causation.

6.11[5] Pleading Conditions Precedent.

6.11[5][a] Make General Averment of Performance or Occurrence of Condition Precedent.

6.11[5][b] Make Specific Denial of Performance or Occurrence of Condition Precedent.

6.11[6] Pleading Official Document or Act.

6.11[7] Pleading Judgment.

6.11[8] Alleging Time and Place.

6.11[8][a] Make Averments of Time and Place With Precision.

6.11[8][b] Determine Whether Averments of Time and Place Are Necessary.

6.11[8][c] Consequences of Insufficient Averments of Time and Place.

6.11[9] Pleading Special Damages.

6.11[9][a] Specifically State Items of Special Damages.

6.11[9][b] Special Damages Defined.

6.11[9][c] Alleging Special Damages for Certain Libel Claims.

6.11[9][d] Drafting Special Damages Allegation.

6.11[9][e] Consequences of Failure to Plead Special Damages.

6.11[10] Pleading Admiralty and Maritime Claims.

6.11[10][a] Electing to Invoke Admiralty and Maritime Jurisdiction.

6.11[10][b] Procedural Consequences of Pleading Admiralty or Maritime Claim.

6.11[10][c] LOCAL PRACTICE: ED Cal Admiralty Requirements.

6.11[11] Pleading Copyright Infringement.

6.11[12] Making Necessary Allegations in Shareholder Derivative Action.

6.11[12][a] Determine Whether Action Is Derivative Action.

6.11[12][b] Required Allegations.

6.11[13] Alleging Specific Facts in Support of Request for Ex Parte Temporary Restraining Order.

6.11[14] LOCAL PRACTICE: Special Pleading Requirements.

6.11[14][a] CD Cal Requirements: Notice of Interested Parties.

6.11[14][b] ED Cal Requirements: Social Security Number in Certain Actions.

6.11[14][c] ND Cal Requirements: Certification of Interested Persons.

6.11[14][d] SD Cal Requirements: Three-Judge Court.

6.12 Complaint Must Include Prayer Demanding Relief.

6.12[1] Demanding Relief.

6.12[1][a] State Demand for Relief in Complaint.

6.12[1][b] Making General Demand for Relief.

6.12[1][c] Demanding Alternative or Multiple Forms of Relief.

6.12[2] Effect of Demand for Relief.

6.12[2][a] In Non-Default Case, Demand Does Not Limit Actual Award.

6.12[2][b] In Default Case, Actual Award May Not Exceed Demand.

6.12[2][c] Demand That Seeks Only Equitable Relief Prevents Jury Trial.

6.13 Complaint May Include Jury Demand.

6.13[1] Preserving Right to Jury Trial.

6.13[2] Jury Demand May Be Endorsed on Face of Complaint.

6.13[3] LOCAL PRACTICE: Jury Demand.

6.13[3][a] LOCAL PRACTICE: CD Cal Requirements.

6.13[3][b] LOCAL PRACTICE: ED Cal Requirements.

6.13[3][c] LOCAL PRACTICE: ND Cal Requirements.

6.13[3][d] LOCAL PRACTICE: SD Cal Requirements.

6.13[4] Indicating Jury Demand on Civil Cover Sheet Is Insufficient.

6.13[5] Specifying Issues for Jury Trial.

6.14 Complaint Must Be Signed.

6.14[1] Complying With Signature Requirement.

6.14[1][a] Sign Original Complaint.

6.14[1][b] Omit Signature From Unfiled Copies.

6.14[1][c] Courts May Allow or Require Electronic Filing, Signing, and Verification by Electronic Means.

6.14[1][d] LOCAL PRACTICE: ED Cal Requirements--Complaints Covered in Electronic Case Filing Program.

6.14[1][e] LOCAL PRACTICE: ND Cal Requirements--Complaints Not Covered in Electronic Case Filing Program.

6.14[1][f] LOCAL PRACTICE: SD Cal Requirements--Complaints Not Covered in Electronic Case Filing Program.

6.14[2] Determining Proper Person to Sign Complaint.

6.14[3] LOCAL PRACTICE: Additional Signature Requirements.

6.14[3][a] LOCAL PRACTICE: CD Cal Requirements.

6.14[3][b] LOCAL PRACTICE: ED Cal Requirements.

6.14[3][c] LOCAL PRACTICE: SD Cal Requirements.

6.14[4] Signing Complaint Makes Implicit Certifications to Court.

6.14[4][a] Elements of Certification Under Rule 11.

6.14[4][b] Signing in Violation of Implicit Certifications May Result in Sanctions.

§ 6.14[4][c] Complaint Must Not Be Filed for Improper Purpose.

6.14[4][d] None of Plaintiff's Claims May Be Frivolous.

6.14[5] Inquiry Must Precede Signing.

6.14[5][a] Reasonable Investigation Is Required.

6.14[5][b] Investigation Evaluated Under Objective Standard.

6.14[5][c] Attorney May Rely on Statements of Client.

6.14[5][d] Failure to Make Inquiry May Result in Sanctions.

6.15 Verification of Complaint May Be Required.

6.15[1] Verification Is Unnecessary Unless Specifically Required by Rule or Statute.

6.15[2] LOCAL PRACTICE: CD Cal--Request for Temporary Receiver.

6.15[3] Signing Verification Makes Same Certifications to Court As Signature on Complaint.

6.15[4] Appropriate Individual Must Sign Verification.

6.15[5] Direct Knowledge Is Not Required.

6.15[6] Verification of Complaint Does Not Impose Obligation on Defendant to Verify Answer.

6.16 Exhibits May Be Attached.

6.16[1] Plaintiff May Attach Written Instrument to Complaint.

6.16[2] Exhibit Will Be Treated As Part of Complaint.

6.16[3] Plaintiff May Controvert Statements Contained in Exhibit.

6.16[4] Plaintiff May Refer to Written Instrument Without Attaching It.

6.16[5] LOCAL PRACTICE: Attaching Exhibits.

6.16[5][a] LOCAL PRACTICE: CD Cal Requirements.

6.16[5][b] LOCAL PRACTICE: SD Cal Requirements.

6.17 Copies of Complaint Should Be Prepared for Service and Other Purposes.

6.17[1] Prepare Extra Copies of Complaint for Service.

6.17[2] Prepare Extra Copies of Complaint for Miscellaneous Purposes.

6.17[3] LOCAL PRACTICE: Copies of Complaint.

6.17[3][a] LOCAL PRACTICE: CD Cal Requirements.

6.17[3][b] LOCAL PRACTICE: ED Cal Requirements.

6.17[3][c] LOCAL PRACTICE: ND Cal Requirements.

6.17[3][d] LOCAL PRACTICE: SD Cal Requirements.

6.18 CHECKLIST: Preparing Summons and Other Documents Necessary at Commencement of Action.

6.19 Summons Generally Must Be Served With Complaint, Unless Service Waived.

6.19[1] Summons Generally Must Be Served With Complaint.

6.19[2] Service of Summons May Be Waived.

6.19[2][a] Cost of Service May Be Avoided.

6.19[2][b] Situations When Waiver Not Available.

6.19[2][c] Costs May Be Assessed Against Defendant Who Refuses to Waive Service.

6.19[2][d] Time for Response to Complaint Increases If Defendant Waives Service.

6.19[2][e] Plaintiff May Use Official Form to Request Waiver of Service.

6.19[3] Drafting Summons.

6.19[3][a] All Elements of Summons Must Be Included.

6.19[3][b] Plaintiff May Use Official Form.

6.19[3][c] LOCAL PRACTICE: CD Cal--Mandatory Use of Court-Supplied Form.

6.19[4] Prepare Summons for Each Defendant.

6.19[5] Obtain Issuance of Summons by Court Clerk.

6.19[6] Effect of Errors in Summons.

6.20 Civil Cover Sheet Is Required Under Local Rules.

6.20[1] Function of Civil Cover Sheet.

6.20[2] LOCAL PRACTICE: Civil Cover Sheets.

6.20[2][a] LOCAL PRACTICE: CD Cal Requirements.

6.20[2][b] LOCAL PRACTICE: ED Cal Requirements.

6.20[2][c] LOCAL PRACTICE: ND Cal Requirements.

6.20[2][d] LOCAL PRACTICE: SD Cal Requirements.

6.21 Other Documents May Be Required to Accompany Complaint.

6.21[1] Preparing Corporate Disclosure Statement.

6.21[1][a] Determine Whether Plaintiff Must File Disclosure Statement.

6.21[1][b] Filing of Disclosure Statement.

6.21[2] LOCAL PRACTICE: Identifying Interested Parties.

6.21[2][a] LOCAL PRACTICE: CD Cal Requirements.

6.21[2][b] LOCAL PRACTICE: ND Cal Requirements.

6.21[3] LOCAL PRACTICE: Designating Related Cases.

6.21[3][a] LOCAL PRACTICE: CD Cal Requirements--Notice of Related Cases.

6.21[3][b] LOCAL PRACTICE: CD Cal Requirements--Notice of Pendency of Other Actions or Proceedings.

6.21[3][c] LOCAL PRACTICE: ED Cal Requirements--Notice of Related Cases.

6.21[3][d] LOCAL PRACTICE: ND Cal Requirements--Administrative Motion to Consider Whether Cases Should Be Related.

6.21[3][e] LOCAL PRACTICE: ND Cal Requirements--Notice of Pendency of Other Action or Proceeding.

6.21[3][f] LOCAL PRACTICE: SD Cal Requirements--Notice of Related Case.

6.21[4] LOCAL PRACTICE: ED Cal Requirements--Preparing Designation of Counsel for Service.

6.21[5] Establishing or Securing Representation of Minor or Incompetent.

6.21[6] Applying for Leave to Proceed in Forma Pauperis.

6.21[6][a] Court Permission Required.

6.21[6][b] Affidavit Required.

6.21[6][c] LOCAL PRACTICE: CD Cal Requirements.

6.21[6][d] LOCAL PRACTICE: ND Cal Requirements.

6.21[6][e] LOCAL PRACTICE: SD Cal Requirements.

6.21[7] LOCAL PRACTICE: Application to File Complaint Under Seal.

6.21[7][a] LOCAL PRACTICE: CD Cal Requirements.

6.21[7][b] LOCAL PRACTICE: ND Cal Requirements.

6.21[8] Application for Temporary Restraining Order.

6.21[8][a] Application Must Be Supported by Affidavit or Verified Complaint.

6.21[8][b] LOCAL PRACTICE: CD Cal Requirements.

6.21[8][c] LOCAL PRACTICE: ED Cal Requirements.

6.21[8][d] LOCAL PRACTICE: ND Cal Requirements.

6.21[9] Notice of Claim of Unconstitutionality.

6.21[9][a] Court Required to Notify Appropriate Authority.

6.21[9][b] LOCAL PRACTICE: ED Cal Requirements.

6.21[9][c] LOCAL PRACTICE: ND Cal Requirements.

6.21[10] LOCAL PRACTICE: ED Cal Requirements--Notice of Requirement of Three-Judge Court.

6.21[11] Additional Documents in Class Action Subject to Private Securities Litigation Reform Act.

6.21[11][a] Certification by Potential Lead Plaintiff.

6.21[11][b] LOCAL PRACTICE: ND Cal Requirements--Certification by Potential Class Counsel.

6.21[11][c] LOCAL PRACTICE: ND Cal Requirements--Electronic Copy of Complaint.

6.21[12] LOCAL PRACTICE: CD Cal Requirements--Filing Required Notice in Patent, Plant Variety Protection, Trademark, or Copyright Case.

6.22 Sample Format of Complaint.

6.23 Allegations of Federal Question Jurisdiction.

6.24 Allegations of General Diversity Jurisdiction.

6.25 Statement of Supplemental Jurisdiction.

6.26 Statement of Claim Based on State Common Law: Contract Breach.

6.27 Statement of Claim Based on Federal Statute: Copyright Infringement.

6.28 Allegation of Securities Fraud.

6.29 Allegation of Performance or Occurrence of Conditions Precedent.

6.30 Allegation of Nonperformance of Conditions Precedent.

6.31 Demand for Judgment (Prayer).

6.32 Verification of Complaint.

6.33 Summons.

6.34 Local District Court Forms.

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint
I. STRATEGY

1-6 MB Practice Guide: Fed Pretrial Civ Proc in CA 6.01

6.01 Scope.

This chapter covers:

- Preparation of the complaint [*see 6.03 -6.17*; *Forms: 6.22 -6.32*].
- Preparation of the summons [*see 6.18*, *6.19*; *Form: 6.33*].
- Preparation of other documents necessary at the commencement of an action [*see 6.18*, *6.20*, *6.21*].

Core Rules:
Fed R Civ P 3, *4*, *8(a)*, *(d)*, *(e)*, *9*, *10*, *11(a)*, *(b)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint
I. STRATEGY

1-6 MB Practice Guide: Fed Pretrial Civ Proc in CA 6.02

6.02 Objective and Strategy.

The complaint is the pleading by which a party who initiates a civil action seeks affirmative relief. It puts the defendant on notice of the plaintiff's claim so as to enable the defendant to answer and prepare for trial [*Fed R Civ P 8(a)*; *McKeever v. Block (9th Cir 1991) 932 F2d 795, 798*]. Filing the complaint with the court commences the action [*Fed R Civ P 3*].

Decision Point--Whether or Not to Rush to File:

There are important considerations in deciding whether to use a complaint strategically before filing it. One the one hand, showing the defendant the complaint before filing it in appropriate cases can have a positive effect. Informally mailing a factually rich complaint, based on a strong claim, to the prospective defendant may precipitate settlement. Also, a defendant who does not want adverse publicity may be more likely to settle before the complaint is filed, so that plaintiff could benefit from delaying filing until it is clear that there will be no possibility of settlement before the period of limitation runs. In a more general sense, if there is a good chance that providing a copy of the complaint in advance can have the effect of resolving the case, the risk may be worthwhile. If there is little risk that the potential defendant will initiate an action of its own, and if the complaint presents a strong position for the plaintiff, it may be a very useful strategy.

On the other hand, there can be great risk involved in providing a copy of the complaint to the potential defendant before filing. If the claims asserted by the plaintiff are not particularly strong, the weaknesses in the plaintiff's position may become more apparent and have a negative effect on reaching a pre-litigation settlement. Further, if there is any possibility that the defendant will attempt to preempt the filing of the complaint by initiating an action beforehand in a different jurisdiction, it is unwise to provide the copy before filing. In addition, when the parties have reached an impasse in negotiations, providing a copy of the complaint before it is filed gives the defendant substantially more time to prepare a defense and possible crossclaims. The plaintiff can achieve the same objective by delaying service until settlement possibilities have been exhausted.

If you do not need to file the complaint to comply with the statute of limitations or to obtain a provisional remedy, such as preliminary injunctive relief or attachment, it may be useful to delay for an appropriate

time to develop the case fully without opening yourself to discovery, and allow time for settlement negotiations. In all cases, it is important to take the time necessary to develop appropriate legal theories and to draft a complaint that will withstand challenge.

The summons is essentially an order, issued by the clerk of the court, summoning the defendant to appear in the case and respond to the complaint. The summons, which must be prepared by the plaintiff, sets forth the time for responding and includes a warning that a failure to respond will result in the entry of a default judgment against the defendant [*Fed R Civ P 4(a), (b)*]. Service of the summons (accompanied by a copy of the complaint) is the usual manner in which the court obtains personal jurisdiction over the defendant [*see Fed R Civ P 4(k); Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co. (1987) 484 US 97, 104, 108 S Ct 404, 98 L Ed2d 415*]. As a cost-saving alternative, the court's jurisdiction over the defendant will be established if the defendant waives service of the summons [*Fed R Civ P 4(d), (k)*].

Detailed Discussion/Forms:

1 Moore's Federal Practice, Ch. 4, Summons (Matthew Bender 3d ed.).

2 Moore's Federal Practice, Chs. 8, 9, 10, 11 (Matthew Bender 3d ed.).

1 Bender's Federal Practice Forms, Rule 4, Summons (Matthew Bender).

1-3 Bender's Federal Practice Forms, Rule 8, General Rule of Pleading (Matthew Bender).

4 Bender's Federal Practice Forms, Rules 9-11 (Matthew Bender).

Cross References:

Discussion of Rule 4 requirements for service of summons, see Ch. 7, Service of Summons. Discussion of amending and supplementing pleadings, see Ch. 9, Amending and Supplementing Complaints.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint
II. PREPARING COMPLAINT

1-6 MB Practice Guide: Fed Pretrial Civ Proc in CA 6.03

6.03 CHECKLIST: Preparing Complaint.

☐ Consider using official forms for complaint or as guide to drafting complaint.

Authority:
Fed R Civ P 84

Discussion:
See *§ 6.04[2]*

Forms:
Fed R Civ P Appendix of Forms, Forms 10-15, 17-21, 61

☐ Review format requirements for pleadings under local rules of court.

Authority:
Fed R Civ P 83(a); *CD Cal Civ LR 11-3*; *ED Cal Gen LR 130*, *133*; *ND Cal Civ LR 3-4(c)*; *SD Cal Civ LR 5.1*

Discussion:
See *§ 6.04[3]*

☐ Draft heading of complaint:

○ Start heading at top left corner of first page of complaint.

- ○ Identify attorney and plaintiff.
- ○ Include additional information and follow format prescribed by local rules.

Authority:
Fed R Civ P 83(a); *CD Cal Civ LR 11-3.8*; *ED Cal Gen LR 131(a)*, *182(c)*; *ND Cal Civ LR 3-4(a)*, *11-3(e)*; *SD Cal Civ LR 5.1(j.1)*

Discussion:
See *§ 6.05*

Form:
See *§ 6.22*

☐ Draft caption, including:

- ○ Name of court.
- ○ Title of action, listing all parties, including fictitiously named parties if appropriate.
- ○ Space for file number of action.
- ○ Designation of complaint as such.
- ○ Endorsement of jury demand, if appropriate.
- ○ Additional information required by local rules.

Authority:
Fed R Civ P 10(a), *38(b)*

Discussion:
See *§ 6.06*

Form:
See *§ 6.22*

☐ Draft allegation of subject matter jurisdiction, such as:

- ○ Allegation of federal question jurisdiction.
- ○ Allegation of diversity jurisdiction.
- ○ Allegation of admiralty or maritime jurisdiction.

- ○ Allegation of supplemental jurisdiction.
- ○ Allegations showing plaintiff's standing and existence of justiciable case or controversy.

Authority:
Fed R Civ P 8(a)

Discussion:
See *§ 6.07*

Forms:
See *§§ 6.23*, *6.24*, *6.25*

☐ Draft party allegations as appropriate, such as:

- ○ Allegations of parties' capacity, if necessary to establish subject matter jurisdiction.
- ○ Allegations of plaintiff's status in shareholder derivative action.
- ○ Class action allegations.

Authority:
Fed R Civ P 9(a), *17(b)*

Discussion:
See *§ 6.08*

☐ Draft statement of claim or claims.

- ○ In most cases, prepare short, plain statement of each claim.
- ○ Present each claim in numbered paragraphs, limiting each paragraph to single set of circumstances.
- ○ Present each claim as separate count to facilitate clarity.
- ○ Comply with special pleading requirements imposed by statute or by rules (including local rules), such as in:
  - ☐ Allegations of fraud or mistake.
  - ☐ Allegations of special damages.
  - ☐ Securities fraud class actions.

- ☐ Shareholder derivative actions.

Authority:
Fed R Civ P 8(a), (d), 9, 10(b), (c), 18, 23.1

Discussion:
See *§§ 6.09 -6.11*

Forms:
See *§§ 6.26 -6.30*

☐ Draft prayer, demanding judgment for relief plaintiff seeks, including following as applicable:

- ○ Damages.
- ○ Punitive damages.
- ○ Interest.
- ○ Equitable relief, such as:
  - ☐ Temporary restraining order.
  - ☐ Preliminary injunction.
  - ☐ Permanent injunction.
  - ☐ Specific performance.
  - ☐ Declaratory relief.
  - ☐ Provisional remedies, such as appointment of receiver.
- ○ Costs of suit.
- ○ Attorney's fees, if applicable.
- ○ Other relief deemed proper by court.

Authority:
Fed R Civ P 8(a)

Discussion:

See *§ 6.12*

Forms:
See *§§ 6.22, 6.31*

☐ Draft jury demand, if jury is desired and if demand is required in body of complaint by local rules.

Authority:
Fed R Civ P 38(b), (c)

Discussion:
See *§ 6.13*

☐ Have complaint signed.

- ○ Before signing, have signer make reasonable investigation of facts and law to ascertain that:
  - ☐ Complaint is being presented for proper purpose.
  - ☐ Complaint is warranted by law and supported by facts.
- ○ Have plaintiff's attorney sign, unless plaintiff is unrepresented, in which case plaintiff must sign.
- ○ State signer's address and telephone number below signature.
- ○ Include additional information and follow format prescribed by local rules.

Authority:
Fed R Civ P 11(a), (b)

Discussion:
See *§ 6.14*

Form:
See *§ 6.22*

☐ If required by rule or statute, prepare verification of complaint.

- ○ If required, prepare verification stating that plaintiff knows or believes facts stated in complaint to be true.
- ○ Prepare signature block for verification that complies with requirements for signatures generally.
- ○ Have plaintiff make reasonable investigation of facts and law before signing.

Authority:
Fed R Civ P 11(a), (b)

Discussion:
See *§ 6.15*

Form:
See *§ 6.32*

☐ Attach exhibits, if any, to complaint.

Authority:
Fed R Civ P 10(c)

Discussion:
See *§ 6.16*

☐ Prepare additional copies of complaint as needed for service, filing, and office use.

Authority:
Fed R Civ P 4(c)(1)

Discussion:
See *§ 6.17*

☐ Review complaint for conformity to general pleading requirements, including:

- ○ Essential components of complaint:
  - ☐ Heading.
  - ☐ Caption.
  - ☐ Jurisdictional allegation.
  - ☐ Statement of claim.
  - ☐ Demand for judgment.
  - ☐ Signature.
- ○ Requirement that complaint provide defendant with fair notice of plaintiff's claim.
- ○ Need to omit redundant, immaterial, impertinent, or scandalous material from complaint.

- Possibility that special pleading requirements may apply.

Authority:
Fed R Civ P 3, *7(a)*, *8(a)*, *(d)*, *9*, *10(a)*, *11(a)*, *12(f)*

Discussion:
See *§ 6.04[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint
II. PREPARING COMPLAINT

1-6 MB Practice Guide: Fed Pretrial Civ Proc in CA 6.04

6.04 Standards for Pleading Must Be Followed.

6.04[1] Notice Pleading Requirements.

6.04[1][a] Essential Elements Must Appear in Complaint. To commence a civil action in federal district court on behalf of a plaintiff, you must file a complaint [*Fed R Civ P 3*] containing all of the following:

- A heading that identifies you as the attorney representing the plaintiff [*CD Cal Civ LR 11-3.8(a)*; *ED Cal Gen LR 131(a)*; *ND Cal Civ LR 3-4(a)(1)*; *SD Cal Civ LR 5.1(j.1)*; *see 6.05*].

- A caption that sets forth the name of the court, the title of the action, the file number of the action, and a designation of the pleading as a complaint [*Fed R Civ P 7(a)*, *10(a)*; *see 6.06*].

- A short and plain statement of the grounds on which the court's jurisdiction depends [*Fed R Civ P 8(a)*; *see 6.07*].

- A short and plain statement of each claim, showing that the plaintiff is entitled to relief [*Fed R Civ P 8(a)*; *see 6.09 -6.11*].

- A demand for judgment for the relief the plaintiff seeks [*Fed R Civ P 8(a)*; *see 6.12*].

- Your signature [*Fed R Civ P 11(a)*; *see 6.14*].

Cross Reference:

Sample form of complaint, see *§ 6.22*.

6.04[1][b] Fair Notice of Claim Must Be Provided. Under the "notice pleading" requirements of the Federal Rules of Civil Procedure, the complaint need not set out in detail the facts on which a claim for relief is based, but it must give the court and the defendant fair notice of the claims asserted [*Bell Atlantic Corp. v. Twombly (2007) 550*

US 544, 127 S Ct 1955, 167 L Ed2d 929, 940-941 (complaint would not survive motion to dismiss without some factual context sufficient to state claim to relief that was "plausible on its face")].

No technical forms of pleading are required [*Fed R Civ P 8(d)(1)*].

6.04[1][c] Extraneous Material Must Be Omitted. The complaint should not include any matters that are redundant, immaterial, impertinent, or scandalous [*Fed R Civ P 12(f)*].

6.04[1][d] Special Pleading Requirements Must Be Satisfied. Depending on the particular kind of claim asserted, the general pleading rules may be supplemented by specific requirements imposed by federal statutes, the Federal Rules of Civil Procedure, applicable state law, and local court rules and standing orders.

Example--Application of Federal Statutory Requirements for Alleging Securities Fraud:
The 1995 Private Securities Litigation Reform Act of 1995 (PSLRA) requires that a complaint alleging securities fraud specify each statement alleged to have been misleading and the reasons the statement is misleading. If an allegation regarding the statement or omission is made on information and belief, the complaint must also state with particularity all the facts on which that belief is formed [*15 USC § 78u-4(b)(1)*].

Cross Reference:

Discussion of special pleading requirements under the PSLRA, see *§ 6.11[4]*].

Example--Application of FRCP Pleading Requirement for Shareholder Derivative Actions:
In a shareholder derivative action, the complaint must state, among other things, that the action is not a collusive one to confer jurisdiction on the federal court [*Fed R Civ P 23.1*].

Cross Reference:

Discussion of special pleading requirements in shareholder derivative actions, see *§ 6.11[12]*.

Example--Application of State Law Re Fictitiously Named Defendants in Diversity Case:
The Ninth Circuit has found that the California statute allowing a complaint to sue fictitiously named defendants [*see CCP § 474*] is a part of the substantive state law to be applied in federal court, under the *Erie* doctrine, when a federal court is sitting in diversity [*Lindley v. General Elec. Co. (9th Cir 1986) 780 F2d 797, 800-801*].

Cross References:

Discussion of the use of fictitious names for defendants, see *6.06[4]*. Discussion of special pleading requirements, see *§ 6.11*.

6.04[2] LOCAL PRACTICE: Court-Supplied Complaint Forms. District courts may provide optional or mandatory forms for use in certain actions [*see, e.g., SD Cal Civ LR 8.2(a)* (civil rights complaint for use by prisoner)]. Such forms may be downloaded from the court's websites:

- United States District Court for the Central District of California: www.cacd.uscourts.gov.
- United States District Court for the Eastern District of California: www.caed.uscourts.gov.
- United States District Court for the Northern District of California: www.cand.uscourts.gov.
- United States District Court for the Southern District of California: www.casd.uscourts.gov.

6.04[3] LOCAL PRACTICE: Format Requirements for Pleadings.

6.04[3][a] LOCAL PRACTICE: CD Cal Requirements.

Printing: All documents presented for filing or lodging, including all exhibits, must be typewritten or printed, or prepared by a photocopying or other process that produces clear and permanent copies equally legible to printing, in black or dark blue ink [*CD Cal Civ LR 11-3.1*].

Typeface: A proportionally spaced or monospaced typeface may be used. A proportionally spaced typeface must be 14-point or larger unless the court orders otherwise. A monospaced typeface may not contain more than 10.5 characters per inch [*CD Cal Civ LR 11-3.1.1*].

Paper: Documents presented to the clerk must be prepared on opaque, unglazed, white paper (which may be recycled paper) not less that 13-pound weight. The paper must be 81/2 x 11 inches, numbered on the left margin with not more than 28 lines per page. Only one side of the paper may be used. The lines on each page must be double-spaced and numbered consecutively, with line 1 beginning at least one inch below the top edge of the paper [*CD Cal Civ LR 11-3.2*].

Page Numbering: The pages of the all documents presented to the clerk must be numbered consecutively, with the page numbers appearing at the bottom of each page [*CD Cal Civ LR 11-3.3*].

Original and Copies: The originals of all documents presented to the clerk must be labeled as the original, and copies must be clearly identified as copies. The original must consist entirely of the original pages, except as otherwise allowed by the local rules (such as exhibits that consist of copies) [*CD Cal Civ LR 11-3.4*].

Pre-Punching, Riders, and Backing of Documents: All documents presented for filing or lodging in paper format, and mandatory chambers copies of electronic case filings, must be pre-punched with two normal-sized holes (approximately 1/4 inches in diameter), centered 23/4 inches apart, 1/2 to 5/8 inches from the top edge of the document. All pages must be firmly bound at the top and backed. The backing may not extend more than one inch below the pages bound and must have the short title of the document typed in the lower right-hand corner [*CD Cal Civ LR 11-3.5*].

Spacing: The typing or printing generally must be double-spaced, including citations and quotations [*CD Cal Civ LR 11-3.6*]. However, footnotes and descriptions of real property may be single-spaced [*CD Cal Civ LR 11-3.6.1*, *11-3.6.2*].

Quotations: A quotation from a cited case or other authority more than one sentence in length must be clearly indented not less than 5 spaces and not more than 20 spaces [*CD Cal Civ LR 11-3.7*].

Electronic filing: Documents filed electronically must be submitted in pdf format [CD Gen Order 08-02(IV)(C)]. The parties must refrain from including and/or redact when inclusion is necessary, the following personal data identifiers: social security numbers, names of minor children, dates of birth, financial account numbers, and home addresses [*see* CD Gen Order 08-02(IV)(E)-(H)].

Cross Reference: Discussion of electronic filing pilot project in the Central District, see *Ch. 5, Formatting, Serving, and Filing Papers, 5.31[1].*

6.04[3][b] LOCAL PRACTICE: ED Cal Requirements.

Electronic filing: Complaint filings by attorneys in all civil actions must be performed electronically [*ED Cal Gen LR 121(d)*; *see 5.29 -5.31*]. Documents electronically filed must be created and formatted to comply in appearance and presentation, both in an electronic format and when printed, with the requirements for conventionally filed paper

documents [*ED Cal Gen LR 130(a)*].

Cross Reference:

Eastern District requirements for electronic filings, see *§ 5.31[2]*.

Paper: Documents presented for conventional filing or lodging must be on white, unglazed, opaque paper of good quality with numbered lines in the left margin, 81/2 x 11 inches in size [*ED Cal Gen LR 130(a)*, *(b)*].

Format of Documents: Documents presented for conventional filing must be flat, unfolded (except as necessary for the presentation of exhibits), firmly bound at the top left corner, and pre-punched with two holes (approximately 1/4 inch in diameter) centered 23/4 inches apart, 1/2 to 5/8 inches from the top edge of the document [*ED Cal Gen LR 130(a)*, *(b)*].

Printing: Matters contained in a document must be presented by typewriting, printing, photographic or offset reproduction, or other clearly legible process, without erasures or interlining that materially defaces the document, and must appear on one side of each sheet only [*ED Cal Gen LR 130(a)*, *(b)*].

Spacing: Documents must be double-spaced except for the identification of counsel, title of the action, category headings, footnotes, quotations, exhibits and descriptions of real property [*ED Cal Gen LR 130(c)*].

Quotations: Quotations of more than 50 words must be indented. Each page must be numbered consecutively at the bottom and provide a brief description of the document on the same line [*ED Cal Gen LR 130(d)*].

References to Parties by Name: If there are more than two parties, any reference to a party in the body of the complaint must include the name (which may be abbreviated) of the particular party [*ED Cal Gen LR 133(h)*].

6.04[3][c] LOCAL PRACTICE: ND Cal Requirements.

Paper: The complaint (and all other documents presented for filing) must be on top-centered, two-hole punched, 81/2 x 11-inch white opaque paper of original or recycled bond quality, with numbered lines. The complaint must be flat, unfolded (except as necessary for the presentation of exhibits), without back or cover, and firmly bound at the top [*ND Cal Civ LR 3-4(c)(1)*].

Written Text: Text must appear on one side of the pages only and must be double-spaced with no more than 28 lines per page, except for the identification of counsel, title of the case, footnotes, and quotations. Typewritten text may be no less than standard pica or 12-point type in the Courier font or equivalent, spaced 10 characters per horizontal inch. Printed text, produced on a word processor or other computer, may be proportionally spaced, provided that the type may not be smaller than 12-point standard font (e.g., Times New Roman). The text of footnotes and quotations must also conform to these font requirements [*ND Cal Civ LR 3-4(c)(2)*].

Identification of Paper: Except for exhibits, the lower margin of each page of the complaint must bear a footer stating "Complaint" [*ND Cal Civ LR 3-4(c)(3)*].

Redaction of Personal Data Identifiers: Any document filed in the public file, whether filed electronically or in paper, must comply with the requirements for redaction of personal data identifiers [*ND Cal Civ LR 3-17*].

Cross Reference:

Northern District requirements for redaction of personal data identifiers, see *§ 5.13[3]*.

6.04[3][d] LOCAL PRACTICE: SD Cal Requirements.

Legibility and Interlineations: The complaint (and each document filed), including exhibits as practical, must be in English, plainly written, or typed in double space on one side of the document, line numbered in the left margin, and letter size. Documents filed in paper format must be flat and unfolded, without backing sheet, double spaced on one side of the paper or printed or prepared by means of a duplicating process on opaque, unglazed white paper. Quotations in excess of three lines must be indented and single spaced. Printed text, produced on a word processor or computer, may be proportionally spaced, provided the type is no smaller than 12-point standard font (e.g., Times New Roman). The text of footnotes and quotations must also conform to these font requirements [*SD Cal Civ LR 5.1(a)*]. The complaint must not contain any erasures or interlineations unless they are noted by the clerk or judge by marginal initials at the time of filing [*SD Cal Civ LR 5.1(c)*].

Prepunching and Attachments: The complaint and other documents presented for filing must be pre-punched with two normal-size holes (approximately 1/4-inch diameter), centered 23/4 inches apart, 1/2 to 5/8 inches from the top edge of the document. No page should have any attachment affixed to it. All pages must be firmly bound at the top [*SD Cal Civ LR 5.1(d)*].

Paragraphing: Averments in the complaint must be made in numbered paragraphs, each of which must be limited, as far as is practicable, to a statement of a single set of circumstances [*SD Cal Civ LR 5.1(k)*].

Compliance: Unless a waiver is first obtained from the court, the clerk will not file a complaint or other document that does not comply with the foregoing requirements. A noncomplying document will be endorsed "lodged" until approved by the court [*SD Cal Civ LR 5.1(f)*].

Warning:

This provision appears to be overridden by *Fed R Civ P 5(e)*, which does not permit a clerk to refuse filing solely because of improper format [*see Marshall v. Gates (9th Cir 1995) 44 F3d 722, 725* ; *see also 6.04[4][a]*].

6.04[4] Avoid Consequences of Failure to Comply With Pleading Requirements.

6.04[4][a] Clerk Will Accept for Filing Complaint That Violates Format Requirements. The court clerk may not refuse to accept for filing any complaint or other paper presented for filing solely because it is not presented in proper form as required by the Federal Rules of Civil Procedure or by local rules or practices [*Fed R Civ P 5(d)(4)*; *see Fed R Civ P 83(a)(2), (b)*].

Example:

An improperly formatted complaint offered for filing on the last day before the statute of limitations expires will be timely, because the clerk must accept it for filing despite the improper format [*Fed R Civ P 5(d)(4)*].

6.04[4][b] Court Has Power to Dismiss or Make Other Orders. If a complaint fails to comply with the pleading requirements, the court has the power to [*Fed R Civ P 12(e), (f), 41(b)*]:

- Order a more definite statement;
- Strike redundant, immaterial, impertinent, or scandalous matter; or
- Dismiss the complaint.

A dismissal of the complaint for failure to comply with pleading requirements will usually be without prejudice, so that

the plaintiff will have an opportunity to amend the complaint [*see, e.g., McHenry v. Renne (9th Cir 1996) 84 F3d 1172, 1178*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint
II. PREPARING COMPLAINT

1-6 MB Practice Guide: Fed Pretrial Civ Proc in CA 6.05

6.05 Heading of Complaint Must Identify Attorney and Plaintiff and Comply With Local Rule Requirements.

6.05[1] Attorney and Plaintiff Must Be Identified. The first page of the complaint should begin with a heading that identifies the attorney who will present the complaint for filing. The heading should also identify the plaintiff or plaintiffs represented by the attorney. Local rules specify the format and contents of the heading.

6.05[2] LOCAL PRACTICE: Heading of Complaint.

6.05[2][a] LOCAL PRACTICE: CD Cal Requirements. On the first page of the complaint, beginning on line 1 at the left margin, state the name, California bar number, (or, when the attorney is a registered legal service attorney appearing pursuant to *CD Cal Civ LR 83-2.3.5*, the bar number and jurisdiction where the attorney is admitted to practice), office address (or residence address if no office is maintained), telephone number, facsimile number, and e-mail address of the attorney or pro se plaintiff. The e-mail address must be placed immediately beneath the name of the attorney. Immediately beneath, identify the party on whose behalf the complaint is filed. This information must be single-spaced and must be presented for each attorney or pro se party who joins in presenting the complaint [*CD Cal Civ LR 11-3.8(a)*].

The space between lines 1 and 7 to the right of center of the page must be left blank for use by the court clerk [*CD Cal Civ LR 11-3.8(b)*].

6.05[2][b] LOCAL PRACTICE: ED Cal Requirements. The name, address, telephone number, and the California State Bar membership number of all counsel (or of a pro se plaintiff) and the specific identification of the party represented by name and interest in the litigation (e.g., "plaintiff Smith") must appear in the upper left-hand corner of the first page the complaint. However, if multiple parties are represented, this heading may refer to the signature page for a complete list of parties represented [*ED Cal Gen LR 131(a)*].

If multiple attorneys from a single law firm, organization, public entity, agency or department are listed as counsel, one of the listed attorneys must be designated as counsel for service. That designation may be made in the heading of the complaint, or by filing and serving a document entitled "Designation of Counsel for Service," stating the name, address, and telephone number of the designated counsel for service, and signed by that counsel [*ED Cal Gen LR 182(c)(1)*]. If

no designation of counsel for service has been made, the court clerk may select the attorney for service from the heading on the first page of the complaint or from the signature block [*ED Cal Gen LR 182(c)(2)*].

6.05[2][c] LOCAL PRACTICE: ND Cal Requirements. The upper left-hand corner of the first page of the complaint must state the name, address, telephone number, facsimile ("fax") telephone number, e-mail address, and state bar number of the attorney presenting the complaint for filing. This information must be accompanied by the name of the plaintiff as well as that party's status as plaintiff. In a multiparty action, reference may be made to the signature page for the complete list of parties represented. If the plaintiff is proceeding pro se, the name, address, telephone number, fax telephone number, and e-mail address of the plaintiff must appear in the upper left-hand corner of the first page of the complaint [*ND Cal Civ LR 3-4(a)(1)*].

If the plaintiff's attorney is proceeding pro hac vice, the identification of the attorney must specify that the attorney's appearance is "pro hac vice" [*ND Cal Civ LR 11-3(e)*], and must be followed by the name, address, telephone and state bar number of local co-counsel [*ND Cal Civ LR 3-4(a)(2)*].

6.05[2][d] LOCAL PRACTICE: SD Cal Requirements. On the first page of the complaint, the name, address and telephone number of the attorney appearing for the plaintiff (or of a pro se plaintiff) must be printed or typewritten in the space to the left of the page's center and beginning at line 1. An attorney appearing for the plaintiff must also include his or her California State Bar Number. This information may be single-spaced. The space to the right of the page's center must be reserved for the clerk's filing stamp [*SD Cal Civ LR 5.1(j.1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint
II. PREPARING COMPLAINT

1-6 MB Practice Guide: Fed Pretrial Civ Proc in CA 6.06

6.06 Caption Must Meet Specific Format Requirements.

6.06[1] Name of Court Must Be Identified.

6.06[1][a] District and Division Must Be Specified. The complaint must contain a caption that names the court in which the complaint will be filed [*Fed R Civ P 10(a)*]. If the district court in which the complaint will be filed has divisions, the caption should state the division [Fed R Civ P Appendix of Forms, Form 1].

The court's name should be centered on the first page of the complaint [*see, e.g.,* Fed R Civ P Appendix of Forms, Form 1].

6.06[1][b] LOCAL PRACTICE: CD Cal Requirements. The court's name must be centered on or below line 8 of the first page of the complaint [*CD Cal Civ LR 11-3.8(c)*].

6.06[1][c] LOCAL PRACTICE: ED Cal Requirements. The court's title must appear on the eighth line of the first page of the complaint, following the counsel identification, unless additional space is required for identification [*ED Cal Gen LR 133(g)*].

6.06[1][d] LOCAL PRACTICE: ND Cal Requirements. The court's title, including the appropriate division or location, must appear on the eighth line of the first page of each paper presented for filing with the court, unless additional space is required for counsel identification [*ND Cal Civ LR 3-4(a)(3)(A)*].

Consider:
Although *ND Cal Civ LR 3-4(a)(3)(A)* provides that "each paper presented for filing" must set forth this information, in fact when a complaint is presented for filing, a division and location has not yet been assigned. Accordingly, this information is not normally included on the initial complaint. However, after assignment to a specific judge, the division in which the judge is located should be included as the division following the name of the court, in subsequent papers presented for filing, and filed with the clerk in that location.

6.06[1][e] LOCAL PRACTICE: SD Cal Requirements. The court's title must begin at or below line 8 of the

first page of the complaint [*SD Cal Civ LR 5.1(j.2)*].

6.06[2] Title of Action Must Be Provided.

6.06[2][a] Parties Must Be Named in Title of Action. The caption of the complaint must state the action's title, which must include the names of all the parties [*Fed R Civ P 10(a)*; *Ferdik v. Bonzelet (9th Cir 1992) 963 F2d 1258, 1261-1262*].

Distinguish:

In subsequent pleadings it is sufficient to state the first party's name on each side with an appropriate indication of the existence of other parties, such as "et al." ("and others") [*Fed R Civ P 10(a)*; *see CD Cal Civ LR 11-3.8(d)*].

The action's title should appear on the left side of the first page of the complaint, below the court's name [*see ED Cal Gen LR 133(g)*; *ND Cal Civ LR 3-4(a)(3)(B)*].

6.06[2][b] Requirement That All Parties Be Named Is Construed Liberally. Courts liberally interpret the requirement that all parties be named in the caption of the complaint [*Yeseta v. Baima (9th Cir 1988) 837 F2d 380, 382-383*].

Example:

Failure to name a defendant in the caption does not prevent the action from proceeding against that defendant, if the body of the complaint makes it clear that the plaintiff intended to sue that defendant [*Yeseta v. Baima (9th Cir 1988) 837 F2d 380, 382-383*].

Warning:

The court may dismiss an action or a claim if a party is not sufficiently identified to permit the necessary service of process [*see Ferdik v. Bonzelet (9th Cir 1992) 963 F2d 1258, 1261-1262*].

6.06[2][c] LOCAL PRACTICE: CD Cal Requirements. The parties' names must be single-spaced and placed below the court's title, to the left of center. If the parties are too numerous to fit on the first page of the complaint, the names may be continued on successive pages in the same space [*CD Cal Civ LR 11-3.8(d)*].

6.06[2][d] LOCAL PRACTICE: ED Cal Requirements. If there are more than two parties, any reference to a party in the body of the complaint must include the name (which may be abbreviated) of the particular party [*ED Cal Gen LR 133(h)*].

6.06[2][e] LOCAL PRACTICE: SD Cal Requirements. Below and to the left of the court's title, the title of the action must be inserted. If the parties are too numerous for all to be named on the first page, the parties' names may be carried onto successive pages [*SD Cal Civ LR 5.1(j.3)*].

The complaint must be entitled as an adversary proceeding naming at least one defendant, unless it is a Petition for Limitation of Liability under Fed R Civ P, Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F. The clerk will refuse to file a complaint that does not comply with this requirement [*SD Cal Civ LR 5.1(g)*]. *SD Cal Civ LR 5.1(g)* appears to be in tension with *Fed R Civ P 5(d)(4)* [*see 6.04[4][a]*] to the extent that the body of the complaint identifies an adversary proceeding, and therefore is probably unenforceable. However, the failure to identify a particular person as a defendant in the caption of the complaint may not qualify as a "format" error [*see Marshall v. Gates (9th Cir 1995) 44 F3d 722, 725* (courts are obliged to construe local rules so that they do not conflict with the federal rules)].

6.06[3] Use of Fictitious Name for Plaintiff Is Restricted.

6.06[3][a] Plaintiff Must Obtain Leave of Court to Use Fictitious Name. A plaintiff seeking to proceed under a fictitious name must request permission from the court to do so. Absent permission, the court lacks jurisdiction over the fictitiously named plaintiff [*W.N.J. v. Yocom (10th Cir 2001) 257 F3d 1171, 1172* ; *National Commodity & Barter Ass'n v. Gibbs (10th Cir 1989) 886 F2d 1240, 1245*].

6.06[3][b] Plaintiff's Real Name May Be Disclosed to Defendant but Kept Under Seal. If the court grants the plaintiff permission to proceed under a fictitious name, it is often with the requirement that the real name of plaintiffs be disclosed to the defendant and the court but kept under seal thereafter [*W.N.J. v. Yocom (10th Cir 2001) 257 F3d 1171, 1172* ; *Doe v. Lepley (D Nev 1999) 185 FRD 605, 606-607* ; *Doe v. Rostker (ND Cal 1981) 89 FRD 158, 161*].

6.06[3][c] Use of Fictitious Name Is Generally Against Public Policy. The use of fictitious names by plaintiffs is against the public's legitimate interest in knowing the facts of a lawsuit, including the parties' names [*Fed R Civ P 17(a)*; *Doe v. Advanced Textile Corp. (9th Cir 2000) 214 F3d 1058, 1067-1068*].

6.06[3][d] Privacy Interest May Justify Anonymous Proceeding. In special circumstances, the court may make an exception to the policy favoring disclosure, allowing a plaintiff to proceed anonymously to protect a person from harassment, injury, ridicule or personal embarrassment [*Doe v. Advanced Textile Corp. (9th Cir 2000) 214 F3d 1058, 1067-1068* ; *United States v. Doe (9th Cir 1981) 655 F2d 920, 922 n1*].

6.06[3][e] Factors to Consider When Plaintiff Seeks to Plead Anonymously. In deciding whether to allow a plaintiff to plead anonymously, the court generally employs a balancing test to decide if the plaintiff has a substantial privacy interest outweighing the presumption of openness in judicial proceedings [*Doe v. Goldman (D Nev 1996) 169 FRD 138, 139-140*].

If a pseudonym is used to shield the anonymous plaintiff from retaliation, the district court should determine the need for anonymity by evaluating the following factors [*Doe v. Advanced Textile Corp. (9th Cir 2000) 214 F3d 1058, 1068*]:

- The severity of the threatened harm.
- The reasonableness of the anonymous party's fears.
- The plaintiff's vulnerability to such retaliation.
- Prejudice to the defendant, and whether proceedings may be structured so as to mitigate that prejudice.
- Whether the public's interest in the case would be best served by requiring that the litigants reveal their identities.

6.06[3][f] Examples of Sufficient Privacy Concerns. Privacy concerns have been held sufficient to allow plaintiffs to proceed anonymously in cases involving the following matters:

- Birth control [*see, e.g., Poe v. Ullman (1961) 367 US 497, 498 n1, 81 S Ct 1752, 6 L Ed2d 989*].
- Abortion [*see, e.g., Roe v. Wade (1973) 410 US 113, 120 n4, 93 S Ct 705, 35 L Ed2d 147*].
- Homosexuality [*see, e.g., Webster v. Doe (1988) 486 US 592, 595, 108 S Ct 2047, 100 L Ed2d 632*].
- Mental illness [*see, e.g., Doe v. Colautti (3d Cir 1979) 592 F2d 704, 705*].

- Reasonable fear of retaliatory physical or mental harm, such as employer reprisals [*Doe v. Advanced Textile Corp. (9th Cir 2000) 214 F3d 1058, 1068*].

- Risk of possible criminal liability stemming from disclosure of a party's identity [*see Doe v. Advanced Textile Corp. (9th Cir 2000) 214 F3d 1058, 1068*].

6.06[3][g] Examples of Insufficient Privacy Concerns. If only "personal embarrassment" or some "social stigma" will result from disclosure of the plaintiff's identity, or if the plaintiff's fear of reprisals is only speculative, the court will not allow the plaintiff to proceed under a fictitious name [*see Doe v. Frank (11th Cir 1992) 951 F2d 320, 324*]. For example, permission to proceed anonymously has been denied in the following cases:

- A physician facing state professional disciplinary proceedings arising from complaints of sexual and other improprieties may not anonymously pursue a federal court case to enjoin those proceedings, because the public's right to know outweighs the plaintiff's privacy concerns [*Coe v. United States Dist. Court (10th Cir 1982) 676 F2d 411, 418*].

- The fear of retaliation or other reprisal against plaintiffs challenging Selective Service guidelines was insufficient to allow them to proceed anonymously, as the fear was "speculative" [*Doe v. Rostker (ND Cal 1981) 89 FRD 158, 162*].

6.06[4] Using Fictitious Name for Defendant.

6.06[4][a] "Doe" Pleading Is Used to Sue Unknown Defendant. If the plaintiff cannot ascertain a defendant's real identity, the complaint may name the defendant by using a fictitious name or other descriptive term, such as "John Doe." In general, the use of fictitious names for defendants is disfavored, but may be appropriate in unusual cases where the identity of the alleged defendant is not known before filing the complaint [*Gillespie v. Civiletti (9th Cir 1980) 629 F2d 637, 642-643*].

The use of a fictitious name for a defendant in the title of a case can be supported by a paragraph in the body of the complaint stating both of the following:

- The plaintiff is using a fictitious name for the defendant because the plaintiff has been unable to ascertain the defendant's true identity.

- The plaintiff will amend the complaint to add the defendant's true name once the defendant's identity is discovered [*see Fed R Civ P 15(a)*].

6.06[4][b] Effect on Diversity Jurisdiction. If a case is removed from state court to federal district court based on general diversity of citizenship jurisdiction, the citizenship of defendants sued under fictitious names is to be disregarded, and becomes relevant only if and when the plaintiff seeks leave to substitute a named defendant [*28 USC §§ 1441(a), 1447(e); Soliman v. Philip Morris, Inc. (9th Cir 2002) 311 F3d 966, 971*]. The general diversity statute does not address the issue [*28 USC § 1332*], and the Ninth Circuit has not recently considered whether the presence of a Doe defendant (whose citizenship presumably cannot be established) in a complaint filed in federal district court precludes the complete diversity of citizenship necessary for diversity jurisdiction.

However, before the amendments to the removal statute that made clear that the citizenship of defendants sued under fictitious names is to be disregarded, the Ninth Circuit ruled that the presence of fictitious "Does" in an original federal diversity action destroys complete diversity [*see Garter-Bare Co. v. Munsingwear, Inc. (9th Cir 1980) 650 F2d 975, 981* (citing *Molnar v. National Broadcasting Co. (9th Cir 1956) 231 F2d 684, 687-688* and *Fifty Assocs. v. Prudential Ins. Co. (9th Cir 1970) 446 F2d 1187, 1190*]. These cases were decided before the amendment of the removal statute to

exclude fictitious names in determining diversity, but presumably still apply to the generic diversity statute.

Consider:

It is difficult to imagine how a plaintiff or defendant could establish diversity jurisdiction when the citizenship of one of the parties is unknown.

6.06[4][c] Use of Doe Pleading to Avoid Bar of Statute of Limitations on State-Law Claim. A plaintiff who uses a Doe appellation to sue an unknown defendant may amend the complaint to add the defendant's true name once the proper identity of the defendant is determined [*see Fed R Civ P 15(a)*]. If, after the expiration of the statute of limitations, a complaint is amended to add the true name of a defendant who was originally sued as a "Doe," the claim against the defendant will be barred unless the amendment "relates back" to the time of filing the original complaint. An amendment to a state-law claim will relate back only if permitted by the state law that provides the statute of limitations applicable to the action [*Fed R Civ P 15(c)(1)(A)*]. California law does permit such relation back, if the plaintiff was ignorant of the facts giving rise to the cause of action against the defendant when the complaint was filed [*CCP § 474*; *General Motors Corp. v. Superior Court (1996) 48 CA4th 580, 593-594, 55 CR2d 871*].

Cross Reference:

Discussion of the relation back doctrine under California law, see Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, see *§ 4.44*.

6.06[4][d] Use of Doe Pleading to Avoid Bar of Statute of Limitations on Federal Claim. If the complaint uses Doe pleading to prevent the running of the statute of limitations on a federal claim, a subsequent amendment of the complaint to add the true name of the defendant will relate back to the time of the original filing only if all of the following circumstances exist [*Fed R Civ P 15(c)(1)(B), (C)*]:

- The claim asserted in the amended complaint arose out of the conduct, transaction, or occurrence described in the original complaint.

- Within 120 days after filing the amendment, the defendant named in the amendment has received notice of the action so as not to be prejudiced in maintaining a defense on the merits [*see Fed R Civ P 4(m)*].

- Within 120 days after filing the amendment, the defendant named in the amendment knew or should have known that he or she would have been named in the complaint earlier but for a mistake concerning identification [*see Fed R Civ P 4(m)*].

Warning:

Most federal courts have held that an amended federal claim that otherwise meets the foregoing requirements will relate back only if there was a *mistaken* identification of the defendant by the plaintiff, but not if the identity of the defendant was *unknown* to the claimant at the time of the initial filing [*Butler v. Robar Enters., Inc. (CD Cal 2002) 208 FRD 621, 623-624* ; *see, e.g., Wayne v. Jarvis (11th Cir 1999) 197 F3d 1098, 1102-1104* ; *Jacobsen v. Osborne (5th Cir 1998) 133 F3d 315, 321* ; *Delgado-Brunet v. Clark (7th Cir 1996) 93 F3d 339, 344* ; *Barrow v. Wethersfield Police Dep't (2d Cir 1995) 66 F3d 466, 470* ; *Wilson v. United States (1st Cir 1994) 23 F3d 559, 563*].

6.06[4][e] LOCAL PRACTICE: CD Cal Requirements. The complaint may not include more than 10 fictitiously named parties [*CD Cal Civ LR 19-1*].

6.06[5] File Number of Action Must Be Included.

6.06[5][a] Caption Should Provide Space for File Number. The caption of every pleading must state the case's file number (also called a docket number or case number) [*Fed R Civ P 10(a)*]. Because the original complaint will be prepared before the court clerk assigns a file number, the caption of the complaint should include a space in which the court clerk can stamp or otherwise indicate the file number of the action [*Fed R Civ P 10(a)*].

The space for the file number should be provided next to the title of the action, on the right side of the first page of the complaint [*CD Cal Civ LR 11-3.8(e)*; *see ND Cal Civ LR 3-4(a)(3)(C)*; *SD Cal Civ LR 5.1(j.3)*].

Distinguish:

Although *Fed R Civ P 10(a)* refers to "file number," the local rules of district courts, and common local practice, may be to use other, similar terms such as "case number," "docket number," or "number of the action" [*see CD Cal Civ LR11-3.8(e)*; *see ND Cal Civ LR 3-4(a)(3)(C)*; *SD Cal Civ LR 5.1(j.3)*].

6.06[5][b] Court Clerk Will Assign File Number. When the complaint is filed, the court clerk will assign a file number. Civil actions are assigned consecutive file numbers [*Fed R Civ P 79(a)(1)*]. Because local rules may regulate the assignment of file numbers, the format of, and information contained in, the numbers may vary among the district courts [*see Fed R Civ P 83(a)*].

6.06[6] Pleading Must Be Designated As Complaint.

6.06[6][a] Identify Document As Complaint. The caption of the complaint must identify the pleading as a "complaint," which is one of the allowable pleadings [*Fed R Civ P 10(a)*; *see Fed R Civ P 7(a)*].

The designation of the pleading as a complaint is usually placed to the right of the title of the action, or at the bottom of the caption, just above the body of the complaint [*see ND Cal Civ LR 3-4(a)(3)(D)*].

Example:

A designation such as "Complaint" or "Complaint for Breach of Contract" is sufficient unless local rules require a more specific designation.

6.06[6][b] LOCAL PRACTICE: CD Cal Requirements. Immediately below the space for the file number (docket number), insert a concise description of the nature of the document and the proceeding [*CD Cal Civ LR 11-3.8(e)*, *(f)*]. Presumably, a designation such as "Complaint for Breach of Contract" is usually sufficient. If the action is a class action, the designation should include the words "Class Action" [*CD Cal Civ LR 23-1*].

6.06[6][c] LOCAL PRACTICE: ED Cal Requirements. If the plaintiff elects to proceed under the court's admiralty and maritime jurisdiction, the complaint must state "In Admiralty" following the court's name, in addition to the necessary statement identifying the claim as an admiralty or maritime claim in the body of the complaint [ED Cal Adm LR 510(a)]. If the complaint also contains one or more claims at law, it must state "At Law and In Admiralty" following the court's name [ED Cal Adm LR 510(a)].

Cross Reference:

Discussion of the election to proceed under the court's admiralty and maritime jurisdiction, as well as the allegations required in the body of the complaint, see *§ 6.11[10]*.

6.06[6][d] LOCAL PRACTICE: ND Cal Requirements. A complaint seeking review of a federal agency determination in an immigration case, Privacy Act case, or Administrative Procedure Act case must include, under the title of the complaint, whichever of the following is applicable: "Immigration Case," "Privacy Act Case," or "Administrative Procedure Act Case" [*ND Cal Civ LR 3-4(a)(4)*].

A complaint by the United States asserting a claim under the Federal Debt Collection Procedures Act [*28 USC § 3001 et*

seq.] must identify the action by using the words "Debt Collection Case" on the first page of the complaint [*ND Cal Civ LR 16-6(a)*].

If the action is sought to be maintained as a class action, the complaint must bear the legend "Class Action" on its first page below the title describing the paper as a complaint [*ND Cal Civ LR 3-4(a)(5)*].

6.06[6][e] LOCAL PRACTICE: SD Cal Requirements. Immediately below the docket number, the complaint must be designated as such [*SD Cal Civ LR 5.1(j.3)*] and must state a category from among the following that most nearly describes the action's subject matter [*SD Cal Civ LR 3.1*]:

- Admiralty-Maritime Claims (except Jones Act).
- Antitrust.
- Contract.
- Copyright/Trademark/Unfair Competition.
- Patent.
- Labor Relations.
- Tax.
- Tort/Personal Injury (including Jones Act)/Property Damage Fraud/Other [*specify*].
- Government Collection/Forfeiture/Penalty.
- Civil Rights.
- Land Condemnation.
- Habeas Corpus.
- Review of Administrative Action.
- Federal Securities.
- Miscellaneous [*specify*].

If the action is sought to be maintained as a class action, the complaint must also bear the legend "Class Action" below the docket number [*SD Cal Civ LR 23.1(a)*].

6.06[7] Jury Demand Must Be Included.

6.06[7][a] Endorse Jury Demand on Complaint. A demand for a trial by jury may be endorsed on the complaint [*Fed R Civ P 38(b)*].

Example:

The usual method of endorsing the demand on the complaint is to place a notation such as "Jury Demanded" on the first page of the complaint [*see Gargiulo v. Delsole (2d Cir 1985) 769 F2d 77, 78-79*

]. Local rules may require a separate demand in the body of the complaint, in addition to the endorsement [*see, e.g., CD Cal Civ LR 38-1*; *ND Cal Civ LR 3-6(a)*].

Cross Reference:

Further coverage of jury demands, see *§ 6.13*.

6.06[7][b] LOCAL PRACTICE: CD Cal Requirements. If a jury demand is included in the complaint, the caption of the complaint must contain the words "Demand for Jury Trial." The demand itself must be stated at the end of the complaint and be signed by the attorney for the plaintiff [*CD Cal Civ LR 38-1*].

6.06[7][c] LOCAL PRACTICE: ED Cal Requirements. A jury demand made in the complaint must appear immediately following the title of the complaint. Alternatively, a jury demand may be made in any other document permitted by Fed Civ P 38(b) [*ED Cal Civ LR 201*].

6.06[7][d] LOCAL PRACTICE: ND Cal Requirements. If the jury demand is included in the complaint, the caption of the complaint must state "Demand for Jury Trial." immediately following the designation of the pleading as a complaint. The demand itself must be stated at the end of the complaint and be signed by the plaintiff's attorney [*ND Cal Civ LR 3-6(a)*].

6.06[7][e] LOCAL PRACTICE: SD Cal Requirements. If a jury is demanded, the words "Demand for Jury Trial" must appear on the first page of the complaint, to the right of center, across from the title of the action and following the designation of the document as the complaint [*SD Cal Civ LR 5.1(j.3)*, *38.1*].

6.06[8] LOCAL PRACTICE: Indicating Three-Judge Court.

6.06[8][a] LOCAL PRACTICE: CD Cal Requirements. If the plaintiff contends that the case requires hearing by a three-judge court [*see 28 USC § 2284*], type the words "Three-Judge Court" immediately below the space for the file number (docket number) [*CD Cal Civ LR 8-2*].

6.06[8][b] LOCAL PRACTICE: SD Cal Requirements. If the plaintiff contends that the case requires hearing by a three-judge court [*see 28 USC § 2284*], type the words "Three-Judge District Court Requested," or their equivalent, immediately following the title of the complaint [*SD Cal Civ LR 9.2(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint
II. PREPARING COMPLAINT

1-6 MB Practice Guide: Fed Pretrial Civ Proc in CA 6.07

6.07 Jurisdictional Allegations Must Be in Short and Plain Statement.

6.07[1] Subject Matter Jurisdiction Must Be Alleged.

6.07[1][a] Setting Forth Basis of Subject Matter Jurisdiction. A complaint must contain a short and plain statement of the grounds on which the court's subject matter jurisdiction depends [*see Fed R Civ P 8(a)*].

The jurisdictional statement is usually made in the first paragraph of the body of the complaint [*see, e.g., CD Cal Civ LR 8-1*; *ED Cal Civ LR 204*]. The statement must state the basis for federal question jurisdiction or diversity jurisdiction [*see 28 USC § 1330 et seq.*].

Warning:

The parties may not waive lack of subject matter jurisdiction. The court will sua sponte dismiss an action whenever it appears that subject matter jurisdiction is lacking [*Fed R Civ P 12(h)(3)*]. In this respect, a lack of subject matter jurisdiction differs from defects such as a lack of personal jurisdiction, improper venue, or insufficiency of process or service of process, which the parties can waive [*see Fed R Civ P 12(h)(1)*].

Cross Reference:

Discussion of subject matter jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.03 -2.30*.

6.07[1][b] LOCAL PRACTICE: CD Cal Requirements. The statutory or other basis for the court's jurisdiction must be plainly stated in the first paragraph of the complaint [*CD Cal Civ LR 8-1*].

6.07[1][c] LOCAL PRACTICE: ED Cal Requirements. An allegation of jurisdiction must appear as the first allegation of the complaint, and it must meet all the following requirements [*ED Cal Civ LR 204*]:

- It must be styled "Jurisdiction."

- It must state the claimed statutory or other basis of federal jurisdiction.

- It must state the facts supporting the jurisdictional claim.

6.07[1][d] LOCAL PRACTICE: ND Cal Requirements. The complaint must include a separate paragraph, entitled "Jurisdiction," that identifies the statutory or other basis for federal jurisdiction and the facts supporting such jurisdiction [*ND Cal Civ LR 3-5(a)*].

6.07[1][e] Model Jurisdictional Allegations May Be Considered. Official Form 2 provides model allegations of subject matter jurisdiction, one for diversity, one for federal question, one for statutory jurisdiction, and one for admiralty or maritime jurisdiction [*see* Fed R Civ P Appendix of Forms, Form 7].

6.07[2] Federal Question Jurisdiction Must Be Pleaded, If Applicable.

6.07[2][a] Allege Facts to Support General Federal Question Jurisdiction. To establish that the district court has general federal question jurisdiction over a claim, the well-pleaded facts of the complaint must establish that the claim itself is grounded in federal law [*see Pan Am. Corp. v. Superior Court (1961) 366 US 656, 663, 81 S Ct 1303, 6 L Ed2d 584* ; *see* Fed R Civ P Appendix of Forms, Form 7(b)].

Warning:

A complaint must allege that the claim for relief itself arises under federal law. Allegations that an anticipated defense is grounded in federal law are not adequate to establish federal question jurisdiction [*Rivet v. Regions Bank (1998) 522 US 470, 475, 118 S Ct 921, 139 L Ed2d 912*].

Cross Reference:

Discussion of federal question jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.03 -2.09*.

6.07[2][b] Include Reference to Federal Law Underlying Claim. It is good practice to include a specific reference to the section of the Constitution, federal statute, or treaty that supplies the basis for the claim [*see* Fed R Civ P Appendix of Forms, Form 7(b)]. If federal common law is pleaded as the basis for federal question jurisdiction, a reference to the relevant case and a description of its holding presumably would suffice.

Failure to cite the federal law on which the plaintiff's claim is based is not fatal to the complaint, so long as the facts alleged sufficiently demonstrate the basis for jurisdiction [*Schlesinger v. Councilman (1975) 420 US 738, 742-745 n5 & 9, 95 S Ct 1300, 43 L Ed 2d 591*]. The court may allow an amendment to the complaint to add the necessary allegations [*28 USC § 1653*].

6.07[2][c] Plead Jurisdiction Under Specific Statutory Grant of Federal Question Jurisdiction. If jurisdiction is founded on a special jurisdictional statute, reference to the statute should be made in the first paragraph of the complaint, and specific factual averments should be made in the body of the complaint demonstrating that the statute applies [Fed R Civ P Appendix of Forms, Form 7(b)].

Examples:

Following are some of the cases in which specific statutes confer federal question jurisdiction:

- Actions to enforce orders of the Surface Transportation Board (formerly the Interstate Commerce Commission) [*28 USC § 1336*].

- Actions arising under antitrust statutes [*28 USC § 1337*].
- Actions arising under patent, copyright, and trademark law [*28 USC § 1338*].
- Postal matters [*28 USC § 1339*].
- Federal tax matters [*28 USC § 1340*].
- Civil rights actions [*28 USC § 1343*].
- Actions against the United States [*28 USC § 1346*].
- Claims under the Employee Retirement Income Security Act (ERISA) [*29 USC § 1132(e)*].
- Actions under the Racketeer Influenced and Corrupt Organization Act (RICO) [*18 USC § 1965(a)*].
- Actions under the Securities Exchange Act of 1934 [*15 USC § 78aa*].

6.07[3] Diversity Jurisdiction Must Be Pleaded, If Applicable.

6.07[3][a] Determine Whether General Diversity Jurisdiction Is Available. In general, a federal district court may exercise diversity jurisdiction over a civil action if the amount in controversy exceeds $75,000, exclusive of interest and costs, and if any of the following applies [*28 USC § 1332(a)*]:

- The matter in controversy is between citizens of different states.
- The matter in controversy is between citizens of a state and citizens or subjects of a foreign state.
- The matter in controversy is between citizens of different states and in which citizens or subjects of a foreign state are additional parties.
- The matter in controversy is between a foreign state [*see 28 USC § 1603(a)* as plaintiff and citizens of a state or of different states.

Cross Reference:

Discussion of diversity jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.10 -2.25*.

6.07[3][b] Special Diversity Jurisdiction Is Available in Mass Tort Litigation and Certain Class Actions. A federal district court has original jurisdiction of a civil action that arises from a single accident in which any two adverse parties are of diverse citizenship, if at least 75 natural persons died in the accident at a discrete location, and if any of the following circumstances exists [*28 USC § 1369(a)*]:

- A defendant resides in one state, and a substantial part of the accident took place in another state or other location, regardless of whether that defendant is also a resident of the state where a substantial part of the accident took place.
- Any two defendants reside in different states, regardless of whether those defendants are also residents of the same state or states.

- Substantial parts of the accident took place in different states.

Exception:

The court has discretion to abstain from hearing the action if the substantial majority of all plaintiffs are citizens of the state of which the primary defendants are also citizens, and the claims asserted will be governed primarily by the laws of that state [*28 USC § 1369(b)*].

Cross Reference:

Discussion of diversity jurisdiction in mass tort cases, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§ 2.24*.

A federal district court also has original jurisdiction of certain class actions in which the matter in controversy exceeds the sum or value of $5 million, exclusive of interest and costs, and in which diversity of citizenship exists between any member of a plaintiff class and any defendant [*28 USC § 1332(d)(2)*].

Cross Reference:

Discussion of diversity jurisdiction under Class Action Fairness Act of 2005, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§ 2.24A*.

6.07[3][c] Citizenship and Amount in Controversy Must Be Averred. A claim alleging jurisdiction based on diversity of citizenship must contain averments of the parties' citizenship and the amount in controversy [*Fifty Assocs. v. Prudential Ins. Co. (9th Cir 1970) 446 F2d 1187, 1190* ; *see* Fed R Civ P Appendix of Forms, Form 7(a)]. A failure to refer to the diversity statute is not fatal if the facts necessary to establish diversity jurisdiction are pleaded [*Scheuer v. Rhodes (1974) 416 US 232, 234 n2, 94 S Ct 1683, 40 L Ed2d 90*].

The better practice is to allege specifically both the citizenship of the parties and the amount in controversy, even if express citation or reference is made to the diversity statute [*see Fifty Assocs. v. Prudential Ins. Co. (9th Cir 1970) 446 F2d 1187, 1190*]. However, it appears that for jurisdictional purposes, it is sufficient to allege the amount in controversy by stating that, exclusive of interest and costs, the matter in controversy exceeds the sum specified by *28 USC § 1332*, the general diversity statute [*see* Fed R Civ P Appendix of Forms, Form 7(a)].

6.07[3][d] Complete Diversity of Citizenship Must Be Established for Most Actions. Because complete diversity of citizenship is required to establish general diversity jurisdiction, a complaint alleging general diversity jurisdiction must aver that every plaintiff is of diverse citizenship from every defendant [*see Strawbridge v. Curtiss (1806) 7 US 267, 267, 2 L Ed 435*].

Exception--Interpleader Action:

An interpleader action requires only minimal diversity. Thus, a complaint in an interpleader action may establish diversity of citizenship by alleging that two or more defendants are of diverse citizenship from one another [*28 USC § 1335(a)*; *see State Farm Fire & Cas. Co. v. Tashire (1967) 386 US 523, 530-531, 87 S Ct 1199, 18 L Ed2d 270* ; *see also Ch. 4, Determining Parties to the Action, 4.56*].

Exception--Mass Tort Litigation:

Complete diversity need not be alleged in a mass tort action that qualifies for special diversity jurisdiction. The complaint may establish diversity jurisdiction by alleging the following [*28 USC § 1369(a)*]:

- The citizenship of at least two adverse parties who are of diverse citizenship.

- At least 75 natural persons died in the underlying accident at a discrete location.
- Either:
  - ○ A defendant resides in one state, and a substantial part of the accident took place in another state or other location.
  - ○ Any two defendants reside in different states.
  - ○ Substantial parts of the accident took place in different states.

Exception--Class Actions:

Complete diversity need not be alleged in a class action that qualifies for minimal diversity jurisdiction under the Class Action Fairness Act of 2005. The complaint may establish diversity jurisdiction by alleging a matter in controversy that exceeds the sum or value of $5 million, exclusive of interests and costs, and diversity of citizenship between any member of a plaintiff class and any defendant [*28 USC § 1332(d)(2)*].

6.07[3][e] Pleading Citizenship of Individuals. An allegation of citizenship of an individual should state that the individual is a citizen of a specified state, of the District of Columbia, of the Commonwealth of Puerto Rico, or of a specified United States territory [*see* Fed R Civ P Appendix of Forms, Form 7(a); *see also 28 USC § 1332(e)*].

For purposes of diversity jurisdiction, an alien admitted to the United States for permanent residence is deemed a citizen of the state in which he or she is domiciled [*28 USC § 1332(a)*].

6.07[3][f] Pleading Citizenship of Corporations. An allegation of citizenship of a corporation should allege the state in which it is incorporated and the state in which it has its principal place of business, because a corporation is deemed a citizen of both of those states [*28 USC § 1332(c)(1)*].

Exception:

In a direct action against a liability insurer, if the insured is not joined as a defendant, the insurer is deemed a citizen of the state of which the insured is a citizen, in addition to the state in which the insurer is incorporated and the state in which it has its principal place of business [*28 USC § 1332(c)(1)*].

6.07[3][g] Pleading Citizenship of Partnerships and Unincorporated Associations. An allegation of citizenship of a partnership or unincorporated association should specify the particular states of citizenship of each partner or member. Partnerships and unincorporated associations lack their own citizenship for purposes of the general diversity statute. Instead, the citizenship of a partnership or unincorporated association is dependent on the citizenship of each of the individual members of the association [*Carden v. Arkoma Assocs. (1990) 494 US 185, 195-196, 110 S Ct 1015, 108 L Ed2d 157*].

Exception:

In multistate class actions subject to the modified jurisdictional requirements of the Class Action Fairness Act of 2005 [*see* 109 PL 2, 199 Stat 4], an unincorporated association is deemed to be a citizen of the state where it has its principal place of business and the state under whose laws it is organized [*28 USC § 1332(d)(10)*].

6.07[3][h] Pleading Citizenship of Political Subdivisions and Other Entities. A municipal corporation, a county, or any other political subdivision of a state is a citizen of the state in which it is located, unless it is simply an

arm or the alter ego of the state [*see Moor v. County of Alameda (1973) 411 US 693, 717, 93 S Ct 1785, 36 L Ed2d 596*].

Distinguish:

Unlike its political subdivisions, a state (including an arm or alter ego of the state) is not a "citizen" for purposes of general diversity jurisdiction [*Moor v. County of Alameda (1973) 411 US 693, 717, 93 S Ct 1785, 36 L Ed2d 596*].

6.07[3][i] In General Diversity Case, Pleading Must Allege That Amount in Controversy Exceeds $75,000. A pleading relying on general diversity jurisdiction must allege that the amount in controversy exceeds $75,000, exclusive of interest and costs. Detailed explanations usually are not required [*28 USC § 1332(a)*; Fed R Civ P Appendix of Forms, Form 7(a)].

Example:

It appears that for jurisdictional purposes, it is sufficient to allege the amount in controversy by stating that, exclusive of interest and costs, the matter in controversy exceeds the sum specified by *28 USC § 1332*, the general diversity statute [*see* Fed R Civ P Appendix of Forms, Form 7(a)].

Warning:

A defendant, or the court sua sponte, may challenge the plaintiff's allegation of the jurisdictional amount. Whether the amount in controversy exceeds $75,000 is usually determined from the perspective and pleading of the party invoking jurisdiction, and the amount is determined as of the time subject matter jurisdiction is first invoked. In general, all that is required is a good-faith allegation that the amount in controversy exceeds the jurisdictional amount, and dismissal will not be warranted unless it appears "to a legal certainty" that the claim is for less than the jurisdiction amount [*St. Paul Mercury Indem. Co. v. Red Cab Co. (1938) 303 US 283, 288, 58 S Ct 586, 82 L Ed 845*].

6.07[4] Admiralty or Maritime Jurisdiction Must Be Pleaded, If Applicable. In pleading a claim under admiralty and maritime jurisdiction [*see 28 USC § 1333*], allegations of fact demonstrating the applicability of admiralty or maritime authority are required. For example, a party seeking to invoke federal admiralty jurisdiction over a tort claim must allege facts that satisfy both the conditions of location and of connection with maritime activity [*Grubart v. Great Lakes Dredge & Dock Co. (1995) 513 US 527, 534, 115 S Ct 1043, 130 L Ed2d 1024* ; *see, e.g., Ramirez v. Butler (ND Cal 2004) 319 F Supp2d 1034, 1038* (admiralty jurisdiction did not lie over suit alleging conversion of noncommercial sailboat because there was no potential for disruptive impact on maritime commerce)].

To invoke general admiralty or maritime jurisdiction, the first paragraph of the complaint should refer to admiralty or maritime authority, and support should be more fully developed in the body of the complaint [Fed R Civ P Appendix of Forms, Form 7(c)]. To invoke the distinctively maritime procedures referred to in *Fed R Civ P 9(h)*, the first paragraph of the complaint should add the following or its substantial equivalent: "This is an admiralty or maritime claim within the meaning of Rule 9(h)" [Fed R Civ P Appendix of Forms, Form 7(c)].

Cross Reference:

Further coverage of the pleading of admiralty or maritime claims, see *§ 6.11[10]*.

6.07[5] Supplemental Jurisdiction Must Be Pleaded, If Applicable.

6.07[5][a] Determination of Whether Supplemental Jurisdiction Is Available. Generally, in a case in which a federal district court has original jurisdiction, it may also exercise supplemental jurisdiction over other claims that are so related to claims in the action within the court's original jurisdiction that they form part of the same case or controversy under Article III of the Constitution [*28 USC § 1367(a)*].

Exceptions:

If the court's original jurisdiction over a case is based on diversity of citizenship, supplemental jurisdiction is not available for claims that would bring in defendants whose joinder would be inconsistent with the requirements for diversity jurisdiction [*28 USC § 1367(b)*; *see 28 USC § 1332*]. Also, even if the district court has supplemental jurisdiction over a claim, it may decline to exercise that jurisdiction if any of the following conditions exists [*28 USC § 1367(c)*]:

- The claim raises a novel or complex issue of state law.
- The claim substantially predominates over the claim or claims over which the court has original jurisdiction.
- The court has dismissed all claims over which it has original jurisdiction.
- In exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Cross Reference:

Discussion of supplemental jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.26 -2.30*.

6.07[5][b] Sufficient Facts Must Be Alleged to Establish Supplemental Jurisdiction. To establish that two claims form part of the same case under Article III for purposes of supplemental jurisdiction, the plaintiff must plead and prove facts sufficient to support a finding that the claims have a common nucleus of operative facts [*see United Mine Workers v. Gibbs (1966) 383 US 715, 725, 86 S Ct 1130, 16 L Ed2d 218* ; *Kuba v. 1-A Agric. Ass'n (9th Cir 2004) 387 F3d 850, 855* ; *Trustees of Constr. Indus. & Laborers Health & Welf. Trust v. Desert Valley Landscape & Maint., Inc. (9th Cir 2003) 333 F3d 923, 925*].

6.07[6] Satisfying Justiciability Requirements.

6.07[6][a] Justiciability Is Generally Not an Issue in Actions Alleging Actual Injury to Plaintiff. The federal courts' subject matter jurisdiction is limited by the "case or controversy" and standing requirements imposed by Article III of the Constitution [*Lewis v. Continental Bank Corp. (1990) 494 US 472, 477, 110 S Ct 1249, 108 L Ed2d 400* ; *see also* US Const, art III]. In most kinds of actions, these justiciability requirements are not usually a concern, because allegations of actual injury suffered by the plaintiff are sufficient to establish the existence of an actual controversy and the plaintiff's standing to seek redress [*see Lujan v. Defenders of Wildlife (1992) 504 US 555, 561, 112 S Ct 2130, 119 L Ed2d 351*].

A representative plaintiff in an action under *B&P Code 17200* does not have standing under Article III because the plaintiff has suffered no actual injury, but rather is seeking redress for injuries suffered by others as a private attorney general [*e.g., Lee v. American Nat'l Ins. Co. (9th Cir 2001) 260 F3d 997, 1001-1002*].

6.07[6][b] Plaintiff in Declaratory Relief Action Must Establish Justiciability. To avoid dismissal for lack of subject matter jurisdiction, a complaint seeking declaratory relief must allege facts sufficient to establish both of the following [*Lujan v. Defenders of Wildlife (1992) 504 US 555, 560, 112 S Ct 2130, 119 L Ed2d 351*]:

- A case or controversy that is ripe for judicial review [*see 6.07[6][c]*].
- The plaintiff's standing to seek judicial resolution of the controversy [*see 6.07[6][d]*].

6.07[6][c] In Declaratory Relief Action, Complaint Must Allege Existence of Case or Controversy. To allege

an actual case or controversy, the complaint must allege an immediate danger of the plaintiff sustaining an injury as a result of the defendant's conduct [*Maryland Cas. Co. v. Pacific Coal & Oil Co. (1941) 312 US 270, 273, 61 S Ct 510, 85 L Ed 826* ; *Principal Life Ins. Co. v. Robinson (9th Cir 2005) 394 F3d 665, 671*].

In most declarative relief actions, therefore, the allegations necessary to establish the plaintiff's standing will also suffice to establish the existence of a case or controversy [*see 6.07[6][d]*].

6.07[6][d] In Declaratory Relief Action, Complaint Must Allege Plaintiff's Standing. To establish the plaintiff's standing to sue for declaratory relief, the plaintiff must plead and prove all of the following [*Lujan v. Defenders of Wildlife (1992) 504 US 555, 560, 112 S Ct 2130, 119 L Ed2d 351*]:

- The plaintiff has suffered an actual injury, or there is a realistic, imminent danger that the plaintiff will suffer a distinct and palpable injury that is real and not conjectural [*see Allen v. Wright (1984) 468 US 737, 751, 104 S Ct 3315, 82 L Ed2d 556* ; *Idaho Conservation League v. Mumma (9th Cir 1992) 956 F2d 1508, 1514*].

- The injury is fairly traceable to the allegedly unlawful conduct of the defendant.

- The injury is likely to be addressed by a declaration of the parties' rights and liabilities.

Cross Reference:

Detailed discussion of declaratory relief, see 12 Moore's Federal Practice, Ch. 57, Declaratory Judgment (Matthew Bender 3d ed.).

6.07[7] Allegations of Personal Jurisdiction and Venue Are Not Required. A complaint need not include allegations of personal jurisdiction or venue. A defense based on a lack of personal jurisdiction or improper venue will be waived unless the defendant makes a timely objection by motion or in a responsive pleading [*Fed R Civ P 12(h)(1)*].

Although a statement of venue is not required, most attorneys will include in the complaint a statement of the grounds for venue, along with descriptions of the citizenship and residence of all parties.

Cross Reference:

Discussion of personal jurisdiction and venue, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.31 -2.41*.

6.07[8] LOCAL PRACTICE: ND Cal--Intradistrict Assignment. The complaint must include a paragraph, entitled "Intradistrict Assignment," that identifies any basis for assignment to a particular location or division of the district court [*ND Cal Civ LR 3-5(b)*; *see ND Cal Civ LR 3-2(c)*].

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6.08 Allegations Concerning Party Status May Be Included.

6.08[1] Alleging Parties' Capacity, Authority, or Legal Existence Is Necessary Under Specific Circumstances. A complaint need not aver a party's capacity to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court or as required by other rules [*Fed R Civ P 9(a)*].

Although specific allegations are usually unnecessary, a complaint often contains allegations of capacity, authority, or legal existence because such allegations facilitate stating a claim in a short and plain manner as required by the Federal Rules of Civil Procedure [*see Fed R Civ P 8(a)*].

6.08[2] Situations in Which Capacity Should Be Alleged.

6.08[2][a] Allege Capacity If Necessary to Establish Diversity Jurisdiction. The complaint may need to allege capacity, authority, or legal existence when federal jurisdiction is based on diversity of citizenship. In determining whether diversity jurisdiction exists, the citizenship of nominal or formal parties, such as the legal representative of a decedent's estate, an infant, or an incompetent, generally is deemed to be the same as that of the decedent, infant, or incompetent [*28 USC § 1332(c)*].

However, if a party is a trustee of an active trust, the trustee will be considered the real party in interest for diversity purposes [*Navarro Sav. Ass'n v. Lee (1980) 446 US 458, 464-465, 100 S Ct 1779, 64 L Ed2d 425*].

In a class action, the capacity of the representative of the class should be alleged, because the citizenship of the class representative controls for diversity jurisdiction purposes [*Supreme Tribe of Ben Hur v. Cauble (1921) 255 US 356, 366, 41 S Ct 338, 65 L Ed 673*].

Cross Reference:

Discussion of diversity jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.10 -2.25*.

6.08[2][b] Allege Capacity If Necessary to Establish Federal Question Jurisdiction. An allegation of capacity, authority, or legal existence might be necessary to establish federal question jurisdiction, if required by the federal statute under which the claim for relief arises.

Example:

Certain actions brought pursuant to the Employee Retirement Income Security Act (ERISA) are within the exclusive jurisdiction of the federal district courts if brought by a participant, beneficiary, or fiduciary [*29 USC § 1132(e)(1)*]. In order to allege federal jurisdiction in such a case, the complaint must contain specific allegations that the plaintiff is suing as a participant, beneficiary, or fiduciary [*see Grand Union Co. v. Food Employers Labor Relations Ass'n (DC Cir 1987) 808 F2d 66, 71*].

6.08[2][c] Allege Individual Capacity of State Officer in Civil Rights Action. Under the *Eleventh Amendment*, a state's sovereign immunity protects a state officer sued for damages in an official capacity, but not if the official is sued in an individual capacity or if the suit seeks equitable relief. The Ninth Circuit has ruled that in asserting a civil rights claim against a state official, the complaint need not allege the defendant's capacity, because the district court may look beyond the pleadings to determine the capacity in which the defendant is being sued [*Price v. Akaka (9th Cir 1990) 928 F2d 824, 828*]. As a practical matter, however, the Supreme Court has stated that it is obviously preferable for a civil rights claimant to be specific in the complaint about the capacity in which the defendant is being sued, in order to avoid ambiguity [*Hafer v. Melo (1991) 502 US 21, 24 n*, 112 S Ct 358, 116 L Ed 2d 301*].

6.08[3] Capacity, Authority, or Legal Existence of Party May Be Challenged by Negative Averment. If the plaintiff wishes to raise an issue as to the legal existence of any party, or the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, the plaintiff must do so by specific negative averment, which must include any supporting particulars that are peculiarly within the plaintiff's knowledge [*Fed R Civ P 9(a)*].

6.08[4] Determining Capacity, Authority, or Legal Existence. Capacity, authority to sue or be sued in federal civil actions, and questions of a party's legal existence are usually determined by state law. The capacity of an individual, other than one acting in a representative capacity, is determined by the law of his or her domicile. The capacity of a corporation to sue or be sued is determined by the law under which it was organized [*Fed R Civ P 17(b)(1), (2)*].

In all other cases in federal district court in California, capacity to sue or be sued is determined by California state law, with the following two exceptions [*Fed R Civ P 17(b)(3)*]:

- A partnership or other unincorporated association, if it has no capacity to sue or be sued under state law, may sue or be sued in its common name for the purpose of enforcing for or against it in a substantive right existing under the Constitution or laws of the United States.

Consider:

This exception appears to have little relevance in California district courts, inasmuch as California law specifically states that general partnerships and unincorporated associations have the capacity to sue and be sued in their own names [*CCP § 369.5(a)*; *Corp Code § 16307(a)*].

- The capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by federal law [*28 USC §§ 754, 959(a)*].

Cross References:

Discussion of determining capacity of parties, see *Ch. 4, Determining Parties to the Action, 4.20 -4.40*.

Discussion of capacity of parties under California law, see Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, see *§§ 5.08 -5.17*.

6.08[5] Alleging Plaintiff's Status in Shareholder Derivative Action. In a shareholder derivative suit, the complaint must contain specific allegations, including that the plaintiff was a shareholder or member at the time of the transaction on which the complaint is based, or that the plaintiff's shares thereafter devolved by operation of law [*Fed R Civ P 23.1*].

6.08[6] Drafting Class Action Allegations.

6.08[6][a] Allege Required Elements. For a class action to proceed, the class must be numerous, members of the class must have legal and factual issues in common, the claims and defenses of the class representatives must be typical, and the class representatives must adequately protect the interests of the class [*Fed R Civ P 23(a)*]. A class action complaint must allege all of the required elements and basic underlying facts [*Gillibeau v. City of Richmond (9th Cir 1969) 417 F2d 426, 432*].

Cross Reference:

Discussion of elements of class actions, see Ch. 20, Class Actions, see *§ 20.06*.

6.08[6][b] LOCAL PRACTICE: CD Cal Requirements. If the action is a class action, the complaint must contain a separate section entitled "Class Action Allegations" containing the following [*CD Cal Civ LR 23-2*]:

- A reference to the portion or portions of *Fed R Civ P 23* under which the plaintiff contends the action is maintainable as a class action [*CD Cal Civ LR 23-2.1*].

- Appropriate allegations justifying the action's proceeding as a class action, including the following [*CD Cal Civ LR 23-2.2*]:

  - The definition of the proposed class.

  - The size or approximate size of the proposed class.

  - The adequacy of representation by the class representative or representatives.

  - The commonality of questions of law and fact.

  - The typicality of the claims or defenses of the class representative or representatives.

  - If proceeding under *Fed R Civ P 23(b)(3)*, allegations to support the necessary findings that common questions of law or fact predominate and that a class action is superior to other available methods of adjudicating the case.

  - The nature of notice to the proposed class that is required or contemplated.

6.08[6][c] LOCAL PRACTICE: SD Cal Requirements. A class action complaint must include a statement describing the class or classes on behalf of which the action is sought to be maintained [*SD Cal Civ LR 23.1(b)*].

6.08[7] Identifying Necessary Parties Who Have Not Been Joined or Identified. The complaint must state the names, if known to the plaintiff, of persons who are required to be joined but who have not been joined. The complaint must also explain the reasons that such persons have not been joined in the action [*Fed R Civ P 19(c)*; *see Fed R Civ P 19(a)*].

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6.09 Short and Plain Statement of Each Claim Must Be Included in Complaint.

6.09[1] Drafting Short, Plain Statement of Claim.

6.09[1][a] Short, Plain Statement of Claim Must Be Included. A complaint must include a short and plain statement of each claim showing that the plaintiff is entitled to relief [*Fed R Civ P 8(a)*]. Each averment in support of the claim must be simple, concise, and direct [*Fed R Civ P 8(d)(1)*].

Warning:

The Ninth Circuit has held that a district court abused its discretion by dismissing a first amended complaint with prejudice solely because it was 68 pages long, rather than imposing less drastic measures, such as striking surplusage. Although the complaint set out excessive factual detail, it was otherwise coherent, organized, and stated legally viable claims [*Hearns v. San Bernardino Police Dept. (9th Cir 2008) 530 F3d 1124, 1127* ; *cf. Grosz v. Lassen Cmty. College Dist. (ED Cal 2008) 2008 US Dist LEXIS 64494, at *6-*7* (court dismissed case with prejudice and without further leave to amend, after plaintiffs, who were given three opportunities and clear and detailed guidance, failed to correct deficiencies in their complaint)].

However, the better practice is to ensure that the complaint simply states who is being sued, for what relief, and on what facts and theory, with enough detail to guide discovery. Overelaborate and argumentative pleadings may be dismissed for violation of the requirement of a short and plain statement of a claim [*McHenry v. Renne (9th Cir 1996) 84 F3d 1172, 1177-1178, 1180* ; *Jacobson v. Schwarzenegger (CD Cal 2005) 226 FRD 395, 397-398*].

Fact-pleading jurisdictions such as California require greater specificity in pleading that is required by the notice pleading in the federal rules. A federal complaint must merely place the defendant on notice of the claims against the defendant without necessarily detailing the facts on which the claim is based [*see Fed R Civ P 8(a)*]. The Ninth Circuit does not impose a heightened pleading standard in the absence of "an explicit requirement in a statute or federal rule" [*Fed R Civ P 8(a)(1)*; Doe v. Holy See *(9th Cir) 557*

F3d 1066, 1074 (in evaluating assertions of subject-matter jurisdiction based on exception to foreign sovereign immunity, court applies same notice pleading requirements that apply to any other assertion of subject-matter jurisdiction and look only for a "short and plain statement" of basis for jurisdiction)]. In contrast, California fact pleading requires the plaintiff to plead the facts constituting the cause of action [*see CCP § 425.10*].

6.09[1][b] Sufficient Facts Must Be Alleged to Put Defendant on Notice of Claim. The Supreme Court has traditionally held that a party is not required to specifically plead the elements of a claim [*see Swierkiewicz v. Sorema, N.A. (2002) 534 US 506, 512, 122 S Ct 992, 152 L Ed2d 1]* .

More recently, however, the Court required a plaintiff to plead factual allegations relevant to "loss causation," an element of a securities fraud claim [*Dura Pharms., Inc. v. Broudo (2005) 544 US 336, 346-348, 125 S Ct 1627, 161 L Ed2d 577]* .

In an antitrust class action brought under the Sherman Act, the Supreme Court ruled that the complaint could not survive a motion to dismiss without some factual context suggesting an agreement in restraint of trade, sufficient to state a claim to relief that was "plausible on its face" [*Bell Atlantic Corp. v. Twombly (2007) 550 US 544, 127 S Ct 1955, 167 L Ed2d 929, 949 (2007)* (plaintiff's allegations of conspiracy were not "plausible" so complaint was properly dismissed for failure to state claim)]. The Court reiterated the traditional Rule 8 "short and plain statement" standard, and also noted that on a motion to dismiss, the district court must accept as true all the factual allegations in the complaint. However, the Court went on to say that, while a complaint does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of its entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, and the allegations must be enough to raise a right to relief above the speculative level. The Court stated that its decision does not require heightened fact pleading of specifics. Rather the Court interpreted the basic Rule 8 notice standard as requiring enough facts to state a claim to relief that is plausible on its face [*Bell Atlantic Corp. v. Twombly (2007) 550 US 544, 127 S Ct 1955, 167 L Ed2d 929, 940* ; *see Ashcroft v. Iqbal (2009) ___ US ___, 129 S Ct 1937, 173 L Ed2d 868, 885* (petitioner's conclusory legal allegations, unsupported by factual allegations, did not comply with Rule 8 under *Twombly*); al- *Kidd v. Ashcroft (9th Cir 2009) 580 F.3d 949, 977* (plaintiffs pled "enough facts to state a claim to relief that is plausible on its face"; specific allegations demonstrated that defendant Attorney General purposefully used material witness statute to detain suspects whom he wished to investigate and detain preventatively, and that plaintiffs were subjected to this policy); *Rick-Mik Enterprises, Inc. v. Equilon Enters., LLC (9th Cir 2008) 532 F3d 963, 970-971* (in antitrust action against gasoline station franchisor, allegations of "tying arrangement" involving purchase of franchise and credit card services were insufficient to state claim for relief)]. These pleading requirements are not limited to the antitrust context [*Ashcroft v. Iqbal (2009) ___ US ___, 129 S Ct 1937, 173 L Ed2d 868, 887-888* (Rule 8 pleading requirements as interpreted by *Twombly* apply "in all civil actions")].

6.09[1][c] Pleading Evidentiary Facts Ordinarily Is Not Required. Pleading evidentiary facts may be seen as a violation of the short-and-plain-statement requirement. However, if the pleading of evidence is harmless or if it assists in providing fair notice of the claim, it will be tolerated [*see Salahuddin v. Cuomo (2d Cir 1988) 861 F2d 40, 43* (citing **Moore's**)]. Moreover, as to certain matters the rules or applicable law mandate the pleading of factual details [*see, e.g., Fed R Civ P 9*].

Example--Facts Required for Civil Rights Claim:

Conclusory allegations, unsupported by facts, are insufficient to state a claim under the Civil Rights Act. The plaintiff must allege with at least some degree of particularity overt acts of the defendants that support the plaintiff's claim [*Jones v. Community Redevelopment Agency (9th Cir 1984) 733 F2d 646, 649*].

Cross Reference:

Discussion of pleading special matters, see *§ 6.11*.

Detailed information on a claim may be developed during such pretrial procedures as discovery and depositions, pretrial conferences, and motions for a more definite statement or for summary judgment [*see Swierkiewicz v. Sorema N.A. (2002) 534 US 506, 512-514, 122 S Ct 992, 152 L Ed2d 1* ; *see also Fed R Civ P 12(e), 16, 26 -37, 56*]. Therefore, a complaint will not ordinarily be dismissed because it lacks detailed averments of the claim for relief [*see Bodine Produce, Inc. v. United Farm Workers Org. Comm. (9th Cir 1974) 494 F2d 541, 561-562*].

Strategic Points--Plaintiff:

Even if detailed pleading is not required, in some cases there may be advantages to describing fully the factual basis for the allegations, for one or more of the following reasons [*but see 6.09[1][a]* (complaint must include short and plain statement of each claim, without overelaborate or argumentative pleading)]:

- Presenting the "whole picture" in the complaint may convince the judge that the plaintiff is fully disclosing his or her case, rather than hoping for a surprise or forcing the defendant through tangled discovery proceedings.

- Detailed pleading may avert a motion for sanctions based on an alleged failure to perform a reasonable investigation of the case prior to filing the complaint [*see Fed R Civ P 11(c)*].

- Detailed pleading in the original complaint may avert a dispute over whether a subsequent amendment relates to the same transaction for purposes of the statute of limitations [*see Fed R Civ P 15(c)(1)*].

- Detailed pleading may facilitate discovery. Generally, unsupervised discovery is restricted to matters that are relevant to the "claim or defense" of any party, although for good cause, the court may order discovery of any matter relevant to the "subject matter" involved in the action [*Fed R Civ P 26(b)(1)*]. Thus, the pleadings define the scope of discovery that is available without advance court approval. Therefore, a cautious plaintiff may feel that more elaborate statements of claims are necessary in order to ensure that a full range of unsupervised discovery will be available.

Warning:

One potential danger in pleading unnecessary material is that it provides more of a basis for a motion to dismiss the complaint.

Cross References:

Discussion of the duty to perform a reasonable investigation prior to filing the complaint, see *6.14[5]*. Discussion of sanctions under Rule 11 based on a failure to investigate before filing the complaint, see *Ch. 33, Rule 11 Sanctions, 33.04[3]*. Discussion of the amendment of pleadings, see Ch. 9, Amending and Supplementing Pleadings, see *§§ 9.03 -9.11*.

6.09[1][d] Facts May Be Alleged on Information and Belief. After making reasonable inquiry, a plaintiff may aver facts that he or she believes to be true, but that lack evidentiary support at the time the complaint is filed. Such allegations must be specifically identified in the complaint as likely to have evidentiary support after a reasonable opportunity for further investigation or discovery [*Fed R Civ P 11(b)(3)*]. Generally, however, such averments on information and belief are allowed only if the facts that would support the allegations are within the defendant's knowledge or control [*see Tuchman v. DSC Communications Corp. (5th Cir 1994) 14 F3d 1061, 1068*].

6.09[1][e] Complaint Need Not State Legal Theory. The complaint need not state any legal theory justifying the relief sought on the facts alleged, as long as it contains sufficient factual averments to show that the plaintiff may be entitled to some relief [*American Timber & Trading Co., v. First Nat'l Bank (9th Cir 1982) 690 F2d 781, 786* (citing **Moore's**)]. The statement of a claim need not even specify under which law it arises [*Ghebreselassie v. Coleman Sec. Serv. (9th Cir 1987) 829 F2d 892, 895*]. In any case, it is always essential to state facts sufficient to meet the essential elements of a claim. The complaint should state the nature of the claim (such as breach of contract, negligence, etc.), and specify an applicable statute, if appropriate.

Distinguish:

Although the complaint need not specify the law underlying a claim as part of the statement of the claim, it may be necessary to specify the law in order to establish the subject matter jurisdiction of the court [*Fed R Civ P 8(a)*; *Ghebreselassie v. Coleman Sec. Serv. (9th Cir 1987) 829 F2d 892, 895*].

6.09[1][f] Alternative and Inconsistent Legal Theories May Be Presented. A complaint may simultaneously state several alternative and inconsistent theories of recovery on a claim [*Fed R Civ P 8(d)(2), (3), 18(a)*; *Molsbergen v. United States (9th Cir 1985) 757 F2d 1016, 1019*].

6.09[1][g] Setting Forth Legal Theory Does Not Limit Relief. If a complaint does state a legal theory, any relief ultimately granted by the court usually is not limited strictly to that theory. Except for a judgment rendered by default, a final judgment must grant the relief a party is entitled to, regardless of the relief demanded in the party's pleading [*see Fed R Civ P 54(c)*].

Cross Reference:

Discussion of Rule 54(c), see 10 *Moore's Federal Practice, §§ 54.70 -54.72* (Matthew Bender 3d ed.).

6.09[1][h] Complaint Need Not Negate Affirmative Defenses. The complaint ordinarily need not allege facts to negate an anticipated affirmative defense that the defendant might assert in the answer. Such affirmative defenses are automatically taken as denied [*see Fed R Civ P 8(d)*]. However, if the complaint pleads facts that tend to establish an affirmative defense, the complaint should allege any additional facts that negate the apparent defense, so as to avoid dismissal [*see Tregenza v. Great Am. Communications Co. (7th Cir 1993) 12 F3d 717, 718*]. Certain affirmative defenses, such as a claim that is barred by limitations on the face of the complaint, do not require negating.

6.09[1][i] Allegations May Be Adopted by Reference. Any statement in a complaint may be adopted by reference in a different part of the complaint or in any subsequent pleading or motion [*Fed R Civ P 10(c)*]. To facilitate such references, all averments of a claim must be made in numbered paragraphs [*Fed R Civ P 10(b), (c)*].

6.09[1][j] Statements in Exhibit May Be Adopted by Reference. Because an exhibit to the complaint is treated as a part of the complaint for all purposes, statements in the exhibit may be adopted by reference in the body of the complaint [*see Fed R Civ P 10(c)*].

6.09[1][k] Unattached Written Document May Be Adopted by Reference. Even if a written instrument is not formally attached to the complaint, the instrument may be treated as incorporated by the complaint if there is a clear and definite reference to the instrument in the complaint [*see Parrino v. FHP, Inc. (9th Cir 1998) 146 F3d 699, 705-706* ; *Cortec Indus., Inc. v. Sum Holding, L.P. (2d Cir 1991) 949 F2d 42, 47*].

Decision Point--Attaching Document to Complaint:

It is important to keep in mind when deciding whether to attach an agreement or other document to a complaint that it can be used against the plaintiff. A plaintiff may characterize an agreement in a favorable manner, but if the actual words of the agreement do not support that characterization or if other terms preclude relief, a motion to dismiss for failure to state a claim may be granted. In addition, even if

a plaintiff does not attach the document relied on, a defendant may request judicial notice of the document if it is specifically mentioned in the complaint and relied on for relief. Defendants frequently seek judicial notice of written documents to contradict the allegations of the complaint or to show that there are other provisions of the document that demonstrate the plaintiff has no claim. Although there are advantages to attaching an important document, if the document contains any information that could be destructive to the plaintiff's claim, it is risky to attach it.

6.09[2] Dividing Statement of Claim Into Paragraphs.

6.09[2][a] Each Paragraph Must Be Numbered. All averments of a claim must be made in numbered paragraphs, so that particular paragraphs may be referred to in other paragraphs of the complaint and in succeeding pleadings and motions [*Fed R Civ P 10(b)*, *(c)*; *SD Cal Civ LR 5.1(k)*].

6.09[2][b] Each Paragraph Must Be Limited to Single Set of Circumstances. The contents of each paragraph must be limited as far as practicable to a statement of a single set of circumstances [*Fed R Civ P 10(c)*; *SD Cal Civ LR 5.1(k)*].

Examples:

When pleading injuries, the varying harms to both person and business caused by a single act or series of related acts can be combined in a single paragraph. Thus, in an auto accident case, a plaintiff can plead in one paragraph all injuries resulting from the defendant's negligent operation of a motor vehicle, including physical injuries, loss of earnings or business opportunities, pain and suffering, and expenses for medical attention and hospitalization, because these injuries all arose from a single set of circumstances [*see* Fed R Civ P Appendix of Forms, Form 11; *see also* Fed R Civ P Appendix of Forms, Forms 13, 14]. Similarly, when pleading the bases for a defendant's liability, varying wrongs, even if inconsistent, can be combined by the plaintiff in a single paragraph. Thus, in an automobile accident case, a plaintiff can plead in one paragraph that a defendant drove a car "willfully or recklessly or negligently," because these actions constitute a single set of circumstances [*see* Fed R Civ P Appendix of Forms, Form 12].

Separate paragraphs may be useful even when there is only a single claim, if many facts or more than a single ground to support the claim are stated in the complaint [*O'Donnell v. Elgin, J. & E. Ry. (1949) 338 US 384, 392, 70 S Ct 200, 94 L Ed 187* (quoting **Moore's**)].

6.09[2][c] Compound Allegations Must Be Avoided. In making allegations on critical issues, ensure that each element is alleged in a separate sentence or paragraph. If the complaint is carefully drafted to avoid compound statements, it may force the defendant into making key admissions in the answer.

Strategic Point--Plaintiff:

If a sentence in the complaint is compound, the defendant will have an easy "out" in answering. The defendant can deny the allegation in its totality, even if only one of the compound elements is untrue. On the other hand, if the compound allegation is replaced by two simple sentences, the defendant's answer must admit or deny each allegation separately [*see Fed R Civ P 8(b)*].

6.09[2][d] LOCAL PRACTICE: CD Cal--Class Action Allegations. If the action is a class action, the complaint must contain a separate section entitled "Class Action Allegations" [*CD Cal Civ LR 23-2*; *see CD Cal Civ LR 23-2.1*, *23-2.2*].

Cross Reference:

Discussion of the information that must be stated in the "Class Action Allegations" section, see *§*

6.08[6][b].

6.09[3] Pleading Separate Counts.

6.09[3][a] Separate Count May Be Pleaded for Each Claim Founded on Separate Transaction or Occurrence. Each claim founded on a separate transaction or occurrence must be stated in a separate count, if separation facilitates the clear presentation of the matters stated [*Fed R Civ P 10(b)*]. Thus, separate counts are required if necessary to enable the defendant to frame a responsive pleading or to enable the court and the other parties to understand the claims [*Bautista v. Los Angeles County (9th Cir 2000) 216 F3d 837, 840* (quoting **Moore's**)].

6.09[3][b] Separate Counts May Be Necessary When Not All Claims Apply to All Parties. Separate counts may be required if there are multiple plaintiffs asserting various claims, to indicate which claims are asserted by which plaintiffs [*Bautista v. Los Angeles County (9th Cir 2000) 216 F3d 837, 840-841* (quoting **Moore's**)]. Similarly, if there are multiple defendants, separate counts may be required in order to clearly indicate which claims are asserted against which defendants [*see Bautista v. Los Angeles County (9th Cir 2000) 216 F3d 837, 840-841* (quoting **Moore's**)].

6.09[3][c] Single Count May Be Used When Sole Claim Applies to All Parties. If all plaintiffs plead an identical claim that would impose joint liability on all defendants, separate counts may not be required, regardless of the number of parties. In such a case, there may be only one transaction or occurrence or one claim involved [*see Fed R Civ P 10(b)*].

6.09[3][d] Defendant's Options If Complaint Does Not Allege Separate Counts. The defendant may obtain detailed information on a claim during pretrial procedures such as discovery and depositions, pretrial conferences, and motions for a more definite statement or for summary judgment [*see Fed R Civ P 12(e)*, *16*, *26*- 37, 56] . Failure to comply with the separate-count requirement will generally result in dismissal of the complaint with leave to replead the claims in separate counts [*see Bautista v. Los Angeles County (9th Cir 2000) 216 F3d 837, 840-841*].

The objective of the requirement of separate counts is clarity in pleading; thus, the failure to state multiple claims in separate counts does not deprive the district court of jurisdiction [*Mechanical Contractors Ass'n of Am., Inc. v. Mechanical Contractors Ass'n of N. Cal., Inc. (9th Cir 1965) 342 F2d 393, 398*]. Moreover, because separate counts are required only when "a separation facilitates the clear presentation of the matters set forth" [*see Fed R Civ P 10(b)*], a failure to use separate counts may be tolerated if it causes no uncertainty.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint
II. PREPARING COMPLAINT

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6.10 Claims May Be Joined.

6.10[1] All of Plaintiff's Claims May Be Joined Against Proper Defendant. A plaintiff asserting a claim for relief in the complaint may join, either as independent or as alternate claims, as many claims--legal, equitable, or maritime--as the plaintiff has against any defendant [*Fed R Civ P 18(a)*]. Thus, the plaintiff may join alternative and inconsistent claims [*Fed R Civ P 8(d)(2), (3)*].

Exceptions:

Limitations on federal subject matter jurisdiction and other doctrines may preclude joinder [*see 6.10[6] -[8]*].

6.10[2] Claims May Be Joined to Original Claim.

6.10[2][a] Claims of One Plaintiff. The plaintiff may join to the original claim any other claims he or she has against the defendant [*Fed R Civ P 18(a)*].

6.10[2][b] Claims of Multiple Plaintiffs. In general, multiple plaintiffs may join in one complaint all transactionally related claims that any plaintiff has against any defendant [*see Fed R Civ P 20(a)*].

6.10[2][c] LOCAL PRACTICE: CD Cal--Copyright, Patent, or Trademark Claims of Multiple Plaintiffs. A complaint must not contain claims by different owners claiming violations of different copyrights, patents or trademarks, unless the complaint is accompanied by a declaration of counsel setting forth grounds showing that joinder will advance the interests of justice and avoid a multiplicity of actions [*CD Cal Civ LR 19-2*].

6.10[3] Contingent Claim May Be Joined to Principal Claim. The plaintiff may join principal and contingent claims in a single complaint, even though technically the contingent claim does not accrue until resolution of the principal claim [*Fed R Civ P 18(b)*].

Example:

A plaintiff may sue a debtor to recover a money judgment, and in the same complaint the plaintiff may join a claim against a third party to whom the debtor has conveyed property, asserting that the

conveyance is in fraud of creditors [*Fed R Civ P 18(b)*].

6.10[4] Alternative, Hypothetical, and Inconsistent Claims May Be Joined. The complaint may include two or more statements of a claim alternatively or hypothetically, either in one count or in separate counts. If two or more statements are made in the alternative and one of them if made independently would be sufficient, the complaint is not made insufficient by the insufficiency of one or more of the alternative statements [*Fed R Civ P 8(d)(2)*; *Molsbergen v. United States (9th Cir 1985) 757 F2d 1016, 1019*].

6.10[5] Determining Whether to Omit Claims.

6.10[5][a] Procedural Rules Do Not Require Joinder. The joinder of claims is permissive, not compulsory [*Fed R Civ P 18(a)*]. Thus, nothing in the procedural rules requires a plaintiff to assert all claims against a defendant in one action [*see Headley v. Bacon (8th Cir 1987) 828 F2d 1272, 1275*].

6.10[5][b] Joining Claims to Avoid Claim Preclusion in Subsequent Suit. The doctrine of claim preclusion, or res judicata, may effectively require a plaintiff to assert all transactionally related claims in a single case. The doctrine of claim preclusion generally precludes a plaintiff from suing the same defendant twice on the same claim. Therefore, a plaintiff must be careful to join all transactionally related claims in a single case [*Lytle v. Household Mfg., Inc. (1990) 494 US 545, 552, 110 S Ct 1331, 108 L Ed2d 504*].

Cross Reference:

Discussion of claim preclusion doctrine, see 18 Moore's Federal Practice, Ch. 131, Claim Preclusion and Res Judicata (Matthew Bender 3d ed.).

6.10[6] Subject Matter Jurisdiction and Venue Must Be Proper for Each Claim.

6.10[6][a] Verify That All Claims Are Within Court's Subject Matter Jurisdiction. Neither the claim-joinder rule nor any of the other Federal Rules of Civil Procedure can expand the jurisdiction of federal courts [*Fed R Civ P 82*]. Therefore, although the procedural rules permit unrestricted joinder of claims as a matter of pleading, the court must have a basis of subject matter jurisdiction for each joined claim [*see Fed R Civ P 18(a)*; *see also United Mine Workers v. Gibbs (1966) 383 US 715, 725 n13, 86 S Ct 1130, 16 L Ed2d 218*].

Cross Reference:

Discussion of subject matter jurisdiction requirements, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.03 -2.30*.

6.10[6][b] Verify That Venue Is Proper for Each Claim. Neither the claim-joinder rule nor any of the other Federal Rules of Civil Procedure can affect the venue provisions governing actions in the federal courts [*Fed R Civ P 82*]. Therefore, although the procedural rules permit unrestricted joinder of claims as a matter of pleading, venue must be proper as to each claim [*see Fed R Civ P 18(a)*; *see also 28 USC § 1391(a)(1), (2), (b)(1), (2)*].

Cross Reference:

Discussion of venue requirements, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.48 -2.60*.

6.10[7] Each Defendant Must Be Properly Joined. The plaintiff may not join claims against a person who has not properly been brought into the case under the various party joinder provisions [*see Fed R Civ P 18(a)*; *see also Fed R Civ P 13(h), 14, 19, 20, 22, 24*].

Cross Reference:

Discussion of party joinder requirements, see *Ch. 4, Determining Parties to the Action, 4.03 -4.29*, *4.41 -4.51*; Ch. 10, Adding, Dropping, and Substituting Parties, see *§§ 10.04 -10.09*.

6.10[8] Joining Claims Involving United States.

6.10[8][a] Sovereign Immunity Limits Assertion of Claims Against United States. A claim against the United States is permitted only if the government has expressly waived its sovereign immunity. The joinder provisions of the Federal Rules of Civil Procedure cannot change this rule [*United States v. Shaw (1940) 309 US 495, 500-501, 60 S Ct 659, 84 L Ed 888*].

Examples:

For example, the United States has waived its sovereign immunity in the following kinds of actions:

- Monetary actions based on torts, under the Federal Tort Claims Act [*28 USC § 1346(b)*].
- Monetary actions not sounding in tort, under the Tucker Act [*28 USC §§ 1346(a)*, *1491*].

Although it is generally true that suit by a sovereign does not effect a waiver as to counterclaims against that sovereign [*see, e.g., Nassau Smelting & Refining Works, Ltd. v. United States (1924) 266 US 101, 106-107, 45 S Ct 25, 69 L Ed 190* ; *United States v. Finn (9th Cir 1956) 239 F2d 679, 682-683*], case law has developed a key exception. Despite the doctrine of sovereign immunity, and even in the absence of express statutory authority, a defendant may recover on a counterclaim (or setoff) to the amount of the underlying claim [*see United States v. United States Fid. & Guar. Co. (1940) 309 US 506, 511, 60 S Ct 653, 84 L Ed 894* ; *United States v. Agnew (9th Cir 1970), 423 F2d 513, 514*]. However, affirmative monetary relief is not available.

6.10[8][b] Tucker Act Effectively Limits Joinder of Claims Against United States. The Tucker Act provides that district courts have original jurisdiction, concurrent with that of the Court of Federal Claims, over any civil non-tort action against the United States, not exceeding $10,000, that has its basis in federal law or any express or implied contract with the United States. The Court of Federal Claims has exclusive jurisdiction over such claims exceeding $10,000 [*28 USC §§ 1346(a)*, *1491*].

Although the Tucker Act contains no express restrictions on joinder of claims, its limits on the district court's jurisdiction may effectively restrict joinder. Thus, a plaintiff cannot join a tort claim with a Tucker Act claim in excess of $10,000, because the district court has exclusive jurisdiction of the tort claim, while the Court of Federal Claims has exclusive jurisdiction of the Tucker Act claim [*28 USC § 1346(b)(1)*; *see 28 USC §§ 1346(a)*, *1491(a)*].

6.10[8][c] Free Joinder of Claims Asserted by United States. When the United States is the plaintiff, there is no issue of sovereign immunity, for the simple reason that no one is asserting liability against the government. Like other plaintiffs, the United States may take advantage of unrestricted joinder of claims [United States v. 93. *970 Acres of Land (1959) 360 US 328, 332, 79 S Ct 1193, 3 L Ed2d 1275* ; *see Fed R Civ P 18(a)*].

6.10[9] Joined Claims May Be Segregated.

6.10[9][a] Court May Order Separate Trials of Properly Joined Claims or Issues. The court has discretion to order separate trials of claims or issues that have been properly joined in the same complaint [*see Fed R Civ P 20(b)*, *42(b)*].

6.10[9][b] Dismissal or Severance of Improperly Joined Claims. If a claim is asserted against a party that cannot be joined in the case under the party joinder provisions, the court may dismiss the misjoined party without dismissing the remainder of the action. Alternatively, the court may order that the claim against the misjoined party be

severed from the case and pursued in a separate action [*Fed R Civ P 21*].

Legal Topics:

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6.11 Certain Matters Must Be Specially Pleaded.

6.11[1] Pleading Special Capacity of Party. It is not necessary for a complaint to aver the capacity of a party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court or as required by other rules [*Fed R Civ P 9(a)*].

If the plaintiff desires to raise an issue as to the legal existence of any party, or the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, the plaintiff party must do so by specific negative averment that includes such supporting particulars as are peculiarly within the plaintiff's knowledge [*Fed R Civ P 9(a)*].

Cross Reference:

Further discussion of pleading the parties' capacity, see *6.08*. General discussion of capacity, see Ch. 4, Determining Parties to Action, see *§§ 4.20 -4.40*.

6.11[2] Pleading Fraud or Mistake.

6.11[2][a] Fraud and Mistake Must Be Alleged With Particularity. In all averments of fraud or mistake, the circumstances constituting the fraud or mistake must be stated with particularity [*Fed R Civ P 9(b)*]. This heightened pleading requirement allows the fraud-action defendant to "prepare an adequate answer from the allegations" [*Odom v. Microsoft Corp. (9th Cir 2007) 486 F3d 541, 553* ; *see, e.g., In re Gilead Sciences Sec. Litig. (9th Cir 2008) 536 F3d 1049, 1056* (investors sufficiently pleaded loss causation); *Berson v. Applied Signal Tech., Inc. (9th Cir 2008) 527 F3d 982, 989-990* (investors' complaint offered sufficient detail "to give defendants ample notice of [their] loss causation theory, and to give us some assurance that the theory has a basis in fact")]. Thus, although mere conclusory allegations of fraud will not suffice, statements of the time, place, and nature of the alleged fraudulent activities are sufficient to meet the particularity requirement [*Bosse v. Crowell, Collier & MacMillan (9th Cir 1977) 565 F2d 602, 611*].

Distinguish:

The element of scienter--the defendant's intent to defraud--usually may be pleaded generally [*Fed R Civ*

P 9(b); *see 6.11[3]*].

6.11[2][b] Particular Circumstances of Fraud Must Be Alleged. The requirements of particularity may differ with the facts of each case. However, the circumstances constituting fraud usually include the following [*see In re Glenfed, Inc. Sec. Litig. (9th Cir 1994) 42 F3d 1541, 1547 n7* (en banc) (citing **Moore's**)]:

- The fraudulent statement.
- The time and place of the fraudulent statement.
- The person or persons making the fraudulent statement.
- The method of communicating the fraudulent statement.
- An explanation of why the statement was misleading.
- The resulting injury.

Example--Insufficient Detail:

A complaint that alleges corporate fraud does not meet the particularity requirement by making a general allegation of "confidential non-public information" that would reveal "true facts" inconsistent with the allegedly fraudulent statements [*Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 994-996* ; *see Glazer Capital Mgmt., LP v. Magistri (9th Cir 2008) 549 F3d 736, 743-745* (discussing doctrines of "collective scienter" and "group pleading," but declining to decide whether it is possible to plead scienter under collective theory); *cf. McCasland v. FormFactor Inc. (ND Cal 2008) 2008 US Dist LEXIS 60544, at *22-*23* (rejecting concept of "collective scienter" and holding that for each allegedly false or misleading statement, plaintiff must specify statement, describe circumstances under which it occurred, identify declarant, state why statement was false when made, and plead facts that give rise to strong inference of recklessness and strongly suggest scienter)].

Strategic Point--Defendant:

If the plaintiff has not done so, the defendant should move to require the plaintiff to attach copies of documents forming the basis of the fraud claim to the complaint [*see, e.g., United States v. Sequel Contractors, Inc. (CD Cal 2005) 402 F Supp2d 1142, 1154*].

Cross Reference:

Discussion of additional requirements for pleading fraud in a private securities fraud action under the Private Securities Litigation Reform Act of 1995 [*15 USC § 78u-4(b)*], see *§ 6.11[4]*.

6.11[2][c] Each Defendant's Participation in Fraud Must Be Described. If multiple defendants are accused of committing a fraud, the complaint should make specific and separate allegations against each defendant [*see Middlesex Ret. Sys. v. Quest Software, Inc. (CD Cal 2008) 2008 US Dist LEXIS 68419, at *7]* .

6.11[2][d] Substantive Elements of Fraud Must Be Alleged. The particular circumstances that must be pleaded in a fraud case depend on the substantive elements of a fraud claim under applicable substantive law. Thus, if a claim is based on substantive federal law, the elements of fraud are defined by federal law [*Pence v. United States (1942) 316 US 332, 334, 62 S Ct 1080, 86 L Ed 1510*]. If the federal court's jurisdiction over a claim is based on diversity of citizenship or supplemental jurisdiction, state substantive law usually defines fraud [*see 389 Orange St. Partners v. Arnold (9th Cir 1999) 170 F3d 1200, 1205 n2*].

Warning:

In an action in federal district court, even if state law provides the elements of fraud, the plaintiff must plead the circumstances constituting the fraud with particularity [*389 Orange St. Partners v. Arnold (9th Cir 1999) 170 F3d 1200, 1205 n2* ; *see Fed R Civ P 9(b)*].

6.11[2][e] Fraud Is Alleged on Information and Belief When Details Are Inaccessible. Pleadings alleging fraud based on information and belief usually do not satisfy the particularity requirement. However, when the facts constituting fraud are particularly within the defendant's knowledge or are otherwise inaccessible to the plaintiff, the particularity requirement may be satisfied by pleading fraud on information and belief, if the complaint identifies the available information on which the allegation of fraud is founded, as well as the efforts made to obtain additional information [*see United States ex rel. Lee v. SmithKline Beecham, Inc. (9th Cir 2001) 245 F3d 1048, 1051-1052*]. This rule excuses a party from pleading intent under an elevated pleading standard; it does not allow a party to evade Rule 8's pleading requirements that plaintiff allege enough facts to state a claim for relief that is plausible on its face [*see Ashcroft v. Iqbal (2009) ___ US ___, 129 S Ct 1937, 173 L Ed2d 868, 889* (discrimination action)].

Example--Insufficient Basis for Pleading on Information and Belief:

In one case, the Ninth Circuit held that, although the particularity requirement may be relaxed if evidence of fraud is within the defendant's exclusive possession, there was insufficient reason to relax the requirement for a plaintiff who brought a False Claims Act suit against his former employer. Having been an employee of the defendant, the plaintiff had had adequate access to necessary facts and had no legitimate excuse for filing a vague complaint [*United States ex rel. Lee v. SmithKline Beecham, Inc. (9th Cir 2001) 245 F3d 1048, 1051-1052*].

6.11[2][f] Particularity in Pleading Mixed Claims. The particularity requirement applies to all averments of fraud, whether in the context of common-law or statutory claims [*In re Glenfed, Inc. Sec. Litig. (9th Cir 1994) 42 F3d 1541, 1545 n3* (en banc)].

Example:

The particularity requirement applied to plaintiff's fraud claims in his putative class action against defendant car dealership, alleging violation of California's consumer protection statutes (California's Consumers Legal Remedies Act, *CC §§ 1750-1784*, and California's Unfair Competition Law, *B & P C §§ 17200-17210*), related to misrepresentations and fraud by defendant regarding its "certified pre-owned" vehicles program. Even though fraud was not a necessary element of plaintiff's claims under either statute, his claims were all grounded in fraud [*Kearns v. Ford Motor Co. (9th Cir 2009) 567 F3d 1120, 1125-1126]* .

Distinguish:

If fraud is an essential element of a claim, then the pleading of that claim as a whole must satisfy the particularity requirement [*Vess v. Ciba-Geigy Corp. USA (9th Cir 2003) 317 F3d 1097, 1103-1104*]. However, if a claim combines an allegation of fraud with an allegation of nonfraudulent wrongdoing, only the fraud is subject to the particularity requirement [*Vess v. Ciba-Geigy Corp. USA (9th Cir 2003) 317 F3d 1097, 1104-1105* ; *Lewis v. Sporck (ND Cal 1985) 612 F Supp 1316, 1324*].

Example:

A civil claim under the Racketeer Influenced and Corrupt Organizations Act (RICO) involves predicate racketeering acts that may be based on fraud, as well as the existence of an enterprise to carry on the racketeering [*see 18 USC § 1961 et seq.*]. Although fraud-based predicate acts in a RICO civil claim must be pleaded with particularity, nonfraudulent predicate acts, and the existence of the racketeering enterprise, in the same action may be averred generally [*Lewis v. Sporck (ND Cal 1985) 612 F Supp 1316, 1324*].

6.11[2][g] Consequences of Failure to Comply With Particularity Requirement. The defendant may raise a failure to plead fraud or mistake with sufficient particularity by a motion to dismiss or a motion for a more definite statement [*see Fed R Civ P 12(b)(6), (e)*].

Consider:

If the complaint fails to satisfy the particularity requirement, the court will usually allow the plaintiff to amend the complaint to bring it into compliance, unless an amendment would be futile [*see Doe v. United States (9th Cir 1995) 58 F3d 494, 497*].

Cross References:

Discussion of motions to dismiss and motions for a more definite statement, see Ch. 8, Answers and Responsive Motions Under Rule 12, *§§ 8.14 -8.22, 8.25*. Discussion of amending pleadings, see Ch. 9, Amending and Supplementing Pleadings, *§§ 9.03 -9.18*.

6.11[3] Pleading Conditions of Mind.

6.11[3][a] Averring Conditions of Mind Generally. Malice, intent, knowledge, and any other condition of mind of a person may be averred generally [*Fed R Civ P 9(b)*].

6.11[3][b] Making General Averment of Scienter in Fraud Claim. Because state of mind may be averred generally, the particularity requirement for pleading a claim of fraud applies only to the specific statements or conduct giving rise to the fraud claim. Scienter, the defendant's specific intent to defraud, may be averred generally [*In re GlenFed, Inc. Sec. Litig. (9th Cir 1994) 42 F3d 1541, 1547* (en banc)].

Exception:

In a securities fraud class action, the complaint must include a statement that identifies with particularity the facts giving rise to a strong inference that the defendant acted with an intent to defraud [*15 USC § 78u-4(b)(2)*].

Cross Reference:

Discussion of special requirements for pleading securities fraud in a class action, see *§ 6.11[4]*.

6.11[3][c] Defendant's Motion for More Definite Statement. If a general averment of condition of mind is so vague or ambiguous thatthe defendant cannot reasonably be required to frame a responsive pleading, the court may require more detail of the plaintiff by granting the defendant's motion for a more definite statement [*see Fed R Civ P 12(e)*].

Cross Reference:

Coverage of a motion for a more definite statement, see Ch. 8, Answers and Responsive Motions Under Rule 12, *§ 8.25*.

6.11[4] Alleging Fraud Under Private Securities Litigation Reform Act of 1995.

6.11[4][a] Pleading Securities Fraud Is Subject to Special Statutory Requirements. The Private Securities Litigation Reform Act of 1995 (PSLRA) adds special pleading requirements for a private claim of securities fraud under Section 10(b) of the Securities Exchange Act of 1934 [*see 15 USC § 78j*] and its accompanying rules and regulations, most notably Securities Exchange Act *Rule 10b-5* [*see 17 CFR § 240.10b-5*]. Under the PSLRA, a complaint alleging securities fraud in such an action must contain all of the following [*15 USC § 78u-4(b)(1), (2)*]:

- A specification of each statement alleged to be misleading.

- The reason or reasons that each specified statement is misleading [*see 6.11[4][b]*].

- If an allegation regarding the statement or omission is made on information and belief, a statement that identifies with particularity all the facts on which that belief is formed [*see 6.11[4][c]*].

- A scienter allegation that identifies with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind [*see 6.11[4][d]*].

- A "loss causation" allegation that provides the defendant with notice of what the relevant loss might be and of what the causal connection might be between that loss and the alleged misrepresentation [*see 6.11[4][e]*].

Consider:

The PSLRA does not completely supersede the general requirements of *Fed R Civ P 8(a)* and *(d)* that the complaint should be in the form of a "short and plain statement" of the claims and that pleadings should be "simple, concise, and direct." To the extent possible, the information required by the PSLRA should be stated in short, plain, and non-redundant allegations [*Wenger v. Lumisys, Inc. (ND Cal 1998) 2 F Supp2d 1231, 1240*].

6.11[4][b] Alleging That Particular Statement Is Misleading. Under the PSLRA, an allegation of fraud must explain why the statement was misleading as of the time it was made [*Fischer v. Vantive Corp. (In re Vantive Corp. Secs. Litig.) (9th Cir 2002) 283 F3d 1079, 1091-1092*].

6.11[4][c] Making Allegations on Information and Belief. Under the PSLRA, an allegation made on information and belief must include a statement that identifies with particularity all the facts on which that belief is formed [*15 USC § 78u-4(b)(1)*]. Included among these facts are the sources of the plaintiff's information and belief [*In re Silicon Graphics Sec. Litig. (9th Cir 1999) 183 F3d 970, 985*].

A personal source of information, such as a confidential witness, relied on in a complaint need not be named but must be described in the complaint with enough particularity to support the probability that a person in the position occupied by the source would possess the information alleged [*In re Daou Sys. (9th Cir 2005) 411 F3d 1006, 1015* ; *Nursing Home Pension Fund, Local 144 v. Oracle Corp. (9th Cir 2004) 380 F3d 1226, 1233*].

Example--Insufficient Detail:

It is not sufficient for a plaintiff's complaint to state a belief that certain unspecified sources will reveal, after discovery, facts that will validate the claim of fraud [*In re Silicon Graphics Sec. Litig. (9th Cir 1999) 183 F3d 970, 985*]; *see Swartz v. KPMG LLP (9th Cir 2007) 476 F3d 756, 765* (conclusory allegations of fraud were insufficient as a matter of law)].

6.11[4][d] Alleging Scienter With Particularity. The Supreme Court has held that in order to plead a "strong inference" of scienter as required in secuirty fraud actions by the PSLRA, a complaint must include allegations that give rise to an inference of fraudulent intent that is not merely plausible or reasonable, but is "cogent and at lease as compelling as any opposing inference of nonfraudulent intent" [*Tellabs, Inc. v. Makor Issues & Rights, Ltd. (2007) 551 US 308, 127 S Ct 2499, 168 L Ed2d 179, 187-188* (establishing methodology to be applied by lower courts); *see Gompper v. VISX, Inc. (9th Cir 2002) 298 F3d 893, 897* (in determining whether plaintiffs have shown a strong inference of scienter under PRSLA, court must consider all reasonable inferences to be drawn from allegations, including inferences unfavorable to plaintiffs)].

In the Ninth Circuit, a complaint under the PSLRA alleges scienter sufficiently only if it alleges facts that "create a strong inference of knowing or intentional conduct." The complaint must contain allegations of specific contemporaneous statements or conditions that demonstrate the intentional or the deliberately reckless false or

misleading nature of the statements when made [*In re Read-Rite Corp. Sec. Litig (9th Cir. 2003) 335 F3d 843, 846* ; *In re Silicon Graphics Sec. Litig. (9th Cir 1999) 183 F3d 970, 974* ; *see, e.g., Middlesex Ret. Sys. v. Quest Software, Inc. (CD Cal 2008) 2008 US Dist LEXIS 68419, at *26* (allegations supported strong inference that defendants knew or were deliberately reckless in not knowing that their intentional backdating procedures rendered Quest's financial statements misstated)].

The Ninth Circuit conducts a dual inquiry to analyze different types of scienter allegations. First, the court determines whether any of the plaintiff's allegations, standing alone, are sufficient to create a strong inference of scienter. Second, if no individual allegations are sufficient, the court conducts a "holistic" review of the same allegations to determine whether the insufficient allegations combine to create a strong inference of intentional conduct or deliberate recklessness [*Zucco Partners, LLC v. Digimarc Corp. (9th Cir. 2009) 2009 US App LEXIS 7025, at *17-*18* ; *see Rubke v. Capitol Bancorp, Ltd. (9th Cir 2009) 551 F3d 1156, 1165* (before summarily dismissing complaint whose individual allegations are insufficient under PSLRA, court must perform second holistic analysis to determine whether complaint contains an inference of scienter that is greater than the sum of its parts)].

Example:

Plaintiffs' complaint alleged that defendants used accounting manipulations to deceive investors into believing that the corporation had become profitable. Plaintiffs argued that the district court applied a more stringent standard than required in *Tellabs, Inc. v. Makor Issues & Rights, Ltd. (2007) 551 US 308, 313-314, 127 S Ct 2499, 168 L Ed2d 179* in determining that the complaint failed to allege a strong inference of scienter as required under the PSLRA. The Ninth Circuit, however, held that *Tellabs* did not materially alter the particularity requirement for scienter claims established in the circuit's previous decisions, but instead added an additional "holistic" component to those requirements. In this case, none of plaintiffs' allegations, standing alone, were sufficient to create a strong inference of scienter. And in considering the complaint in its entirety, the voluminous allegations taken together were not as cogent or compelling as a plausible alternative inference--that although the corporation was experiencing problems controlling and updating its accounting and inventory practices, there was no specific intent to fabricate the accounting misstatements at issue [*Zucco Partners, LLC v. Digimarc Corp., 2009 US App LEXIS 7025, at *28-*42* ; *see, e.g., City of Westland Police & Fire Ret. Sys. v. Sonic Solutions (2009) 2009 US Dist LEXIS 33339, at *22-*26* (lead plaintiffs have not plead with particularity any other facts that would show how defendants' insider trading supported strong inference of scienter); *cf. Berson v. Applied Signal Tech., Inc. (9th Cir 2008) 527 F3d 982, 987-990* (permitting securities plaintiff to rely on core operations inference without particularized allegations about defendants' access to relevant information)].

Warning:

Drawing an inference that facts crucial to company's "core operations" (or to a particular important transaction) were known by the company's key officers, while permissible, is not alone sufficient--except in unusual circumstances--to adequately plead scienter [*South Ferry LP, No. 2 v. Killinger (9th Cir 2008) 542 F3d 776, 784-785* ("*Tellabs* counsels us to consider the totality of the circumstances, rather than to develop separately rules of thumb for each type of scienter allegation.")].

Pleadings showing only motive and opportunity, or nondeliberate recklessness, do not adequately plead scienter. The Ninth Circuit requires the pleadings to show *intentional acts* or *deliberate recklessness* [*In re Silicon Graphics Sec. Litig. (9th Cir 1999) 183 F3d 970, 974]* .

Stock sale allegations only raise an inference of scienter if specific facts are alleged that show that the sales were "dramatically out of line with prior trading practices at times calculated to maximize the personal benefit from undisclosed inside information" [*In re Silicon Graphics Sec. Litig. (9th Cir 1999) 183 F3d 970, 986* ; *In re* Gilead Scis. Sec. Litig. (ND Cal 2005) 2005 US Dist LEXIS 3170, at *30].

Strategic Point:

Courts will consider allegations of scienter collectively. Even if individual allegations are lacking by themselves, the totality of the allegations may create a strong inference that defendants acted with deliberate recklessness [*No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America W. Holding Corp. (9th Cir 2003) 320 F3d 920, 938 , cert. denied, 540 US 966 (2003)*].

Prior to the enactment of the PSLRA, securities fraud plaintiffs could plead on information and belief that members of corporate management had the required scienter if alleged corporate misrepresentations appeared in "group published" documents such as prospectuses, annual reports, and press releases [*see In re Glenfed, Inc. Sec. Litig. (9th Cir 1995) 60 F3d 591, 593*]. The extent to which this "group published" or "group pleading" doctrine continues to apply in actions subject to the PSLRA, which heightened the particularity requirement for pleading scienter, is unclear. The Ninth Circuit has not squarely addressed the issue [*see Howard v. Everex Sys., Inc. (9th Cir 2000) 228 F3d 1057, 1065-1066* (arguably recognizing continuing existence of group pleading doctrine)]. California district courts are in conflict [*compare In re Real Estate Assocs. Ltd. P'ship Litig. (CD Cal 2002) 223 F Supp2d 1142, 1149-1150* (recognizing doctrine's continuing viability); *In re Secure Computing Corp. Sec. Litig. (ND Cal 2000) 120 F Supp2d 810, 821* (same); with *In re Lockheed Martin (CD Cal 2002) 272 F Supp2d 928, 936* (finding doctrine inconsistent with PSLRA)].

Distinguish:

Because actions brought by the SEC are not subject to the PSLRA, the "group published" information doctrine may apply but the presumption must be reasonable in the particular case [*see, e.g., SEC v. Yuen (CD Cal 2004) 221 FRD 631, 637* (given substantial discovery engaged in by SEC, reliance on doctrine with respect to three defendants was misplaced and inappropriate)].

6.11[4][e] Alleging Loss Causation. The securities fraud plaintiff must allege and prove that the alleged misleading statements caused the loss for which the plaintiff seeks to recover [*15 USC § 78u-4(b)(4)*]. This requirement is not satisfied by merely alleging in the complaint, and subsequently establishing, that the price of the security was inflated on the date of purchase because of the misrepresentation. An inflated purchase price does not itself constitute, and may not proximately cause, the required economic loss. The complaint must provide the defendant with an indication of the loss and the causal connection between the misrepresentation and that loss [*Dura Pharms., Inc. v. Broudo (2005) 544 US 336, 342-346, 125 S Ct 1627, 161 L Ed2d 577*].

In order to satisfy these requirement, the plaintiff need only allege "facts that, if taken as true, plausibly establish loss causation" [*In re Gilead Sciences Sec. Litig. (9th Cir 2008) 536 F3d 1049, 1057* (citing with approval decisions by other circuits suggesting that loss causation is fact-intensive inquiry better suited for determination at trial than at pleading stage)].

6.11[5] Pleading Conditions Precedent.

6.11[5][a] Make General Averment of Performance or Occurrence of Condition Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred [*Fed R Civ P 9(c)*].

6.11[5][b] Make Specific Denial of Performance or Occurrence of Condition Precedent. A denial of the performance or occurrence of a condition precedent must be made specifically and with particularity [*Fed R Civ P 9(c)*].

6.11[6] Pleading Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law [*Fed R Civ P 9(d)*].

Examples:

A complaint in a patent infringement action may allege that "Letters Patent Nos _____ ... were duly and legally issued" [Fed R Civ P Appendix of Forms, Form 18]. A complaint in a copyright infringement action may allege that the plaintiff "complied in all respects with" the applicable copyright law and "received from the Register of Copyrights a certificate of registration" [Fed R Civ P Appendix of Forms, Form 19].

6.11[7] Pleading Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it is sufficient to aver the judgment or decision without setting forth any matter showing jurisdiction to render it [*Fed R Civ P 9(e)*].

6.11[8] Alleging Time and Place.

6.11[8][a] Make Averments of Time and Place With Precision. Averments of time and place are material and must be made with precision. In testing the sufficiency of the complaint, the court will treat averments of time and place like all other averments of material matter [*Fed R Civ P 9(f)*].

Warning:

Because it is deemed a material allegation, a date used by a plaintiff in pleading a claim may trigger a dismissal if the face of the complaint shows that the statute of limitations has run [*see Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd. (9th Cir 1950) 185 F2d 196, 204*].

6.11[8][b] Determine Whether Averments of Time and Place Are Necessary. That averments of time and place are deemed material does not mean that all complaints must contain averments of time and place [*see Fed R Civ P 9(f)*]. Whether time and place must be alleged depends on the substantive law that provides the elements of the plaintiff's claim and on any other applicable pleading rules.

Example:

A complaint asserting a fraud claim must allege the circumstances constituting the fraud, including the time and place of the fraud [*see Fed R Civ P 9(b)*; *In re Glenfed, Inc. Sec. Litig. (9th Cir 1994) 42 F3d 1541, 1547 n7* (en banc) (citing **Moore's**)].

Cross References:

Discussion of the requirements for pleading fraud in most cases, see *§ 6.11[2]*. Discussion of the special requirements for pleading securities fraud, see *§ 6.11[4]*.

6.11[8][c] Consequences of Insufficient Averments of Time and Place. If the complaint does not contain averments of time and place, the defendant may make one of the following motions to determine whether issues of time and place foreclose the plaintiff's claim:

- A motion to dismiss [*see Fed R Civ P 41(b)*].
- A motion for a more definite statement [*see Fed R Civ P 12(e)*].
- A motion for summary judgment [*see Fed R Civ P 56*].

If the court finds that the complaint contains insufficient averments of time and place, the court will usually allow the plaintiff to amend the complaint to bring it into compliance, unless an amendment would be futile [*see Fed R Civ P 15(a)*; *see Doe v. United States (9th Cir 1995) 58 F3d 494, 497*].

Cross References:

Discussion of motions to dismiss, see Ch. 8, Answers and Responsive Motions Under Rule 12, § 8.21. Discussion of a motion for a more definite statement, see Ch. 8, Answers and Responsive Motions Under Rule 12, § 8.25. Discussion of summary judgment, see Ch. 29, Summary Judgment. Discussion of amending pleadings, see Ch. 9, Amending and Supplementing Pleadings, *§§ 9.03 -9.14*.

6.11[9] Pleading Special Damages.

6.11[9][a] Specifically State Items of Special Damages. If the plaintiff claims any items of special damages, they must be specifically stated in the complaint [*Fed R Civ P 9(g)*].

6.11[9][b] Special Damages Defined. "Special damages" are damages that, although resulting from the commission of the wrong, are unusual for the claim in question and not normally associated with the claim [*Avitia v. Metropolitan Club, Inc. (7th Cir 1995) 49 F3d 1219, 1226* ; *Botosan v. Fitzhugh (SD Cal 1998) 13 F Supp2d 1047, 1053*].

Example:

In contract cases, damages for personal injury are special damages, because they are not normally associated with contract breach. In contrast, personal-injury damages are normal in automobile accident cases [*see Avitia v. Metropolitan Club, Inc. (7th Cir 1995) 49 F3d 1219, 1226*].

6.11[9][c] Alleging Special Damages for Certain Libel Claims. Under California law, when an alleged libel is not actionable per se, an allegation of special damages is an essential element of the claim [*CC § 45a*].

Under California law, libel per se is a libel that is defamatory of the plaintiff without the necessity of explanatory matter or any other extrinsic fact [*CC § 45a*]. Special damages are all damages that the plaintiff alleges and proves that he or she has suffered in respect to his or her property, business, trade, profession, or occupation, including money the plaintiff alleges and proves that he or she has expended as a result of the alleged libel [*CC § 48a(4)(b)*].

Cross Reference:

Discussion of libel actions under California law, see 30 California Forms of Pleading and Practice, Ch. 340, Libel and Slander (Matthew Bender).

6.11[9][d] Drafting Special Damages Allegation. Special damages should be stated in an itemized form rather than in a lump sum. Itemization, however, is not required beyond the point at which it becomes evidentiary rather than allegational [*Kuenzell v. United States (ND Cal 1957) 20 FRD 96, 100*].

Example:

In one case, the plaintiffs alleged special damages of $500,000 in lost profits from several businesses; the court required the plaintiffs to amend the complaint to itemize the amount of damage suffered by each business. However, the court did not require the complaint to specify evidentiary matters such as where the businesses were located and the circumstances giving rise to the loss of profits [*Kuenzell v. United States (ND Cal 1957) 20 FRD 96, 100*].

6.11[9][e] Consequences of Failure to Plead Special Damages. If the complaint fails to specify special damages, the defendant may make one of the following motions:

- A motion to dismiss [*see Fed R Civ P 41(b)*].
- A motion for a more definite statement [*see Fed R Civ P 12(e)*].

- A motion for summary judgment [*see Fed R Civ P 56*].

- A motion to exclude evidence of special damages as being irrelevant to the issues raised by the pleadings [*see* Fed R Evid 103, *401*].

Recovery of damages may be denied if the complaint fails to state the damages specifically. However, leave to amend the complaint usually will be granted unless allowing the amendment would result in prejudice to the defendant [*see Fed R Civ P 15(b)*].

Cross References:

Discussion of motions to dismiss, see Ch. 28, Answers and Responsive Motions Under Rule 12, § 8.21. Discussion of a motion for a more definite statement, see Ch. 8, Answers and Responsive Motions Under Rule 12, § 8.25. Discussion of summary judgment, see Ch. 29, Summary Judgment. Discussion of amending pleadings, see Ch. 9, Amending and Supplementing Pleadings, *§§ 9.03 -9.14*.

6.11[10] Pleading Admiralty and Maritime Claims.

6.11[10][a] Electing to Invoke Admiralty and Maritime Jurisdiction. If a complaint sets forth a claim that is within the admiralty and maritime jurisdiction and within the jurisdiction of the federal district court on some other ground, the plaintiff may elect to have the claim treated as an admiralty or maritime claim for certain purposes. To make the election, the plaintiff must include in the complaint a statement identifying the claim as an admiralty or maritime claim for the purposes of *Fed R Civ P 14(c)* (impleading third parties), *Fed R Civ P 38(e)* (jury), *Fed R Civ P 82* (venue), and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions [*Fed R Civ P 9(h)*].

Distinguish:

If a claim is cognizable only in admiralty, it will be treated as an admiralty or maritime claim for the purposes of *Fed R Civ P 14(c)*, *38(c)*, and *82*, and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions whether or not the complaint identifies it as such [*Fed R Civ P 9(h)*].

Substantive admiralty and maritime law will apply regardless of whether the plaintiff expressly invokes admiralty and maritime jurisdiction [*Carey v. Bahama Cruise Lines (1st Cir 1988) 864 F2d 201, 206* ; *see Chan v. Society Expeditions, Inc. (9th Cir 1994) 39 F3d 1398, 1403*].

6.11[10][b] Procedural Consequences of Pleading Admiralty or Maritime Claim. Electing to proceed under the court's admiralty and maritime jurisdiction has the following procedural consequences:

- The claim will not be triable by a jury [*Fed R Civ P 9(h), 38(e)*; *Fitzgerald v. United States Lines Co. (1963) 374 US 16, 20, 83 S Ct 1646, 10 L Ed2d 720*].

Exception:

The election to proceed in admiralty does not deprive the defendant of a jury trial on properly joined counterclaims, even if the result is a jury trial of the entire case [*Wilmington Trust v. United States Dist. Court (9th Cir 1991) 934 F2d 1026, 1032*].

- The general venue statutes will not apply to the claim; instead, general admiralty practice controls. Venue of an admiralty action in personam is in any district where service of process could have been made on a defending party, and venue of an admiralty action in rem is in the district where seizure of a vessel is made or other property is found or a substitute of the res exists [*see Fed R Civ P, Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F(9)*].

- If the defendant impleads a third party and alleges that the third party is liable to the plaintiff on the original claim, the action will proceed as if the plaintiff had originally brought the claim against the third party as well as the defendant [*Fed R Civ P 9(h), 14(c)*; *see Fed R Civ P, Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, Rule C(6)(a)(1)*].

- An interlocutory appeal may be taken from an interim decree that determines the rights and liabilities of the parties on any admiralty or nonadmiralty claim that is properly joined in the case [*28 USC § 1292(a)(3)*; *Fed R Civ P 9(h)*].

- Depending on the nature of the claim, the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions may apply [*see* Fed R Civ P, Supplemental Rules for Certain Admiralty and Maritime Claims, Rule A].

6.11[10][c] LOCAL PRACTICE: ED Cal Admiralty Requirements.

Caption: To proceed under admiralty and maritime jurisdiction, the complaint must state "In Admiralty" following the name of the court, in addition to the necessary statement identifying the claim as an admiralty or maritime claim in the body of the complaint [ED Cal Adm LR 510(a)]. If the complaint also contains one or more claims at law, it must state "At Law and In Admiralty" following the name of the court [ED Cal Adm LR 510(a)].

Mandatory Allegations: A complaint in a Supplemental Rule B or C action [*Fed R Civ P, Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions Rules B, C*] must state the dollar amount of the debt, damages, or salvage for which the action is brought. This dollar amount must also be stated in the process, together with a description of the nature of any other items of damage, including any unliquidated items claimed, such as attorney's fees. The defendant or claimant may post bond pursuant to Supplemental Rule E(5) based on such allegations [ED Cal Adm LR 510(b); *see ED Cal Gen LR 151*; ED Cal Adm LR 523].

Mandatory Allegations in Salvage Actions: In a salvage action, the complaint must state the known or estimated dollar value of the hull, cargo, freight, and other property salved, the dollar amount claimed, and the names of the principal salvers. The complaint must also state that the action is instituted in their behalf and in behalf of all other persons interested or associated with them [ED Cal Adm LR 510(c)].

Affidavit Showing Defendant's Absence: In an in personam action, if the defendant cannot be found within the district, the complaint offered for filing must be accompanied by an affidavit of the plaintiff or plaintiff's attorney stating with particularity the efforts made to obtain *in personam* jurisdiction over the defendant within the district. In this context, the phrase "not found within the district" means that, in an *in personam* action, the defendant cannot be served with the summons and complaint as provided in *Fed R Civ P 4* [ED Cal Adm LR 510(d)].

6.11[11] Pleading Copyright Infringement. To prevail on a claim of copyright infringement, the plaintiff must establish the plaintiff's ownership of the copyright and the defendant's infringement of that copyright. A complaint may allege infringement either by alleging specific acts of copying or by alleging (1) the defendant's access to the copyrighted work and (2) substantial similarity between the copyrighted work and the defendant's work [*see Litchfield v. Spielberg (9th Cir 1984) 736 F2d 1352, 1355*]. In alleging particular infringing acts, some specificity is required [*see* Fed R Civ P Appendix of Forms, Form 19; *see also Hartman v. Hallmark Cards, Inc. (WD Mo 1986) 639 F Supp 816, 820*].

Cross Reference:

Form illustrating the specificity required in stating a claim of copyright infringement, see *§ 6.27*.

6.11[12] Making Necessary Allegations in Shareholder Derivative Action.

6.11[12][a] Determine Whether Action Is Derivative Action. A "derivative action" is one brought by one or more shareholders or members of a corporation or of an unincorporated association to enforce a right that the corporation or association could assert but has failed to assert [*Fed R Civ P 23.1*].

Prerequisite:

The action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association [*Fed R Civ P 23.1*].

6.11[12][b] Required Allegations. In a derivative action, in addition to the allegations necessary to establish the corporation or association's substantive right to relief, the complaint must include all of the following [*Fed R Civ P 23.1*]:

- An allegation that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains, or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law (the "contemporary ownership requirement").

- An allegation that the action is not a collusive one to confer jurisdiction on the federal district court that it would not otherwise have.

- Allegations stating with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority of the corporation or association, and from the shareholders or members if necessary, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. (the "demand requirement")

- A verification.

If the pleading requirements of *Fed R Civ P 23.1* are not satisfied, the complaint may be dismissed for failing to state a claim under *Fed R Civ P 12(b)(6)* [*see, e.g.,* Mitzner v. Hastings (ND Cal 2005) 2005 US Dist LEXIS 835 (plaintiff failed to sufficiently plead futility of making demand on board of directors); *In re* OmniVision Techs., Inc. (ND Cal 2004) 2004 US Dist LEXIS 22215 (plaintiffs were not shareholders at time of transactions of which they complained)]. However, failure to meet the demand requirement may be excused if the facts show that demand would have been futile [*Potter v. Hughes (9th Cir 2008) 546 F3d 1051, 1056* (shareholder was not excused from demand requirement on grounds of futility)].

Cross Reference:

Discussion of shareholder derivative actions, see 5 Moore's Federal Practice, Ch. 23.1, Derivative Actions (Matthew Bender 3d ed.).

Complaint and allegations forms for use in shareholder derivative actions, see 5 *Bender's Federal Practice Forms, Forms 23.1:1- 23.1:13* (Matthew Bender).

6.11[13] Alleging Specific Facts in Support of Request for Ex Parte Temporary Restraining Order. A complaint that requests an ex parte temporary restraining order must allege specific facts sufficient to prove that the plaintiff will suffer immediate and irreparable injury, loss, or damage before the defendant can be heard in opposition to the request [*Fed R Civ P 65(b)(1)(A)*]. The complaint must be verified [*Fed R Civ P 65(b)(1)(A)*].

Cross Reference:

Discussion of requirements for temporary restraining orders, see Ch. 19, Preliminary Injunctions, TROs, and Other Provisional Remedies, *§ 19.09*.

6.11[14] LOCAL PRACTICE: Special Pleading Requirements.

6.11[14][a] CD Cal Requirements: Notice of Interested Parties. To enable the court to evaluate possible disqualification or recusal, counsel for all parties must file with their first appearance a specified "Notice of Interested Parties," listing all persons, associations, firms, partnerships, and corporations that have a direct pecuniary interest in the outcome of the case, including an insurance carrier that may be liable for a judgment entered in the action or for the cost of defense [*CD Cal Civ LR 7.1-1*].

6.11[14][b] ED Cal Requirements: Social Security Number in Certain Actions. A complaint under Title II, XVI, or XVIII of the Social Security Act [*see 42 USC §§ 405(g), 1383(c)(3), 1395ff*], or under Part B, Title N, of the Federal Coal Mine Health and Safety Act of 1969 [*see 30 USC § 801 et seq.*], must contain the following information [*ED Cal Civ LR 206(a)(1), (2)*]:

- In an action involving a claim for retirement, survivors, disability, health insurance, or black lung benefits, the last four digits of the social security number of the worker on whose wage record the application for benefits was filed (who may or may not be the plaintiff).

- In an action involving a claim for supplemental security income benefits, the last four digits of the social security number of the plaintiff.

The plaintiff must disclose the full social security number of the worker or plaintiff, as the case may be, to the defendant within seven days after a request for the full number [*ED Cal Civ LR 206(a)*].

6.11[14][c] ND Cal Requirements: Certification of Interested Persons. To enable the court's judges to evaluate any need for disqualification or recusal early in the course of any case, the plaintiff must include a "Certification of Interested Entities or Persons." The Certification must be filed as a separate document [*ND Cal Civ LR 3-16(a), (b), (c)(3)*; *see 28 USC § 455*]. This requirement does not apply, however, if the plaintiff is any governmental entity or agency [*ND Cal Civ LR 3-16(a)*]. The certification must be signed by the plaintiff's attorney and must take one of the following forms [*ND Cal Civ LR 3-16(c)(1), (2)*]:

- "Pursuant to Civil L.R. 3-16, the undersigned certifies that the following listed persons, associations of persons, firms, partnerships, corporations (including parent corporations) or other entities (i) have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii) have a nonfinancial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding: (*list names and identify their connection and interest*)."

- "Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report."

6.11[14][d] SD Cal Requirements: Three-Judge Court. If the plaintiff contends that the case requires hearing by a three-judge district court [*see 28 USC § 2284*], and if the basis for the request is not otherwise apparent from the allegations of the complaint, the basis must be stated in the complaint or in a brief statement attached to it [*SD Cal Civ LR 9.2(a)*].

Example:

A three-judge court is used when specifically required by an act of Congress, such as when the action challenges the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body [*see 28 USC § 2284(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGeneral Overview

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Unit 3 Pleading Stage
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6.12 Complaint Must Include Prayer Demanding Relief.

6.12[1] Demanding Relief.

6.12[1][a] State Demand for Relief in Complaint. A complaint must contain a prayer, that is, a demand for judgment for the relief the plaintiff seeks [*Fed R Civ P 8(a)*].

6.12[1][b] Making General Demand for Relief. The demand for judgment may be stated in general terms [*see, e.g.,* Fed R Civ P Appendix of Forms, Form 11].

Example:
A complaint may demand a single sum of money for an act of negligence that resulted in physical injury, physical and mental suffering, and loss of business income [*see, e.g.,* Fed R Civ P Appendix of Forms, Form 11].

Distinguish:
Although special damages must be specifically stated in the body of the complaint [*see Fed R Civ P 9(g)*], the demand for judgment need not distinguish or itemize special damages [*see* Fed R Civ P Appendix of Forms, Forms 11, 13].

6.12[1][c] Demanding Alternative or Multiple Forms of Relief. The demand for judgment may demand relief in the alternative or of several different types [*Fed R Civ P 8(a)*].

Example:
A complaint may demand specific performance of a contract or, if specific performance is not granted, a money judgment [*see, e.g.,* Fed R Civ P Appendix of Forms, Form 17].

6.12[2] Effect of Demand for Relief.

6.12[2][a] In Non-Default Case, Demand Does Not Limit Actual Award. The demand for judgment ordinarily will not limit the relief that can be ordered by the court. Except as to a party against whom a judgment is entered by

default, every final judgment must grant the relief to which the party in whose favor it is rendered is entitled, even if the party's pleadings have not demanded that relief [*Fed R Civ P 54(c)*].

Exception:

If the failure to request a particular form of relief prejudices the opposing party in its defense of the claim asserted, granting that relief would be improper [*Albemarle Paper Co. v. Moody (1975) 422 US 405, 423-425, 95 S Ct 2362, 45 L Ed2d 280*]. Prejudice may result if the plaintiff delays in requesting particular relief, or if the plaintiff expressly disclaims or abandons a request for particular relief and later seeks to obtain that relief [*see, e.g., Albemarle Paper Co. v. Moody (1975) 422 US 405, 423-425, 95 S Ct 2362, 45 L Ed2d 280* ; *Seven Words LLC v. Network Solutions (9th Cir 2001) 260 F3d 1089, 1097-1098*].

Strategic Point--Plaintiff:

Despite the court's power to award relief not demanded, it is good practice for the prayer to list every form of relief sought by the plaintiff, to ensure that adverse parties and the court are put on notice of the full extent of the plaintiff's demand for relief.

6.12[2][b] In Default Case, Actual Award May Not Exceed Demand. A default judgment cannot be different in kind from, or exceed in amount, the relief prayed for in the demand for judgment [*Fed R Civ P 54(c)*].

Cross Reference:

Default judgment as limited by relief prayed for in demand for judgment, see Ch. 27, Defaults and Motions for Relief From Default, see *§ 27.13*.

6.12[2][c] Demand That Seeks Only Equitable Relief Prevents Jury Trial. If only equitable relief is sought, neither party can request a jury trial, because there is no right to a jury trial on equitable issues [*see Tull v. United States (1987) 481 US 412, 417, 107 S Ct 1831, 95 L Ed2d 365*].

Cross Reference:

Restrictions on availability of jury trial, see Ch. 13, Demanding a Jury Trial, *§ 13.04[3][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesGeneral Overview

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6.13 Complaint May Include Jury Demand.

6.13[1] Preserving Right to Jury Trial. The complaint may include a demand for a jury trial of any issue triable of right by a jury [*Fed R Civ P 38(b)*].

A demand for a jury trial on an issue may also be served and filed by any party at any time after the commencement of the action and not later than 14 days after the service of the last pleading directed to that issue [*Fed R Civ P 38(b)*].

Warning:

The failure to demand a jury trial constitutes a waiver of trial by jury, although in such a case the court has discretion to try any issue with an advisory jury [*Fed R Civ P 38(d)*, *39(c)*].

Cross Reference:

Discussion of jury demands made after commencement of an action, see Ch. 13, Demanding a Jury Trial, *§ 13.05[2]*.

6.13[2] Jury Demand May Be Endorsed on Face of Complaint. A demand for a trial by jury may be endorsed on the complaint [*Fed R Civ P 38(b)*].

Example:

The usual method of endorsing the demand on the complaint is to place a notation such as "Jury Demanded" on the first page of the complaint [*see Gargiulo v. Delsole (2d Cir 1985) 769 F2d 77, 78-79*].

Although local rules may require a separate demand in the body of the complaint, in addition to the endorsement [*see, e.g., CD Cal Civ LR 38-1*; *ND Cal Civ LR 3-6(a)*; § 16.13[3]], once the demand for a jury trial has been properly made under *Fed R Civ P 38(b)*, the "failure to fulfill an additional requirement of a local rule ... cannot constitute a waiver of a trial by jury" [*Solis v. County of Los Angeles (9th Cir 2008) 514 F3d 946, 955* (district court's determination that pro se plaintiff's failure to file proposed jury instructions and special verdict forms constituted waiver of his right to jury trial

was erroneous)].

Example:

A pro se plaintiff's request for a jury trial in the complaint, in both the caption and at the end of the pleading, complied with both the "spirit and the letter of Federal Rule 38(b)." Because the plaintiff's jury demand was sufficiently clear to alert both the defendants and the district court that a jury trial was requested, the district court's finding that plaintiff did not "file a jury demand" was clearly erroneous [*Solis v. County of Los Angeles (9th Cir 2008) 514 F3d 946, 954]* .

6.13[3] LOCAL PRACTICE: Jury Demand.

6.13[3][a] LOCAL PRACTICE: CD Cal Requirements. If the jury demand is included in the complaint, it must be stated at the end of the complaint and be signed by the attorney for the plaintiff. The caption of the complaint must also contain the words "DEMAND FOR JURY TRIAL" [*CD Cal Civ LR 38-1*].

6.13[3][b] LOCAL PRACTICE: ED Cal Requirements. A jury demand made in the complaint must appear immediately following the title of the complaint. Alternatively, a jury demand may be made in any other document permitted by Fed Civ P 38(b) [*ED Cal Civ LR 201*].

6.13[3][c] LOCAL PRACTICE: ND Cal Requirements. In the caption of the complaint, immediately following the designation of the pleading as a complaint, the following must appear: "DEMAND FOR JURY TRIAL." A demand for a jury trial must also be separately stated at the end of the complaint. If the plaintiff is represented by counsel, the complaint and the jury demand must be signed by the plaintiff's attorney [*ND Cal Civ LR 3-6(a)*].

6.13[3][d] LOCAL PRACTICE: SD Cal Requirements. If a jury is demanded, the words "Demand for Jury Trial" must appear on the first page of the complaint, to the right of center, across from the title of the action and following the designation of the document as the complaint [*SD Cal Civ LR 5.1(j.3)*, *38.1*].

6.13[4] Indicating Jury Demand on Civil Cover Sheet Is Insufficient. Indicating on the civil cover sheet that a jury is demanded does not constitute a valid demand for jury trial [*Wall v. National R.R. Passenger Corp. (9th Cir 1983) 718 F2d 906, 909* ; *CD Cal Civ LR 38-3*; *ED Cal Civ LR 200*, *201*; *ND Cal Civ LR 3-6(b)*; *SD Cal Civ LR 38.1*].

Cross Reference:

Discussion of the preparation of the civil cover sheet, see *§ 6.20*.

6.13[5] Specifying Issues for Jury Trial. In the jury demand the plaintiff may specify the issues for trial by jury [*Fed R Civ P 38(c)*]. If the jury demand does not specify any issues, the plaintiff will be deemed to have demanded a jury on all issues triable by jury [*Fed R Civ P 38(c)*].

Strategic Point--Defendant:

If a party has demanded trial by jury for only some of the issues, any other party may, within 14 days after service of the demand or a lesser time ordered by the court, serve a demand for trial by jury of any other or all issues of fact in the action [*Fed R Civ P 38(c)*]. However, if the plaintiff has demanded a jury trial on only some of the issues, this rule should not be applied to cut off the jury right of a defendant who fails to make a jury demand within 14 days after service of the complaint. Even if the defendant allows the 14-day period to lapse, the defendant may demand a jury up to 14 days after service of the *last* pleading directed to the issue [*Fed R Civ P 38(b)*]. That last pleading presumably will be the defendant's answer, which generally may be served up to 21 days after service of the complaint [*Fed R Civ P 12(a)(1)(A)(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury Demands

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6.14 Complaint Must Be Signed.

6.14[1] Complying With Signature Requirement.

6.14[1][a] Sign Original Complaint. The complaint filed with the court must be signed [*Fed R Civ P 11(a)*]. The signature must be accompanied by the signer's address, e-mail address, and telephone number, if any [*Fed R Civ P 11(a)*].

Warning:

An unsigned complaint will be stricken if the omission is not corrected promptly after being called to the attention of the attorney or party [*Fed R Civ P 11(a)*].

6.14[1][b] Omit Signature From Unfiled Copies. Copies of the complaint need not be signed [*see CD Cal Civ LR 11-4.4*].

6.14[1][c] Courts May Allow or Require Electronic Filing, Signing, and Verification by Electronic Means. A court may by local rule permit or require papers to be filed, signed, or verified by electronic means [*Fed R Civ P 5(d)(3)*].

6.14[1][d] LOCAL PRACTICE: ED Cal Requirements--Complaints Covered in Electronic Case Filing Program. A Case Management/Electronic Case Files (CM/ECF) docketing and filing system took effect in the Eastern District on January 3, 2005. Unless specifically excused, electronic filing of complaints is mandatory for attorneys [*see ED Cal Gen LR 133(a)*]. When a complaint is submitted via portable electronic media, signatures must appear either as a facsimile of the original in the scanned complaint placed on portable electronic media, or on a separate, scanned signature page if the complaint was published to.pdf and then placed on portable electronic media. If the signature is submitted on a separate scanned page, the docket will reflect the submission of the signature page [*ED Cal Gen LR 131(b)*]. Anything filed using an attorney's name, login and password will be deemed to have been signed by that attorney [*ED Cal Gen LR 131(c)*]. An objection to the authenticity of an attorney's electronic signature generally must be made within 21 days of receipt of a notice of electronic filing, but may be made at a later time for good cause shown by an attorney exercising due diligence [*ED Cal Gen LR 131(d)*].

Cross References:

Discussion of Eastern District electronic signature requirements, see *Ch. 5, Formatting, Serving, and Filing Papers, 5.10[4][b]*. Discussion of electronic filing, see Ch. 5, Formatting, Serving, and Filing Papers, *§§ 5.29 -5.31*.

6.14[1][e] LOCAL PRACTICE: ND Cal Requirements--Complaints Not Covered in Electronic Case Filing Program. The Northern District of California's Electronic Case Filing Program provides that complaints and other initiating documents are to be filed, fees paid, and summons issued and served in the traditional manner on paper rather than electronically [ND Cal General Order 45, V(A)]. Consequently, electronic signatures are not utilized for complaints.

Cross Reference:

Discussion of electronic filing, see Ch. 5, Formatting, Serving, and Filing Papers, *§§ 5.29 -5.31*.

6.14[1][f] LOCAL PRACTICE: SD Cal Requirements--Complaints Not Covered in Electronic Case Filing Program. The Southern District's electronic case filing program provides that complaints and other initiating documents are to filed in paper format at the clerk's office [SD Cal Electronic Case Filing Admin Policies & Procedures Manual 1(b)].

6.14[2] Determining Proper Person to Sign Complaint. If the plaintiff is represented by counsel, the complaint must be signed by at least one attorney of record. The signature must be in the attorney's individual name [*Fed R Civ P 11(a)*].

If the plaintiff is not represented by counsel and appears pro se, the complaint must be signed by the plaintiff [*Fed R Civ P 11(a)*].

6.14[3] LOCAL PRACTICE: Additional Signature Requirements.

6.14[3][a] LOCAL PRACTICE: CD Cal Requirements. The name of the person signing the complaint must be clearly typed below the signature line [*CD Cal Civ LR 11-1*]. If the person signing is a member of a law firm, the firm's name should also be indicated [*see CD Cal Civ LR 83-2.5.2*].

6.14[3][b] LOCAL PRACTICE: ED Cal Requirements. The name of the person signing the complaint must be clearly typed below the signature line [*ED Cal Gen LR 131(b)*].

6.14[3][c] LOCAL PRACTICE: SD Cal Requirements. The name of the person signing the complaint must be typed below the signature line [*SD Cal Civ LR 5.1(j.5)*].

6.14[4] Signing Complaint Makes Implicit Certifications to Court.

6.14[4][a] Elements of Certification Under Rule 11. An attorney or unrepresented plaintiff who signs a complaint or other paper certifies, to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, all of the following [*Fed R Civ P 11(b)*]:

- The paper is not being presented for any improper purpose [*see 6.14[4][c]*].

- The paper's claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law [*see 6.14[4][d], [e], [f]*].

- The paper's allegations and other factual contentions have evidentiary support or, if specifically so

identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

- Any denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Cross Reference:

Discussion of the duty to make a reasonable inquiry before signing, see *§ 6.14[5]*.

6.14[4][b] Signing in Violation of Implicit Certifications May Result in Sanctions. Signing or otherwise presenting a complaint or other paper in violation of the implicit certifications may result in the imposition of sanctions [*Fed R Civ P 11(c)*]. Generally, sanctions will be imposed on the signer of a complaint if either [*Townsend v. Holman Consulting Corp. (9th Cir 1990) 929 F2d 1358, 1362* (en banc)]:

- The complaint is filed for an improper purpose [*see 6.14[4][c]*].
- The complaint is frivolous [*see 6.14[4][d]*].

Cross Reference:

Discussion of Rule 11 sanctions, see Ch. 33, Rule 11, Sanctions.

§ 6.14[4][c] Complaint Must Not Be Filed for Improper Purpose. Improper purposes for signing and filing a complaint include the following [*Fed R Civ P 11(b)(1)*]:

- Harassment of an opposing party.
- Delay.
- Needless increase in litigation costs.

In determining whether a person's purpose in signing and filing a complaint is improper, the standard is objective reasonableness, and the subjective intent of the signer is immaterial. Thus, whether the signer had an improper purpose is determined from the signer's point of view, objectively tested, rather than from the consequences of the signer's act, subjectively viewed by the signer's opponent. The "reasonable person" against which conduct is tested is a competent attorney admitted to practice before the district court [*see G.C. & K.B. Invs., Inc. v. Wilson (9th Cir 2003) 326 F3d 1096, 1109* ; *Zaldivar v. City of Los Angeles (9th Cir 1986) 780 F2d 823, 832*].

Distinguish--Well-Founded Complaint:

The Ninth Circuit has held that the filing of a well-founded (that is, nonfrivolous) complaint is not sanctionable, regardless of the subjective intent of the attorney or litigant [*Townsend v. Holman Consulting Corp. (9th Cir 1990) 929 F2d 1358, 1362* (en banc); *Hudson v. Moore Bus. Forms, Inc. (9th Cir 1987) 836 F2d 1156, 1159*]. In contrast, once the action has been commenced, a well-founded motion may be sanctioned if it is part of a campaign of successive harassing and vexatious motions [*Aetna Life Ins. Co. v. Alla Med. Servs., Inc. (9th Cir 1988) 855 F2d 1470, 1476*].

Distinguish--Venue Selection:

The choice of a proper but inconvenient forum is not sanctionable unless the choice is made for an improper purpose such as harassment [*Newton v. Thomason (9th Cir 1994) 22 F3d 1455, 1463-1464*].

Distinguish--Seeking Publicity:

The signing and filing of a nonfrivolous complaint in order to generate adverse publicity for the defendant is not an improper purpose [*see Sussman v. Bank of Israel (2d Cir 1995) 56 F3d 450, 459* , *quoting Townsend v. Holman Consulting Corp. (9th Cir 1990) 929 F2d 1358, 1362* (en banc)].

6.14[4][d] None of Plaintiff's Claims May Be Frivolous. A frivolous complaint is one that is both baseless and made without a reasonable and competent inquiry [*Montrose Chem. Corp. v. American Motorists Ins. Co. (9th Cir 1997) 117 F3d 1128, 1133*].

A complaint that contains one frivolous claim violates the signer's certification, even if other material in the complaint is not frivolous [*Townsend v. Holman Consulting Corp. (9th Cir 1990) 929 F2d 1358, 1362-1365* (en banc)].

A claim will not be deemed baseless or frivolous if it is supported by a nonfrivolous argument for the extension, modification, or reversal of existing law, or for establishing new law [*Fed R Civ P 11(b)(2)*].

6.14[5] Inquiry Must Precede Signing.

6.14[5][a] Reasonable Investigation Is Required. Attorneys and unrepresented parties have an affirmative duty to make a reasonable investigation of the facts and the law before signing and submitting any pleading, motion, or other paper [*Fed R Civ P 11(b)*].

6.14[5][b] Investigation Evaluated Under Objective Standard. The reasonableness of a pre-signing investigation is measured by an objective standard based on the circumstances of the case [*Fed R Civ P 11(b)*; *see Business Guides, Inc. v. Chromatic Communications Enters., Inc. (1991) 498 US 533, 549, 111 S Ct 922, 112 L Ed2d 1140*].

6.14[5][c] Attorney May Rely on Statements of Client. In making a pre-signing investigation, an attorney may rely on the statements of his or her client [*Hamer v. Career Coll. Ass'n (9th Cir 1992) 979 F2d 758, 759*].

Distinguish:

Depending on the circumstances of the case, reliance on information received from sources other than the client might not be reasonable if the attorney has an opportunity to verify the information independently [*see Fed R Civ P 11(b)*].

6.14[5][d] Failure to Make Inquiry May Result in Sanctions. A failure to make a reasonable investigation prior to signing the complaint may result in the imposition of sanctions [*Fed R Civ P 11(c)*].

Exception:

Sanctions may not be imposed for a failure to conduct a reasonable inquiry if the complaint turns out to be well-founded [*In re Keegan Mgmt. Co. Sec. Litig. (9th Cir 1996) 78 F3d 431, 434*].

Cross Reference:

Discussion of Rule 11 sanctions, see Ch. 33, Rule 11 Sanctions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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6.15 Verification of Complaint May Be Required.

6.15[1] Verification Is Unnecessary Unless Specifically Required by Rule or Statute. Except as otherwise specifically provided by rule or statute, a complaint need not be verified or accompanied by an affidavit [*Fed R Civ P 11(a)*].

Examples:

Cases in which the complaint must be verified include the following:

- A shareholder derivative action [*Fed R Civ P 23.1*].
- Any case in which the complaint requests an ex parte temporary restraining order [*Fed R Civ P 65(b)*].
- An admiralty case that includes a quasi-in-rem or in-rem claim [Fed R Civ P, Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions Rules B, C].

6.15[2] LOCAL PRACTICE: CD Cal--Request for Temporary Receiver. A complaint seeking the appointment of a temporary receiver must be verified [*CD Cal Civ LR 66-1*].

Cross Reference:

Appointment of receivers, see Ch. 19, Preliminary Injunctions, TROs, and Other Provisional Remedies, *§§ 19.85 -19.113*.

6.15[3] Signing Verification Makes Same Certifications to Court As Signature on Complaint. If a verification or affidavit is submitted with a complaint, it must be signed in accordance with *Fed R Civ P 11*. The signature denotes the same certifications to the court as does a signature on the complaint [*Fed R Civ P 11(a), (b)*; *Business Guides, Inc. v. Chromatic Communications Enters., Inc. (1991) 498 US 533, 549, 111 S Ct 922, 112 L Ed2d 1140*].

Cross Reference:

Discussion of the certifications implicit in the signature, see *§ 6.14[4]*.

6.15[4] Appropriate Individual Must Sign Verification. A verification of a complaint must be signed by a plaintiff [*see Fed R Civ P 23.1*; *Surowitz v. Hilton Hotels Corp. (1966) 383 US 363, 365, 86 S Ct 845, 15 L Ed2d 807*]. A verification on behalf of a corporate plaintiff should be signed by a corporate officer or agent having knowledge of the matters alleged [*see In re Ben Weiss Co. (7th Cir 1959) 271 F2d 234, 235*].

6.15[5] Direct Knowledge Is Not Required. If a verification is required, it is sufficient if the person signing states that he or she knows or believes the facts stated in the complaint to be true [*Surowitz v. Hilton Hotels Corp. (1966) 383 US 363, 365, 86 S Ct 845, 15 L Ed2d 807*].

Example:

The person signing the verification need not have direct knowledge of the facts on which the complaint is based. Thus, in a shareholder derivative action, a plaintiff shareholder may verify the complaint based on truthful explanations of the case by others [*Surowitz v. Hilton Hotels Corp. (1966) 383 US 363, 370-371, 86 S Ct 845, 15 L Ed2d 807*].

Cross Reference:

Form of verification, see *§ 6.32*.

6.15[6] Verification of Complaint Does Not Impose Obligation on Defendant to Verify Answer. In an unlimited civil case filed in California superior court, verification of the complaint requires the defendant's answer to be verified [*CCP § 446(a)*; *see CCP § 92(b)*]. This effect of verification does not exist under federal practice, which requires verification only as specifically provided by rule or statute [*Fed R Civ P 11(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint
II. PREPARING COMPLAINT

1-6 MB Practice Guide: Fed Pretrial Civ Proc in CA 6.16

6.16 Exhibits May Be Attached.

6.16[1] Plaintiff May Attach Written Instrument to Complaint. If a written instrument is material to the allegations of the complaint, the plaintiff may attach a copy of the instrument as an exhibit to the complaint [*Fed R Civ P 10(c)*].

Strategic Points--Plaintiff:

Only documents that are essential to the case or that make the complaint easier to understand should be attached as exhibits. For example, exhibits may be essential when seeking provisional relief, such as attachment or an injunction. In such cases, copies of the relevant documents are typically necessary to establish the basis and scope of any court order granting provisional relief.

If a case involves only one or a few documents, such as a note, contract, or deed, attaching copies as exhibits will aid the judge's review of the pleadings in response to pretrial motions or conferences. If able to see the entire document, the judge will have a better view of the dispute than if only "relevant" paragraphs are quoted in the complaint.

There are important considerations in deciding whether to use a complaint strategically before filing it. One the one hand, showing the defendant the complaint before filing it in appropriate cases can have a positive effect. Informally mailing a factually rich complaint, based on a strong claim, to the prospective defendant may precipitate settlement. On the other hand, there can be great risk involved in providing a copy of the complaint to the potential defendant before filing. If the claims asserted by the plaintiff are not particularly strong, the weaknesses in the plaintiff's position may become more apparent and have a negative effect on reaching a pre-litigation settlement, as well as prompting the prospective defendant to preemptively file an action [*see § 6.02*].

6.16[2] Exhibit Will Be Treated As Part of Complaint. A copy of any written instrument that is an exhibit to the complaint is a part of it for all purposes [*Fed R Civ P 10(c)*].

Example:

Because it is part of the complaint for all purposes, an exhibit will be considered by the court in deciding a motion to dismiss the complaint [*Hall v. Bellmon (10th Cir 1991) 935 F2d 1106, 1112*].

6.16[3] Plaintiff May Controvert Statements Contained in Exhibit. Although an exhibit becomes a part of the complaint "for all purposes," the plaintiff does not necessarily adopt as true the full contents of the exhibit.

Example:

A libel plaintiff may attach a copy of the allegedly libelous document without risking that the court will deem true the statements contained in the exhibit [*Gant v. Wallingford Bd. of Educ. (2d Cir 1995) 69 F3d 669, 674-675*].

Exception:

If a written instrument contradicts material allegations in the complaint to which it is attached, the exhibit usually controls [*Ott v. Home Sav. & Loan Ass'n (9th Cir 1958) 265 F2d 643, 646, n1*].

6.16[4] Plaintiff May Refer to Written Instrument Without Attaching It. The attachment of exhibits to a complaint is permissive, not mandatory [*see Fed R Civ P 10(c)*]. Therefore, instead of attaching a copy of a written instrument as an exhibit, the plaintiff may include an allegation identifying the document and setting forth the relevant contents of the document.

Warning:

The plaintiff may not avoid the consequences of an entire document by quoting from it selectively in the complaint and not attaching it as an exhibit [*I. Meyer Pincus & Assocs. v. Oppenheimer & Co. (2d Cir 1991) 936 F2d 759, 762* ; *see Fecht v. Price Co. (9th Cir 1995) 70 F3d 1078, 1080*].

6.16[5] LOCAL PRACTICE: Attaching Exhibits.

6.16[5][a] LOCAL PRACTICE: CD Cal Requirements. Unless compliance is impracticable, a paper exhibit must be scanned and electronically filed with the complaint, and the pages of the exhibit must be numbered at the bottom of each page consecutively to the pages of the complaint [*CD Cal Civ LR 11-5.2*]. Exhibits must be tabbed in sequential order, and the exhibit number must also be placed immediately above or below the page number on each page of the exhibit [*CD Cal Civ LR 11-5.3*]. Exhibits must not exceed 8 1/2 x 11 inches in size and should be scanned and electronically filed whenever practicable. Exhibits that are too large to scan shall be folded in such a manner as not to exceed an 8 1/2 x 11 inch sheet, and filed as paper exhibits. CM/ECF users must file electronically a Notice of Manual Filing setting forth the reason(s) why the exhibit cannot be filed electronically and present the Notice of Electronic Filing with the exhibits to be filed or lodged [*CD Cal Civ LR 11-5.4*]. An exhibit smaller than 81/2 x 11 inches must be attached to an 81/2 x 11-inch sheet [*CD Cal Civ LR 11-5.5*].

A nonpaper physical exhibit must not be attached to the complaint. Rather, it must be placed in a secure container identified by the case name and number and the name, address, and telephone number of the plaintiff's attorney (or the plaintiff, if unrepresented). The exhibit must be lodged with a separately filed Notice of Lodging [*CD Cal Civ LR 11-5.1*].

CM/ECF users must first file electronically a Notice of Manual Filing setting forth the reason(s) why the exhibit cannot be filed electronically and present the Notice of Electronic Filing with the exhibits to be lodged [CD Cal Civ LR 11-5.1].

6.16[5][b] LOCAL PRACTICE: SD Cal Requirements. Unless compliance is impracticable, exhibits must be paginated in consecutive numerical order, and each page must show the exhibit number either immediately above or below the page number. Unless the physical nature of an exhibit renders it impracticable, it must be attached to the

complaint and must be readable without detaching it from the accompanying document [*SD Cal Civ LR 5.1(e)*]. If the complaint contains any exhibits it must have, as a cover page to the exhibits, a table of contents indicating the page number of each of the succeeding exhibits. If exhibits are tabbed, the tabs must be at the bottom and not at the sides [*SD Cal Civ LR 5.1(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint
II. PREPARING COMPLAINT

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6.17 Copies of Complaint Should Be Prepared for Service and Other Purposes.

6.17[1] Prepare Extra Copies of Complaint for Service. In addition to the original of the complaint that will be filed with the court, counsel should prepare additional copies for service on the defendants [*see Fed R Civ P 4(c)(1)*].

Cross Reference:

Discussion of service of process, see Ch. 7, Service of Summons.

6.17[2] Prepare Extra Copies of Complaint for Miscellaneous Purposes. In addition to the original of the complaint and service copies, counsel should prepare additional copies of the complaint for office use and for distribution to the client.

6.17[3] LOCAL PRACTICE: Copies of Complaint.

6.17[3][a] LOCAL PRACTICE: CD Cal Requirements. The original of the complaint, if filed in paper format, must be filed with one clear, conformed, and legible copy for the use of the judge [*CD Cal Civ LR 11-4.1*]. Unless the assigned judge's orders or written procedures otherwise specify, a mandatory chambers copy of all electronically filed documents must be delivered to the assigned judge [CD Cal Civ LR 11-4.1]. If the case is to be heard by a three-judge court [*see 28 USC § 2284*], three paper copies must be filed with the original [*CD Cal Civ LR 11-4.2*]. If the plaintiff presenting a complaint for filing in paper format wishes the clerk to return a conformed copy of the complaint by mail, the plaintiff must submit an extra copy with a postage-paid, self-addressed envelope [*CD Cal Civ LR 11-4.5*].

Copies must be conformed to the original but need not be signed. Conformed copies must be identical to the original in content, pagination, deletions, and interlineations [*CD Cal Civ LR 11-4.4*].

6.17[3][b] LOCAL PRACTICE: ED Cal Requirements. In the Eastern District, electronic filing of the complaint is mandatory for attorneys unless it is specifically excused by the court or by local rule [*ED Cal Gen LR 133(a)*].

Cross Reference:

Eastern District requirement for electronic filing, see *§ 5.31[2]*.

6.17[3][c] LOCAL PRACTICE: ND Cal Requirements. An extra copy of the complaint, marked by counsel as the copy for "Chambers," generally must accompany the original of the complaint when it is submitted for filing [*ND Cal Civ LR 5-1(b)*].

6.17[3][d] LOCAL PRACTICE: SD Cal Requirements. The original of the complaint must be labeled as the original, and all copies must be clearly identified as such [*SD Cal Civ LR 5.1(b)*]. When the original of the complaint is filed, it must be accompanied by one legible conformed copy of the complaint, including any exhibits, for the court's use [*SD Cal Civ LR 5.1(i.1)*]. In an action to be heard by a three-judge court [*see 28 USC § 2284*], three copies must accompany the original [*SD Cal Civ LR 5.1(i.2)*, *9.2(b)*]. If the plaintiff requests the clerk to return a conformed copy by mail, an extra copy must be submitted and must be accompanied by a self-addressed envelope bearing sufficient postage [*SD Cal Civ LR 5.1(i.4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint
III. PREPARING SUMMONS AND OTHER DOCUMENTS NECESSARY AT COMMENCEMENT OF ACTION

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6.18 CHECKLIST: Preparing Summons and Other Documents Necessary at Commencement of Action.

☐ If seeking defendant's waiver of service of summons to save cost of service:

○ Ascertain that defendant is not one of following, who are disqualified from waiving service:

☐ Infant or incompetent person.

☐ United States.

☐ Federal agency or corporation.

☐ Federal officer or employee sued in official capacity or in individual capacity for conduct in connection with federal duties.

☐ Foreign, state, or local government.

○ If defendant is qualified to waive service, prepare following:

☐ Notice of Lawsuit and Request for Waiver of Service of Summons.

☐ Waiver of Service of Summons.

Authority:
Fed R Civ P 4(d)

Discussion:
See *§ 6.19[1][b]*; Ch. 7, Service of Summons

Forms:
Fed R Civ P Appendix of Forms, Forms 5, 6

☐ If not seeking defendant's waiver of service of summons, prepare summons.

○ If multiple defendants, either:

☐ Prepare separate summons for each defendant.

☐ Prepare one summons addressed to all defendants, making copy for each defendant.

○ Include following elements in each summons:

☐ Name and address of plaintiff's attorney or, if plaintiff is unrepresented, of plaintiff.

☐ Caption as on complaint.

☐ Statement, directed to defendant, setting forth time within which defendant must appear and defend.

☐ Notification that failure to appear and defend will result in default judgment against defendant for relief demanded in complaint.

☐ Space for signature of court clerk and seal of court.

Authority:
Fed R Civ P 4(a)

Discussion:
See *§ 6.19*

Form:
See *§ 6.33*

Official Form:
Fed R Civ P Appendix of Forms, Forms 1, 3

☐ Prepare Civil Cover Sheet in accordance with local rules of court.

- ○ Obtain form from court clerk.
- ○ Complete form for presentation to clerk with complaint.

Authority:
CD Cal Civ LR 3-1; *ED Cal Gen LR 200*; *ND Cal Civ LR 3-2(a)*; *SD Cal Civ LR 3.1*

Discussion:
See *§ 6.20*

☐ If plaintiff is nongovernmental corporation, prepare two copies (plus office copies) of corporate disclosure statement that either:

- ○ Identifies any parent corporation and any publicly held corporation that owns 10 percent or more of plaintiff's stock.
- ○ States that there is no parent corporation or publicly held corporation that owns 10 percent or more of plaintiff's stock.

Authority:
Fed R Civ P 7.1(a)

Discussion:
See *§ 6.21[1]*

☐ If required by local rules, prepare notice or certification that informs court of persons or entities that have interest in outcome of action or in party to action.

Authority:
CD Cal Civ LR 7.1-1; *ND Cal Civ LR 3-16*

Discussion:
See *§ 6.21[2]*

☐ If required by local rules, prepare Notice of Related Cases, or an Administrative Motion to Consider Whether Cases Should Be Related, and any other required notice informing court of other actions that are related to plaintiff's action.

Authority:
CD Cal Civ LR 83-1.3.1, *83-1.4.1*, *83-1.4.2*, *83-1.4.3*; *ED Cal Gen LR 123*; *ND Cal Civ LR 3-12*, *3-13*; *SD Cal Civ LR 40.1(e)*, *(f)*

Discussion:
See *§ 6.21[3]*

☐ If multiple attorneys represent plaintiff, prepare designation of counsel for service, if required by local rules.

Authority:
ED Cal Gen LR 182(c)

Discussion:
See *§ 6.21[4]*

☐ If action is brought on behalf of minor or incompetent person, either:

- ○ Prepare to present documentation of appointment of representative under state law.
- ○ Prepare motion for appointment of guardian ad litem.

Authority:
Fed R Civ P 17(c)

Discussion:
See *§ 6.21[5]*

☐ If plaintiff cannot afford to pay filing fee, prepare:

- ○ Application for in forma pauperis status.
- ○ Affidavit documenting plaintiff's financial condition.
- ○ If plaintiff is prisoner, copy of prisoner's trust fund account statement covering past six months.

Authority:
28 USC § 1915(a)

Discussion:
See *§ 6.21[6]*

☐ If filing under seal is authorized by law and desired by plaintiff, prepare application to file complaint or portion of complaint under seal, as required by local rules.

Authority:
CD Cal Civ LR 79-5.1; *ND Cal Civ LR 79-5(b)*, *(c)*; ND Cal Gen Order 62

Discussion:
See *§ 6.21[7]*

☐ If plaintiff has grounds to proceed anonymously and wishes to doso, prepare ex parte motion for leave to use fictitious name for plaintiff.

Authority:
Fed R Civ P 17(a)

Discussion:
See *§ 6.06[3]*

☐ If plaintiff seeks temporary restraining order (TRO), prepare application and accompanying documents as required by local rules.

Authority:
Fed R Civ P 65(b)

Discussion:
See *§ 6.21[8]*

☐ If complaint alleges unconstitutionality of statute or regulation, prepare notice of claim of unconstitutionality.

Authority:
28 USC § 2403; *Fed R Civ P 5.1*; *ED Cal Gen LR 132*; *ND Cal Civ LR 3-8*

Discussion:
See *§ 6.21[9]*

☐ If action is required to be heard and determined by three-judge court, prepare notice to that effect if required by local rules.

Authority:
28 USC § 2284; *ED Cal Civ LR 203*

Discussion:
See *§ 6.21[10]*

☐ If action is private plaintiff class action brought under Securities Exchange Act of 1934:

○ If plaintiff is seeking to serve as representative party on behalf of class, prepare plaintiff's sworn certification for filing with the complaint.

○ If plaintiff's counsel is seeking appointment as class counsel, prepare counsel's certification if required by local rule.

○ If local rules require posting of complaint to Internet site, prepare electronic copy of complaint.

Authority:
15 USC § 78u-4(a)(2); *ND Cal Civ LR 3-7(b)*, *(d)*; *ND Cal Civ LR 23-2*

Discussion:
See *§ 6.21[11]*

☐ If required by local rules in patent, plant variety protection, trademark, or copyright case, prepare required notice to Patent and Trademark Office.

Authority:
CD Cal Civ LR 3-1; *15 USC § 1116(c)*; *17 USC § 508*; *35 USC § 290*

Discussion:
See *§ 6.21[12]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint
III. PREPARING SUMMONS AND OTHER DOCUMENTS NECESSARY AT COMMENCEMENT OF ACTION

1-6 MB Practice Guide: Fed Pretrial Civ Proc in CA 6.19

6.19 Summons Generally Must Be Served With Complaint, Unless Service Waived.

6.19[1] Summons Generally Must Be Served With Complaint. A summons ordinarily must accompany the copy of the complaint that is served on the defendant [*Fed R Civ P 4(c)(1)*]. Service of a summons is the usual manner in which the court obtains personal jurisdiction over the defendant [*see Fed R Civ P 4(k)*; *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co. (1987) 484 US 97, 104, 108 S Ct 404, 98 L Ed2d 415*].

Cross Reference:

Discussion of procedures for service of the summons and complaint, see Ch. 7, Service of Summons.

6.19[2] Service of Summons May Be Waived.

6.19[2][a] Cost of Service May Be Avoided. To avoid the cost of service, the plaintiff may in most cases notify the defendant of the commencement of the action and request that the defendant waive service of a summons [*Fed R Civ P 4(d)*].

6.19[2][b] Situations When Waiver Not Available. Waiver of service is not available if the defendant is [*Fed R Civ P 4(d)(1)*; *see Fed R Civ P 4(g), (i), (j)*]:

- A minor or incompetent person.
- The United States.
- A federal agency or corporation.
- A federal officer or employee sued in an official capacity or in an individual capacity for conduct in connection with federal duties.
- A foreign, state, or local government.

6.19[2][c] Costs May Be Assessed Against Defendant Who Refuses to Waive Service. If the defendant agrees to waive service of the summons, the plaintiff will have saved the cost of service. If a defendant located in the United States refuses to waive service, the court will impose the costs of service on the defendant unless the defendant shows good cause for the refusal to waive service [*Fed R Civ P 4(d)(2)*]. An award of costs will also include costs and attorney's fees incurred by the plaintiff in making a motion to collect the costs of service [*Fed R Civ P 4(d)(2)(B)*].

6.19[2][d] Time for Response to Complaint Increases If Defendant Waives Service. If the defendant waives service of the summons, the defendant will have an additional 40 days to respond to the complaint, or an additional 90 days if the defendant is outside the United States [*Fed R Civ P 4(d)(3)*, *12(a)(1)*].

6.19[2][e] Plaintiff May Use Official Form to Request Waiver of Service. The Appendix of Forms to the Federal Rules of Civil Procedure includes forms for a Notice of Lawsuit and Request for Waiver of Service of Summons [Fed R Civ P Appendix of Forms, Form 5] and a Waiver of Service of Summons [Fed R Civ P Appendix of Forms, Form 6]. Forms are also available from the court clerk and may be downloaded from the court websites:

- United States District Court for the Central District of California: www.cacd.uscourts.gov.
- United States District Court for the Eastern District of California: www.caed.uscourts.gov.
- United States District Court for the Northern District of California: www.cand.uscourts.gov.
- United States District Court for the Southern District of California: www.casd.uscourts.gov.

Cross Reference:

Local district court forms, see *§ 6.34*. Waiver of service, see Ch. 7, Service of Summons, *§§ 7.12 -7.19*.

6.19[3] Drafting Summons.

6.19[3][a] All Elements of Summons Must Be Included. The summons must contain the following elements [*Fed R Civ P 4(a)*; *see* Fed R Civ P Appendix of Forms, Forms 1, 3]:

- The name and address of the plaintiff's attorney or, if the plaintiff is unrepresented, of the plaintiff.
- A caption identifying the court and the parties.
- A statement, directed to the defendant, that sets forth the following:
  - The time within which the defendant must appear and defend:
    - General rule: 21 days after service of the summons [*Fed R Civ P 12(a)(1)(A)(i)*].
    - If the defendant is the United States, an agency of the United States, or an officer or employee of the United States served in an official capacity: 60 days after service on the United States Attorney [*Fed R Civ P 12(a)(2)*].
    - If the defendant is a United States officer or employee who is sued in an individual capacity for acts or omissions in connection with duties performed on behalf of the United States: 60 days after service on the officer or employee, or service on the United States Attorney, whichever is later [*Fed R Civ P 12(a)(3)*].

Exception--Additional Time If Defendant Waives Service of Summons:

If service of the summons is timely waived and the defendant was addressed within a United States judicial district, the defendant will have 60 days to respond after the request for waiver was sent [*Fed R Civ P 12(a)(1)(A)(ii)*; *see Fed R Civ P 4(d)*]. If service of the summons is timely waived and the defendant was addressed outside any United States judicial district, the defendant will have 90 days to respond after the request for waiver was sent [*Fed R Civ P 12(a)(1)(A)(ii)*; *see Fed R Civ P 4(d)*]. Because these response periods apply only if service of the summons has been waived, they would not be mentioned in any summons.

- A notification that a failure to appear and defend will result in a judgment by default against the defendant for the relief demanded in the complaint.

- The signature of the court clerk.

- The seal of the court.

6.19[3][b] Plaintiff May Use Official Form. The plaintiff may use the official summons form in the Appendix of Forms to the Federal Rules of Civil Procedure [*see* Fed R Civ P Appendix of Forms, Form 3]. Use of the official form is not mandatory [*Fed R Civ P 84*].

The court clerk also supplies summons forms, which may be downloaded from the court's website:

- United States District Court for the Central District of California: www.cacd.uscourts.gov.

- United States District Court for the Eastern District of California: www.caed.uscourts.gov.

- United States District Court for the Northern District of California: www.cand.uscourts.gov.

- United States District Court for the Southern District of California: www.casd.uscourts.gov.

Cross Reference:

Local district court forms, see *§ 6.34*.

6.19[3][c] LOCAL PRACTICE: CD Cal--Mandatory Use of Court-Supplied Form. The summons must be prepared on forms supplied by the court clerk *CD Cal Civ LR 4-1*].

6.19[4] Prepare Summons for Each Defendant. A summons must be issued for each defendant to be served [*Fed R Civ P 4(b)*]. Thus, the plaintiff may prepare a separate summons directed to each defendant. Alternatively, the plaintiff may prepare a single summons directed to all defendants, with a separate copy to be issued for each defendant to be served [*Fed R Civ P 4(b)*].

6.19[5] Obtain Issuance of Summons by Court Clerk. At or after the filing of the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk will sign, seal, and issue it to the plaintiff for service on the defendant [*Fed R Civ P 4(b)*; *ED Cal Civ LR 210(a)*].

At the time of issuance of the summons, the court clerk may provide additional materials that must be served on the defendant along with the summons and complaint. Such materials might include, for example, an order setting an initial case management conference, and ADR deadlines and pertinent standing orders of the court [*see, e.g., ND Cal Civ LR 4-2*, *16-2(a)*].

6.19[6] Effect of Errors in Summons. Even if the summons fails to name all of the defendants, or the summons specifies the incorrect time for filing of the answer, dismissal is generally not justified unless the defect in the summons is prejudicial to the defendant [*UFCW, Locals 197 & 373 v. Alpha Beta Co. (9th Cir 1984) 736 F2d 1371, 1382*].

Example:

A summons that incorrectly specified 10 days to answer the complaint, rather than the correct 20 days, did not warrant dismissal in a case in which the defendant filed a timely answer and suffered no prejudice from the defect in the summons [*UFCW, Locals 197 & 373 v. Alpha Beta Co. (9th Cir 1984) 736 F2d 1371, 1382*].

If the defendant is unable to demonstrate to the court that a defect in the summons is prejudicial, the plaintiff will be granted permission to amend the summons and re-serve the defendant or defense counsel with the corrected summons [*see Great Plains Crop Mgmt., Inc. v. Tryco Mfg. Co. (D Mont 1983) 554 F Supp 1025, 1028*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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CHAPTER 6 Drafting the Summons and Complaint
III. PREPARING SUMMONS AND OTHER DOCUMENTS NECESSARY AT COMMENCEMENT OF ACTION

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6.20 Civil Cover Sheet Is Required Under Local Rules.

6.20[1] Function of Civil Cover Sheet. Local rules require the plaintiff to complete and submit a civil cover sheet when the complaint is submitted for filing. The sheet is usually available from the court clerk and on the court's web site. The sheet typically seeks statistical information for the benefit of the clerk and court in administering the court's caseload, and it is not served on opposing parties [*see Wall v. National R.R. Passenger Corp. (9th Cir 1983) 718 F2d 906, 909* ; *see also CD Cal Civ LR 3-1*; *ED Cal Civ LR 200*; *ND Cal Civ LR 3-2(a)*; *SD Cal Civ LR 3.1*].

Warning:

If there is an error on the cover sheet, the clerk will generally issue an error sheet describing the error and instructing counsel to file a revised cover sheet. It is not clear what the clerk's response would be if the cover sheet was omitted, but it is likely the clerk would instruct counsel to complete and file one.

6.20[2] LOCAL PRACTICE: Civil Cover Sheets.

6.20[2][a] LOCAL PRACTICE: CD Cal Requirements. The complaint presented to the clerk for filing must be accompanied by a Civil Cover Sheet, in duplicate, completed and signed by the plaintiff's attorney or the plaintiff. Copies of the Civil Cover Sheet are available from the clerk [*CD Cal Civ LR 3-1*]. A copy of the Civil Cover Sheet may be downloaded form the court's website: www.cacd.uscourts.gov.

6.20[2][b] LOCAL PRACTICE: ED Cal Requirements. The complaint must be accompanied by a completed civil cover sheet, on a form available from the court clerk [*ED Cal Civ LR 200*]. A copy of the Civil Cover Sheet may be downloaded form the court's website: www.caed.uscourts.gov.

6.20[2][c] LOCAL PRACTICE: ND Cal Requirements. The complaintmust be filed with a completed civil cover sheet on a form approved by the court [*ND Cal Civ LR 3-2(a)*]. A copy of the Civil Cover Sheet may be downloaded form the court's website: www.cand.uscourts.gov.

6.20[2][d] LOCAL PRACTICE: SD Cal Requirements. The complaint initiating the action must be accompanied by a completed civil cover sheet [*SD Cal Civ LR 3.1*]. A copy of the Civil Cover Sheet may be

downloaded form the court's website: www.casd.uscourts.gov.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsContent & Form

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 3 Pleading Stage
CHAPTER 6 Drafting the Summons and Complaint
III. PREPARING SUMMONS AND OTHER DOCUMENTS NECESSARY AT COMMENCEMENT OF ACTION

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6.21 Other Documents May Be Required to Accompany Complaint.

6.21[1] Preparing Corporate Disclosure Statement.

6.21[1][a] Determine Whether Plaintiff Must File Disclosure Statement. To enable judges to make informed decisions concerning possible disqualification based on financial interest, any nongovernmental corporate party to a civil action in a federal district court must file a statement that either [*Fed R Civ P 7.1(a)*; *SD Cal Civ LR 40.2*]:

- Identifies any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock.

- States that there is no parent corporation or any publicly held corporation that owns 10 percent or more of the party's stock.

6.21[1][b] Filing of Disclosure Statement. A disclosure statement must be filed with the party's first appearance in the action. Thus, a nongovernmental corporate plaintiff ordinarily must file its disclosure statement with the complaint [*Fed R Civ P 7.1(b)*; *SD Cal Civ LR 40.2*].

Two copies of the disclosure statement must be filed [*Fed R Civ P 7.1(a)*].

Warning:

If there is any change in the information provided in the disclosure statement, the corporate plaintiff must promptly file a supplemental disclosure statement [*Fed R Civ P 7.1(b)*].

6.21[2] LOCAL PRACTICE: Identifying Interested Parties.

6.21[2][a] LOCAL PRACTICE: CD Cal Requirements. To enable the court to evaluate possible disqualification or recusal, the plaintiff's attorney must file with the complaint an original and two copies of a Notice of Interested Parties. The Notice must list all persons, associations of persons, firms, partnerships, and corporations (including parent corporations) that have a direct, pecuniary interest in the outcome of the case, including any insurance

carrier that might be liable in whole or in part (directly or indirectly) for a judgment that may be entered in the action or for the cost of defense [*CD Cal Civ LR 7.1*- 1] . The Notice must include the following certification [*CD Cal Civ LR 83-1.5*]:

The undersigned, counsel of record for the plaintiff, certifies that the following listed parties have a direct, pecuniary interest in the outcome of this case, These representations are made to enable the Court to evaluate possible disqualification or recusal.

6.21[2][b] LOCAL PRACTICE: ND Cal Requirements. To enable the court's judges to evaluate any need for disqualification or recusal early in the course of any case, the plaintiff must file a "Certification of Interested Entities or Persons." The Certification must be filed as a separate document [*ND Cal Civ LR 3-16(a)*, *(b)*, *(c)(3)*; *see 28 USC § 455(d)(1)*, *(3)*, *(4)*]. This requirement does not apply, however, if the plaintiff is any governmental entity or agency [*ND Cal Civ LR 3-16(a)*].

Cross Reference:

Discussion of the required contents of the Certification of Interested Entities or Persons, see *§ 6.11[14][b]*.

6.21[3] LOCAL PRACTICE: Designating Related Cases.

6.21[3][a] LOCAL PRACTICE: CD Cal Requirements--Notice of Related Cases. When the complaint is filed, or as soon as known thereafter, the plaintiff's attorney must file a Notice of Related Cases. The Notice must state whether any action previously filed or currently pending in the Central District and the action being filed appear [*CD Cal Civ LR 83-1.3.1*; *see CD Cal Civ LR 83-1.3.1.1*, CD Cal Gen Order 224, 5.0]:

- To arise from the same or substantially identical transactions, happenings, or events.
- To involve the same patent, trademark, or copyright, unless one of the actions joins the patent, trademark, or copyright with others that do not cover the same or substantially identical subject matter.
- To call for a determination of the same or substantially identical questions of law or fact.
- Likely for other reasons to entail substantial duplication of labor if heard by different judges.

The Notice of Related Cases must also include a brief factual statement setting forth the basis for the attorney's belief that the action qualifies for related-case transfer [*CD Cal Civ LR 83-1.3.1*]. The Notice of Related Cases must be served concurrently with service of the complaint [*CD Cal Civ LR 83-1.3.1*]. The plaintiff's attorney has a continuing duty to supplement the information required in the Notice of Related Cases [*CD Cal Civ LR 83-1.3.3*].

6.21[3][b] LOCAL PRACTICE: CD Cal Requirements--Notice of Pendency of Other Actions or Proceedings. If the action involves all or a material part of the subject matter of an action pending before the Court of Appeals for the Ninth Circuit, Bankruptcy Appellate Panel, Bankruptcy Court, or any other federal or state court or administrative agency the plaintiff's attorney must file a Notice of Pendency of Other Actions or Proceedings with the original complaint [*CD Cal Civ LR 83-1.4.1*]. The Notice of Pendency of Other Actions or Proceedings must contain the following [*CD Cal Civ LR 83-1.4.2*]:

- A description sufficient to identify all the other actions or proceedings.
- The title of the court or administrative body in which the other actions or proceedings are pending.

- The names of the parties or participants in the other proceedings.

- The names, addresses, and telephone numbers of the attorneys in the other actions or proceedings.

- A brief factual statement setting forth the basis for the attorney's belief that the action involves all or a material part of the subject matter of the other actions or proceedings.

The duty to file a Notice of Pendency of Other Actions or Proceedings continues throughout the time the action is before the district court [*CD Cal Civ LR 83-1.4.1*]. The Notice must also be filed if the action is the subject of or is related to an action that is before, or has been transferred by, the Judicial Panel on Multidistrict Litigation [*CD Cal Civ LR 83-1.4.3*; *see 28 USC § 1407*].

6.21[3][c] LOCAL PRACTICE: ED Cal Requirements--Notice of Related Cases. If the plaintiff's attorney has reason to believe that the action about to be filed is related to another action (whether or not dismissed or otherwise terminated), he or she must file (and serve on all parties in each action) a Notice of Related Cases [*ED Cal Gen LR 123(b)*]. For this purpose, two actions are "related" if any of the following circumstances exists [*ED Cal Gen LR 123(a)*]:

- Both actions involve the same parties and are based on the same or a similar claim.

- Both actions involve the same property, transaction, or event.

- Both actions involve similar questions of fact and the same question of law, and their assignment to the same judge or magistrate judge is likely to effect a substantial savings or judicial effort, either because the same result should follow in both actions or otherwise.

- For any other reasons, it would entail substantial duplication of labor if the actions were heard by different judges or magistrate judges.

The Notice of Related Cases must state the title and number of each possibly related action, together with a brief statement of their relationship and the reasons that assignment to a single judge or magistrate judge is likely to effect a savings of judicial effort and other economies [*ED Cal Gen LR 123(b)*].

6.21[3][d] LOCAL PRACTICE: ND Cal Requirements--Administrative Motion to Consider Whether Cases Should Be Related. If the plaintiff knows or believes that the action is related to an action that is or was pending in the Northern District of California, the plaintiff must file an Administrative Motion to Consider Whether Cases Should Be Related in the earliest-filed case. The motion must comply with *ND Cal Civ LR 7-11* and must contain [*ND Cal Civ LR 3-12(b), (d)*]:

- The title and case number of each apparently related case.

- A brief statement of the relationship of the actions [*see ND Cal Civ LR 3-12(a)*].

- A statement addressing whether assignment to a single judge is likely to conserve judicial resources and promote an efficient determination of the actions.

In this context, two cases are "related" if both of the following circumstances exist [*ND Cal Civ LR 3-12(a)*]:

- Both cases concern substantially the same parties, property, transaction or event.

- It appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different judges.

The plaintiff must serve a copy of the notice on all known parties to each identified case. Also, a chambers copy of the notice must be lodged for the assigned judge in each identified case [*ND Cal Civ LR 3-12(b)*].

6.21[3][e] LOCAL PRACTICE: ND Cal Requirements--Notice of Pendency of Other Action or Proceeding. If the plaintiff knows that the action being filed involves all or a material part of the same subject matter and all or substantially all of the same parties as another action that is pending in any other federal or state court, the plaintiff must promptly file (presumably with the complaint), and serve on all opposing parties, a Notice of Pendency of Other Action or Proceeding [*ND Cal Civ LR 3-13(a)*]. The notice must contain all of the following [*ND Cal Civ LR 3-13(b)*]:

- A description of the other action.
- The title and location of the court in which the other action or proceeding is pending.
- A brief statement of the following:
  - The relationship of the other action to the action being filed by the plaintiff.
  - If the other action is pending in another federal district court, whether transfer should be effected pursuant to *28 USC § 1407* (multidistrict litigation procedures) or whether other coordination might avoid conflicts, conserve resources, and promote an efficient determination of the action.
  - If the other action is pending before any state court, whether proceedings should be coordinated to avoid conflicts, conserve resources, and promote an efficient determination of the action.

6.21[3][f] LOCAL PRACTICE: SD Cal Requirements--Notice of Related Case. If the plaintiff's attorney has reason to believe that the action about to be filed is related to another pending action or proceeding on file in the Southern District of California or in any other federal or state court (whether pending, dismissed, or otherwise terminated), the attorney must file (and serve on all known parties to each related action or proceeding) a notice of related case. The notice must state the following [*SD Cal Civ LR 40.1(e)*]:

- The title, number, and filing date of each action or proceeding believed to be related.
- A brief statement of the cases' relationship and the reasons why assignment to a single district judge is or is not likely to effect a saving of judicial effort and other economies.

For this purpose, two cases are "related" if any of the following circumstances exists [*SD Cal Civ LR 40.1(f)*]:

- The cases involve some of the same parties and are based on the same or similar claims.
- The cases involve the same property, transaction, or event.
- The cases involve substantially the same facts and the same questions of law.

6.21[4] LOCAL PRACTICE: ED Cal Requirements--Preparing Designation of Counsel for Service. If

multiple attorneys from a single law firm, organization, public entity, agency or department are listed as counsel for a plaintiff, one of the listed attorneys must be designated as counsel for service. That designation may be made in the heading of the complaint, or by filing and serving a document entitled "Designation of Counsel for Service," stating the name, address, and telephone number of the designated counsel for service, and signed by that counsel [*ED Cal Gen LR 182(c)(1)*].

If no designation of counsel for service has been made, the court clerk may select the attorney for service from the heading on the first page of the complaint or from the signature block [*ED Cal Gen LR 182(c)(2)*].

6.21[5] Establishing or Securing Representation of Minor or Incompetent. If the action will be brought on behalf of a minor or incompetent person, counsel should either [*see Fed R Civ P 17(c)*; *ED Cal Civ LR 202(a)*]:

- Prepare to present documentation of the appointment of a representative for the minor or incompetent person under state law.

- Prepare a motion for the appointment of a guardian ad litem.

6.21[6] Applying for Leave to Proceed in Forma Pauperis.

6.21[6][a] Court Permission Required. If the plaintiff cannot afford to pay the filing fee at the time of filing the complaint, an application for in forma pauperis status should be prepared and submitted with the complaint [*see 28 USC § 1915*].

A pending application to proceed in forma pauperis, filed with a complaint, temporarily tolls a statute of limitations period, even if the filing fee is not paid at the time of the filing [*Gilardi v. Schroeder (7th Cir 1987) 833 F2d 1226, 1233*].

6.21[6][b] Affidavit Required. An application for in forma pauperis status must be accompanied by an affidavit that includes a statement documenting the plaintiff's financial condition and inability to pay the filing fee, plus a statement of the nature of the action and the plaintiff's belief that he or she is entitled to redress [*28 USC § 1915(a)(1)*]. If the plaintiff is a prisoner, the affidavit must be accompanied by a copy of the prisoner's trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint, obtained from the appropriate official of each prison at which the prisoner is or was confined [*28 USC § 1915(a)(1)*].

The court clerk provides forms for use in applying for in forma pauperis status. These forms should be used, since they incorporate the requirements of applicable local rules. Forms may be obtained from the clerk's office and may also be downloaded from the court's website:

- United States District Court for the Central District of California: www.cacd.uscourts.gov.

- United States District Court for the Eastern District of California: www.caed.uscourts.gov.

- United States District Court for the Northern District of California: www.cand.uscourts.gov.

- United States District Court for the Southern District of California: www.casd.uscourts.gov.

6.21[6][c] LOCAL PRACTICE: CD Cal Requirements. If the plaintiff wishes to proceed in forma pauperis [*see 28 USC § 1915*], the complaint must be accompanied by a motion and supporting declaration that sets forth information sufficient to establish that the plaintiff will be unable to pay the fees and costs or give security for them. The clerk supplies forms that may be used to prepare the application to proceed in forma pauperis [*CD Cal Civ LR 5-2*].

6.21[6][d] LOCAL PRACTICE: ND Cal Requirements. If the plaintiff wishes to proceed in forma pauperis [*see 28 USC § 1915*], the complaint must be accompanied by an ex parte motion to proceed in forma pauperis [*see ND Cal Civ LR 7-10(a)*] containing a request to so proceed, an affidavit or declaration executed under penalty of perjury, and a proposed order [*ND Cal Civ LR 3-10(a), (b)*]. The clerk supplies forms that may be used to prepare the affidavit [*ND Cal Civ LR 3-10(b)*] which must contain the information required by *28 USC § 1915*. The clerk will file the complaint, assign a case number, and deliver a copy to the assigned judge for determination [*ND Cal Civ LR 3-10(a)*]. If the judge grants the motion in part, or denies it, the order will state that the action is dismissed unless any outstanding fees, costs, or security is paid within the time set forth in the order [*ND Cal Civ LR 3-10(c)*].

6.21[6][e] LOCAL PRACTICE: SD Cal Requirements. If the plaintiff wishes to file the complaint in forma pauperis [*see 28 USC § 1915*], the complaint must be accompanied by an affidavit, executed under penalty of perjury, that includes the following [*SD Cal Civ LR 3.2(a), (f)*]:

- A statement as to current employment, including the amount of wages or salary per month and the name and address of the current employer.

- A statement, if not currently employed, as to the date of last employment and the amount of wages or salary per month that was received.

- A statement as to any money received within the past twelve months from any of the following sources:

  - Business, profession, or self-employment.

  - Rent payments, interest, or dividends.

  - Pensions, annuities, or life insurance payments.

  - Gifts or inheritances.

  - Any other source.

- A statement as to any cash in possession and as to any money in a financial institution, including checking, savings, and any other accounts. The statement must include any money available to the plaintiff.

- A statement as to any real estate, stocks, bonds, notes, automobiles, investments, or other valuable property (excluding ordinary household furnishings and clothing), describing the property and stating its approximate value.

- A statement as to all persons who depend on the plaintiff for support. The statement must include the relationship of the dependents and the amount contributed toward their support.

- A statement that, because of poverty, there is an inability to pay the initial costs of the proceeding or give security for costs, and the plaintiff's belief that he or she is entitled to relief.

6.21[7] LOCAL PRACTICE: Application to File Complaint Under Seal.

6.21[7][a] LOCAL PRACTICE: CD Cal Requirements. To obtain court approval to file the complaint under seal, the plaintiff must submit a written application and proposed order, along with the complaint. The original complaint and the judge's copy must be sealed in separate envelopes, with a copy of the title page attached to the front of each envelope. Conformed copies need not be placed in sealed envelopes [*CD Cal Civ LR 79-5.1*]. Applications and orders to seal, along with the material to be placed under seal, may not be electronically filed but must be filed manually, as prescribed by Local Rule 79-5. A Notice of Manual Filing must also be electronically filed identifying materials being manually filed [CD Cal LR 79-5.1].

6.21[7][b] LOCAL PRACTICE: ND Cal Requirements. A sealing order is required to allow the filing of documents under seal; a stipulation or a blanket protective order that allows a party to designate documents as sealable is insufficient [*ND Cal Civ LR 79-5(a)*]. To obtain a court order authorizing the sealing of the complaint, or portions thereof, the plaintiff must file and serve an administrative motion to file under seal [*see ND Cal Civ LR 7-11*], along with an accompanying declaration establishing that the complaint, or a portion of it, is sealable, and lodge the complaint with the court clerk [*ND Cal Civ LR 79-5(a)-(c)*].

Pending consideration of a revision to *ND Cal Civ LR 79-5*, the following procedures apply, effective May 10, 2010, to the filing of sealed documents in civil cases [ND Cal Gen Order 62]:

- Motions to file documents under seal must be made electronically.

- In order to move to electronically file (e-file) either an entire document under seal pursuant to *ND Cal Civ LR 79-5(b)*, or a portion of a document under seal pursuant to *ND Cal Civ LR 79-5(c)*:

  - E-file an Administrative Motion to File Under Seal [*see ND Cal Civ LR 7-11*];

  - E-file under seal and serve manually one or more Declarations (instructions on how to e-file under seal are available on the ECF website under FAQs at https://ecf.cand.uscourts.gov/cand/index.html);

  - E-file the Proposed Order (filed unsealed) and e-mail the Proposed Order to the Judge's proposed order e-mail address; and

  - Serve manually, but do not e-file, the documents to be filed under seal.

- Lodge with the clerk for delivery to the judge's chambers a copy of the entire filing including the documents to be filed under seal, contained in an 81/2-inch by 11-inch sealed envelope or other suitable sealed container, with a cover sheet affixed to the envelope or container, setting out the information required by ND Cal Civ LR 3-4(a) and (b), prominently displaying the notation: "DOCUMENT SUBMITTED UNDER SEAL AND CHAMBERS COPY" no later than noon on the business day following the day that the administrative motion is filed electronically.

If the motion to file under seal is denied in part or in full, neither the document nor any proposed redacted version may be e-filed under seal. If the motion is denied in full, the submitting party may retain the document and not make it part of the record in the case, or, within 4 days, e-file the document unsealed. If the motion is denied in part and granted in part, the party may within 4 days resubmit the document in a manner that conforms to the Court's order and this rule [ND Cal Gen Order 62].

If a motion to file under seal is granted in part or full, the requesting party will e-file the document under seal according

to the procedures outlined in the FAQs on the ECF website at https://ecf.cand.uscourts.gov/cand/index.html [ND Cal Gen Order 62].

Unless otherwise ordered by the court, any document filed under seal must be kept from public inspection, including inspection by attorneys and parties to the action, during the pendency of the case. The chambers copy of sealed documents will be disposed of in accordance with the assigned Judge's discretion. Ordinarily these copies will be recycled, not shredded, unless special arrangements are made [ND Cal Gen Order 62].

Any document filed under seal in a civil case will be open to public inspection without further action by the court 10 years from the date the case is closed. However, a party that submitted documents that were placed under seal may, on showing good cause at the conclusion of the case, seek an order that would continue the seal until a specific date beyond 10 years. Nothing in this rule is intended to affect the normal records destruction policy of the United States Courts [ND Cal Gen Order 62].

Cross Reference:

Discussion of the information required on the first page of the complaint, see *§ 6.06*.

6.21[8] Application for Temporary Restraining Order.

6.21[8][a] Application Must Be Supported by Affidavit or Verified Complaint. If the plaintiff will seek a temporary restraining order (TRO), the complaint presented for filing should be accompanied by an application for a TRO, which must be supported by an affidavit or the verified allegations of the complaint [*Fed R Civ P 65(b)*]. If the TRO is sought ex parte, the plaintiff's attorney should also certify to the court in writing the efforts, if any, that have been made to notify the defendant of the application and the reasons that notice should not be required [*Fed R Civ P 65(b)*].

Cross Reference:

Discussion of temporary restraining orders, see Ch. 19, Preliminary Injunctions, TROs, and Other Provisional Remedies, *§ 19.09*.

6.21[8][b] LOCAL PRACTICE: CD Cal Requirements. If the plaintiff will seek a temporary restraining order (TRO), the complaint presented for filing should be accompanied by an application for a TRO, a proposed TRO, and an order to show cause why a preliminary injunction should not issue [*CD Cal Civ LR 65-1*].

6.21[8][c] LOCAL PRACTICE: ED Cal Requirements. If the plaintiff will seek a temporary restraining order (TRO), the complaint presented for filing should be accompanied by the following [*ED Cal Civ LR 231(c)*]:

- A motion for a TRO.
- A brief on the legal issues presented by the motion.
- An affidavit supporting the existence of an irreparable injury.
- An affidavit detailing the notice given to affected parties or counsel, or detailing the efforts made to effect notice, or showing good cause why notice should not be given.
- A proposed TRO.
- A proposed order with blanks fixing the time and date for a hearing on a motion for a preliminary injunction, the date for filing responsive papers, the amount of any bond, and the date and hour of

issuance. If the TRO is sought ex parte, this proposed order must also notify the affected party of the right to request modification or dissolution of the TRO on two days' notice, or shorter notice if allowed by the court [*see Fed R Civ P 65(b)*].

A motion for a temporary restraining order filed electronically after normal business hours of the clerk's office will not be reviewed by the court until the next business day, at the earliest [*ED Cal Gen LR 134(d)*].

6.21[8][d] LOCAL PRACTICE: ND Cal Requirements. If the plaintiff will seek an ex parte temporary restraining order (TRO), the complaint presented for filing should be accompanied by the following [*ND Cal Civ LR 65-1(a), (c)*]:

- A motion for a TRO.
- A memorandum of points and authorities in support of the motion.
- A proposed TRO.
- A proposed order to show cause setting a hearing on a motion for a preliminary injunction.

6.21[9] Notice of Claim of Unconstitutionality.

6.21[9][a] Court Required to Notify Appropriate Authority. If the complaint challenges the constitutionality of an act of Congress or a state statute, and neither the appropriate government nor any of its officers, agencies, or employees is a party to the action, the plaintiff must notify the appropriate federal or state authority, who may then intervene in the action [*28 USC § 2403*; *Fed R Civ P 5.1*]. Local rules may require the plaintiff to provide similar notice.

6.21[9][b] LOCAL PRACTICE: ED Cal Requirements. If the complaint challenges the constitutionality of any federal or state administrative regulation of general applicability, and neither the appropriate government nor any of its officers, agencies, or employees is a party to the action, the plaintiff must file a notice identifying the regulation and setting forth in what respects its constitutionality is questioned. Thereupon, or sua sponte, the court must serve the notice on the United States Attorney General, on the United States Attorney, and on all other parties [*ED Cal Gen LR 132*].

Distinguish:

The foregoing provision applies only to claims of unconstitutionality of *administrative regulations* [*ED Cal Gen LR 132*]; the District Court for the Eastern District of California does not appear to impose on the parties a similar requirement to provide the court with notice of a claim of unconstitutionality of a federal or state *statute*.

6.21[9][c] LOCAL PRACTICE: ND Cal Requirements. If the complaint challenges the constitutionality of any an act of Congress or a state statute, and neither the appropriate government nor any of its officers, agencies, or employees is a party to the action, the plaintiff must file with the court a notice of the claim of unconstitutionality with the assigned judge (or, if no assignment has been made, with the chief judge). The notice must identify the statute and describe the basis for the claim that it is unconstitutional. The notice must be served on the United States Attorney for the Northern District of California, or on the state attorney general, as appropriate [*ND Cal Civ LR 3-8*].

6.21[10] LOCAL PRACTICE: ED Cal Requirements--Notice of Requirement of Three-Judge Court. If the action is required to be heard and determined by a three-judge court [*see 28 USC § 2284*], the plaintiff must immediately file a notice to that effect with the clerk. A copy of the notice must served on all other parties [*ED Cal Civ LR 203*].

Example:

A three-judge court is required when specifically required by an act of Congress, such as when the action challenges the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body [*see 28 USC § 2284(a)*].

6.21[11] Additional Documents in Class Action Subject to Private Securities Litigation Reform Act.

6.21[11][a] Certification by Potential Lead Plaintiff. In a private plaintiff class action brought under the Securities Exchange Act of 1934 [*15 USC § 78a et seq.*], the Private Securities Litigation Reform Act of 1995 (PSLRA) [*see 15 USC §§ 77z-1, 78u-4*] requires each plaintiff seeking to serve as a representative party on behalf of a class to provide a sworn certification for filing with the complaint. The certification, which must be personally signed by the plaintiff, must contain all of the following [*15 USC § 78u-4(a)(2)(A)*]:

- A statement that the plaintiff has reviewed the complaint and authorized its filing.
- A statement that the plaintiff did not purchase the security that is the subject of the complaint at the direction of the plaintiff's counsel or in order to participate in any private action arising under the Securities Exchange Act of 1934.
- A statement that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary.
- A statement setting forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint.
- An identification of any other action under the Securities Exchange Act of 1934, filed during the three-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff sought to serve as a representative party on behalf of a class.
- A statement that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court.

The certification will not be construed to be a waiver of the plaintiff's attorney-client privilege [*15 USC § 78u-4(a)(2)(B)*].

The PSLRA requires that the potential lead plaintiff's certification be filed [*15 USC § 78u-4(a)(2)*], but it does not require service of the certification. Local rules, however, may require service [*see, e.g., ND Cal Civ LR 3-7(b)*].

6.21[11][b] LOCAL PRACTICE: ND Cal Requirements--Certification by Potential Class Counsel. In an action governed by the Private Securities Litigation Reform Act of 1995 (PSLRA) [*see 15 USC §§ 77z-1, 78u-4*], any attorney seeking to serve as class counsel must serve and file a certificate under penalty of perjury that either [*ND Cal Civ LR 3-7(d)*]:

- Affirms that the attorney does not directly own or otherwise have a beneficial interest in securities that are the subject of the action.
- Sets forth with specificity the extent of any such ownership or interest and explains why that ownership or interest does not constitute a conflict of interest sufficient to disqualify the attorney from representing the class.

6.21[11][c] LOCAL PRACTICE: ND Cal Requirements--Electronic Copy of Complaint. In an action governed by the Private Securities Litigation Reform Act of 1995 (PSLRA) [*see 15 USC §§ 77z-1*, *78u-4*], the complaint (and certain other documents in the action) must be posted at a Designated Internet Site to which potential class members will have access [*ND Cal Civ LR 23-2(a)*, *(b)(1)*]. The plaintiff's attorney must post the complaint on the day it is filed with the court, by forwarding an electronic copy of the complaint to a qualifying Designated Internet Site [*ND Cal Civ LR 23-2(c)*, *(d)*].

6.21[12] LOCAL PRACTICE: CD Cal Requirements--Filing Required Notice in Patent, Plant Variety Protection, Trademark, or Copyright Case. In a patent, plant variety protection, or trademark case in which jurisdiction is invoked in whole or in part under *28 USC § 1338*, the complaint presented to the clerk for filing must be accompanied by the original and two copies of the required notice to the Patent and Trademark Office (Form AO 120, Report on the Filing or Determination of an Action Regarding a Patent or Trademark) [*see 15 USC § 1116(c)*; *35 USC § 290*]. Copies of the notice are available from the clerk and may be downloaded from the court's website (www.cacd.uscourts.gov) [*CD Cal Civ LR 3-1*].

In a copyright case in which jurisdiction is invoked in whole or in part under *28 USC § 1338*, the complaint presented to the clerk for filing must be accompanied by the original and four copies of the required notice to the Patent and Trademark Office (Form AO 121, Report on the Filing or Determination of an Action or Appeal Regarding a Copyright) [*see 17 USC § 508*]. Copies of the notice are available from the clerk and may be downloaded from the court's website (www.cacd.uscourts.gov) [*CD Cal Civ LR 3-1*].

Cross Reference:

Local district court forms, see *§ 6.34*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

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6.22 Sample Format of Complaint.

Sample Format of Complaint.

Tom Doe (California Bar number 987654)

100 North Main St., Suite 200
Farallon City, California 90000

Phone: 555-555-5555

Fax: 555-555-5556

_____ [*attorney's e-mail address*]

Attorney for [*party's status and name*]

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	NO. _____
Plaintiff	)	
vs.	)	COMPLAINT FOR DAMAGES

_____ [*name*],	)	(Contract)
Defendant	)	
	)	JURY DEMANDED
	)	

_____

1. **Jurisdiction.** _____ [*Allege subject matter jurisdiction*.]

2. _____ [*If necessary, allege capacity of plaintiff*.]

3. _____ [*If necessary, allege capacity of defendant*.]

4. _____ [*Insert short, plain statement of claim, using as many numbered paragraphs as necessary*.]

_____ [*If appropriate, insert jury demand*.]

Wherefore, the plaintiff demands judgment against the defendant for the sum of $_____, plus interest and costs [*or specify other relief sought*].

Signed: _____

Tom Doe

Attorney for Plaintiff

100 North Main St., Suite 200

Farallon City, California 90000

Phone: 555-555-5555

[*If required, add verification*.]

[*If appropriate, attach exhibits*.]

[*If required under local rules (e.g., ND Cal Civ LR 3-16(c)), set out Certification of Interested Persons*.]

[*If required, attach designation of related cases*.]

NOTES.

Authority:
Fed R Civ P 7(a), 8(a), (d), 9, 10, 11(a), (b)

Format Requirements:
See *§ 6.04[3]*

Drafting Heading:
See *§ 6.05*

Drafting Caption:
See *§ 6.06*

Drafting Jurisdictional Allegations:
See *§ 6.07*

Drafting Party Allegations:
See *§ 6.08*

Drafting Statement of Claim:
See *§§ 6.09*, *6.10*, *6.11*

Drafting Jury Demand:
See *§ 6.13*

Drafting Prayer:
See *§ 6.12*

Drafting Signature Block:
See *§ 6.14*

Drafting Verification:
See *§ 6.15*

Attaching Exhibits:
See *§ 6.16*

Corporate Disclosure Statement:
See *§ 6.21[1]*

Notice or Certification of Interested Parties:
See *§ 6.21[2]*

Designation of Related Cases:
See *§ 6.21[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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6.23 Allegations of Federal Question Jurisdiction.

Allegations of Federal Question Jurisdiction.

[*Use one or more of the following allegations, as appropriate:*]

1. **Jurisdiction.** This action arises under the Constitution of the United States, Article _____ [*number*], Section _____ [*number*], as more fully described below.

[*OR*]

1. **Jurisdiction.** This action arises under the Constitution of the United States, Amendment _____ [*number*], Section _____ [*number*], as more fully described below.

[*OR*]

1. **Jurisdiction.** This action arises under the United States Code, Title _____ [*number*], Section _____ [*number*], as more fully described below.

[*OR*]

1. **Jurisdiction.** This action arises under the _____ [*name of treaty*] Treaty of the United States, regarding _____ [*describe substance of treaty*], executed on _____ [*date*], as more fully described below.

NOTES.

Authority:
28 USC § 1331; *Fed R Civ P 8(a)*

Official Form:
See Fed R Civ P Appendix of Forms, Form 7(b), (c)

Format Requirements:
See *§ 6.04*

Drafting Federal Question Jurisdiction Allegations:
See *§§ 6.07[1], [2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsConstitutional LawThe JudiciaryJurisdictionFederal Questions

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6.24 Allegations of General Diversity Jurisdiction.

Allegations of General Diversity Jurisdiction.

[*Allege parties' citizenship and amount in controversy, e.g.:*]

[*If the parties are individuals and United States citizens:*]

1. **Jurisdiction.** Plaintiff _____ [*name*] is a citizen of the State of _____ [*name of state*]. Defendant _____ [*name*] is a citizen of the State of _____ [*name of state*]. The matter in controversy, exclusive of interest and costs, exceeds the sum of $75,000.

[*OR, if the parties are corporations incorporated in the United States:*]

1. **Jurisdiction.** Plaintiff _____ [*name*] is a corporation incorporated under the laws of the State of _____ [*name of state*], with its principal place of business in the State of _____ [*name of state*]. Defendant _____ [*name*] is a corporation incorporated under the laws of the State of _____ [*name of state*], with its principal place of business in the State of _____ [*name of state*]. The matter in controversy, exclusive of interest and costs, exceeds the sum of $75,000.

[*Or, if the parties are partnerships or unincorporated associations:*]

1. **Jurisdiction.** Plaintiff _____ [*name*] is a partnership consisting of the following partners:
_____ [*name*], who is a citizen of the State of _____ [*name of state*];
_____ [*name*], who is a citizen of the State of _____ [*name of state*]; and
_____ [*name*], who is a citizen of the State of _____ [*name of state*]. Defendant

_____ [*name*] is an unincorporated association consisting of the following individuals:
_____ [*name*], who is a citizen of the State of _____ [*name of state*];
_____ [*name*], who is a citizen of the State of _____ [*name of state*]; and
_____ [*name*], who is a citizen of the State of _____ [*name of state*]. The matter in controversy, exclusive of interest and costs, exceeds the sum of $75,000.

[*Or, if a foreign citizen or subject is a party:*]

1. **Jurisdiction.** Plaintiff _____ [*name*] is a citizen of the State of _____ [*name of state*]. Defendant _____ [*name*] is a _____ [citizen *or* subject] of _____ [*name of foreign state*], a foreign State. The matter in controversy, exclusive of interest and costs, exceeds the sum of $75,000.

[*Or, if a foreign state, or its political subdivision, agency, or instrumentality, is the plaintiff, and the defendant is a United States citizen:*]

1. **Jurisdiction.** Plaintiff _____ [*name of foreign state*] is a foreign State as defined in *United States Code, Title 28, Section 1603(a)*. Defendant _____ [*name*] is a citizen of the State of _____ [*name of state*]. The matter in controversy, exclusive of interest and costs, exceeds the sum of $75,000.

NOTES.

Authority:
28 USC § 1332(a); *Fed R Civ P 8(a)*

Format Requirements:
See *§ 6.04*

Drafting Diversity Jurisdiction Allegations:
See *§ 6.07[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewConstitutional LawThe JudiciaryJurisdictionDiversity

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1-6 MB Practice Guide: Fed Pretrial Civ Proc in CA 6.25

6.25 Statement of Supplemental Jurisdiction.

Statement of Supplemental Jurisdiction.

2. **Supplemental Jurisdiction.** The claim of Plaintiff _____ [*name*] against Defendant _____ [*name*] for _____ [*describe claim subject to supplemental jurisdiction, e.g.,* breach of contract] is related to the Plaintiff's claim for _____ [*describe claim over which court has subject matter jurisdiction, e.g.,* copyright infringement] to the extent that both claims form part of the same case under Article III of the Constitution, in the following respects: _____ [*describe connection between claims, showing common nucleus of operative facts*]. Supplemental jurisdiction over _____ [*describe claim subject to supplemental jurisdiction, e.g.,* breach of contract] is therefore proper under *United States Code, Title 28, Section 1367(a)*.

NOTES.

Authority:
28 USC § 1367(a); *Fed R Civ P 8(a)*

Official Form:
See Fed R Civ P Appendix of Forms, Form 7(a)

Format Requirements:
See *§ 6.04*

Pleading Supplemental Jurisdiction:
See *§ 6.07[5]*

Legal Topics:

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

Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewConstitutional LawThe JudiciaryJurisdictionSupplemental Jurisdiction

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6.26 Statement of Claim Based on State Common Law: Contract Breach.

Statement of Claim Based on State Common Law: Contract Breach.

_____ [*Paragraph number*]. On _____ [*date*], Plaintiff _____ [*name*] and Defendant _____ [*name*] entered into a contract for _____ [*describe purpose of contract, e.g.*, the repair of the Defendant's bicycle] for a valuable consideration. A true and correct copy of this contract is attached to this complaint as Exhibit 1 and is incorporated by reference in this complaint.

_____ [*Paragraph number*]. Among other things, as part of the contract, the Defendant agreed to _____ [*specify performance plaintiff desired to obtain, e.g.,* pay the Plaintiff the sum of $ 1,000 on the Plaintiff's completion of the repair work].

_____ [*Paragraph number*]. Plaintiff _____ [*name*] has performed all the terms and conditions of the contract that he/she was obligated to perform.

_____ [*Paragraph number*]. Defendant _____ [*name*] breached the contract, in that he/she _____ [*describe breach, e.g.*, has failed and refused to pay the Plaintiff the sum of $1,000, despite the Defendant's acceptance of the repair work done by the Plaintiff].

_____ [*Paragraph number*]. Plaintiff _____ [*name*] has demanded that Defendant _____ [*name*] fulfill his/her obligations under the contract, but the Defendant has failed and refused to do so and continues to fail and refuse to do so.

_____ [*Paragraph number*]. By reason of the Defendant's breach of contract, the Plaintiff has been damaged in the sum of $1,000.

NOTES.

Authority:

Fed R Civ P 8(a)

Format Requirements:
See *§ 6.04*

Drafting Claim:
See *§§ 6.09*, *6.11[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawGeneral OverviewContracts LawBreachGeneral Overview

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6.27 Statement of Claim Based on Federal Statute: Copyright Infringement.

Statement of Claim Based on Federal Statute: Copyright Infringement.

_____ [*Paragraph number*]. Prior to _____ [*date of issuance of copyright registration*], Plaintiff _____ [*name*] created and wrote an original book, entitled _____ [*title*] (the Work).

_____ [*Paragraph number*]. The Work contains a large amount of material that is wholly original with the Plaintiff and is copyrightable subject matter under the laws of the United States.

_____ [*Paragraph number*]. On _____ [*date*], copyright registration _____ [*specify registration number*] pertaining to the Work was duly and legally issued to Plaintiff _____ [*name*].

_____ [*Paragraph number*]. Since _____ [*date of issuance of copyright registration*], the Work has been published by Plaintiff _____ [*name*] and all copies of it made by the Plaintiff or under the Plaintiff's authority or license have been published in strict conformity with the provisions of the laws governing copyright.

_____ [*Paragraph number*]. Since _____ [*date of issuance of copyright registration*], Plaintiff _____ [*name*] has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in the Work.

_____ [*Paragraph number*]. After _____ [*date of issuance of copyright registration*], Defendant _____ [*name*] infringed the copyright of Plaintiff _____ [*name*] in the Work by publishing and placing on the market a book entitled _____ [*title*] (the Infringing Work), which was copied largely from the Work.

_____ [*Paragraph number*]. A copy of the Work attached to this Complaint as Exhibit 1. A copy of the Infringing Work is attached to this Complaint as Exhibit 2.

_____ [*Paragraph number*]. Plaintiff _____ [*name*] has notified Defendant _____ [*name*] that the Defendant has infringed the Plaintiff's copyright, and the Defendant has continued to infringe the copyright.

_____ [*Paragraph number*]. After _____ [*date of issuance of copyright registration*], and continuously since about _____ [*date*], Defendant _____ [*name*] has been publishing, selling, and otherwise marketing the Infringing Work, to the irreparable damage of Plaintiff _____ [*name*].

NOTES.

Authority:
Fed R Civ P 8(a), 9(d)

Official Form:
See Fed R Civ P Appendix of Forms, Form 19

Format Requirements:
See *§ 6.04*

Drafting Claim:
See *§§ 6.09, 6.11[11]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCopyright LawGeneral OverviewCopyright LawCivil Infringement ActionsGeneral Overview

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6.28 Allegation of Securities Fraud.

Allegation of Securities Fraud.

_____ [*Paragraph number*]. On _____ [*dates*], at _____ [*place*], the Plaintiffs entered into stock purchase and stock syndication agreements with Defendant _____ [*name*]. By the terms of the agreements, the parties attempted to _____ [*describe agreements*]. True and correct copies of the agreements are attached to this complaint as Exhibits 1 and 2.

_____ [*Paragraph number*]. The agreements were obtained by fraud and misrepresentation by Defendant _____ [*name*]. Under the terms of the stock purchase agreement (Exhibit 1), the Defendant expressly represented that _____ [*state specific representations that are alleged to be fraudulent*].

_____ [*Paragraph number*]. The representations described in Paragraph _____ [*number*] were false when made, for the following reasons: _____ [*provide forth detailed explanation of why representations were false*].

_____ [*Paragraph number*]. When Defendant _____ [*name*] made the representations described in Paragraph _____ [*number*], the Defendant knew they were false, in that _____ [*state facts creating strong inference of knowing or intentional conduct by defendant*].

_____ [*Paragraph number*]. In making the representations described in Paragraph _____ [*number*], Defendant _____ [*name*] intended to induce the Plaintiffs to rely on them and to enter into the agreements described in Paragraph _____ [*number*].

_____ [*Paragraph number*]. The Plaintiffs relied on the representations described in Paragraph _____ [*number*] and entered into the agreements described in Paragraph _____ [*number*] to their detriment, in that _____ [*explain resulting detriment*].

_____ [*Paragraph number*]. As a result of their reliance on the representations described in Paragraph _____ [*number*],

the Plaintiffs were damaged in that _____ [*state all elements of damage*].

NOTES.

Authority:
15 USC § 78u-4(b)(1), (2); Fed R Civ P 8(a), 9(b)

Format Requirements:
See *§ 6.04*

Drafting Allegation:
See *§§ 6.11[2], [3], [4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewSecurities LawGeneral OverviewSecurities LawBlue Sky LawsBlue Sky FraudGeneral OverviewSecurities LawLiabilitySecurities Exchange Act of 1934 ActionsImplied Private Rights of ActionGeneral Overview

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6.29 Allegation of Performance or Occurrence of Conditions Precedent.

Allegation of Performance or Occurrence of Conditions Precedent.

[*Use one of the following allegations, as appropriate:*]

_____ [*Paragraph number*]. Plaintiff _____ [*name*] has performed all of the conditions _____ [*describe source of conditions precedent, e.g.*, of the contract described in Paragraph 3] that he/she was required to perform.

[*OR:*]

_____ [*Paragraph number*]. All of the conditions precedent to _____ [*describe act required on occurrence of conditions precedent, e.g.*, Defendant Mary Jones's obligations under the contract described in Paragraph 3] have been satisfied or have occurred.

NOTES.

Authority:
Fed R Civ P 9(c)

Format Requirements:
See *§ 6.04*

Drafting Allegation:
See *§ 6.11[5][a]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewContracts LawGeneral Overview

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6.30 Allegation of Nonperformance of Conditions Precedent.

Allegation of Nonperformance of Conditions Precedent.

_____ [*Paragraph number*]. Defendant _____ [*name*] has failed to perform all of the conditions _____ [*describe source of conditions precedent, e.g.*, of the insurance contract described in Paragraph 3] that he/she was required to perform. In particular, the Defendant did not submit proofs of loss to the Plaintiff in compliance with the requirements of the insurance contract, or at all.

NOTES.

Authority:
Fed R Civ P 9(c)

Format Requirements:
See *§ 6.04*

Drafting Allegation:
See *§ 6.11[5][b]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewContracts LawGeneral Overview

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6.31 Demand for Judgment (Prayer).

Demand for Judgment (Prayer).

Wherefore, Plaintiff _____ [*name*] demands judgment against Defendant _____ [*name*] as follows:

[*Use one or more of the following provisions, as appropriate:*]

(1) For damages in the sum of $_____;

(2) For liquidated damages according to the agreement of the parties in the sum of $_____;

(3) For interest on the damages at an annual rate of _____ [*specify legal or agreed rate*] percent per annum from _____ [*date*];

(4) For the principal sum of $_____, with interest at an annual rate of _____ [*specify legal or agreed rate*] percent per annum from _____ [*date*];

(5) For a declaration by the court of the rights and duties of the parties herein, and specifically for a declaration that _____ [*specify declaratory judgment sought*];

(6) For _____ [*specify injunctive relief sought, e.g.,* a temporary restraining order, a preliminary injunction, and a permanent injunction] enjoining the Defendant [and the Defendant's agents, servants, and employees, and all persons acting under, in concert with, or for the Defendant] from _____ [*specify acts to be enjoined*];

(7) Ordering the Defendant to _____ [*indicate specific performance sought, e.g.,* execute and deliver

to the Plaintiff the deed to the property described above];

(8) For punitive damages _____ [in the sum of $_____ or according to proof];

(9) For reasonable attorney's fees, pursuant to _____ [*specify statutory authority*], _____ [in the sum of $_____ or in an amount to be determined by the court];

(10) For costs of suit herein incurred; and

(11) For such other and further relief as the court may deem proper.

NOTES.

Authority:
Fed R Civ P 8(a)

Drafting Prayer:
See *§ 6.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesGeneral Overview

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6.32 Verification of Complaint.

Verification of Complaint.

_____ [*Name*], being duly sworn, deposes and says that he/she resides at _____ [*address*]; that he/she is _____ [the Plaintiff *or* one of the Plaintiffs or a specified officer of a plaintiff corporation] in this action; and that he/she has read the foregoing complaint and knows the contents of it and that the contents of the complaint are true of his/her own knowledge, except as to matters stated in the complaint on in formation and belief, and as to those matters he/she believes them to be true.

_____ [*signature*]

_____ [*typed or printed name*]

_____ [*address*]

_____ [*telephone number*]

NOTES.

Authority:
Fed R Civ P 11(a)

Drafting Verification:
See *§ 6.15*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading &

PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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6.33 Summons.

Summons.

[*Set forth heading, including attorney's name, address, and other identifying information*]

[*Set forth caption of action, including title of court and title of case*]

To the Defendant named above:

[*If the defendant is the United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity:*]

You are hereby summoned and required to serve upon _____ [*name*], plaintiff's attorney, whose address is _____ [*state address*], an answer to the complaint that is herewith served upon you, within 60 days after service of this summons on the United States Attorney, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable time after service.

[*Or, if the defendant is a United States officer or employee sued in an individual capacity for acts or omissions in connection with duties performed on behalf of the United States:*]

You are hereby summoned and required to serve upon _____ [*name*], plaintiff's attorney, whose address is _____ [*state address*], an answer to the complaint that is herewith served upon you, within 60 days after service of this summons on you or service on the United States Attorney, whichever is later, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for

the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable time after service.

[*Or, in any other case:*]

You are hereby summoned and required to serve upon _____ [*name*], plaintiff's attorney, whose address is _____ [*state address*], an answer to the complaint that is herewith served upon you, within 20 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable time after service.

_____ [*signature*]

Clerk of the Court

_____ [*seal of the district court*]
_____ [*date*]

NOTES.

Authority:
Fed R Civ P 4(a), 12(a)(1)(A), (2), (3)

Official Form:
See Fed R Civ P Appendix of Forms, Form 3

Drafting Summons:
See *§ 6.19*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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6.34 Local District Court Forms.

Local district court forms relating to matters addressed in this chapter are listed below.

Central District

Civil Cover Sheet (CV-71)

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Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Summons in a Civil Action (AO 440)

Click here to view image.

Proof of Service -- Summons and Complaint (CV-1)

Click here to view image.

Summons in a Civil Action (AO 440)

Click here to view image.

Notice to Counsel (CV-20)

Click here to view image.

Notice of Acknowledgment of Receipt of Summons and Complaint (CV-21)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Notice of Lawsuit and Request for Waiver of Service of Summons (CV- 39)

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Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Waiver of Service of Summons (CV-108)

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Eastern District

Civil Cover Sheet (JS-44)

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Summons in a Civil Action (AO 440)

Click here to view image.

Waiver of Service of Summons (AO 399)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Notice of Lawsuit and Request for Waiver of Service of Summons (AO 398)

Click here to view image.

Go to Interactive Fillable Form.

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Northern District

Civil Cover Sheet (JS 44)

Click here to view image.

Summons in a Civil Action (AO 440)

Click here to view image.

Notice of Lawsuit and Request for Waiver of Service of Summons (AO 398)

Click here to view image.

Waiver of Service of Summons (AO 399)

Click here to view image.

Southern District

Civil Cover Sheet (JS-44)

Click here to view image.

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Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Summons in a Civil Action (AO 440)

Click here to view image.

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Waiver of Service of Summons

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Notice of Lawsuit and Request for Waiver of Service of Summons Declaration of Service

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Sample Complaint

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Cross Reference:

Automated HotDocs(R) and PDF versions of these forms may be accessed and filled in from the online version of this publication, and are also available at www.LexisOne.com/forms.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 7 Service of Summons

1-7 MB Practice Guide: Fed Pretrial Civ Proc in CA 7.syn

§ 7.syn Synopsis to Chapter 7: Service of Summons

7.01 Scope.

7.02 Objective and Strategy.

7.02[1] Service of Summons or Waiver of Service Is Prerequisite to Invoking Personal Jurisdiction Over Defendant.

7.02[2] Consider Advantages and Disadvantages of Various Methods for Service.

7.02A CHECKLIST: Avoiding Dismissal for Untimely Service.

7.03 Service of Summons and Complaint Must Be Timely.

7.03[1] Plaintiff Usually Has Only 120 Days From Filing of Complaint to Serve Defendants.

7.03[2] Failure to Meet Service Deadline May Result in Dismissal.

7.04 Dismissal for Failure to Serve Within 120 Days Follows Notice to Plaintiff.

7.04[1] Notice Is Prerequisite to Dismissal.

7.04[2] LOCAL PRACTICE: SD Cal Requirements--Clerk Prepares OSC Re Dismissal Following Lack of Timely Service.

7.04[3] Dismissal Is Without Prejudice.

7.04[4] Defendant May Waive Untimely Service by Failure to Object.

7.05 Extension of 120-Day Deadline for Good Cause.

7.05[1] Court May Grant Extension After Original 120-Day Period Expires.

7.05[2] Court Will Grant Extension If Plaintiff Shows Good Cause.

7.05[3] "Good Cause" Is Not Clearly Defined.

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7.11[3][b] LOCAL PRACTICE: CD Cal Requirements--Limitation on Service by U.S. Marshal.

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7.29[3] California Law Provides Several Methods for Serving Active Corporations.

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7.30[1][a] U.S. Attorney Must Be Served.

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7.30[2] Serving a U.S. Agency or Governmental Corporation, or Officer or Employee Sued in Official Capacity.

7.30[2][a] U.S. Attorney and Attorney General Must Be Served.

7.30[2][b] Agency, Corporation, Officer, or Employee Must Be Served by Registered or Certified Mail.

7.30[3] Serving a U.S. Officer or Employee Sued in Individual Capacity for Acts or Omissions in Performance of Duty.

7.30[3][a] U.S. Attorney and Attorney General Must Be Served.

7.30[3][b] Officer or Employee Must Be Served Individually.

7.30[4] Court Must Allow Time to Cure Defects in Service.

7.30[4][a] If U.S. Attorney or U.S. Attorney General Has Been Served, Court Must Grant Reasonable Time to Serve Others.

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7.31[1] State and Local Governments May Be Served by Delivery of Summons and Complaint to Chief Executive.

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7.31[3] California Law Provides Several Methods for Service on State and Local Governments.

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7.32 CHECKLIST: Choosing Proper Method for Serving Individual in Foreign Country.

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7.35 CHECKLIST: Choosing Proper Method for Serving Foreign Government.

7.36 CHECKLIST: Choosing Proper Method for Serving Foreign Governmental Agency or Instrumentality.

7.37 Serving Individuals in Foreign Countries.

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7.37[2] Absent International Authority, Service May Generally Be Made Pursuant to Law of Foreign Country.

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7.38 Serving Minors and Incompetent Persons in Foreign Countries.

7.39 Serving Corporations, Partnerships, and Unincorporated Associations in Foreign Countries.

7.40 Serving Foreign States, Their Political Subdivisions, Agencies, or Instrumentalities.

7.40[1] Foreign State, Its Political Subdivision, Agency, or Instrumentality Must Be Served in Compliance With 28

USC § 1608.

7.40[2] Service on Foreign State or Its Political Subdivision.

7.40[2][a] First Attempt Is by Delivery.

7.40[2][b] Second Attempt Is by Return Receipt Mail Sent to Foreign State.

7.40[2][c] Third Attempt Is by Return Receipt Mail Sent to Secretary of State.

7.40[2][d] When Service Is Deemed Complete.

7.40[3] Service on Foreign State Agency or Instrumentality.

7.40[3][a] First Attempt Requires Delivery of Summons and Complaint.

7.40[3][b] Second Attempt Requires Delivery of Additional Documents.

7.40[3][c] When Service Is Deemed Complete.

7.41 120-Day Deadline Does Not Apply to Service in Foreign Country.

7.42 Waiver Rules Apply to Service in Foreign Country.

7.42A CHECKLIST: Ensuring Service Is Complete.

7.43 Both Summons and Complaint Must Be Served.

7.44 Local Rules May Require Service of Additional Material Along With Summons and Complaint.

7.44[1] Practice Varies From District to District.

7.44[2] LOCAL PRACTICE: CD Cal Requirements--Service of Additional Notice.

7.44[3] LOCAL PRACTICE: ED Cal Requirements--Service of Additional Notices.

7.44[4] LOCAL PRACTICE: ND Cal Requirements--Service of Supplementary Material.

7.44[5] LOCAL PRACTICE: SD Cal Requirements--Service of Additional Notice.

7.44A CHECKLIST: Determining Whether Service of Process Established Personal Jurisdiction Over Defendant.

7.45 Completion of Mechanical Steps for Service of Process Does Not Conclusively Establish Personal Jurisdiction of Defendant.

7.45[1] Rule 4 Recognizes Constitutional Limits and Establishes Territorial Limits for Effective Service of Process.

7.45[2] Rule 4(k) Establishes Four-Alternative Test for Measuring When Service Creates Personal Jurisdiction.

7.46 Service of Process Establishes Personal Jurisdiction Only When Consistent With Constitution.

7.46[1] Constitution Requires Minimum Contacts, Purposeful Availment, and Fairness.

7.46[2] Rule 4 Limits Relevant Contacts to Contact With Particular State Forum.

7.47 "Bulge" Service Extends Jurisdictional Reach of Federal Court.

7.48 Foreign Defendants May Be Served Anywhere If Claim Asserted Is Based on Federal Law.

7.49 Sufficiency of Service Determination Is Reviewed for Abuse of Discretion.

7.49A CHECKLIST: Seizure of Property for In Rem Jurisdiction.

7.50 Statutory Jurisdiction Over Property for Judgment Affecting Property Only.

7.50[1] Court May Assert Jurisdiction According to Terms of Federal Statute.

7.50[2] Property Disputes Under 28 USC § 1655 Proceed Under This Provision of Rule 4.

7.51 Court May Assert Jurisdiction Over Property When Defendant Cannot Be Served.

7.51[1] Court May Seize Property and Make Judgment Concerning Interests in Property.

7.51[2] Seizure Must Follow State Law Procedures.

7.51[3] In Rem Jurisdiction Does Not Attach Until the Property Is Seized.

7.51[4] In Rem Jurisdiction Is Discretionary.

7.51A CHECKLIST: Filing Proof of Service or Waiver.

7.52 Proof of Service Always Required.

7.53 Proof of Service Must Establish That Service Was Proper and Timely.

7.54 Failure to File Proof of Service Does Not Affect Validity of Service.

7.55 Proof of Service May Be Amended.

7.56 Notice of Lawsuit and Request for Waiver of Service of Summons.

7.57 Waiver of Service of Summons.

7.58 Proof of Personal Service on Individual Defendant.

7.59 Proof of Substituted Service on Individual Defendant.

7.60 Proof of Service on Corporate Defendant.

7.61 Local District Court Forms.

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Unit 3 Pleading Stage
CHAPTER 7 Service of Summons
I. STRATEGY

1-7 MB Practice Guide: Fed Pretrial Civ Proc in CA 7.01

7.01 Scope.

This chapter covers:

- The timing of service of a summons and complaint [*see 7.03 -7.07*].
- Who may serve a summons and complaint [*see 7.08 -7.11*].
- Methods for service of a summons and complaint [*see 7.20 -7.31*].
- International service of a summons and complaint [*see 7.32 -7.42*].
- Waiver of service of a summons and complaint [*see 7.12 -7.19*; *Forms: 7.56*, *7.57*].
- Seizure of property in lieu of service of a summons and complaint [*see 7.50*, *7.51*].
- Filing of proof of service [*see 7.52 -7.55*; *Forms: 7.58 -7.60*].

Core Rule:
Fed R Civ P 4.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 7 Service of Summons
I. STRATEGY

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7.02 Objective and Strategy.

7.02[1] Service of Summons or Waiver of Service Is Prerequisite to Invoking Personal Jurisdiction Over Defendant. "Service of process" is a term that means formal delivery of documents to the defendant that will charge the defendant with notice of a pending action [*Volkswagenwerk Aktiengesellschaft v. Schlunk (1988) 486 US 694, 700, 108 S Ct 2104, 100 L Ed2d 722*]. Rule 4 mandates the documents that a plaintiff must deliver in order to serve process--the "summons" and the "complaint" [*see Fed R Civ P 4(c)(1)*]. The contents of the "summons" are set by Rule 4. The summons is a formal notice that announces the existence of the suit and informs the defendant of the duty to respond within a fixed time or face a default judgement [*see Fed R Civ P 4(a)(1)*]. The "complaint" is the document that describes the plaintiff's claim against the defendant [*see Fed R Civ P 7(a), 8(a)*].

Cross Reference:

Ch. 6, Drafting the Summons and Complaint.

Service of process is not synonymous with invocation of personal service. Service of process gives a defendant the official notice of the pendency of the action, and it is that notice that compels a defendant to respond and defend and be bound by the judgment of the court [*see Henderson v. United States (1996) 517 US 654, 671, 116 S Ct 1638, 134 L Ed2d 880*]. In practical terms, however, the ultimate purpose of serving a summons (or obtaining a waiver of service) is to invoke the court's personal jurisdiction over the defendant served [*Fed R Civ P 4(k)*].

There is a two-pronged test for invoking personal jurisdiction [*see, e.g., Greenspun v. Del E. Webb Corp. (9th Cir 1980) 634 F2d 1204, 1207*]:

- First, the requirements of Rule 4 must be satisfied.
- Second, the constitutional limits of due process must be satisfied, regardless of service of summons under Rule 4.

The constitutional limits are beyond the scope of this chapter [*see* Ch. 2, Determining Forum (Jurisdiction and Venue),

2.40[1]]. This chapter focuses on the options and requirements set out directly in Rule 4 or incorporated by reference into Rule 4 from other statutes and rules.

Warning--Compliance With Rule 4 Is Critical:

Satisfaction of the Rule 4 requirements is critical. Without effective service of process, a defendant has no obligation to participate in the case [*see Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc. (1999) 526 US 344, 350-351, 119 S Ct 1322, 143 L Ed2d 448*] and the judgment will not bind the defendant [*McDonald v. Mabee (1917) 243 US 90, 92, 37 S Ct 343, 61 L Ed 608*].

Warning--Defendant's Knowledge About Case Is Not Substitute for Service of Process:

A defendant's informal knowledge about a case is not a substitute for proper service of process, and will not invoke the court's personal jurisdiction over that defendant [*see, e.g., SEC v. Ross (9th Cir 2007) 504 F3d 1130, 1140* ("the *ability* to obtain jurisdiction coupled with actual notice of an *intent* to exercise jurisdiction" did not confer personal jurisdiction without proper service) (emphasis in original)].

7.02[2] Consider Advantages and Disadvantages of Various Methods for Service. Rule 4 offers a variety of methods for service of process, depending on what type of defendant is being served and where that defendant is located [*see 7.20 -7.42*, *7.47*, *7.48*].

Example:

Rule 4 authorizes three different methods for serving an individual [*see Fed R Civ P 4(e)(2)* (personal service, service on agent, and serving on person at defendant's "usual place of abode")]. In addition to those three methods, Rule 4 authorizes service on an individual defendant by any methods authorized by the law of the state in which the district court is located [*Fed R Civ P 4(e)(1)*]. Thus, all of the methods for service of process that would apply in California state courts will also apply in California's federal district courts [*see CCP § 415.10 et seq.*].

When several methods are available in a particular set of circumstances, be sure to consider the possible advantages and disadvantages of each.

Example--Seeking Waiver of Service From Evasive Defendants.

Both Rule 4 and California statutes authorize service by mailing a copy of the summons and complaint together with a request that the defendant waive more formal service. Under both Rule 4 and the California statute, if the defendant declines to accept service by this inexpensive means, the defendant may be charged with the costs of subsequent service by more elaborate means [*see Fed R Civ P 4(d)(2)*; *CCP § 415.30*]. If there is time (that is, if the defendant's presence need not be compelled immediately, such as for a TRO or preliminary injunction), service by mail with a waiver or notice and acknowledgment may be the ideal method for serving such a reluctant defendant. Even if it is ineffective, only time has been lost. Resort to this method of service can shift to the defendant the burden of subsequent, perhaps costly, attempts at service.

Cross Reference:

Discussion of waiver of service, see *§§ 7.12 -7.19*.

Consider--Multiple Attempts and Methods for Evasive Defendants:

Whenever a defendant is evading service, the best course may be to attempt service multiple times and by multiple means. Within California, various forms of substituted service will be less costly than repeated attempts at personal service. Outside California, service by certified mail is another inexpensive alternative. In any event, careful documentation of these multiple attempts and multiple means will

establish the basis for "good cause" if the plaintiff needs to seek an extension of time for service of process, or if the plaintiff needs to request the court for authority to resort to a rare method of service, such as service by publication.

Cross References:

Discussion of methods for service within United States, see *§§ 7.20 -7.31*. Discussion of methods of service in foreign countries, see *§§ 7.32 -7.42*. Discussion of extension of time for service of process, see *§§ 7.05 -7.07*.

Consider--Assistance of Private Investigators and Local Counsel:

Private investigators may be of substantial assistance in locating and serving defendants. Even when the plaintiff seeks substituted service, such as leaving the summons and complaint at the defendant's usual place of abode, a professional investigator may be able to determine all of the relevant facts, and make an proper declaration concerning them, more quickly, efficiently, and cheaply than could an attorney. For service on defendants located outside of California or outside of the United States, local investigators and local counsel may prove well worth their initial expense.

Cross Reference:

Discussion of selecting persons to serve summons and complaint, see *§§ 7.08 -7.11*.

Locating Parties With the Help of Online Resources.

Many resources are available online for investigating whether individuals have died, and if not, the location of living persons. For example, helpful resources at *lexis.com* include:

- Public Records tab>Find a Person>Locate a Person (Nationwide)
- Public Records tab>Find a Person>Social Security Death Master

Cross References:

Discussion of content requirements for summons and complaint, see Ch. 6, Drafting the Summons and Complaint.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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CHAPTER 7 Service of Summons
II. MAKING SERVICE TIMELY

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7.02A CHECKLIST: Avoiding Dismissal for Untimely Service.

☐ Serve each defendant named in original complaint within 120 days of filing of the complaint.

☐ Serve each defendant first named in amended complaint within 120 days of filing of that amended complaint.

Authority:
Fed R Civ P 4(m)

Discussion:
See *§ 7.03*

☐ If a defendant has not been served within 120-day period:

○ Determine whether exception to time limit exists because of service in foreign country.

Authority:
Fed R Civ P 4(m), 6

Discussion:
See §§ *7.03, 7.41*

○ Determine whether good cause can be shown for obtaining extension before time limit expires.

Authority:
Fed R Civ P 4(m), 6

Discussion:
See *§§ 7.03, 7.05*

○ Determine whether defendant waived untimely service by failing to object.

Authority:
McCurdy v. American Bd. of Plastic Surgery (3d Cir 1998) 157 F3d 191, 194

Discussion:
See *§ 7.04[4]*

☐ If plaintiff has received notice of dismissal because of failure to serve defendant in a timely manner, determine whether good cause can be shown to obtain extension.

Authority:
Fed R Civ P 4(m), 6(b)(1)(B)

Discussion:
See *§§ 7.04 -7.07*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral Overview

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CHAPTER 7 Service of Summons
II. MAKING SERVICE TIMELY

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7.03 Service of Summons and Complaint Must Be Timely.

7.03[1] Plaintiff Usually Has Only 120 Days From Filing of Complaint to Serve Defendants. A plaintiff has 120 days from the filing of the complaint to effect service of the summons and complaint on each defendant [*Fed R Civ P 4(m)*].

Warning:

A federal court borrowing a state's time period for filing suit should not also borrow the state's time limits for service of process [*S.J. v. Issaquah Sch. Dist. No. 411 (9th Cir 2006) 470 F3d 1288, 1293* (*Fed R Civ P 4(m)* governed time limit for filing complaint in Individuals with Disabilities Education Act action)].

If a defendant is added later, by way of amendment to the complaint, the 120-day period runs from the date of the amendment [*McGuckin v. United States (9th Cir 1990) 918 F2d 811, 812-813*].

There are two exceptions to the 120-day time limit:

- **Extension of time.** As with most time limits set in the Federal Rules, prior to its expiration, the court may extend the time limit and may do so on motion, on an ex parte request [so far as local rules permit ex parte requests], or sua sponte [*Fed R Civ P 6(b)(1)(A)*].

- **Service in foreign countries.** The 120-day time limit does not apply to service of a defendant in a foreign country that is made pursuant either to Rule 4(f) (service on individuals in foreign countries) or Rule 4(j)(1) (service on foreign governments of government instrumentalities) [*Fed R Civ P 4(m)*; *see Fed R Civ P 4(f), (j)(1)*]. It is not clear whether this exception applies to service on foreign corporations, partnerships, or associations.

Cross References:

Discussion of limits on foreign defendant exception to 120-day time limit, see *§ 7.41*. Discussion of

extension of time, see *§ 7.05*. Discussion of international service, see *§§ 7.32 -7.42*. Discussion of extension of time by noticed motion, see Ch. 26, Pretrial Motion Practice, *§ 26.35*.

7.03[2] Failure to Meet Service Deadline May Result in Dismissal. If the plaintiff fails to serve the summons and complaint on a defendant within 120 days after the filing of the complaint, the court has the discretion to dismiss the complaint. Unless the plaintiff makes a showing of good cause for the failure to make service within the 120-day time limit, the court has two options:

- **Dismissal.** Dismissal of the unserved defendant is the usual remedy for failure to serve a defendant within the time limit [*see 7.04*].

- **Setting new deadline.** If the court chooses not to dismiss, the court may set a new time limit for service on the unserved defendant on motion or on its own initiative after notice to the plaintiff [*see 7.06*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral Overview

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CHAPTER 7 Service of Summons
II. MAKING SERVICE TIMELY

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7.04 Dismissal for Failure to Serve Within 120 Days Follows Notice to Plaintiff.

7.04[1] Notice Is Prerequisite to Dismissal. A court may dismiss a defendant because of a plaintiff's failure to serve that defendant in a timely manner. The court may do so on the motion of a party or on its own motion. However, the court may dismiss only after giving notice to the plaintiff of its intention to do so [*Fed R Civ P 4(m)*]. The purpose of the notice to the plaintiff is to give the plaintiff an opportunity to establish the type of good cause that will compel the court to grant the plaintiff an extension of time to complete the service on the defendant [*see, e.g., Thompson v. Maldonado (2d Cir 2002) 309 F3d 107, 109-110*].

7.04[2] LOCAL PRACTICE: SD Cal Requirements--Clerk Prepares OSC Re Dismissal Following Lack of Timely Service. In the Southern District, on the 130th day following the filing of the complaint, or on the 14th day following an extension of time to serve, if proof of service has not yet been filed, the clerk will automatically prepare an order to show cause and submit it to the assigned district judge for signature. Once the clerk presents the order to the plaintiff, the plaintiff has the required notice authorizing the court to dismiss and the plaintiff must appear and show why the case should not be dismissed [*SD Cal Civ LR 4.1(b)*].

7.04[3] Dismissal Is Without Prejudice. The dismissal that a court grants a defendant for the plaintiff's failure to serve that defendant within 120 days is without prejudice [*see, e.g., United States v. 2,164 Watches (9th Cir 2004) 366 F3d 767, 772* ; *Johnson v. Meltzer (9th Cir 1998) 134 F3d 1393, 1396* (*Fed R Civ P 4(m)* does not authorize dismissal with prejudice)]. If the statute of limitations has not expired, the plaintiff is free to file a new suit and start another 120-day period for service [*see United States v. 2,164 Watches (9th Cir 2004) 366 F3d 767, 772-773*].

7.04[4] Defendant May Waive Untimely Service by Failure to Object. The 120-day time limit for service of process is not jurisdictional. If the plaintiff serves a defendant after the 120-day time limit has expired, and the defendant does not raise an objection to the untimely service either in a responsive pleading or a Rule 12 motion, the objection is waived [*McCurdy v. American Bd. of Plastic Surgery (3d Cir 1998) 157 F3d 191, 194*].

Legal Topics:

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

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7.05 Extension of 120-Day Deadline for Good Cause.

7.05[1] Court May Grant Extension After Original 120-Day Period Expires. A district court may grant an extension of time to serve the complaint after the expiration of the 120-day period [*Mann v. American Airlines (9th Cir 2003) 324 F3d 1088, 1090* ; *see Henderson v. United States (1996) 517 US 654, 661, 116 S Ct 1638, 134 L Ed2d 880*].

Distinguish:

Extensions *prior* to the expiration of the time limit are available as well, under Rule 6, which generally allows motions for extension of time on a showing of good cause and excusable neglect [*see Fed R Civ P 6(b)(1)*].

7.05[2] Court Will Grant Extension If Plaintiff Shows Good Cause. If the plaintiff shows good cause for the failure to serve the summons and complaint within 120 days, the court is required to extend the time for service for an appropriate period [*Fed R Civ P 4(m)*]. Failure to grant an extension when good cause is shown constitutes an abuse of discretion [*see, e.g., De Tie v. Orange County (9th Cir 1998) 152 F3d 1109, 1111-1112*].

7.05[3] "Good Cause" Is Not Clearly Defined. There is no definite or bright-line test for what does and does not constitute "good cause." The Ninth Circuit has characterized good cause, at a minimum, as similar to the "excusable neglect" required for an extension of time under *Fed R Civ P 6(b)(1)(B)* [*see Electrical Specialty Co. v. Road & Ranch Supply, Inc. (9th Cir 1992) 967 F2d 309, 312* ; *Boudette v. Barnette (9th Cir 1991) 923 F2d 754, 756*]. Under *Fed R Civ P 6(b)*, "excusable neglect" is a discretionary determination, in which the court considers whether the party seeking the extension of time has demonstrated both good faith and a reasonable basis for noncompliance with the time limit [*see, e.g., In re Prudential Sec., Inc. (SDNY 1994) 158 FRD 301, 303-304*].

Example--Good Cause Shown When Defendant Evading Service:

Good cause for an extension may be shown if the defendant is evading service or conceals a defect in earlier attempts at service [*see Fed R Civ P 4*, Committee Note of 1993; *see, e.g., Williams-Guice v. Board of Educ. (7th Cir 1995) 45 F3d 161, 164* (defendant evaded service by convincing process server not to leave papers); *Benjamin v. Grosnick (1st Cir 1993) 999 F2d 590, 591-593* (defendant concealed

defect in service)].

Example--Good Cause Shown When Defendant Relied on U.S. Marshal:

Good cause for an extension was shown by an incarcerated plaintiff whose reliance on service by the U.S. Marshal resulted in ineffective service. The Marshal failed to effect service in a manner permitted by the Federal Rules of Civil Procedure [*see Puett v. Blandford (9th Cir 1990) 912 F2d 270, 275-276*].

Example--Simple Mistake or Inadvertence Is Not Good Cause:

An attorney's mistake, even when abetted by reliance on erroneous advice by the court clerk, is not good cause. It is the attorney's job to research the law and comply with its requirements [*see Gabriel v. United States (7th Cir 1994) 30 F3d 75, 77* ("reliance on the advice of a Clerk's office employee cannot excuse plaintiff's counsel's failure to do basic research")].

Example--Reliance on Agents Is Not Good Cause:

Counsel may not assert good cause merely by asserting that he or she relied on a process server [*see, e.g., Putnam v. Morris (10th Cir 1987) 833 F2d 903, 905*] or a secretary [*see, e.g., McGinnis v. Shalala (5th Cir 1993) 2 F3d 548, 550-551*]. Nor, in most cases, may a party claim good cause merely by asserting reliance on a neglectful attorney [*see, e.g., Tso v. Delaney (7th Cir 1992) 969 F2d 373, 375-376*].

Example--Reliance on Other Conduct in Litigation Is Not Good Cause:

The mere fact that a party or counsel took other steps to further the litigation is not good cause for failure to effect timely service of process. Plaintiff's desire to amend the complaint before serving it [*see, e.g., Wei v. Hawaii (9th Cir 1985) 763 F2d 370, 372*] or even adding new parties or new claims [*see, e.g., Tso v. Delaney (7th Cir 1992) 969 F2d 373, 377*] is not good cause. Similarly, engagement in settlement negotiations with a defendant is not good cause for failure to serve that defendant in a timely manner [*see, e.g., Davis-Wilson v. Hilton Hotels Corp. (ED La 1985) 106 FRD 505, 506*].

Example--Ignorance of Law Is Not Good Cause:

Plaintiff's attorney's ignorance concerning the requirements of Rule 4 is never good cause [*Hamilton v. Endell (9th Cir 1992) 981 F2d 1062, 1065* ; *Townsel v. County of Contra Costa (9th Cir 1987) 820 F2d 319, 320*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.06 Court May Extend Deadline Even If No Good Cause Shown.

7.06[1] Extension Without Good Cause Is Rare. A district court may enlarge the time for service even if no good cause is shown [*Fed R Civ P 4(m)*; *see Henderson v. United States (1996) 517 US 654, 658 n5, 663 n10, 116 S Ct 1638, 134 L Ed2d 880* ; *Mann v. American Airlines (9th Cir 2003) 324 F3d 1088, 1091*].

Example:

Plaintiffs' suit against the State of California and four individual Highway Patrol officers stemmed from their arrests at a demonstration at the Golden Gate Bridge. The four officers were served, but not within 120 days of the filing of the complaint. Although good cause was not shown for this failure, the district court exercised its discretion to grant an extension of time to serve the officers *nunc pro tunc*. The court pointed out that the plaintiffs would be barred from refiling by the statute of limitations, the officers had actual notice of the complaint well within the 120-day period, and the officers would not suffer prejudice from the untimely service [Ibrahim v. California (ND Cal 2004) 2004 US Dist LEXIS 22149, at *5-*9].

Warning:

Given the calendar pressure that virtually all federal courts face, a plaintiff should not rely on a court's willingness to enlarge the time for service without a showing of good cause.

7.06[2] LOCAL PRACTICE: SD Cal Requirements--Court's Policy of No Extensions, Except on Good Cause. The policy of the Southern District of California is that plaintiffs must complete service of process within the 120-day time limit. The only extensions of time that the court will grant are on good cause shown [*SD Cal Civ LR 4.1(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.07 Court Weighs Effect of Statute of Limitations in Deciding to Grant Extension.

7.07[1] Expiration of Statute of Limitations Weighs in Favor of Extension. If the statute of limitations would bar refiling of the suit if the court were to dismiss the case instead of granting an extension, the bar is a factor that weighs heavily in favor of granting an extension [*Fed R Civ P 4*, Committee Note of 1993 ("Relief may be justified, for example, if the applicable statute of limitations would bar the re-filed action"); *see Mann v. American Airlines (9th Cir 2003) 324 F3d 1088, 1090-1091* ; *see also De Tie v. Orange County (9th Cir 1998) 152 F3d 1109, 1111 n5* ; *Tyson v. Sunnyvale (ND Cal 1995) 159 FRD 528, 530*].

Consider:

In appropriate circumstances, the court has the discretion to dismiss a case rather than grant an extension even if the statute of limitations has expired [*see, e.g., Townsel v. County of Contra Costa (9th Cir 1987) 820 F2d 319, 320-321*].

7.07[2] Expiration of 120-Day Time Limit Does Not Restart Statute of Limitations. Failure to serve process within the 120-day period does not affect the tolling of the statute of limitations caused by the initial filing of the complaint. The mere expiration of the 120-day time limit does not, by itself, restart the running of the statute of limitations in a case in which it has already been tolled [*Mann v. American Airlines (9th Cir 2003) 324 F3d 1088, 1091*].

The 120-day time limit *can* raise limitations issues if the court *dismisses* the case because of failure to serve process within the time limit, and the statute of limitations has run at the time of the dismissal, thus barring a refiling of the action [*Mann v. American Airlines (9th Cir 2003) 324 F3d 1088, 1091*].

If the court extends the 120-day time limit, process may be served within the court's extension without raising any statute of limitations issues [*Mann v. American Airlines (9th Cir 2003) 324 F3d 1088, 1091*].

Cross Reference:

Discussion of time for service, see 1 *Moore's Federal Practice, §§ 4.80 -4.82* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.08 CHECKLIST: Choosing Process Server for Summons and Complaint.

☐ Determine whether service will be made by private process server or by U.S. Marshal or Deputy Marshal.

○ Service by U.S. Marshal is normal method of service only if:

☐ Plaintiff is authorized to proceed in forma pauperis; or

☐ Plaintiff is authorized to proceed as a seaman.

Authority:
28 USC §§ 1915, 1916; Fed R Civ P 4(c)(2), (3)

Discussion:
See *§ 7.11[2]*

○ Service by U.S. Marshal might be available if plaintiff requests it and the court orders it, such as when:

☐ Defendant is incarcerated; or

☐ Law enforcement presence is necessary or advisable in order to keep the peace.

Authority:
Fed R Civ P 4(c)(3)

Discussion:
See *§§ 7.11[1], [3][a]*

○ In the Central District Court of California, process cannot be presented to the U.S. Marshal for service, except when:

☐ A court order provides for service by the Marshal's office;

☐ Service by the Marshal's office is required by federal statute or treaty; or

☐ The U.S. government, or its officer or agency, requests service of process by the U.S. Marshal.

Authority:
CD Cal Civ LR 4-2, 4-3

Discussion:
See *§ 7.11[3][b]*

○ In the Northern District of California, service of summons in a civil action by U.S. Marshal is not available except when:

☐ Service is to be on behalf of the United States;

☐ Service by the Marshal is required by Rule 4(c)(3); or

☐ The court has ordered service by the Marshal for good cause shown.

Authority:
ND Cal Civ LR 4-1

Discussion:
See *§ 7.11[3][c]*

○ In the Southern District of California, the U.S. Marshal might not serve the defendant as requested unless the plaintiff provides the Marshal's office with appropriate instructions regarding:

☐ The person to be served;

☐ The capacity in which the defendant is to be served (i.e., the defendant's official or individual capacity); and

☐ The address for service.

Authority:

SD Cal Civ LR 4.1(c)

Discussion:
See *§ 7.11[3][d]*

☐ If the U.S. Marshal's office will not perform the service, determine whether court needs to specifically appoint private person to serve process because:

○ Federal statute requires service by Marshal or person specially appointed by court, and Marshal's office will not be able to serve process quickly enough;

○ Plaintiff is proceeding in forma pauperis or as seaman, and Marshal's office will not be able to serve process quickly enough;

○ Federal statute relating to plaintiff's status requires service by Marshal's office or person specially appointed by court, and some person other than U.S. Marshal or Deputy Marshal is in a unique position or relationship to effect service more efficiently and quickly.

Authority:
28 USC §§ 1915, 1916; *Fed R Civ P 4(c)(3)*

Discussion:
See *§ 7.11*

☐ If private person will serve process without court order, be certain that person is:

○ Over 18 years of age;

○ Not a party to the action; and

○ Trustworthy and experienced enough to serve process in the proper manner within a reasonable time.

Authority:
Fed R Civ P 4(c)(2)

Discussion:
See *§ 7.10*

☐ Supply process server with sufficient number of copies of complaint and properly issued summons to effect delivery of summons and complaint on all defendants process server is engaged to serve.

Authority:
Fed R Civ P 4(c)(1)

Discussion:
See *§ 7.09*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.09 Plaintiff Is Responsible for Serving Summons and Complaint.

The summons must be served by a person over 18 years of age who is *not* a party to the action [*Fed R Civ P 4(c)(2)*]. Nonetheless, the plaintiff is solely responsible for serving a copy of the summons and complaint on each defendant [*Fed R Civ P 4(c)(1)*; *see, e.g., Hickory Travel Sys., Inc. v. Tui Ag (ND Cal 2003) 213 FRD 547, 551* (although *Fed R Civ P 4* should be construed liberally, service is not effective unless plaintiff substantially complies with its requirements)].

Warning--Consequences of Service by Unauthorized Person:

If plaintiff selects an unauthorized person to serve a summons, the service is invalid and will not support a default judgment or a judgment against any defendant who has appeared but preserved his or her objection to the faulty service [*see Veeck v. Commodity Enters., Inc. (9th Cir 1973) 487 F2d 423, 425*].

Warning--Reliance on Third Parties Is No Excuse for Failure to Serve:

Plaintiff's reliance on process servers [*see, e.g., Putnam v. Morris (10th Cir 1987) 833 F2d 903, 905*] or a neglectful attorney [*see, e.g., Tso v. Delaney (7th Cir 1992) 969 F2d 373, 375-376*] or an attorney's secretary [*see, e.g., McGinnis v. Shalala (5th Cir 1993) 2 F3d 548, 550-551*] will not excuse a failure to serve the summons in a timely manner.

The plaintiff is also responsible for furnishing the process server with the necessary copies of the summons and complaint [*Fed R Civ P 4(c)(1)*].

Cross Reference:

Drafting of summons and complaint, see Ch. 6, Drafting the Summons and Complaint.

Legal Topics:

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7.10 Any Person Not Party to Action and 18 Years of Age or Older May Serve Summons.

Service of a summons may be effected by any person who is not a party and who is at least 18 years of age [*Fed R Civ P 4(c)(2)*].

Trap--Service by Attorney:

As a general rule, you should not serve process on behalf of a client. If the defendant later contests service, there is a possibility that you may face the ethical dilemma of testifying as a witness as well as acting as an advocate [*see* Cal Rules Prof Conduct 5-210], although this possibility may be insignificant with some methods of service, such as when the plaintiff attempts service by mail.

Legal Topics:

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7.11 Court May Appoint Marshal or Other Person on Request of Plaintiff.

7.11[1] Marshal or Special Appointee Not Needed in Most Cases. Because virtually any person 18 years of age or older may serve process [*see Benny v. Pipes (9th Cir 1986) 799 F2d 489, 493-494* (even felons and incarcerated persons may serve process)], the U.S. Marshal Service will rarely be needed for service. Nonetheless, if the plaintiff so requests, the court may direct that a U.S. Marshal or Deputy Marshal, or some other court-appointed person, will serve process in the case [*Fed R Civ P 4(c)(3)*].

7.11[2] Exception When Statute Requires Court to Appoint Process Server. The court will appoint the U.S. Marshal or some other specific person to serve process when the plaintiff proceeds in forma pauperis (without prepayment of normal court fees) or when the plaintiff is a seaman suing under a statute enacted for the health or safety of seamen [*see Fed R Civ P 4(c)(3)*; *28 USC §§ 1915(d), 1916*].

Cross Reference:

Discussion of appointment of process server by court, see 1 *Moore's Federal Practice, § 4.72* (Matthew Bender 3d ed.).

7.11[3] Other Circumstances May Justify Appointment of Special Process Server, but Local Rules Are Restrictive.

7.11[3][a] Court May Appoint Process Server on Plaintiff's Request in Unique Circumstances. The court may appoint the U.S. Marshal or some other person as process server in the case whenever the plaintiff requests an appointment [*see Fed R Civ P 4(c)(3)*]. In practice, however, a court will do so only if there are some unique circumstances that justify the appointment. For example, an appointment of the U.S. Marshal as process server might be appropriate if a law enforcement presence would be necessary or advisable to keep the peace [*see Fed R Civ P 4*, Committee Note of 1993].

7.11[3][b] LOCAL PRACTICE: CD Cal Requirements--Limitation on Service by U.S. Marshal. Except as otherwise provided by order of the Court, or when required by the treaties or statutes of the United States, process must not be presented to the United States Marshal for service [*CD Cal Civ LR 4-2*]. Civil process on behalf of the United

States government, or an officer or agency of the federal government, will be made by the United States Marshal on request by the government [*CD Cal Civ LR 4-3*].

7.11[3][c] LOCAL PRACTICE: ND Cal Requirements--Limitation on Service by U.S. Marshal. In the Northern District, except for service on behalf of the United States or as required by *Fed R Civ P 4(c)(2)*, or unless the Court orders otherwise for good cause shown, service of summons in a civil action will not be made by the United States Marshal [*ND Cal Civ LR 4-1*].

7.11[3][d] LOCAL PRACTICE: SD Cal Requirements--Providing Instructions to Marshal's Office. In the Southern District, when service of a summons and pleading is to be made by a United States Marshal on a person or entity, the party requesting the summons must provide the United States Marshal's office with appropriate instructions regarding the person on whom service is to be made, in what capacity the service is to be made (official or individual), and at what address service is to be made. Failure to comply with these instructions may cause the Marshal not to perform service [*SD Cal Civ LR 4.1(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.12 CHECKLIST: Determining Whether to Seek Waiver of Service.

☐ Determine whether defendant is subject to *Fed R Civ P 4(d)* waiver of service:

○ Defendant is individual located within the United States and subject to service under *Fed R Civ P 4(e)*;

○ Defendant is individual located outside the United States, but subject to service under *Fed R Civ P 4(f)*; or

○ Defendant is corporation or association that is subject to service under *Fed R Civ P 4(h)*.

Authority:
Fed R Civ P 4(d)(1)

Discussion:
See *§ 7.15[1]*

☐ Determine whether there is time to complete Rule 4(d) procedures for waiver of service of summons, considering:

○ Will the 120-day deadline for service of process be satisfied if there is a successful attempt to obtain waiver?

○ Will the 120-day deadline for service of process be satisfied if the attempt to secure a waiver is unsuccessful and service must be attempted by other means after the waiver is refused?

Authority:
Fed R Civ P 4(d), (m)

Discussion:
See *§ 7.03*

○ Statute of limitations should not be a factor in limiting time to seek waiver of service of summons in California federal district courts because:

☐ If plaintiff's claim is based on federal law and a federal statute of limitations, plaintiff only needs to file the complaint within the limitations period [*see Fed R Civ P 3*].

☐ If plaintiff's claim is based on California law, plaintiff still only needs to file the complaint within the limitations period [*see CCP § 350*].

Authority:
Fed R Civ P 4(d)

Discussion:
See *§ 7.19*

○ If defendant complies with request for waiver, will extending defendant's time to appear and answer interfere with any proceedings that need quick action, such as initial disclosures and commencement of discovery?

○ If defendant is or is expected to both refuse the waiver and to evade service, unreasonably increasing its costs, will extra time needed to complete the waiver process be compensated by shifting the costs of service to the defendant?

Authority:
Fed R Civ P 4(d)(1), (5)

Discussion:
See *§§ 7.15[2], 7.18*

☐ If there is time to seek a waiver of service of summons, assess whether it will result in any savings for the plaintiff, considering:

○ What the actual cost savings will be from having attorney's office prepare and mail waiver papers, calendaring the time for the defendant's response, and risking the need to re-serve the defendant if a waiver is refused, versus simply hiring a professional process server in the first place.

○ If the defendant refuses the waiver, costs of service are shifted to the defendant; but if a motion is

made to collect those costs, the attempt at a waiver may well increase the contentious atmosphere of the litigation rather than foster a cooperative atmosphere among the parties and their counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.13 CHECKLIST: Seeking Waiver of Service of Summons.

☐ Prepare documents needed to secure waiver, including:

○ "Notice of Lawsuit and Request for Waiver of Service of Summons," using Official Form 5;

○ Form for defendant to execute, entitled "Waiver of Service of Summons," using Official Form 6;

○ Copy of complaint to serve along with other papers;

○ Extra copy of "Notice of Lawsuit" form and "Waiver of Service" form for defendant to serve with other papers and for defendant to retain; and

○ Postage-prepaid return envelope or other prepaid means for defendant to return "Waiver of Summons" form.

Authority:
Fed R Civ P 4(d)(1), 84; Fed R Civ P Appendix of Forms, Forms 5, 6

Forms:
See *§§ 7.56, 7.57*

Discussion:

See *§ 7.16*

☐ Address documents to the defendant:

○ Directly, if defendant is an individual; or

○ By specifying an officer or managing or general agent of the defendant if the defendant is a corporation or association with the meaning of Rule 4(h).

Authority:
Fed R Civ P 4(d)(1)(A)

Discussion:
See *§ 7.16[2]*

☐ In documents, allow defendant "reasonable time" within which to return waiver, meaning:

○ At least 30 days from the date of sending request if defendant is within United States; or

○ At least 60 days from the date of sending request if defendant is outside of the United States.

Authority:
Fed R Civ P 4(d)(1)(F)

Discussion:
See *§ 7.16[2]*

☐ Dispatch all documents seeking request for waiver (including copy of complaint and extra copies of "Notice" and "Waiver" forms) by first class mail or other reliable means.

Authority:
Fed R Civ P 4(d)(1)(G)

Discussion:
See *§ 7.17*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.14 CHECKLIST: Responding to Request for Waiver of Service.

☐ Review request for waiver to ensure that Rule 4(d) requirements have been satisfied.

☐ If request is in proper form, consider disadvantages of waiving service, keeping in mind that:

- Any defendant located within the United States will be required to pay for service of process effected by other means; and
- Waiver of service of summons does not waive any objection to venue or to the court's lack of personal jurisdiction.

Authority:
Fed R Civ P 4(d)(1), (2), (5)

Discussion:
See *§§ 7.15[2], 7.19[1]*

☐ Consider advantages to waiver of service of summons, including:

- Avoidance of paying costs of service, and
- Extension of time to respond from normal 20-day period to 60 days if served within the United States or 90 days if served outside of the United States.

Authority:
Fed R Civ P 4(d)(1), (3), 12(a)(1)

Discussion:
See *§§ 7.15[2], 7.18*

☐ In absence of compelling reason to refuse waiver, return waiver form to plaintiff's attorney (or directly to unrepresented plaintiff) in return envelope or other pre-paid means of return provided by plaintiff.

Authority:
Fed R Civ P 4(d)(1)(C), (3)

Discussion:
See *§§ 7.16[5], 7.18*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessWaiversGeneral Overview

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7.15 Certain Defendants Have Obligation to Avoid Unnecessary Costs When Faced With Waiver Request.

7.15[1] Plaintiff May Seek Waiver From Most Types of Defendants. A plaintiff may seek a waiver from any of the following defendants [*Fed R Civ P 4(d)(1)*]:

- An individual defendant that is capable of being served in any judicial district of the United States by any means for service of process listed in or referred to in Rule 4(e) [*see Fed R Civ P 4(e)*], except for minors or incompetent persons [*see Fed R Civ P 4(g)* (special provisions for service on minors or incompetents)];

- An individual defendant that is capable of being served outside of the United States by any of the means for service of process listed in or referred to in Rule 4(f) [*see Fed R Civ P 4(f)*], except for minors or incompetent persons [*see Fed R Civ P 4(g)* (special provisions for service on infants or incompetents)]; and

- Any domestic or foreign corporation, or any partnership or other unincorporated association that is capable of being served inside or outside of the United States by any of the means for service of process listed in or referred to in Rule 4(h) [*see Fed R Civ P 4(h)*].

Consider--Governmental Defendants Are Not Subject to Waiver Procedure:

The right to request a waiver of summons is limited to defendants who may be served under Rule 4(e), (f), and (h) [*Fed R Civ P 4(d)(1)*]. The United States, its agencies, and its officers or employees may be served only under Rule 4(i) [*see Fed R Civ P 4(i)*]. Similarly, foreign, state, and local governments may be served only under Rule 4(j) [*see Fed R Civ P 4(j)*].

Timing:

In some other states, a plaintiff must serve a defendant with process in order to satisfy a statute of limitations [*see, e.g., Ragan v. Merchants Transfer & Warehouse Co. (1949) 337 US 530, 532-533, 69 S Ct 1233, 93 L Ed 1520* (under Kansas law, action commenced for limitations purposes when summons

was served)]. In diversity cases in these states, the need to have service completed within the limitations period may rule out resort to seeking a waiver. Under California law, as under *Fed R Civ P 3*, an action is commenced for statute of limitations purposes on the filing of the complaint [*CCP § 350*]. Under California law, a plaintiff has three full years after the filing of the complaint to serve the summons [*CCP § 583.210(a)*], and the 120-day time limit of Rule 4 [*see Fed R Civ P 4(m)*] will have expired long before any California statute of limitations requires service of summons.

7.15[2] Defendant Who Refuses Waiver Usually Will Pay Costs for Service of Process. When any of the defendants who may be requested to waive service of process receives a proper request for waiver, that defendant "has a duty to avoid unnecessary expenses of serving the summons" [*Fed R Civ P 4(d)(1)*]. In fact, if one of these defendants located within the United States fails to comply with a request for waiver made by a plaintiff who is also located within the United States, the court *must* impose the costs of any subsequent service on the refusing defendant. The court must award the costs of service even when the defendant who refused waiver ends up as the prevailing party entitled to recover other costs under *Fed R Civ P 54(d)(1)* [*Estate of Darulis v. Garate (9th Cir 2005) 401 F3d 1060, 1063*]. The court may excuse the defendant from paying these costs only if the defendant shows "good cause" for refusal of the request for waiver [*Fed R Civ P 4(d)(2)*]. The costs that a refusing defendant may be compelled to pay include [*Fed R Civ P 4(d)(2)*; *see, e.g., Davilla v. Thinline Collections, LLC (ND Cal 2005) 230 FRD 601, 603* (plaintiff entitled to $900 in attorney fees for preparing motion and $170.28 for costs of personal service)]:

- All costs subsequently incurred in effecting service under *Fed R Civ P 4(e)*, *(f)*, or *(h)*;
- All costs incurred in connection with any motion seeking to collect the costs of service; and
- Reasonable attorney's fees incurred in connection with any motion seeking to collect the costs of service.

Strategic Point--Plaintiff:

The plaintiff must actually send the request for waiver to the defendant to be eligible for an award of costs under *Fed R Civ P 4(d)* [*Hy Cite Corp. v. Badbusinessbureau.com, L.L.C. (D Ariz 2005) 418 F Supp2d 1142, 1153-1154* (argument that sending request for waiver of service would have been futile is not grounds for shifting costs and fees of service of process)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.16 Rule 4 Prescribes Form of Request for Waiver of Service.

7.16[1] Plaintiffs Use Official Forms to Send Notice of Action and Waiver Forms to Defendants.

7.16[1][a] Official Form 5 Sets Out Notice of Action and Request for Waiver. The request for a waiver of service of process is a form that notifies a defendant of the commencement of the action and requests that the defendant waive service of a summons [*Fed R Civ P 4(d)(2)*]. One of the Official Forms in the Appendix of Forms to the Federal Rules of Civil Procedure [*see Fed R Civ P 84*] sets out the required language for a notice of commencement of the action and request for waiver of service of summons [*see* Fed R Civ P Appendix of Forms, Form 5]. *Fed R Civ P 4* requires that the notice and request be in writing [*Fed R Civ P 4(d)(1)(A)*], but never explicitly requires that the notice and request be made using this form and this form only. Nonetheless, the form is, in practice, almost always used.

7.16[1][b] Official Form 6 Sets Out Form of Waiver That Defendant May Complete. Along with the notice of the action and request, it is customary to send the defendant a form that the defendant may complete to waive service of summons. The Official Forms in the Appendix of Forms to the Federal Rules of Civil Procedure [*see Fed R Civ P 84*] contain a form of waiver that complies with *Fed R Civ P 4* [*see* Fed R Civ P Appendix of Forms, Form 6]. Although Rule 4 requires that the plaintiff provide the defendant with a "mea ns for returning" the request to waive service of summons [*Fed R Civ P 4(d)(1)(C)*], the Rule does not explicitly require the plaintiff to supply a waiver form or for the defendant to make a waiver on this form. Nonetheless, the form is, in practice, almost always used.

7.16[1][c] Official Form 6 Sets Out Required Warning Language. The plaintiff *must* send the defendant a warning along with the notice of commencement of action and request for waiver. The warning must inform the defendant of the consequences, such as payment of the costs for formal service of process, if the defendant fails to timely complete and return the request for waiver of service of summons. Rule 4 explicitly requires that the warning take the form of language "prescribed in Form 5" set out in the Appendix of Forms to the Federal Rules of Civil Procedure [*Fed R Civ P 4(d)(1)(D)*; *see Fed R Civ P 84*]. This language is contained in the waiver form promulgated as Official Form 6 [*see* Fed R Civ P Appendix of Forms, Form 6].

7.16[2] Rule 4 Specifies Contents for Notice Form. Rule 4(d)(1) sets out three matters that must be specified in the notice of commencement of the action and request for waiver of service of summons [*Fed R Civ P 4(d)(1)*]:

- **Name of Defendant to Whom Request Is Addressed:** The notice and request for waiver of service of summons must be addressed to the defendant if the defendant is an individual. If the defendant is a corporation, partnership, or other association sued under its common name, the plaintiff must specify the officer or managing or general agent (or other agent authorized by law to receive process) to whom the request is addressed [*Fed R Civ P 4(d)(1)(A)(ii)*].

- **Date on Which Request Sent:** The defendant's time to respond to the request for waiver of service of summons (and, by that means, to avoid the costs for service of summons), runs from the date on which the request was sent to the defendant [*see Fed R Civ P 4(d)(1)(F)*]. Therefore, the notice and request must explicitly identify the date on which the request was sent [*Fed R Civ P 4(d)(1)(E)*].

- **Time Limit for Responding to the Request:** The defendant has a time limit within which to waive service of summons, and the notice and request for waiver must specify that time limit. The plaintiff must give the defendant a "reasonable" time to decide whether to waive summons and to execute and return the waiver of service of summons if the defendant agrees to the waiver [*Fed R Civ P 4(d)(1)(F)*]. There is no upper limit on the time that a plaintiff may give the defendant, except for the 120-day limit on serving summons [*see Fed R Civ P 4(m)*]. However, at a minimum, the plaintiff must give the defendant *at least* 30 days from the date on which the request was sent, and *at least* 60 if the request is addressed to a defendant outside the United States [*Fed R Civ P 4(d)(1)(F)*].

Official Form 5 contains blanks for all three of these matters and instructions as to how to fill in those blanks [*see* Fed R Civ P Appendix of Forms, Form 5].

7.16[3] Copy of Complaint Must Accompany Request for Waiver. The request for waiver of service of summons must include a copy of the complaint [*Fed R Civ P 4(d)(1)(C)*].

7.16[4] Defendant Must Receive Extra Copy. The plaintiff must send the defendant two copies of the waiver form [*Fed R Civ P 4(d)(1)(C)*].

7.16[5] Plaintiff Must Send Defendant a Prepaid Means of Returning Waiver of Service of Summons. In addition to all of the other matters that must be included in a request for waiver of service of summons, the plaintiff must provide the defendant with "a prepaid means for returning the [waiver] form." In other words, the plaintiff must provide the defendant with some means for agreeing to the request in writing, and a prepaid means of communicating this written request to the plaintiff. Usually, this will mean including a prepaid, self-addressed envelope in which the written waiver form [Official Form 6] may be returned to the plaintiff by mail.

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.17 Plaintiff Must Send Request for Waiver by Mail or Other Reliable Means.

All of the materials that comprise a proper request for waiver of service of summons [*see 7.16*] must be sent to the defendant by first-class mail or other "reliable" means [*Fed R Civ P 4(d)(1)(G)*]. Private messenger services and electronic means of delivery may be as reliable as first class mail. Particularly in foreign countries, these means may be more reliable than the mails [*see Fed R Civ P 4*, Committee Note of 1993]. Regular mail is reliable, but somewhat slow. As a practical matter, private messenger or overnight delivery services have the advantage, particularly for out-of-state and foreign deliveries, of being faster than mail service. They also provide easy verification of delivery. In contrast, facsimile and e-mail delivery raise difficult issues of proving delivery. Furthermore, they raise questions as to how to provide (or how to prove that one has provided) all of the required copies of the notice and request, plus "the prepaid means" for returning the waiver form [*see Fed R Civ P 4(d)(1)(C)*]. In other words, it may be difficult to include a postage prepaid envelope in an e-mail, so that the defendant can execute the waiver "in writing" and return the executed waiver to the plaintiff free of charge. Unless a plaintiff has a clear understanding with the defendant that a waiver is intended, there is little or no authority that a reply e-mail or return fax constitutes a proper execution of the waiver "in writing."

Warning:

Keep in mind that merely mailing a request for waiver of service does not suffice to effect service. Instead, the defendant to whom the waiver of service is addressed must sign and return the waiver [Woodruff v. Mueller (ND Cal 2004) 2004 US Dist LEXIS 5218, at *10].

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.18 Defendant Obtains Extension of Time to Plead by Waiving Service of Summons.

If a defendant returns a waiver of service of summons within the time allowed in the request, the defendant so waiving service of summons obtains an extension of time within which to answer or otherwise respond to the complaint [*see Fed R Civ P 4(d)(3), 12(a)(1)(A)(ii)*]. A defendant subject to a request for waiver of service of summons normally has 21 days from the service of the summons and complaint within which to respond to the complaint [*Fed R Civ P 12(a)(1)(A)(i)*]. If the defendant timely waives service of summons, the defendant has 60 days from the date that the request for waiver of service was sent within which to respond to the complaint. If the waiver was requested from a defendant outside of the United States, the defendant has 90 days from the date that the request for waiver was sent within which to respond to the complaint [*Fed R Civ P 4(d)(3), 12(a)(1)(A)(ii)*].

Cross Reference:

Discussion of time for response to complaint, see Ch. 8, Answers and Responsive Motions Under Rule 12, *§ 8.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.19 After Waiver of Service of Summons, Action Proceeds As If Service Made When Waiver Filed.

7.19[1] Waiver of Service Is Not Waiver of Jurisdictional or Venue Objections. A defendant who waives service of a summons does not waive objection to the court's ability to exercise personal jurisdiction [*Fed R Civ P 4(d)(5)*]. The defendant may still bring a motion to dismiss for lack of personal jurisdiction [*see Fed R Civ P 12(b)(2)*]. Similarly, a defendant who waives service of summons does not waive objection to venue [*Fed R Civ P 4(d)(5)*]. The defendant may still bring a motion to dismiss for improper venue [*see 28 USC § 1406(a)*; *Fed R Civ P 12(b)(3)*], or move to transfer venue, either on the grounds that venue is improper [*see 28 USC § 1406(a)*] or for the convenience of witnesses and the ends of justice [*see 28 USC § 1404(a)*].

Warning--Waiver of Objection to Service of Process:

Rule 4(d)(1) explicitly provides that a timely waiver of service of a summons does not prejudice the right of a defendant to make a Rule 12(b)(2) motion objecting to the court's lack of personal jurisdiction over the defendant and does not prejudice Rule 12(b)(3) or statutory venue objections and motions. Obviously, however, because the waiver eliminates service of process, the waiver *does* eliminate a defendant's right to make a Rule 12(b)(4) motion objecting to "the sufficiency of the summons or the sufficiency of the method by which it is served" [*see Fed R Civ P 4*, Committee Note of 1993]. On the other hand, a defendant should not reject a request for a waiver merely to preserve a technical objection to the form of the summons or some technical defect in the waiver. If the defendant is otherwise inclined to waive formal service of process, little is to be gained by preserving a technical objection. Furthermore, as a practical matter, a defendant rejecting a waiver should consider whether and to what extent the court will be favorably disposed to any Rule 12(b)(4) motion objecting to the sufficiency of the summons or of the method of service after the defendant forces that service by rejecting the request for a waiver.

7.19[2] Action Proceeds As If Summons Served on Date Waiver Is Filed. Apart from the defendant's extension of time to respond to the complaint, an action in which a defendant waives service of summons is treated the same as an action in which the plaintiff serves the defendant with a summons and complaint. Instead of filing a proof of service of the summons [*see Fed R Civ P 4(l)*], the plaintiff files the waiver of service of summons. The action is treated as if the defendant was served as of the date of the filing of the waiver [*Fed R Civ P 4(d)(4)*].

7.19[3] LOCAL PRACTICE: ED Cal Requirements--Waiver Must Be Filed Immediately. In the Eastern District Court of California, if the defendant has waived service of process, the plaintiff must file the waiver of service as soon as possible after receiving the waiver. The plaintiff must file the waiver before any party requests action from the court or the court takes any action in reliance on proper service or a waiver of service [*ED Cal Civ LR 210(c)*].

Cross Reference:

Request and notice of waiver, see 1 *Moore's Federal Practice, §§ 4.10 -4.16* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.20 CHECKLIST: Choosing Method for Serving Individual.

☐ Establish that:

- ○ A waiver has not been obtained.
- ○ The person is *not* an infant or incompetent.

Authority:
Fed R Civ P 4(e)

Discussion:
See *§ 7.27*

☐ Review which methods of service might be appropriate for serving individual defendant, including:

- ○ Any methods authorized by California law;
- ○ Any methods authorized by the law of the state where service will take place, if it will take place outside of California; and
- ○ Any of the following three methods explicitly authorized by Rule 4(e):
  - ☐ Delivering a copy of the summons and of the complaint to the individual

personally.

☐ Leaving copies at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing in it.

☐ Delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

Authority:
Fed R Civ P 4(e)

Discussion:
See *§ 7.27*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.21 CHECKLIST: Choosing Method for Serving Minor or Incompetent Person.

☐ Determine where minor or incompetent will be served.

☐ Use method prescribed by state law for serving minors or incompetents in the place where service will occur.

☐ Determine what individual or individuals need to be served to effect service on minors or incompetents under state law in the place where service will occur.

Authority:
Fed R Civ P 4(e)

Discussion:
See *§ 7.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.22 CHECKLIST: Choosing Method for Serving Corporation, Partnership, or Association.

☐ Establish that:

- ○ The entity, and not some individual, is being sued under its common name;
- ○ The entity may be sued under its common name; and
- ○ The entity has not executed a waiver of service of summons.

Authority:
Fed R Civ P 4(e)(1), (h)

Discussion:
See *§ 7.29*

☐ Review which methods of service might be appropriate for serving entity defendant, including:

- ○ Any methods authorized by California law;
- ○ Any methods authorized by the law of the state where service will take place, if it will take place outside of California; and
- ○ By the following method explicitly authorized by Rule 4(h)(1):

☐ Delivering a copy of the summons and complaint to one of the following:

○ An officer;

○ A managing or general agent; or

○ Any other agent authorized by appointment or by law to receive service of process.

☐ If the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Authority:
Fed R Civ P 4(e)(1), (h)

Discussion:
See *§ 7.29*

☐ Determine what individual or individuals must be served on behalf of legal entity that is the defendant.

Authority:
CCP § 416.10 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.23 CHECKLIST: Serving United States Government, U.S. Agencies or Governmental Corporations, or U.S. Officers or Employees.

☐ Complete service on the United States itself by:

○ Serving the United States Attorney, and doing so by either:

☐ Delivering a copy of the summons and of the complaint to:

○ The United States Attorney for the district in which the action is brought; or

○ An assistant United States Attorney or clerical employee designated by the United States Attorney in a writing filed with the clerk of the court; or

☐ Mailing a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States Attorney; and

○ Mailing an additional copy of the summons and complaint by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

○ If the action attacks the validity of an order of an officer or agency of the United States not made a party, mailing one more additional copy of the summons and complaint by registered or certified mail to the officer or agency.

Authority:
Fed R Civ P 4(i)(1)

Discussion:
See *§ 7.30[1]*

☐ Complete service on a United States agency or governmental corporation, or United States officer or employee sued in an official capacity, by:

○ Taking all of the steps necessary to serve the United States itself; and

○ Mailing an additional copy of the summons and complaint by registered or certified mail to the affected officer, employee, agency, or governmental corporation.

Authority:
Fed R Civ P 4(i)(1), (2)

Discussion:
See *§ 7.30[2]*

☐ Complete service on a United States officer or employee sued in an individual capacity for acts or omissions in the performance of his or her duty, by:

○ Taking all of the steps necessary to serve the United States itself; and

○ Serving the officer or employee separately, as if he or she were:

☐ An individual to be served within the United States under Rule 4(e).

☐ An individual to be served outside the United States pursuant Rule 4(f).

☐ An incompetent to be served pursuant to Rule 4(g).

Authority:
Fed R Civ P 4(i)(3) see *Fed R Civ P 4(e)-(g)*

Discussion:
See *§ 7.30[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.24 CHECKLIST: Service on State and Local Governments or Governmental Entities.

☐ Serve a state, municipal corporation, or other governmental organization subject to suit by delivering a copy of the summons and complaint to its chief officer.

☐ Alternatively, serve the State of California, any office, department, division, bureau, board, commission or agency, the Regents of the University of California, any county, city, district, public authority, public agency, or any other political subdivision of the State of California by delivering a copy of the summons and complaint to the clerk, secretary, president, presiding officer, or other head of the governing body.

Authority:
Fed R Civ P 4(j)(2); *CCP § 416.50*

Discussion:
See *§ 7.31*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.25 CHECKLIST: Reviewing Available California Methods of Service.

☐ Consider personal service (hand delivery).

Authority:
Fed R Civ P 4(e)(1); *CCP § 415.10*

Discussion:
See *§§ 7.27[1], [3]*

☐ For corporations, banks, former corporations, joint stock companies, other unincorporated associations, or public entities, consider delivery of summons and complaint to person in charge of office of individual to be served and mailing additional copy to the individual to be served at that office.

Authority:
CCP § 415.20(a); see *CCP §§ 416.10-416.50*

Warning:
This method of service is not complete until 10 days after the mailing [*CCP § 415.20(a)*]. Thus, it cannot be used for service being made on the eve of the 120-day deadline for service of process [*see Fed R Civ P 4(m)*].

☐ For minors, wards of a guardianship, persons served pursuant to the Elections Code, or others from whom no other method of service is specified by law, and if personal service is not possible with reasonable diligence, consider delivery of summons and complaint to the usual dwelling place or place of abode, or office, or post office address (other than a P.O. Box), to a competent member of the household

or a person in charge of the office of the individual to be served:

- The person with whom the summons and complaint are left must be at least 18 years of age and must be informed of the contents of the summons and complaint.

- The delivery to the dwelling place, office, or post office address must followed by mailing an additional copy to the individual to be served at that same place.

Authority:
CCP § 415.20(b); see *CCP §§ 416.60-416.90*

Warning:
This method of service is not complete until 10 days after the mailing [*CCP § 415.20(b)*]. Thus, it cannot be used for service being made on the eve of the 120-day deadline for service of process [*see Fed R Civ P 4(m)*].

☐ Consider notice and acknowledgment of receipt, which requires:

- Mailing a copy of the summons and a copy of the complaint, together with two copies of a "notice and acknowledgment of receipt" to person to be served.
  - ☐ Sending documents to a post office address is sufficient.

  - ☐ Notice and acknowledgment must be substantially in the form prescribed by statute or in a form approved by the California Judicial Council.

- Having person voluntarily sign and return the acknowledgment of receipt form.

Authority:
Fed R Civ P 4(e)(1); *CCP § 415.30*

Discussion:
See *§ 7.27[3][c]*

☐ For persons located outside of California, consider service by certified or registered mail, keeping in mind that:

- Service is deemed completed on the 10th day after mailing.

- The defendant located outside of California need not execute an acknowledgment of the receipt for service to be complete.

Authority:
Fed R Civ P 4(e)(1); *CCP § 415.40*

Discussion:
See *§§ 7.15 -7.19*, *7.27[3][c]*

Warning:

This method of service is not complete until 10 days after the mailing [*CCP § 415.40*]. Thus, it cannot be used for service being made on the eve of the 120-day deadline for service of process [*see Fed R Civ P 4(m)*].

☐ For real property disputes, consider one of the special service methods for those disputes, such as:

○ In unlawful detainer actions, posting of the summons on the premises, if the court so orders and the defendant cannot be served with reasonable diligence in any other manner;

○ In unlawful detainer actions seeking immediate, pre-judgment possession of the property, by also serving persons actually occupying the property; and

○ When a lessor claims the lessee has abandoned a leasehold, but the lessee has responded with formal notice of non-abandonment under *California Civil Code Section 1951.3*, serving the lessee by certified mail.

Authority:

Fed R Civ P 4(e)(1); *CCP §§ 415.45-415.47*; see *CC § 1951.3*

Discussion:

Matthew Bender(R) Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer.

Warning:

The method of serving an abandoning tenant under *CCP § 415.47* is not complete until 10 days after the mailing. Thus, it cannot be used for service being made on the eve of the 120-day deadline for service of process [*see Fed R Civ P 4(m)*].

☐ If the defendant may not be served with reasonable diligence by any other method, consider service by publication, which requires:

○ Application to the court for an order authorizing service by publication.

○ Affidavits in support of the application showing that no other method of service is feasible.

○ Publishing the service in accordance with statutory requirements and the court order.

Authority:

Fed R Civ P 4(e)(1); *CCP §§ 415.50, 2015.5*

Discussion:

See *§ 7.27[3][e]*

Warning:

This method of service is not complete until the end of the publication period [*see CCP § 415.50(c)*], which is four weeks [*Gov Code § 6064*]. Thus, it cannot be used for service being made on the eve of the 120-day deadline for service of process [*see Fed R Civ P 4(m)*].

☐ If it appears that no service statute is specifically applicable to the defendant or the circumstances of the case, apply to the court for an order regarding the manner of service.

Authority:
Fed R Civ P 4(e)(1); *CCP § 413.30*

☐ If desired, transmit process by telegraph for service anywhere.

Authority:
Fed R Civ P 4(e)(1); *CCP § 1017*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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7.26 CHECKLIST: Identifying Person to Serve Under California Methods of Service.

☐ Serve a minor located in California by:

○ Serving the summons on the minor's parent, guardian, conservator, or similar fiduciary.

○ If a parent, guardian, conservator, or similar fiduciary cannot be found with reasonable diligence, serving one of the following:

☐ The person having care or control of the minor;

☐ The person with whom the minor resides; or

☐ The person by whom the minor is employed.

○ Serving an additional copy of the summons and complaint on the minor himself or herself if he or she is age 12 or older.

Authority:
Fed R Civ P 4(g); *CCP § 416.60*

Discussion:
See *§ 7.28[2]*

☐ Serve an incompetent (a person other than a minor for whom a guardian, conservator, or other fiduciary has been appointed) who is located in California by:

○ Delivering a copy of the summons and complaint to the guardian, conservator, or other fiduciary that has been appointed; and

○ Delivering an additional copy of the summons and complaint on the incompetent person unless, for good cause shown, the court dispenses with that service.

Authority:
Fed R Civ P 4(g); *CCP § 416.70*

Discussion:
See *§ 7.28[3]*

☐ Serve a domestic or foreign corporation, partnership, or other unincorporated association by serving a copy of the summons and complaint on:

○ A person designated by law as an agent for service of process.

○ A corporate officer, such as the president, vice-president, secretary, assistant secretary, treasurer or assistant treasurer, general manager, or any other person specifically authorized by the corporation to receive service of process.

○ A cashier or assistant cashier if the defendant is a bank.

○ The Secretary of State, when that is authorized by law.

Authority:
Fed R Civ P 4(e)(1), (h); *CCP § 416.10*; *Corp Code §§ 1701, 1702*

Discussion:
See *§ 7.29[3]*

☐ Serve a foreign corporation by serving a copy of the summons and complaint on:

○ A person designated by law as an agent for service of process.

○ A corporate officer, such as the president, vice-president, secretary, assistant secretary, treasurer or assistant treasurer, general manager, or any other person specifically authorized by the corporation to receive service of process.

○ A cashier or assistant cashier if the defendant is a bank.

○ The Secretary of State, when that is authorized by law.

Authority:
Fed R Civ P 4(e)(1), (h); *CCP § 416.10*; *Corp Code §§ 2110, 2110.1, 2111*

Discussion:
See *§§ 7.29[3], [5]*

☐ Serve a defunct corporation by:

○ Delivery of a copy of the summons to a person who is the trustee of the corporation and of its stockholders or members, if any; or

○ Service on the persons described in the California Corporations Code provisions governing defunct domestic and foreign corporations.

Authority:
Fed R Civ P 4(e)(1), (h); *CCP § 416.20*; *Corp Code §§ 2011, 2110, 2110.1, 2111, 2114*

Discussion:
See *§ 7.29[4]*

☐ Serve a joint stock company or association by serving:

○ The same persons as for an active corporation if the joint stock company or association is active;

○ The same persons as for a defunct corporation if the joint stock company or association is defunct.

Authority:
Fed R Civ P 4(e)(1), (h); *CCP § 416.10*; *Corp Code §§ 1701, 1702, 2011, 2110, 2110.1, 2111, 2114*

Discussion:
See *§ 7.29[6]*

☐ Serve a partnership or other unincorporated association by:

○ Serving a designated agent, general partner, or general manager of a general or limited partnership.

○ Serving a designated agent, officer, or other authorized representative of an unincorporated association other than a partnership.

Authority:
Fed R Civ P 4(e)(1), (h); *CCP § 416.40(a), (b)*; *Corp Code §§ 16310, 18200*

Discussion:
See *§ 7.29[7]*

☐ Serve a partnership domiciled outside California that has no regular place of business in California, by serving a designated agent or, if the designated agent is a corporation, any person named in the designated agent's last certificate.

Authority:
Fed R Civ P 4(e)(1), (h); *Corp Code §§ 15800, 16310(b)*

Discussion:
See *§ 7.29[7]*

☐ Serve a partnership that cannot be served successfully by other means, by:

- ○ Serving the California Secretary of State;
- ○ Providing a statement of the last known address of the partnership;
- ○ Paying the appropriate fee; and
- ○ Giving the partnership 30 days after receipt of service from the Secretary of State to appear.

Authority:
Fed R Civ P 4(e)(1), (h); *Corp Code § 15800*; *Gov Code § 12197 (fee)*

Discussion:
See *§ 7.29[7]*

☐ Serve a limited liability partnership with its principal office outside California, or a foreign limited liability partnership, by:

- ○ Serving limited partnership in same manner as an unincorporated association;
- ○ Hand delivering a summons and complaint to an agent or to the office of the corporate agent; or
- ○ If there is no agent designated or an agent cannot be found, serving the California Secretary of State by means of:
  - ☐ Obtaining a court order authorizing service on the California Secretary of State; and
  - ☐ Hand delivering a copy of the summons to the California Secretary of State, with the authorization order and appropriate fee.

Authority:
Fed R Civ P 4(e)(1), (h); *CCP § 416.40*; *Corp Code §§ 1505, 16962(b), (c), (e), (f)*

Discussion:

See *§ 7.29[8]*

☐ Serve a liability company by:

○ Personally serving a designated agent, a corporate agent, or the California Secretary of State if appointed by a company to receive service of process;

○ Serving any company member who has consented in writing; or

○ If no agent is designated, or none can be found, by serving the California Secretary of State by means of:

☐ Obtaining a court order authorizing service on the California Secretary of State;

☐ Hand delivering a copy of the summons to the California Secretary of State, with the authorization order and appropriate fee.

Authority:
Fed R Civ P 4(e)(1), (h); *CCP §§ 413.10-417.40*; *Corp Code §§ 17001, 17061, 17456(d)*

Discussion:
See *§ 7.29[9]*

☐ Serve a public entity (other than the State of California and for claims for inverse condemnation) by:

○ Consulting the Roster of Public Agencies or the County Clerk to determine the proper official to serve.

○ Delivering a copy of the summons to the clerk, officer, or other head of the governing body.

○ In the absence of an appropriate officer, obtaining a court order permitting another manner of service, including service on the California Secretary of State by means of:

☐ Preparing two copies of the summons, two copies of the court order, and bring the appropriate fee; and

☐ Serving the California Secretary of State by personal service or registered return-receipt mail.

Authority:
Fed R Civ P 4(e)(1), (h); *CCP § 416.50*; *Gov Code §§ 960.3, 960.8, 53050, 53051*

Discussion:
See *§ 7.31[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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7.27 Serving Individuals.

7.27[1] Rule 4 Provides Three Methods of Service That Apply in Every Judicial District. A plaintiff may serve a summons and complaint on an individual located in the United States (other than a minor or an incompetent person) by any of the following methods [*Fed R Civ P 4(e)(2)*]:

- By delivering a copy of the summons and of the complaint to the individual personally.

- By leaving copies of the summons and complaint at the individual's dwelling house or usual place of abode with some person of suitable age and discretion residing there.

- By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process for the individual in question.

These methods of service apply in every judicial district of the United States, unless a federal statute provides otherwise for a particular defendant or for a particular type of claim [*see Fed R Civ P 4(e)(2)*].

Cross Reference:

Discussion of service on individuals under Rule 4(e), see 1 *Moore's Federal Practice, §§ 4.92 -4.94* (Matthew Bender 3d ed.).

7.27[2] Rule 4 Permits Service to Be Made Pursuant to State Law. A plaintiff is not limited to the methods of service that are valid in every judicial district [*see Fed R Civ P 4(e)(2)*]. A plaintiff may serve an individual defendant (other than a minor or incompetent) by any means authorized by the law of the state in which the district court is located, or in which service is effected, for the service of a summons on the defendant in an action brought in the courts of general jurisdiction of the State [*Fed R Civ P 4(e)(1)*]. The state-law methods of service are not available, however, if a federal statute requires a particular type of service for a particular individual or a particular type of claim [*see Fed R Civ P 4(e)(1)*].

7.27[3] California Law Authorizes a Wide Variety of Service Methods.

7.27[3][a] Service May Be Made by Personal Delivery to Defendant. Under California law, just as under Rule 4(e)(2), a plaintiff may serve an individual defendant by personally delivering to him or her a copy of the summons and complaint. Service is complete at the time of delivery [*CCP § 415.10*].

7.27[3][b] Combination Service Is Available After Failure of Good-Faith Attempt at Personal Service. Combination service is a form of service that includes a good-faith attempt at physical service on a responsible person, in addition to notice of the action by mail [*Khourie, Crew & Jaeger v. Sabek, Inc. (1990) 220 CA3d 1009, 1013-1014, 269 CR 687*]. After the unsuccessful exercise of reasonable diligence to effect personal service on an individual defendant, a plaintiff may use combination service to complete service by the following method [*CCP § 415.20(b)*]:

- Leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box.

- Leaving the papers in the presence of a competent member of the household or a person apparently in charge of the office, place of business or usual mailing address of the defendant other than a United States Postal Service post office box, who is at least 18 years of age.

- Advising the person with whom the summons is left of the contents of the served papers.

- Mailing the summons and complaint by first-class mail, postage prepaid, to the person to be served at the place where the papers were left.

Service is deemed completed on the 10th day after mailing [*CCP § 415.20(b)*].

7.27[3][c] Service May Be Made by Notice and Acknowledgment of Receipt. Under California law, a plaintiff may effect service by "notice" and "acknowledgment of receipt" [*see CCP § 415.30*]. In essence, this is a procedure similar to, but not identical to, having the defendant agree to waive formal service of summons under Rule 4(d) [*see Fed R Civ P 4(d)*]. Under the California procedure, plaintiff mails [*CCP § 415.30(a)*]:

- A copy of the summons and a copy of the complaint;

- Two copies of a "notice and acknowledgment of receipt" to the person to be served; and

- A self-addressed, postage prepaid return envelope.

The notice and acknowledgment must be substantially in the form prescribed by statute [*see CCP § 415.30(b)*], and most practitioners use the form approved by the California Judicial Council, which contains all of the required language [*CCP § 415.30(e)*].

Timing:

The defendant has 20 days to sign and return the acknowledgment form. If the defendant fails to do so in a timely manner, the defendant will be compelled to pay the costs of subsequent service by other means unless the defendant shows good cause for its failure [*CCP § 415.30(d)*].

Distinguish:

This procedure is not the same as a "waiver" of service under Rule 4(d). Under the California procedure, service is not waived, but "completed" by the defendant's acknowledgment of receipt of the summons [

CCP § 415.30(c)]. There are other, practical difference between the California procedure and Rule 4(d) that should be kept in mind:

- Under California law, the defendant has only 20 days to decide whether to accept service by this means, rather than a minimum of 30 days [*compare CCP 415.30(d) with Fed R Civ P 4(d)(1)(F)*];

- Under California procedure, service is "complete" on the date the written acknowledgment of receipt is executed by the defendant, rather than having the action "proceed" on the date the waiver is filed with the court [*compare CCP § 415.30(c) with Fed R Civ P 4(d)(4)*]; and

- The California procedure does not grant the defendant an extension of time to respond to the complaint [*cf. Fed R Civ P 4(d)(3)*].

Cross Reference:

Discussion of notice and acknowledgment of receipt, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, §§ 8.14[4]*, 8.46 (form) (Matthew Bender 3d ed.).

7.27[3][d] Service May Be Made by Certified or Registered Mail to Persons Outside California. A plaintiff may serve a summons on an individual who is outside California by sending a copy of the summons and complaint to the person to be served by any form of first-class mail requiring a return receipt, which is to say by certified or registered mail [*CCP § 415.40*; *see Mason v. Genisco Tech. Corp. (9th Cir 1991) 960 F2d 849, 851*]. Service of summons by this form of mail is deemed complete on the 10th day after mailing [*CCP § 415.40*].

7.27[3][e] As Last Resort, Service May Be Made by Publication. A plaintiff may serve a summons by publication if the defendant cannot be served with reasonable diligence in any other manner. In order to serve a summons by publication, the plaintiff must apply to the court for an order authorizing service in this manner. The motion must be supported by an affidavit that shows that the defendant cannot be served with reasonable diligence in any other manner authorized by California law [*CCP § 415.50(a)*]. The affidavit must also show either that:

- A cause of action exists against the party on whom service is to be made, or he or she is a necessary or proper party to the action [*CCP § 415.50(a)(1)*]; or

- The party to be served has or claims an interest in real or personal property in California that is subject to the jurisdiction of the court, or the relief demanded in the action consists wholly or in part in excluding the party from any interest in California property [*CCP § 415.50(a)(2)*].

The court may not require a plaintiff seeking an order for service by publication to conduct a search of public databases if access by a registered process server to residential addresses is prohibited by law, or by published policy of the agency providing the database, including, but not limited to, voter registration rolls and records of the Department of Motor Vehicles [*CCP § 415.50(e)*].

The plaintiff completes service by publication by [*CCP § 415.50(b)*]:

- Publishing the summons in the California newspaper named in the court order that is most likely to give actual notice to the defendant. If the defendant resides or is located outside California, the newspaper named by the court in its order may order publication in a named newspaper outside California that is most likely to give actual notice to that party.

- Mailing a copy of the summons, the complaint, and the order for publication to the defendant if the

plaintiff learns his or her address before four-week publication period expires.

- Paying for publication at least once a week for at least a four-week period unless the court, in its discretion, orders publication for a longer period. Four publications in a newspaper regularly published at least once a week, with at least five days intervening between the respective publication dates (not counting the publication dates) will suffice. The period of notice commences with the first day of publication and terminates at the end of the 28th day, including the first day [*Gov Code § 6064*].

Service of summons by publication is not complete until the four-week publication period is over [*CCP § 415.50(c)*; *see Gov Code § 6064*].

7.27[3][f] Special Statutory Methods Are Available for Particular Types of Defendants. Under California law, a plaintiff may resort to specific statutory procedures for service of a summons and complaint on particular types of individual defendants in actions asserting particular types of claims, including:

- A candidate for public office in an action asserting a claim relating to the candidacy [*see CCP § 416.80*; *Elec Code §§ 11*, *12*].

- A California resident motor vehicle owner or operator of a motor vehicle outside California in an action regarding ownership or operation of the vehicle [*see CCP §§ 412.20(a)(3)*, *413.20*, *415.40*; *Veh Code §§ 17454-17456*, *17459-15462*].

- A motor vehicle owner or operator who is not a California resident in an action regarding operation of the vehicle in California [*see CCP §§ 412.20(a)(3)*, *415.30*; *Veh Code §§ 17450-17455*, *17462*].

- A nonresident executor or administrator [*see CCP §§ 415.10-415.50*; *Prob Code §§ 8572-8574*].

- A nonresident insurance agent, or broker [*see CCP §§ 415.10-415.50*; *Ins Code §§ 1452*, *1605*, *1612*, *11104*, *11105*, *12931*].

- A nonresident real estate licensee or subdivider [*see B&P Code §§ 10151.5*, *11007*; *CCP §§ 415.10-415.50*].

- A nonresident defendant in an action under the California Corporate Securities Law or Franchise Investment Law [*see CCP §§ 415.40*, *2015.5*; *Corp Code §§ 25102(h)(4)*, *25165*, *25240*, *31155*].

- A person who lives in a gated community [*see CCP § 415.21*].

Cross Reference:

Discussion of specific statutory methods, see Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, see *§§ 8.26 -8.33*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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7.28 Serving Minors and Incompetent Persons.

7.28[1] Minors and Incompetent Persons Must Be Served According to State Law. The only method by which a plaintiff may effect service on a minor or an incompetent person in a judicial district of the United States is the manner prescribed by the law of the state in which the service is made [*Fed R Civ P 4(g)*].

7.28[2] Minors Are Served Under California Law by Delivering Summons to Parent or Similar Fiduciary. Under California law, a plaintiff must serve a minor by delivering a copy of the summons and complaint to the minor's parent, guardian, conservator, or similar fiduciary. If no such person can be found with reasonable diligence, plaintiff must serve a minor by delivering a copy of the summons and complaint to a person having the care or control of the minor, or with whom the minor resides, or by whom he or she is employed. If there is no parent, guardian, conservator, or fiduciary for the minor, the plaintiff must also deliver a copy of the summons and complaint to the minor, if he or she is at least 12 years of age [*CCP § 416.60*].

Cross Reference:

Discussion of service on minors under California law, see Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, *§ 8.24*.

7.28[3] Incompetent Persons Are Served Under California Law by Delivering Summons to Guardian, Conservator, or Other Fiduciary and to Incompetent Person. California law does not expressly address service on an incompetent person. Instead, California law provides for a method of serving a person (other than a minor) for whom a guardian, conservator, or similar fiduciary has been appointed. If a guardian, conservator, or fiduciary has been appointed for a defendant, the plaintiff must serve that defendant by delivering a copy of the summons and complaint to the guardian, conservator, or fiduciary. In addition, the plaintiff must deliver a copy of the summons and complaint directly to the defendant for whom a guardian, conservator, or fiduciary has been appointed unless, for good cause shown, the court excuses direct service on the defendant [*CCP § 416.70*].

Cross Reference:

Discussion of service under California law, see Matthew Bender(R) Practice Guide: California Pretrial

Civil Procedure, *§ 8.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGuardians

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7.29 Serving Corporations, Partnerships, and Associations.

7.29[1] Rule 4 Provides Method of Service Valid in All Judicial Districts. A plaintiff may serve a summons and complaint on a domestic or foreign corporation or on a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained, by [*Fed R Civ P 4(h)(1)*; *see Chan v. Society Expeditions, Inc. (9th Cir 1994) 39 F3d 1398, 1404* (involving prior version of rule); *McKinney v. Apollo Group, Inc. (SD Cal 2008) 2008 US Dist LEXIS 56324, at *12-*13]* :

- Delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process; and

- If the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Cross Reference:

Service on business entities, see 1 *Moore's Federal Practice, §§ 4.53, 4.54* (Matthew Bender 3d ed.).

7.29[2] Rule 4 Permits Service to Be Made Pursuant to State Law. Unless a federal statute provides otherwise, a plaintiff may serve a domestic or foreign corporation or a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, pursuant to the law of the state in which the district court is located or pursuant to the law in which service is effected [*Fed R Civ P 4(h)(1)* (incorporating provisions of *Fed R Civ P 4(e)(1)* by reference)].

7.29[3] California Law Provides Several Methods for Serving Active Corporations.

7.29[3][a] Service May Be Made by Delivery to Agent for Service. A plaintiff may serve an active corporation by delivering a copy of the summons and complaint to the person designated as the corporation's statutory agent for service of process [*CCP § 416.10(a)*; *see Corp Code §§ 202, 1502, 2105, 2107*]. The name and address of the agent for service of process of a corporation can be found by contacting the California Secretary of State, or by accessing the Secretary of State website at www.ss.ca.gov, and checking business filings.

7.29[3][b] Service May Be Made by Delivery to Officer of Corporation. A plaintiff may serve an active corporation by delivering a copy of the summons and complaint to any of the following corporate officers [*CCP § 416.10(b)*]:

- The president or other head of an active corporation;
- A vice president;
- A secretary or assistant secretary;
- A treasurer or assistant treasurer;
- A general manager; or
- Another person authorized by the corporation to receive service of process.

7.29[3][c] If Corporation Is a Bank, Service May Be Made by Delivery to Bank Cashier, Assistant Cashier, or Other Authorized Person. If the defendant corporation is a bank, the plaintiff may serve the defendant by delivering a copy of the summons and complaint to [*CCP § 416.10(c)*; *see CCP § 416.10(a), (b)*]:

- A cashier;
- An assistant cashier; or
- Any other authorized person.

7.29[3][d] Service May Be Made by Hand Delivery to Designated Agent. A plaintiff may serve an active corporation by hand delivering a copy of the summons and complaint to a natural person designated by the corporation as its agent, or to any person named in the latest certificate as the corporate agent, at the corporate agent's office [*Corp Code § 1701*; *see Corp Code § 1505*].

7.29[3][e] In the Absence of a Corporate Agent, Service May Be Made by Serving the Secretary of State. A plaintiff may serve a defendant domestic corporation by hand delivering copies of the summons and complaint to the Secretary of State, or an assistant Secretary of State; in the following situations [*Corp Code § 1702(a)*]:

- The corporation's agent for service has resigned and not been replaced;
- The agent could not be found at the address designated after the exercise of reasonable diligence; or
- If no agent has been designated.

A plaintiff may serve a defendant domestic corporation in this manner only after obtaining a court order permitting it [*Corp Code § 1702(a)*; *see Corp Code § 1702(d)* (because action is pending in federal court, order must be obtained from that court)]. And even after an order is obtained, service is not complete on delivery of copies of the summons and complaint to the Secretary of State. After receiving service, the Secretary of State forwards the summons and complaint to the corporation's principal executive office by registered or certified return-receipt mail. If the Secretary of State does not have an address for the corporation's principal executive office, notification is made by forwarding the summons in the same manner to the last designated agent for service of process. If the agent for service of process has resigned and has not been replaced, and the records of the Secretary of State do not give an address for its principal executive office, the Secretary of State may take no action [*Corp Code § 1702(b)*]. Service on the Secretary of State is deemed complete

only on the 10th day after delivery of the process to the Secretary of State [*Corp Code § 1702(a)*].

7.29[3][f] California Law Provides Additional Methods for Serving Foreign Corporations. A plaintiff may serve a defendant foreign corporation in any of the following ways:

- By any of the methods discussed above that are authorized for serving defendants under the California Code of Civil Procedure, Part II, Title 5, Chapter 4 [*Corp Code § 2110.1*; *see CCP §§ 413.10-417.40* (relevant portion of CCP)].

- Hand delivery of a copy of the summons and complaint to any of the following [*Corp Code § 2110*]:

  - An officer or general manager of the corporation in California.

  - If the corporation is a bank, to a cashier or assistant cashier.

  - Any natural person the corporation has designated as an agent for service of process. A copy of the corporation's statement and designation, or a copy of the latest statement filed under *Corp Code § 2117*, is sufficient evidence of the appointment of an agent for service of process.

  - If the corporation has designated a corporate agent, to any person named as a corporate agent in the most recent certificate filed under *Corp Code § 1505*. The name and address of a foreign corporation's agent for service of process can be obtained online from the Corporate Records pages of the Secretary of State's website at www.ss.ca.gov.

- If other methods of service have been unsuccessful, by obtaining a court order permitting service by delivery of copies of the summons and complaint to the Secretary of State [*see Corp Code § 2111*].

- If a foreign corporation has surrendered its right to transact business in California, by delivery of copies of the summons and complaint to the Secretary of State if the suit asserts a liability or obligation incurred in California before the surrender. No court order is required for this type of service [*Corp Code § 2114(b)*].

7.29[4] California Law Provides Method for Serving Defunct Corporation, Corporation With Forfeited Charter, or Dissolved Corporation. A plaintiff may serve a defunct corporation, a corporation that has forfeited its charter or its right to do business, or one that has dissolved, by delivering a copy of the summons and complaint to any of the following [*CCP § 416.20(a)*; *Corp Code § 2114(c)*]:

- A trustee of the corporation and its stockholders or members; or

- As authorized on an officer, director, person having charge of the assets, or agent, or by serving the Secretary of State, as authorized by law for domestic and foreign corporations [*CCP § 416.20(b)*; *see Corp Code § 2011* (domestic corporation), *Corp Code § 2114* (foreign corporation)].

7.29[5] California Provides Additional Method for Serving Foreign Corporation That Has Lost Right to Do Business in California. In addition to any other method of service that might apply under California law, a plaintiff may also serve a foreign corporation that has had its right to do business in California forfeited by the Franchise Tax Board under the Corporation Tax Law by hand delivery of a copy of the summons and complaint to an officer or agent of the corporation, or to the Secretary of State [*see Corp Code §§ 2110*, *2111*], as if the right to transact business had

not been forfeited [*Corp Code § 2114(c)*].

7.29[6] California Law Provides Special Method for Serving Joint Stock Company or Association. A plaintiff may serve a joint stock company or association by delivering a copy of the summons and complaint to [*CCP § 416.30*]:

- Its agent, president, or other officer, if the company or association is active [*see CCP § 416.10*].

- A person who is a trustee of the corporation and of its stockholders or members, or to others authorized to receive service by *Corp Code §§ 2011*, *2114*, if the company or association has forfeited its charter or its right to do business, [*see CCP § 416.20*].

7.29[7] California Law Provides Several Methods for Serving Unincorporated Associations or Partnerships.

7.29[7][a] General or Limited Partnership Is Served by Delivery of Summons to Agent, General Partner, or General Manager. A plaintiff may serve a general partnership or a limited partnership by serving a copy of the summons and complaint on the designated agent (if any), general partner, or general manager of the partnership [*CCP § 416.40(a)*; *Corp Code § 16310*; *see Corp Code § 15627* (service on limited partnerships)]. Domestic general partnerships may designate an agent by filing a Statement of Partnership Authority (Form GP-1) with the Secretary of State. Filing Form GP-1 is optional under *Corp Code § 16303*. At this time, general partnership records cannot be searched online. They are obtainable from the Secretary of State by mail on written request (this may take two to three weeks), or over the counter at the Sacramento office of the Secretary of State. Limited partnership records may be checked online by going to the California Secretary of State website www.ss.ca.gov and checking the business filings section.

7.29[7][b] Unincorporated Association Is Served by Delivery of Summons to Designated Agent, Officer, or Other Representative. A plaintiff may serve an unincorporated association that is not a general or limited partnership by serving a copy of the summons and complaint on the designated agent (if any), officer, or other authorized representative [*see CCP § 416.40(b)*; *Corp Code § 18200*].

7.29[7][c] Foreign Unincorporated Association or Partnership Is Generally Served by Delivery of Summons to Agent or at Corporate Agent's Office. A foreign unincorporated association or partnership may be served by hand delivery of a copy of the summons and complaint to the designated agent or at the corporate agent's office [*Corp Code § 18200(e)*].

Exception--Foreign Partnerships or Associations Who Fail to Make or Maintain Required Designation of Agent:

Foreign unincorporated associations and partnerships (other than limited partnerships) with no regular place of business in California must file a statement with the Secretary of State designating a natural person or corporation as an agent for purposes of service of process [*see Corp Code § 15800(a)*]. Foreign limited partnerships are separately required to register with the Secretary of State (Form LP-5) and designate agents for service of process [*see Corp Code §§ 15627*, *15692(c)*]. If a foreign partnership or unincorporated has not designated an agent or, if the person designated as the agent cannot be found or, if after due diligence delivery to a corporate agent [*see Corp Code § 16310(b)*] cannot be made or, if the designated agent is no longer authorized to act, the plaintiff may serve copies of the summons and complaint by personal delivery on the Secretary of State [*Corp Code § 15800(c)* (court order not required for this type of service)], payment of a $50 service fee [*Gov Code § 12197*], and by providing a signed statement to the Secretary of State, setting forth the last known address of the partnership. The Secretary of State will forward the summons to the partnership by registered or certified [*see Corp Code § 8*], return-receipt mail, to the address provided in the statement [*Corp Code § 15800(b)*].

In the alternative, the plaintiff may seek a court order. If an agent has not been designated to receive

service of process or, if the agent cannot be found after reasonable diligence [*see Corp Code § 18220*], a plaintiff can move for a court order supported by affidavit or declaration [*see CCP § 2015.5*] satisfactory to the court, that the unincorporated association cannot be served in a manner provided by *CCP §§ 415.10*, *415.20(a)*, or *415.30*. The court order permits service on designated association members by mailing a copy of the summons and complaint to the association at its last known address. Personal service on the unincorporated association is then deemed to have been made [*Corp Code § 18220*].

7.29[8] California Law Provides Several Methods for Serving Limited Liability Partnerships. A plaintiff may serve a domestic or foreign registered limited liability partnership by delivering copies of the summons and complaint to:

- A general partner or general manager of the partnership [*CCP § 416.40(a)*; *see Corp Code § 16310*];

- The designated agent for the limited liability partnership, if the delivery is hand delivery [*Corp Code § 16962(b)*];

- Any person named on the latest certificate of a corporate agent [*see Corp Code § 1505*] at the office of that corporate agent [*Corp Code § 16962(b)*], if the limited liability partnership's designated agent is a corporate agent;

- The Secretary of State if the plaintiff has obtained a court order authorizing this form of service and if the designated agent resigned or cannot be found after reasonable diligence, or if no agent was designated, and if other methods of service have been unsuccessful [*Corp Code § 16962(c)*]. The plaintiff must hand deliver the summons and complaint to the Secretary of State, along with a copy of the order authorizing service, and a $50 fee [*Corp Code § 16962(c)*; *see Gov Code § 12197(b) (fee)*]. Service by this method is deemed complete on the 10th day after delivery to the Secretary of State [*Corp Code § 16962(c)*]. The certificate of the Secretary of State, under seal, certifying receipt of process, notice, and forwarding the process [*see Corp Code § 16962*] is competent and prima facie evidence of receipt [*Corp Code § 16962(e)*].

7.29[9] California Law Provides Several Methods for Serving Limited Liability Companies. A limited liability company (LLC) may be served by any of the following methods [*Corp Code § 17061*]:

- Any of the methods discussed above that are authorized for serving defendants under the California Code of Civil Procedure, Part II, Title 5, Chapter 4 [*see CCP §§ 413.10-417.40* (relevant portion of CCP)]. Any method of service provided by *CCP §§ 413.10-417.40*.

- Hand delivery of a copy of the summons and complaint on the LLC's designated agent. If the designated agent is a corporate agent, service may be made on any person named in the most recently filed certificate of the corporate agent under *Corp Code § 1505*.

- In the case of a foreign LLP that has transacted business in California without registering in California, by service on the Secretary of State [*Corp Code § 17061(b)*; *see Corp Code § 17456(d)*], made by hand delivery of copies of the summons, along with the court order permitting service, and by paying the fee [*Corp Code § 17061(b)*].

- In the case of a foreign LLC that has registered, and if the designated agent resigned or cannot be found after reasonable diligence, and if other methods of service have been unsuccessful, by substituted service by delivery to the Secretary of State. A court order must be obtained for service in this manner. Service is made by hand delivery of copies of the summons and complaint to the Secretary of State,

along with a copy of the order authorizing service. Service is deemed complete on the 10th day after delivery to the Secretary of State [*Corp Code § 17061(c)(1)*]. The certificate of the Secretary of State, under seal, certifying receipt of process, notice, and forwarding the process [*see Corp Code § 17061(c)(2)*] is competent and prima facie evidence of service of process [*Corp Code § 17061(c)(3)*].

7.29[10] Combination Service May Be Made Under California Law After Failure of Good-Faith Attempt at Personal Service. Combination service is a form of service that includes a good-faith attempt at physical service on a responsible person, in addition to notice of the action by mail [*Khourie, Crew & Jaeger v. Sabek, Inc. (1990) 220 CA3d 1009, 1013-1014, 269 CR 687*].

A plaintiff may make combination service by leaving a copy of the summons and complaint in the office of the defendant being served during usual office hours, or, if no physical address is known, at that person's usual mailing address, other than a United States Postal Service post office box. The plaintiff's process server must leave the copy of the summons and complaint with the person who is apparently in charge. The person given the summons and complaint must be at least 18 years of age, and the process server must inform the person of the contents of the papers. The process server must then mail another copy of the summons and complaint, by first-class mail, postage prepaid, to the defendant being served at the place where a copy of the summons and complaint were left [*CCP § 415.20(a)*]. Service of a summons in this manner is deemed complete on the 10th day after the mailing [*CCP § 415.20(a)*].

7.29[11] Special Statutory Methods for Particular Types of Defendants. Under California law, a plaintiff may resort to specific statutory procedures for service of a summons and complaint on particular types of corporate, partnership, or association defendants in actions asserting particular types of claims, including:

- A California resident motor vehicle owner or operator of a motor vehicle outside California, regarding ownership or operation of the vehicle [*see CCP §§ 412.20(a)(3), 413.20, 415.40*; *Veh Code §§ 17454-17456, 17459-15462*].

- A motor vehicle owner or operator who is not a California resident regarding operation of the vehicle in California [*see CCP §§ 412.20(a)(3), 415.30*; *Veh Code §§ 17450-17455, 17462*].

- A nonresident executor or administrator [*see CCP §§ 415.10-415.50*; *Prob Code §§ 8572-8574*].

- A nonresident insurance carrier, agent, or broker [*see CCP §§ 415.10-415.50*; *Ins Code §§ 1452, 1605, 1612, 11104, 11105, 12931*].

- A nonresident real estate licensee or subdivider [*see B&P Code §§ 10151.5, 11007*; *CCP §§ 415.10-415.50*].

- A nonresident defendant in an action under the California Corporate Securities Law or Franchise Investment Law [*see CCP §§ 415.40, 2015.5*; *Corp Code §§ 25102(h)(4), 25165, 25240, 31155*].

Cross Reference:

Discussion of service on corporations and other associations under California law, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, §§ 8.18 -8.21, 8.26 -8.33.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon

AgentsCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesAgents

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7.30 Serving the United States, Its Agencies, Corporations, Officers, or Employees.

7.30[1] Serving the United States.

7.30[1][a] U.S. Attorney Must Be Served. The plaintiff's primary step in serving the United States is delivering a copy of the summons and of the complaint to the United States Attorney for the district in which the action is brought. The delivery may be to the United States Attorney, or an assistant United States attorney or clerical employee designated by the United States Attorney in a writing filed with the clerk of the court. In the alternative, the plaintiff may send a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States Attorney [*Fed R Civ P 4(i)(1)(A)*].

7.30[1][b] Attorney General Must Be Served by Registered or Certified Mail. In addition to serving the United States Attorney in the district where the action is brought, the plaintiff must also send a copy of the summons and the complaint by registered or certified mail to the Attorney General of the United States at Washington, D.C. [*Fed R Civ P 4(i)(1)(B)*].

7.30[1][c] Nonparty Officer or Agency Must Be Served by Registered or Certified Mail If Validity of Its Order Attacked. If the plaintiff's action attacks the validity of an order of an officer or agency of the United States and that officer or agency is not a party to the action, the plaintiff's service on the United States is not complete until the plaintiff also sends a copy of the summons and of the complaint by registered or certified mail to the officer or agency [*Fed R Civ P 4(i)(1)(C)*].

Cross Reference:

Discussion of service of process on United States, see 1 *Moore's Federal Practice, § 4.55* (Matthew Bender 3d ed.).

7.30[2] Serving a U.S. Agency or Governmental Corporation, or Officer or Employee Sued in Official Capacity.

7.30[2][a] U.S. Attorney and Attorney General Must Be Served. The first step in serving a United States

agency or governmental corporation, or an officer or employee of the United States sued only in an official capacity, is serving the United States itself. This means serving the United States Attorney in the district where the action is brought and mailing an additional copy of the summons and complaint to the United States Attorney General in Washington, D.C., as described above [*Fed R Civ P 4(i)(2)*; *see Fed R Civ P 4(i)(1)(A), (B)*].

7.30[2][b] Agency, Corporation, Officer, or Employee Must Be Served by Registered or Certified Mail. In addition to serving the United States itself, the plaintiff must serve the defendant agency or governmental corporation, or an officer or employee of the United States sued only in an official capacity, by sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation [*Fed R Civ P 4(i)(2)*].

7.30[3] Serving a U.S. Officer or Employee Sued in Individual Capacity for Acts or Omissions in Performance of Duty.

7.30[3][a] U.S. Attorney and Attorney General Must Be Served. The first step in serving a United States officer or employee who is sued in an individual capacity for acts or omissions occurring in connection with the performance of his or her duties is serving the United States itself. This means serving the United States Attorney in the district where the action is brought and mailing an additional copy of the summons and complaint to the United States Attorney General in Washington, D.C., as described above [*Fed R Civ P 4(i)(3)*; *see Fed R Civ P 4(i)(1)(A), (B)*].

An action against a former officer or employee of the United States is covered by the same rules as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need to serve the United States [*see Fed R Civ P 4*, Committee Note of 2000].

Distinguish--No Service on United States for Employee's Actions That Are Not Connected With Official Duties:

> Many actions are brought against individual federal officers or employees of the United States for acts or omissions that have no connection to their governmental roles. For example, if a federal employee is involved in an automobile accident while on vacation, there is no reason to require service on the United States in an action arising out of the collision. It is a connection to federal employment that requires service on the United States. Whether the connection requires service on the United States must be determined as a practical matter, considering whether the individual defendant has reasonable grounds to look to the United States for assistance and whether the United States has reasonable grounds for demanding formal notice of the action [*see Fed R Civ P 4*, Committee Note of 2000].

7.30[3][b] Officer or Employee Must Be Served Individually. In addition to service on the United States, the plaintiff must serve the individual officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States by the same methods that apply to all other individual defendants [*Fed R Civ P 4(i)(3)*; *see Fed R Civ P 4(e)* (methods for serving individuals in the United States); *Fed R Civ P 4(f)* (methods for serving individuals in foreign countries); *Fed R Civ P 4(g)* (methods for serving minors or incompetents)].

Cross References:

Discussion of serving individuals in the United States, see *§ 7.27*. Discussion of serving individuals in foreign countries, see *§ 7.37*. Discussion of serving infants and incompetents, see *§§ 7.28*, *7.38*.

7.30[4] Court Must Allow Time to Cure Defects in Service.

7.30[4][a] If U.S. Attorney or U.S. Attorney General Has Been Served, Court Must Grant Reasonable Time to Serve Others. Serving the United States and agencies, governmental corporations, and officers and employees of the United States served in their official capacities requires several steps and, as noted above, serving multiple copies of the summons and complaint on different persons and entities. If the plaintiff has timely served either the United States

Attorney for the district or the Attorney General of the United States, the court must allow the plaintiff a reasonable time to cure a failure to serve all of the persons and entities required to be served [*Fed R Civ P 4(i)(4)(A)*].

7.30[4][b] If Individual Officer or Employee Sued in Individual Capacity Has Been Served, Court Must Grant Reasonable Time to Serve United States. When a United States officer or employee is sued in his or her individual capacity, but in connection with the performance or omission of some official duty, plaintiffs frequently forget to serve the United States as well. If the plaintiff has timely and properly served the individual officer or employee, the court will allow the plaintiff a reasonable time to serve process on the United States [*Fed R Civ P 4(i)(4)(B)*].

Consider:

Rule 4(i) does not require the plaintiff to show that the failure to serve the United States was reasonable. Rule 4(i) requires the court to grant the extra time whenever the plaintiff has made timely service on the officer or employee [*see Fed R Civ P 4*, Committee Note of 2000].

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.31 Serving State or Local Governments.

7.31[1] State and Local Governments May Be Served by Delivery of Summons and Complaint to Chief Executive. Regardless of the judicial district in which the case is pending or the defendant is located, a plaintiff may serve a state, a municipal corporation, or other governmental organization subject to suit by delivering a copy of the summons and of the complaint to its chief executive officer [*Fed R Civ P 4(j)(2)(A)*].

7.31[2] State and Local Governments May Be Served Pursuant to State Law. As an alternative to delivery of a copy of the summons and complaint to the chief executive of a state, municipal corporation, or other local governmental organization subject to suit, a plaintiff may serve these defendants by any method provided for by the law of the state in which they are located [*Fed R Civ P 4(j)(2)(B)*].

7.31[3] California Law Provides Several Methods for Service on State and Local Governments.

7.31[3][a] Local Governmental Entities May Be Served by Delivery of Process to Clerk, Officer, or Other Head of Entity. A public entity may be served by delivering a copy of the summons and complaint to the clerk, officer, or other head of the governing body [*CCP § 416.50(a)*; *see CCP § 416.50(b)* ("public entity" defined)]. The identity and location of the appropriate officer may be found in the California Roster maintained by the office of the Secretary of State [*see Gov Code § 53051(c)*]. The roster can be viewed online in pdf format, on the Secretary of State's website www.ss.ca.gov or obtained in print by contacting the Sacramento office of the Secretary of State. County clerks are also required to establish and maintain a roster [*see Gov Code § 53051(c)*].

7.31[3][b] Substituted Service on Local Governmental Entities Is Available If No Appropriate Officer Can Be Found. If an appropriate officer cannot be located, the plaintiff must file an affidavit with the court stating that service of summons cannot be made pursuant to *CCP § 416.50(a)*. The court may then order that service of summons be made on the public entity by either of the following methods [*Gov Code § 960.3(b)*]:

- Leaving two copies of the process for each public agency defendant to be served, together with two copies of the order authorizing the service, at the office of the Secretary of State in Sacramento; or

- Mailing two copies of the process for each public agency defendant to be served, together with two copies of the order authorizing the service, to the office of the Secretary of State in Sacramento by certified or registered mail, addressee only, return receipt requested.

The Secretary of State charges a $50 fee for each public agency served in this manner [*Gov Code § 960.3(d)*]. Service is effective as of the day the return receipt is received from the Secretary of State [*Gov Code § 960.3(b)(2)*].

7.31[3][c] State of California Is Served by Serving State Attorney General. The plaintiff must serve the California Attorney General with the summons and complaint in claims against the State of California itself [*Gov Code § 955.4*]. There are additional options in actions for inverse condemnation against the Department of Transportation or the Department of Water Resources. In those cases, the plaintiff may serve the summons and complaint on either the Director of those Departments or on the California Attorney General [*Gov Code §§ 955.6*, *955.8*].

Cross Reference:

Discussion of service on public entities under California law, see Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, *§ 8.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.32 CHECKLIST: Choosing Proper Method for Serving Individual in Foreign Country.

☐ Determine if individual defendant is located in country that is signatory to the Hague Convention or other international treaty specifying acceptable methods of service; and

○ If Hague Convention or other treaty specifies method of service, serve individual defendant according to any method of service agreed to; or

○ If Hague Convention does not apply, or if it or some other treaty allows other means of service, serve the individual defendant:

☐ Pursuant to the law of the foreign country;

☐ Pursuant to method directed by the foreign country in response to a letter rogatory or letter of request;

☐ By personal delivery of a copy of the summons and complaint to the individual defendant, unless that method of service is prohibited by the law of the foreign country;

☐ By mailing a copy of the summons and complaint to the individual defendant in the foreign country, by any method of mail that requires a signed receipt, unless that method of service is prohibited by the law of the foreign country; or

○ If none of the above methods of service are reasonably available, serve the defendant by any

method directed by the court that is not prohibited by international agreement.

☐ Regardless of method selected, make certain the service is calculated to give notice.

Authority:

Fed R Civ P 4(f); *Rio Props., Inc. v. Rio Int'l Interlink (9th Cir 2002) 284 F3d 1007, 1016*

Discussion:

See *§ 7.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsForeign ServiceCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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7.33 CHECKLIST: Choosing Proper Method for Serving Minor or Incompetent Person in Foreign Country.

☐ Serve a minor or incompetent person according to one of the following methods:

○ Pursuant to the law for service of process on minors and incompetents of the foreign country in which the defendant is located; or

○ Pursuant to method directed by the foreign country in response to a letter rogatory or letter of request.

☐ Alternatively, serve a minor or incompetent person as instructed by the court.

Authority:
Fed R Civ P 4(g) (incorporating *Fed R Civ P 4(f)(2)(A), (B)* by reference).

Discussion:
See *§ 7.38*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.34 CHECKLIST: Choosing Proper Method for Serving Corporation, Partnership, or Unincorporated Association in Foreign Country.

☐ Serve a foreign corporation, partnership, or unincorporated association that is located in a foreign country by serving according to *almost* any of the methods authorized for service of individuals located in foreign countries, including:

○ If Hague Convention or other treaty applies and specifies methods of service, serve corporations, partnerships, or unincorporated associations according to any method of service agreed to; or

○ If Hague Convention does not apply, or if it or some other treaty allows other means of service, serve the corporation, partnership, or unincorporated association:

☐ Pursuant to the law of the foreign country;

☐ Pursuant to method directed by the foreign country in response to a letter rogatory or letter of request;

☐ By mailing a copy of the summons and complaint to the defendant in the foreign country, by any method of mail that requires a signed receipt, unless that method of service is prohibited by the law of the foreign country; or

○ Alternatively, serve the defendant by any method directed by the court that is not prohibited by

international agreement.

☐ Refrain from any attempt to serve foreign corporation, partnership, or unincorporated association by personal delivery of a copy of the summons and complaint to any individual.

Authority:

Fed R Civ P 4(h)(2) (incorporating by reference *Fed R Civ P 4(f)*, but excluding the applicability of *Fed R Civ P 4(f)(2)(C)(i)*)

Discussion:

See *§ 7.39*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.35 CHECKLIST: Choosing Proper Method for Serving Foreign Government.

☐ Plaintiff must always serve a foreign state or political subdivision of a foreign state pursuant to the Foreign Sovereign Immunities Act, and *28 USC § 1608* in particular.

☐ Make the first attempt to serve foreign state or political subdivision of foreign state:

- ○ By delivery of a copy of the summons and complaint in accordance with any special arrangement; or
- ○ If no special arrangement is made, then by delivery of a copy of the summons and complaint pursuant to any applicable international convention.

☐ If service is not possible by the above two methods, serve foreign state or political subdivision of foreign state by any form of mail requiring a signed receipt, which entails:

- ○ Sending a copy of the summons and complaint and a notice of suit;
- ○ Sending a translation of each document into the official language of the foreign state; and
- ○ Having the clerk of the court address and dispatch the package to the head of the ministry of foreign affairs of the foreign state.

☐ If service by mail not effective within 30 days, serve foreign state or political subdivision of foreign state by any form of mail requiring a signed receipt. This service entails:

○ Sending two copies of the summons and complaint and a notice of suit;

○ Sending a translation of each document into the official language of the foreign state;

○ Having the clerk of the court address and dispatch the package to Secretary of State in Washington, D.C., to the attention of the Director of Special Consular Services;

○ Having the Secretary of State transmit one copy through diplomatic channels to the foreign state; and

○ Having the Secretary of State send the court clerk a certified copy of the diplomatic note indicating when the papers were transmitted.

Authority:
28 USC § 1608(a); *Fed R Civ P 4(j)(1)*

Discussion:
See *§§ 7.40[1], [2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.36 CHECKLIST: Choosing Proper Method for Serving Foreign Governmental Agency or Instrumentality.

☐ Plaintiff must always serve a foreign state agency or instrumentality pursuant to the Foreign Sovereign Immunities Act, and *28 USC § 1608* in particular.

☐ Make the first attempt to serve a foreign state agency or instrumentality:

- ○ By delivery of a copy of the summons and complaint pursuant to any special arrangement;
- ○ If no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States, or in accordance with an applicable international convention on service of judicial documents.

☐ Alternatively, if service is not possible by the above two methods, serve agency or instrumentality of foreign state by:

- ○ Sending a copy of the summons and complaint and a notice of suit;
- ○ Sending a translation of each document into the official language of the foreign state; and

☐ Making the delivery as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request; or

☐ Having the court clerk address and dispatch the package to the agency or instrumentality by any form of mail requiring a signed receipt; or

☐ Making the delivery as ordered by the by court order in a manner consistent with the law of the place where service is to be made.

Authority:
28 USC § 1608(b)

Discussion:
See *§§ 7.40[1], [3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.37 Serving Individuals in Foreign Countries.

7.37[1] Service Is Usually Made Pursuant to Hague Convention, Which Frequently Authorizes Service by Mail. Unless a federal statute provides otherwise, a plaintiff may serve an individual located in a foreign country by any internationally agreed means reasonably calculated to give notice. In practice, this almost always means the methods authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents [*Fed R Civ P 4(f)(1)*].

The Hague Convention furnishes safeguards against the abridgment of rights of parties through inadequate notice. Article 15 provides for verification of actual notice or a demonstration that process was served by a method prescribed by the internal laws of the foreign state before a default judgment may be entered. Article 16 of the Convention also enables the judge to extend the time for appeal after judgment if the defendant shows a lack of adequate notice either to defend or to appeal the judgment, or has disclosed a prima facie case on the merits [*see Fed R Civ P 4*, Committee Note of 1993].

The Hague Convention does not specify a time within which the Central Authority of a foreign country must effect service, but Article 15 does provide that alternate methods may be used if a Central Authority does not respond within six months. Generally, a Central Authority can be expected to respond much more quickly than that limit might permit, but there have been occasions when the signatory state was dilatory or refused to cooperate for substantive reasons. In such cases, the server may resort to the court and secure an order directing an alternate means of service [*see Fed R Civ P 4*, Committee Note of 1993].

Cross Reference:

Service of process on individuals in foreign countries, see 1 *Moore's Federal Practice, § 4.52* (Matthew Bender 3d ed.).

Strategic Point--State Department Has Helpful Information:

The Department of State has gathered information concerning service of legal documents in foreign countries. Much of this is in publication or on the Department's web site. The Department's web site has a page providing a general comparison of the pros and cons of varying methods of service [*see* http://travel.state.gov/service_general.html]. The web site also has a page called "judicial assistance" that provides useful information, including the service requirements of a number of different countries. This country-specific information is of great practical value, pointing out matters such as how the laws of most foreign countries require translations of the summons and complaint into the local language [*see* http://travel.state.gov/judicial_assistance.html].

Strategic Point--Multiple Methods and Attempts at Service:

As a practical matter, it is important to use all available methods rather than limit attempts at service to a single method. If local counsel or a local investigator provides multiple addresses, service at all of the addresses is recommended. Multiple attempts and methods are not necessarily costly. The Ninth Circuit permits service of process by mail pursuant to Article 10(a) of the Hague Convention, if service by mail is not forbidden by local law. Service by mail must be performed in accordance with Rule 4(f) [*Brockmeyer v. May (9th Cir 2004) 383 F3d 798, 808-809* (service by ordinary first class international mail was ineffective because service did not comply with *Fed R Civ P 4* requirements)]. Under Rule 4, the court may authorize a variety of alternative methods of service abroad, including ordinary mail, e-mail, publication, telex, and delivery service [*see Fed R Civ P 4(f)(3)*; *see, e.g., R. Griggs Group Ltd. v. Filanto SpA (D Nev 1996) 920 F Supp 1100, 1102, 1107-1108* (service by Federal Express)].

7.37[2] Absent International Authority, Service May Generally Be Made Pursuant to Law of Foreign Country. The United States is a signatory to the Hague Convention, but not every foreign country is. The Hague Convention applies only when both the originating and receiving countries are signatories [*see, e.g., Perfumer's Workshop, Ltd. v. Roure Bertrand du Pont, Inc. (SDNY 1990) 737 F Supp 785, 789-790*]. Thus, if there is no internationally agreed means of service (or the applicable international agreement allows other means of service), plaintiff must serve an individual in a foreign country pursuant to and in the manner prescribed by the law of the foreign country for service of process in an action in any of its courts of general jurisdiction [*Fed R Civ P 4(f)(2)(A)*; *Lamm v. Bumbo (ND Cal 2008) 2008 US Dist LEXIS 39042, at *34-*38* (plaintiffs did not meet their burden under *Fed R Civ P 4(f)(2)(A)* to show that service was effected "as prescribed" by laws of South Africa)]. The method selected must, however, be "reasonably calculated to give notice" to the individual so served [*Fed R Civ P 4(f)(2)*]; service by ordinary first class international mail is not permitted without prior district court approval [*Brockmeyer v. May (9th Cir 2004) 383 F3d 798, 808-809*].

7.37[3] Absent International Authority, Service May Be Made As Directed by Authority in Foreign Country. Although an individual in a foreign country may be served as provided by the law of that country [*see Fed R Civ P 4(f)(2)(A)*], it is not always easy to know what that law is, and the provisions might not be applicable to the defendant in question or for the type of claim in question. Therefore, the court may issue a formal enquiry to the relevant authorities in the foreign country to determine what the proper or acceptable means for service of process is or should be. A plaintiff may serve an individual defendant in a foreign country as directed by the foreign authority in response to a letter rogatory or letter of request [*Fed R Civ P 4(f)(2)(B)*]. The method selected must, however, be "reasonably calculated to give notice" to the individual so served [*Fed R Civ P 4(f)(2)*].

This provision in Rule 4 should not be interpreted to authorize use of a letter of request when there is no treaty obligation on the receiving country to honor such a request from the United States, or when the United States does not extend diplomatic recognition to the foreign nation [*see Fed R Civ P 4*, Committee Note of 1993].

7.37[4] Absent International Authority, Service May Generally Be Made by Personal Delivery or by Mail. If there is no internationally agreed means of service (or if the applicable international agreement allows other means of

service), a plaintiff may serve an individual defendant in a foreign country by [*Fed R Civ P 4(f)(2)(C)*]:

- Personal delivery of a copy of the summons and the complaint to the individual defendant; or
- Having the clerk of the court mail a copy of the summons and complaint to the individual defendant by any form of mail requiring a signed receipt.

There are, however, two substantial limitations on service either by mail or by personal delivery [*Fed R Civ P 4(f)(2)(C)*]:

- The method selected must be "reasonably calculated to give notice" to the person served; and
- The method selected may not be prohibited by the law of the country in which the defendant is served.

7.37[5] Absent International Authority, Service May Generally Be Made As Ordered by Court.

7.37[5][a] There Must Be a Court Order and Service Method Must Not Be Prohibited by Treaty. If there is no internationally agreed means of service (or if the applicable international agreement allows other means of service), a plaintiff may apply to the court and receive an order authorizing service on an individual defendant in a foreign country by any means not prohibited by international agreement [*Fed R Civ P 4(f)(3)*]. Plaintiffs must have obtained "prior court approval" for their proposed alternative method of serving process [*Brockmeyer v. May (9th Cir 2004) 383 F3d 798, 806* (plaintiffs failed to obtain court approval)].

The Hague Convention, for example, far from prohibiting many kinds of service, actually authorizes special forms of service in cases of urgency if conventional methods will not permit timely service on a defendant. Other circumstances that might justify the use of additional methods include the failure of the Central Authority of the foreign country to effect service within the six-month period provided by the Convention, or the refusal of the Central Authority to serve a complaint seeking punitive damages or to enforce the antitrust laws of the United States. In those types of cases, the court may direct a special method of service not explicitly authorized by international agreement, but not prohibited by it either. Furthermore, the court should limit the methods it authorizes to those that will give the defendant reasonable notice and that are as inoffensive to the laws of the foreign country as possible. A court may, in some instances, authorize service of process by ordinary mail [*see Fed R Civ P 4*, Committee Note of 1993].

Courts have authorized a wide variety of alternative methods of service including publication, ordinary mail, mail to the defendant's last known address, delivery to the defendant's attorney, telex, and most recently, e-mail [*Rio Props., Inc. v. Rio Int'l Interlink (9th Cir 2002) 284 F3d 1007, 1016*].

7.37[5][b] Attempts at Other Service Methods Not Required Prior to Seeking Court Order. Service of process under Rule 4(f)(3) is neither a "last resort" nor extraordinary relief. It is merely one means among several that enables service of process on an international defendant [*Rio Props., Inc. v. Rio Int'l Interlink (9th Cir 2002) 284 F3d 1007, 1015*]. Alternate service of process under Rule 4(f)(3) is available without first attempting service by other means. Specifically, in cases of urgency, Rule 4(f)(3) may allow the district court to order a special method of service, even if other methods of service remain incomplete or unattempted [*see Rio Props., Inc. v. Rio Int'l Interlink (9th Cir 2002) 284 F3d 1007, 1015* -1016 (authorizing service under *Fed R Civ P 4(f)(3)* after plaintiff had made multiple unsuccessful attempts to locate "an elusive international defendant, striving to evade service of process"); *but see Lamm v. Bumbo (ND Cal 2008) 2008 US Dist LEXIS 39042, at *40-*41* (declining to order alternative methods of service of process under *Fed R Civ P 4(f)(3)*, because defendant's physical location in South Africa was "well-known" to plaintiffs and there was no indication that defendant was trying to evade service); *see also Fed R Civ P 4*, Committee Note of 1993].

Legal Topics:

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7.38 Serving Minors and Incompetent Persons in Foreign Countries.

There are two main options for serving a minor or incompetent person in a foreign country [*Fed R Civ P 4(g)* (incorporating *Fed R Civ P 4(f)(2)(A), (B)* by reference)]:

- Pursuant to the law for service of process on minors and incompetents of the foreign country in which the defendant is located; or

- Pursuant to the method directed by the foreign country in response to a letter rogatory or letter of request.

Alternatively, the plaintiff may apply to the court for an order authorizing some other particular form of service [*Fed R Civ P 4(g)*]. The two main options are expressly incorporated by reference from Rule 4(f)(2), which sets out the methods for serving individual defendants in foreign countries. The alternative option of seeking an order from the court does not expressly refer to Rule 4(f)(3) [*see Fed R Civ P 4(g)*]. Nonetheless, although the limitations are unspoken, the plaintiff should not seek and the court should not order a method of service prohibited by international agreement [*cf. Fed R Civ P 4(f)(3)* (limitation on court orders for alternative methods of serving adult, competent individual defendant in foreign countries)]. Further, as with orders authorizing service under Rule 4(f)(3), the court should limit the methods it authorizes to those that will give the defendant reasonable notice and that are as inoffensive to the laws of the foreign country as possible [*see Fed R Civ P 4*, Committee Note of 1993].

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.39 Serving Corporations, Partnerships, and Unincorporated Associations in Foreign Countries.

Unless a federal statute requires some other conduct, a plaintiff may serve a foreign corporation, partnership, or unincorporated association that is located in a foreign country by any of the methods authorized for service of individuals located in foreign countries *except* personal service [*Fed R Civ P 4(h)(2)* (incorporation of *Fed R Civ P 4(f)* by reference except *Fed R Civ P 4(f)(2)(C)(i)*)]. This means, in most cases, that if the Hague Convention or other treaty applies and specifies methods of service, the plaintiff must serve the corporation, partnership, or unincorporated association according to any of the relevant methods of service agreed to in the Convention [*see Fed R Civ P 4(f)(1)*]. If, on the other hand, neither the Hague Convention nor any other treaty applies (or if the applicable law allows other means of service) the plaintiff must serve the corporation, partnership, or unincorporated association [*see Fed R Civ P 4(h)(2)*]:

- Pursuant to the law of the foreign country where the defendant is being served;

- Pursuant to method directed by the foreign country in response to a letter rogatory or letter of request;

- By any method of mail that requires a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served, unless that method of service is prohibited by the law of the foreign country [*see* Power Integrations, Inc. v. Sys. Gen. Corp. (ND Cal 2004) 2004 US Dist LEXIS 25414, at *4-*10 (approving service by Federal Express)]; or

- By any method as directed by the court that is not prohibited by international agreement.

Warning:

It is never permissible to attempt to serve a foreign corporation, partnership, or unincorporated association by personal delivery of a copy of the summons and complaint to any individual [*Fed R Civ P 4(h)(2)* (specifically rejecting method of service set out in *Fed R Civ P 4(f)(2)(C)(i)*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.40 Serving Foreign States, Their Political Subdivisions, Agencies, or Instrumentalities.

7.40[1] Foreign State, Its Political Subdivision, Agency, or Instrumentality Must Be Served in Compliance With 28 USC § 1608. Service on a foreign state or a political subdivision, agency, or instrumentality must comply with the provisions of the Foreign Sovereign Immunities Act, particularly *28 USC § 1608* [*Fed R Civ P 4(j)(1)*].

7.40[2] Service on Foreign State or Its Political Subdivision.

7.40[2][a] First Attempt Is by Delivery. Service on a foreign state or its political subdivisions may involve a three-stage process. A plaintiff must make the first attempt to serve foreign state or political subdivision of foreign state by one of two means [*28 USC § 1608(a)(1), (2)*]:

- By delivery of a copy of the summons and complaint in accordance with any special arrangement; or
- If no special arrangement has been made, then by delivery of a copy of the summons and complaint pursuant to any applicable international convention.

7.40[2][b] Second Attempt Is by Return Receipt Mail Sent to Foreign State. If service is not possible by the above two methods, the plaintiff may then attempt to serve a foreign state or political subdivision of a foreign state by any form of mail requiring a signed receipt. Service by mail in this context entails having the clerk of the court address and dispatch a package of documents to the head of the ministry of foreign affairs of the foreign state. The package must contain all of the following [*28 USC § 1608(a)(3)*]:

- A copy of the summons and complaint;
- A notice of suit ("notice of suit" means a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation); and
- A translation of each of these documents into the official language of the foreign state.

7.40[2][c] Third Attempt Is by Return Receipt Mail Sent to Secretary of State. If the plaintiff's service by mail not effective within 30 days, the plaintiff must serve the foreign state or a political subdivision of the foreign state by another service by any form of mail requiring a signed receipt. This second attempt entails having the clerk of the court assemble a package of documents. However, instead of the clerk mailing this off to a foreign country, the clerk will, this second time, address and dispatch the package to Secretary of State in Washington, D.C., to the attention of the Director of Special Consular Services. The Secretary of State will transmit a copy through diplomatic channels to the foreign state and will send the court clerk a certified copy of the diplomatic note indicating when the papers were transmitted. The package is similar, but not identical to that used in the earlier attempt at service by mail and consists of [*28 USC § 1608(a)(4)*]:

- Two copies of the summons and complaint (as opposed to the single copy used earlier);
- A "notice of suit"; and
- A translation of each document into the official language of the foreign state.

7.40[2][d] When Service Is Deemed Complete. Service on a foreign state of political subdivision is deemed complete [*28 USC § 1608(c)*]:

- On the date of the proof of service for whatever means of service were used by special arrangement or that were authorized by treaty;
- On the date of the signed postal receipt in the case of the first attempt to serve the defendant by mail; or
- On the date of transmittal of the diplomatic note set out in the copy sent to the clerk of the court by the Secretary of State if the plaintiff is forced to rely on the Secretary to serve process through diplomatic channels as described above.

7.40[3] Service on Foreign State Agency or Instrumentality.

7.40[3][a] First Attempt Requires Delivery of Summons and Complaint. There are a number of stages to attempting to serve a foreign governmental agency or instrumentality, but they are less formal and less regimented than the stages used to serve the foreign state itself or its political subdivisions. A plaintiff must first attempt to serve process on an agency or instrumentality of a foreign government by delivering a copy of the summons and complaint [*28 USC § 1608(b)(1), (2)*]:

- Pursuant to any special arrangement; or
- If no special arrangement exists, to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States, or
- If no special arrangement or agent exists, in accordance with an applicable international convention on service of judicial documents.

7.40[3][b] Second Attempt Requires Delivery of Additional Documents. If service is not possible by the above methods, the plaintiff must put together the following documents [*28 USC § 1608(b)(3)*]:

- A copy of the summons and complaint;
- A notice of suit (a "notice of suit" means a notice addressed to the foreign state in a form prescribed

by the Secretary of State [*see 28 USC § 1608(a)*]);

- A translation of each of these documents into the official language of the foreign state.

The plaintiff then has three choices as to how this package gets delivered:

- Making the delivery as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request; or

- Having the court clerk address and dispatch the package to the agency or instrumentality by any form of mail requiring a signed receipt; or

- Making the delivery as ordered by the by court order in a manner consistent with the law of the place where service is to be made.

7.40[3][c] When Service Is Deemed Complete. Service on an agency or instrumentality of a foreign state is deemed complete [*28 USC § 1608(c)*]:

- On the date of the proof of service for whatever means of service were used by special arrangement, by court order, that were authorized by treaty, or any other means of delivery other than mail;

- On the date of the signed postal receipt in the case of an attempt to serve the defendant by mail.

Legal Topics:

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7.41 120-Day Deadline Does Not Apply to Service in Foreign Country.

The 120-day limit for service of process that is set out in Rule 4(m) does not apply to service made pursuant to Rule 4(f) or Rule 4(j)(1). In other words, the 120-day time limits does not apply to service made on individuals who are located in a foreign country or to service on foreign governments or subdivisions, agencies, or instrumentalities of foreign governments [*Fed R Civ P 4(m)* (subdivision setting out time limit creates exceptions for those served under *Fed R Civ P 4(f), (j)(1)*)].

It is not clear whether this exception from the 120-day time limit includes service on foreign corporate and association defendants. The exception from the 120-day limit expressly applies only to service made pursuant to Rule 4(f) or Rule 4(j)(1) [*see Fed R Civ P 4(m)*]. Rule 4(h)(2), not Rule 4(f) or Rule 4(j)(1), is the provision that governs service on foreign corporations, partnerships, and associations. On the other hand, Rule 4(h)(2) requires service on foreign corporations, partnerships, and association to be made under Rule 4(f)--that is, by the same methods that are applicable to service on individuals in foreign countries (except for "personal" delivery, because it is impossible to deliver any document to a corporation personally). Rule 4(h)(2) incorporates Rule 4(f) by reference [*see Fed R Civ P 4(h)(2)*]. Thus, after a fashion, foreign corporations, partnerships, and association *are* served under Rule 4(f) and are arguably within the exception to the 120-day time limit. The argument is far from certain, however.

Cross Reference:

Discussion of time limits for service, see *§ 7.03[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.42 Waiver Rules Apply to Service in Foreign Country.

The waiver of service provisions are not limited to defendants located within the United States. A waiver may be requested from an individual or a corporation, partnership, or unincorporated association located in a foreign country [*Fed R Civ P 4(d)(2)* (defendants who may be served under *Fed R Civ P 4(f), (h)(2)* have duty to avoid unnecessary costs of service by agreeing to waive service)].

A waiver request need not be sent by domestic, first class mail; but may be sent by any reliable means [*see Fed R Civ P 4(d)(2)(B)*]. For requesting waivers from foreign defendants, a plaintiff may resort to such reliable and economic means as fax transmission [*see Fed R Civ P 4*, Committee Note of 1993].

A foreign defendant who declines to waive service of summons is *not* subject to the provisions of Rule 4 that make the defendant automatically liable for the costs of service [*see Fed R Civ P 4(d)(2)*]. Nonetheless, a waiver of service might still be economically advantageous to a defendant because, if the defendant loses, the costs of service may ultimately be taxed against the defendant. The costs of foreign service, including the costs of translation, can be substantial [*see Fed R Civ P 4*, Committee Note of 1993]. Moreover, a defendant that waives service is afforded substantially more time, 90 days from the date the request for waiver was sent rather than 20 days after service, within which to respond to the complaint [*see Fed R Civ P 4*, Committee Note of 1993].

Cross Reference:

Discussion of waiver of service, see *§§ 7.15 -7.19*.

Legal Topics:

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7.42A CHECKLIST: Ensuring Service Is Complete.

☐ Serve both summons and complaint on each defendant.

Authority:
Fed R Civ P 4(c)(1)

Discussion:
See *§ 7.43*

☐ Comply with local rules requiring service of additional materials, which are generally provided by clerk:

Discussion:
See *§ 7.44[1]*

○ In the Central District, additional materials include notice of option to consent to hearing by magistrate judge, notice of interested parties, and notice of related cases.

Authority:
CD Cal Civ L R 7.1-1, 73-2, 83-1.3.1

Discussion:
See *§ 7.44[2]*

○ In the Eastern District, additional materials include notice of option to consent to hearing by magistrate judge and notice of voluntary dispute resolution program.

Authority:
ED Cal Civ LR 271(c)(1); *ED Cal Mag LR 305(a)*

Discussion:
See *§ 7.44[3]*

○ In the Northern District, additional material includes required documents related to dispute resolution procedures.

Authority:
ND Cal Civ LR 4-2

Discussion:
See *§ 7.44[4]*

○ In the Southern District, additional material includes notice of option to consent to hearing by magistrate judge.

Authority:
SD Cal Civ LR 73.1(a)

Discussion:
See *§ 7.44[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.43 Both Summons and Complaint Must Be Served.

For service of process to be complete and effective, the plaintiff must serve both the summons and the complaint [*Fed R Civ P 4(c)(1)*]. Service of the complaint without the summons constitutes ineffective service of process [*see, e.g.,* Williams v. United States (ND Cal 2001) 2001 US Dist LEXIS 17875, at *8-*9]. Likewise, service of a summons without the complaint constitutes ineffective service of process, as does service of summons with the wrong version of the complaint or service of summons with an incomplete or defective copy of the complaint [*see West Coast Theater Corp. v. City of Portland (9th Cir 1990) 897 F2d 1519, 1521*].

Warning:

Mandatory electronic filing in the Eastern District has not changed the requirement for effecting service of process on the defendant [*see ED Cal Civ LR 210(d)*].

Legal Topics:

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7.44 Local Rules May Require Service of Additional Material Along With Summons and Complaint.

7.44[1] Practice Varies From District to District. Local rules may require the parties to serve additional or supplementary notices and papers along with the summons and complaint. The rules of the four California federal district courts are discussed below. Note, however, that in almost all instances, the clerk provides the plaintiff with the additional or supplemental material that the plaintiff must serve. Although, as noted above, service is not effective unless the plaintiff serves both the summons and complaint, a non-willful failure to serve any supplementary material as required by local rules should not negate the validity of service, at least not if negating service were to deprive the plaintiff of any substantive rights. A failure to comply can lead to a number of other consequences, however, including appropriate sanctions [*see Fed R Civ P 83(a)(2)* (local rules imposing requirements "of form" may not "be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply")].

7.44[2] LOCAL PRACTICE: CD Cal Requirements--Service of Additional Notice. In the Central District, there is *at least* one notice that the plaintiff must serve along with the summons and complaint, a notice required by all four of California's district courts. When a case is assigned initially only to a magistrate judge, the clerk will provide a "Notice and Consent form" to the initiating party advising the parties that they may consent to having their case heard by an assigned magistrate judge. The initiating party must serve the Notice and Consent Form on all other parties at the time of service of the summons and complaint or other initial pleading [*CD Cal Civ LR 73-2.1*]. However, other notices may be required to be served by other rules. For example, because the plaintiff will be filing its "Notice of Interested Parties" with the complaint [*see CD Cal Civ LR 7.1-1*], the plaintiff will be serving this on the defendant with the summons and complaint. The same is true concerning the "Notice of Related Cases" [*see CD Cal Civ LR 83-1.3.1*] and any other notice or paper actually supplied by the clerk at the time of filing.

7.44[3] LOCAL PRACTICE: ED Cal Requirements--Service of Additional Notices. In the Eastern District, there are *at least* two notices that must be served along with the summons and complaint:

- When the plaintiff files an action, the clerk will provide the plaintiff with a notice of the court's Voluntary Dispute Resolution Program. The notice will order the plaintiff to provide all other parties with a copy of the notice "at the time service is effected or, for parties already served, no later than 14 days after plaintiff receives the notice from the Court" [*ED Cal Civ LR 271(c)(1)*].

- When the plaintiff files an action, the clerk will provide the plaintiff with a notice of the option that the parties have to consent to having their case heard by a magistrate judge. The plaintiff must transmit this notice to all other parties as an attachment to copies of the complaint and summons, when served [*ED Cal Mag LR 305(a)*].

Likewise, the clerk will provide the notice to the removing defendant at the time of removal and the defendant must then transmit the notice to all other parties as an attachment to the removal documents when served [*ED Cal Mag LR 305(a)*].

This list is not necessarily exhaustive. The plaintiff should also serve any other paper or notice supplied by the clerk for service on the defendant.

7.44[4] LOCAL PRACTICE: ND Cal Requirements--Service of Supplementary Material. In the Northern District of California, except in cases that are exempt from the court's case management system or initial disclosures under Rule 26 [*see ND Cal Civ LR 16-7*], a plaintiff must serve additional materials along with the complaint and the summons or request for waiver of service. The plaintiff must serve the following supplementary material [*ND Cal Civ LR 4-2*]:

- A copy of the Order Setting Initial Case Management Conference and ADR Deadlines issued pursuant to *ND Cal Civ LR 16-2(a)*, *(b)*, or *(c)*;

- Any pertinent Standing Orders of the assigned judge;

- A copy of the assigned judge's order and form for the preparation of a Case Management Statement or, if none, the court's form pursuant to *ND Cal Civ LR 16-10*; and

- Except in cases assigned at the time of filing to a Magistrate Judge, a copy of the form allowing a party to consent to assignment of the case to a Magistrate Judge.

This list is not necessarily exhaustive. The plaintiff should also serve any other paper or notice supplied by the clerk for service on the defendant.

7.44[5] LOCAL PRACTICE: SD Cal Requirements--Service of Additional Notice. In the Southern District, there is *at least* one notice that the plaintiff must serve along with the summons and complaint, a notice required by all four of California's district courts. When the plaintiff files an action, the clerk will provide the plaintiff with a notice of the option that the parties have to consent to having their case heard by a magistrate judge. The plaintiff must transmit this notice to all other parties "as attachments to copies of the complaint and summons when served" [*SD Cal Civ LR 73.1(a)*]. This notice does not necessarily exhaust all of the extra notices or papers that the plaintiff must serve with the summons and complaint. The plaintiff should also serve any other paper or notice supplied by the clerk for service on the defendant.

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.44A CHECKLIST: Determining Whether Service of Process Established Personal Jurisdiction Over Defendant.

☐ Determine whether service or the filing of service established personal jurisdiction over the defendant:

Authority:
Fed R Civ P 4(k)

Discussion:
See *§ 7.45*

○ Is the defendant subject to general or specific personal jurisdiction in the state where the district court is located?

Authority:
Fed R Civ P 4(k)(1)(A)

Discussion:
See *§ 7.46*

○ Is the defendant joined as a party under *Fed R Civ P 14* or *19* and served at a place not more than 100 miles from the place from which the summons issued?

Authority:
Fed R Civ P 4(k)(1)(B)

Discussion:
See *§ 7.47*

○ Is the defendant subject to federal interpleader jurisdiction?

Authority:
Fed R Civ P 4(k)(1)(C); *28 USC § 1335*

Discussion:
See *§ 7.45[2]*

○ Is jurisdiction over a foreign defendant authorized by federal law?

Authority:
Fed R Civ P 4(k)(1)(D)

Discussion:
See *§ 7.48*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.45 Completion of Mechanical Steps for Service of Process Does Not Conclusively Establish Personal Jurisdiction of Defendant.

7.45[1] Rule 4 Recognizes Constitutional Limits and Establishes Territorial Limits for Effective Service of Process. Service of the summons under Rule 4 does not conclusively establish the court's personal jurisdiction over a defendant. Even if a defendant fully complies with all of the mechanical steps for service of process authorized by Rule 4, a defendant may still object to the court's exercise of personal jurisdiction by asserting the constitutional limitations imposed by the *Due Process Clause of the Fifth Amendment* or the simple territorial limits for service of process set out Rule 4(k) [*see Fed R Civ P 4*, Committee Note of 1993].

7.45[2] Rule 4(k) Establishes Four-Alternative Test for Measuring When Service Creates Personal Jurisdiction. Service of a summons or filing a waiver of service is effective to establish the court's personal jurisdiction over a defendant if [*Fed R Civ P 4(k)(1)*]:

- The defendant could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located [*Fed R Civ P 4(k)(1)(A)*];

- The defendant is joined as a party joined under *Fed R Civ P 14* or *19* and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues [*Fed R Civ P 4(k)(1)(B)*];

- The defendant is subject to the federal interpleader jurisdiction under *28 USC § 1335* [*Fed R Civ P 4(k)(1)(C)*]; or

- Jurisdiction over the defendant is authorized by a statute of the United States [*Fed R Civ P 4(k)(1)(D)*].

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over a defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state [*Fed*

R Civ P 4(k)(2)].

Cross References:

Discussion of personal jurisdiction generally, see Ch. 2, Determining Forum (Jurisdiction and Venue), *§§ 2.31 -2.41*. Discussion of interpleader jurisdiction, see Ch. 4, Determining Parties to the Action, *§ 4.56*.

Detailed coverage of personal jurisdiction, see 16 Moore's Federal Practice, Ch. 108, Territorial Jurisdiction: Jurisdiction Over Persons and Property.

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.46 Service of Process Establishes Personal Jurisdiction Only When Consistent With Constitution.

7.46[1] Constitution Requires Minimum Contacts, Purposeful Availment, and Fairness. If the state courts where the federal district court is located could constitutionally exercise jurisdiction over a defendant, so can the federal courts located in that state [*see Fed R Civ P 4(k)(1)(A)*]. The constitutional principles that permit either state courts or federal courts to exercise personal jurisdiction over a defendant constitute a large and complex field of law, but the general principles are:

- The defendant must have minimum contacts with the forum that are sufficient to justify the exercise of jurisdiction by the courts of the forum [*International Shoe Co. v. Washington (1945) 326 US 310, 316, 66 S Ct 154, 90 L Ed 95*]. There is a substantial exception to this rule, however. If the defendant is present in the forum, even transiently, and can be served with process in the forum, service of process itself may be an adequate basis for jurisdiction [*Burnham v. Superior Court (1990) 495 US 604, 622, 110 S Ct 2105, 109 L Ed2d 631*].

- Contacts that are continuous or systematic may justify "general" personal jurisdiction over the defendant on a wide variety of matters [*see, e.g., Perkins v. Benguet Consol. Mining Co. (1952) 342 US 437, 447-449, 72 S Ct 413, 96 L Ed 485, 63 Ohio Law Abs. 146*].

- More limited contacts, but contacts with the forum that are directly related to the claim in dispute, may justify "specific" personal jurisdiction over the defendant--jurisdiction limited to claims that are related to the defendant's contacts with the forum [*Burger King Corp. v. Rudzewicz (1985) 471 US 462, 472, 105 S Ct 2174, 85 L Ed2d 528*].

- The defendants contacts with the forum must constitute "purposeful availment" of the laws and protections of the forum; the contacts may not be accidental or unintended [*Hanson v. Denckla (1958) 357 US 235, 254, 78 S Ct 1228, 2 L Ed2d 1283*].

- The nature and extent of the defendant's contacts must be such that it would be "fair" for the court to

exercise personal jurisdiction over the defendant [*Burger King Corp. v. Rudzewicz (1985) 471 US 462, 476, 105 S Ct 2174, 85 L Ed2d 528* ; *Core-Vent Corp. v. Nobel Indus. AB (9th Cir 1993) 11 F3d 1482, 1488* (Ninth Circuit identifies seven factors that must be weighed and balanced)].

7.46[2] Rule 4 Limits Relevant Contacts to Contact With Particular State Forum. The United States Constitution limits the exercise of personal jurisdiction by federal courts in the same manner that it does the exercise of personal jurisdiction by state courts [*see US Const, amend V* (*due process clause of Fifth Amendment* controls federal courts); *US Const, amend XIV* (*Fourteenth Amendment* extends due process limits to state courts)]. Due process requires that the defendant have "minimum contacts" with the "forum" so that it would be "fair" for the court to exercise jurisdiction over the defendant. The main difference is that, as applied to federal courts, the "forum" that the defendant must have contacts with is the United States as a whole, rather than the territorial limits of any one particular state [*see Mississippi Publ'g Corp. v. Murphree (1946) 326 US 438, 441-442, 66 S Ct 242, 90 L Ed 185*]. Thus, Rule 4 could have provided, and in a couple of instances does provide, that service of process anywhere in the United States may create personal jurisdiction. Rule 4 does authorize nationwide service of process for statutory interpleader actions [*Fed R Civ P 4(k)(1)(C)*; *see 28 USC § 1335*] and whenever a federal statute provides for it [*Fed R Civ P 4(k)(1)(D)*]. Federal statutes do provide for nationwide service of process in a number of instances, such as in securities fraud cases [*see 15 USC § 78aa*], ERISA cases [*see 29 USC § 1132(e)*], and RICO cases [*see 18 USC § 1965*]. The Ninth Circuit agrees that in such cases, it is the defendant's contacts with the United States as a whole that is the constitutional limit on personal jurisdiction [*Go-Video, Inc. v. Akai Elec. Co. (9th Cir 1989) 885 F2d 1406, 1413*]. In most cases, however, Rule 4 makes state court jurisdiction and federal court jurisdiction parallel by making service of process effective to create personal jurisdiction over a defendant only in those cases in which the state court of the state in which the district court is located could also validly exercise personal jurisdiction over the defendant [*Fed R Civ P 4(k)(1)(A)*].

Exceptions:

There are only two exceptions to this state-court limit on personal jurisdiction in the vast majority of federal court cases:

- So-called "bulge" service within a 100 miles of the federal courthouse when the party being served is so closely related to the claims before the court that the party being served is being joined under Rule 14 (third-party practice) or Rule 19 (necessary and indispensable parties) [*Fed R Civ P 4(k)(1)(B)*; *see 7.47*]; and

- Federal-law based claims asserted against a party who is not subject to personal jurisdiction by the state courts of any state of the United States [*Fed R Civ P 4(k)(2)*; *see 7.48*].

Cross Reference:

Discussion of limitations on bases for personal jurisdiction under Rule 4, see 16 Moore's Federal Practice, § 108.123.

Legal Topics:

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7.47 "Bulge" Service Extends Jurisdictional Reach of Federal Court.

A plaintiff may obtain personal jurisdiction over a defendant even when the state courts of the state in which the district court sits would not be able to serve or exercise personal jurisdiction over the defendant (or third-party defendant) in the following, limited situation [*Fed R Civ P 4(k)(1)(B)* ("bulge" service authorization)]:

- The defendant or third-party defendant must be served within the United States; and
- The place of service must be within 100 miles of the federal courthouse that issued the summons in the case (the so-called "bulge"); and
- The person served must qualify for impleader as a third-party defendant under Rule 14 [*see generally Fed R Civ P 14* (third-party practice)]; or
- The person served must be joined as a required or indispensable party under Rule 19 [*see generally Fed R Civ P 19(a), (b)* (required and indispensable parties)].

If a plaintiff (or third-party plaintiff) make "bulge" service, the person served need not have minimum contacts with the forum state. The federal court may exercise personal jurisdiction if there is any constitutional basis for exercising jurisdiction over the defendant in either the bulge state where service took place or the forum state where the action is proceeding [*Sprow v. Hartford Ins. Co. (5th Cir 1979) 594 F2d 412, 416*].

Cross References:

Discussion of required or indispensable parties, see Ch. 4, Determining Parties to the Action, *§§ 4.41 -4.51*. Discussion of third-party practice, see Ch. 12, Third-Party Actions.

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.48 Foreign Defendants May Be Served Anywhere If Claim Asserted Is Based on Federal Law.

If a claim is based on federal law, and if a defendant is not subject to personal jurisdiction in any judicial district, any valid service will create personal jurisdiction over the defendant if the defendant has contacts with the United States as a whole sufficient to justify the exercise of the personal jurisdiction of the federal court consistent with the Constitution and the laws of the United States [*Fed R Civ P 4(k)(2)*].

This rule applies to both general and specific jurisdiction [*see Holland Am. Line Inc. v. Wartsila N. Am., Inc. (9th Cir 2007) 485 F3d 450, 459]* . A court may exercise jurisdiction when three requirements are met [*Holland Am. Line Inc. v. Wartsila N. Am., Inc. (9th Cir 2007) 485 F3d 450, 461]* :

- The claim against the defendant arises under federal law.
- The defendant is not subject to the personal jurisdiction of any state court of general jurisdiction.
- The federal court's exercise of personal jurisdiction comports with due process.

The due process analysis under *Fed R Civ P 4(k)(2)* is "nearly identical" to traditional personal jurisdiction analysis with one significant difference: rather than considering contacts between the defendant and the forum state, the court considers contacts with the nation as a whole [*Holland Am. Line Inc. v. Wartsila N. Am., Inc. (9th Cir 2007) 485 F3d 450, 462* ("scant, fleeting, and attenuated" contacts were insufficient to support exercise of jurisdiction)].

Cross Reference:

For discussion of due process requirements relating to personal jurisdiction, see *§ 2.31[2]*.

This exception to the general rule that federal court personal jurisdiction is parallel with state court personal jurisdiction is a narrow one:

- This narrow exception does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country, even though there might be diversity or alienage subject-matter jurisdiction as to such claims. If, however, personal jurisdiction is established under this

paragraph with respect to federal claim, then the supplemental jurisdiction statute provides supplemental jurisdiction over related claims against that defendant, subject to the court's discretion to decline exercise of that jurisdiction under [*see 28 USC § 1367(a), (c)*; *Fed R Civ P 4*, Committee Note of 1993].

- District courts should scrupulously protect aliens who reside in a foreign country from a plaintiff's forum selection when that is so onerous that injustice could result. The rule expressly incorporates the general due process limits of applicable to every federal court's exercise of personal jurisdiction [*Fed R Civ P 4(k)(2)* ("if ... exercising jurisdiction is consistent with the United States Constitution and laws")]. Furthermore, the Advisory Committee warns courts to take great care when extending the notions of personal jurisdiction into the international field [*see Fed R Civ P 4*, Committee Note of 1993 (citing *Asahi Metal Indus. Co. v. Superior Court (1987) 480 US 102, 115, 107 S Ct 1026, 94 L Ed2d 92*].

Cross Reference:

Discussion of jurisdiction under Rule 4(k)(2), see 16 Moore's Federal Practice, § 108.123[2][c].

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7.49 Sufficiency of Service Determination Is Reviewed for Abuse of Discretion.

A district court's decision regarding the sufficiency of service of process is reviewed only for abuse of discretion [*Rio Props., Inc. v. Rio Int'l Interlink (9th Cir 2002) 284 F3d 1007, 1014*].

Cross Reference:

Discussion of opposition to service, see Ch. 8, Answers and Responsive Motions Under Rule 12, *§ 8.20*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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IX. SEIZURE OF PROPERTY FOR IN REM JURISDICTION

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7.49A CHECKLIST: Seizure of Property for In Rem Jurisdiction.

☐ Determine whether *28 USC § 1655* permits the court to assert jurisdiction over property located within the judicial district:

- ○ Is there a claim to personal or real property within the district?
- ○ Is the plaintiff unable to serve the defendant?
- ○ Is the defendant unwilling to appear voluntarily?

Authority:
Fed R Civ P 4(n)(1); *28 USC § 1655*

Discussion:
See *§§ 7.50*, *7.51[1]*

☐ Consider whether exigent circumstances exist that will favor court's exercise of discretion to assert in rem jurisdiction.

Authority:
Fed R Civ P 4(n)(2)

Discussion:
See *§ 7.51[4]*

☐ If court exercises discretion to authorize seizure of property to establish in rem jurisdiction, follow state law procedures to effect that seizure.

Authority:
Fed R Civ P 4(n)(2)

Discussion:
See *§ 7.51[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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IX. SEIZURE OF PROPERTY FOR IN REM JURISDICTION

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7.50 Statutory Jurisdiction Over Property for Judgment Affecting Property Only.

7.50[1] Court May Assert Jurisdiction According to Terms of Federal Statute. If a federal statute so provides, the court may assert "jurisdiction over property" [*Fed R Civ P 4(n)(1)*]. This means that the court may render a judgment concerning the property over which it exercises jurisdiction ("in rem" or "quasi in rem" jurisdiction); but property-based jurisdiction does not permit the court to render a judgment for which a defendant will have personal liability apart from the property in question ("in personam" jurisdiction). Persons claiming an interest in the property are entitled to prejudgment notice of the action. The notice must be given in the manner specified in whatever federal statute authorizes the court to exercise jurisdiction over the disputed property or, if the statute is silent, in the manner provided for in an order of the court [*Fed R Civ P 4(n)(1)*].

7.50[2] Property Disputes Under 28 USC § 1655 Proceed Under This Provision of Rule 4. According to the Committee Notes, the federal statute that was contemplated in this portion of Rule 4 is Section 1655 of Title 28 [*Fed R Civ P 4*, Committee Note of 1993]. Under that statute, a federal district court may render a judgment settling claims to real or personal property located within its judicial district, even if the defendant cannot be served within the state where the court sits or the defendant does not voluntarily appear in the action to assert its right in the property [*28 USC § 1655*]. In this situation, the court may enter an order requiring the defendant to appear or plead by a specific time [*28 USC § 1655(a)*]. The plaintiff must serve this order on the defendant; but the plaintiff may do so anywhere. If personal service of the order is not "practicable," the order may be published for six consecutive weeks. Even if the defendant does not appear or plead within the time allowed, the court may render a judgment concerning the property (and only concerning the property, not concerning the defendant personally). A defendant who did not receive personal notice of the court's order to appear has one year from the final judgment to appear and have the judgment set aside [*28 USC § 1655*].

Legal Topics:

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IX. SEIZURE OF PROPERTY FOR IN REM JURISDICTION

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7.51 Court May Assert Jurisdiction Over Property When Defendant Cannot Be Served.

7.51[1] Court May Seize Property and Make Judgment Concerning Interests in Property. If a plaintiff cannot serve a defendant under Rule 4, the court may not exercise personal jurisdiction over the defendant and cannot render an "in personam" judgment against the defendant [*see Printed Media Servs. v. Solna Web, Inc. (8th Cir 1993) 11 F3d 838, 843* (court lacked jurisdiction to render personal judgment over improperly served defendant)]. If a defendant has real or personal property within the judicial district of the court, and the defendant cannot be served with reasonable effort in any manner authorized by Rule 4 (and the state law it incorporates), the court may assert jurisdiction over the defendant's property by seizing it [*Fed R Civ P 4(n)(2)*]. The seizure of the property authorizes the court to render a judgment concerning defendant's interests the property. The court still lacks the jurisdiction to render a judgment against the defendant personally, a judgment on claims unrelated to the property or, even if related to the property, a judgment that will bind the defendant apart from the defendant's interest in the seized property [*Shaffer v. Heitner (1977) 433 US 186, 212, 97 S Ct 2569, 53 L Ed2d 683*].

Cross Reference:

Ch. 2, Determining Forum (Jurisdiction and Venue), see *§ 2.39*.

7.51[2] Seizure Must Follow State Law Procedures. There are no non-admiralty federal procedures for the seizure of property to establish a court's in rem jurisdiction over the defendant's property. The procedures for the seizure, and even the court's authority to seize property, depend on state law. The assets must be seized "under the circumstances and in the manner provided by the law of the state" in which the district court sits [*Fed R Civ P 4(n)(2)*].

7.51[3] In Rem Jurisdiction Does Not Attach Until the Property Is Seized. The mere filing of a complaint does not establish in rem jurisdiction. In rem jurisdiction over the property does not attach until the property is seized [*see, e.g., United States v. One Oil Painting (CD Cal 2005) 362 F Supp2d 1175, 1181-1182*].

7.51[4] In Rem Jurisdiction Is Discretionary. Rule 4(n) states that "the court *may* assert jurisdiction over any of the defendant's assets" [*Fed R Civ P 4(n)(2)* (emphasis added)]. A court is never compelled to do so and the court, should, in fact, limit its exercise of this type of jurisdiction to exigent circumstance. Occasions for the use of this provision should be rare, as when the defendant is a fugitive or assets are in imminent danger of disappearing. Even

then, the assets may be protected, pending personal service under Rule 4, by provisional remedies. Given the liberal availability of long-arm jurisdiction, the exercise of in rem or quasi-in-rem jurisdiction has become almost an anachronism. If a defendant's contacts with the forum as so slight that no form of Rule 4 service will be effective to establish personal jurisdiction, chances are that the circumstances are also inadequate to support seizure of the defendant's assets fortuitously found within the state [*see Fed R Civ P 4*, Committee Note of 1993, citing *Shaffer v. Heitner (1977) 433 US 186, 97 S Ct 2569, 53 L Ed2d 683*].

Cross References:

Discussion of jurisdiction over property, see 1 *Moore's Federal Practice, §§ 4.120 -4.121* (Matthew Bender 3d ed.), 16 *Moore's Federal Practice, §§ 108.70 -108.81* (Matthew Bender 3d ed.).

Legal Topics:

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X. FILING PROOF OF SERVICE

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7.51A CHECKLIST: Filing Proof of Service or Waiver.

☐ If service of summons has been waived, file waiver with the court.

Authority:
Fed R Civ P 4(d)(4)

Discussion:
See *§ 7.52*

☐ If service of summons has not been waived, ascertain that proof of service is properly signed and shows:

- ○ Title of each document served.
- ○ Date service was completed or effected.
- ○ Where service was completed or effected.
- ○ The name of the person or entity intended to be served, and the name of the person actually served if other.
- ○ How the defendant was served, i.e., by mail or in person.

Authority:
CD Cal Civ LR 5-3.1; *ED Cal Civ LR 210(b)*

Discussion:
See *§ 7.53*

☐ If service of summons has not been waived, file proof of service with court.

Authority:
Fed R Civ P 4(l)

Discussion:
See *§ 7.52*

Legal Topics:

For related research and practice materials, see the following legal topics:
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X. FILING PROOF OF SERVICE

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7.52 Proof of Service Always Required.

If service is not waived, the person effecting service must file a proof of service with the court [*Fed R Civ P 4(l)*]. This proof of service may take many forms [*Fed R Civ P 4(l)*]:

- Proof of service on a defendant in the United States, by any person other than a United States Marshal or Deputy Marshal, must be in the form of an affidavit;

- Proof of service on a defendant in the United States made by the United States Marshal's office will be handled by the Marshal's office and will take a form similar to an affidavit called a "return of service."

- Proof of service on a defendant outside the United States that is made pursuant to a treaty must be in the form prescribed by the treaty.

- Proof of service on a defendant outside the United States that is made pursuant to some method other than specified in a treaty must contain a receipt signed by the person served or some other evidence of delivery satisfactory to the court.

If service of summons has been waived, the plaintiff will file the waiver instead of a proof of service [*see Fed R Civ P 4(d)(4)*; *ED Cal Civ LR 210(c)*].

Cross Reference:

Discussion of proof of service, see 1 *Moore's Federal Practice, §§ 4.100 -4.105* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Unit 3 Pleading Stage
CHAPTER 7 Service of Summons
X. FILING PROOF OF SERVICE

1-7 MB Practice Guide: Fed Pretrial Civ Proc in CA 7.53

7.53 Proof of Service Must Establish That Service Was Proper and Timely.

Although Rule 4 does not spell out the required contents of a proof of service, the contents are self-evident. The courts have recognized that the plaintiff bears the initial burden of establishing that the defendant was served in a proper and timely manner [*see, e.g., Grand Entm't Group v. Star Media Sales (3d Cir 1993) 988 F2d 476, 486-491* (plaintiff obligated to show Spanish defendants were properly served under Spanish law)]. The proof of service constitutes prima facie evidence that plaintiff properly served the defendant [*see, e.g.,* Trustee of Local 727 v. *Perfect Parking, Inc. (ND Ill 1989) 126 FRD 48, 52*]. A defendant must present more than a mere allegation in order to challenge the validity of service as established in the proof of service [*see, e.g., FROF, Inc. v. Harris (ED Pa 1988) 695 F Supp 827, 828-829*]. Therefore, the proof of service must [*see CD Cal Civ LR 5-3.1*; *ED Cal Civ LR 210(b)*]:

- Be signed by the person who completed or effected the service [*O'Brien v. R.J. O'Brien & Assocs. (7th Cir 1993) 998 F2d 1394, 1398* ; *see CD Cal Civ LR 5-3.1* (proof must be in form of declaration)];

- Show the title of each document served [*CD Cal Civ LR 5-3.1(c)*];

- Show the date that service was completed or effected [*CD Cal Civ LR 5-3.1(a)*; *ED Cal Civ LR 210(b)*; *see United States ex rel. Henry S. Wolkins Co. v. Dimen-Pascau Constr. Co. (D Mass 1988) 123 FRD 413, 414* (although there is deadline for filing proof of service, proof of service must show that service was accomplished within 120-day deadline of *Fed R Civ P 4(m)*)];

- Show where service was completed or effected [*ED Cal Civ LR 210(b)*; *Robinson v. United States (MD La 1982) 551 F Supp 1120, 1121*];

- Show the name of each individual and entity defendant intended to be served; the name of the person actually served; and, if that person not the defendant, the served person's relationship to the defendant [*CD Cal Civ LR 5-3.1(b)*; *ED Cal Civ LR 210(b)*; *Williams v. Bruce's Juices, Inc. (WD Ky 1940) 35 F Supp 847, 849*]; and

- Show how the defendant was served (i.e., personal service, substituted service, by mail, etc.) [*CD Cal Civ LR 5-3.1(a)*; *ED Cal Civ LR 210(b)*; *see Scheerger v. Wiencek (WDNY 1940) 34 F Supp 805,*

805 (because substituted service was made by leaving summons and complaint with someone at defendant's dwelling house, "certificate here should show where the service was made and that the person served was one of suitable age and discretion")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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X. FILING PROOF OF SERVICE

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7.54 Failure to File Proof of Service Does Not Affect Validity of Service.

Failure to make or file the proof of service does not affect the validity of the service [*Fed R Civ P 4(l)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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X. FILING PROOF OF SERVICE

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7.55 Proof of Service May Be Amended.

The court may allow proof of service to be amended [*Fed R Civ P 4(l)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 7 Service of Summons
XI. FORMS

1-7 MB Practice Guide: Fed Pretrial Civ Proc in CA 7.56

7.56 Notice of Lawsuit and Request for Waiver of Service of Summons.

Notice of Lawsuit and Request for Waiver of Service of Summons.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	
_____ [*name*],	)	NOTICE OF LAWSUIT AND
Defendant	)	REQUEST FOR WAIVER OF
	)	SERVICE OF SUMMONS
	)	(*Fed R Civ P 4(d)*)
	)	

[*Select appropriate greeting*]

[*Alternative One: Use for individual defendant*]

TO _____ [*NAME OF INDIVIDUAL DEFENDANT*]:

[*Alternative Two: Use for corporate defendant*]

TO _____ [*NAME OF OFFICER OR AGENT*]
AS _____ [*TITLE OR OTHER RELATIONSHIP TO CORPORATION, e.g.,* PRESIDENT] of _____
[*NAME OF CORPORATE DEFENDANT*]:

[*Alternative Three: Use for partnership defendant*]

TO _____ [*NAME OF MANAGING OR GENERAL PARTNER*] as _____
[*TITLE OR OTHER RELATIONSHIP, e.g.,* GENERAL PARTNER] of _____
[*NAME OF PARTNERSHIP*]:

[*Continue as follows*]

Why are you getting this?

A lawsuit has been filed against _____ [you *or* the entity you represent], in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within _____ (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, a long with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require _____ [you *or* the entity you represent] to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date _____

[*Select appropriate signature block*]

[*Alternative One: for plaintiff represented by attorney*]

_____ [*signature of attorney*]

_____ [*typed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for Plaintiff

[*Alternative Two: for plaintiff acting pro se*]

_____ [*signature of plaintiff*]

_____ [*typed name of plaintiff*]

Plaintiff

NOTES.

Authority:
Fed R Civ P 4(d)

Waiver of Service of Summons:
See *§§ 7.12 -7.19*

Waiver Form:
See *§ 7.57*

Related Forms:
See Federal Rules of Civil Procedure, Official Form 5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessWaiversGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 7 Service of Summons
XI. FORMS

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7.57 Waiver of Service of Summons.

Waiver of Service of Summons.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	WAIVER OF SERVICE OF SUMMONS
	)	(*Fed R Civ P 4(d)*)
	)	

TO _____ [*NAME OF PLAINTIFF'S ATTORNEY*]:

I have received your request to waive service of a summons in this action along with a copy of the complaint, two

copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

_____ [I *or* The entity I represent] agree[s] to save the expense of serving a summons and complaint in this case.

I understand that _____ [I *or* the entity I represent] will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that _____ [I *or* the entity I represent] must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against _____ [me *or* the entity I represent].
Dated: _____

_____ [*signature*]

_____ [*typed name*]

[*Optional. Add for corporate or other entity defendant*]

as _____ [*title, e.g.,* Secretary]

of _____ [*entity name, e.g.,* ABC, Co., Inc.]

[*Include on reverse side or at foot of form*]

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

NOTES.

Authority:
Fed R Civ P 4(d)

Waiver of Service of Summons:
See *§§ 7.12 -7.19*

Notice and Request for Waiver:
See *§ 7.56*

Related Forms:
See Federal Rules of Civil Procedure, Official Form 6. See also 1 *Bender's Federal Practice Forms, Forms 4:200-4:203*, *4:650* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessWaiversGeneral Overview

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7.58 Proof of Personal Service on Individual Defendant.

Proof of Personal Service on Individual Defendant.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	PROOF OF SERVICE
	)	
	)	

I, _____ [*name of server*], declare:

1. My name is _____ [*name of server*]. I am over 18 years of age and not a party to this action. I reside

at _____ [*street address*] in _____ [*city, state*]. I am fully competent to make this declaration, and I have personal knowledge of the facts stated in this declaration. To my knowledge, all of the facts stated in this declaration are true and correct.

2. I am _____ [*status in case, e.g.,* a professional process server hired by the attorney for the plaintiff in this matter *or* a personal friend of the plaintiff in this action]. I make this declaration as proof that the summons and complaint were duly served in this action.

3. On _____ [*date*], I personally handed a true copy of the summons and complaint in this action to the defendant at _____ [*location or street address*]. I identified the person to whom I handed the summons and complaint as the defendant by _____ [*means of identification, e.g.,* asking him his name or asking him his name and observing that he met the physical description of the defendant given to me by the plaintiff's attorney *or* my personal familiarity with the defendant].

I declare under penalty of perjury that the foregoing is true and correct. I executed this declaration at _____ [*city, state*] on _____ [*date*].

_____ [*signature*]

_____ [*typed name*]

NOTES.

Authority:

Fed R Civ P 4(l) (requires "affidavit" by server); see *28 USC § 1746* (declaration under penalty of perjury is always acceptable substitute for affidavit); see also *CD Cal Civ LR 5-3.1* ("proof of service shall be made by declaration of the person accomplishing the service")

Proof of Service:

See *§§ 7.52 -7.55*

Related Forms:

See 1 *Bender's Federal Practice Forms, Forms 4:600, 4:650* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 7 Service of Summons
XI. FORMS

1-7 MB Practice Guide: Fed Pretrial Civ Proc in CA 7.59

7.59 Proof of Substituted Service on Individual Defendant.

Proof of Substituted Service on Individual Defendant.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	PROOF OF SERVICE
	)	
	)	

I, _____ [*name of server*], declare:

1. My name is _____ [*name of server*]. I am over 18 years of age and not a party to this action. I reside

at _____ [*street address*] in _____ [*city, state*]. I am fully competent to make this declaration and I have personal knowledge of the facts stated in it.

2. I am _____ [*status in case, e.g.,* a professional process server hired by the attorney for the plaintiff in this matter *or* a personal friend of the plaintiff in this action]. I make this declaration as proof that the summons and complaint were duly served in this action.

3. On _____ [*date*], I left a true copy of the summons and complaint in this action with a person _____ [of suitable age and discretion *or* a person over 18 years of age *or whatever is required by California law or federal statute*], who was found by me at _____ [*street address*], _____ [*city, state*], which is the _____ [defendant's usual place of abode in this State *or* defendant's business *or* defendant's dwelling house *or whatever is required by California law or governing federal statute*].

4. _____ [*Facts needed to justify substituted service, e.g.,* Prior to leaving a copy of the summons and complaint at the address described above, I made three attempts to locate and personally serve the defendant with a copy of summons and complaint. I visited the premises attempting to locate such a person on January 4, 2003 at 3 p.m. and on January 5, 2003 at 10 a.m., without success. I also visited the defendant's place of employment, Acme Corporation, but office personnel refused to grant me any access to the defendant there.]

5. _____ [*Any other facts needed to complete service in this manner under California law or governing federal statute, e.g.,* After leaving a true copy of the summons and complaint at the defendant's usual abode, as described above, I mailed an additional copy of the summons and complaint by first class mail to the defendant at the defendant's place of business, which is 150 Main Street, Farallon City, CA 90000, in a plain envelope, postage prepaid, marked "Personal and Confidential," and with no indication on the outside of the envelope that the contents were from an attorney or involved any lawsuit].

I declare under penalty of perjury that the foregoing is true and correct. I executed this declaration at _____ [*city, state*] on _____ [*date*].

_____ [*signature*]

_____ [*typed name*]

NOTES.

Authority:

Fed R Civ P 4(l) (requires "affidavit" by server); see *28 USC § 1746* (declaration under penalty of perjury is always acceptable substitute for affidavit); see also *CD Cal Civ LR 5-3.1* ("proof of service shall be made by declaration of the person accomplishing the service")

Proof of Service:

See *§§ 7.52 -7.55*

Related Forms:

See 1 *Bender's Federal Practice Forms, Forms 4:601, 4:602* (Matthew Bender)

Legal Topics:

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

Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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CHAPTER 7 Service of Summons
XI. FORMS

1-7 MB Practice Guide: Fed Pretrial Civ Proc in CA 7.60

7.60 Proof of Service on Corporate Defendant.

Proof of Service on Corporate Defendant.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	PROOF OF SERVICE
	)	
	)	

I, _____ [*name of server*], declare:

1. My name is _____ [*name of server*]. I am over 18 years of age and not a party to this action. I reside

at _____ [*street address*] in _____ [*city, state*]. I am fully competent to make this declaration and I have personal knowledge of the facts stated in it.

2. I am _____ [*status in case, e.g.,* a professional process server hired by the attorney for the plaintiff in this matter *or* a personal friend of the plaintiff in this action]. I make this declaration as proof that the summons and complaint were duly served in this action.

3. On _____ [*date*], I served the summons and complaint in the above-captioned action on defendant _____ [*name of defendant corporation*], by delivering true and correct copies of the summons and complaint to _____ [*name of individual served*], who is the _____ [*title, e.g.,* Secretary] of _____ [*name of defendant corporation*] and a person authorized to receive service of process for the corporation under *Section 416.10(b) of the California Code of Civil Procedure*.

4. I made this service at the offices of the corporation located at _____ [*street address*], _____ [*city, state*].

I declare under penalty of perjury that the foregoing is true and correct. I executed this declaration at _____ [*city, state*] on _____ [*date*].

_____ [*signature*]

_____ [*typed name*]

Authority:

Fed R Civ P 4(*l*) (requires "affidavit" by server); see *28 USC § 1746* (declaration under penalty of perjury is always acceptable substitute for affidavit); see also *CD Cal Civ LR 5-3.1* ("proof of service shall be made by declaration of the person accomplishing the service")

Proof of Service:

See *§§ 7.52 -7.55*

Related Forms:

1 *Bender's Federal Practice Forms, Form 4:910* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessProofGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 7 Service of Summons
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1-7 MB Practice Guide: Fed Pretrial Civ Proc in CA 7.61

7.61 Local District Court Forms.

Local district court forms relating to matters addressed in this chapter are listed below.

Central District

Summons in a Civil Action (AO 440)

Click here to view image.

Proof of Service of Summons (POS-010)

Click here to view image.

Summons in a Civil Action (AO 440)

Click here to view image.

Notice to Counsel (CV-20)

Click here to view image.

Notice of Acknowledgment of Receipt of Summons and Complaint (CV-21)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Notice of Lawsuit and Request for Waiver of Service of Summons (CV-39)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Waiver of Service of Summons (CV-108)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Eastern District

Notice of Lawsuit and Request for Waiver of Service of Summons (AO 398)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Waiver of Service of Summons (AO 399)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Summons Civil (AO 440)

Click here to view image.

Northern District

Notice of Lawsuit and Request for Waiver of Service of Summons (AO 398)

Click here to view image.

Waiver of Service of Summons (AO 399)

Click here to view image.

Summons in a Civil Action (AO 440)

Click here to view image.

Southern District

Summons and Return of Service

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Waiver of Service of Summons

Click here to view image.

Go to Interactive Fillable Form.
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Notice of Lawsuit and Request for Waiver of Service of Summons Declaration of Service

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Cross Reference:

Automated HotDocs(R) and PDF versions of these forms may be accessed and filled in from the online version of this publication, and are also available at www.LexisOne.com/forms.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.syn

§ 8.syn Synopsis to Chapter 8: Answers and Responsive Motions Under Rule 12

8.01 Scope.

8.02 Objective and Strategy.

8.03 CHECKLIST: Deadlines for Responding to Complaint.

8.04 Options and Strategy.

8.04[1] Time to Respond.

8.04[2] Filing Motion to Dismiss Extends Time to Answer.

8.05 Respond to Complaint Within Applicable Time Limits.

8.05[1] General Rule: Respond Within 21 Days of Service of Summons and Complaint.

8.05[2] Exceptions to 20-Day Rule May Apply.

8.05[2][a] Defendant's Waiver of Service of Summons Extends Time to Respond.

8.05[2][b] Federal Government and Officials Have Additional Time to Respond.

8.05[2][c] Statutes May Provide Different Deadline for Response.

8.05[2][d] Service of Preanswer Motion Alters Time to Respond.

8.05[2][e] Computing Time to Respond.

8.05[3] Obtaining Extension of Time to Respond.

8.05[3][a] Requests and Motions for Extension of Time to Respond.

8.05[3][b] LOCAL PRACTICE: CD Cal Requirements--Stipulation.

8.05[3][c] LOCAL PRACTICE: ED Cal Requirements--30-Day Extensions on Stipulation.

8.05[3][d] LOCAL PRACTICE: ND Cal Requirements--Stipulation.

8.05[3][e] LOCAL PRACTICE: SD Cal Requirements--Court Must Approve Stipulation.

8.05[4] Filing Answer After Ruling on Preanswer Motion.

8.06 CHECKLIST: Drafting Answer.

8.07 Options and Strategy.

8.07[1] Defendant Must Respond to Complaint to Avoid Default Judgment.

8.07[2] Answer and Complaint Frame Issues in Action.

8.08 Notice Pleading Requirements Apply to Answers.

8.09 Admit or Deny Material Allegations in Complaint.

8.09[1] Answer in Short and Plain Terms.

8.09[2] Admit Any Material Allegations in Complaint.

8.09[3] Denials Must Meet Substance of Allegations in Complaint.

8.09[4] General Denials Are Permissible.

8.09[5] Specific Denials Are Preferable to General Denials.

8.09[6] Defendant May Deny or Clarify Part of Allegation in Complaint.

8.09[7] Denial May Be Based on Lack of Information or Knowledge.

8.09[8] Failing to Deny Allegations May Result in Admission.

8.10 Assert All Available Affirmative Defenses.

8.10[1] Failure to Plead Affirmative Defenses May Result in Waiver.

8.10[1][a] General Rule.

8.10[1][b] Ninth Circuit Allows Later Assertion of Defense If Plaintiff Is Not Prejudiced.

8.10[2] Defendant Has Burden of Raising Affirmative Defenses.

8.10[3] Plead Short, Plain Statement of Affirmative Defense.

8.10[4] Some Defenses Must Be Pleaded With Particularity.

8.10[5] Raising Multiple or Alternative Defenses Is Permissible.

8.10[6] Some Defenses May Be Raised by Preanswer Motion to Dismiss.

8.10[7] Defendant May Seek Leave to Amend Answer to Include Omitted Affirmative Defenses.

8.11 Answer Alone May Not Be Used to Obtain Affirmative Relief.

8.12 Format Answer As Required by Rules.

8.12[1] Format Rules Applicable to Complaints Apply to Answers.

8.12[2] Answer May Contain Prayer for Relief.

8.12[3] Answer Must Be Signed by Defense Attorney or Pro Se Defendant.

8.12[4] Certificate of Service Is Required.

8.12[5] Verification of Answer Is Not Required.

8.13 Timely Serve Answer on Other Parties and File With Court.

8.13[1] Timely Serve Answer on Opposing Party or Counsel.

8.13[2] File Answer With Court.

8.14 CHECKLISTS: Rule 12(b) Motions to Dismiss.

8.14[1] CHECKLIST: Drafting Rule 12(b) Motion to Dismiss.

8.14[2] CHECKLIST: Responding to Rule 12(b) Motions to Dismiss.

8.14[3] CHECKLIST: Preparing Motion to Dismiss for Lack of Subject Matter Jurisdiction.

8.14[4] CHECKLIST: Preparing Motion to Dismiss for Lack of Personal Jurisdiction.

8.14[5] CHECKLIST: Preparing Motion to Dismiss for Improper Venue.

8.14[6] CHECKLIST: Preparing Motion to Dismiss for Insufficient Process or Service of Process.

8.14[7] CHECKLIST: Preparing Motion to Dismiss for Failure to State Claim on Which Relief Can Be Granted.

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8.15 Options and Strategy.

8.15[1] Preanswer Motion Is Optional.

8.15[2] Defenses Must Be Consolidated in Motion to Dismiss or Are Waived.

8.15[3] Defenses Waived If Not Asserted in Initial Response or Motion.

8.15[4] Filing Motion to Dismiss Does Not Prevent Amendment or Dismissal of Complaint.

8.16 Rule 12(b) Procedures.

8.16[1] Assert Rule 12(b) Defenses in Preanswer Motion.

8.16[2] File Rule 12(b) Motion Before Responsive Pleading.

8.16[2][a] Motion Is Timely If Filed Before Responsive Pleading.

8.16[2][b] Extension of Time to Respond to Complaint Should Apply to Rule 12(b) Preanswer Motion.

8.16[2][c] Filing Motion to Dismiss Extends Time to Answer Complaint.

8.16[3] Failure to Assert Certain Defenses Results in Waiver.

8.16[3][a] Motion Must Include Every Available Rule 12 Defense or Objection.

8.16[3][b] Omitted Defenses or Objections Are Waived Unless Nonwaivable.

8.16[3][c] Avoid Waiver of Omitted Defenses by Filing Amended Motion or Pleading.

8.16[4] Comply With Rules Governing Motion Practice.

8.16[5] Rule 12(b) Motions Are Subject to Rule 11 Sanctions.

8.16[6] Responding to Motion to Dismiss.

8.16[6][a] Plaintiff's Options in Responding to Motion to Dismiss.

8.16[6][b] Filing Opposition Papers.

8.16[6][c] Filing Statement of Nonopposition.

8.16[6][d] Filing Amended Complaint.

8.16[6][e] Seeking Voluntary Dismissal.

8.16[7] Replying to Opposition Papers.

8.17 Motion to Dismiss for Lack of Subject Matter Jurisdiction.

8.17[1] Challenge Subject Matter Jurisdiction.

8.17[1][a] File Motion to Dismiss.

8.17[1][b] Challenge Subject Matter Jurisdiction at Any Time.

8.17[2] Challenge Subject Matter Jurisdiction on Face of Pleading.

8.17[2][a] Making Facial Attack on Subject Matter Jurisdiction.

8.17[2][b] Court Accepts Plaintiff's Allegations As True in Facial Attack.

8.17[2][c] Plaintiff May Amend Complaint in Response to Facial Attack.

8.17[3] Challenge Subject Matter Jurisdiction Based on Facts.

8.17[3][a] Making Factual Attack on Subject Matter Jurisdiction.

8.17[3][b] Introducing Extrinsic Evidence.

8.17[3][c] Court Will Not Presume Truthfulness of Jurisdictional Allegations.

8.17[3][d] Seeking Discovery to Resolve Jurisdictional Facts.

8.17[4] Court Determination of Motion.

8.17[4][a] Rule 12(b)(1) Motions Considered Before Other Rule 12 Motions.

8.17[4][b] Plaintiff Bears Burden of Proving Jurisdiction.

8.17[4][c] Evidentiary Hearing Is Required If Motion Raises Disputed Factual Issues.

8.17[4][d] Court May Permit Amendment of Complaint to Remedy Jurisdictional Allegations Defective As to Form.

8.17[4][e] Dismissal for Lack of Subject Matter Jurisdiction Is Without Prejudice and Has No Res Judicata Effect.

8.17[5] Challenge Jurisdiction in Diversity Cases Based on Amount in Controversy.

8.17[5][a] Attack Based on Failure to Meet Minimum Jurisdictional Amount.

8.17[5][b] Determining Amount in Controversy From Face of Complaint.

8.17[6] Challenge Subject Matter Jurisdiction Based on Lack of Diversity of Citizenship.

8.17[6][a] Attacking Diversity of Citizenship.

8.17[6][b] Plaintiff Bears Burden of Establishing Diversity of Citizenship.

8.17[6][c] Dismissing Nondiverse Parties to Preserve Jurisdiction.

8.17[7] Challenge Jurisdiction Based on Lack of Federal Question.

8.18 Motion to Dismiss for Lack of Personal Jurisdiction.

8.18[1] Raising Lack of Personal Jurisdiction.

8.18[1][a] Due Process Considerations.

8.18[1][b] Avoid Waiver by Promptly Raising Defense.

8.18[1][c] Avoid Waiver by Properly Pressing Defense.

8.18[1][d] Submit Evidence Outside Pleadings.

8.18[1][e] Request Court Authorization of Jurisdictional Discovery.

8.18[1][f] Request Evidentiary Hearing When Evidence Presents Disputed Facts or Credibility Issues.

8.18[2] Court Determination of Motion.

8.18[2][a] Plaintiff Bears Burden of Establishing Personal Jurisdiction.

8.18[2][b] Plaintiff Must Make Prima Facie Showing When Motion Is Based on Written Materials.

8.18[2][c] Plaintiff Must Make Preponderance Showing If Court Holds Evidentiary Hearing.

8.18[2][d] Court May Authorize Jurisdictional Discovery.

8.18[2][e] Dismissal for Lack of Personal Jurisdiction Is Not on the Merits and Is Without Prejudice.

8.18[2][f] Court May Transfer Rather Than Dismiss Action.

8.19 Motion to Dismiss for Improper Venue.

8.19[1] Challenge Improper Venue.

8.19[1][a] Move to Dismiss Before Filing Responsive Pleading.

8.19[1][b] Motion Is Proper for Enforcing Forum Selection Clause.

8.19[1][c] Avoid Waiving Objection to Venue.

8.19[1][d] Combine Motion With Motion to Transfer.

8.19[1][e] Submit Supplemental Written Materials in Support of Motion.

8.19[1][f] Request Discovery to Resolve Disputed Issues of Fact.

8.19[1][g] Request Evidentiary Hearing to Resolve Conflicts in Evidence.

8.19[1][h] Plaintiff Bears Burden of Proof.

8.19[2] Court Will Transfer or Dismiss Action If Venue Is Improper.

8.20 Motion to Dismiss for Insufficient Process or Service of Process.

8.20[1] Challenge Sufficiency of Process or Service of Process.

8.20[1][a] File Rule 12(b)(4) or 12(b)(5) Motion.

8.20[1][b] Dismissals for Technical Defects in Form or Service of Summons Are Disfavored.

8.20[1][c] Avoid Waiving Defense of Insufficient Process or Service of Process.

8.20[1][d] Submit Supplemental Materials With Motion.

8.20[2] Court Determination of Motion.

8.20[2][a] Burden Is on Plaintiff to Show Valid Service.

8.20[2][b] Court May Conduct Hearing to Determine Contested Issues.

8.20[2][c] Dismissal Is Without Prejudice.

8.20[2][d] Court May Dismiss for Improper Service or May Retain and Quash Service.

8.21 Motion to Dismiss for Failure to State Claim on Which Relief Can Be Granted.

8.21[1] Challenge Complaint for Failure to State Claim.

8.21[1][a] Consider That Motion Is Disfavored.

8.21[1][b] File Motion to Dismiss.

8.21[1][c] Bases for Defense.

8.21[1][d] Defenses Under Rule 9(b) Treated As Rule 12(b)(6) Motions.

8.21[1][e] Defense of Failure to State Claim Not Waived by Failure to Assert in Motion or Responsive Pleading.

8.21[1][f] Limited Supplemental Materials May Be Submitted to Court With Motion.

8.21[2] Plaintiff May Amend Complaint in Response to Rule 12(b)(6) Motion.

8.21[3] Court Determination of Motion.

8.21[3][a] Moving Party Bears Burden of Demonstrating Failure to State Valid Claim.

8.21[3][b] Court Applies Plausibility Standard to Allegations in Complaint.

8.21[3][c] Court Must Only Consider Pleadings in Ruling on 12(b)(6) Motion.

8.21[3][d] Considering Matters Outside Complaint Converts Rule 12(b)(6) Motion to Summary Judgment Motion.

8.21[3][e] Court Need Not Provide Notice of Conversion but Must Ensure Nonmoving Party Is Fully Apprised.

8.21[3][f] Dismissal Is on Merits and Without Prejudice.

8.22 Motion to Dismiss for Failure to Join Indispensable Party.

8.22[1] Challenge Failure to Join Indispensable Party.

8.22[1][a] Raise Failure to Join Indispensable Party Under Rule 19.

8.22[1][b] Defense May Be Raised at Any Time Through Trial.

8.22[1][c] Submit Supplemental Materials With Motion.

8.22[2] Court Determination of Motion to Dismiss for Failure to Join Party.

8.22[2][a] Moving Party Bears Burden of Proof.

8.22[2][b] Court Must Apply Two-Part Analysis in Deciding Motion.

8.22[2][c] Dismissal for Failure to Join Indispensable Party Is Without Prejudice.

8.23 CHECKLIST: Drafting Motions to Clarify Pleadings.

8.23[1] CHECKLIST: Preparing Motion for More Definite Statement.

8.23[2] CHECKLIST: Preparing Motion to Strike.

8.24 Options and Strategy.

8.24[1] Motion for More Definite Statement May Clarify Complaint.

8.24[2] Motion to Strike May Streamline Action.

8.24[3] Motions Are Disfavored and Should Be Sparingly Used.

8.24[4] Motions Are Typically Joined With Other Rule 12 Motions.

8.25 Motion for More Definite Statement.

8.25[1] Grounds for Motion for More Definitive Statement.

8.25[1][a] Challenge Vague or Ambiguous Complaint.

8.25[1][b] Pleading Must Be So Indefinite That Defendant Cannot Ascertain Nature of Claim.

8.25[1][c] Motion Cannot Be Used to Seek Discoverable Material.

8.25[1][d] Defense Is Waived If Not Made Before Filing of Responsive Pleading.

8.25[2] Court Determination of Motion.

8.25[2][a] Complaint Must Be Too Vague or Ambiguous to Answer.

8.25[2][b] Court Granting Motion May Order Plaintiff to File and Serve Amended Complaint.

8.26 Motion to Strike Improper Material in Complaint.

8.26[1] Motion Is Disfavored.

8.26[2] File Rule 12(f) Motion.

8.26[3] Avoid Waiver.

8.26[4] Plaintiff May Challenge Improper Material in Answer.

8.26[5] Moving Party Has Burden of Proof.

8.26[6] Defendant Can Move to Strike State Law Claim Under Anti-SLAPP Statute.

8.27 CHECKLIST: Drafting Motion for Judgment on the Pleadings.

8.28 Options and Strategy.

8.28[1] Motion for Judgment on Pleadings May Dispose of Complaint.

8.28[2] Motion for Judgment on Pleadings Cannot Be Filed Before Answer.

8.28[3] Motion Going Beyond Pleadings May Be Converted to Motion for Summary Judgment.

8.29 Motion for Judgment on the Pleadings.

8.29[1] File Rule 12(c) Motion.

8.29[1][a] Challenge Legal Sufficiency of Opposing Party's Pleadings.

8.29[1][b] File Motion After Pleadings Close.

8.29[1][c] Motion May Be Asserted by Either Party.

8.29[1][d] Submission of Matters Outside Pleadings May Result in Conversion of Motion to Summary Judgment Motion.

8.29[2] Court Determination of Motion for Judgment.

8.29[2][a] Standard Applicable to Motions for Judgment.

8.29[2][b] Reliance on Matters Outside Pleadings Results in Conversion to Summary Judgment Motion.

8.29[2][c] Reasonable Opportunity to Respond Must Be Given.

8.29[2][d] Dismissal May Be Without Prejudice.

8.30 Notice of Motion and Motion for Extension of Time to Answer Complaint.

8.31 Stipulation to Extension of Time to Answer Complaint.

8.32 Sample Answer--Containing Admissions, Specific Denials, and Affirmative Defenses.

8.33 Notice of Motion and Motion to Dismiss--Lack of Subject Matter Jurisdiction.

8.34 Alternative Paragraph: Lack of Personal Jurisdiction.

8.35 Alternative Paragraph: Improper Venue.

8.36 Alternative Paragraph: Insufficient Process.

8.37 Alternative Paragraph: Insufficient Service of Process.

8.38 Alternative Paragraph: Failure to State Claim on Which Relief Can Be Granted.

8.39 Alternative Paragraph: Failure to Join Indispensable Party.

8.40 Plaintiff's Opposition to Defendant's Motion to Dismiss.

8.41 Notice of Motion and Motion for More Definite Statement.

8.42 Notice of Motion and Motion to Strike.

8.43 Notice of Motion and Motion for Judgment on the Pleadings.

8.44 Local District Court Forms.

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
I. STRATEGY

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.01

8.01 Scope.

This chapter contains discussion of and forms for use in responding to complaints in California federal district courts, including:

- Answers [*see 8.06 -8.13*; *Forms: 8.30 -8.32*].
- Motions to dismiss [*see 8.14 -8.22*; *Forms: 8.33 -8.40*].
- Motions to clarify or narrow issues raised in the complaint [*see 8.23 -8.26*; *Forms: 8.41*, *8.42*].
- Motions for judgment on the pleadings [*see 8.27 -8.29*; *Form: 8.43*].

Core Rules:
Fed R Civ P 6, *7*, *8*, *9*, *12*, *13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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CHAPTER 8 Answers and Responsive Motions Under Rule 12
I. STRATEGY

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8.02 Objective and Strategy.

Once a plaintiff commences an action in federal district court by filing a complaint, the defendant generally must file an answer within 21 days of service of the complaint [*Fed R Civ P 12(a)(1)(A)(i)*; *see Federal Mar. Comm'n v. South Carolina State Ports Auth. (2002) 535 US 743, 757, 122 S Ct 1864, 152 L Ed2d 962* (decided under prior law)]. If a defendant fails to timely respond to the complaint, the court may enter default judgment on behalf of the plaintiff [*Federal Mar. Comm'n v. South Carolina State Ports Auth. (2002) 535 US 743, 757, 122 S Ct 1864, 152 L Ed2d 962* ; *see Fed R Civ P 55*]. The defendant may avoid default by filing either an answer or a Rule 12 motion within the time prescribed by the rules for responding to the complaint [*see Fed R Civ P 12(a)(1)*].

Together, the complaint and answer serve to notify the parties of the allegations at issue, and to confine the issues to be adjudicated [*United States Indus./Fed. Sheet Metal, Inc. v. Director, Office of Workers' Comp. Programs (1982) 455 US 608, 613, 102 S Ct 1312, 71 L Ed2d 495* ; *Jones Stevedoring Co. v. Director, Office of Workers' Comp. Programs (9th Cir 1997) 133 F3d 683, 691*]. An answer may contain admissions or denials of the allegations in the plaintiff's complaint and any available defenses to the plaintiff's suit [*see Fed R Civ P 8(b), (c)*; *Fed R Civ P 12(a), (b)*].

Before filing an answer, a defendant should consider filing preanswer motions containing admissions, denials, and any available defenses [*see Fed R Civ P 8(b), (c), 12(b)*]. Some of these objections or defenses may be waived if not raised either in an initial answer or preanswer motion [*see Fed R Civ P 12(h)(1), (2)*]. In addition, a defendant may want to file a motion seeking clarification of the plaintiff's pleadings before filing an answer or pre-answer motion [*see Fed R Civ P 12(e), (f)*].

Prerequisite--CD Cal: Meet and Confer:

In the Central District, comply with "meet and confer" requirements before bringing the motion [*CD Cal Civ LR 7-3*].

- Contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution.
- "Meet and confer" must take place at least five days prior to last day for filing the motion.

- If parties are unable to reach a resolution that eliminates the need for a hearing, include in the notice of motion the statement "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*]."

Strategic Point--Defendant:

Though the first inclination may be to file an answer to the complaint as soon as possible, take time to develop an overall defensive strategy by considering the range of different defenses and objections available, the order in which they may best be presented, and the possible ramifications of each approach. Counsel may wish to seek a stipulated extension of the time to answer to permit a thorough investigation of the facts and law.

Detailed Discussion/Forms:

2 Moore's Federal Practice, Ch. 8, General Rules of Pleading, Ch. 9, Pleading Special Matters, Ch. 12, **Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing** (Matthew Bender 3d ed.).

3 Moore's Federal Practice, Ch. 13, Counterclaim and Crossclaim (Matthew Bender 3d ed.).

4 Bender's Federal Practice Forms, Rule 12, Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing (Matthew Bender).

Cross Reference:

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

Legal Topics:

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Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
II. TIMING RESPONSE TO COMPLAINT

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8.03 CHECKLIST: Deadlines for Responding to Complaint.

☐ Determine which deadline applies to response to complaint or other plaintiff's pleading.

○ General rule--21 days to serve response: Defendant must serve answer or responsive pleading within 21 days of being served with complaint.

○ Court may order different time for response.

○ Statutory deadline controls: If complaint is brought under federal statute prescribing time period for responding to complaint, statutory deadline controls.

○ 60-day time limit applies when:

☐ Complaint sues federal agency, officer, or employee in official capacity: Defendant must serve answer within 60 days after United States attorney is served with pleading asserting claim.

☐ Defendant is federal officer or employee sued in individual capacity in connection with performance of official duties: Defendant must serve answer within 60 days after service on officer or employee, or on United States attorney, whichever is later.

☐ Defendant is foreign state, or subdivision, agency, or instrumentality of foreign state: Defendant must serve answer or other responsive pleading within 60 days after

service by plaintiff.

☐ Defendant waives service of summons on plaintiff's request: Defendant has 60 days from date request was sent to serve an answer or file preanswer motion. If request was sent to defendant at an address outside United States judicial district, period is extended to 90 days.

○ 14-day time limit applies:

☐ In responding to complaint amended as a matter of course: Defendant must respond within 14 days after service of amended complaint, or within time remaining for responding to original complaint, whichever is longer.

☐ After defendant serves Rule 12 motion in lieu of an answer:

○ Court denies motion in whole or part: Defendant must serve responsive pleading within 14 days after notice of court's action.

○ Court postpones disposition of motion until trial: Defendant must serve responsive pleading within 14 days after notice of court's action.

○ Court grants motion for more definite statement: Defendant must serve responsive pleading within 14 days after plaintiff's service of more definite statement.

Authority:
Fed R Civ P 12(a), 15(a); 28 USC § 1608(d)

Discussion:
See *§§ 8.05[1], [2]*

☐ Compute time period for responding to complaint.

○ If last day of time period is Saturday, Sunday, or legal holiday, time to respond continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

○ Applicable deadline must be extended by three days when:

☐ Plaintiff serves complaint by mail.

☐ Plaintiff serves complaint on court clerk due to lack of known address for defendant.

☐ Plaintiff serves defendant by electronic or alternate means of delivery consented to in writing.

○ If 21-day time limit applies for responding to complaint, exclude Saturdays, Sundays, and holidays from computing time to respond.

Authority:
Fed R Civ P 6(a), (b), (d)

Discussion:
See *§ 8.05[2][e]*

☐ Request additional time to serve response when appropriate.

○ Defendant may request that court grant additional time for responding if response cannot be made within prescribed time period.

☐ If defendant makes request before prescribed time period, court may grant request for cause shown at any time, with or without motion or notice by defendant.

☐ If defendant makes request by motion after expiration of specified period, court may permit extension of time to serve response if defendant fails to serve timely response as result of excusable neglect.

○ Check local rules for stipulating to extension of time to file response.

Authority:
Fed R Civ P 6(b); *ND Cal Civ LR 6-1(a)*; *CD Cal Civ LR 8-3*; *SD Cal Civ LR 12.1*; *ED Cal Gen LR 144*

Discussion:
See *§ 8.05[3]*

Forms:
See *§§ 8.30, 8.31*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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II. TIMING RESPONSE TO COMPLAINT

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8.04 Options and Strategy.

8.04[1] Time to Respond. After being served with the plaintiff's complaint, a defendant typically has 21 days to serve and file either an answer or a motion to dismiss [*see Fed R Civ P 12(a)(1)(A)(i)*].

If the defendant waives service of the summons, he or she has 60 days to serve and file an answer or a motion to dismiss [*see Fed R Civ P 12(a)(1)(A)(ii)*]. Other time limits may also apply under the rules [*see, e.g., Fed R Civ P 12(a)(1), (2), (3)*], or under specific statutes [*see, e.g., 28 USC § 1608(d)*].

8.04[2] Filing Motion to Dismiss Extends Time to Answer. Filing a motion to dismiss under *Fed R Civ P 12(b)* acts as a tolling mechanism to extend the time within which the defendant must file an answer. If the court denies the motion or postpones a decision on the motion until trial, the defendant must serve an answer within 14 days after receiving notice of the court's action [*see Fed R Civ P 12(a)(4)*].

Legal Topics:

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8.05 Respond to Complaint Within Applicable Time Limits.

8.05[1] General Rule: Respond Within 21 Days of Service of Summons and Complaint. In general, a defendant must serve an answer within 21 days after being served with a plaintiff's summons and complaint [*see Fed R Civ P 12(a)(1)(A)(i)*]. Similarly, a party served with a pleading containing a crossclaim against that party must serve an answer to the crossclaim within 21 days after being served [*Fed R Civ P 12(a)(1)(B)*].

Cross Reference:

Responses to crossclaims, see Ch. 11, Counterclaims, Crossclaims, and Replies, see *§§ 11.44 -11.51*.

8.05[2] Exceptions to 20-Day Rule May Apply.

8.05[2][a] Defendant's Waiver of Service of Summons Extends Time to Respond. A plaintiff may serve the defendant with a request that the defendant waive service of the summons [*see Fed R Civ P 4(d)*]. If the defendant timely waives service as requested, the defendant must file a response to the complaint within 60 days after the date on which the plaintiff sent the request for waiver. If the defendant's address is not within a United States judicial district, the defendant has until 90 days after the date on which the plaintiff sent the request for waiver to file the response to the complaint [*see Fed R Civ P 12(a)(1)(A)(ii)*].

A defendant who waives service of a summons does not waive objections to the venue or personal jurisdiction of the court [*see Fed R Civ P 4(d)(5)*].

Cross Reference:

Waiver of service of summons, see Ch. 7, Service of Summons, see *§§ 7.12 -7.19*.

8.05[2][b] Federal Government and Officials Have Additional Time to Respond. The United States, a United States agency, or an officer or employee of the United States who is sued in an official capacity must serve an answer to the complaint within 60 days after the plaintiff serves the United States attorney with the pleading asserting the claim [*Fed R Civ P 12(a)(2)*].

Similarly, an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States must serve an answer to the complaint within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later [*Fed R Civ P 12(a)(3)*].

8.05[2][c] Statutes May Provide Different Deadline for Response. United States statutes may prescribe different deadlines for responding to the complaint than those set forth in Rule 12 [*see Fed R Civ P 12(a)(1)*], which may be applicable to the case in which the complaint has been filed.

Example--Suits Against Foreign States or Entities:

In any action brought in a United States court, a foreign state, or a political subdivision, agency, or instrumentality of a foreign state must serve an answer or other responsive pleading to the complaint within 60 days after service of a complaint [*see 28 USC § 1608(d)*].

Example--Civil Forfeiture Cases:

In any case in which the government files a complaint in federal district court for forfeiture of seized property, a person claiming an interest in the property may file a claim asserting an interest in the property no later than 30 days after the date of service of the government's complaint, or no later than 30 days after final publication of notice of the filing of the complaint [*see 18 USC § 983(a)(4)(A)*].

Example--Actions Affecting Property on Which United States Has Lien:

The United States may appear and answer within 60 days after service of a complaint to quiet title to, foreclose a mortgage or other lien on, partition, or condemn real or personal property on which the United States has or claims a mortgage or other lien [*28 USC § 2410(b)*].

Example--Federal Election Contests:

A contestee who is served with a notice of an election contest under *2 USC § 382* must serve a written answer within 30 days after service of the notice [*2 USC § 383(a)*].

8.05[2][d] Service of Preanswer Motion Alters Time to Respond. When the defendant responds to a complaint by a preanswer Rule 12 motion, such as a motion to dismiss for failure to state a claim, the time period within which a defendant must file an answer is altered [*see Fed R Civ P 12(a)(4)*].

If the court denies a defendant's preanswer motion or postpones disposition of the motion until trial on the merits, the defendant must serve a responsive pleading within 14 days after notice of the court's action [*Fed R Civ P 12(a)(4)(A)*]. If the court grants a defendant's motion for a more definite statement, the defendant must serve a responsive pleading within 14 days after the opposing party serves the more definite statement [*Fed R Civ P 12(a)(4)(B)*].

In either instance, the court may issue an order fixing a different time to respond [*see Fed R Civ P 12(a)(4)*].

8.05[2][e] Computing Time to Respond. In calculating the time within which the defendant must respond to a complaint under Rule 12, a district court rule, a court order, or an applicable statute, when the period is stated in days or a longer unit of time, the day on which the complaint is served is not included. Accordingly, the 21-day period for responding begins to run on the day after service of process [*see Fed R Civ P 6(a)(1)(A)*]. Every other day, including intermediate Saturdays, Sundays, and legal holidays, as well as the last day of the period, is included in the calculation [*Fed R Civ P 6(a)(1)(B), (C)*]. However, if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday [*Fed R Civ P 6(a)(1)(C)*]. If the clerk's office is inaccessible on the last day of filing, the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday [*Fed R Civ P 6(a)(3)(A)*]. Legal holidays include New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day,

Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress, or by the state in which the district court is held [*Fed R Civ P 6(a)(6)*; *see CCP § 135* (judicial holidays); *Gov Code § 6700* (state holidays); *see also Dwyer v. Duffy (9th Cir 2005) 426 F3d 1041, 1044* (day after Thanksgiving is legal holiday under *Fed R Bankr P 9006*, which is modeled on *Fed R Civ P 6*)]. The "last day," for electronic filing means midnight at the court's timezone [*Fed R Civ P 6(a)(4)(A)*]. The "last day" for filing by other means is when the clerk's office is scheduled to close [*Fed R Civ P 6(a)(4)(B)*]. The "next day" is determined by continuing to count forward after the "event" (in this case, service of the complaint), or after the request for waiver was sent [*see Fed R Civ P 6(a)(5)*].

A defendant served with a complaint by the following methods has three additional days to respond to the pleading [*see Fed R Civ P 5(b)(2)(C), (D), (E), (F)*, and *Fed R Civ P 6(d)*]:

- Service by mail.
- Service on the court clerk because there is no known address for the defendant.
- Service electronically or by other means of service consented to in writing.

Example:

When the plaintiff serves a defendant with a complaint by mail, the defendant must serve a response to the complaint within 24 days of the date on which the plaintiff served the complaint, not counting the day on which the plaintiff executed service.

Cross References:

Service of process generally, see Ch. 7, Service of Summons.

8.05[3] Obtaining Extension of Time to Respond.

8.05[3][a] Requests and Motions for Extension of Time to Respond. For good cause shown, the court may extend the time within which a defendant must file a response to the complaint. The manner in which a defendant must request an extension depends on when the defendant seeks the extension [*see Fed R Civ P 6(b)*]. If the defendant requests the extension before expiration of the period prescribed by the court, either originally or as extended by a previous order, the defendant may request an extension with or without a motion or notice [*see Fed R Civ P 6(b)(1)*].

After expiration of the time to respond to the complaint, the defendant must make a motion for an extension of time. In addition, the defendant must make a showing that failure to timely serve a response was the result of excusable neglect [*see Fed R Civ P 6(b)(1)*].

Cross Reference:

Motion practice in general, see Ch. 26, Pretrial Motion Practice.

8.05[3][b] LOCAL PRACTICE: CD Cal Requirements--Stipulation. In the Central District of California, the parties may stipulate to an extension in the time to answer or otherwise respond to the initial complaint for up to 30 days without obtaining court approval. The defendant must file the stipulation with the court [*see CD Cal Civ LR 8-3*]. The stipulation must have as its title "Stipulation to Extend Time to Respond to Initial Complain By Not More than 30 Days (L.R. 8-3)." Directly beneath the title, the parties must state when the complaint was served, when a response is currently due, and when it will be due following the filing of the stipulation [*CD Cal Civ LR 8-3*].

The parties must obtain court approval of stipulations to extend the time to respond for longer than 30 days. Similarly, court approval is required on stipulations extending the time to respond to answers or other responses to crossclaims or

to any amended or supplemental complaints [*see CD Cal Civ LR 8-3*; *Cook v. City of Pomona (CD Cal 1995) 884 F Supp 1457* , *aff'd*, *70 F3d 1277 (9th Cir 1995)* (stipulations for second and subsequent extensions of time to respond to complaint are effective only when filed with and approved by court; citing predecessor rule, former CD Cal Civ LR 3-11)].

8.05[3][c] LOCAL PRACTICE: ED Cal Requirements--30-Day Extensions on Stipulation. In the Eastern District of California, unless the filing date has been set by order of the court, an initial stipulation may extend the time for no more than 30 days to respond to a complaint, crossclaim or counterclaim, without approval of the court. The stipulation must be signed on behalf of all parties who have appeared in the action and are affected by the stipulation [*ED Cal Gen LR 144(a)*]. All motions to the court for extensions of time must set forth the total period of extensions already obtained by the parties as to the particular matters for which the extension is sought [*ED Cal Gen LR 144(b)*]. The court may, in its discretion, grant an initial extension ex parte on the affidavit of counsel that a stipulation extending time cannot reasonably be obtained, explaining the reasons why the stipulation cannot be obtained and the reasons why the extension is necessary [*ED Cal Gen LR 144(c)*].

Counsel must seek to obtain a necessary extension from the court or from other counsel or parties in an action as soon as the need for an extension becomes apparent. Requests for court-approved extensions brought on the required filing date for the pleading or other document are looked on with disfavor [*ED Cal Gen LR 144(d)*].

Warning:

When seeking an extension of time to respond to the complaint, be careful to use language in the motion, request, or stipulation that encompasses both Rule 12 motions and answers as possible responses. Using language indicating only that the client seeks an extension of time to serve an answer may prevent you from filing a Rule 12 motion instead of an answer.

8.05[3][d] LOCAL PRACTICE: ND Cal Requirements--Stipulation. In the Northern District of California, the parties may stipulate to extend the time within which to respond to the complaint if the extension will not alter any date for hearing set by the court. The stipulation is effective without a court order, though the defendant must file the stipulation with the court [*see ND Cal Civ LR 6-1(a)*].

8.05[3][e] LOCAL PRACTICE: SD Cal Requirements--Court Must Approve Stipulation. In the Southern District of California, the parties must obtain court approval for any extension of time to answer or to move to dismiss the complaint. The court will base its decision on a showing of good cause for the extension [*see SD Cal Civ LR 12.1*].

Accordingly, though parties in the Southern District may stipulate to an extension of time to respond to a complaint, the court must approve the stipulation. Such stipulations must recite good grounds for the extension beyond the mere concurrence of opposing counsel [California Federal Civil Rules, *SD Cal Civ LR 12.1* (LexisNexis 2009), Author Commentary].

8.05[4] Filing Answer After Ruling on Preanswer Motion. Unless the court issues an order fixing a different time to respond, the defendant's service of a Rule 12 motion on the plaintiff alters the time periods for serving a subsequent response as follows [*see Fed R Civ P 12(a)(4)*]:

- If the court denies the motion or postpones its disposition until the trial on the merits, the defendant must serve a responsive pleading within 14 days after notice of the court's action.

- If the court grants a motion for a more definite statement, the defendant must serve a responsive pleading within 14 days after the plaintiff serves the more definite statement.

Cross Reference:

Rule 12 motions to dismiss, see *§§ 8.14 -8.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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8.06 CHECKLIST: Drafting Answer.

☐ Review general pleading and answer requirements.

○ Answer's function is to facilitate proper decision on merits.

○ Answer should contain all admissions, denials, and defenses necessary to controvert material allegations in complaint.

Authority:
Fed R Civ P 8(b), (c), 12(b)

Discussion:
See *§§ 8.04[1], 8.08 -8.10*

Form:
See *§ 8.32*

☐ Review requirements governing typical components of answer, including:

○ Admissions.

○ General denials.

○ Specific denials.

- Denials based on lack of knowledge or information.
- Affirmative defenses.

Authority:
Fed R Civ P 8(b)

Discussion:
See *§ 8.09[1]*

☐ Format answer as required by rules applicable to formatting of papers generally.

- Rules applicable to format and size of papers generally apply with equal force to answers.
- Answer caption may name only first party on each side.
- If there is more than one party, include appropriate indication of additional plaintiffs through use of "et al."
- If there are several defendants, clearly state name of each defendant for whom you file an answer.

Authority:
Fed R Civ P 10, 11

Discussion:
See *§ 8.12*

Form:
See *§ 8.32*

☐ Admit or deny material averments in complaint.

- Answer must admit or deny each material allegations raised in complaint.
- Admit any material allegations raised in complaint that cannot be denied in good faith.
- Failure to deny material allegations may result in their admission.
- Denial must fairly meet substance of allegation denied.
  - ☐ Answer should contain specific denials of each material allegation in complaint.
  - ☐ General denial is proper only if defendant intends to controvert all allegations in

complaint, including allegations regarding court's jurisdiction.

☐ Limited general denial denying all averments in plaintiff's complaint except for those averments expressly admitted is permissible.

☐ Blanket and limited general denials are subject to obligations to avoid filing frivolous pleadings.

○ Defendant may in good faith deny or qualify part of allegation in complaint by:

☐ Specifying portion of complaint that is true and material.

☐ Specifying portion of complaint denied or qualified.

○ If defendant is without knowledge or information sufficient to form belief as to truth of averment, defendant must so state.

☐ Denial must be based on lack of information or belief formed after reasonable inquiry.

☐ Denials based on lack of information or knowledge have effect of affirmative denial.

☐ Actual denial is unnecessary.

Authority:
Fed R Civ P 8(b) and *Fed R Civ P 11(b)*

Discussion:
See *§ 8.09*

Form:
See *§ 8.32*

☐ Assert all affirmative defenses available to defendant.

○ Defendant has burden of pleading any available affirmative defenses in answer.

☐ List of affirmative defenses or avoidances to be alleged in answer is not exclusive.

☐ Failure to assert available affirmative defenses may result in their waiver.

☐ Defenses that cannot be waived by omission from answer include:

- ○ Failure to state claim on which relief can be granted.
- ○ Failure to join indispensable party.
- ○ Lack of subject matter jurisdiction.

○ Set forth defenses in short, plain terms sufficient to give plaintiff fair notice of defense.

☐ State as many separate defenses as you have, regardless of consistency, or grounds on which defense is based.

☐ It is permissible to set forth two or more statements of defense alternatively or hypothetically.

○ Some defensive matters may be raised initially in preanswer motion to dismiss rather than in answer, including:

☐ Lack of subject matter jurisdiction.

☐ Lack of personal jurisdiction.

☐ Improper venue.

☐ Insufficient process.

☐ Insufficient service of process.

☐ Failure to state claim on which relief can be granted.

☐ Failure to join indispensable party.

Authority:
Fed R Civ P 8(a), (c), (e), 12(b)(1)-(7), (h)(2)

Discussion:
See *§ 8.10*

Forms:
See *§§ 8.32, 8.33 -8.40*

☐ Assert claims for affirmative relief against plaintiff in counterclaim distinct from answer.

○ Defendant asserting counterclaim should file "Answer and Counterclaim."

○ A counterclaim mistakenly designated as a defense in an answer may be treated as properly designated by court when justice requires.

Authority:
Fed R Civ P 8(c), 13

Discussion:
See *§ 8.11*

☐ If desirable, include prayer for relief at conclusion of answer.

○ Prayer typically requests that:

☐ Plaintiff take nothing as result of complaint.

☐ Court enter judgment in defendant's favor.

○ If suit is of type in which defendant as prevailing party may recover costs, including attorney's fees, include request in prayer.

○ Courts generally do not award attorney's fees to prevailing defendants absent statutory or contractual fee-shifting provision.

Discussion:
See *§ 8.12[2]*

Form:
See *§ 8.32*

☐ Sign answer before service and filing.

○ If defendant is represented by attorney, at least one attorney of record must sign answer by individual name.

○ If defendant is not represented by attorney, defendant must sign answer.

○ Failure to properly sign answer will result in it being stricken by court unless lack of signature is promptly corrected after being called to attention of attorney or party.

○ Include signer's address and telephone number, if any.

Authority:

Fed R Civ P 11(a), (b)

Discussion:
See *§ 8.12[3]*

Form:
See *§ 8.32*

☐ Include certificate of service in answer.

○ Answer must contain certificate of service to be filed with court within reasonable time after service on opposing parties.

○ Certificate of service should include:

☐ Date, place, and manner of service.

☐ Names and addresses of persons on whom service is made.

☐ Certification by person making service.

Authority:
Fed R Civ P 5(d)

Discussion:
See *§ 8.12[4]*

Form:
See *§ 8.32*

☐ Answer need not be verified or accompanied by affidavits.

Authority:
Fed R Civ P 11(a)

Discussion:
See *§ 8.12[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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8.07 Options and Strategy.

8.07[1] Defendant Must Respond to Complaint to Avoid Default Judgment. After the plaintiff files the complaint and serves it on the defendant, the defendant generally has 21 days to respond to the complaint by filing an answer or a Rule 12 motion [*Fed R Civ P 12(a)(1)*; *see Federal Mar. Comm'n v. South Carolina State Ports Auth. (2002) 535 US 743, 122 S Ct 1864, 152 L Ed2d 962* (decided under prior law)]. If the defendant fails to file a timely response to the complaint, the court may enter default judgment on behalf of the plaintiff [*see Fed R Civ P 55*; *Federal Mar. Comm'n v. South Carolina State Ports Auth. (2002) 535 US 743, 122 S Ct 1864, 152 L Ed2d 962*]. To avoid a default judgment, the defendant must either file an answer or a Rule 12 motion within the time prescribed by the rules [*see Fed R Civ P 12(a)(1)*].

8.07[2] Answer and Complaint Frame Issues in Action. Together, the complaint and answer serve to notify the parties of the allegations at issue and to confine the issues to be adjudicated [*United States Indus./Fed. Sheet Metal, Inc. v. Director, Office of Workers' Comp. Programs (1982) 455 US 608, 613, 102 S Ct 1312, 71 L Ed2d 495* ; *Jones Stevedoring Co. v. Director, Office of Workers' Comp. Programs (9th Cir 1997) 133 F3d 683, 691*]. An answer may contain admissions or denials of the allegations in the plaintiff's complaint and any available defenses to the plaintiff's suit [*see Fed R Civ P 8(b), (c), 12(a), (b)*].

Strategic Point--Defendant:

By filing an answer, the defendant can preclude the plaintiff from amending the complaint or dismissing the action voluntarily, and can preserve all Rule 12 objections by asserting them as affirmative defenses. Because challenges to personal jurisdiction, venue, and insufficiency of process or service of process are preserved if asserted as affirmative defenses in the answer, and assuming no other motion is made under Rule 12, no substantive prejudice results from filing an answer rather than raising one or more of these issues by an initial motion. Of course, if a Rule 12 motion is made on any ground, all objections to personal jurisdiction, venue, or service of process are waived unless raised in the same motion. As a practical matter, a defendant may want to defer filing a motion to dismiss on grounds of personal jurisdiction, venue, or service of process to allow sufficient time to collect the evidence necessary to

support the motion. If an extension of time cannot be obtained, either by stipulation or court order, it is better to preserve the defenses by answer and make an appropriate motion as soon as the evidence necessary can be collected and presented to the court. Note, however, that it may not be sufficient simply to raise these defenses in the answer. A defendant who wishes to preserve a defense of lack of personal jurisdiction, improper venue, insufficiency of process, or insufficiency of service of process should take care to reassert the issue as soon as possible during the litigation to avoid forfeiture. An answer may also be preferable to a Rule 12 motion if a motion will consume expense and time without offsetting gain or will reveal strategies that should be kept confidential until certain discovery is completed.

Legal Topics:

For related research and practice materials, see the following legal topics:
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8.08 Notice Pleading Requirements Apply to Answers.

Together with the complaint, the answer's function is to facilitate a proper decision on the merits [*see Conley v. Gibson (1957) 355 US 41, 47, 78 S Ct 99, 2 L Ed2d 80*]. An answer to a complaint should contain all admissions, denials, and defenses necessary to controvert the material allegations of the complaint [*see Fed R Civ P 8(b), (c), 12(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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8.09 Admit or Deny Material Allegations in Complaint.

8.09[1] Answer in Short and Plain Terms. In drafting an answer to the complaint, the defendant must state in short and plain terms the defenses to each claim asserted [*Fed R Civ P 8(b)*]. The answer must admit or deny each of the material allegations raised in the complaint [*Fed R Civ P 8(b)*, *(d)*; *see Tokio Marine & Fire Ins. Co. v. Kaisha (CD Cal 1997) 25 F Supp2d 1071, 1078*]. A typical answer may contain [*see Fed R Civ P 8(b)*]:

- Admissions;
- General denials;
- Specific denials;
- Denials based on lack of knowledge or information; and
- Affirmative defenses.

Cross Reference:

Form, see *§ 8.32*.

8.09[2] Admit Any Material Allegations in Complaint. The defendant must admit in the answer any material allegations raised in the complaint that cannot be denied in good faith [*see Fed R Civ P 8(b)*].

Cross Reference:

Form of admission, see *§ 8.32*.

8.09[3] Denials Must Meet Substance of Allegations in Complaint. In denying an allegation in the plaintiff's complaint, the defendant's denials must fairly meet the substance of the allegation denied [*Fed R Civ P 8(b)*].

8.09[4] General Denials Are Permissible. A defendant who intends to controvert all allegations in the complaint, including allegations regarding the court's jurisdiction, may do so in a general denial [*see Fed R Civ P 8(b)(3)*]. It is rare that a defendant could generally deny the complaint as a whole. As an alternative to a blanket general denial, a defendant may include in an answer a limited general denial denying all the allegations in the plaintiff's complaint as a whole, except for those averments or paragraphs that the defendant expressly admits [*see Fed R Civ P 8(b)(3)*]. Nevertheless, general denials, whether blanket or limited, are subject to the obligations to avoid filing frivolous pleadings [*see Fed R Civ P 8(b), 11*].

Cross Reference:

Sanctions for violating *Fed R Civ P 11*, see Ch. 33, Rule 11 Sanctions.

8.09[5] Specific Denials Are Preferable to General Denials. Unless the defendant intends in good faith to controvert all the allegations in the complaint, the answer should contain specific denials of each material allegation in the plaintiff's complaint. A specific denial responds to particular allegations in the complaint, or to portions of the allegations, rather than to the complaint as a whole [*see Fed R Civ P 8(b)(3)*].

Cross Reference:

Form of specific denial, see *§ 8.32*.

8.09[6] Defendant May Deny or Clarify Part of Allegation in Complaint. A defendant may in good faith deny or qualify part of an allegation in a complaint. To do so, the defendant must specify in the answer the portion of the complaint that is true and material, and must deny the remainder [*see Fed R Civ P 8(b)(4)*].

8.09[7] Denial May Be Based on Lack of Information or Knowledge. When a defendant is without knowledge or information sufficient to form a belief as to the truth of an allegation, the defendant must so state in the answer. Denials based on lack of information or knowledge have the effect of an affirmative denial [*Fed R Civ P 8(b)(5)*]. In these cases, an actual denial is unnecessary. Defendant's assertion that he or she lacks sufficient knowledge or information to form a belief as to the truth of the allegation in the complaint has the effect of a denial [*see Fed R Civ P 8(b)(5)*].

However, to avoid sanctions, the denial must be based on a lack of information or belief formed after reasonable inquiry [*see Fed R Civ P 11(b)(4)*]. An answer asserting lack of knowledge sufficient to form a belief as to the truth of facts alleged in a complaint will not serve as a denial if the assertion of ignorance is an obvious sham. In these circumstances, the court treats the facts alleged in the complaint as admitted [*Harvey Aluminum, Inc. v. NLRB (9th Cir 1964) 335 F2d 749, 758*].

Cross References:

Form of denial based on lack of information or belief, see *8.32*. Sanctions for violating *Fed R Civ P 11*, see Ch. 33, Rule 11 Sanctions.

8.09[8] Failing to Deny Allegations May Result in Admission. Any material allegations in the complaint are deemed admitted if not effectively denied in the answer [*Fed R Civ P 8(d)(6)*]. Allegations in a pleading to which no responsive pleading is required or permitted are taken as denied or as avoided [*Fed R Civ P 8(d)(6)*].

Exception:

Allegations as to the amount of damages are not deemed admitted even when a defendant does not deny them in an answer [*Fed R Civ P 8(d)(6); Taylor v. United States (9th Cir 1987) 821 F2d 1428, 1433 , cert. denied, 485 US 992 (1988)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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8.10 Assert All Available Affirmative Defenses.

8.10[1] Failure to Plead Affirmative Defenses May Result in Waiver.

8.10[1][a] General Rule. A defendant's failure to assert properly all available affirmative defenses in the first responsive pleading, whether in an answer or in a preanswer motion to dismiss, may result in waiver of the defense [*Kontrick v. Ryan (2004) 540 US 443, 457-460, 124 S Ct 906, 157 L Ed2d 867* (failure to raise defense of time-barred bankruptcy complaint in answer and response to summary judgment motion); *see Taylor v. United States (9th Cir 1987) 821 F2d 1428, 1432-1433 , cert. denied, 485 US 992 (1988)*]. In particular, the defenses of lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process may be waived if the defendant [*see Fed R Civ P 12(h)(1)*]:

- Omits these defenses from a preanswer motion to dismiss; or
- Fails to include these defenses in another responsive pleading or amended pleading permitted as a matter of course under *Fed R Civ P 15(a)*.

Distinguish:

The defense of lack of subject matter jurisdiction "is preserved post-trial" [*Kontrick v. Ryan (2004) 540 US 443, 459-460, 124 S Ct 906, 157 L Ed2d 867*].

Warning:

Rule 12(h)(1) specifies the minimum steps a party must take to preserve a defense. However, failure to satisfy those minimum steps does not constitute the only circumstance under which a party may be deemed to have waived a defense. Most defenses also may be waived as a result of the course of conduct pursued by a party during litigation [*Peterson v. Highland Music, Inc. (9th Cir 1998) 140 F3d 1313, 1318 , cert. denied, 525 US 983 (1998)*].

Example:

When a defendant raises lack of personal jurisdiction in a motion to dismiss, engages in "sandbagging" by deliberately refraining from pursuing the issue after the court denies the motion in the hopes of receiving a favorable disposition on the merits, and then raises the issue again on appeal if he or she is unhappy with the district court's ultimate decision, the appellate court may find the defendant has waived any right to pursue the defense [*see Peterson v. Highland Music, Inc. (9th Cir 1998) 140 F3d 1313, 1318 , cert. denied, 525 US 983 (1998)* (dicta)].

Exceptions:

The defenses of failure to state a claim on which relief can be granted and failure to join a required party under *Fed R Civ P 19* may be made in any pleading permitted or ordered under *Fed R Civ P 7(a)*, in a motion for judgment on the pleadings, or at a trial on the merits [*see Fed R Civ P 12(h)(2)*]. Similarly, the court must dismiss an action whenever it appears, by suggestion of the parties or otherwise, that the court lacks subject matter jurisdiction [*see Fed R Civ P 12(h)(3)*].

8.10[1][b] Ninth Circuit Allows Later Assertion of Defense If Plaintiff Is Not Prejudiced. The Ninth Circuit has liberalized the requirement that defendants must raise affirmative defenses in their initial pleadings. Thus, a defendant may raise an affirmative defense for the first time in a motion for judgment on the pleadings or in a motion for summary judgment, but only if the delay in asserting the defense does not prejudice the plaintiff [*Owens v. Kaiser Found. Health Plan, Inc. (9th Cir 2001) 244 F3d 708, 713* (motion for judgment on pleadings); *Magana v. Commonwealth of the N. Mariana Islands (9th Cir 1997) 107 F3d 1436, 1446* (motion for summary judgment)].

Example:

Counsel may raise the statute of limitations as an affirmative defense at any time up to and including trial, providing the other party is not prejudiced by the delay in raising the defense [*see, e.g., Magana v. Commonwealth of the N. Mariana Islands (9th Cir 1997) 107 F3d 1436, 1446*].

Cross References:

Motions for judgment on the pleadings, see *§§ 8.27 -8.29*. Motions for summary judgment, see Ch. 29, Summary Judgment.

Waiver of affirmative defenses, see 2 *Moore's Federal Practice, § 8.07* (Matthew Bender 3d ed.).

8.10[2] Defendant Has Burden of Raising Affirmative Defenses. In responding to a complaint, the defendant bears the burden of pleading any available affirmative defenses in the answer [*see Fed R Civ P 8(c)*]. Affirmative defenses plead matters extraneous to the plaintiff's prima facie case that deny the plaintiff's right to recover even if the allegations of the complaint are true [*In re National Lumber & Supply, Inc. (9th Cir 1995) 184 BR 74, 77*]. Affirmative defenses or avoidances that must be alleged in the answer include [*see Fed R Civ P 8(c)*]:

- Accord and satisfaction;
- Arbitration and award;
- Assumption of risk;
- Contributory negligence;
- Discharge in bankruptcy;
- Duress;

- Estoppel;
- Failure of consideration;
- Fraud;
- Illegality;
- Injury by a fellow servant;
- Laches;
- License;
- Payment;
- Release;
- Res judicata;
- Statute of frauds;
- Statute of limitations; and
- Waiver.

In diversity of citizenship actions, state law defines the nature of the defenses. However, the Federal Rules of Civil Procedure provide for the manner and time in which defenses must be raised and when waiver of those defenses occurs [*see Taylor v. United States (9th Cir 1987) 821 F2d 1428, 1432-1433 , cert. denied, 485 US 992 (1988)* (though state substantive law governs in diversity actions under Federal Tort Claims Act, Federal Rules of Civil Procedure determine manner and time in which defenses may be raised and when waiver occurs)].

Cross Reference:

Law governing affirmative defenses generally, see 2 *Moore's Federal Practice, § 8.07* (Matthew Bender 3d ed.).

8.10[3] Plead Short, Plain Statement of Affirmative Defense. As with claims pleaded in answers, the defendant must provide a short and plain statement of the affirmative defense pleaded [*see Fed R Civ P 8(a)*]. The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense [*Wyshak v. City Nat'l Bank (9th Cir 1979) 607 F2d 824, 827*].

If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must treat the pleading as if it was properly designated when justice so requires [*see Fed R Civ P 8(c)(2)*].

Cross Reference:

Counterclaims, see Ch. 11, Counterclaims, Crossclaims, and Replies.

8.10[4] Some Defenses Must Be Pleaded With Particularity. Certain affirmative defenses must be pleaded with more particularity than other defenses [*see Fed R Civ P 9*]. For example, when a defendant desires to raise an issue regarding the legal capacity of a party to sue, the defendant must include specific negative allegations, and must include

any supporting particulars within the defendant's knowledge [*see Fed R Civ P 9(a)(1)(A)* and *(2)*].

Similarly, when the defendant asserts fraud or mistake as a defense to a plaintiff's complaint, the defendant must state with particularity the circumstances of the fraud or mistake [*see Fed R Civ P 9(b)*]. In this context, "particularity" means the allegations must be specific enough to give the plaintiff notice of the particular misconduct alleged to constitute the defense asserted, so that the plaintiff can defend against the charge and not just deny that it has done anything wrong [*see Semegen v. Weidner (9th Cir 1985) 780 F2d 727, 731* ; *Wenger v. Lumisys, Inc. (ND Cal 1998) Inc., 2 F Supp2d 1231, 1239* (both applying particularity requirement to complaints)].

8.10[5] Raising Multiple or Alternative Defenses Is Permissible. The defendant does not waive a defense or objection by joining it with one or more other defenses or objections in a responsive pleading or motion [*Fed R Civ P 12(b)*]. In addition, the defendant may set forth two or more statements of a defense alternatively or hypothetically, either in one defense or in separate defenses, and may also state as many separate defenses as are available, regardless of consistency or whether the defense is based on legal, equitable, or maritime grounds [*Fed R Civ P 8(d)(2)(3)*].

Accordingly, when a defendant makes two or more statements in the alternative, and one of the statements if made independently would be sufficient, the answer does not become insufficient because of the insufficiency of one or more of the alternative statements [*see Fed R Civ P 8(d)(2)*]. In light of the liberal pleading policy embodied in the Federal Rules, answers cannot be construed as an admission against another alternative or inconsistent pleading in the same case [*see McCalden v. California Library Ass'n (9th Cir 1990) 955 F2d 1214, 1219* (construing complaint); *Coleman v. Standard Life Ins. Co. (ED Cal 2003) 288 F Supp2d 1116, 1119* (construing complaint)]. Nevertheless, all statements in an answer are subject to Rule 11 obligations.

Cross Reference:

Rule 11 sanctions, see Ch. 33, Rule 11 Sanctions.

8.10[6] Some Defenses May Be Raised by Preanswer Motion to Dismiss. Though a defendant should assert every legal or factual defense to a claim for relief in the answer, the following matters may, at the defendant's option, be raised initially in a preanswer motion to dismiss rather than in an answer [*see Fed R Civ P 12(b)(1)-(7)*]:

- Lack of jurisdiction over the subject matter;
- Lack of jurisdiction over the person;
- Improper venue;
- Insufficient process;
- Insufficient service of process;
- Failure to state a claim on which relief can be granted; and
- Failure to join an indispensable party under Rule 19.

Cross Reference:

Rule 12 motions to dismiss, see *§§ 8.14 -8.22*.

8.10[7] Defendant May Seek Leave to Amend Answer to Include Omitted Affirmative Defenses. Affirmative defenses that have been omitted from the answer, other than defenses listed in *Fed R Civ P 12*--lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficient service of process--may be added by amending

the answer [*Magnesystems, Inc. v. Nikken, Inc. (CD Cal 1996) 933 F Supp 944, 948* ; *see Fed R Civ P 12(h)(1)(B), 15(a)*].

Strategic Point--Defendant:

The best practice is to raise all potential affirmative defenses in your original answer. If you later discover that you have omitted an available defense, promptly seek to amend the answer pursuant to *Fed R Civ P 15*.

Cross Reference:

Amending answers, see Ch. 9, Amending and Supplementing Pleadings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.11

8.11 Answer Alone May Not Be Used to Obtain Affirmative Relief.

Counsel should make requests for affirmative relief against a plaintiff by including them in a counterclaim rather than as an affirmative defense in the answer. Typically, a defendant asserting a counterclaim will file an "answer and counterclaim" [*see, e.g., General Signal Corp. v. MCI Telecomms. Corp. (9th Cir 1995) 66 F3d 1500, 1511 , cert. denied, 516 US 1146 (1996)*].

When a defendant mistakenly designates a counterclaim as a defense in an answer, the court, when justice requires, must treat the pleading as if it were properly designated [*see Fed R Civ P 8(c)(2), 13; Reiter v. Cooper (1993) 507 US 258, 263, 113 S Ct 1213, 122 L Ed2d 604*]. Redesignation is not automatic; whether to permit redesignation of a defense or counterclaim is within the district court's discretion [*389 Orange St. Partners v. Arnold (9th Cir 1999) 179 F3d 656, 664* (district court does not abuse its discretion in refusing to redesignate crossclaim as affirmative defense when request is initially asserted in motion to reconsider court's determination of summary judgment motion)].

Cross Reference:

Counterclaims, see Ch. 11, Counterclaims, Crossclaims, and Replies.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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8.12 Format Answer As Required by Rules.

8.12[1] Format Rules Applicable to Complaints Apply to Answers. The Federal Rules of Civil Procedure applicable to form and signing of papers generally apply with equal force to answers [*see Fed R Civ P 10*, *11*]. Thus, in general, the rules governing the size of paper to be used, the size of the type, and pagination are identical to that governing complaints [*see Fed R Civ P 10*].

Defenses must be set forth in separate numbered paragraphs [*Fed R Civ P 10*].

Distinguish:

Though the first page of the answer should be formatted as in the complaint, the answer's caption may name only the first party on each side. If there is more than one party, the defendant may include an appropriate indication that there are additional plaintiffs, as through the use of "et al." [*see Fed R Civ P 10(a)*]. However, if there are several defendants, counsel should clearly state the name of each defendant for whom an answer is being filed.

Cross References:

Form of sample answer, see *§ 8.32*. Formatting of pleadings generally, see Ch. 5, Formatting, Serving, and Filing Papers.

8.12[2] Answer May Contain Prayer for Relief. Though not a requirement, it is customary for a defendant to include a prayer for relief at the end of an answer. The prayer typically request that the plaintiff take nothing as a result of the complaint, and that the court enter judgment in the defendant's favor.

However, if the suit is of a type in which a defendant, as a prevailing party, may recover costs, counsel should include a request for them in the prayer. Similarly, when attorney's fees are recoverable by a prevailing defendant, a request for them should be included in the prayer. Courts generally do not award attorney's fees to prevailing defendants in the absence of a statutory or contractual fee-shifting provision [*California Dep't of Toxic Substances Control v. Alco Pac., Inc. (CD Cal 2002) 217 F Supp2d 1028, 1045*].

Cross Reference:

Form of prayer in answer, see *§ 8.32*.

8.12[3] Answer Must Be Signed by Defense Attorney or Pro Se Defendant. When the defendant is represented by an attorney, the answer must be signed by at least one attorney of record in the attorney's individual name. If the defendant is not represented by an attorney, the defendant must sign the answer. In addition, the answer must include the signer's address, e-mail address, and telephone number [*see Fed R Civ P 11(a)*]. Failure to properly sign the answer will result in it being stricken by the court unless the omission is promptly corrected after being called to the attention of the attorney or party [*Fed R Civ P 11(a)*].

By properly signing the answer and presenting it to the court, the defendant's attorney certifies, to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, that [*see Fed R Civ P 11(b)*]:

- The answer is not presented for an improper purpose;
- The claims, defenses, and other legal contentions in the answer are warranted by existing law, by a nonfrivolous argument for extending, modifying, or reversing existing law, or the establishment of new law;
- Any allegations and other factual contentions have evidentiary support or, if so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- Any denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The court may impose sanctions if it determines that an answer has been filed in violation of these requirements [*see Fed R Civ P 11(c)*].

Cross Reference:

Sanctions for violating *Fed R Civ P 11*, see Ch. 33, Rule 11 Sanctions.

8.12[4] Certificate of Service Is Required. Since the answer must be served on the other parties in the action [*see Fed R Civ P 5(a)*], counsel must include with the answer a certificate of service to be filed with the court within a reasonable time after service [*see Fed R Civ P 5(d)*]. In general, the certificate of service should indicate the date, place, and manner of service; the names and addresses of the persons on whom service is made; and should be certified by the person making service [*see, e.g., ND Cal Civ LR 5-6(a)(2)*; *SD Cal Civ LR 5.2*].

Cross References:

Form of certificate of service included in answer, see *§ 8.32*. Requirements for serving papers generally, see Ch. 5, Formatting, Serving, and Filing Papers.

8.12[5] Verification of Answer Is Not Required. Unless an applicable rule or statute specifically provides otherwise, the answer need not be verified [*see Fed R Civ P 11(a)*]. This is so even in those cases in which the complaint must be verified [*see, e.g., Fed R Civ P 23.1* (complaint in shareholder derivative suit must be verified)]. Nor need the answer be accompanied by an affidavit [*see Fed R Civ P 11(a)*].

Strategic Point--Defendant:

One situation in which defendant's counsel may wish to verify the answer is when counsel wants the

client to verify under oath to preserve the sworn statement of the witness. This may be useful, for example, when the client is a corporation and counsel is concerned that the verifying witness will soon be leaving the client's employ.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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8.13 Timely Serve Answer on Other Parties and File With Court.

8.13[1] Timely Serve Answer on Opposing Party or Counsel. In general, an answer must be served within 21 days after the defendant is served with the summons and complaint [*see Fed R Civ P 12(a)(1)(A)(i)*]. However, there are numerous exceptions to this rule. For example, if counsel has timely waived service of the summons on the plaintiff's request pursuant to *Fed R Civ P 4(d)*, the answer must be served within 60 days of the date on which the plaintiff sent the request for waiver. The 60-day period is extended to 90 days if the defendant is addressed outside a United States judicial district [*see Fed R Civ P 12(a)(1)(A)(ii)*].

Service of the answer on a plaintiff represented by an attorney must be made on the attorney unless the court orders otherwise. Service may be accomplished by mailing a copy of the answer to the last known address of the person served [*see Fed R Civ P 5(b)(2)(C)*]. Counsel may also deliver a copy of the answer by electronic methods, as long as the plaintiff or the attorney to be served has consented to those methods in writing [*see Fed R Civ P 5(b)(2)(E)*]. In addition, service may be effected by hand delivering a copy of the answer to the person, by leaving it at the person's office, or by leaving it the person's dwelling or usual abode [*see Fed R Civ P 5(b)(2)(A), (B)*]. If the person to be served has no known address, a copy of the answer may be left with the court clerk [*see Fed R Civ P 5(b)(2)(D)*].

Cross References:

Deadlines for serving answer or other responsive pleading, see *§§ 8.04*, *8.05*. Serving papers generally, see Ch. 5, Formatting, Serving, and Filing Papers.

8.13[2] File Answer With Court. In general, counsel must file the answer with the court by submitting it to the court clerk of the court where the action is docketed. The federal rules also permit district courts to establish local rules allowing or requiring answers to be filed by electronic means [*see Fed R Civ P 5(d)(3)*]. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules [*see Fed R Civ P 5(d)(3)*; *see, e.g., ND Cal Civ LR 5-2*; *SD Cal Civ LR 5.3* (both concerning facsimile filing); SD Cal Civ LR 5.4 (concerning electronic filing)].

The clerk cannot refuse to accept an answer for filing solely because it is not presented in proper form as required by the

federal rules or by local rules or practices [*see Fed R Civ P 5(d)(4)*].

Cross Reference:

Filing papers, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.24 -5.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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CHAPTER 8 Answers and Responsive Motions Under Rule 12
IV. PREPARING MOTION TO DISMISS

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.14

8.14 CHECKLISTS: Rule 12(b) Motions to Dismiss.

8.14[1] CHECKLIST: Drafting Rule 12(b) Motion to Dismiss.

☐ In Central District, comply with "meet and confer" requirements before bringing motion.

○ Contact opposing counsel to discuss thoroughly, preferably in person, substance of contemplated motion and any potential resolution.

○ "Meet and confer" must take place at least five days before last day for filing motion.

○ If parties are unable to reach resolution that eliminates the reason for a hearing, include in notice of motion, statement that "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*]."

Authority:
CD Cal Civ LR 7-3

Discussion:
Ch. 26, Pretrial Motion Practice, see *§ 26.15[1]*

☐ If applicable, assert the following defenses in motion to dismiss before filing an answer:

○ Lack of subject matter jurisdiction.

○ Lack of personal jurisdiction.

- Improper venue.
- Insufficiency of process.
- Insufficient service of process.
- Failure to state a claim on which relief can be granted.
- Failure to join an indispensable party.

Authority:
Fed R Civ P 12(b)

Discussion:
See *§ 8.16[1]*

☐ Comply with general rules governing motion practice.

- General rules governing motions apply with equal force to motions to dismiss under Rule 12.
- Rules applicable to captions and formatting with regard to pleadings apply to motions and motion-related papers.

Authority:
Fed R Civ P 7(b), 10, 11

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice

☐ Follow general requirements for form and contents of motion.

- Motion should be in writing, stating:
  - ☐ Grounds for motion with particularity.
  - ☐ Relief or order sought.
- Rules applicable to captions and formatting with regard to pleadings apply to motions and motion-related papers.
  - ☐ Rules applicable to format and size of papers generally apply with equal force to motions to dismiss.

☐ Motion caption may name only first party on each side.

☐ If there is more than one party, include appropriate indication of additional plaintiffs through use of "et al."

☐ If there are several defendants, clearly state name of each defendant for whom you file a motion.

○ Motion may be part of written notice of hearing of motion.

○ Motion must be signed.

☐ If defendant is represented by attorney, at least one attorney of record must sign motion by individual name.

☐ If defendant is not represented by attorney, defendant must sign motion.

☐ Include signer's address, e-mail address, and telephone number, if any.

☐ Failure to properly sign motion will result in it being stricken by court unless promptly corrected after being called to attention of attorney or party.

○ Movant subject to sanction for:

☐ Filing frivolous motion to dismiss.

☐ Filing motion to dismiss for an improper purpose.

Authority:
Fed R Civ P 7(b)(1), 10, 11

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Form:
See *§ 8.33*

☐ Join all other available Rule 12 defenses or objections with Rule 12(b) defenses to avoid waiver.

○ Omitting available defenses or objections from initial motion to dismiss results in waiver unless nonwaivable.

- ○ In lieu of motion to dismiss, available defenses or objections may be asserted in initial answer.

☐ Failing to assert the following defenses in an initial Rule 12(b) motion or answer results in waiver:

- ○ Lack of jurisdiction over the person.
- ○ Improper venue.
- ○ Insufficiency of process.
- ○ Insufficiency of service of process.

☐ You may assert the following defenses in a motion to dismiss, in an answer under *Fed R Civ P 7(a)*, in a motion for judgment on pleadings, or at trial on merits without risking waiver:

- ○ Failure to state a claim on which relief can be granted.
- ○ Failure to join an indispensable party.

☐ You may assert lack of subject matter jurisdiction at any time without risking waiver.

☐ You may assert affirmative defenses under *Fed R Civ P 8(c)* without risking waiver under Rule 12.

Authority:
Fed R Civ P 8(c), 12(b), (g), (h)

Discussion:
See *§§ 8.16[1], [3]*

☐ If desirable, include prayer for relief at conclusion of motion.

- ○ Prayer typically requests that:
  - ☐ Plaintiff take nothing as result of complaint.
  - ☐ Court enter judgment in defendant's favor.
- ○ If suit is of type in which defendant as prevailing party may recover costs, include request in prayer.

Discussion:
See *§ 8.12[2]*

Form:
See *§ 8.33*

☐ Include certificate of service in motion.

○ Motion to dismiss must contain certificate of service to be filed with court within reasonable time after service on opposing parties.

○ Certificate of service should include:

☐ Date, place, and manner of service.

☐ Names and addresses of persons on whom service is made.

☐ Certification by person making service.

Authority:
Fed R Civ P 5(d)

Discussion:
See *§ 8.12[4]*

Form:
See *§ 8.33*

☐ File and serve supporting materials as required by applicable local rules, including:

○ Brief or memorandum of points and authorities.

○ Statement of facts.

○ Any evidence on which motion is based.

○ Affidavits in support of factual allegations in motion.

○ Proposed order.

Authority:
SD Cal Civ LR 7.1(f.1); *CD Cal Civ LR 7-5*; *ND Cal Civ LR 7-2-7-5*; *ED Cal Civ LR 230*

Discussion:
See *§ 8.16[4]*

Forms:

See *§§ 8.33 -8.40*

☐ Serve and file motion and supporting papers as required by rules.

○ Motion and supporting papers must be served on other parties in same manner as other motions.

○ Motion and supporting papers must be filed with court in same manner as other motions.

Authority:
Fed R Civ P 5(a), (d)

Discussion:
See *§ 8.16[4]*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ Timely file Rule 12(b) motion to dismiss.

○ Motion may be filed any time before defendant files a responsive pleading, if required.

○ Motion is timely if filed within time limits applicable to responsive pleadings generally.

○ Extensions of time to file response to complaint should apply to filing of motion to dismiss.

☐ In seeking extension of time to respond to complaint, use broad language to include possibility of responding with motion to dismiss.

☐ Service of motion to dismiss extends time to serve and file answer or other responsive pleading until 10 days after notice of court's ruling on motion.

Authority:
Fed R Civ P 12(a), (b)

Discussion:
See *§ 8.16[2]*

8.14[2] CHECKLIST: Responding to Rule 12(b) Motions to Dismiss.

☐ In Central District, comply with "meet and confer" requirements before bringing motion.

○ Contact opposing counsel to discuss thoroughly, preferably in person, substance of contemplated motion and any potential resolution.

○ "Meet and confer" must take place at least five days before last day for filing

motion.

○ If parties are unable to reach resolution that eliminates reason for hearing, include in notice of motion, statement that "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*]."

Authority:
CD Cal Civ LR 7-3

Discussion:
Ch. 26, Pretrial Motion Practice, see *§ 26.15[1]*

☐ Plaintiff's options in responding to motion to dismiss include:

○ Not responding.

○ Filing opposition papers.

○ Filing statement of nonopposition.

○ Filing amended complaint.

○ Seeking voluntary dismissal of action.

☐ Plaintiff may choose not to respond to motion to dismiss.

○ Local rules may require plaintiff to file opposition papers or statement of nonopposition.

○ When so required, plaintiff's failure to respond may be deemed as consent to dismissal.

Authority:
Fed R Civ P 15(a), 41(a); *ND Cal Civ LR 7-3(a), (b)*; *CD Cal Civ LR 7-9, 7-12*; *SD Cal Civ LR 7.1(f.3.a), (f.3.c)*; *ED Cal Civ LR 230(c)*

Discussion:
See *§ 8.16[6][c]*

☐ File opposition papers if:

○ Plaintiff opposes motion to dismiss in any regard.

○ Plaintiff plans to file an amended answer, unless amendment as matter of right is available under *Fed R Civ P 15(a)*.

☐ Opposition papers must be in writing.

☐ Contents vary depending on applicable local rules, but may include:

- ○ Brief statement of reasons why court should deny motion to dismiss.
- ○ Answering memorandum of points and authorities.
- ○ Copies of any documentary evidence on which plaintiff relies.

☐ Time for filing opposition papers differs depending on local rules in district in which case is filed.

Authority:
SD Cal Civ LR 7.1(e.2), (f.3.b); *ND Cal Civ LR 7-3(a)*; *CD Cal Civ LR 7-9*; *ED Cal Civ LR 230*

Discussion:
See *§ 8.16[6][b]*

Form:
See *§ 8.40*

☐ File statement of nonopposition only if plaintiff:

- ○ Chooses not to oppose motion to dismiss in any regard.
- ○ Concedes that defendant's motion to dismiss, including relief sought in motion, should be granted.

☐ Statement must be filed within time required for serving opposition papers.

Authority:
Fed R Civ P 15(a); *SD Cal Civ LR 7.1(e.2), (f.3.a)*; *CD Cal Civ LR 7-9*; *ND Cal Civ LR 7-3(b)*; *ED Cal Civ LR 230(c)*

Discussion:
See *§ 8.16[6][c]*

☐ File amended complaint in lieu of opposing motion to dismiss original complaint when:

- ○ Defendant's motion to dismiss is well-founded.
- ○ Complaint can be amended to avoid issues raised in motion.

☐ Plaintiff may amend complaint once without leave of court any time before responsive pleading is filed.

○ Rule 12(b) motion to dismiss is not responsive pleading for purposes of this rule.

○ After responsive pleading is filed, plaintiff must seek leave of court before filing amended complaint.

Authority:
Fed R Civ P 12(b), 15(a)

Discussion:
See *§ 8.16[6][d]*

☐ Seek voluntary dismissal of complaint by filing:

○ Notice of dismissal; or

○ Stipulation of dismissal signed by all parties who have appeared in action.

☐ Dismissal must be filed any time before defendant's service of answer or motion for summary judgment, whichever occurs first.

☐ Voluntary dismissals:

○ Do not require leave of court if filed before defendant serves answer or motion for summary judgment.

○ Are generally without prejudice to plaintiff's ability to refile complaint.

Authority:
Fed R Civ P 41(a)(1)

Discussion:
See *§ 8.16[6][e]*

8.14[3] CHECKLIST: Preparing Motion to Dismiss for Lack of Subject Matter Jurisdiction.

☐ In Central District, comply with "meet and confer" requirements before bringing motion:

○ Contact opposing counsel to discuss thoroughly, preferably in person, substance of contemplated motion and any potential resolution.

○ "Meet and confer" must take place at least five days before last day for filing motion.

○ If parties are unable to reach resolution that eliminates reason for hearing, include in

notice of motion, statement that "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*]."

Authority:
CD Cal Civ LR 7-3

Discussion:
Ch. 26, Pretrial Motion Practice, see *§ 26.15[1]*

☐ Challenge plaintiff's action for lack of subject matter jurisdiction by filing motion to dismiss asserting:

○ Lack of federal question arising under federal constitution, law, or treaty.

☐ Court must examine literal language of complaint and whether jurisdiction would exist under properly-pleaded complaint.

☐ Dismissal for lack of federal question is proper only if federal claim appears immaterial, is made solely for purpose of obtaining federal jurisdiction, or is wholly insubstantial and frivolous.

○ Lack of complete diversity of citizenship between parties.

☐ Federal court has subject matter jurisdiction over action only when no defendant has same citizenship as any plaintiff.

☐ Plaintiff bears burden of establishing complete diversity.

☐ Plaintiff may seek court order to dismiss dispensable party to achieve complete diversity.

○ In diversity case, amount in controversy fails to exceed $75,000, exclusive of interest and costs.

☐ Sum of damages averred on face of complaint generally determines amount in controversy if claim is made in good faith.

☐ To justify dismissal it must appear a legal certainty that claim is really for less than jurisdictional amount.

Authority:
Fed R Civ P 8(a), 12(b)(1); 28 USC §§ 1331, 1332

Discussion:
See *§ 8.17*

Form:

See *§ 8.33*

☐ Challenge subject matter jurisdiction based on face of pleading.

○ Contend allegations in complaint are insufficient on their face to demonstrate existence of jurisdiction.

○ Court's inquiry is limited to allegations in complaint.

Authority:
Fed R Civ P 8(a), 12(b)(1)

Discussion:
See *§ 8.17[2]*

Form:
See *§ 8.33*

☐ Challenge subject matter jurisdiction based on extrinsic evidence apart from pleadings.

○ Present affidavits or other evidence properly before court.

○ Plaintiff must then furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.

Authority:
Fed R Civ P 8(a), 12(b)(1)

Discussion:
See *§ 8.17[3]*

Form:
See *§ 8.33*

☐ Challenge subject matter jurisdiction at any time in proceedings.

○ Lack of subject matter jurisdiction cannot be waived as defense.

○ Court may raise lack of subject matter jurisdiction on its own motion.

Authority:
Fed R Civ P 12(b)(1), (h)(3)

Discussion:
See *§ 8.17[1][b]*

☐ Seek discovery in factual attacks on jurisdiction when:

- ○ Pertinent facts bearing on question of jurisdiction are controverted.
- ○ A more satisfactory showing of facts is necessary.

Authority:
Fed R Civ P 12(b)(1)

Discussion:
See *§ 8.17[3][d]*

☐ Request evidentiary hearing when motion raises disputed factual issues.

- ○ Request hearing to resolve factual disputes on jurisdictional issues.
- ○ In factual attack, court may look beyond complaint to extrinsic evidence without converting motion into one for summary judgment.

Discussion:
See *§ 8.17[4][c]*

☐ District court determination of motion.

- ○ Court generally considers Rule 12(b)(1) motions before other Rule 12 motions.
- ○ Court may give priority to determining challenge to personal jurisdiction before deciding challenge to subject matter jurisdiction when:
  - ☐ Personal jurisdictional issue does not present complex question of state law; and
  - ☐ Alleged defect in subject matter jurisdiction raises difficult and novel question.
- ○ Plaintiff bears burden of establishing that jurisdiction exists.
  - ☐ Plaintiff must affirmatively show existence of federal jurisdiction in the complaint.
  - ☐ If plaintiff fails to establish jurisdiction, court must dismiss case unless defect can be corrected by amending complaint.
- ○ In facial attack on jurisdiction:

☐ Court presumes factual allegations of complaint to be true, granting motion only if plaintiff fails to allege an element necessary for subject matter jurisdiction.

☐ Court must dismiss case unless defect can be corrected by amending the complaint.

○ In factual attack on jurisdiction:

☐ Court presumes lack of jurisdiction unless asserting party can prove otherwise.

☐ Court may weigh evidence presented and determine facts to evaluate whether it has power to hear case.

☐ Court may hold evidentiary hearing to resolve factual disputes without converting motion to dismiss into motion for summary judgment.

○ Dismissal for lack of subject matter jurisdiction typically is not an adjudication on merits.

☐ Dismissal generally is without prejudice and has no res judicata effect.

☐ Plaintiff typically may reassert claims in competent court.

☐ Court has power to dismiss dispensable party whose presence prevents complete diversity jurisdiction.

Authority:
Fed R Civ P 12(b)(1), 15(a), 21

Discussion:
See *§ 8.17[4]*

8.14[4] CHECKLIST: Preparing Motion to Dismiss for Lack of Personal Jurisdiction.

☐ In Central District, comply with "meet and confer" requirements before bringing motion.

○ Contact opposing counsel to discuss thoroughly, preferably in person, substance of contemplated motion and any potential resolution.

○ "Meet and confer" must take place at least five days before last day for filing motion.

○ If parties are unable to reach resolution that eliminates reason for hearing, include in notice of motion, statement that "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*]."

Authority:
CD Cal Civ LR 7-3

Discussion:
Ch. 26, Pretrial Motion Practice, see *§ 26.15[1]*

☐ Challenge action for lack of personal jurisdiction by filing motion to dismiss asserting court lacks authority to:

○ Render judgment commanding defendant's personal obedience; or

○ Impose obligations on defendant that are enforceable by other courts.

Authority:
Fed R Civ P 12(b)(2)

Discussion:
See *§ 8.18[1]*

Form:
See *§ 8.34*

☐ Avoid waiver by promptly raising defense in motion to dismiss or in first responsive pleading.

○ Filing preanswer motion to dismiss without asserting lack of personal jurisdiction waives defense.

○ After waiver, defendant cannot subsequently raise defense in an answer or otherwise.

○ Asserting defense of insufficient process or insufficient service of process does not preserve lack of personal jurisdiction defense.

☐ Avoid waiver through conduct by:

○ Failing to press defense during pendency of action.

○ Submitting to process or jurisdiction of court through conduct.

Authority:
Fed R Civ P 12(b)(2), (4), (5), (h)(1)

Discussion:
See *§§ 8.18[1][b], [c]*

☐ Submit evidence outside pleadings for court's consideration in determining motion.

Discussion:
See *§ 8.18[1][d]*

☐ Request that court permit discovery to aid in determining motion when:

- ○ Pertinent facts bearing on question of jurisdiction are controverted.
- ○ A more satisfactory showing of facts is necessary.

Discussion:
See *§ 8.18[1][e]*

☐ Request that court conduct evidentiary hearing when:

- ○ Pleadings and other written materials submitted to court raise issues of credibility.
- ○ There are disputed questions of fact with regard to personal jurisdiction.

Discussion:
See *§ 8.18[1][f]*

☐ Court determination of motion.

- ○ Plaintiff bears burden of establishing personal jurisdiction over defendant.
- ○ Quantum of proof required to meet burden varies depending on nature of proceeding and type of evidence plaintiff is permitted to present.
  - ☐ Plaintiff must make prima facie showing when motion is based on written materials.
  - ☐ Plaintiff must make preponderance showing if court holds evidentiary hearing to resolve disputed facts or credibility issues.
- ○ Court may permit discovery when:
  - ☐ Pertinent facts bearing on question of jurisdiction are controverted.
  - ☐ A more satisfactory showing of facts is necessary.
- ○ Court has discretion to hold preliminary hearing to resolve issues of credibility or disputed questions of fact with regard to jurisdiction.
- ○ Dismissal for lack of personal jurisdiction generally is not on merits.

☐ Dismissal is without prejudice to refiling of action in court of proper jurisdiction.

☐ In lieu of dismissal for lack of personal jurisdiction, court may transfer action to appropriate court if transfer is in interest of justice.

☐ Dismissal may be with prejudice when there is no way for plaintiff to establish personal jurisdiction over defendant.

Authority:
28 USC § 1406(a)

Discussion:
See *§ 8.18[2]*

8.14[5] CHECKLIST: Preparing Motion to Dismiss for Improper Venue.

☐ In Central District, comply with "meet and confer" requirements before bringing motion.

○ Contact opposing counsel to discuss thoroughly, preferably in person, substance of contemplated motion and any potential resolution.

○ "Meet and confer" must take place at least five days before last day for filing motion.

○ If parties are unable to reach resolution that eliminates reason for hearing, include in notice of motion, statement that "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*]."

Authority:
CD Cal Civ LR 7-3

Discussion:
Ch. 26, Pretrial Motion Practice, see *§ 26.15[1]*

☐ Challenge district in which plaintiff brought action by filing motion to dismiss for improper venue requesting:

○ That court decide whether venue is proper in district in which plaintiff filed suit.

○ That court dismiss improperly venued action.

☐ If appropriate, combine motion to dismiss with motion to transfer.

○ As alternative to dismissal for improper venue, request that court transfer case to proper district or division if in interests of justice.

- ○ If court finds venue is proper, request transfer for convenience.

Authority:
Fed R Civ P 12(b)(3); *28 USC §§ 1391*, *1404(a)*, *1406(a)*

Discussion:
See *§§ 8.19[1][a]*, *[d]*

Form:
See *§ 8.35*

☐ Motion to dismiss based on forum-selection clause is treated as motion to dismiss for improper venue in Ninth Circuit.

Authority:
Fed R Civ P 12(b)(3)

Discussion:
See *§ 8.19[1][b]*

☐ Avoid waiving objection to venue by asserting defense as part of initial motion to dismiss or first responsive pleading.

☐ Avoid waiving objection through conduct during pendency of action.

Authority:
Fed R Civ P 12(b), *(h)(1)*

Discussion:
See *§ 8.19[1][c]*

☐ Submit supplemental written materials outside pleadings for court to consider in ruling on motion.

- ○ Parties may submit materials such as sworn affidavits and exhibits.

- ○ Submitting materials does not transform motion to dismiss into motion for summary judgment.

Discussion:
See *§ 8.19[1][e]*

☐ Request leave to conduct discovery on factual issues related to motion to dismiss for improper venue.

Discussion:
See *§ 8.19[1][f]*

☐ Request that court conduct evidentiary hearing when motion raises genuine factual issues.

Authority:
Fed R Civ P 12(i)

Discussion:
See *§ 8.19[1][g]*

☐ Court determination of motion.

○ Plaintiff appears to bear burden of establishing that venue as originally selected is proper in Ninth Circuit.

○ Court need not accept pleadings as true.

☐ Court may properly consider facts outside pleadings along with motion to dismiss.

☐ Consideration of supplemental written materials does not transform motion to dismiss into motion for summary judgment.

○ Court may permit discovery when discovery would be useful in resolving issues of fact presented by motion to dismiss.

○ Court may hold evidentiary hearing when motions raises genuine factual issues.

☐ When holding evidentiary hearing, court may weigh evidence, assess credibility, and make findings of fact on motion.

☐ Court's factual findings are entitled to deference.

○ Court must dismiss action if improperly venued.

☐ Dismissal for improper venue generally is not on merits.

☐ Dismissal does not preclude plaintiff from refiling action in forum where venue is proper.

○ Court may transfer improperly venued action when transfer is in interest of justice.

☐ Court may not transfer action for improper venue unless it has subject matter jurisdiction.

☐ Transferee court must have proper subject matter jurisdiction, proper venue, and personal jurisdiction.

Authority:
28 USC § 1406(a); *Fed R Civ P 12(b)(3)* and *Fed R Civ P 12(i)*, *41(b)*

Discussion:
See *§ 8.19[2]*

8.14[6] CHECKLIST: Preparing Motion to Dismiss for Insufficient Process or Service of Process.

☐ In Central District, comply with "meet and confer" requirements before bringing motion.

○ Contact opposing counsel to discuss thoroughly, preferably in person, substance of contemplated motion and any potential resolution.

○ "Meet and confer" must take place at least five days before last day for filing motion.

○ If parties are unable to reach resolution that eliminates reason for hearing, include in notice of motion, statement that "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*]."

Authority:
CD Cal Civ LR 7-3

Discussion:
Ch. 26, Pretrial Motion Practice, see *§ 26.15[1]*

☐ Challenge sufficiency of summons or of its service by filing motion to dismiss.

○ Motion to dismiss for insufficient process is designed to challenge irregularities in the contents of the summons.

○ Motion to dismiss for improper service of process is designed to challenge irregularities in manner of delivery of summons and complaint.

☐ Motion must specifically point out manner in which plaintiff failed to satisfy applicable summons or service requirements.

Authority:
Fed R Civ P 12(b)(4), *(5)*

Discussion:
See *§ 8.20[1]*

Form:
See *§§ 8.36*, *8.37*

☐ Avoid waiving defense of insufficient process or insufficient service of process by asserting them in motion to

dismiss or in initial responsive pleading if required.

☐ Avoid waiving defense through conduct during pendency of action.

Authority:
Fed R Civ P 12(b)(4), (5), 12(g), (h)(1)

Discussion:
See *§ 8.20[1][c]*

☐ Submit supplemental materials with motion for court's consideration.

○ Materials may include sworn affidavits, exhibits, depositions, and oral testimony.

○ Submission of materials does not convert motion to dismiss into motion for summary judgment.

Authority:
Fed R Civ P 12(b)(4), (5)

Discussion:
See *§ 8.20[1][d]*

☐ Court determination of motion:

○ Burden is on plaintiff to show valid summons and properly effected service.

○ Court may consider supplemental materials with motions to dismiss for insufficient process or insufficient service.

☐ Materials may include sworn affidavits, exhibits, depositions, and oral testimony.

☐ Submission of supplemental materials does not convert motion to dismiss into one for summary judgment.

○ Court may conduct evidentiary hearing when motions present genuine factual issues.

○ Court may dismiss an action for insufficient process or service of process.

☐ Dismissal is typically without prejudice to plaintiff's ability to refile case.

☐ Dismissals for defects in form of summons generally are not grounds for dismissal unless defendant demonstrates actual prejudice.

☐ Plaintiff's failure to comply with technical rules governing service of process also

does not necessarily require dismissal of plaintiff's claims.

☐ As alternative to dismissal for insufficient service, court may retain jurisdiction but quash service.

Authority:
Fed R Civ P 4(h), Fed R Civ P 12(b)(4), Fed R Civ P 12(b)(5), (i)

Discussion:
See *§ 8.20[2]*

8.14[7] CHECKLIST: Preparing Motion to Dismiss for Failure to State Claim on Which Relief Can Be Granted.

☐ In Central District, comply with "meet and confer" requirements before bringing motion.

○ Contact opposing counsel to discuss thoroughly, preferably in person, substance of contemplated motion and any potential resolution.

○ "Meet and confer" must take place at least five days before last day for filing motion.

○ If parties are unable to reach resolution that eliminates reason for hearing, include in notice of motion, statement that "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*]."

Authority:
CD Cal Civ LR 7-3

Discussion:
Ch. 26, Pretrial Motion Practice, see *§ 26.15[1]*

☐ Challenge plaintiff's complaint for failing to state claim on which relief can be granted by filing motion to dismiss on that basis.

○ Motion is designed to test formal sufficiency of plaintiff's statement of claims for relief.

○ Motion is viewed with disfavor and is rarely granted.

☐ Use to challenge complaint when:

○ Complaint lacks cognizable legal theory.

○ Complaint lacks sufficient facts to allege cognizable legal theory.

○ An affirmative defense or other bar to relief is apparent from face of complaint.

Authority:
Fed R Civ P 12(b)(6)

Discussion:
See *§ 8.21[1]*

Form:
See *§ 8.38*

☐ Defense may be made in motion to dismiss, answer permitted or ordered by court, in motion for judgment on pleadings, or at trial on merits without waiver.

Authority:
Fed R Civ P 7(a), 12(b)(6), (h)(2)

Discussion:
See *§ 8.21[1][e]*

☐ Submit limited supplemental materials for court's consideration in deciding motion.

○ If defendant presents court with matters outside pleadings that court does not exclude, court must convert motion to dismiss into motion for summary judgment.

○ Court may consider the following supplemental materials with complaint without converting motion into motion for summary judgment:

☐ Material properly submitted as part of complaint.

☐ Documents not part of complaint if referenced in complaint and accepted by all parties as authentic.

☐ Matters of public record of which court may take judicial notice.

Authority:
Fed R Civ P 12(b)(6), 56; Fed R Evid 201

Discussion:
See *§ 8.21[1][f]*

☐ Court determination of motion.

○ Moving party bears burden of demonstrating that plaintiff has not met liberal pleading requirements in stating claim.

○ In considering motion, court must treat plaintiff's allegations of material fact as true and must construe them in light most favorable to plaintiff.

○ Court may dismiss claim only if it appears beyond doubt that plaintiff can prove no set of facts in support of claim that would entitle plaintiff to relief.

○ With some exceptions, if court considers matters outside pleadings it must convert motion to dismiss into motion for summary judgment.

☐ On conversion of motion to motion for summary judgment, court must fairly apprise nonmoving party that court will look beyond pleadings.

☐ Court must give all parties reasonable opportunity to present material pertinent to motion for summary judgment.

☐ Court must provide additional safeguards to pro se litigants.

○ Dismissal for failure to state claim is typically without prejudice to plaintiff's ability to file amended pleading.

☐ Court should grant leave to amend whenever it appears possible that plaintiff can correct defect.

☐ Denial of leave to amend is not abuse of discretion if court could reasonably conclude that further amendment would be futile.

Authority:
Fed R Civ P 8(a)(2), 12(b)(6), 56

Discussion:
See *§ 8.21[3]*

8.14[8] CHECKLIST: Preparing Motion to Dismiss for Failure to Join Indispensable Party.

☐ In Central District, comply with "meet and confer" requirements before bringing motion.

○ Contact opposing counsel to discuss thoroughly, preferably in person, substance of contemplated motion and any potential resolution.

○ "Meet and confer" must take place at least five days before last day for filing motion.

○ If parties are unable to reach resolution that eliminates reason for hearing, include in

notice of motion, statement that "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*]."

Authority:
CD Cal Civ LR 7-3

Discussion:
Ch. 26, Pretrial Motion Practice, see *§ 26.15[1]*

☐ Challenge plaintiff's failure to join an indispensable party by filing motion to dismiss on that basis.

○ Assert that nonparty is required but cannot be joined.

○ Assert that nonparty is indispensable so that court must dismiss action in equity and good conscience.

Authority:
Fed R Civ P 12(b)(7), 19(a)

Discussion:
See *§ 8.22[1][a]*

Form:
See *§ 8.39*

☐ Assert defense at any time through trial.

○ Defense cannot be waived.

○ Court may consider any delay in asserting defense in weighing prejudice to moving party from defending separate actions.

Authority:
Fed R Civ P 7(a), 12(h)(2)

Discussion:
See *§ 8.22[1][b]*

☐ Submit supplemental materials such as affidavits and other relevant extra-pleading evidence to aid court in determining motion.

Authority:
Fed R Civ P 12(b)(7)

Discussion:
See *§ 8.22[1][c]*

☐ Court determination of motion:

○ Moving party bears burden of persuasion in showing that dismissal is necessary.

○ Court must apply two-step analysis in determining whether action can proceed without absent person.

☐ Court must first find that nonparty is necessary party who must be joined if feasible.

☐ If absent party is necessary, court must determine whether action can proceed or must be dismissed because of absent person's indispensability.

○ Court may consider facts beyond scope of complaint in determining motion without converting it into motion for summary judgment.

○ Dismissal for failure to join indispensable party is not typically on merits.

☐ Court may properly order dismissal for failure to join party only if person is indispensable to action and cannot be joined.

☐ Grant of motion to dismiss is without prejudice to plaintiff's ability to amend complaint.

☐ Court does not err in denying leave to amend when amendment would be futile.

Authority:
Fed R Civ P 12(b)(7), 19

Discussion:
See *§ 8.22*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticePleadingsGeneral Overview

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
IV. PREPARING MOTION TO DISMISS

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.15

8.15 Options and Strategy.

8.15[1] Preanswer Motion Is Optional. A defendant is not required to file a preanswer motion to dismiss under *Fed R Civ P 12(b)*. Defenses set forth under the rule may be asserted in an answer [*see Fed R Civ P 12(b)*]. Some defenses or objections may be raised either in an initial answer or in a Rule 12(b) motion to dismiss [*see Fed R Civ P 12(b)*].

8.15[2] Defenses Must Be Consolidated in Motion to Dismiss or Are Waived. The rules permit a defendant only one preanswer motion. Thus, if a defendant chooses to file a preanswer motion, that motion must contain all Rule 12 defenses or objections then available to the defendant [*see Fed R Civ P 12(g)*]. Some defenses or objections then available to the defendant but omitted from the motion are waived [*Fed R Civ P 12(h)(1)*]. Thus, a defendant generally cannot raise a few of his or her waivable defenses in a preanswer motion while saving other available defenses for a subsequent answer [*see Fed R Civ P 12(b)*].

Distinguish:

A second motion to strike immaterial matter is not barred because the district court may strike immaterial matter at any time *Fed R Civ P 12(f)*; *see* In re Ess Tech., Inc. Secs. Litig. (ND Cal 2005) 2005 US Dist LEXIS 2593, at *13].

8.15[3] Defenses Waived If Not Asserted in Initial Response or Motion. Lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficient service of process are waived forever if not asserted in an initial Rule 12 motion or answer [*Fed R Civ P 12(h)(1)*; *see American Ass'n of Naturopathic Physicians v. Hayhurst (9th Cir 2000) 227 F3d 1104, 1106 , cert. denied, 532 US 1008 (2001)* ; *see Fed R Civ P 12(b)*].

Strategic Point:

Filing a motion to dismiss before filing an answer to the complaint provides a vehicle for challenging and possibly eliminating allegations or claims from the plaintiff's complaint at an early stage in the action. A motion to dismiss under Rule 12(b)(1) or (6) provides the earliest and most expeditious means

of obtaining a potentially dispositive remedy when the court lacks subject matter jurisdiction, if there is a defect in the claims pleaded, or if there is uncertainty or confusion regarding the basis for liability against a particular defendant. While the preparation of a motion to dismiss may be expensive, it provides additional time for a defendant to develop the factual basis for a more thorough and accurate answer to the complaint and any potential affirmative defenses. On the other hand, the motion gives the plaintiff an opportunity to clean up any defects, which may be more difficult to do on a later motion for summary judgment or judgment on the pleadings.

8.15[4] Filing Motion to Dismiss Does Not Prevent Amendment or Dismissal of Complaint. A motion to dismiss under *Fed R Civ P 12(b)* is not a responsive pleading under *Fed R Civ P 15(a)* or an answer under *Fed R Civ P 41(a)* [*see Fed R Civ P 7(a)*]. Accordingly, the defendant's filing of a Rule 12(b) motion to dismiss, alone, does not terminate the plaintiff's right to amend the complaint once as a matter of course [*CRST Van Expedited, Inc. v. Werner Enters., Inc. (9th Cir 2007) 479 F3d 1099, 1104 n.3* (decided under prior law); *see Fed R Civ P 15(a)(1)(B)*]. Nor does it prevent the plaintiff from voluntarily dismissing the complaint [*see Fed R Civ P 41(a)*].

Cross Reference:

Voluntary motions to dismiss, see Ch. 30, Voluntary Dismissal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
IV. PREPARING MOTION TO DISMISS

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.16

8.16 Rule 12(b) Procedures.

8.16[1] Assert Rule 12(b) Defenses in Preanswer Motion. Though every defense may be asserted in an answer, the defendant has the option of asserting the following defenses in a motion to dismiss before filing an answer [*see Fed R Civ P 12(b)*]:

- Lack of subject matter jurisdiction;
- Lack of personal jurisdiction;
- Improper venue;
- Insufficiency of process;
- Insufficient service of process;
- Failure to state a claim on which relief can be granted; and
- Failure to join an indispensable party.

Prerequisite-CD Cal: Meet and Confer.
In the Central District, comply with "meet and confer" requirements before bringing the motion [*CD Cal Civ LR 7-3*].

○ Contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution.

○ "Meet and confer" must take place at least five days before last day for filing the motion.

- If parties are unable to reach a resolution that eliminates the need for a hearing, include in the notice of motion the statement "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*]."

8.16[2] File Rule 12(b) Motion Before Responsive Pleading.

8.16[2][a] Motion Is Timely If Filed Before Responsive Pleading. In general, counsel must file a motion to dismiss under *Fed R Civ P 12(b)* before filing an answer [*see Fed R Civ P 12(b)*]. The Ninth Circuit allows motions under Rule 12(b) to be filed any time before filing of a responsive pleading [*Aetna Life Ins. Co. v. Alla Med. Servs., Inc. (9th Cir 1988) 855 F2d 1470, 1474*].

Thus, counsel should file a Rule 12(b) motion to dismiss within the time limit applicable to the responsive pleading generally. For example, the rules provide for a 21-day period for service of an answer [*see Fed R Civ P 12(a)(1)(A)(i)*]. However, there are numerous exceptions to the 20-day limit [*see, e.g., Fed R Civ P 12(a)(1)(A)(ii), (2), (3)*].

Cross Reference:

Exceptions to 21-day time period for serving responsive pleadings, see *§ 8.05[2]*.

8.16[2][b] Extension of Time to Respond to Complaint Should Apply to Rule 12(b) Preanswer Motion. When a defendant obtains an extension of time to respond to the complaint, that extension should apply to the filing of a preanswer motion to dismiss under *Fed R Civ P 12(b)* [*see, e.g., Aetna Life Ins. Co. v. Alla Med. Servs., Inc. (9th Cir 1988) 855 F2d 1470, 1474*].

Strategic Point--Defendant:

It is prudent, when seeking an extension of time to respond to a complaint, to use broad language that includes the possibility of responding to the complaint with either an answer or a preanswer motion to dismiss (e.g., state that "defendant shall have until [*date*] to answer or otherwise respond to the complaint.") Otherwise, the plaintiff may argue that the defendant is time-barred from filing any response other than an answer.

8.16[2][c] Filing Motion to Dismiss Extends Time to Answer Complaint. Unless the court orders otherwise, service of a Rule 12(b) motion to dismiss extends the time the defendant must serve and file an answer to the complaint or another responsive pleading [*Fed R Civ P 12(a)(4)*]. In general, serving a Rule 12(b) motion to dismiss extends the defendant's time to file an answer or other responsive pleading until 14 days after notice of the court's ruling on the motion [*see Fed R Civ P 12(a)(4)*].

Cross Reference:

Extension of time, see *§ 8.05[4]*.

8.16[3] Failure to Assert Certain Defenses Results in Waiver.

8.16[3][a] Motion Must Include Every Available Rule 12 Defense or Objection. A defendant who files a motion to dismiss under Rule 12 must join with it any other motions provided in the rule that are then available to the defendant [*see Fed R Civ P 12(g)*]. For example, a motion to dismiss for failure to state a claim [*see Fed R Civ P 12(b)(6)*] may be combined with a motion for more definite statement [*see Fed R Civ P 12(e)*]. Thus, the defenses may be asserted either in an answer or in a preanswer motion to dismiss [*see Fed R Civ P 12(b)*]. This mandatory consolidation provision applies only to defenses and objections available to the party at the time of filing the motion to

dismiss under *Fed R Civ P 12(b)* [*see Fed R Civ P 12(g)*].

8.16[3][b] Omitted Defenses or Objections Are Waived Unless Nonwaivable. If counsel files a motion to dismiss under *Fed R Civ P 12* but omits from that motion any waivable defense or objection that is then available under *Fed R Civ P 12*, the omitted defense or objection is waived [*see Fed R Civ P 12(g)*]. To avoid waiving these defenses or objections under *Fed R Civ P 12*, counsel must raise them in an initial motion to dismiss, or in the first responsive pleading if no motion to dismiss is filed [*see Fed R Civ P 12(g), (h)(1)*]. Thereafter, the defendant cannot assert a motion based on an omitted defense or objection unless it is one of the defenses or objections excepted from the waiver provision [*see Fed R Civ P 12(g), (h)(2); Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1034* (despite the policy concerns underlying the waiver provisions of Rule 12, nothing in the rule requires codefendants represented by the same counsel to raise or waive all their defenses together)].

When waiver occurs, the defense or objection is permanently lost. The defendant cannot assert the defense or objection in a second preanswer motion or in an answer [*Chilicky v. Schweiker (9th Cir 1986) 796 F2d 1131, 1136 , rev'd on other grounds, 487 US 412 (1988)*].

Warning--Waivable Defenses:

The following defenses are expressly waived if not asserted in a Rule 12 motion to dismiss or included in a responsive pleading [*see Fed R Civ P 12(h)(1)*]:

- Lack of jurisdiction over the person;
- Improper venue;
- Insufficiency of process; and
- Insufficiency of service of process.

Distinguish--Nonwaivable Defenses:

In contrast, the defenses of failure to state a claim on which relief can be granted, and failure to join an indispensable party are not waived by failing to assert them in an initial motion to dismiss under Rule 12 [*see Fed R Civ P 12(h)(2)*]. Though these defenses may not be asserted in a second Rule 12 motion, they may be raised in any pleading permitted or ordered under *Fed R Civ P 7(a)*, in a motion for judgment on the pleadings, or at the trial on the merits [*see Fed R Civ P 12(h)(2)*]. In addition, lack of subject matter jurisdiction is not a waivable defense; it may be raised at any time by the defendant, or by the court on its own motion [*see Fed R Civ P 12(h)(3)*].

Distinguish--Rule 8 Affirmative Defenses:

The mandatory consolidation and waiver provisions do not apply to affirmative defenses that must be pleaded under *Fed R Civ P 8(c)* [*see Parker v. United States (9th Cir 1997) 110 F3d 678, 683* (*Fed R Civ P 12(g)* refers to defenses that may be raised by Rule 12 motion, not to all defenses)]. Defenses that a party may waive under *Fed R Civ P 12(h)*, unlike affirmative defenses under *Fed R Civ P 8(c)*, cannot be asserted in an amended answer [*see Parker v. United States (9th Cir 1997) 110 F3d 678, 683* (noting authority for proposition that affirmative defense may not be raised by motion to dismiss)]. Similarly, a defendant does not waive motions other than those specified in *Fed R Civ P 12*, such as motions to stay, when omitted from a Rule 12 preanswer motion to dismiss [*see Aetna Life Ins. Co. v. Alla Med. Servs., Inc. (9th Cir 1988) 855 F2d 1470, 1475* (*Fed R Civ P 12* waiver inapplicable to motion to stay)].

8.16[3][c] Avoid Waiver of Omitted Defenses by Filing Amended Motion or Pleading. To avoid waiver of the

omitted defense of lack of personal jurisdiction, improper venue, insufficiency of process, or insufficient service of process, counsel may attempt to file an amended motion to dismiss or other responsive pleading when permitted as a matter of course under *Fed R Civ P 15(a)* [*see Fed R Civ P 12(h)(1)(B)*]. A party may amend a pleading once as a matter of course within 21 days after serving it [*Fed R Civ P 15(a)(1)(A)*]. If the pleading is one to which a responsive pleading is required, the party may amend within 21 days after service of the responsive pleading, or within 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier [*Fed R Civ P 15(a)(1)(B)*].

Cross Reference:

Amending answers, see Ch. 9, Amending and Supplementing Pleadings.

8.16[4] Comply With Rules Governing Motion Practice. A motion to dismiss should be made by a written motion stating with particularity the grounds for the motion and the relief or order sought. The writing requirement is satisfied if the defendant sets forth the motion in a written notice of the hearing on the motion [*see Fed R Civ P 7(b)(1)*]. A motion to dismiss must be signed in accordance with *Fed R Civ P 11*. Counsel should check the local rules.

The rules governing motions generally apply with equal force to motions to dismiss under Rule 12 [*see Fed R Civ P 7(b)*]. Similarly, the rules applicable to captions and formatting with regard to pleadings also apply to motions and motion-related papers [*see Fed R Civ P 7(b)(2)*, *10*].

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*.

8.16[5] Rule 12(b) Motions Are Subject to Rule 11 Sanctions. A defendant may be sanctioned for filing a frivolous motion to dismiss, or for filing a motion to dismiss for an improper purpose [*see* Fed R Civ P *11(a)*, *(b)*]. Even when a motion to dismiss under *Fed R Civ P 12* is technically appropriate, a defendant may risk sanctions for filing a motion to dismiss for an improper purpose, such as to harass or to delay the proceedings [*see Fed R Civ P 11*; *Aetna Life Ins. Co. v. Alla Med. Servs., Inc. (9th Cir 1988) 855 F2d 1470, 1476* (successive motions may become so harassing and vexatious that they justify sanctions even if not totally frivolous under standards set forth in case law)].

Cross Reference:

Rule 11 sanctions, see Ch. 33, Rule 11 Sanctions.

8.16[6] Responding to Motion to Dismiss.

8.16[6][a] Plaintiff's Options in Responding to Motion to Dismiss. The plaintiff has several options in responding to a motion to dismiss, including:

- Not responding;
- Filing opposition papers [*see, e.g., ND Cal Civ LR 7-3(a)*];
- Filing a statement of nonopposition [*see, e.g., ND Cal Civ LR 7-3(b)*];
- Filing an amended complaint [*see Fed R Civ P 15(a)*]; or
- Seeking voluntary dismissal of the action [*see Fed R Civ P 41(a)*].

Strategic Point--Plaintiff:

Local rules may require that the plaintiff file opposition papers in response to the motion to dismiss, or

that the plaintiff file a statement of nonopposition [*see ED Cal Civ LR 230(c)*]. Thus, it is risky not to respond to the motion to dismiss in some manner, since failure to do so may be deemed by the court as consent by the plaintiff to the motion to dismiss [*see, e.g., CD Cal Civ LR 7-9*, *7-12* (opposition or statement of nonopposition paper required); *CD Cal Civ LR 7-12* (failure to file required paper may be deemed consent to granting of motion); *SD Cal Civ LR 7.1(f.3.a)*, *(f.3.c)* (opposition papers or statement of nonopposition required; failure to file may be deemed consent to granting of motion)].

Cross Reference:

Responding to motions, see Ch. 26, Pretrial Motion Practice, see *§§ 26.37 -26.43*.

8.16[6][b] Filing Opposition Papers. A plaintiff may file written opposition papers in response to a motion to dismiss [*see, e.g., SD Cal Civ LR 7.1(f.3.b)*; *ND Cal Civ LR 7-3(a)*]. The contents of opposition papers may vary depending on the local rules in the district in which the case is filed [*see, e.g., SD Cal Civ LR 7.1(f.3.b)*; *CD Cal Civ LR 7-9*; *ND Cal Civ LR 7-3(a)*; *ED Cal Civ LR 230(c)*]. For example, in the Southern District, opposition papers must contain a brief statement of the reasons why the court should deny the motion to dismiss, an answering memorandum of points and authorities, and copies of any documentary evidence on which the plaintiff relies [*see SD Cal Civ LR 7.1(f.3.b)*]. Similarly, the time for filing opposition papers differs depending on the district in which the case is filed [*see, e.g., SD Cal Civ LR 7.1(e.2)* (no later than 14 calendar days before noticed hearing); *CD Cal Civ LR 7-9* (no later than 21 days before date of hearing); *ND Cal Civ LR 7-3(a)* (must be served and filed within 21 days before hearing on motion); *ED Cal Civ LR 230(c)* (not less than 14 days before noticed or continued hearing)]. Therefore, counsel for defendant is advised to become familiar with the local rules in the district in which the case is filed.

Cross Reference:

Formatting of opposition papers and related forms, see Ch. 5, Formatting, Serving, and Filing Papers.

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.37*.

8.16[6][c] Filing Statement of Nonopposition. A plaintiff choosing not to file opposition papers generally must file a statement of nonopposition [*see, e.g., SD Cal Civ LR 7.1(f.3.a)*; *CD Cal Civ LR 7-9*; *ND Cal Civ LR 7-3(b)*; *ED Cal Civ LR 230(c)*].

Strategic Point--Plaintiff:

Counsel should not file a statement of nonopposition unless conceding that the defendant's motion to dismiss, including the relief sought in the motion, should be granted. For example, if the motion requests that the court dismiss the complaint without leave to amend, you must file opposition papers if you plan to file an amended answer, unless amendment as a matter of right is available under *Fed R Civ P 15(a)*.

8.16[6][d] Filing Amended Complaint. A complaint may be amended once as a matter of right before the defendant files a responsive pleading [*see Fed R Civ P 15(a)*]. A motion to dismiss under *Fed R Civ P 12(b)* is not a responsive pleading [*see Fed R Civ P 7(a)*]. Accordingly, filing a Rule 12(b) motion to dismiss, alone, does not terminate the plaintiff's right to amend the complaint once as a matter of course [*see Fed R Civ P 15(a)*]. Therefore, in lieu of opposing a motion to dismiss the original complaint, the plaintiff may serve and file an amended complaint without obtaining leave of court [*Miles v. Department of Army (9th Cir 1989) 881 F2d 777, 781* ; *see Fed R Civ P 15(a)*].

Strategic Point--Plaintiff:

Plaintiff should consider filing an amended complaint when the defendant's motion to dismiss is well-founded, as when the motion has exposed material defects in the original complaint. If the complaint can be easily amended to avoid the issues raised in the motion, filing an amended complaint may save time and expense. Note that in the Central District, it is advisable to address the possibility of an amended answer during the "meet and confer" process. If the plaintiff forces the defendant to make a motion, sanctions may be available to the defendant.

Cross Reference:

Amending complaints, see Ch. 9, Amending and Supplementing Pleadings.

8.16[6][e] Seeking Voluntary Dismissal. The plaintiff may dismiss an action without a court order by filing a notice of dismissal any time before service by the defendant of an answer or a motion for summary judgment, whichever occurs first [*see Fed R Civ P 41(a)(1)(A)(i)*]. The plaintiff may also obtain a dismissal by filing a stipulation of dismissal signed by all parties who have appeared in the action [*see Fed R Civ P 41(a)(1)(A)(ii)*].

Unless otherwise stated in the notice of dismissal or stipulation, voluntary dismissals are without prejudice. However, a notice of dismissal operates as an adjudication on the merits if filed by a plaintiff who has already dismissed an action based on or including the same claim in any United States or state court [*see Fed R Civ P 41(a)(1)*].

Cross Reference:

Ch. 30, Voluntary Dismissal.

8.16[7] Replying to Opposition Papers. Though not expressly permitted under the federal rules, California local court rules permit a defendant who has filed a motion to dismiss under Rule 12(b) to file a reply to the plaintiff's response [*see, e.g., ND Cal Civ LR 7-3(c)*; *CD Cal Civ LR 7-10*; *SD Cal Civ LR 7.1(e.3)*; *ED Cal Civ LR 230(d)*]. Typically, replies consist of a memorandum, supporting declarations, or other evidence rebutting the plaintiff's opposition papers [*see, e.g., CD Cal Civ LR 7-10*].

The time for filing memoranda or other materials in reply to the plaintiff's opposition varies depending on the district in which the case is filed [*see, e.g., CD Cal Civ LR 7-10* (no later than 14 days before hearing); *ND Cal Civ LR 7-3(c)* (no less than 14 days before hearing date); *ED Cal Civ LR 230(d)* (no less than seven days before hearing); *SD Cal Civ LR 7.1(e.3)* (no later than seven days before hearing date)]. Counsel for defendant should check the local rules in the district in which the case is filed.

Cross References:

Replies in motion practice generally, see Ch. 26, Pretrial Motion Practice, see *§§ 26.37 -26.43*. Form and content of replies and related forms, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.03 -5.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
IV. PREPARING MOTION TO DISMISS

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.17

8.17 Motion to Dismiss for Lack of Subject Matter Jurisdiction.

8.17[1] Challenge Subject Matter Jurisdiction.

8.17[1][a] File Motion to Dismiss. A defendant may challenge the plaintiff's action for lack of subject matter jurisdiction by filing a motion to dismiss [*see Fed R Civ P 12(b)(1)*]. A federal court has subject matter jurisdiction over an action that either arises under federal law, or when there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000 [*Tosco Corp. v. Communities for a Better Env't (9th Cir 2001) 236 F3d 495, 499* ; *see 28 USC §§ 1331, 1332*].

Cross References:

Jurisdiction generally, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.03 -2.25*. Form of motion to dismiss for lack of subject matter jurisdiction, see *§ 8.33*.

8.17[1][b] Challenge Subject Matter Jurisdiction at Any Time. Because lack of subject matter jurisdiction challenges the court's statutory or constitutional authority to adjudicate the type of controversy involved in the action [*see Steel Co. v. Citizens for Better Env't (1998) 523 US 83, 89, 118 S Ct 1003, 140 L Ed2d 210*], it may not be waived as a defense [*Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co. (9th Cir 2003) 346 F3d 1190, 1192*]. Thus, a defendant may challenge lack of subject matter jurisdiction at any time in the proceedings [*see Fed R Civ P 12(h)(3)*; *see, e.g., Miguel v. Country Funding Corp. (9th Cir 2002) 309 F3d 1161, 1163-1164*]. Indeed, the court may consider subject matter jurisdiction on its own motion, even if not raised by a party [*see, e.g., Westlands Water Dist. v. Firebaugh Canal (9th Cir 1993) 10 F3d 667, 673* (appellate court may consider subject matter jurisdiction on its own motion even though not raised at district court level)], and an objection that a federal court lacks subject-matter jurisdiction may be raised by a party even after trial and the entry of judgment [*Arbaugh v. Y & H Corp. (2006) 546 US 500, 126 S Ct 1235, 163 L Ed 2d 1097, 1104*].

Distinguish:

An objection that a complaint fails to state a claim upon which relief can be granted under *Fed R Civ P 12(b)(6)* may not be asserted post trial [*Arbaugh v. Y & H Corp. (2006) 546 US 500, 126 S Ct 1235, 163 L Ed 2d 1097, 1105*].

8.17[2] Challenge Subject Matter Jurisdiction on Face of Pleading.

8.17[2][a] Making Facial Attack on Subject Matter Jurisdiction. In a "facial attack" on a court's subject matter jurisdiction under *Fed R Civ P 12(b)(1)*, the defendant contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the existence of jurisdiction [*Westlands v. NRDC (ED Cal 2003) 276 F Supp2d 1046, 1049* ; *see Fed R Civ P 8(a)* (complaint must contain short, plain statement of grounds on which court's jurisdiction depends)]. In facial attacks, the court's inquiry generally is confined to the allegations in the complaint [*White v. Lee (9th Cir 2000) 227 F3d 1214, 1242*].

Example:

In a declaratory judgment action by a homeowner's insurer to determine if it was liable under the insurance policy to the administrator of insured's estate and to the victims of the insured's alleged tort, the insurer properly alleged diversity of citizenship jurisdiction by alleging its own citizenship and that of the defendants, but failed to properly allege facts showing the citizenship of the decedent or the administrator of his estate [*see, e.g., Blue Ridge Ins. Co. v. Stanewich (9th Cir 1998) 142 F3d 1145, 1148* (court permitted correction of deficient allegations on appeal)].

8.17[2][b] Court Accepts Plaintiff's Allegations As True in Facial Attack. In determining a motion to dismiss based on a facial attack on the court's subject matter jurisdiction, the court will presume the factual allegations of the complaint to be true, and will grant the motion only if the plaintiff fails to allege an element necessary for subject matter jurisdiction [*Westlands v. NRDC (ED Cal 2003) 276 F Supp2d 1046, 1049*]. A complaint will be dismissed for lack of subject matter jurisdiction if (1) the cause does not arise under a federal law or under the United States Constitution; (2) there is no case or controversy within the meaning of that constitutional term; or (3) the cause is not one described by any jurisdictional statute [*Baker v. Carr (1962) 369 US 186, 198, 82 S Ct 691, 7 L Ed2d 663* ; *Westlands v. NRDC (ED Cal 2003) 276 F Supp2d 1046, 1049*].

8.17[2][c] Plaintiff May Amend Complaint in Response to Facial Attack. When a defendant moves to dismiss based on the insufficiency of the complaint in alleging subject matter jurisdiction, the plaintiff may amend the complaint as a matter of course to cure the defect within 21 days after serving it [*Fed R Civ P 15(a)(1)(A)*]. If the pleading is one to which a responsive pleading is required, the party may amend within 21 days after service of the responsive pleading, or within 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier [*Fed R Civ P 15(a)(1)(B)*]. However, when leave of court is required to amend the complaint, a district court may refuse leave to file an amended complaint if amendment would be futile [*see America W. Airlines, Inc. v. GPA Group, Ltd. (9th Cir 1989) 877 F2d 793, 801 , overruled in part on other grounds by Republic of Argentina v. Weltover, Inc. (1992) 504 US 607, 112 S Ct 2160, 119 L Ed2d 394* (court properly denied leave to amend because allegations in support of jurisdiction would contradict sworn affidavits and relevant documentary evidence presented to court on jurisdictional issue)].

8.17[3] Challenge Subject Matter Jurisdiction Based on Facts.

8.17[3][a] Making Factual Attack on Subject Matter Jurisdiction. Factual attacks, also called "speaking motions," attack the court's subject matter jurisdiction as a matter of fact based on extrinsic evidence apart from the pleadings [*Safe Air v. Meyer (9th Cir 2004) 373 F3d 1035, 1039*].

8.17[3][b] Introducing Extrinsic Evidence. In a factual attack, the defendant converts the motion to dismiss into a factual motion by presenting affidavits or other evidence properly before the court. The plaintiff then must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction [*Safe Air v. Meyer (9th Cir 2004) 373 F3d 1035, 1039* ; *Galiano v. Inst. of Governmental Studies at the Univ. of Cal. (ND Cal 2008) 2008 US Dist LEXIS 68527, at *6-*8]* . The district court will evaluate the merits of jurisdictional claims by considering the allegations of the complaint and the extrinsic evidence presented [*Roberts v. Corrothers (9th Cir 1987) 812 F2d 1173, 1177* ; *Valdez v. United States (ED Cal 1993) 837 F Supp 1065, 1067 , aff'd, 56 F3d 1177 (9th Cir 1995)*]. The court

does not abuse its discretion by looking to this extra-pleading material in deciding the jurisdictional issue, even if it becomes necessary to resolve factual disputes [*Association of Am. Med. Colls. v. United States (9th Cir 2000) 217 F3d 770, 778*].

8.17[3][c] Court Will Not Presume Truthfulness of Jurisdictional Allegations. Unlike a facial attack on subject matter jurisdiction, in a factual attack the court will not attach any presumptive truthfulness to the plaintiff's jurisdictional allegations or to any inferences drawn from those allegations [*Safe Air v. Meyer (9th Cir 2004) 373 F3d 1035, 1039*]. Rather, in deciding a factual attack, the court may weigh the evidence presented, and may determine the facts in order to evaluate whether they have the power to hear the case [*Sarei v. Rio Tinto PLC (CD Cal 2002) 221 F Supp2d 1116, 1129*].

8.17[3][d] Seeking Discovery to Resolve Jurisdictional Facts. Discovery should ordinarily be granted when pertinent facts bearing on the question of jurisdiction are controverted, or when a more satisfactory showing of the facts is necessary. Thus, the court should grant discovery when jurisdictional facts are contested or more facts are needed. Conversely, a court's refusal to grant discovery to establish jurisdiction is not an abuse of discretion when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction [*Laub v. United States Dep't of Interior (9th Cir 2003) 342 F3d 1080, 1092*].

Cross Reference:

Discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§§ 22.14 -22.34*.

8.17[4] Court Determination of Motion.

8.17[4][a] Rule 12(b)(1) Motions Considered Before Other Rule 12 Motions. When a defendant asserts lack of subject matter jurisdiction in a preanswer motion to dismiss that also raises other defenses, the court customarily resolves the issue of subject matter jurisdiction first [*Ruhrgas AG v. Marathon Oil Co. (1999) 526 US 574, 583, 119 S Ct 1563, 143 L Ed2d 760*]. This is so when the other issues require determination of the merits [*see Steel Co. v. Citizens for Better Env't (1998) 523 US 83, 93, 118 S Ct 1003, 140 L Ed2d 210*].

However, a district court may appropriately give priority to determining a challenge to personal jurisdiction before deciding a challenge to the court's subject matter jurisdiction when the personal jurisdiction issue presents no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question [*Ruhrgas AG v. Marathon Oil Co. (1999) 526 US 574, 588, 119 S Ct 1563, 143 L Ed2d 760*].

When a motion to dismiss attacks "the substance of the complaint's jurisdictional allegations," the court will treat the motion as brought under *Fed R Civ P 12(b)(1)*, even if it was improperly identified by the moving party as a motion to dismiss for failure to state a claim brought under *Fed R Civ P 12(b)(6)* [*Corrie v. Caterpillar (9th Cir 2007) 503 F3d 974, 980]* .

Cross References:

Motions to dismiss for lack of personal jurisdiction, see *§ 8.18*. Motions to dismiss for failure to state a claim on which relief can be granted, see *§ 8.21*.

8.17[4][b] Plaintiff Bears Burden of Proving Jurisdiction. Though the defendant is the moving party on a motion to dismiss, the plaintiff bears the burden of establishing that jurisdiction exists [*Rio Props., Inc. v. Rio Int'l Interlink (9th Cir 2002) 284 F3d 1007, 1019*]. In effect, the court presumes lack of jurisdiction unless the asserting party can prove otherwise [*Kokkonen v. Guardian Life Ins. Co. of Am. (1994) 511 US 375, 377, 114 S Ct 1673, 128 L Ed2d 391* ; *Stock West, Inc. v. Confederated Tribes (9th Cir 1989) 873 F2d 1221, 1225*]. Thus, the plaintiff must affirmatively and distinctly show in his or her pleading the existence of whatever is essential to federal jurisdiction. If the plaintiff fails to do so, the court must dismiss the case unless the defect can be corrected by amending the complaint

[*Smith v. McCullough (1926) 270 US 456, 459, 46 S Ct 338, 70 L Ed 682* ; *Tosco Corp. v. Communities for a Better Env't (9th Cir 2001) 236 F3d 495, 499*].

8.17[4][c] Evidentiary Hearing Is Required If Motion Raises Disputed Factual Issues. In determining a motion to dismiss under *Fed R Civ P 12(b)(1)*, the district court is free to hear evidence regarding jurisdiction and to resolve factual disputes in determining whether it has jurisdiction over a claim [*Steen v. John Hancock Mut. Life Ins. Co. (9th Cir 1997) 106 F3d 904, 910*]. Moreover, with a factual attack under *Fed R Civ P 12(b)(1)*, the court may look beyond the complaint to extrinsic evidence without converting the motion into one for summary judgment [*Corrie v. Caterpillar (9th Cir 2007) 503 F3d 974, 980* (court may expand its review in Rule 12(b)(1) motion and "rely on affidavits or any other evidence properly before the court"); *White v. Lee (9th Cir 2000) 227 F3d 1214, 1242* (considering matters of public record)].

Distinguish:

The court may not resolve genuinely disputed facts if the question of jurisdiction is dependent on resolution of factual issues going to the merits [*see Safe Air v. Meyer (9th Cir 2004) 373 F3d 1035, 1039-1040*]. For example, the question of jurisdiction and the merits of an action are intertwined when a statute provides the basis for both the subject matter jurisdiction and the plaintiff's substantive claim for relief [*Safe Air v. Meyer (9th Cir 2004) 373 F3d 1035, 1039-1040*]. When jurisdiction is so intertwined with the merits that resolution of the jurisdictional issue depends on resolution of the merits, the trial court must employ the standard applicable to a motion for summary judgment [*Safe Air v. Meyer (9th Cir 2004) 373 F3d 1035, 1040*].

Despite this general rule, a suit may be dismissed for lack of subject matter jurisdiction if the claim under the Constitution or federal statutes clearly appears to be immaterial and made only to obtain jurisdiction, or when the claim is "wholly insubstantial and frivolous" [*Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean Geological Formation (9th Cir 2008) 524 F3d 1090, 1094* ; *Elliott v. San Francisco Residential Rent Stabilization and Arbitration Board (ND Cal 2008) 2008 US Dist LEXIS 67670, at *7-*8]* .

Example:

Plaintiff interstate natural gas pipeline company's claim seeking condemnation of defendant petroleum corporations' gas production wells located within the boundaries of plaintiff's storage reservoirs and alleged causing loss of stored natural gas was not so immaterial, insubstantial, or frivolous on its face as to defeat federal jurisdiction [*Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean Geological Formation (9th Cir 2008) 524 F3d 1090, 1096]* .

Cross Reference:

Standard applicable to motions for summary judgment, see Ch. 29, Summary Judgment, see *§§ 29.26 -29.29*.

8.17[4][d] Court May Permit Amendment of Complaint to Remedy Jurisdictional Allegations Defective As to Form. If the plaintiff fails to establish jurisdiction, the court must dismiss the case unless the defect can be corrected by amending the complaint [*Smith v. McCullough (1926) 270 US 456, 459, 46 S Ct 338, 70 L Ed 682* ; *Tosco Corp. v. Communities for a Better Env't (9th Cir 2001) 236 F3d 495, 499*]. Defective allegations of jurisdiction may be amended in either the trial or appellate courts if the defect may be cured by amendment [*see 28 USC § 1653*; *Blue Ridge Ins. Co. v. Stanewich (9th Cir 1998) 142 F3d 1145, 1148*]. To that end, the court may require a plaintiff to submit additional affidavits with respect to the citizenship of the parties in order to avoid dismissal for lack of subject matter jurisdiction [*Blue Ridge Ins. Co. v. Stanewich (9th Cir 1998) 142 F3d 1145, 1148*].

8.17[4][e] Dismissal for Lack of Subject Matter Jurisdiction Is Without Prejudice and Has No Res Judicata Effect. A dismissal for lack of subject matter jurisdiction under *Fed R Civ P 12(b)(1)* is not an adjudication on the

merits [*Frigard v. United States (9th Cir 1988) 862 F2d 201, 204 , cert. denied, 490 US 1098 (1989)*]. Therefore, dismissals for lack of jurisdiction typically are without prejudice, so that the plaintiff may reassert his or her claims in a competent court [*Freeman v. Oakland Unified Sch. Dist. (9th Cir 1999) 179 F3d 846, 847*].

8.17[5] Challenge Jurisdiction in Diversity Cases Based on Amount in Controversy.

8.17[5][a] Attack Based on Failure to Meet Minimum Jurisdictional Amount. A defendant may challenge diversity jurisdiction under *Fed R Civ P 12(b)(1)* on the basis that the amount in controversy falls below the minimum jurisdictional amount for bringing suit in federal court [*see Tosco Corp. v. Communities for a Better Env't (9th Cir 2001) 236 F3d 495, 499-502* ; *28 USC § 1332(a)(1)*].

Generally, the amount in controversy must exceed $75,000, exclusive of interest and costs [*28 USC § 1332(a)*].

Exception:

In a multistate class action subject to the modified diversity requirements of the Class Action Fairness Act of 2005, the aggregated amount in controversy must exceed $5 million, exclusive of interests and costs [*28 USC § 1332(d)*].

Cross Reference:

Discussion of diversity jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.10 -2.25*.

8.17[5][b] Determining Amount in Controversy From Face of Complaint. In general, the sum of the damages averred on the face of the complaint determines the amount in controversy [*Crum v. Circus Circus Enters. (9th Cir 2000) 231 F3d 1129, 1131*]. The sum claimed by the plaintiff controls as long as the claim is made in good faith. To justify dismissal, it must appear to a legal certainty that the claim is really for less than the jurisdictional amount [*Crum v. Circus Circus Enters. (9th Cir 2000) 231 F3d 1129, 1131*].

8.17[6] Challenge Subject Matter Jurisdiction Based on Lack of Diversity of Citizenship.

8.17[6][a] Attacking Diversity of Citizenship. A defendant may challenge diversity jurisdiction under *Fed R Civ P 12(b)(1)* on the basis that the parties to the action lack diversity of citizenship [*see 28 USC §§ 1331, 1332; Tosco Corp. v. Communities for a Better Env't (9th Cir 2001) 236 F3d 495, 499*]. A federal court generally has subject matter jurisdiction over an action only when there is complete diversity of citizenship between the parties [*Tosco Corp. v. Communities for a Better Env't (9th Cir 2001) 236 F3d 495, 499* ; *see 28 USC §§ 1331, 1332(a)*].

Exception:

In a class action subject to the modified diversity requirements of the Class Action Fairness Act of 2005, diversity of citizenship is required only between any member of a plaintiff class and any defendant [*28 USC § 1332(d)*].

Complete diversity exists between citizens of different states, between citizens of a state and subjects of a foreign state, between citizens of different states when subjects of a foreign state are additional parties, and between a foreign state as plaintiff and citizens of a state or of different states [*see 28 USC § 1332*]. In short, subject matter jurisdiction based on diversity of citizenship requires that no defendant have the same citizenship as any plaintiff [*Tosco Corp. v. Communities for a Better Env't (9th Cir 2001) 236 F3d 495, 499* ; *see 28 USC § 1332*].

Cross References:

Amount in controversy requirement, see *§ 8.17[5]*. Diversity jurisdiction generally, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.10 -2.25*.

8.17[6][b] Plaintiff Bears Burden of Establishing Diversity of Citizenship. When the defendant challenges subject matter jurisdiction on the basis of lack of diversity of citizenship, the plaintiff bears the burden of establishing complete diversity in order to survive the motion [*Tosco Corp. v. Communities for a Better Env't (9th Cir 2001) 236 F3d 495, 499*].

8.17[6][c] Dismissing Nondiverse Parties to Preserve Jurisdiction. A plaintiff may seek a court order to dismiss a dispensable party to achieve complete diversity [*see Galt G/S v. JSS Scandinavia (9th Cir 1998) 142 F3d 1150, 1154* ; *see Newman-Green, Inc. v. Alfonzo-Larrain (1989) 490 US 826, 837-838, 109 S Ct 2218, 104 L Ed2d 893*]. The court has the power to dismiss a dispensable party whose presence prevents complete diversity jurisdiction [*Galt G/S v. JSS Scandinavia (9th Cir 1998) 142 F3d 1150, 1154* ; *see Newman-Green, Inc. v. Alfonzo-Larrain (1989) 490 US 826, 837-838, 109 S Ct 2218, 104 L Ed2d 893* (court of appeals has same authority as district courts to dismiss dispensable parties to effect complete diversity); *Fed R Civ P 21* (misjoinder of parties not grounds for dismissal of action)]. Dispensable parties may be dropped or added by court order on motion of any party, or on the court's own initiative, at any stage of the action and on any just terms [*see Newman-Green, Inc. v. Alfonzo-Larrain (1989) 490 US 826, 109 S Ct 2218, 104 L Ed2d 893*].

Cross Reference:

Joinder of parties, see Ch. 10, Adding, Dropping, and Substituting Parties, see *§§ 10.04 -10.09*.

8.17[7] Challenge Jurisdiction Based on Lack of Federal Question. A defendant may challenge subject matter jurisdiction based on lack of a federal question under *Fed R Civ P 12(b)(1)* [*see 28 USC § 1331*]. Federal courts possess federal question jurisdiction over any civil action arising under the United States Constitution, laws, or treaties [*see 28 USC § 1331*]. A court has federal question jurisdiction over a claim if (1) federal law creates the claim for relief; (2) the plaintiff's state law claims should be recharacterized as federal claims under the artful pleading doctrine; or (3) a state law claim necessarily turns on the construction of a substantial, disputed federal question [*Rains v. Criterion Sys., Inc. (9th Cir 1996) 80 F3d 339, 343* ; *Pickern v. Best W. Timber Cove Lodge Marina Resort (ED Cal 2002) 194 F Supp2d 1128, 1130-1131* ; *see 28 USC § 1331*].

To determine whether a federal question is presented, a court must examine the literal language of the complaint, as well as whether federal jurisdiction would exist under a properly pleaded complaint [*Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, Inc. (9th Cir 1998) 159 F3d 1209, 1212* ; *Wyatt v. Liljenquist (CD Cal 2000) 96 F Supp2d 1062, 1063*].

Jurisdictional dismissals in cases premised on federal question jurisdiction are exceptional [*Sun Valley Gasoline, Inc. v. Ernst Enters., Inc. (9th Cir 1983) 711 F2d 138, 140*]. The court may dismiss a federal question claim for lack of subject matter jurisdiction only if the claim appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction, or if the claim is wholly insubstantial and frivolous [*Sun Valley Gasoline, Inc. v. Ernst Enters., Inc. (9th Cir 1983) 711 F2d 138, 140* ; *Association of Am. Med. Colls. v. United States (9th Cir 2000) 217 F3d 770, 784, n9*]. The claim must also be ripe for review before courts will exercise jurisdiction [*Association of Am. Med. Colls. v. United States (9th Cir 2000) 217 F3d 770, 784, n9*].

Distinguish:

A statutory limitation on coverage under a federal statute may be an element of a plaintiff's claim for relief as opposed to a jurisdictional issue. For example, the 15-employee requirement [*see 42 USC § 2000e(b)*] for coverage of Title VII claims is not a jurisdictional issue whereas the amount-in-controversy threshold [*see 28 USC § 1332*] is an ingredient of subject-matter jurisdiction in diversity-of-citizenship jurisdiction [*Arbaugh v. Y & H Corp. (2006) 546 US 500, 126 S Ct 1235, 163 L Ed 2d 1097, 1110-1111*].

Cross Reference:

Federal question jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.03 -2.09*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral Overview

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1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.18

8.18 Motion to Dismiss for Lack of Personal Jurisdiction.

8.18[1] Raising Lack of Personal Jurisdiction.

8.18[1][a] Due Process Considerations. A motion to dismiss for lack of personal jurisdiction under *Fed R Civ P 12(b)(2)* challenges whether the court has authority to render a judgment commanding the defendant's personal obedience or imposing obligations on the defendant that are enforceable by other courts [*see Burnham v. Superior Court (1990) 495 US 604, 609-610, 110 S Ct 2105, 109 L Ed2d 631*].

To exercise personal jurisdiction over a nonresident defendant in a case presenting a federal question, the district court must first determine that a rule or statute potentially confers jurisdiction over the defendant and then must conclude that asserting jurisdiction does not offend the principles of *Fifth Amendment* due process [*International Shoe Co. v. Washington (1945) 326 US 310, 316, 66 S Ct 154, 90 L Ed 95* ; *Doe v. Unocal Corp. (9th Cir 2001) 248 F3d 915, 921-922*]. In diversity cases, a federal court has powers of personal jurisdiction only as broad as the courts of the state in which it sits [*Abrams Shell v. Shell Oil Co. (CD Cal 2001) 165 F Supp2d 1096, 1104* ; *see Fed R Civ P 4(k)(1)*]. In California, a court may exercise jurisdiction on any basis not inconsistent with the state or federal constitutions [*CCP § 410.10*]. Thus, federal courts in California may exercise jurisdiction to the fullest extent permitted by due process [*Fields v. Sedgwick Associated Risks, Ltd. (9th Cir 1986) 796 F2d 299, 301* ; *Abrams Shell v. Shell Oil Co. (CD Cal 2001) 165 F Supp2d 1096, 1104*]. In addition, due process requires that the nonresident have certain minimum contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice [*Terracom v. Valley Nat'l Bank (9th Cir 1995) 49 F3d 555, 559* ; *Starlight Int'l, LTD. v. Lifeguard Health, LLC (ND Cal 2008) 2008 US Dist LEXIS 58927, at *6-*10]* .

Cross References:

Exercising personal jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.31 -2.41*. Form of motion to dismiss for lack of personal jurisdiction, see *§ 8.34*.

8.18[1][b] Avoid Waiver by Promptly Raising Defense. A defendant must assert the defense of lack of personal jurisdiction in a motion to dismiss, or in the first responsive pleading, or it is waived [*see Fed R Civ P 12(h)(1)*;

Abrams Shell v. Shell Oil Co. (CD Cal 2001) 165 F Supp2d 1096, 1103]. Thus, a defendant who files a preanswer motion to dismiss but fails to raise the defense of lack of personal jurisdiction waives the omitted defense and cannot subsequently raise it in an answer or otherwise [*see Chilicky v. Schweiker (9th Cir 1986) 796 F2d 1131, 1136 , rev'd on other grounds, 487 US 412 (1988)*].

Warning:

A defendant does not preserve an objection under *Fed R Civ P 12(b)(2)* by asserting a defense of insufficient process or insufficient service of process under *Fed R Civ P 12(b)(4)* or *Fed R Civ P 12(b)(5)*, which were not designed to challenge personal jurisdiction [*Chilicky v. Schweiker (9th Cir 1986) 796 F2d 1131, 1136 , rev'd on other grounds, 487 US 412 (1988)*].

Cross Reference:

Defenses of insufficient process or service of process, see *§ 8.20*.

8.18[1][c] Avoid Waiver by Properly Pressing Defense. Raising lack of personal jurisdiction in an answer and subsequently failing to further press the issue may constitute waiver. Lack of personal jurisdiction may be waived by submitting to process or jurisdiction by filing a responsive pleading, by stipulation, or by other conduct [*see, e.g., Petrowski v. Hawkeye-Security Ins. Co. (1956) 350 US 495, 496-497, 76 S Ct 490, 100 L Ed 639* (liability insurer waived right to assert lack of personal jurisdiction by stipulating to submit to jurisdiction of court without personal service)]. The defense may also be waived as a result of a course of conduct pursued by a defendant during litigation [*Peterson v. Highland Music, Inc. (9th Cir 1998) 140 F3d 1313, 1318 , cert. denied, 525 US 983 (1998)*].

Example:

Seeking affirmative relief on a counterclaim before pressing the jurisdictional challenge may waive the personal jurisdiction issue [*see Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1037-1038* (party in consolidated action cannot bring claims mandating filing of counterclaims, then attack personal jurisdiction when judgment is entered against party on counterclaims)].

Distinguish:

A defendant does not waive a challenge to personal jurisdiction by removing a case to federal court alone [*see, e.g., Fields v. Sedgwick Associated Risks, Ltd. (9th Cir 1986) 796 F2d 299, 300-301* (motion to quash and to dismiss in state court did not waive jurisdictional objection in removed action since defendant timely objected to personal jurisdiction in federal court)].

Cross Reference:

Removal generally, see Ch. 3, Removing a State Court Case to Federal Court.

8.18[1][d] Submit Evidence Outside Pleadings. Either party may present sworn affidavits and declarations in addition to the pleadings for the court's consideration in determining whether it has personal jurisdiction over the defendant [*see Doe v. Unocal Corp. (9th Cir 2001) 248 F3d 915, 922* (court may consider evidence presented in affidavits and declaration in determining personal jurisdiction)].

8.18[1][e] Request Court Authorization of Jurisdictional Discovery. Either party may request that the court permit discovery to aid in determining whether it has personal jurisdiction when pertinent facts bearing on the question of jurisdiction are controverted, or when a more satisfactory showing of the facts is necessary [*see Data Disc, Inc. v. Systems Tech. Assocs., Inc. (9th Cir 1977) 557 F2d 1280, 1285 n1 ; Doe v. Unocal Corp. (9th Cir 2001) 248 F3d 915, 922*].

Cross Reference:

Motions for discovery generally, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§§ 22.14 -22.34*.

8.18[1][f] Request Evidentiary Hearing When Evidence Presents Disputed Facts or Credibility Issues. Either party may request that the court hold an evidentiary hearing when the pleadings and other written materials submitted to the court raise issues of credibility or disputed questions of fact with regard to whether the court has personal jurisdiction [*see Data Disc, Inc. v. Systems Tech. Assocs., Inc. (9th Cir 1977) 557 F2d 1280, 1285* (district court has discretion to take evidence at preliminary hearing to resolve contested jurisdictional issues)].

8.18[2] Court Determination of Motion.

8.18[2][a] Plaintiff Bears Burden of Establishing Personal Jurisdiction. The plaintiff bears the burden of establishing the district court's personal jurisdiction over the defendant [*Mattel, Inc. v. Greiner & Hausser GmbH (9th Cir 2003) 354 F3d 857, 862*]. The quantum of proof required to meet that burden may vary, depending on the nature of the proceeding and the type of evidence the court permits the plaintiff to present [*Data Disc, Inc. v. Systems Tech. Assocs., Inc. (9th Cir 1977) 557 F2d 1280, 1285*].

8.18[2][b] Plaintiff Must Make Prima Facie Showing When Motion Is Based on Written Materials. If the court determines that it will receive only written materials, so that it holds no evidentiary hearing, the plaintiff need only make a prima facie showing of the jurisdictional facts through their pleadings and affidavits [*Data Disc, Inc. v. Systems Tech. Assocs., Inc. (9th Cir 1977) 557 F2d 1280, 1285* ; *Mattel, Inc. v. Greiner & Hausser GmbH (9th Cir 2003) 354 F3d 857, 862*]. The materials may consist of the pleadings, declarations, affidavits, deposition testimony, exhibits, or other evidence [*see Omeluk v. Langsten Slip & Batbyggeri A/S (9th Cir 1995) 52 F3d 267, 268*].

Though the plaintiff cannot simply rest on the bare allegations of the complaint, the court must take uncontroverted allegations in the complaint as true [*Dole Food Co. v. Watts (9th Cir 2002) 303 F3d 1104, 1108*]. The court will resolve conflicts between the facts contained in the parties' affidavits in the plaintiff's favor for purposes of deciding whether a prima facie case for personal jurisdiction exists [*Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd. (9th Cir 2003) 328 F3d 1122, 1129*].

Even when the plaintiff avoids a preliminary motion to dismiss by making a prima facie showing of jurisdictional facts, the plaintiff must still prove the jurisdictional facts at trial by a preponderance of the evidence [*Data Disc, Inc. v. Systems Tech. Assocs., Inc. (9th Cir 1977) 557 F2d 1280, 1285 n2*].

8.18[2][c] Plaintiff Must Make Preponderance Showing If Court Holds Evidentiary Hearing. If the pleadings and other submitted materials raise issues of credibility or disputed questions of fact with regard to jurisdiction, the district court has discretion to take evidence at a preliminary hearing to resolve the contested issues [*Data Disc, Inc. v. Systems Tech. Assocs., Inc. (9th Cir 1977) 557 F2d 1280, 1285*]. In this situation, the plaintiff is put to full proof and must establish the jurisdictional facts by a preponderance of the evidence, just as he or she would have to do at trial [*Data Disc, Inc. v. Systems Tech. Assocs., Inc. (9th Cir 1977) 557 F2d 1280, 1285* ; *see, e.g., Spacey v. Burgar (CD Cal 2001) 207 F Supp2d 1037, 1042* (preponderance showing required after court held evidentiary hearing on personal jurisdiction issues)].

8.18[2][d] Court May Authorize Jurisdictional Discovery. The court may grant discovery if pertinent facts bearing on the question of jurisdiction are controverted, or if a more satisfactory showing of the facts is necessary. In granting or denying discovery, the trial court is vested with broad discretion. Its decision will not be reversed except on the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant [*Data Disc, Inc. v. Systems Tech. Assocs., Inc. (9th Cir 1977) 557 F2d 1280, 1285 n1*].

Cross Reference:

Scope of discovery generally, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and

Work Product Protection.

8.18[2][e] Dismissal for Lack of Personal Jurisdiction Is Not on the Merits and Is Without Prejudice. In general, dismissal for lack of personal jurisdiction is not on the merits, and thus is without prejudice to refiling the action in a court of proper jurisdiction [*see Grigsby v. CMI Corp. (9th Cir 1985) 765 F2d 1369, 1372 n5* (court erred in dismissing with prejudice plaintiff's suit for lack of personal jurisdiction); *but see Park v. Oxford Univ. (ND Cal 1997) 35 F Supp2d 1165, 1168 , aff'd, 165 F3d 917 (9th Cir 1998)* (court dismissed suit with prejudice for lack of personal jurisdiction because plaintiff's claim arose out of expulsion from a British university, and it appeared there was no way for plaintiff to establish claim arose out of the university's activities in California)].

8.18[2][f] Court May Transfer Rather Than Dismiss Action. Instead of dismissing an action when it lacks personal jurisdiction, a district court may transfer the action to the appropriate federal court, even though it lacks personal jurisdiction over the defendants, if dismissal would unjustly deny the plaintiff adjudication on the merits [*see Goldlawr, Inc. v. Heiman (1962) 369 US 463, 466-467, 82 S Ct 913, 8 L Ed2d 39* (district court may transfer action under *28 USC § 1406(a)*)]. However, transfer is only proper if it is in the interest of justice [*see Wood v. Santa Barbara Chamber of Commerce, Inc. (9th Cir 1983) 705 F2d 1515, 1523 , cert. denied, 465 US 1081 (1984)* (justice not served by transferring plaintiff's claims back to jurisdiction he purposefully sought to avoid through blatant forum shopping)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
IV. PREPARING MOTION TO DISMISS

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.19

8.19 Motion to Dismiss for Improper Venue.

8.19[1] Challenge Improper Venue.

8.19[1][a] Move to Dismiss Before Filing Responsive Pleading. A defendant may challenge improper venue by asserting a motion to dismiss for improper venue under *Fed R Civ P 12(b)(3)* before filing a responsive pleading. The motion requires the court to decide whether venue is proper in the district in which the plaintiff filed suit. When venue in a particular judicial district is improper, the court must dismiss the action [*28 USC § 1406(a)*; *Abrams Shell v. Shell Oil Co. (CD Cal 2001) 165 F Supp2d 1096, 1102*]. Or if the court finds that it is in the interests of justice, it may transfer the case to any district or division in which it could have been brought [*see 28 USC § 1406(a)*].

Distinguish:

A motion to dismiss based on forum non conveniens is not the same as a motion to dismiss for improper venue. Under the forum non conveniens doctrine, a court has discretion to dismiss a case even if jurisdiction and venue are proper [*American Dredging Co. v. Miller (1994) 510 US 443, 448, 114 S Ct 981, 127 L Ed2d 285*]. The doctrine of forum non conveniens is based on the inconvenience of the chosen venue, not the impropriety of venue under federal statutes [*American Dredging Co. v. Miller (1994) 510 US 443, 448-449, 114 S Ct 981, 127 L Ed2d 285*]. The forum non conveniens doctrine does not apply unless venue is proper [*see 28 USC § 1404*].

Unless an action is brought under a statute specifically providing for venue, the proper venue for an action in federal court is determined under the general venue statute [*see 28 USC § 1391*]. The general venue statute governs venue in actions in which federal jurisdiction is based solely on diversity [*see 28 USC § 1391(a)*], and in which federal jurisdiction is not based solely on diversity [*see 28 USC § 1391(b)*]. In addition, the general venue statute provides for venue in actions brought against a corporation, a foreign citizen, an alien, a federal employee or agency, or a foreign state [*see 28 USC § 1391(c)-(f)*]. The statute also prescribes venue in multiparty actions based on minimal diversity [*see 28 USC §§ 1369, 1391(g)*].

Cross References:

Venue and forum non conveniens generally, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.48 -2.60*. Form of motion to dismiss for improper venue, see *§ 8.35*.

8.19[1][b] Motion Is Proper for Enforcing Forum Selection Clause. In the Ninth Circuit, a motion to dismiss based on a forum selection clause is treated as a motion to dismiss for improper venue under *Fed R Civ P 12(b)(3)* [*see, e.g., American Home Assurance Co. v. TGL Container Lines, Ltd. (ND Cal 2004) 347 F Supp2d 749*]. Thus, in determining the motion to dismiss, the court need not accept the pleadings as true, and may properly consider facts outside the pleadings [*Argueta v. Banco Mexicano, S.A. (9th Cir 1996) 87 F3d 320, 324*]. Nonetheless, the trial court must draw all reasonable inferences and resolve all factual conflicts in favor of the non-moving party [*Murphy v. Schneider Nat'l, Inc. (9th Cir 2004) 362 F3d 1133, 1138*].

Other circuits are split concerning the appropriate vehicle for a motion to dismiss based on enforcement of a forum selection clause [*see Kerobo v. Southwestern Clean Fuels, Corp. (6th Cir 2002) 285 F3d 531, 534-536* (noting circuit split as to whether motion to dismiss based on forum selection clause should be brought under *Fed R Civ P 12(b)(3)* or *Fed R Civ P 12(b)(6)*)]. Some circuits treat motions to enforce a forum selection clause as motions to dismiss for failure to state a claim on which relief can be granted under *Fed R Civ P 12(b)(6)* [*see, e.g., Silva v. Encyclopedia Britannica Inc. (1st Cir 2001) 239 F3d 385, 387-388* ; *Salovaara v. Jackson Nat'l Life Ins. Co. (3d Cir 2001) 246 F3d 289, 298-299*]. The distinction is important because it affects whether and at what point the defense is waivable, which party bears the burden of proof on the motion, and what standards must be applied by the court in determining the motion.

Cross References:

Forum selection and enforcement generally, see Ch. 2, Determining Forum (Jurisdiction and Venue).

Discussion of the split in authority, see 17 *Moore's Federal Practice, § 111.04[b]* (Matthew Bender 3d ed.).

8.19[1][c] Avoid Waiving Objection to Venue. A defendant must assert the defense of improper venue as part of the first responsive pleading, or as a separate motion to dismiss as a first response to the plaintiff's complaint, or the objection is waived [*King v. Russell (9th Cir 1992) 963 F2d 1301, 1305* , *cert. denied, 507 US 913 (1993)* ; *Abrams Shell v. Shell Oil Co. (CD Cal 2001) 165 F Supp2d 1096, 1102* ; *see Fed R Civ P 12(b), (h)(1)*]. Waiver may also occur through the defendant's conduct during pendency of the action [*see, e.g., Commercial Cas. Ins. Co. v. Consolidated Stone Co. (1929) 278 US 177, 49 S Ct 98, 73 L Ed 252*].

Distinguish:

A defendant does not waive the right to object to venue merely by removing the case from state to federal court [*see Tokio Marine & Fire Ins. Co. v. Nippon Express U.S.A., Inc. (CD Cal 2000) 118 F Supp2d 997, 999-1000* ; *Tanzman v. Midwest Exp. Airlines, Inc. (SD Cal 1996) 916 F Supp 1013, 1018*].

Cross References:

Waiver of right to object to venue generally, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§ 2.58*. Effect of removal, see Ch. 3, Removing a State Court Case to Federal Court.

8.19[1][d] Combine Motion With Motion to Transfer. A defendant may combine a motion to dismiss for improper venue under *Fed R Civ P 12(b)(3)* with a motion to transfer for improper venue pursuant to *28 USC § 1406(a)*. Counsel may also combine a motion to dismiss for improper venue with a motion to transfer for convenience under *28 USC § 1404(a)*, as an alternative to be considered by the court should it find the case is properly venued [*see, e.g., Injen Tech. Co. v. Advanced Engine Mgmt., Inc. (SD Cal 2003) 270 F Supp2d 1189, 1192*].

Cross: Reference:

Venue and forum selection generally, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.48 -2.60*.

8.19[1][e] Submit Supplemental Written Materials in Support of Motion. Counsel may submit written materials outside of the pleadings, such as sworn affidavits and exhibits, for the court to consider in ruling on a motion to dismiss for improper venue [*see Argueta v. Banco Mexicano, S.A. (9th Cir 1996) 87 F3d 320, 324* ; *Murphy v. Schneider Nat'l, Inc. (9th Cir 2004) 362 F3d 1133, 1137*]. Submitting written materials does not transform the motion to dismiss into a motion for summary judgment [*Argueta v. Banco Mexicano, S.A. (9th Cir 1996) 87 F3d 320, 324*].

Cross Reference:

Motions for summary judgment, see Ch. 29, Summary Judgment, see *§§ 29.03 -29.13*.

8.19[1][f] Request Discovery to Resolve Disputed Issues of Fact. Either party may request leave to conduct discovery on factual issues related to the motion to dismiss for improper venue [*see Hayashi v. Red Wing Peat Corp. (9th Cir 1968) 396 F2d 13, 14*]. The court should grant discovery when it would be useful in resolving issues of fact presented by the motion [*Hayashi v. Red Wing Peat Corp. (9th Cir 1968) 396 F2d 13, 14*].

Cross Reference:

Discovery motions generally, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§§ 22.14 -22.34*.

8.19[1][g] Request Evidentiary Hearing to Resolve Conflicts in Evidence. If the motion to dismiss for improper venue raises genuine factual issues, either party may request that the court hold motion in abeyance until it holds an evidentiary hearing on the disputed facts [*see Fed R Civ P 12(i)*; *Murphy v. Schneider Nat'l, Inc. (9th Cir 2004) 362 F3d 1133, 1139-1140* (permitting hearing in context of forum selection clause enforcement)].

8.19[1][h] Plaintiff Bears Burden of Proof. The rule in the Ninth Circuit as to who bears the burden of proof on venue is unclear. District courts in the Ninth Circuit have held that the plaintiff bears the burden of establishing that the venue he or she originally selected is proper [*Nissan Motor Co. v. Nissan Computer Corp. (CD Cal 2000) 89 F Supp2d 1154, 1161 , aff'd, 246 F3d 675 (9th Cir 2000)* (although there is some disagreement, most courts hold that the plaintiff bears the burden of establishing proper venue); *see Koresko v. Realnetworks, Inc. (ED Cal 2003) 291 F Supp2d 1157, 1160* ; *cf. Piedmont Label Co. v. Sun Garden Packing Co. (9th Cir 1979) 598 F2d 491, 496* (plaintiff has burden of showing venue is proper in motion for summary judgment based on improper venue)].

However, the Northern District has placed the burden of proof on the defendants. For example, a judge determined the burden to be on the defendant after finding no Ninth Circuit authority on the issue, and based on a conclusion that in any event, the defendant's forum non conveniens motion to transfer under *28 USC § 1404(a)* was proper [*Carolina Cas. Co. v. Data Broad. Corp. (ND Cal 2001) 158 F Supp2d 1044, 1047*]. Another judge has noted that the "burden to prove venue is generally and properly placed on defendant, as the doctrine protects defendant's privilege to avoid litigation in inconvenient forums" [Dudash v. Varnell Struck & Assocs. (ND Cal 2004) 2004 US Dist LEXIS 24872, at *6].

There is a split of authority among the other circuits on this issue, with several circuits holding that the moving party bears the burden of establishing that venue is improper [*see, e.g., Myers v. American Dental Ass'n (3d Cir 1982) 695 F2d 716, 724 , cert. denied, 462 US 1106 (1983)* ; *Simon v. Ward (ED Pa 2000) 80 F Supp2d 464, 466-468* ; *In re Peachtree Lane Assocs., Ltd. (7th Cir 1998) 150 F3d 788, 794*].

Strategic Point--Defendant:

Because of the uncertainty regarding the burden of proof, counsel should assume that he or she has the burden of establishing that venue is improper. If the defendant fails to make a prima facie showing that venue is improper, it is likely that the judge will deny the motion without addressing the burden issue. If the defendant makes a prima facie showing that venue is improper, then the court is likely to shift the burden to the plaintiff to establish that venue is proper.

Cross Reference:

Split of authority on burden of proof on determining motions to dismiss for improper venue, see 17 *Moore's Federal Practice, § 110.01[5][c]* (Matthew Bender 3d ed.).

8.19[2] Court Will Transfer or Dismiss Action If Venue Is Improper. If the court finds that the plaintiff has commenced the action in a district in which venue is not proper, the court will transfer or dismiss the action [*Abrams Shell v. Shell Oil Co. (CD Cal 2001) 165 F Supp2d 1096, 1103* ; *see 28 USC § 1406(a)*]. A dismissal for improper venue is not on the merits and does not preclude refiling the action in another forum where venue is proper [*see Fed R Civ P 41(b)*; *Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V. (9th Cir 1997) 114 F3d 848, 850*].

Transfer is proper when the court finds it to be in the interest of justice [*see 28 USC § 1406(a)*; *Abrams Shell v. Shell Oil Co. (CD Cal 2001) 165 F Supp2d 1096, 1103*]. Generally, it is preferable to transfer the case rather than to dismiss it altogether [*Abrams Shell v. Shell Oil Co. (CD Cal 2001) 165 F Supp2d 1096, 1103*].

Strategic Point--Plaintiff:

A plaintiff combating a motion to dismiss for improper venue should consider including in opposition papers a request for transfer in lieu of dismissal should the court find venue improper [*see Johnson v. Payless Drug Stores NW, Inc. (9th Cir 1991) 950 F2d 586, 588 , cert. denied, 505 US 1225 (1992)* (court did not abuse discretion in dismissing action without prejudice rather than transferring it to appropriate venue because plaintiff did not ask for transfer and actively avoided it)].

A court may not transfer an action for improper venue unless it has subject matter jurisdiction [*Abrams Shell v. Shell Oil Co. (CD Cal 2001) 165 F Supp2d 1096, 1103*]. Moreover, it is only proper to transfer venue to a court where the case originally could have been brought. In other words, the transferee court must have proper subject matter jurisdiction, must have proper venue, and must be able to exercise personal jurisdiction [*Abrams Shell v. Shell Oil Co. (CD Cal 2001) 165 F Supp2d 1096, 1103* ; *see 28 USC § 1406(a)*].

Distinguish:

The transferor court need not have personal jurisdiction over the defendant to order transfer. The court may order the case transferred so that personal jurisdiction can be established in the transferee court [*Abrams Shell v. Shell Oil Co. (CD Cal 2001) 165 F Supp2d 1096, 1103* ; *see Goldlawr, Inc. v. Heiman (1962) 369 US 463, 466-467, 82 S Ct 913, 8 L Ed2d 39*].

When the proper venue is in a foreign country, the district court lacks authority to transfer the action and must dismiss it if venue is improper [SeeComm Network Servs. Corp. v. Colt Telecomms. (ND Cal 2004) 2004 US Dist LEXIS 18049, at *6].

Strategic Point--Defendant:

If a motion to dismiss for improper venue is denied, and no motion for transfer under *28 USC § 1404(a)* for the convenience of the parties and witnesses, and in the interests of justice, was submitted, the court *sua sponte* may order such a transfer [*see* Dudash v. Varnell Struck & Assocs. (ND Cal 2004) 2004 US

Dist LEXIS 24872, at *12].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
IV. PREPARING MOTION TO DISMISS

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.20

8.20 Motion to Dismiss for Insufficient Process or Service of Process.

8.20[1] Challenge Sufficiency of Process or Service of Process.

8.20[1][a] File Rule 12(b)(4) or 12(b)(5) Motion. A defendant may challenge the sufficiency of the summons, or the sufficiency of its service, by filing a motion to dismiss under *Fed R Civ P 12(b)(4)* or *Fed R Civ P 12(b)(5)*, respectively [*U.S.A. Nutrasource, Inc. v. CNA Ins. Co. (ND Cal 2001) 140 F Supp2d 1049, 1052*].

A motion to dismiss for insufficient process is designed to challenge irregularities in the contents of the summons [*see Fed R Civ P 12(b)(4)*; *Chilicky v. Schweiker (9th Cir 1986) 796 F2d 1131, 1136* , *rev'd on other grounds*, *487 US 412 (1988)*].

A motion to dismiss for insufficient service of process is designed to challenge irregularities in the manner of delivery of the summons and complaint [*see Fed R Civ P 12(b)(5)*; *Chilicky v. Schweiker (9th Cir 1986) 796 F2d 1131, 1136* , *rev'd on other grounds*, *487 US 412 (1988)*]. The motion should point out specifically the manner in which the plaintiff has failed to satisfy applicable summons or service requirements [*see O'Brien v. R.J. O'Brien & Assocs. (7th Cir 1993) 998 F2d 1394, 1400*].

Distinguish--Motion to Quash:

Though federal courts have authority to quash defective service of process as an alternative to dismissing a complaint for defective service, the federal rules technically do not provide for motions to quash. A motion to dismiss under *Fed R Civ P 12(b)(5)* is the correct provision for challenging defective service of process [*see R. Griggs Group Ltd. v. Filanto Spa (D Nev 1996) 920 F Supp 1100, 1102*].

Distinguish--Lack of Service:

A motion to dismiss for insufficient service deals with failures occurring in attempts to serve as opposed to a complete failure to make timely service. Thus, a plaintiff's complete failure to serve should be attacked through a motion to dismiss for lack of personal jurisdiction under *Fed R Civ P 12(b)(2)*.

Cross References:

Requirements for proper summons, see Ch. 6, Drafting the Summons and Complaint, see *§§ 6.18 -6.21*.
Proper service of summons, see Ch. 7, Service of Summons.

8.20[1][b] Dismissals for Technical Defects in Form or Service of Summons Are Disfavored. Counsel should consider that dismissals for defects in the form of summons are generally disfavored. These defects are considered technical, and thus are not grounds for dismissal unless the defendant demonstrates actual prejudice [*U.S.A. Nutrasource, Inc. v. CNA Ins. Co. (ND Cal 2001) 140 F Supp2d 1049, 1052*].

Similarly, a plaintiff's failure to comply with technical rules governing service of process does not necessarily require dismissal of the plaintiff's claims [*see Borzeka v. Heckler (9th Cir 1984) 739 F2d 444, 446* (involving pro se plaintiff)]. For example, dismissal for a plaintiff's failure to comply with personal service requirements on an officer or agency of the United States under *Fed R Civ P 4(d)(5)* is inappropriate if (1) the party to be served received actual notice; (2) the defendant suffers no prejudice from the defect in service; (3) there is a justifiable excuse for the failure to properly serve; and (4) the plaintiff would be severely prejudiced if his or her complaint were dismissed [*Borzeka v. Heckler (9th Cir 1984) 739 F2d 444, 447*].

8.20[1][c] Avoid Waiving Defense of Insufficient Process or Service of Process. To avoid waiving the defense of insufficient process or insufficient service of process, a defendant must assert them in a motion to dismiss or in the initial responsive pleading, if one is required [*see Fed R Civ P 12(b)*]. Both insufficient process and insufficient service of process are waived if omitted from a motion to dismiss, or if not included in the defendant's answer [*see Fed R Civ P 12(g), (h)(1); Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1033*].

Warning:

A plaintiff's failure to follow local rules governing service of process is a basis for objecting to the sufficiency of process or its service. Thus failure to properly object to violations of local rules may result in waiver of a defense under *Fed R Civ P 12(b)(4)* or *Fed R Civ P 12(b)(5)* [*see Hays v. United Fireworks Mfg. Co. (9th Cir 1969) 420 F2d 836, 843-844* (sufficiency of process waived)]. Counsel is therefore advised to become familiar with local rules governing service of process.

Cross References:

Requirements for proper summons, see Ch. 6, Drafting the Summons and Complaint, see *§§ 6.18 -6.21*.
Proper service of summons, see Ch. 7, Service of Summons.

A defendant's conduct during the pendency of the action may also result in waiver of the defense of improper process or service [*see McWherter v. CBI Servs., Inc. (D Haw 1994) 153 FRD 161, 164-165 , aff'd, 105 F3d 665 (9th Cir 1997)* (improper service case)].

Example:

A defendant's full participation in a case for nearly two years before filing its motion to dismiss excused the plaintiff's initial failure of service, since it lulled the plaintiff into believing that service had been accomplished [*see Ditkof v. Owens-Illinois, Inc. (ED Mich 1987) 114 FRD 104, 105*].

8.20[1][d] Submit Supplemental Materials With Motion. Parties may submit supplemental materials with a motion to dismiss under both *Fed R Civ P 12(b)(4)* and *Fed R Civ P 12(b)(5)*. These materials may include sworn affidavits, exhibits, depositions, and even oral testimony. Submission of materials does not convert the motion into one for summary judgment [*see Travelers Cas. & Sur. Co. of Am. v. Telstar Const. Co. (D Ariz 2003) 252 F Supp2d 917, 922-923*].

8.20[2] Court Determination of Motion.

8.20[2][a] Burden Is on Plaintiff to Show Valid Service. The plaintiff carries the burden of establishing that he or she has properly effected service [*see Hilska v. Jones (DDC 2003) 217 FRD 16*]. Similarly, once a party challenges the sufficiency of service under *Fed R Civ P 12(b)(5)*, the party on whose behalf service is made has the burden of establishing its validity [*Hickory Travel Sys. Inc. v. Tui Ag (ND Cal 2003) 213 FRD 547, 550*]. A signed acknowledgment of service is prima facie evidence of valid service [*see O'Brien v. R.J. O'Brien & Assocs. (7th Cir 1993) 998 F2d 1394, 1398*].

8.20[2][b] Court May Conduct Hearing to Determine Contested Issues. When motions to dismiss for insufficient process or insufficient service of process present genuine factual issues, it may be appropriate for the district court to hold the motion in abeyance until it holds an evidentiary hearing on the disputed facts [*see Fed R Civ P 12(i)*].

8.20[2][c] Dismissal Is Without Prejudice. Typically, dismissal for insufficient process or service of process is without prejudice to the plaintiff's ability to refile the case [*see, e.g., McLamb v. United States Dep't of Treasury (SD Cal 1994) 858 F Supp 1042, 1043* (dismissal under *Fed R Civ P 12(b)(5)*)].

8.20[2][d] Court May Dismiss for Improper Service or May Retain and Quash Service. A court may dismiss an action for lack of sufficiency of service of process [*Hickory Travel Sys., Inc. v. Tui Ag (ND Cal 2003) 213 FRD 547, 553* ; *see Fed R Civ P 12(b)(5)*]. However, courts are generally reluctant to dismiss an action based on insufficient service of process, since it is typically without prejudice, and often leads to reinstitution of suit after burdening the plaintiff with additional expense and postponing adjudication of the merits [*see In re Johnston Hawks, Ltd. (Bankr D Haw 1985) 49 BR 823, 828*].

In the alternative, the court may retain jurisdiction but quash service. If there is a chance that the plaintiff still can accomplish service, the latter remedy is preferred [*Hickory Travel Sys., Inc. v. Tui Ag (ND Cal 2003) 213 FRD 547, 553*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
IV. PREPARING MOTION TO DISMISS

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.21

8.21 Motion to Dismiss for Failure to State Claim on Which Relief Can Be Granted.

8.21[1] Challenge Complaint for Failure to State Claim.

8.21[1][a] Consider That Motion Is Disfavored. A motion for failure to state a claim is not a procedure for resolving a contest about the facts or merits of the case [*Neilson v. Union Bank of Cal., N.A. (CD Cal 2003) 290 F Supp2d 1101, 1151*]. Dismissal for failure to state a claim is appropriate only when the plaintiff can prove no set of facts supporting relief [*Guerrero v. Gates (9th Cir 2004) 357 F3d 911, 916*]. Accordingly, the motion is viewed with disfavor and is rarely granted [*Gilligan v. Jamco Dev. Corp. (9th Cir 1997) 108 F3d 246, 249* ; *Gallardo v. DiCarlo (CD Cal 2002) 203 F Supp2d 1160, 1164-1165*].

8.21[1][b] File Motion to Dismiss. A defendant may object to the plaintiff's complaint for failing to state a claim on which relief can be granted by filing a motion to dismiss [*see Fed R Civ P 12(b)(6)*]. The purpose of a motion to dismiss for failure to state a claim under *Fed R Civ P 12(b)(6)* is to test the formal sufficiency of the plaintiff's statement of the claim for relief [*Conley v. Gibson (1957) 355 US 41, 45-46, 78 S Ct 99, 2 L Ed2d 80* ; *Navarro v. Block (9th Cir 2001) 250 F3d 729, 732*].

Cross Reference:

Form, see *§ 8.38*.

8.21[1][c] Bases for Defense. Essentially, a motion to dismiss for failure to state a claim tests the plaintiff's compliance with the liberal pleading requirements of *Fed R Civ P 8(a)(2)* [*Gallardo v. DiCarlo (CD Cal 2002) 203 F Supp2d 1160, 1165* ; *see Fed R Civ P 8(a)(2)*]. Thus, a motion to dismiss for failure to state a claim is appropriate when:

- The complaint lacks a cognizable legal theory [*Navarro v. Block (9th Cir 2001) 250 F3d 729, 732* ; *Balistreri v. Pacifica Police Dep't (9th Cir 1988) 901 F2d 696, 699*];

- The complaint lacks sufficient facts to allege a cognizable legal theory [*Navarro v. Block (9th Cir 2001) 250 F3d 729, 732* ; *Balistreri v. Pacifica Police Dep't (9th Cir 1988) 901 F2d 696, 699*]; or

- An affirmative defense or other bar to relief is apparent from the face of the complaint [*see Groten v. California (9th Cir 2001) 251 F3d 844, 851*].

8.21[1][d] Defenses Under Rule 9(b) Treated As Rule 12(b)(6) Motions. Allegations of fraud and mistake in a complaint must be stated with particularity [*see Fed R Civ P 9(b)*]. In this context, "particularity" means the plaintiff's allegations must be specific enough to give the defendant notice of the particular misconduct alleged to constitute the defense asserted so that the plaintiff can defend against the charge and not just deny that it has done anything wrong [*see Semegen v. Weidner (9th Cir 1985) 780 F2d 727, 731* ; *Wenger v. Lumisys, Inc. (ND Cal 1998) 2 F Supp2d 1231, 1239*].

Though failure to state allegations of fraud or mistake with particularity is not among the defenses set forth in *Fed R Civ P 12(b)*, the Ninth Circuit, in analyzing a motion to dismiss a fraud or mistake claim under Rule 9(b) for failure to plead with particularity, held that the district court properly dismissed the complaint because a Rule 9(b) motion is the equivalent of a motion to dismiss for failure to state a claim under *Fed R Civ P 12(b)(6)* [*see Vess v. Ciba-Geigy Corp. USA (9th Cir 2003) 317 F3d 1097, 1107-1108*].

Strategic Point--Defendant:

Even when the defendant believes that a complaint is deficient only under *Fed R Civ P 9(b)*, the defendant is not limited to serving an answer including the Rule 9(b) defense rather than a motion to dismiss. In the Ninth Circuit, Rule 9(b) defenses may be asserted in either an answer or a motion to dismiss [*see Vess v. Ciba-Geigy Corp. USA (9th Cir 2003) 317 F3d 1097, 1107-1108*].

8.21[1][e] Defense of Failure to State Claim Not Waived by Failure to Assert in Motion or Responsive Pleading. The defense of failure to state a claim is not waived if not asserted in a motion to dismiss, or in the first responsive pleading if a further pleading is permitted [*see Fed R Civ P 12(b)*]. The defense also may be made in a pleading permitted or ordered under *Fed R Civ P 7(a)*, in a motion for judgment on the pleadings, and even at trial on the merits [*see Fed R Civ P 12(h)(2)*].

8.21[1][f] Limited Supplemental Materials May Be Submitted to Court With Motion. Unlike other motions to dismiss under *Fed R Civ P 12(b)*, a district court generally may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion [*Lee v. City of Los Angeles (9th Cir 2001) 250 F3d 668, 688-689*]. If a defendant presents the court with matters outside the pleadings that the court does not exclude, it must treat the motion to dismiss as one for summary judgment [*see Fed R Civ P 12(b)*; *Fed R Civ P 56*]. Accordingly, a defendant's submission of supplemental materials for consideration along with the complaint risks converting the motion into a motion for summary judgment under *Fed R Civ P 56* [*see Fed R Civ P 12(b)*].

However, the Ninth Circuit has carved out exceptions to the conversion rule, which permit the court to consider the following supplemental materials along with the complaint without converting the motion into a motion for summary judgment [*United States v. Ritchie (9th Cir 2003) 342 F3d 903, 908*]:

- Material, such as exhibits, properly submitted as part of the complaint;

- Documents that are not part of the complaint if they are referenced extensively in the complaint, and are accepted by all parties as authentic; and

- Matters of public record of which the court may take judicial notice under *Fed R Evid 201*.

Thus, when the defendant offers such materials to the court for consideration with the motion, the court may treat the material as part of the complaint, and therefore may assume that its contents are true for purposes of the motion to dismiss under *Fed R Civ P 12(b)(6)* [*see United States v. Ritchie (9th Cir 2003) 342 F3d 903, 908*].

Examples:

A court, in an eminent domain action, may take judicial notice of a Department of Energy study not included in the pleadings, as a matter of public record, without converting the motion to dismiss into one for summary judgment [*United States v. 14.01 Acres of Land More or Less (9th Cir 2008) 547 F3d 943, 955*].

A court may consider the contents of a coverage plan referenced in the complaint and accepted as authentic by the parties in support of a motion to dismiss the plaintiff's claim about insurance coverage [*see Parrino v. FHP, Inc. (9th Cir 1998) 146 F3d 699, 705-706 , cert. denied, 525 US 1001 (1998)*].

A court may consider the contents of SEC filings alleged in the complaint and whose authenticity no party questions to support a motion to dismiss the plaintiff's stock fraud claim [*see In re Silicon Graphics Sec. Litig. (9th Cir 1999) 183 F3d 970, 986*].

A court may consider an unpublished court order from a related proceeding [*see Kourtis v. Cameron (9th Cir 2005) 419 F3d 989, 994 n2*].

Distinguish:

A court may not take judicial notice of a document for the *truth of the facts contained in it* when those facts are essential to support a contention in the action [*Troy Group, Inc. v. Tilson (CD Cal 2005) 364 F Supp2d 1149, 1152* ; *BP W. Coast Prods. LLC v. May (D Nev 2004) 347 F Supp2d 898, 901*].

8.21[2] Plaintiff May Amend Complaint in Response to Rule 12(b)(6) Motion. A party is entitled to amend his or her pleading once as a matter of course within 21 days after serving it [*Fed R Civ P 15(a)(1)(A)*]. If the pleading is one to which a responsive pleading is required, the party may amend within 21 days after service of the responsive pleading, or within 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier [*Fed R Civ P 15(a)(1)(B)*]. A motion to dismiss is not a responsive pleading under the federal rule governing amendment of pleadings [*Doe v. United States (9th Cir 1995) 58 F3d 494, 497* ; *see Fed R Civ P 15(a)*].

Thus, if a defendant asserts the defense of failure to state a claim in a motion to dismiss rather than an answer, the plaintiff has an absolute right to file an amended complaint without leave of court [*see Fed R Civ P 15(a)*; *Shaver v. Operating Eng'rs Local 428 Pension Trust Fund (9th Cir 2003) 332 F3d 1198, 1201*].

Cross Reference:

Amending pleadings generally, see Ch. 9, Amending and Supplementing Pleadings.

8.21[3] Court Determination of Motion.

8.21[3][a] Moving Party Bears Burden of Demonstrating Failure to State Valid Claim. The party bringing a motion to dismiss for failure to state a claim bears the burden of demonstrating that the plaintiff has not met the pleading requirements of *Fed R Civ P 8(a)(2)* in stating a claim [*Gallardo v. DiCarlo (CD Cal 2002) 203 F Supp2d 1160, 1165*]. Rule 8(a)(2) requires parties seeking relief in federal court by a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief" [*see Fed R Civ P 8(a)(2)*].

8.21[3][b] Court Applies Plausibility Standard to Allegations in Complaint. The court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged [*Ashcroft v. Iqbal (2009) ___ US ___, 129 S Ct 1937, 173 L Ed2d 868, 884* (conclusory legal allegations are not entitled to assumption of truth; they must be supported by factual allegations); *Moss v. United States Secret Serv. (9th Cir. 2009) 572 F3d 962, 969* ("for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief"); *St. Clare v. Gilead Sciences, Inc. (In re Gilead Sciences Sec. Litig.) (9th Cir 2008) 536 F3d 1049, 1055* (court is not

required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences")].

A complaint must be dismissed if it does not plead "enough facts to state a claim to relief that is plausible on its face" [*Bell Atlantic Corp. v. Twombly (2007) 550 US 544, 127 S Ct 1955, 167 L Ed 2d 929, 949]*. In other words, the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level" [*Bell Atlantic Corp. v. Twombly (2007) 550 US 544, 127 S Ct 1955, 167 L Ed2d 929, 940]*. While *Fed R Civ P 8* does not require the pleading of "detailed factual allegations," a plaintiff nevertheless must plead sufficient facts "to provide the 'grounds' of his 'entitle[ment] to relief,' [which] requires more than labels and conclusions, and [for which] a formulaic recitation of the elements of a cause of action will not do" [*Bell Atlantic Corp. v. Twombly (2007) 550 US 544, 127 S Ct 1955, 167 L Ed2d 929, 940*; *see, e.g., Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC (9th Cir 2008) 532 F.3d 963, 970-971* (in antitrust action against gasoline station franchisor, allegations of "tying arrangement" involving purchase of franchise and credit card services were insufficient to state claim for relief, citing *Twombly*); *Alvarez v. Hill (9th Cir 2008) 518 F3d 1152, 1157* (plaintiff's complaint and subsequent filings provided appellees with "fair notice" of that claim, even though relevant statute was not cited in complaint itself, citing *Twombly)*; *see also Skaff v. Meridien N. Am. Beverly Hills L.L.C. (9th Cir 2007) 506 F3d 832, 842* (plaintiff must allege facts "that affirmatively and plausibly suggest" he has the claimed right, not just "facts that are merely consistent with such a right")].

In the context of pro se litigation, the Supreme Court has held that "[s]pecific facts are not necessary" to meet the requirements of *Fed R Civ P 8(a)*. Rather, that rule "requires only a short and plain statement of the claim showing that the pleader is entitled to relief" [*Erickson v. Pardus (2007) 551 US 89, 127 S Ct 2197, 167 L Ed2d 1081, 1085* (petitioner had stated an *Eighth Amendment* claim when he alleged that prison officials had endangered his life by removing him from hepatitis C medication shortly after he began year-long treatment regimen, that he was still in need of treatment, and that prison officials continued to deny him treatment)]. A document filed pro se is to be "liberally construed," and a pro se complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers" [*Erickson v. Pardus (2007) 551 US 89, 127 S Ct 2197, 167 L Ed2d 1081, 1086]*.

8.21[3][c] Court Must Only Consider Pleadings in Ruling on 12(b)(6) Motion. As a general rule, a district court may not consider any material beyond the pleadings in ruling on a motion to dismiss under *Fed R Civ P 12(b)(6)* [*Lee v. City of Los Angeles (9th Cir 2001) 250 F3d 668, 688*]. Thus, if the court considers matters outside the pleadings, it must treat the motion as one for summary judgment [*see Fed R Civ P 12(b), 56*]. The pleadings include any properly submitted attachments [*Wan v. Commercial Recovery Sys., Inc. (ND Cal 2005) 369 F Supp2d 1158, 1161*].

Cross Reference:

Standard governing summary judgment motions, see Ch. 29, Summary Judgment, see *§§ 29.26 -29.29*.

8.21[3][d] Considering Matters Outside Complaint Converts Rule 12(b)(6) Motion to Summary Judgment Motion. If a party presents the district court with matters outside the pleadings that the court does not exclude, it must treat the motion to dismiss as one for summary judgment [*see Fed R Civ P 12(b), 56*]. On conversion of a motion to dismiss under Rule 12(b)(6) to a Rule 56 motion, the court must give all parties a reasonable opportunity to present material pertinent to a motion for summary judgment [*see Fed R Civ P 12(b), 56*].

However, a Rule 12(b)(6) motion to dismiss supported by extraneous materials cannot be regarded as one for summary judgment until the district court acts to convert the motion. The preferable method of "acting" is for the court to make an explicit ruling that it will not exclude extraneous materials from its consideration [*Swedberg v. Marotzke (9th Cir 2003) 339 F3d 1139, 1146*].

8.21[3][e] Court Need Not Provide Notice of Conversion but Must Ensure Nonmoving Party Is Fully Apprised. In the Ninth Circuit, no formal notice is required when a district court converts a Rule 12(b)(6) motion to dismiss into a motion for summary judgment [*In re Fernandez (9th Cir 1998) 227 BR 174, 180 , aff'd, 208 F3d 220*

(9th Cir *BAP 2000*)]. Rather, the court must fairly apprise the nonmoving party before the hearing that the court will look beyond the pleadings. A party is "fairly appraised" that the court will decide the motion to dismiss as a summary judgment motion if that party has submitted matters outside the pleadings to the judge and invites consideration of them [*In re Rothery (9th Cir 1998) 143 F3d 546, 549*].

Warning:

Before its amendment in December 2009, Rule 56(c) specifically required 10 days' notice for any summary judgment (see former *Fed R Civ P 56(c)*]. The courts had clearly determined that, under this provision, the court could not act *sua sponte* without providing the parties the same 10 days' notice that a party would have to give to make a written motion or, in appropriate circumstances, assuring itself that the parties had the same notice and opportunity to present a full record on the critical issues even without formal notice [*see, e.g., In re Rothery (9th Cir 1998) 143 F3d 546, 549]* . However, under the 2009 amendment, there is no longer any specific provision requiring any minimum period of notice of the motion for a valid summary judgment [*see Fed R Civ P 56(c)(1)(B)*]. Therefore, it is not clear how much, if any, notice is required before a court may act *sua sponte*. Further, a court may grant summary judgment without giving notice if the losing party has had a full and fair opportunity to ventilate the issues involved in the motion [*In re Rothery (9th Cir 1998) 143 F3d 546, 549*].

Cross Reference:

Standards governing court determination of motions for summary judgment, see Ch. 29, Summary Judgment, see *§§ 29.26 -29.29*. For detailed discussion of uncertainty stemming from elimination of the specific, 10-day minimum notice requirement for summary judgment motions, see 11 *Moore's Federal Practice, § 56.10[2][c] -[e]* (Matthew Bender 3d ed.).

8.21[3][f] Dismissal Is on Merits and Without Prejudice. Ordinarily, dismissals for failure to state a claim under *Fed R Civ P 12(b)(6)* should be without prejudice to the plaintiff's ability to file an amended pleading [*Balistreri v. Pacifica Police Dep't (9th Cir 1988) 901 F2d 696, 701*]. Dismissal without granting leave to amend is proper only in extraordinary cases [*Broam v. Bogan (9th Cir 2003) 320 F3d 1023, 1028*]. Thus, a district court should grant leave to amend if it appears at all possible that the plaintiff can correct the defect [*Balistreri v. Pacifica Police Dep't (9th Cir 1988) 901 F2d 696, 701*]. Indeed, the court should grant leave to amend even if the plaintiff makes no request to amend the pleading, unless the court determines that the pleading could not possibly be cured by the allegation of other facts [*Lira v. Herrera (9th Cir 2005) 427 F3d 1164, 1169* ; *Doe v. United States (9th Cir 1995) 58 F3d 494, 497*].

Denial of leave to amend is not an abuse of discretion if the district court could reasonably conclude that further amendment would be futile [*Kendall v. Visa U.S.A., Inc. (9th Cir 2008) 518 F3d 1042, 1051]* . Amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim [*Miller v. Rykoff-Sexton Inc. (9th Cir 1988) 845 F2d 209, 214* ; *Van Winkle v. Allstate Ins. Co. (CD Cal 2003) 290 F Supp2d 1158, 1169*]. In addition, a district court's discretion to deny leave to amend is particularly broad when the plaintiff has previously amended the complaint [*Wagh v. Metris Direct, Inc. (9th Cir 2003) 348 F3d 1102, 1111* , *cert. denied, 541 US 1043 (2004)*]. In that situation, the plaintiff's failure to supply new facts in the amended complaint supports denial of further leave to amend [*Allen v. City of Beverly Hills (9th Cir 1990) 911 F2d 367, 373*].

Strategic Point--Plaintiff:

An order dismissing a complaint for failure to state a claim and giving the plaintiff leave to amend is not a final appealable judgment. A plaintiff who chooses not to amend must file a written notice of intent not to file an amended complaint. After this notice is filed, the district court may enter an order dismissing the entire action, which order is appealable [*Lira v. Herrera (9th Cir 2005) 427 F3d 1164* , 1169; *Yourish v. Cal. Amplifier (9th Cir 1999) 191 F3d 983, 992* ; *WMX Techs., Inc. v. Miller (9th Cir 1997)*

104 F3d 1133, 1136].

Cross Reference:

Standards governing leave to amend pleadings generally, see Ch. 9, Amending and Supplementing Pleadings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
IV. PREPARING MOTION TO DISMISS

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8.22 Motion to Dismiss for Failure to Join Indispensable Party.

8.22[1] Challenge Failure to Join Indispensable Party.

8.22[1][a] Raise Failure to Join Indispensable Party Under Rule 19. A defendant challenges a plaintiff's failure to join an indispensable party by filing a motion to dismiss under *Fed R Civ P 12(b)(7)* [*Biagro W. Sales Inc. v. Helena Chem. Co. (ED Cal 2001) 160 F Supp2d 1136, 1141*].

The district court will first determine if the absent person is "required" [*Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1029-1030* ; *see Fed R Civ P 19(a)*]. If that person is deemed required, but cannot be joined, the court then must determine whether the party is indispensable, so that in equity and good conscience it must dismiss the action [*Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1029-1030* ; *see Fed R Civ P 19(b)*].

Cross Reference:

Joinder of parties generally, see Ch. 10, Adding, Dropping, and Substituting Parties, see *§§ 10.04 -10.09*.

8.22[1][b] Defense May Be Raised at Any Time Through Trial. A defendant may raise the defense in any pleading permitted or ordered under *Fed R Civ P 7(a)*, by a motion for judgment on the pleadings, and even at the trial on the merits [*see Fed R Civ P 12(h)(2)*]. Thus, one does not waive the defense by filing a responsive pleading prior to asserting the defense, since failure to join an indispensable party can be raised at any time [*see CP Nat. Corp. v. Bonneville Power Admin. (9th Cir 1991) 928 F2d 905, 911-912*].

However, a court may, in equity and good conscience, consider the timing of the motion and the reasons for any delay in asserting the defense in weighing the prejudice to the moving party by having to defend separate actions [*see Ilan-Gat Engineers, Ltd. v. Antigua Intern. Bank (DC Cir 1981) 659 F2d 234, 242* ; *Fetzer v. Cities Serv. Oil Co. (8th Cir 1978) 572 F2d 1250, 1254*].

8.22[1][c] Submit Supplemental Materials With Motion. Adjudicating a motion to dismiss under *Fed R Civ P 12(b)(7)* is a practical and fact-intensive inquiry [*Makah Indian Tribe v. Verity (9th Cir 1990) 910 F2d 555, 558*]. Thus, either party may present facts in the form of affidavits and other relevant extra-pleading evidence to aid the court

in determining the motion [*see, e.g., McShan v. Sherrill (9th Cir 1960) 283 F2d 462, 464*].

8.22[2] Court Determination of Motion to Dismiss for Failure to Join Party.

8.22[2][a] Moving Party Bears Burden of Proof. A motion to dismiss for failure to join an indispensable party requires the moving party to bear the burden in producing evidence to support the motion [*Biagro W. Sales Inc. v. Helena Chem. Co. (ED Cal 2001) 160 F Supp2d 1136, 1141*]. Thus, the party raising the defense has the burden of persuasion in showing that dismissal is necessary [*Shermoen v. United States (9th Cir 1992) 982 F2d 1312, 1317* , *cert. denied, 509 US 903 (1993)* ; *see Biagro W. Sales Inc. v. Helena Chem. Co. (ED Cal 2001) 160 F Supp2d 1136, 1141*].

8.22[2][b] Court Must Apply Two-Part Analysis in Deciding Motion. The district court performs a two-step analysis under *Fed R Civ P 19* to determine whether an action, in equity and good conscience, can proceed without the absent party [*Biagro W. Sales Inc. v. Helena Chem. Co. (ED Cal 2001) 160 F Supp2d 1136, 1142*]. Before it may reach the issue of indispensability, the district court must first find that the person the plaintiff has not joined is a required party who must be joined if joinder is feasible [*see Fed R Civ P 19(a)*; *Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1029-1031*]. Only if the court finds the absent person to be a necessary party who cannot be joined in the action must the court apply the indispensable party test [*Biagro W. Sales Inc. v. Helena Chem. Co. (ED Cal 2001) 160 F Supp2d 1136, 1142* ; *see Fed R Civ P 19(b)*].

In this second, "indispensable party" phase, the court must determine whether the action can proceed with the existing parties, or whether it must be dismissed because of the indispensability of the absent person. In determining the indispensability of the absent person, and whether the court can allow the matter to proceed or must dismiss it, the trial court must consider [*see Fed R Civ P 19(b)*; *Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1029-1030*]:

- The extent to which a judgment rendered in the person's absence might be prejudicial to the person or to those persons who are already parties;
- The extent to which, by protective provisions in the judgment, by shaping relief, or through other measures, the court can lessen or avoid prejudice;
- Whether a judgment rendered in the person's absence will be adequate; and
- Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

8.22[2][c] Dismissal for Failure to Join Indispensable Party Is Without Prejudice. In general, a trial court's grant of a motion to dismiss for failure to join an indispensable party is without prejudice to the plaintiff's ability to amend the complaint. Denial of leave to amend after responsive pleadings have been filed is strictly reviewed in light of the strong policy permitting amendment [*Shermoen v. United States (9th Cir 1992) 982 F2d 1312, 1319*].

However, a district court does not err in denying leave to amend if the amendment would be futile [*Shermoen v. United States (9th Cir 1992) 982 F2d 1312, 1319*]. Thus, for example, if the trial court properly finds that there is no possibility of amending the complaint to join the absent parties, dismissal is not improper [*see, e.g., Shermoen v. United States (9th Cir 1992) 982 F2d 1312, 1319-1320*].

Cross Reference:

Joinder of parties generally, see Ch. 10, Adding, Dropping, and Substituting Parties, see *§§ 10.04 -10.09*.

Legal Topics:

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

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V. PREPARING MOTION TO CLARIFY PLEADINGS

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8.23 CHECKLIST: Drafting Motions to Clarify Pleadings.

8.23[1] CHECKLIST: Preparing Motion for More Definite Statement.

☐ In Central District, comply with "meet and confer" requirements before bringing motion.

○ Contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution.

○ "Meet and confer" must take place at least five days before last day for filing the motion.

○ If parties are unable to reach a resolution that eliminates the reason for a hearing, include in the notice of motion, a statement that "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*].

Authority:
CD Cal Civ LR 7-3

Discussion:
Ch. 26, Pretrial Motion Practice, see *§ 26.15[1]*

☐ Challenge vagueness or ambiguity of plaintiff's complaint by moving for more definite statement.

○ Assert that pleading is so vague or ambiguous that defendant cannot:

☐ Ascertain nature of claim asserted by plaintiff.

☐ Reasonably frame responsive pleading.

○ Point out defects complained of and details desired.

Authority:
Fed R Civ P 12(e)

Discussion:
See *§§ 8.25[1][a], [b]*

Form:
See *§ 8.41*

☐ Avoid waiver by asserting motion for more definite statement in initial Rule 12 motion.

Authority:
Fed R Civ P 12(e), (g)

Discussion:
See *§ 8.25[1][c]*

☐ Court determination of motion.

○ Motion for more definite statement is viewed with disfavor and is rarely granted.

○ Court will require more definite statement only when pleading is so vague or ambiguous that opposing party cannot respond even with simple denial in good faith or without prejudice to himself or herself.

○ Court must deny motion if moving party could obtain missing detail through discovery.

○ If court grants motion, it will order plaintiff to file amended complaint within fixed time period.

☐ If plaintiff fails to obey order within time fixed by court, court may strike complaint or may make other just orders.

☐ Court may dismiss complaint if order is violated.

Authority:
Fed R Civ P 12(e), 41(b)

Discussion:
See *§ 8.25[2]*

8.23[2] CHECKLIST: Preparing Motion to Strike.

☐ In Central District, comply with "meet and confer" requirements before bringing motion.

○ Contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution.

○ "Meet and confer" must take place at least five days before last day for filing the motion.

○ If parties are unable to reach a resolution that eliminates the reason for a hearing, include in the notice of motion, a statement that "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*].

Authority:
CD Cal Civ LR 7-3

Discussion:
Ch. 26, Pretrial Motion Practice, see *§ 26.15[1]*

☐ Challenge redundant, immaterial, impertinent, or scandalous matter in plaintiff's complaint by filing motion to strike matter from pleading.

○ Function of motion is to avoid expenditure of time and money arising from litigating spurious issues by dispensing with issues prior to trial.

○ Point out defects complained of and material to be stricken.

Authority:
Fed R Civ P 12(f)

Discussion:
See *§ 8.26[2]*

Form:
See *§ 8.42*

☐ Avoid waiving motion to strike by asserting motion to strike:

○ Before responding to pleading.

○ Within 21 days after service of pleading if response is not permitted.

☐ Avoid waiving right to file motion to strike by filing a preanswer Rule 12 motion on other grounds without including motion to strike.

Authority:
Fed R Civ P 12(f), (h)

Discussion:
See *§ 8.26[3]*

☐ Plaintiff may assert motion to strike insufficient defense in defendant's answer by filing motion to strike within 21 days after service of answer.

Authority:
Fed R Civ P 12(f)

Discussion:
See *§ 8.26[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDefects of FormCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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8.24 Options and Strategy.

8.24[1] Motion for More Definite Statement May Clarify Complaint. Rather than attempting to answer a vague or ambiguous complaint, the defendant may file a motion for a more definite statement rather than an answer [*see Fed R Civ P 12(e)*]. The motion must point out the defects complained of and the details desired by the moving party [*Fed R Civ P 12(e)*]. Thus, motions for more definite statement under *Fed R Civ P 12(e)* may be used to weed out meritless claims [*Galbraith v. County of Santa Clara (9th Cir 2002) 307 F3d 1119, 1125*].

8.24[2] Motion to Strike May Streamline Action. Redundant, immaterial, impertinent, or scandalous matter in the plaintiff's complaint may be stricken by filing a motion to strike the matter from the pleading [*see Fed R Civ P 12(f)*]. Thus, motions to strike may be used to make trial of the action less complicated, or to otherwise streamline resolution of the action [*Hart v. Baca (CD Cal 2001) 204 FRD 456, 457*].

8.24[3] Motions Are Disfavored and Should Be Sparingly Used. Motions to strike or for a more definite statement are viewed with disfavor, and are rarely granted [*Bassiri v. Xerox Corp. (CD Cal 2003) 292 F Supp2d 1212, 1220* (motion to strike); *Cellars v. Pacific Coast Packaging, Inc. (ND Cal 1999) 189 FRD 575, 579* (motion for more definite statement)]. They often are used as a delaying tactic [*Neilson v. Union Bank of Cal., N.A. (CD Cal 2003) 290 F Supp2d 1101, 1152*]. Therefore, use caution in asserting these motions.

Strategic Point--Defendant:

A motion for a more definite statement should be used generally when the material factual allegations are truly unclear in light of the legal allegations made. For example, the motion is useful in a case involving multiple defendants (or multiple plaintiffs) if no distinction is made with respect to the acts, conduct, or rights of each individually. A motion to strike should be used more sparingly, when the complaint contains something very unwarranted and prejudicial, such as an inflammatory statement.

8.24[4] Motions Are Typically Joined With Other Rule 12 Motions. Motions for more definite statement and motions to strike are rarely asserted alone. Typically, they are joined with other motions under *Fed R Civ P 12*, such as

motions to dismiss for failure to state a claim.

Strategic Point--Defendant:

When combined with a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court may decide that a more definite statement should be required even if the court concludes that the elements of the claim have been pleaded, such as, when the facts pleaded fail to meet the particularity requirements of Rule 9(b).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDefects of FormCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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8.25 Motion for More Definite Statement.

8.25[1] Grounds for Motion for More Definitive Statement.

8.25[1][a] Challenge Vague or Ambiguous Complaint. When a complaint is so vague or ambiguous that the defendant cannot reasonably frame a responsive pleading, the defendant may move for a more definite statement before interposing an answer [*see Fed R Civ P 12(e)*].

Prerequisite-CD Cal: Meet and Confer.

In the Central District, comply with "meet and confer" requirements before bringing the motion [*CD Cal Civ LR 7-3*].

- Contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution.
- "Meet and confer" must take place at least five days before last day for filing the motion.
- If parties are unable to reach a resolution that eliminates the need for a hearing, include in the notice of motion the statement "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*]."

The motion must point out the defects complained of and the details desired by the moving party [*Fed R Civ P 12(e)*].

Cross Reference:

Form, see *§ 8.41*.

8.25[1][b] Pleading Must Be So Indefinite That Defendant Cannot Ascertain Nature of Claim. A motion for more definite statement is proper only if the complaint is so indefinite that the defendant cannot ascertain the nature of the claim asserted by the plaintiff. The court will deny the motion if the complaint is specific enough to apprise the

defendant of the substance of the claim asserted [*Gay-Straight Alliance Network v. Visalia Unified Sch. Dist. (ED Cal 2001) 262 F Supp2d 1088, 1099*].

Consider:

A motion for a more definite statement may be appropriate in cases involving complaints asserting fraud or mistake. Circumstances relating to fraud or mistake allegations must be stated with particularity [*see Fed R Civ P 9(b)*]. Thus, if a plaintiff fails to plead these allegations with particularity, a motion for more definite statement pointing out the plaintiff's failure is in order. Also consider combining the motion with a motion under Rule 12(b)(6) to dismiss for failure to state a claim.

8.25[1][c] Motion Cannot Be Used to Seek Discoverable Material. If the moving party can obtain the missing detail through discovery, the court will deny the motion [*Davison v. Santa Barbara High Sch. District (CD Cal 1998) 48 F Supp2d 1225, 1228*]. A motion for a more definite statement should not be used to assist in getting facts in preparation for trial [*Hsu v. OZ Optics Ltd. (ND Cal 2002) 211 FRD 615, 619*]. Other rules relating to discovery, such as interrogatories, exist for these purposes [*see Davison v. Santa Barbara High Sch. District (CD Cal 1998) 48 F Supp2d 1225, 1228*].

8.25[1][d] Defense Is Waived If Not Made Before Filing of Responsive Pleading. Failure to assert a motion for more definite statement in an initial motion under Rule 12 may result in waiver of the motion [*see Fed R Civ P 12(g)*].

8.25[2] Court Determination of Motion.

8.25[2][a] Complaint Must Be Too Vague or Ambiguous to Answer. Generally, the court will require a more definite statement only when the pleading is so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself or herself [*Cellars v. Pacific Coast Packaging, Inc. (ND Cal 1999) 189 FRD 575, 579*].

8.25[2][b] Court Granting Motion May Order Plaintiff to File and Serve Amended Complaint. If the court grants a motion for more definite statement, it typically will order the plaintiff to file an amended complaint within 14 days after notice of the order, or within the time fixed by the court [*see Fed R Civ P 12(e)*; *see, e.g., McHenry v. Renne (9th Cir 1996) 84 F3d 1172, 1175*]. If the plaintiff fails to obey the order within the time fixed by the court, the court may strike the complaint to which the motion was directed or may make any other orders it deems just [*see Fed R Civ P 12(e)*]. For example, the court may dismiss the complaint if this order is violated [*McHenry v. Renne (9th Cir 1996) 84 F3d 1172, 1179* ; *see Fed R Civ P 41(b)*].

Within 14 days after the plaintiff serves the amended complaint in response to the court's grant of the motion for more definite statement, the defendant must serve the plaintiff with a responsive pleading, such as an answer [*see Fed R Civ P 12(a)(4)(B)*].

Cross References:

Effects of striking pleading, see *§ 8.26[3]*. Answers, see *§§ 8.06 -8.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDefects of FormCivil ProcedurePleading & PracticePleadingsGeneral Overview

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8.26 Motion to Strike Improper Material in Complaint.

8.26[1] Motion Is Disfavored. Motions to strike are generally viewed with disfavor and are not frequently granted [*Sapiro v. Encompass Ins. (ND Cal 2004) 221 FRD 513, 516-517* ; *Bassiri v. Xerox Corp. (CD Cal 2003) 292 F Supp2d 1212, 1220*]. This is because of the limited importance of pleading in federal practice, and because motions to strike are often used as a delaying tactic [*Neilson v. Union Bank of Cal., N.A. (CD Cal 2003) 290 F Supp2d 1101, 1152*].

Whether to grant a motion to strike lies within the sound discretion of the district court. In exercising its discretion, the court views the pleadings in the light most favorable to the nonmoving party [*Bassiri v. Xerox Corp. (CD Cal 2003) 292 F Supp2d 1212, 1220* ; *Neilson v. Union Bank of Cal., N.A. (CD Cal 2003) 290 F Supp2d 1101, 1152*]. The court will not grant a motion to strike unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation [*Bassiri v. Xerox Corp. (CD Cal 2003) 292 F Supp2d 1212, 1220*].

The court may also issue a motion to strike on its own initiative at any time [*see Fed R Civ P 12(f)*].

8.26[2] File Rule 12(f) Motion. A defendant may attack any redundant, immaterial, impertinent, or scandalous matter in the plaintiff's complaint by filing a motion to strike the matter from the pleading [*see Fed R Civ P 12(f)*].

Prerequisite-CD Cal: Meet and Confer.
In the Central District, comply with "meet and confer" requirements before bringing the motion [*CD Cal Civ LR 7-3*]:

- Contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution.
- "Meet and confer" must take place at least five days before last day for filing the motion.
- If parties are unable to reach a resolution that eliminates the need for a hearing, include in the notice

of motion the statement "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on [*date*]."

The function of a motion to strike under *Fed R Civ P 12(f)* is to avoid the expenditure of time and money that will arise from litigating spurious issues by dispensing with those issues before trial [*Bassiri v. Xerox Corp. (CD Cal 2003) 292 F Supp2d 1212, 1219-1220*].

Cross Reference:

Form, see *§ 8.42*.

8.26[3] Avoid Waiver. The defendant must assert a motion to strike before responding to a pleading, or within 21 days after service of the pleading if a response is not permitted, or the motion may be waived [*see Fed R Civ P 12(f)*]. In addition, the defendant may waive the right to file a motion to strike by filing a preanswer Rule 12 motion on other grounds without including a motion to strike [*see Fed R Civ P 12(h)*; *Culinary & Service Employees Union, AFL-CIO Local 555 v. Hawaii Employment Benefit Admin. (9th Cir 1982) 688 F2d 1228, 1232* ; *but see In re* Ess Tech., Inc. Secs. Litig. (ND Cal 2005) 2005 US Dist LEXIS 2593, at *13 (second motion to strike immaterial matter is not barred)].

8.26[4] Plaintiff May Challenge Improper Material in Answer. A plaintiff may also assert a motion to strike any insufficient or immaterial defense in a defendant's answer. Counsel must file a motion to strike a defense in an answer within 21 days after service of the answer [*see Fed R Civ P 12(f)*; *see, e.g., Quintana v. Baca (CD Cal 2005) 232 FRD 631*].

8.26[5] Moving Party Has Burden of Proof. In asserting a motion to strike, the moving party bears the burden of convincing the court that the motion should be granted [*see, e.g., Neilson v. Union Bank of Cal., N.A. (CD Cal 2003) 290 F Supp2d 1101, 1152*].

In addition, given the disfavored status of motions to strike, courts often require a showing of prejudice by the moving party before granting the motion [*Neilson v. Union Bank of Cal., N.A. (CD Cal 2003) 290 F Supp2d 1101, 1152*]. The possibility that issues will be unnecessarily complicated or that superfluous pleadings will cause the trier of fact to draw unwarranted inferences at trial is the type of prejudice that is sufficient to support granting a motion to strike [*California Dep't of Toxic Substances Control v. Alco Pac., Inc. (CD Cal 2002) 217 F Supp2d 1028, 1033*].

8.26[6] Defendant Can Move to Strike State Law Claim Under Anti-SLAPP Statute. A defendant can move to strike a state law claim under the California anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute [*see CCP § 425.16*; *Thomas v. Fry's Elecs., Inc. (9th Cir 2005) 400 F3d 1206, 1207* (per curiam); *United States ex rel. Newsham v. Lockheed Missiles & Space Co. (9th Cir 1999) 190 F3d 963, 970-973 , cert. denied, 530 US 1203 (2000)*]. The anti-SLAPP statute allows a defendant to move to strike a complaint that stems "from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue" [*CCP § 425.16(b)(1)*]. However, the plaintiff may be granted leave to amend an initial complaint [*see Verizon Del., Inc. v. Covad Communs. Co. (9th Cir 2004) 377 F3d 1081, 1091*].

Cross Reference:

Anti-SLAPP motions to strike, California Forms of Pleading & Practice, Ch. 375, Motions to Strike; Matthew Bender [(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 13, SLAPP Motions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers &

ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeScandalous MattersCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.27

8.27 CHECKLIST: Drafting Motion for Judgment on the Pleadings.

☐ In Central District, comply with "meet and confer" requirements before bringing motion.

○ Contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution.

○ "Meet and confer" must take place at least five days before last day for filing the motion.

○ If parties are unable to reach a resolution that eliminates the reason for a hearing, include in the notice of motion, a statement that "This motion is made following the conference of counsel pursuant to L.R. 7-3 that took place on [*date*]."

Authority:
CD Cal Civ LR 7-3

Discussion:
Ch. 26, Pretrial Motion Practice, see *§ 26.15[1]*

☐ Move for judgment on pleadings to dispose of unmeritorious issues or controversies.

○ Motion may be brought by either party.

○ Defendant's motion seeking judgment on complaint may only be granted if all defenses raised in answer are legally insufficient.

○ Plaintiff's motion on pleadings is only entitled to judgment if answer fails to raise issues of fact or affirmative defense that, if proved, would defeat plaintiff's recovery.

☐ Judgment on pleadings is proper if:

○ Even when all allegations in pleadings are taken as true,

○ Moving party is entitled to judgment as matter of law.

Authority:
Fed R Civ P 12(c)

Discussion:
See *§ 8.29[1]*

Form:
See *§ 8.43*

☐ File motion within proper time:

○ After pleadings are closed.

○ At time that will not delay trial.

Authority:
Fed R Civ P 12(c)

Discussion:
See *§ 8.29[1][b]*

☐ Submission of matters outside pleadings may convert motion for judgment on pleadings to summary judgment motion.

Authority:
Fed R Civ P 12(d), *Fed R Civ P 56*

Discussion:
See *§ 8.29[1][d]*

☐ Court determination of motion:

○ Standard governing motion for judgment on pleadings is essentially same as that governing motion to dismiss for failure to state claim.

☐ Court must accept as true allegations of nonmoving party, while allegations of moving party that have been denied must be assumed false.

☐ Motion will be granted if, accepting as true all material allegations contained in nonmoving party's pleadings, moving party is entitled to judgment as matter of law.

○ Court consideration of matters outside pleadings results in conversion to summary judgment motion.

☐ That party submitted extrinsic material to court does not automatically convert motion into one for summary judgment.

☐ Conversion occurs only if it appears court relied on extrinsic evidence in reaching its conclusions.

☐ Court need not provide formal notice of conversion but must provide reasonable opportunity to present relevant materials.

○ Dismissal may be without prejudice.

☐ In granting judgment on pleadings court may give leave to amend.

☐ Court may dismiss causes of action rather than grant judgment.

Authority:
Fed R Civ P 12(d), *Fed R Civ P 56*

Discussion:
See *§ 8.29[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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8.28 Options and Strategy.

8.28[1] Motion for Judgment on Pleadings May Dispose of Complaint. After the pleadings are closed, a party may move for judgment on the pleadings to dispose of the complaint as a whole, or of unmeritorious issues or controversies [*see Fed R Civ P 12(c)*]. A *Fed R Civ P 12(c)* motion for judgment on the pleadings may be made as to individual causes of action [*Strigliabotti v. Franklin Res., Inc. (ND Cal 2005) 398 F Supp2d 1094, 1097* ; *Moran v. Peralta Community College Dist. (ND Cal 2003) 825 F Supp 891, 893*]. However, the standard for obtaining a judgment on the pleadings is not easy to meet. Judgment on the pleadings is proper only if the moving party is entitled to judgment as a matter of law, even assuming the facts in the complaint are true [*see Torbet v. United Airlines, Inc. (9th Cir 2002) 298 F3d 1087, 1089*].

8.28[2] Motion for Judgment on Pleadings Cannot Be Filed Before Answer. Unlike motions for summary judgment, a motion for judgment on the pleadings cannot be served before the filing of an answer [*see Fed R Civ P 12(c), 56*]. Thus, if there are grounds for filing a motion for summary judgment after service of the complaint, a motion for summary judgment should be used [*see Fed R Civ P 56*].

8.28[3] Motion Going Beyond Pleadings May Be Converted to Motion for Summary Judgment. Unlike a motion for summary judgment, motions for judgment on the pleadings cannot involve examination of materials beyond the pleadings [*see Fed R Civ P 12(d), Fed R Civ P 56*]. Thus, if the parties present evidence beyond the pleadings that is considered by the court, the motion must be converted to a summary judgment motion [*see Fed R Civ P 12(d), Fed R Civ P 56*]. For this reason, some moving parties will file a motion asserting both a motion for judgment on the pleadings and a motion for summary judgment. Nonetheless, a motion for judgment on the pleadings may be appropriate if a motion to dismiss would not be granted based on the complaint alone but would be granted if all pleadings are considered.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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8.29 Motion for Judgment on the Pleadings.

8.29[1] File Rule 12(c) Motion.

8.29[1][a] Challenge Legal Sufficiency of Opposing Party's Pleadings. After the pleadings are closed, any party may move for judgment on the pleadings [*see Fed R Civ P 12(c)*; *Qwest Communications Corp. v. City of Berkeley (ND Cal 2002) 208 FRD 288, 291*].

Prerequisite-CD Cal: Meet and Confer.
In the Central District, comply with "meet and confer" requirements before bringing the motion [*CD Cal Civ LR 7-3*].

- Contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution.
- "Meet and confer" must take place at least five days before last day for filing the motion.
- If parties are unable to reach a resolution that eliminates the need for a hearing, include in the notice of motion the statement "This motion is made following the conference of counsel pursuant to L.R. 7-3 that took place on [*date*]."

The purpose of a motion for judgment on the pleadings is to dispose of unmeritorious issues or controversies [*Provenzano v. United States (SD Cal 2000) 123 F Supp2d 554, 556*].

Judgment on the pleadings is proper if, even when all the allegations in the pleadings are taken as true, the moving party is entitled to judgment as a matter of law [*Torbet v. United Airlines, Inc. (9th Cir 2002) 298 F3d 1087, 1089*].

Distinguish:
A party moving for summary judgment asserts that, based on the existing record, no genuine issue of

material fact exists and it is entitled to judgment on the merits as a matter of law [*see Fed R Civ P 56(c)*]. In contrast, a motion for judgment on the pleadings contends that the moving party is entitled to judgment based on the pleadings alone; the court considering a motion on the pleadings is limited to an examination of the sufficiency of the pleadings [*see Fed R Civ P 12(c)*].

Cross References:

Form of motion on the pleadings, see *§ 8.43*. For standards governing determination of motions for summary judgment, see Ch. 29, Summary Judgment, see *§§ 29.26 -29.29*.

8.29[1][b] File Motion After Pleadings Close. A party must file a motion for judgment on the pleadings after the pleadings are closed. However, the motion must be filed at a time that will not delay the trial [*see Fed R Civ P 12(c)*]. Generally, this means that a party filing a motion under *Fed R Civ P 12(c)* must await the answers of all defendants [*Moran v. Peralta Cmt'y Coll. Dist. (ND Cal 1993) 825 F Supp 891, 893*]. A motion for judgment on the pleadings filed before the defendant files an answer is premature and must be denied [*Doe v. United States (9th Cir 2005) 419 F3d 1058, 1061*].

8.29[1][c] Motion May Be Asserted by Either Party. Any party may move for judgment on the pleadings [*Qwest Communications Corp. v. City of Berkeley (ND Cal 2002) 208 FRD 288, 291*]. A plaintiff may move for judgment on the pleadings if the answer fails to controvert material facts alleged in the complaint; all allegations of fact by the party opposing the motion are accepted as true, and are construed in the light most favorable to that party [*Qwest Communications Corp. v. City of Berkeley (ND Cal 2002) 208 FRD 288, 291*]. A plaintiff is not entitled to judgment on the pleadings if the answer raises issues of fact or an affirmative defense that, if proved, would defeat plaintiff's recovery [*General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church (9th Cir 1989) 887 F2d 228, 230* ; *Qwest Communications Corp. v. City of Berkeley (ND Cal 2002) 208 FRD 288, 291*].

8.29[1][d] Submission of Matters Outside Pleadings May Result in Conversion of Motion to Summary Judgment Motion. If a party presents matters outside the pleadings with the motion for judgment on the pleadings, and those extraneous matters are not excluded by the court, the motion must be treated as a motion for summary judgment and must be disposed of as such [*see Fed R Civ P 12(d)*, *Fed R Civ P 56*].

8.29[2] Court Determination of Motion for Judgment.

8.29[2][a] Standard Applicable to Motions for Judgment. The standard governing a motion for judgment on the pleadings under *Fed R Civ P 12(c)* is essentially the same as that governing a motion to dismiss for failure to state a claim. For a motion for judgment on the pleadings, the court must accept as true the allegations of the nonmoving party, while the allegations of the moving party that have been denied must be assumed false [*Hal Roach Studios, Inc. v. Richard Feiner & Co. (9th Cir 1989) 896 F2d 1542, 1550* ; *Luzon v. Atlas Ins. Agency, Inc. (D Haw 2003) 284 F Supp2d 1261, 1262-1263*]. A motion for judgment on the pleadings will be granted only if, accepting as true all material allegations contained in the nonmoving party's pleadings, the moving party is entitled to judgment as a matter of law [*Torbet v. United Airlines, Inc. (9th Cir 2002) 298 F3d 1087, 1089*].

In addition, *Fed R Civ P 12(c)* must be read in conjunction with *Fed R Civ P 8(a)*, which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Dismissal under *Fed R Civ P 12(c)* is proper only if there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory [*Balistreri v. Pacifica Police Dep't (9th Cir 1988) 901 F2d 696, 699* ; *United States v. Real Prop. (CD Cal 2002) 234 F Supp2d 1136, 1137*].

8.29[2][b] Reliance on Matters Outside Pleadings Results in Conversion to Summary Judgment Motion. If a party presents matters outside the pleadings that the court considers in resolving the motion for judgment, the motion for judgment on the pleadings must be treated as a motion for summary judgment [*see Fed R Civ P 12(d)*, *Fed R Civ P*

56; *Hal Roach Studios, Inc. v. Richard Feiner & Co. (9th Cir 1989) 896 F2d 1542, 1550*].

However, the fact that a party submitted extrinsic material to the court does not automatically convert a motion for judgment on the pleadings into one for summary judgment. Before conversion occurs, it must appear that the court relied on the extrinsic evidence in reaching its conclusions [*Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys., Inc. (ND Cal 1997) 989 F Supp 1237, 1242* ; *see Homart Dev. Co. v. Sigman (11th Cir 1989) 868 F2d 1556, 1561*].

The court may consider certain exhibits submitted with a complaint, matters that may be judicially noticed under the Federal Rule of Evidence, and documents referenced but not included in the complaint whose authenticity no party questions, without converting the motion into a motion for summary judgment [*Rose v. Chase Manhattan Bank USA (CD Cal 2005) 396 F Supp2d 1116, 1119* ; *United States v. Real Prop. (CD Cal 2002) 234 F Supp2d 1136, 1137-1138*].

Cross References:

Further discussion of exceptions to conversion doctrine in failure to state claim context, see *§ 8.21[3][d]*. Standards governing summary judgment motions generally, see Ch. 29, Summary Judgment, see *§§ 29.26 -29.29*.

8.29[2][c] Reasonable Opportunity to Respond Must Be Given. Once conversion occurs, the court must give all parties a reasonable opportunity to present all material pertinent to a summary judgment motion [*Fed R Civ P 12(d)*; *see Olsen v. Idaho State Bd. of Med. (9th Cir 2004) 363 F3d 916, 921-922* (conversion of Rule 12(b)(6) motion, decided under prior law); *In re Rothery (9th Cir 1998) 143 F3d 546, 549* (conversion of Rule 12(b)(6) motion, decided under prior law)].

Warning:

Effective December 1, 2009, Rule 56(c) was amended to eliminate the specific, 10-day minimum notice requirement for summary judgment motions. It remains unclear whether courts will continue to impose a minimum notice requirement on the validity of summary judgments.

Cross Reference:

For detailed discussion of the uncertainly stemming from the elimination of the Rule 56's notice requirement, see 11 *Moore's Federal Practice, § 56.10[2][c] -[e]* (Matthew Bender 3d ed.).

8.29[2][d] Dismissal May Be Without Prejudice. When granting a motion on the pleadings, the court may give leave to amend. The court may also dismiss causes of action rather than grant judgment [*Lonberg v. City of Riverside (CD Cal 2004) 300 F Supp2d 942, 945*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.30

8.30 Notice of Motion and Motion for Extension of Time to Answer Complaint.

Notice of Motion and Motion for Extension of Time to Answer Complaint.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*], Plaintiff vs. _____ [*name*], Defendant	Civil Action No. _____ NOTICE OF MOTION AND MOTION FOR EXTENSION OF TIME TO FILE ANSWER TO THE COMPLAINT Date of Hearing: _____ Time of Hearing: _____ Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*identify moving party, e.g.,* Defendant Mary Jones] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], through his/her undersigned attorney, for an order extending the time within which Defendant may file his/her answer to _____ [*identify plaintiff, e.g.,* Plaintiff John Smith's] _____ [Original *or specify otherwise*] Complaint. The original time for Defendant's answer _____ [expires *or* expired] on _____ [*date*]. Defendant seeks an extension of _____ days, to and including _____ [*date*].

[*EITHER, if defendant has obtained no prior extensions*]

Defendant has obtained no prior extensions of the time within which to file Defendant's answer.

[*OR, if defendant has obtained prior extensions*]

Defendant has obtained _____ [*number of extensions*] of the time to file an answer _____ [through stipulations with Plaintiff *or* as granted by this court].

[*CONTINUE*]

Plaintiff effected service of the complaint on _____ [*date*].

Good cause exists for granting this extension, as follows: _____ [*set forth basis for extension*].

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 6(b), 7(b), 11

Discussion:
See *§ 8.05[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
VII. FORMS
A. Answers

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.31

8.31 Stipulation to Extension of Time to Answer Complaint.

Stipulation to Extension of Time to Answer Complaint.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

[*EITHER, if filing in Eastern, Northern or Southern Districts*]

John Smith, Plaintiff,	)	NO. _____
vs.	)	
Mary Jones, Defendant.	)	STIPULATION TO AND ORDER FOR
	)	EXTENSION OF TIME TO FILE
	)	ANSWER TO COMPLAINT
	)	

[*OR, if filing in Central District*]

	)	
	)	No. [*e.g.*, CV 08-20000-ABC (RZx)]
John Smith, Plaintiff	)	
v.	)	Stipulation to Extend Time to Respond to Initial
Mary Jones, Defendant	)	Complaint By Not More Than 30 Days (L.R. 8-3)
	)	Complaint served: [*e.g.*, September 15, 2008]
	)	Current response date: [*e.g.*, October 6, 2008]
	)	New response date: [*e.g.*, November 5, 2008]

Subject to approval by the court, Plaintiff and Defendant, through their respective counsel, hereby stipulate to an extension of the time within which the Defendant must file an answer to Plaintiff _____ [*name*] _____ [Original *or as the case may be*] Complaint from _____ [*original date*], to and including _____ [*date*], or to such other date that the court may order.

[*EITHER, if defendant has obtained no prior extensions*]

Defendant has obtained no prior extensions of the time within which to file Defendant's answer.

[*OR, if defendant has obtained prior extensions*]

Defendant has obtained _____ [number of extensions] of the time to file an answer _____ [through stipulations with Plaintiff *or* as granted by this court].

[*CONTINUE*]

Plaintiff effected service of the complaint on _____ [*date*].

Good cause exists for granting this extension, as follows: _____ [*Set forth basis for extension, such as:* Defendant's attorney will be in trial at _____ (*location*) from _____ (*date*), until _____ (*date*), and will not be available for conferences with the Defendant to properly prepare the answer until _____ (*date*)].
Dated: _____.

Signed: _____

Tom Doe

Attorney for Plaintiff

100 North Main St., Suite 200

Farallon City, California 90000

Phone: 555-555-5555

Dated: _____.

Signed: _____

Jane Lee

Attorney for Defendant

50 South Main St. Suite 100

Farallon City, California 90000

Phone: 555-999-9999

IT IS SO ORDERED.
Dated: _____.

_____ [*signature*]

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
Fed R Civ P 6(b); *ND Cal Civ LR 6-1(a)*; *CD Cal Civ LR 8-3*; *SD Cal Civ LR 12.1*

Discussion:
See *§ 8.05[3][b] -[d]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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8.32 Sample Answer--Containing Admissions, Specific Denials, and Affirmative Defenses.

Sample Answer--Containing Admissions, Specific Denials, and Affirmative Defenses.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

John Smith, Plaintiff,	)	
vs.	)	NO. _____
Mary Jones, Defendant.	)	_____ [ORIGINAL] ANSWER
	)	OF DEFENDANT MARY JONES
	)	

Defendant _____ [*name*] files this _____ [Original] Answer to the _____ [Original] Complaint of Plaintiff, _____ [*name*], as follows:

1. With respect to Paragraph _____ of the complaint, Defendant admits the allegations.

2. With respect to Paragraph _____ of the complaint, Defendant admits that _____ [*specify matters admitted*], but denies that _____ [*specify matters denied*].

3. Defendant denies each and every allegation of Paragraph _____ of the complaint.

4. Defendant denies each and every allegation of Paragraph _____ of the complaint _____ [*add if applicable:* with the exception of _____ (*specify*), which Defendant admits as follows: _____ (*quote or specifically describe matters admitted*)].

5. _____ [*Repeat as necessary to respond to each paragraph in plaintiff's complaint*.]

6. With respect to Paragraph _____ of the complaint, Defendant is without knowledge or information sufficient to admit or deny the facts contained in the paragraph.

7. With respect to Paragraph _____ of the complaint, Defendant is without knowledge or information sufficient to admit or deny the facts contained in _____ [*specify, such as:* the first sentence]. Defendant admits the facts contained in the second sentence. With respect to the third sentence, Defendant admits that _____ [*specify matters admitted*], but denies that _____ [*specify matters denied*].

8. Defendant denies all the allegations contained in every paragraph of Plaintiff's prayer.

DEFENSES

9. a. Defendant affirmatively alleges that the matters on which Plaintiff bases his or her complaint were previously tried and adjudicated in an action styled _____ [*case name*], Docket No. _____, in the _____ [United States District Court for the _____ District of _____, _____ Division *or as the case may be*].

b. On _____ [*date*], a final and valid judgment _____ [*specify, such as:* against Plaintiff and in favor of Defendant] was entered in the action.

c. The litigants in the prior action are the same persons who are parties in the above action.

d. The matters litigated in that prior action are identical to the matters at issue in this action, in that _____ [*specify*].

e. The judgment in the prior action remains in full force and effect. A certified copy of the judgment is attached as Exhibit _____, and is incorporated by reference.

PRAYER

Therefore, Defendant respectfully requests that the court:

1. Enter judgment that the Plaintiff take nothing by his or her complaint;

2. Award Defendant costs incurred in defending against this action; and

3. Award Defendant any other relief to which Defendant is entitled.

Respectfully submitted,

Signed: _____

Jane Lee

Attorney for Defendant

50 South Main St. Suite 100

Farallon City, California 90000

Phone: 555-999-9999

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 8, *10*, *11*

Discussion:
See *§ 8.07* et seq.

Format Requirements:
See *§ 8.12*

Drafting Admissions and Denials:
See *§ 8.09*

Drafting Affirmative Defenses:
See *§ 8.10*

Drafting Prayer:
See *§ 8.12[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
VII. FORMS
B. Motions to Dismiss

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.33

8.33 Notice of Motion and Motion to Dismiss--Lack of Subject Matter Jurisdiction.

Notice of Motion and Motion to Dismiss--Lack of Subject Matter Jurisdiction.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION TO DIS-
_____ [*name*],	)	MISS
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*identify moving party, e.g.,* Defendant Mary Jones] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], through his/her undersigned attorney, for dismissal of the _____ [Original] Complaint of _____ [*identify opposing party, e.g.,* Plaintiff John Smith], on the ground that this court lacks jurisdiction over the subject matter of the claim set forth in the complaint, in that _____ [*specify basis for lack of subject matter jurisdiction, such as:* the amount in controversy in this case does not exceed $75,000, exclusive of interest and costs]. As a result, this court lacks subject matter jurisdiction in this case, and must dismiss the Plaintiff's action.

Therefore, Defendant respectfully requests that the court:

1. Dismiss the Plaintiff's complaint;

2. Award Defendant costs of suit; and

3. Award Defendant any other relief to which Defendant is entitled.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service.*]

NOTES.

Authority:
Fed R Civ P 7(b), 11, 12(b)(1); 28 USC § 1332

Discussion:
See *§ 8.17[1], [5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
VII. FORMS
B. Motions to Dismiss

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.34

8.34 Alternative Paragraph: Lack of Personal Jurisdiction.

Alternative Paragraph

Defendant moves the court to dismiss this action for lack of personal jurisdiction on the grounds that _____ [*specify, such as:* the Plaintiff failed to secure service of the summons and complaint on the Defendant], as appears from the affidavit of _____ and _____, attached to this motion and incorporated by reference. Accordingly, the court lacks personal jurisdiction over the Defendant and must dismiss this action.

NOTES.

Authority:
Fed R Civ P 7(b), 12(b)(2); 28 USC § 1332

Discussion:
See *§ 8.18*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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CHAPTER 8 Answers and Responsive Motions Under Rule 12
VII. FORMS
B. Motions to Dismiss

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.35

8.35 Alternative Paragraph: Improper Venue.

Alternative Paragraph: Improper Venue.

Defendant moves the court to dismiss the above action on the ground that venue is improper in the _____ District, _____ Division, in that _____ [*specify reason for improper venue claim, e.g.,* the Defendant resides in _____ County, _____ (*state*)]. Accordingly, the United States District Court for the District of _____, _____ Division, is the court of proper venue in this case. Pursuant to *28 USC § 1406(a)*, the Defendant moves the court to transfer this case to the United States District Court for the District of _____, _____ Division, as the court of proper venue.

Alternatively, in the event that the court determines that venue is proper in the _____ District, _____ Division, the Defendant moves the court pursuant to *28 USC § 1404(a)* to transfer this action to the United States District Court for the District of _____, _____ Division, as a more convenient forum.

NOTES.

Authority:
Fed R Civ P 7(b), 12(b)(3); 28 USC §§ 1391, 1404(a), 1406(a)

Discussion:
See *§ 8.19*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers &

ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
VII. FORMS
B. Motions to Dismiss

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.36

8.36 Alternative Paragraph: Insufficient Process.

Alternative Paragraph: Insufficient Process.

Defendant moves the court to dismiss this action for insufficient process, or to quash the summons issued on _____ [*date*], on the ground that _____ [*specify, such as:* the summons does not state the time within which the defendant is required to appear and defend, nor does it state that in case of defendant's failure to appear and defend, the court will enter default judgment against defendant for the relief demanded in the complaint, as required by *Rule 4(a) of the Federal Rules of Civil Procedure*].

NOTES.

Authority:
Fed R Civ P 4(a), 7(b), 12(b)(4)

Discussion:
See *§ 8.20*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
VII. FORMS
B. Motions to Dismiss

1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.37

8.37 Alternative Paragraph: Insufficient Service of Process.

Alternative Paragraph: Insufficient Service of Process.

Defendant moves the court for an order dismissing the above action or, in lieu of dismissal, quashing the return of service of summons filed on _____ [*date*], on the grounds that Defendant has not been properly served with process in this action, as is more fully detailed in the affidavit of _____, attached to this motion and incorporated by reference. Service on Defendant was defective in that _____ [*specify impropriety, such as:*

a. The copies of the summons and complaint were left at the Defendant's abode with a person who did not reside at the location.

b. The person with whom the summons and complaint were left was not of suitable age or discretion within the meaning of *Rule 4(e)(2) of the Federal Rules of Civil Procedure*.

c. This person promptly lost the summons and complaint.

d. The Defendant did not learn of the attempted service until _____ (*date*)].

NOTES.

Authority:
Fed R Civ P 4(e), 7(b), 12(b)(5)

Discussion:
See *§ 8.20*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
VII. FORMS
B. Motions to Dismiss

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8.38 Alternative Paragraph: Failure to State Claim on Which Relief Can Be Granted.

Alternative Paragraph: Failure to State Claim on Which Relief Can Be Granted.

The court must dismiss this complaint for failure to state a claim against Defendant on which relief can be granted, in that _____ [*specify, such as:* the grounds for the motion are that the complaint fails to state a valid claim for relief because it purports to allege a violation of the plaintiff's civil rights, more particularly of *Section 1983 of Title 42 of the United States Code*. As the Supporting Brief attached to this motion more fully explains, the defendant in this case is a private citizen, not acting under color of law, and may not be sued for violations of Section 1983, which expressly requires that the defendant act under color of law]. Therefore, Plaintiff's action against the Defendant must be dismissed.

NOTES.

Authority:
Fed R Civ P 7(b), 12(b)(6)

Discussion:
See *§ 8.21*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.39

8.39 Alternative Paragraph: Failure to Join Indispensable Party.

Alternative Paragraph: Failure to Join Indispensable Party.

_____ [*Name of absent party*], of _____ [*address*], is a person whose joinder is indispensable to the just adjudication of this action, in that _____ [*briefly specify manner in which absent party is necessary and indispensable party*].

_____ [*Absent party*] has not been, and cannot be, made a party to this action because _____ [*specify, such as:* _____ (he *or* she) is not subject to service of process in this judicial district *or* _____ (his *or* her) joinder would deprive the court of jurisdiction over the subject matter of this action *or as the case may be*].

A judgment rendered in this action without _____ [*absent party*] would be inadequate in that _____ [*specify basis for claim of inadequacy*]. In addition, a judgment rendered in _____ [*absent party's*] absence will be prejudicial to _____ [*existing party, such as:* the Defendant], in that it will _____ [*specify, for example:* impair or impede the Defendant's ability to protect Defendant's interests, or may leave the Defendant subject to a substantial risk of incurring inconsistent obligations], as is clearly shown in the affidavit of _____ attached to this motion.

NOTES.

Authority:
Fed R Civ P 7(b), 12(b)(7), 19

Discussion:
See *§ 8.22*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.40

8.40 Plaintiff's Opposition to Defendant's Motion to Dismiss.

Plaintiff's Opposition to Defendant's Motion to Dismiss.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	NO. _____
vs.	)	
_____ [*name*],	)	PLAINTIFF'S OPPOSITION TO
Defendant	)	DEFENDANT'S MOTION TO
	)	DISMISS PLAINTIFF'S COMPLAINT
	)	

Plaintiff, _____ [*name*], through his or her attorney, files this opposition in response to Defendant's motion to dismiss the Plaintiff's complaint, and states:

_____ [*Set forth basis for denying motion to dismiss, e.g.:*

1. Paragraphs _____ through _____ of the Plaintiff's complaint allege that the Defendant, acting under color of state law, violated the Plaintiff's constitutional rights.

2. Paragraph _____ through _____ of the complaint allege the Defendant's liability under *42 USC § 1983* by showing that the Defendant who committed the constitutional violation was an official with final policymaking authority, and that the challenged action itself constituted an act of official governmental policy.

3. Paragraphs _____ through _____ of the Plaintiff's complaint contains nonconclusory allegations setting forth evidence of the Defendant's unlawful intent.

4. These factual allegations are specific and concrete enough to enable the Defendant to prepare a defense to Plaintiff's suit.]

Therefore, Plaintiff respectfully requests that the court:

1. Enter an order denying Defendant's motion to dismiss;

2. Grant the relief prayed for in Plaintiff's complaint;

3. Grant Plaintiff any other relief to which Plaintiff is entitled.

Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach memorandum of points and authorities, affidavits, and other materials in support of motion*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 7(b), *12(b)(6)*; see *ND Cal Civ LR 7-3(a)*, *7-9*; *SD Cal Civ LR 7.1(f.3.b)*

Discussion:
See *§ 8.16[6][b]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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1-8 MB Practice Guide: Fed Pretrial Civ Proc in CA 8.41

8.41 Notice of Motion and Motion for More Definite Statement.

Notice of Motion and Motion for More Definite Statement.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR MORE
_____ [*name*],	)	DEFINITE STATEMENT
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*identify moving party, e.g.,* Defendant Mary Jones] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*] for an order directing Plaintiff to furnish a more definite statement of the _____ [*e.g.,* claims asserted in his complaint] in the following respects and particulars: _____ [*specify defects complained of and details desired, e.g.,*

a. The Plaintiff's lengthy complaint is mostly an extended narrative of the details of the various activities of the Plaintiff, and his numerous alleged arrests. At the end of the complaint, Plaintiff purports to set out two counts, one for damages and one for declaratory and injunctive relief. Plaintiff's claims are set out in a single sentence, 30 lines long, alleging numerous different violations of rights, without any specification of which of the named defendants is liable for which wrongs.

b. Plaintiff makes sweeping allegations against the various defendants, but the complaint does not make clear connections between specific allegations and individual defendants. The vague wording of the complaint makes it excessively difficult for Defendant to formulate a proper defenses, and subjects Defendant to unnecessary discovery.

c. Plaintiff's complaint does provide specific allegations of fact to support the claim that Defendant has intentionally deprived plaintiff of constitutional rights, but does not properly notify Defendant of the allegations with which defendant is charged. Given the number and diversity of named defendants, and the breadth of the allegations, claims that vaguely refer to Defendant or "other responsible authorities" will not suffice.]

Therefore, Defendant's motion for a more definite statement should be granted, and Plaintiff should be ordered to file an amended complaint that clearly and concisely explains which allegations are relevant to Defendant.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 7(b), 12(e)

Discussion:
See *§ 8.25*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDefects of FormCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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8.42 Notice of Motion and Motion to Strike.

Notice of Motion and Motion to Strike.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*], Plaintiff vs. _____ [*name*], Defendant	Civil Action No. _____ NOTICE OF MOTION AND MOTION TO STRIKE Date of Hearing: _____ Time of Hearing: _____ Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*identify moving party, e.g.,* Defendant Mary Jones] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], through his/her undersigned attorney, to strike the _____ [Plaintiff's _____ (*type*) Claim *or* Defendant's _____ (*type*) defense], and states:

_____ [*Set forth basis for motion to strike, e.g.:*

1. In Paragraph 4 of the claim, the Plaintiff attempts to assert state and common law claims for alleged discrimination and harassment relating to the Plaintiff's disability, national origin, and religion in connection with Plaintiff's alleged wrongful discharge.

2. Defendant moves to strike these claims to the extent that they are state law claims preempted by ERISA, since they are based on claims that Defendant's actions were motivated by an intent to interfere with or deprive Plaintiff of ERISA benefits.

3. An ERISA claim is preempted when the complaint alleges that a reason for the plaintiff's discharge was the employer's desire to avoid paying an employee benefits under an ERISA plan. Therefore, these claims, to the extent they are based on ERISA, are preempted and must be dismissed from this complaint.]

Therefore, the _____ [claim *or* defense] must be stricken from the _____ [complaint *or* answer *or* motion] as _____ [redundant, immaterial, and impertinent *or as the case may be*], as matter that can have no possible bearing on the subject matter of the litigation.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations*

and exhibits to those affidavits or declarations.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 7(b), 12(f)

Discussion:
See *§ 8.26*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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8.43 Notice of Motion and Motion for Judgment on the Pleadings.

Notice of Motion and Motion for Judgment on the Pleadings.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*], Plaintiff vs. _____ [*name*], Defendant	)	Civil Action No. _____ NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS Date of Hearing: _____ Time of Hearing: _____ Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*identify moving party, e.g.,* Defendant Mary Jones] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], through his/her undersigned attorney, for judgment on the pleadings, stating as follows:

It appears from the face of the pleadings that _____ [Plaintiff *or* Defendant] is entitled to a judgment on the pleadings in this action, in that _____ [*specify, such as:* the Plaintiffs claims of breach of the duty of fair representation and breach of the agreement are time-barred because the Plaintiff failed to file within the six-month statute of limitations set forth in *29 USC § 160(b)*].

Even assuming all facts in the complaint to be true, _____ [*identify moving party, e.g.,* Defendant Mary Jones] is entitled to judgment as a matter of law.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 7(b), 12(c)

Discussion:
See *§ 8.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 8 Answers and Responsive Motions Under Rule 12
VII. FORMS
E. Local District Court Forms

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8.44 Local District Court Forms.

Central District

Certification and Notice of Interested Parties (CV-30)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Cross Reference:

Automated HotDocs(R) and PDF versions of these forms may be accessed and filled in from the online version of this publication, and are also available at www.LexisOne.com/forms.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 9 Amending and Supplementing Pleadings

2-9 MB Practice Guide: Fed Pretrial Civ Proc in CA 9.syn

§ 9.syn Synopsis to Chapter 9: Amending and Supplementing Pleadings

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9.02 Objective and Strategy.

9.03 CHECKLIST: Amending Pleadings Before Trial.

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9.22 Notice of Motion and Motion for Leave to File Amended Pleading.

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9.25 Notice of Motion and Motion for Leave to Amend Pleading to Conform to Evidence.

9.26 Proposed Order Permitting Amendment of Pleading to Conform to Evidence.

9.27 Notice of Motion and Motion for Leave to File Supplemental Pleading.

9.28 Order Granting Leave to File Supplemental Pleading.

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Unit 3 Pleading Stage
CHAPTER 9 Amending and Supplementing Pleadings
I. STRATEGY

2-9 MB Practice Guide: Fed Pretrial Civ Proc in CA 9.01

9.01 Scope.

This chapter discusses amending and supplementing pleadings under *Fed R Civ P 15*, including:

- Amending pleadings as a matter of course [*see 9.07*].
- Amending pleadings with leave of court or consent of the opposing party [*see 9.08*; *Forms: 9.22 -9.24*].
- Determining when an amendment relates back to the date of the original pleading [*see 9.12 -9.14*].
- Amending pleadings to conform to the evidence [*see 9.15 -9.18*; *Forms: 9.25*, *9.26*].
- Supplementing pleadings [*see 9.19 -9.21*; *Forms: 9.27*, *9.28*].

Core Rule:
Fed R Civ P 15.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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Unit 3 Pleading Stage
CHAPTER 9 Amending and Supplementing Pleadings
I. STRATEGY

2-9 MB Practice Guide: Fed Pretrial Civ Proc in CA 9.02

9.02 Objective and Strategy.

A party may amend a pleading for many reasons, for example: to correct errors; to add facts discovered during the litigation; to add claims or defenses; or to add, substitute, or drop parties. A party may also amend its pleading after trial to conform the pleading to the evidence. Supplementation of a pleading, as opposed to amendment, is appropriate when a party wishes to plead events that have taken place after the date of the original pleading.

Fed R Civ P 15 governs amendment and supplementation procedure. It must be read in conjunction with other rules that govern particular types of amendments and may provide additional requirements [*see Fed R Civ P 13* (counterclaims and crossclaims); *Fed R Civ P 14* (third-party practice); *Fed R Civ P 18* (joinder of claims); *Fed R Civ P 19* (required joinder of parties); *Fed R Civ P 20* (permissive joinder of parties); *Fed R Civ P 21* (misjoinder)].

Detailed Discussion/Forms:

3 Moore's Federal Practice, Ch. 15, Amended and Supplemental Pleadings(Matthew Bender 3d ed.).

4 *Bender's Federal Practice Forms, Form 15:1 et seq*. (Matthew Bender).

Cross References:

Discussion of related topics, see Ch. 6, Drafting the Summons and Complaint; Ch. 7, Service of Summons; Ch. 8, Answers and Responsive Motions Under Rule 12; Ch. 10, Adding, Dropping, and Substituting Parties; and Ch. 11, Counterclaims, Crossclaims, and Replies.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-9 MB Practice Guide: Fed Pretrial Civ Proc in CA 9.03

9.03 CHECKLIST: Amending Pleadings Before Trial.

9.03[1] Amending Party's Checklist.

☐ Analyze whether newly discovered facts or other circumstances require amendment of a pleading to, for example:

- ○ Correct errors or omissions in the complaint disclosed by an opponent's *Fed R Civ P 12(b)(6)* motion to dismiss.
- ○ Add and give notice of alternative legal theories of recovery.
- ○ Add new claims.
- ○ Add persuasive or controlling facts discovered during the litigation.
- ○ Add affirmative defenses.
- ○ Add counterclaims or crossclaims
- ○ Add, substitute, or drop a party.

Authority:
Fed R Civ P 15(a)

Discussion:

See *§ 9.05*

☐ Determine whether Rule 15(a) permits amendment unilaterally (i.e., without the court's permission or opponents consent), by considering whether:

○ Pleading to be amended is one to which the Federal Rules permit the opponent to serve a responsive pleading, noting that an opponent may serve and file only the following responsive pleadings:

☐ Answers to a complaint.

☐ Replies to a counterclaim.

☐ Answers to a crossclaim.

☐ Answers to a third-party complaint.

☐ Replies to an answer or third-party answer, if ordered by the court.

○ If pleading is one that does not require a responsive pleading, whether pleading will be amended within 21 days after serving it.

○ If pleading is one to which responsive pleading is required:

☐ Whether pleading will be amended within 21 days after service of responsive pleading; or

☐ Whether pleading will be amended within 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

Authority:

Fed R Civ P 15(a). See also *Fed R Civ P 7* (pleadings allowed); *Fed R Civ P 12(a)* (time for serving responsive pleadings)

Discussion:

See *§§ 9.07[1]*, *9.08[1]*

☐ Prepare a complete amended pleading that will supersede the previous pleading.

Trap:

Rule 15(a) does not expressly authorize, but has been interpreted to permit, a party to file a separate document containing a description of an amendment or amendments to a previously filed pleading. The local rules of the California district courts preclude this practice. They insist that amendments must always be in the form of a complete, revised pleading.

Authority:
CD Cal Civ LR 15-2; *ED Cal Civ LR 220*; *ND Cal Civ LR 10-1*; *SD Cal Civ LR 15.1*

Discussion:
See *§ 9.06*

☐ If leave of court or consent of the adverse party is not required, file and serve the amended pleading.

Timing:
If the pleading is one that does not require a responsive pleading, be sure that the amended pleading is served within 21 days after serving the pleading. If the pleading is one to which a responsive pleading is required, be sure that the amended pleading is served within 21 days after service of the responsive pleading, or within 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

Authority:
Fed R Civ P 15(a). *See Fed R Civ P 7* (list of "responsive" pleadings)

Discussion:
See *§ 9.07*

☐ If leave of court or consent of the adverse party is required, seek to obtain written consent of the adverse parties, and file the consent with the court along with the amended pleading.

Authority:
Fed R Civ P 15(a)

Discussion:
See *§ 9.08[2]*

Form:
See *§ 9.24* (stipulation allowing filing)

☐ If leave of court is required and consent is not obtained, move the court for leave to amend by:

○ Preparing a motion for leave to file an amended pleading.

○ Attaching a copy of the proposed amended pleading, with any other attachments, to the copies of the motion to be served and filed. A local rule in the Central District requires an original and one copy of the proposed amended pleading to be lodged with the court.

○ Preparing an order for the court's signature in the event it grants the motion.

○ Serving all other parties with the notice of motion and all motion papers.

○ Following all other standard noticed motion procedures.

Timing:

The court will usually specify in a Rule 16 scheduling order the latest permissible date for moving to amend pleadings.

Authority:

Fed R Civ P 15(a); *CD Cal Civ LR 15-1*

Discussion:

See *§§ 9.08[3]*, *[4]*

Forms:

See *§ 9.22* (notice of motion for leave to amend); see *§ 9.23* (order granting leave)

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ If the motion is granted:

○ File a copy of the amended pleading with the court.

○ If a new party is joined or substituted, determine if the statute of limitations has run and, if so, whether the amendment will relate back.

Authority:

Fed R Civ P 15(c)

Checklist:

See *§ 9.12*

Discussion:

See *§ 9.14*

○ Serve any new party under Rule 4 with a summons and a copy of the amended pleading.

Authority:

Fed R Civ P 4

9.03[2] Responding Party's Checklist.

☐ If an adverse party moves to amend or seeks your consent to an amendment, determine whether to oppose amendment by considering:

○ Prejudice, if any, that amendment will cause.

○ Undue delay that amendment will cause, but only to extent that delay causes prejudice.

○ Bad faith or dilatory motive of proponent in offering amendment at current stage of proceedings.

○ Futility of proposed amendment; that is, whether proposed amended pleading would be legally insufficient.

○ Previous amendments that court has already allowed.

Authority:
Foman v. Davis (1962) 371 US 178, 182, 83 S Ct 227, 9 L Ed2d 222

Discussion:
See *§ 9.08[6]*

☐ If potential prejudice from proposed amendment creates reasonable ground for opposing amendment:

○ Refuse to consent to proposed amendment.

○ Prepare and timely file an opposition memorandum and declarations opposing any motion for leave to amend.

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.37*

☐ In preparing an opposition to a motion for leave to amend, or in responding to a request for consent to amendment, propose possible conditions to amendment that would avoid any prejudice resulting from allowing amendment, including conditions such as:

○ Requiring proponent of amendment to bear additional costs incurred as a result of amendment.

○ Obtaining extension of time to respond to the amended pleading.

○ Obtaining court authorization for additional discovery with respect to the added claims or defenses.

○ Continuation of trial date.

Authority:
General Signal Corp. v. MCI Telecomms. Corp. (9th Cir 1995) 66 F3d 1500, 1514

Discussion:
See *§ 9.08[7]*

☐ If the court grants leave to amend a complaint, third-party complaint, or answer asserting a counterclaim or crossclaim, respond to the amended pleading by:

- ○ Making all appropriate admissions and denials to allegations of pleading as amended.
- ○ Asserting all applicable affirmative defenses to new claims.
- ○ Asserting any desired counterclaims and crossclaims.

☐ If the court grants leave to amend an answer or third-party answer and, as amended, allegations in the answer or third-party answer need response, consider requesting court permission to file a reply.

☐ Make certain that any responses to amended pleadings are timely by serving response no later than:

- ○ Time remaining for response to original, unamended pleading.
- ○ 10 days after service of the amended pleading.
- ○ Period ordered by the court if the court extends the time for response.

Authority:
Fed R Civ P 15(a)

Discussion:
See *§ 9.11*

☐ Consider additional and alternative responses to amended pleading, including:

- ○ Motions to dismiss for failure to state claim or lack of subject matter jurisdiction, etc.

Authority:
Fed R Civ P 12(b)(1), (6)

- ○ Motions to add a required party to any added claims, or to dismiss for failure to join an indispensable party on added claims.

Authority:
Fed R Civ P 12(b)(7), 19(a)

- ○ Motions to dismiss, for judgment on the pleadings, or for summary judgment if added claims are barred by limitations and if amendment does not relate back to the original pleading.

Authority:
Fed R Civ P 15(c); see *Fed R Civ P 12(b), (c)*, 56

Checklist:
See *§ 9.12*

Discussion:

See *§ 9.14*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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Unit 3 Pleading Stage
CHAPTER 9 Amending and Supplementing Pleadings
II. AMENDING PLEADINGS BEFORE TRIAL

2-9 MB Practice Guide: Fed Pretrial Civ Proc in CA 9.04

9.04 Options and Strategy.

Courts favor amendment of pleadings in the interest of resolving cases on the merits and interpret the provisions of Rule 15 accordingly [*see Foman v. Davis (1962) 371 US 178, 181-182, 83 S Ct 227, 9 L Ed2d 222*]. A party may amend any of the types of pleadings that are allowed by Rule 7, that is, a party may amend a complaint, an answer, a reply to a counter claim, an answer to a crossclaim, a third-party complaint, a third-party answer, and a reply to an answer [*see Fed R Civ P 7(a)*].

Although amendment of pleadings is favored, a party should strive to make its pleadings as complete and accurate as possible when they are initially served and filed. Despite the strong policy favoring amendment of pleadings, pleadings in federal courts serve limited purposes [*see Fed R Civ P 8(a), (b)*; *see also Fed R Civ P 16(e)* (final pretrial order supersedes pleadings)]. Therefore, a federal court will neither encourage nor permit the parties to engage in a fruitless pleading war, in which all sorts of implausible or insupportable claims or evidentiary facts are asserted and responded to, through a series of unneeded amendments to the pleadings. Even when an amendment seeks to correct an unintentional omission from or error in the pleadings, a court will be reluctant to delay trial or other resolution of the dispute, or to require the parties to incur additional expenses from further discovery proceedings, because of tardy assertions of facts, claims, or defenses that should have been pleaded far earlier in the proceedings. Therefore, except for a very limited period of time following the service of a pleading, a party may amend its pleading only after moving the court for leave to amend [*see Fed R Civ P 15(a)*]. The court may and will deny permission to amend a pleading if the proposed amendment will result in delay that causes prejudice to the opposing parties [*see, e.g., Solomon v. North Am. Life & Cas. Ins. Co. (9th Cir 1998) 151 F3d 1132, 1139*].

Before moving for leave to amend, it is a good practice to seek to obtain the stipulation of the opposing party to the amendment. In the Central District, for example, a local rule *requires* that counsel confer in an attempt to resolve matters before the filing of any type of motion [*CD Cal Civ LR 7-3*]. Even when a court does not expressly require it, courts expect that the parties will not consume the court's time with any motion that is not needed or is not opposed [*see ND Cal Civ LR 7-3(b)* (party served with motion who does not oppose it must file written statement of "nonopposition")]. Because of the strong policy favoring leave to amend, there is often little advantage in opposing a proposed amendment that is offered in a reasonably timely manner.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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9.05 Amendment May Serve Various Purposes.

Amendment may become necessary during the course of the litigation for any of various reasons:

- To cure defects in the complaint after the court grants a motion to dismiss for failure to state a claim [*see Fed R Civ P 12(b)(6)*; *see, e.g., Brown v. Rumsfeld (ND Cal 2002) 211 FRD 601, 605-606*].

- To cure defective allegations of jurisdiction [*see 28 USC § 1653*].

- To add claims or counterclaims that were omitted from the original pleadings [*see Fed R Civ P 15(a), 18*; *see, e.g., SAES Getters S.p.A. v. Aeronex, Inc. (SD Cal 2002) 219 F Supp2d 1081, 1085, 1095*].

- To add an affirmative defense to an answer [*see Fed R Civ P 8(c)*; *see, e.g., Owens v. Kaiser Found. Health Plan, Inc. (9th Cir 2001) 244 F3d 708, 712-713*].

- To add a new defendant [*see, e.g., Flowers v. First Hawaiian Bank (9th Cir 2002) 295 F3d 966, 976*] or other party, such as additional plaintiffs with similar claims against the same defendants [*see, e.g., Immigrant Assistance Project of L.A. County Fed'n of Labor v. INS (9th Cir 2002) 306 F3d 842, 857-859*]. Parties may be added at any stage of the proceedings "on such terms as are just" [*see Fed R Civ P 21*; *see also Fed R Civ P 19, 20*] provided jurisdiction and venue requirements are met.

- To name a party in his or her proper capacity [*see Fed R Civ P 17(b)*; *see, e.g., Bowles v. Reade (9th Cir 1999) 198 F3d 752, 757*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.06 Amendment Takes Form of Complete Amended Pleading.

9.06[1] Amended Pleading Must Be In Proper Format. When a pleading is amended, whether by right or with leave of court, the amending party should prepare, serve, and file a complete document that incorporates the amendments and supersedes the prior pleading, rather than a document that sets out only the amendments or that incorporates the previous pleading by reference. Although either method of amending pleadings would satisfy the requirements of Rule 15, all four of the California district courts have adopted local rules permitting only completely amended and superseding pleadings and disallowing amendment of pleadings by means of any form of document that requires reference to the original pleading [*see CD Cal Civ LR 15-2*; *ED Cal Civ LR 220*; *ND Cal Civ LR 10-1*; *SD Cal Civ LR 15.1*].

Consider:

Even though a copy of the amended pleading is attached to the motion filed with the court, the amending party should separately file the amended pleading after an order permitting it.

Warning--Matters Omitted From Amended Pleading Are Waived:

Because the complete amended pleading supersedes the previous pleading, care should be taken not to erroneously omit any claims or parties. Claims alleged in the previous pleading but not included in the amended pleading are waived [*King v. Atiyeh (9th Cir 1987) 814 F2d 565, 567*]. Likewise, a party not named in the amended pleading will not be bound by the judgment [*Hal Roach Studios, Inc. v. Richard Feiner & Co. (9th Cir 1989) 896 F2d 1542, 1546*]. However, a party is not required to replead a claim that a court has dismissed without leave to amend in order to preserve the right to appeal the dismissal [*see Parrino v. FHP, Inc. (9th Cir 1998) 146 F3d 699, 704*].

9.06[2] LOCAL PRACTICE: Format for Amendment of Pleadings.

9.06[2][a] LOCAL PRACTICE: CD Cal Requirements. A proposed amended pleading must be electronically filed as a document separate from a related motion or stipulation [*CD Cal Civ LR 15-1*].

Every amended pleading filed as a matter of right or allowed by order of the court must be complete including exhibits. The amended pleading must not refer to the prior, superseded pleading [*CD Cal Civ LR 15-2*].

Every amended pleading must be filed as a paper document [*CD Cal Civ LR 15-4*].

9.06[2][b] LOCAL PRACTICE: ED Cal Requirements. Unless prior approval to the contrary is obtained from the court, every pleading to which an amendment or supplement is permitted as a matter of right or has been allowed by court must be retyped and filed so that it is complete in itself without reference to the prior or superseded pleading. No pleading will be deemed supplemented until Rule 220 is complied with [*ED Cal Civ LR 220*].

As used in Rule 220, "changed pleadings" means amended and supplemental pleadings permitted and filed pursuant to *Fed R Civ P 15* [*ED Cal Civ LR 220*].

All changed pleadings must contain copies of all exhibits referred to in the changed pleading. Permission may be obtained from the court, if desired, for the removal of any exhibit or exhibits attached to a superseded pleading, in order that the same may be attached to the changed pleading [*ED Cal Civ LR 220*].

9.06[2][c] LOCAL PRACTICE: ND Cal Requirements. Any party filing or moving to file an amended pleading must reproduce the entire proposed pleading and may not incorporate any part of a prior pleading by reference [*ND Cal Civ LR 10-1*].

9.06[2][d] LOCAL PRACTICE: SD Cal Requirements. Unless prior court approval is obtained, every pleading to which an amendment is permitted as a matter of right or has been allowed by court order, must be retyped and filed so that it is complete in itself without reference to the superseded pleading. Amended pleadings must contain copies of all exhibits referenced therein [*SD Cal Civ LR 15.1*].

A party may obtain permission from the court for removal of any exhibit or exhibits attached to prior pleadings, so that the same may be attached to the amended pleading [*SD Cal Civ LR 15.1*]. Each amended pleading must be designated successively as first amended, second amended, etc. [*SD Cal Civ LR 15.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.07 Pleadings May Be Amended Once Without Leave.

9.07[1] Party May Amend Without Leave Within Strict Timeframe. A party may amend its pleading once "as a matter of course," that is, unilaterally without court permission or the consent of opposing parties, within 21 days after serving the pleading [*Fed R Civ P 15(a)(1)(A)*]. This simple, 21-day deadline applies to pleadings that do not require a responsive pleading [*see Fed R Civ P 15(a)(1)(A)*; *see also Fed R Civ P 7(a)* (list of responsive pleadings)]. If the pleading is one that does require a responsive pleading, a more complex time limit applies. In these circumstances, a party may amend its pleading either [*Fed R Civ P 15(a)(1)(B)*]:

- Within 21 days after service of the responsive pleading; or
- Within 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

Warning:

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. For example, if a responsive pleading is served after one of the designated motions is served, there is no new 21-day period [*Fed R Civ P 15*, Committee Note of 2009].

Because amendment is "as a matter of course," the amending party need not file a motion for leave to amend. Filing and serving the amended pleading [*see Fed R Civ P 5*] is sufficient [*see Fed R Civ P 15(a)*].

Not all papers filed in response to a complaint are "responsive pleadings," however:

- Responsive pleadings *do* include an answer to a complaint, a reply to a counterclaim, an answer to a crossclaim, and an answer to a third-party complaint, and may also include a reply to an answer or to a third-party answer, if ordered by the court [*see Fed R Civ P 7(a)* (permissible "pleadings" defined)].
- Responsive pleadings *do not* include other papers, such as pre-trial motions and other papers not

listed in Rule 7 as "pleadings" [*see Fed R Civ P 7(a)*]. A Rule 12(b) motion to dismiss, for example, is not a responsive pleading and, therefore, does not cut off the pleader's right to amend once, without leave of the court [*see Rick-Mik Enters., Inc. v. Equilon Enters., LLC (9th Cir 2008) 532 F3d 963, 977]* .

If some of the defendants have answered but not others, the plaintiff may amend the claims against the non-answering parties "as a matter of course," but must obtain leave with respect to the others [*see Barksdale v. King (5th Cir 1983) 699 F2d 744, 746-747*].

9.07[2] Only One Amendment Permitted Without Leave. A party may amend its pleading "as a matter of course," that is, without leave of court or consent of opposing parties, only once. For additional amendments, even within the proper time period, the party must seek leave of court [*see Fed R Civ P 15(a)*; *Eminence Capital, LLC v. Aspeon (9th Cir 2003) 316 F3d 1048, 1051*].

Cross Reference:

Discussion of amendment with leave of court, see *§ 9.08*.

9.07[3] Court May Not Deny Amendment Without Leave When Rule 15 Permits It. If, under *Fed R Civ P 15(a)*, a party is entitled to amend its pleading "as a matter of course," that is without leave of court or consent of opposing parties, the court abuses its discretion if it refuses to allow the amendment [*Doe v. United States (9th Cir 1995) 58 F3d 494, 497*]. However, the party may not use an amendment "as a matter of course" to defeat a court's jurisdiction [*see Lyster v. First Nationwide Bank Fin. Corp. (ND Cal 1993) 829 F Supp 1163, 1165*].

Example--Amendment May Not Preempt Court Discretion in Removed Cases:

The statute governing procedure after removal provides that when the plaintiff seeks to join additional defendants after removal, and when the joined parties' presence would destroy the diversity jurisdiction, the court has discretion. The court may either deny joinder or permit joinder and remand the action to state court [*28 USC § 1447(e)*]. The plaintiff may not use a purported amendment "as a matter of course" to control the court's discretion over the joinder of parties whose presence might destroy jurisdiction. The court may deny or permit joinder of additional parties, even when an amendment joining the parties would otherwise have been available "as a matter of course" under Rule 15(a) [*Clinco v. Roberts (CD Cal 1999) 41 F Supp2d 1080, 1088*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.08 Pleadings May Be Amended With Leave of Court or With Consent of Adverse Party.

9.08[1] Leave or Consent Required After 21-Day Window for Amendment as Matter of Course Has Run. A party has a one-time right to amend its pleadings "as a matter of course" [*see Fed R Civ P 15(a)(1)*]. In all other cases, a party may amend its pleading only with the leave of the court or the written consent of the adverse party [*Fed R Civ P 15(a)(2)*].

Cross Reference:

Leave to amend unilaterally, see *§ 9.07*.

9.08[2] Consent Must Be Written. A party may amend a pleading by consent of the adverse party. But consent will authorize the amendment only if the consent is in writing [*Fed R Civ P 15(a)(2)*]. The best practice is to make sure that the written consent follows the requirements for written stipulations as set out in the court's local rules, which usually means that [*see CD Cal Civ LR 7-1*; *ED Cal Gen LR 143*; *ND Cal Civ LR 7-12*; *SD Cal Civ LR 7.2*]:

- The written stipulation must be signed by all the parties;
- It does not take effect until it is approved by the court; and
- The court's approval may be obtained by having a "SO ORDERED" provision in the stipulation and by providing a place for the court to sign and date the stipulation to indicate its approval of the stipulation.

Cross Reference:

Form for stipulation allowing amendment of pleading, see *§ 9.24*. Requirements for written stipulations under local rules, see Ch. 26, Pretrial Motion Practice, see *§ 26.09[2]*.

9.08[3] Leave Is Sought Through Noticed Motion, With Proposed Pleading Attached. The party seeking leave of court to amend must move for leave to amend [*see Fed R Civ P 7(b)* (all requests for court orders must be by

motion)]. Courts may sometimes grant leave even though leave is not properly requested [*Edwards v. Occidental Chem. Corp. (9th Cir 1990) 892 F2d 1442, 1445 n2*], but need not do so when there is no proper motion before the court [*see U.S. Care, Inc. v. Pioneer Life Ins. Co. (CD Cal 2002) 244 F Supp2d 1057, 1065* ("bare request [to amend] in an opposition to a motion to dismiss--without any indication of the particular grounds on which the amendment is sought--does not constitute a motion within the contemplation of Rule 15(a)")].

As a practical matter, a copy of the proposed amended pleading must always be attached to the motion as filed and served. The court will not be able to rule on the motion, and the opposing parties will not be able to respond to the motion, without seeing exactly what amendment is being proposed. A Central District Rule requires that a proposed amended pleading be electronically filed as a document separate from a related motion or stipulation [*CD Cal Civ LR 15-1*]. Similarly, a Northern District Rule requires that any party moving to file an amended pleading must reproduce the entire proposed pleading [*ND Cal Civ LR 10-1*]. In the Eastern District, the amended pleading proposed to be filed must be attached as an exhibit to the motion and a proposed order filed [*ED Cal Gen LR 137(c)*].

Consider:

Even though a copy of the proposed amended pleading is filed with the court along with the motion, the amending party should separately file the amended pleading after the court grants leave.

Cross References:

Form of notice of motion for leave to file an amended pleading, see *§ 9.22*. Form of order granting leave to amend, see *§ 9.23*. Discussion of service of motions, see Ch. 26, Pretrial Motion Practice; Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.18*.

9.08[4] Time Limit for Moving to Amend Set in Scheduling Order. After a pretrial conference, the court will issue a pretrial case-management order that, among other things, will set a deadline for motions to join parties and amend the pleadings [*see Fed R Civ P 16(b)(3)(A)*].

Warning:

When determining whether to allow an amendment after the time set in the scheduling order, the court will apply the more stringent "good cause" standard for granting an exception to a scheduling order rather than the more lenient Rule 15 standard favoring amendment [*see Johnson v. Mammoth Recreations, Inc. (9th Cir 1992) 975 F2d 604, 608*].

Cross Reference:

Discussion of "good cause" standard under Rule 16, see Ch. 16, Case Management Conferences, see *§ 16.12*.

The time for filing an amendment may also be cut off if undue delay by the amending party causes prejudice to the adverse party.

Cross Reference:

Discussion of effect of undue delay, see *§ 9.08[6][c]*.

9.08[5] Leave to Amend Must Be Granted Freely. When a party requests leave to amend, "leave shall be freely given when justice so requires" [*Fed R Civ P 15(a)(2)*]. This policy is to be applied with "extreme liberality" [*Eminence Capital, LLC v. Aspeon (9th Cir 2003) 316 F3d 1048, 1051*], because it facilitates decisions on the merits, rather than on the pleadings or technicalities [*Nunes v. Ashcroft (9th Cir 2004) 375 F3d 805, 808 , cert. denied, 543 US 1188 (2005)*]. The policy strongly favoring granting leave to amend applies equally to amendments proposing to add new parties or amendments proposing to add new claims. Courts are particularly reluctant to deny leave to amend to

pro se litigants [*Flowers v. First Hawaiian Bank (9th Cir 2002) 295 F3d 966, 976*]. This policy also applies to amendments proposing to add counterclaims [*see Fed R Civ P 15(a)*; *Fed R Civ P 15*, Committee Note of 2009].

Cross Reference:

Discussion of counterclaims, see Ch. 11, Counterclaims, Crossclaims, and Replies, see *§§ 11.03 -11.25*.

A court is not required to grant leave "freely" when a proper motion seeking leave to amend is not before it. The party seeking leave must take the procedural steps required to invoke the policy. When, as part of its opposition papers filed in response to a motion to dismiss, a party makes a bare request to amend, without any indication of the exact nature of the proposed amendment or the grounds for the amendment, the party has not made a proper motion for leave to amend under Rule 7. In these circumstances, the court need not grant leave freely [*see Confederate Memorial Ass'n v. Hines (DC Cir 1993) 995 F2d 295, 299*].

9.08[6] Court Must Consider Several Factors in Deciding Whether to Grant Leave to amend.

9.08[6][a] List of Factors Stated in *Foman v. Davis*. In the leading case of *Foman v. Davis,* the Supreme Court listed the factors that a court must consider in deciding whether to grant leave to amend [*Foman v. Davis (1962) 371 US 178, 182, 83 S Ct 227, 9 L Ed2d 222*]:

- Undue delay by the movant.
- Bad faith or dilatory motive on the part of the movant.
- Repeated failure to cure deficiencies by amendments previously allowed.
- Undue prejudice to the opposing party if the amendment were allowed.
- Futility of the amendment.

These factors are non-exclusive; other factors may be relevant as well.

9.08[6][b] Prejudice to Opposing Party. Whether the proposed amendment will prejudice the opposing party is the most important factor in deciding whether to grant leave to amend. If there is no prejudice (nor a strong showing of any of the other *Foman* factors that might require denial of leave), there is a presumption favoring granting leave to amend [*Eminence Capital, LLC v. Aspeon (9th Cir 2003) 316 F3d 1048, 1052*].

Prejudice might occur if an opposing party will need to bear significant additional expense, or will suffer significant delays in the resolution of the dispute, because the addition of claims or parties increases the scope and complexity of the litigation or because the amendment will require the court to reopen discovery [*see, e.g., In re Fritz Cos. Secs. Litig. (ND Cal 2003) 282 F Supp2d 1105, 1109*]. Undue prejudice may exist, for example, when the addition of new claims at a late stage in the proceedings would greatly alter the nature of the litigation, thus requiring the defendant to undertake an entirely new defense [*see Morongo Band of Mission Indians v. Rose (9th Cir 1990) 893 F2d 1074, 1079* ; IXYS Corp. v. Advanced Power Tech., Inc. (ND Cal 2004) 2004 US Dist LEXIS 804, at *8 ("the need for a party to conduct supplemental discovery or to consider a new line of legal argument are classic sources of prejudice that have regularly proven sufficient to defeat a motion for leave to amend")].

The party opposing the amendment has the burden of showing prejudice [*DCD Programs Ltd. v. Leighton (9th Cir 1987) 833 F2d 183, 187* ; *Serpa v. SBC Telecomms., Inc. (ND Cal 2004) 318 F Supp2d 865, 870*].

9.08[6][c] Delay. The amending party's delay in seeking to amend its pleadings is not, by itself, sufficient to justify

denying a motion for leave to amend [*see, e.g., Owens v. Kaiser Found. Health Plan, Inc. (9th Cir 2001) 244 F3d 708, 712-713*]. Delay justifies denial of leave to amend only when the delay causes prejudice, or shows bad faith by the moving party, or when it precludes full consideration of the possible futility of the proposed amendment [*Bowles v. Reade (9th Cir 1999) 198 F3d 752, 758-759*].

Example--No Prejudice:

The district court did not abuse its discretion when the defendant was permitted to amend its answer to add a res judicata defense. The plaintiff did not suffer any prejudice because the amendment caused no delay in the proceedings and required no additional discovery [*Owens v. Kaiser Found. Health Plan, Inc. (9th Cir 2001) 244 F3d 708, 712*].

Courts are more willing to conclude that delay is prejudicial (or illustrative of bad faith) when the matters in the proposed amendment were known or should have been known to the amending party, and no reason is given for their exclusion from the previous version of the pleading [*see, e.g., In re Fritz Cos. Secs. Litig. (ND Cal 2003) 282 F Supp2d 1105, 1110-1111*].

Example--Prejudice to Adverse Party.

The district court did not abuse its discretion in finding undue delay when fifteen months passed between the time the plaintiff discovered new facts and asserted a new theory based on those facts in a motion for leave to amend. Plaintiff did not allege any "newly discovered facts" in the motion nor did it explain why it waited over a year after filing its complaint before bringing these facts to the attention of the court; and the amendments were prejudicial because they contradicted plaintiff's "own previous admissions" without any proffered reason [*AmerisourceBergen Corp. (9th Cir 2006) 465 F3d 946, 953]* .

9.08[6][d] Bad Faith. Bad faith, as a grounds for denying leave to amend, is often another aspect of undue delay. In other words, the timing of a request to amend, when compared to the need to amend, may disclose that the moving party is merely seeking to delay proceedings. The timing of the request for leave to amend, when compared with the reasons offered (or not offered) for the delay in making the request, might show that the moving party is guilty of "gamesmanship" or attempting to "sandbag" an opponent by springing new matters on the opponent at the last possible moment. Bad faith may also take the form of an attempt to defeat the court's jurisdiction; for example, seeking to add a party defendant merely to destroy diversity jurisdiction [*see SAES Getters S.p.A. v. Aeronex, Inc. (SD Cal 2002) 219 F Supp2d 1081, 1086*].

9.08[6][e] Futility of Amendment. A court should not permit an amendment that fails to state a legally sufficient claim or defense [*see Partington v. Bugliosi (9th Cir 1995) 56 F3d 1147, 1162*]. The general rule allowing free amendment of pleadings does not apply when the amendment would be an exercise in futility because the amended pleading would also be subject to dismissal or a motion to strike [*see, e.g., In re Fritz Cos. Secs. Litig. (ND Cal 2003) 282 F Supp2d 1105, 1111*]. Futility includes "the inevitability of a claim's defeat on summary judgment" [*State of Cal. v. Neville Chem. Co. (9th Cir 2004) 358 F3d 661, 673-674 , cert. denied, 543 US 869 (2004)*].

Futility of the amendment alone can justify the denial of a motion for leave to amend. [*Ahlmeyer v. Nevada System of Higher Education (9th Cir 2009) 555 F3d 1051, 1055]* . The opposing party need not demonstrate that it will be prejudiced by the amendment [*Nunes v. Ashcroft (9th Cir 2004) 375 F3d 805, 808-810 , cert. denied, 543 US 1188 (2005)*]. The court's discretion to deny amendments as futile is particularly broad when the plaintiff has been given leave to amend previously [*In re Fritz Cos. Secs. Litig. (ND Cal 2003) 282 F Supp2d 1105, 1111* ; *see, e.g., Miller v. Yokohama Tire Corp. (9th Cir 2004) 358 F3d 616, 622* (no written findings necessary to support denial of leave to amend when complaint was previously amended and complaint could not be saved by any amendment)].

Strategic Point--Defendant:

While courts will determine the legal sufficiency of a proposed amendment on a motion for leave to amend using the same standard as applied on a Rule 12(b)(6) motion to dismiss, courts are reluctant to deny leave to amend except in the clearest cases. As a practical matter, a claim that an amended pleading fails to state a claim for relief is likely to have more success on a subsequent Rule 12(b)(6) motion than it would in the context of a motion for leave to amend [*see SAES Getters S.p.A. v. Aeronex, Inc. (SD Cal 2002) 219 F Supp2d 1081, 1086*].

9.08[6][f] Previous Amendments Were Allowed. A court's discretion to deny leave to amend is somewhat broader when the court has already allowed one or more amendments [*see, e.g., Chodos v. West Publ'g Co. (9th Cir 2002) 292 F3d 992, 1003*]. A court need not permit a party unlimited attempts to plead its claims or defenses [*see Sisseton-Wahpeton Sioux Tribe v. United States (9th Cir 1996) 90 F3d 351, 355-356* ("It is time for this litigation to end")].

Example:

When a plaintiff sought to amend his complaint a second time and the district court found that the facts he sought to add had been available at the time of the earlier amendment, the district court did not abuse its discretion in ruling that the motion to amend had come after undue delay [*Chodos v. West Publ'g Co. (9th Cir 2002) 292 F3d 992, 1003*].

9.08[7] Court May Impose Conditions When Granting Leave to amend. Rather than deny leave to amend when there is possible prejudice to an opposing party, a court may impose conditions, such as costs, when this will mitigate the prejudice to the opposing party [*see General Signal Corp. v. MCI Telecomms. Corp. (9th Cir 1995) 66 F3d 1500, 1514*]. A court should not undermine the liberal policy favoring amendment, however, by effectively denying leave to amend by imposing unreasonable conditions [*see International Ass'n of Machinists v. Republic Airlines (9th Cir 1985) 761 F2d 1386, 1390-1391*].

Strategic Point--Party Opposing Amendment:

Because of the liberal amendment policy, it may be easier to convince the court to impose conditions rather than deny leave to amend. Other possible conditions, in addition to costs, might include an extension of time to respond to the amended pleading, additional discovery with respect to the added claims or defenses, or a continuation of the trial date.

9.08[8] Court Must State Grounds for Denial. A denial of leave to amend without any explanation by the district court is an abuse of discretion and subject to reversal [*Foman v. Davis (1962) 371 US 178, 182, 83 S Ct 227, 9 L Ed2d 222*]. Written findings are preferable; but detailed, formal findings of fact and conclusions of law are not always required. A court may satisfy the requirement of giving its grounds for denial by stating its rationale either in a written opinion or orally, on the record [*Roth v. Garcia Marquez (9th Cir 1991) 942 F2d 617, 628*].

9.08[9] Court May Grant Leave to Amend Nunc Pro Tunc When Plaintiff Fails to Comply With Rule 15(a) or May Strike Amended Pleading. If the plaintiff files an amended complaint without having obtained leave of court after the right to amend once "as a matter of course" has terminated [*see Fed R Civ P 15(a)*], the court may accept that amended complaint by granting leave to amend nunc pro tunc [*see, e.g., Sapiro v. Encompass Ins. (ND Cal 2004) 221 FRD 513, 517-518* (decided under former *Fed R Civ P 15(a)*)]. The court should only accept the amendment nunc pro tunc when leave to amend would have been granted if timely applied for, i.e., when the plaintiff is not litigating in bad faith, when acceptance of the amended complaint will not spur undue delay, and when no prejudice to the defendant will result.

Strategic Point--Defendant:

The defendant may move to strike the amended pleading under *Fed R Civ P 12(f)* when the plaintiff has failed to obtain the required leave of court before filing the amended complaint [*see* Vasquez v. Johnson County Hous. Coalition, Inc. (D Kan 2003) 2003 US Dist LEXIS 10786, at *2-*3 (motion granted)]; or has amended the complaint in a manner not authorized by the order granting leave to amend, i.e., adding a new claim for relief [*see, e.g.*, Ambrose Packaging, Inc. v. FlexSol Packaging Corp. (D Kan 2004) 2004 US Dist LEXIS 18645, at *8-*10 (motion granted)]. However, Rule 12(f) motions are disfavored and the motion should only be made if the defendant can demonstrate prejudice, bad faith, or that undue delay will result [*see, e.g.*, *Sapiro v. Encompass Ins. (ND Cal 2004) 221 FRD 513, 517-518* (motion denied)].

Cross Reference:

Discussion of motions to strike under Rule 12(f), Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.26*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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9.09 Party May Amend After Dismissal.

9.09[1] Party May Amend by Right If Dismissal Is Not Final Judgment. A party's right to amend after a dismissal depends on whether the dismissal order is a final judgment or final, appealable order. A party may amend a pleading as of right even after dismissal, provided no responsive pleading was filed and no final judgment was rendered [*Mayes v. Leipziger (9th Cir 1984) 729 F2d 605, 607-608* ; *see Rick-Mik Enters., Inc. v. Equilon Enters., LLC (9th Cir 2008) 532 F3d 963, 977* ("Where a final judgment is entered following dismissal of an action, the plaintiff no longer has the right to amend the complaint as a matter of course"); *see 9.09[3]*].

Generally, an order dismissing a complaint is not a final judgment or a final, appealable order unless circumstances make it clear that the court concluded that the action could not be saved by any amendment of the complaint [*see Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group (9th Cir 1995) 55 F3d 463, 466*]. This usually occurs only when the court expressly states that the dismissal is "final," "without leave to amend," or "with prejudice."

Cross References:

Discussion of how right to amend without leave may be cut off by dismissal, see 3 *Moore's Federal Practice, § 15.12* (Matthew Bender 3d ed.). Discussion of final judgments, see 19 Moore's Federal Practice, Ch. 202, Final Judgments (Matthew Bender 3d ed.).

9.09[2] Most Dismissals Are With Leave to amend. When dismissing a complaint (or other pleading) for failure to state a claim, the court should grant leave to amend even if no request to amend has been made. Dismissal with leave to amend is the normal form of dismissal except in the comparatively rare circumstances in which the court is able to determine that the pleading could not possibly be cured by the allegation of other facts [*Doe v. United States (9th Cir 1995) 58 F3d 494, 497*]. A dismissal with prejudice and without leave to amend is not appropriate unless it is absolutely clear that the complaint could not be saved by amendment. The district court's failure to articulate why dismissal should be with prejudice may constitute an abuse of discretion [*Eminence Capital, LLC v. Aspeon (9th Cir 2003) 316 F3d 1048, 1052*].

9.09[3] Amendment After Final Judgment Is Conceivable, If Judgment Is Set Aside. If a court dismisses a

complaint with prejudice and without leave to amend, or if the court makes some similar dismissal order that is a final judgment, a party may request leave to amend, but may do so only after successfully moving to have the judgment altered or reopened under Rule 59 or set aside under Rule 60 [*see Fed R Civ P 59(e), 60(b); see, e.g., Confederate Memorial Ass'n v. Hines (DC Cir 1993) 995 F2d 295, 299* ("Once the District Court granted appellees' motions to dismiss, appellants could amend the complaint 'only by leave of court or by written consent of the adverse party,' *Fed R Civ P 15(a)*, coupled with a motion under Rule 59(e) to alter or amend the judgment")].

Distinguish:

Generally, a post-order motion requesting a substantive change in an order, as opposed to a clerical change, is considered a Rule 59(e) motion, if filed within ten days of entry. Otherwise it is considered a Rule 60(b) motion [*Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp. (9th Cir 2001) 248 F3d 892, 898-899* ; *see, e.g., United States v. Moyer (ND Cal 2008) 2008 US Dist LEXIS 63995, at *13-*14]* .

Cross Reference:

Discussion of alteration or relief from judgments, see 12 Moore's Federal Practice Ch. 59, New Trials; Amendment of Judgments, and Ch. 60, Relief From Judgment or Order (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.10 Ability to Amend After Summary Judgment Motion Is Filed Is Limited.

9.10[1] Amendment Allowed Only If It Has Substantial Factual Support. The filing of a summary judgment motion impedes the right to amend by the party opposing the summary judgment motion. Granting leave to amend after summary judgment is within the discretion of the trial court, but a court ordinarily will be reluctant to do so. The value of the summary judgment procedure is at stake. A properly researched, timed, and supported summary judgment motion comes when the parties have explored their case and at a time when discovery, at least on the issues controlling the motion, is complete. Therefore, a motion for leave to amend made after a summary judgment motion is pending may be considered untimely. A motion for leave to amend is not a vehicle to circumvent summary judgment [*Schlacter-Jones v. General Tel. of Cal. (9th Cir 1991) 936 F2d 435, 443* , *overruled in part on other grounds*, *Cramer v. Consolidated Freightways, Inc. (9th Cir. 2001) 255 F3d 683, 692*].

After a motion for summary judgment has been filed, a party may amend its pleadings, but it must make a different and stronger showing than might otherwise be the case. A party seeking to amend its pleadings in the face of a summary judgment motion should not be permitted merely to allege a new theory, or a new claim or defense, that is credible in the abstract. Because amendment at this stage of the proceedings may very well be nothing more than a maneuver to avoid an inevitable ruling on summary judgment, leave to amend may be denied unless the party seeking to amend makes a substantial factual showing of the allegations set out in the proposed amendment [*see* *Cowen v. Bank United of Tex. (7th Cir 1995) 70 F3d 937, 944* ("district judges are not content with an allegation sufficient in law; they want some evidence to back it up"); *see, e.g.,* Maldonado v. City of Oakland (ND Cal 2002) 2002 US Dist LEXIS 7746, at *12].

9.10[2] After Summary Judgment Rendered, Change in Legal Theory Not Allowed. If a party is restricted in its ability to amend after a summary judgment motion is filed, the party is even more restricted after summary judgment is rendered. After summary judgment is rendered, the losing party is ordinarily restricted to the theories relied on in the pleadings. Except in exceptional circumstances, a party may not have the summary judgment set aside in order to amend the pleadings and have the case proceed on some other legal theory. Summary judgment proceedings would be undermined if a party were free to rely on one theory in an attempt to defeat a motion for summary judgment and then, should that theory prove unsound, come back afterward and amend to assert other theories [*Nguyen v. United States (9th Cir 1986) 792 F2d 1500, 1503*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.11 Adverse Party May Respond to Amended Pleading.

9.11[1] Responsive Pleading Is Not Required. An opposing party *may,* but is *not required* to, serve and file a responsive pleading [*see Fed R Civ P 15(a)*]. The right to notice of the amended pleading and an opportunity to respond are required by due process [*Nelson v. Adams USA Inc. (2000) 529 US 460, 465-466, 120 S Ct 1579, 146 L Ed2d 530*]. However, if, for example, a defendant has already served an answer to the original version of the complaint, the defendant does not waive an affirmative defense that was pleaded in the original answer by failing to serve an amended answer [*Stanley Works v. Snydergeneral Corp. (ED Cal 1990) 781 F Supp 659, 664-665*]. A defendant may wish to file an amended answer, however, if an amended complaint changes the theory or scope of the case, or adds new facts that have yet to be admitted or denied.

Strategic Point

--New Responsive Pleading Is Always Best Practice: While there is authority that no response is required, the best practice is to amend the original responsive pleading whenever a responsive pleading is permitted. This will ensure that the matters identified in the original responsive pleading are still at issue, and will provide for a review of all of the amended allegations to make certain that all required denials have been made and all affirmative defenses fully pleaded.

9.11[2] Time to Serve Responsive Pleading Is Brief. A party must plead in response to an amended pleading within the time remaining for response to the previous pleading, or within 14 days after service of the amended pleading, whichever is later [*Fed R Civ P 15(a)(3)*]. This is a brief period, so the responding party must review the amended pleading and act promptly. The adverse party may agree to stipulate to an extension in the response period. Additionally, the court may extend the response period [*Fed R Civ P 15(a)(3)*]. However, because the response period is so brief, the best practice is to analyze any difficulties in filing a response before the court grants leave to amend. This allows the party opposing the amendment to ask the court to condition granting leave to amend on an extended period of time for response.

Cross Reference:

Discussion of extended time for response as proper condition for granting leave to amend, see *§ 9.08[7].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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9.12 CHECKLIST: Relation Back of Amendments.

☐ If a proposed amended pleading adds claims or parties, determine whether the statute of limitations has run with respect to those claims or parties.

☐ If the statute has run, determine whether the limitations problem will be avoided if the amendment relates back to the time of the original pleading.

☐ If relation back of the amendment will solve a limitations problem with added claims or parties, consider whether the amendment in question will relate back on one of following three grounds:

○ Relation back is permitted by the state or federal law that it the source of the applicable statute of limitations.

Authority:
Fed R Civ P 15(c)(1)(A). See, e.g., CCP § 474 (allowing relation back with respect to "Doe" defendants)

Discussion:
See *§ 9.14[1]*

○ The amendment adds a claim that arose out of the transaction set forth in the original pleading.

Authority:
Fed R Civ P 15(c) (1(B)

Discussion:
See *§ 9.14[2]*

○ The amendment changes the party or the naming of a party against whom a claim is being asserted and:

☐ The claim against the new or renamed party is transactionally related to the claim asserted in the original pleading.

☐ Within the 120-day period provided for service of the summons and complaint under Rule 4(m), the party to be brought in by amendment has both:

○ Received notice of the action so that the party will not be prejudiced in maintaining a defense on the merits; and

○ Knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Authority:
Fed R Civ P 4(m), 15(c)(1)(C)

Discussion:
See *§ 9.14[3]*

☐ If the United States, or any officer or agency of the United States, is being added as a party defendant by amendment, the amendment will relate back to the original filing date if:

☐ The claim against the new or renamed party governmental defendant is transactionally related to the claim asserted in the original pleading.

☐ Within the 120-day period provided for service of the summons and complaint under Rule 4(m), the plaintiff has delivered or mailed process to the United States Attorney, the United States Attorney's designee, the Attorney General of the United States, or the agency or officer who would have been a proper defendant if originally named.

Authority:
Fed R Civ P 15(c)(2)

Discussion:
See *§ 9.14[3][e]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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9.13 Options and Strategy.

When amendments add new claims or new parties, the current defendants may assert that the new claims are time barred, or the new defendants may assert that the claims asserted against them are time barred. Assuming that the claims as asserted in the original pleading are not time barred, the argument comes down to whether the plaintiff may claim that the action was "commenced" as to the new claims or new defendants as of the date of filing of the original complaint rather than the date of the amendment. The terminology used is "relation back." An amendment adding new claims or parties "relates back" to the date of filing of the original complaint or it does not. *Fed R Civ P 15(c)* provides the standards for when amendments "relate back." By default, if the amendment cannot satisfy the standards of Rule 15(c), the amendment does not "relate back," and the statute of limitations is measured as of the date of filing of the amended pleading rather than the date of filing of the original complaint.

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.14 Amendment May Relate Back on Any of Three Grounds.

9.14[1] When Relation Back Is Permitted by Law Governing Statute of Limitations. An amendment of a pleading relates back to the date of filing of the original pleading when relation back is permitted by the law that provides the statute of limitations applicable to the action [*Fed R Civ P 15(c)(1)(A)*]. Accordingly, if the applicable limitations law, whether state or federal, affords a more forgiving principle of relation back than is provided in the other subdivisions of Rule 15, that law is available to save the claim [*Fed R Civ P 15*, Committee Note of 1991].

Example--"Doe" Defendants:

No statute of limitations is contained in *42 USC § 1983*, so state law provides the statute of limitations for civil rights claims founded on this statute. The applicable California law of limitations does more than provide a period of time within which these types of actions may be commenced [*see CCP § 340* (limitation period for tort actions, one year, usually applies to *42 USC § 1983* actions)]. California limitations law also provides that a plaintiff who does not know the name of a defendant at the time of filing of a complaint may name a "Doe" defendant and amend the complaint at a later time to substitute the true name when it becomes known [*CCP § 474*]. Under this law, amendments to substitute the true name of a "Doe" defendant relate back to the time of filing of the original complaint. If a plaintiff complies with this provision of California law, an amendment naming a new party as a substitute for a former "Doe" defendant will relate back to the time of filing of the original complaint and will not be barred by limitations [*Motley v. Parks (CD Cal 2000) 198 FRD 532, 534-535* ; *see also Palestini v. General Dynamics Corp. (SD Cal 2000) 193 FRD 654, 656-657*].

For purposes of the Class Action Fairness Act of 2005 (CAFA) [*see* 109 PL 2, 119 Stat 12], an action filed in California state court is commenced when a complaint is filed, irrespective of any later amendment of that complaint [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1016-1017* ; *see McAtee v. Capital One, F.S.B. (9th Cir 2007) 479 F3d 1143, 1148* (substitution of named defendant for Doe defendant in California state court action does not "commence" civil action against new named defendant within meaning of CAFA).

Cross Reference:

Discussion of minimal diversity requirement under Class Action Fairness Act of 2005, see Ch. 2, Determining Forum (Jurisdiction and Venue), § 2.24A.

Warning:

Even when there is relation back for an amendment substituting a particular defendant for a previously named "Doe" defendant under California law, the defendants so named have argued that the other portions of the Federal Rules limit the plaintiff's ability to join them in the action. Such defendants have argued that they may not be joined under the Federal Rules unless they have been or can be served within Rule 4(m)'s 120-day time limit for service, which runs from the filing of the original complaint [*see Fed R Civ P 4(m)*]. One court has resolved this argument by ruling that, when leave to amend is properly granted and the amendment relates back to the filing of the original complaint under *Fed R Civ P 15(c)(1)(C)*, there is good cause for the court to extend the 120-day time limit for service under Rule 4(m) [*Motley v. Parks (CD Cal 2000) 198 FRD 532, 533*].

9.14[2] When Amendment to Add Claim or Defense Is Transactionally Related to Original Claims. An amendment of a pleading relates back to the date of filing of the original pleading when the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading [*Fed R Civ P 15(c)(1)(B)*]. That is, the original and amended pleadings must share a "common core of operative facts" [*Martell v. Trilogy, Ltd. (9th Cir 1989) 872 F2d 322, 325*].

Example:

There was no common core of operative facts between plaintiffs' compensation discrimination claim in their amended complaint and the promotion discrimination, hostile work environment, and retaliation claims in their original complaint. Plaintiffs offered different statistical evidence and witnesses to prove the compensation and promotion discrimination claims, because the employer used different processes for making salary and promotion decisions [*Williams v. Boeing Co. (9th Cir 2008) 517 F3d 1120, 1133-1134]* .

This basis for relation back applies when a party seeks to add a new claim or defense against an existing party. There are additional restrictions when the amendment seeks to change parties [*see Martell v. Trilogy, Ltd. (9th Cir 1989) 872 F2d 322, 327* ; *see 9.14[3]*].

The purpose of the transactional relationship requirement is to ensure that the original defendant had sufficient notice of the new claim. Accordingly, in determining whether the claims are transactionally related, a court will consider whether the facts pleaded to support the original claim gave the defendant fair notice of the transaction or occurrence underlying the claim added by the amendment [*Union Pac. R.R. Co. v. Nevada Power Co. (9th Cir 1991) 950 F2d 1429, 1431-1433*]. Courts will also consider whether the two claims will rely on the same evidence [*Williams v. Boeing Co. (9th Cir 2008) 517 F3d 1120, 1133* ; *In re Dominguez v. Miller (9th Cir 1995) 51 F3d 1502, 1510*]. When the original pleading fails to provide adequate notice of the claims and is, therefore, deficient under *Fed R Civ P 8*, it cannot support relation back of the amended pleading [*see Baldwin County Welcome Ctr. v. Brown (1984) 466 US 147, 149 n3, 104 S Ct 1723, 80 L Ed2d 196* ; *Williams v. Boeing Co. (9th Cir 2008) 517 F3d 1120, 1131* (relation back doctrine did not apply because plaintiffs' general allegations that they were discriminated against with regard to "terms of employment" did not provide "fair notice" of their compensation discrimination claim)].

Cross Reference:

Discussion of determination as to whether claim arose out of same conduct, transaction, or occurrence, see 3 *Moore's Federal Practice § 15.19[2]* (Matthew Bender 3d ed.).

9.14[3] When Amendment Changes Parties or Names of Parties.

9.14[3][a] Transactional Relatedness Plus Notice and Knowledge Are Required. There are more rigorous requirements for an amendment adding or renaming parties to relate back to the date of filing of the original complaint. When parties are added or changed by amendment, relation back depends on the same "transactionally related" requirement that applies when an amendment is proposed to add a new claim. However, additional requirements apply as well [*see Martell v. Trilogy, Ltd. (9th Cir 1989) 872 F2d 322, 327*]. An amendment of a pleading adding or renaming parties relates back to the date of filing of the original pleading if, but only if, *both* of the following are true [*Fed R Civ P 15(c)(1)(C)*]:

- The claim or defense is transactionally related to the claim or defense asserted in the original pleading.

Cross Reference:

Discussion of required transactional relatedness, see *§ 9.14[2]*.

- The party to be added (1) must have received notice of the action so that he or she will not be prejudiced in maintaining a defense on the merits, and (2) the notice must be such that the party either knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him or her originally. This must be accomplished within the original time limit for service of summons and complaint provided for in Rule 4(m).

Cross References:

Discussion of required notice, see *§ 9.14[3][b]*. Discussion of required knowledge, see *§ 9.14[3][c]*. Discussion of time limit on notice and knowledge, see *§ 9.14[3][d]*.

This ground for relation back protects a plaintiff who mistakenly names a party and then discovers, after the relevant statute of limitations has run, the identity of the proper party [*see G.F. Co. v. Pan Ocean Shipping Co. (9th Cir 1994) 23 F3d 1498, 1503-1504*]. It allows a plaintiff to correct a formal defect such as a misnomer or misidentification [*see Butler v. Robar Enters., Inc. (CD Cal 2002) 208 FRD 621, 623-624*].

9.14[3][b] Added Party Must Receive Notice of Action. The party to be brought in by amendment must receive notice of the action so that the party will not be prejudiced in maintaining a defense on the merits [*Fed R Civ P 15(c)(1)(C)(i)*]. Notice need not be formal [*see In re Dominguez v. Miller (9th Cir 1995) 51 F3d 1502, 1509-1510*].

Courts may find notice when there is sufficient "community of interest" between the originally named party and the party named in the amendment to justify imputing knowledge of the action from the former to the latter. This occurs when the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other [*G.F. Co. v. Pan Ocean Shipping Co. (9th Cir 1994) 23 F3d 1498, 1502-1503*]. Common situations possibly showing a community of interest are (1) subsidiary and parent corporations; and (2) related entities with substantially the same officers, directors, or shareholders and similar names. A shared attorney may also be one indicator of a community of interest, as the attorney is likely to have communicated notice of the action to the new party [*see G.F. Co. v. Pan Ocean Shipping Co. (9th Cir 1994) 23 F3d 1498, 1503*]. One district court has stated that contractual relationships alone "are insufficient to demonstrate a community of interest justifying an imputation of knowledge" [*see Bailey v. United States (D Haw 2003) 289 F Supp2d 1197, 1208*].

9.14[3][c] Added Party Must Know of Mistake As to Identity. Relation back requires that the party to be brought in by the amendment knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the new party [*Fed R Civ P 15(c)(1)(C)(ii)*]. This provision requires both (1) a mistake by the amending party and (2) knowledge of the mistake by the party to be brought in [*see, e.g., Abels v. JBC Legal Group, P.C. (ND Cal 2005) 229 FRD 152, 158*]. A conscious choice to sue one party rather than another does not constitute mistake as to identity [*Louisiana Pac. Corp. v. ASARCO, Inc. (9th Cir 1993) 5 F3d 431,*

434]. When the amending party knew of the new party's role and existence and deliberately chose to assert its claim only against the original defendants, relation back does not apply [*see Nelson v. Adams USA Inc. (2000) 529 US 460, 467 n1, 120 S Ct 1579, 146 L Ed2d 530*]. Similarly, if the plaintiff becomes aware of the mistake and fails to amend the complaint in a timely fashion to name the correct party, this may indicate that the party was not named for strategic reasons and therefore defeat relation back of a later amendment [*see G.F. Co. v. Pan Ocean Shipping Co. (9th Cir 1994) 23 F3d 1498, 1503-1504*].

Lack of knowledge of the identity of an individual at the time of the filing of the complaint is not considered a "mistake concerning the identity of the proper party" for the purposes of this requirement. Accordingly, when a plaintiff names a "Doe" defendant, there is no mistake as to identity that would allow later relation back (at least not under this provision of Rule 15) when the plaintiff discovers the identity of the defendant [*Butler v. Robar Enters., Inc. (CD Cal 2002) 208 FRD 621, 623-624*].

Distinguish:

Relation back with respect to "Doe" defendants is allowed when state law provides the statute of limitations and that law would allow relation back [*Fed R Civ P 15(c)(1)(A)*].

Cross Reference:

Discussion of relation back with respect to "Doe" defendants, see *§ 9.14[1].*

9.14[3][d] Time Limit on Notice and Knowledge Runs From Original Complaint. The additional notice and knowledge requirements for relation back must be met within the Rule 4(m)'s time limits for service of the summons and complaint. This means that the party to be added must have the required notice and knowledge within 120 days from the date of filing of the original complaint [*Fed R Civ P 15(c)(1)(C)(i)*; *see Fed R Civ P 4(m)*]. However, the 120-day period is not fixed and absolute. Rule 4(m) allows the court to extend the 120-day time period for service for "good cause" [*Fed R Civ P 4(m)*]. The time limit on notice and knowledge in this relation back provision of Rule 15 includes both the nominal 120-day period and any extension of it granted by the court [*see Fed R Civ P 15*, Committee Note of 1991].

9.14[3][e] Alternative Method of Satisfying Notice Requirements As to Government Defendants. Proper identification of parties is a particular problem in suits against the government. To alleviate this difficulty, a special provision applies when the United States or any United States agency or officer is to be brought in as a defendant. The requirements of notice of the action and knowledge of the mistake (but not the transactional relationship requirement) are met if, within the 120-day period specified for serving the summons and complaint, the amending party delivers or mails process [*Fed R Civ P 15(c)(2)*]:

- To the United States Attorney or designee, or
- To the Attorney General of the United States, or
- To the agency or officer who would have been a proper defendant if named.

This special government notice provision is an alternative to the general notice provision. If either is satisfied, the notice requirements of Rule 15(c)(3) are met [*Miles v. Department of Army (9th Cir 1989) 881 F2d 777, 782*].

Warning--Contrary Authority:

This provision is written in the disjunctive, so that the notice requirements are met if the party serves the U.S. Attorney *or* the Attorney General *or* the agency or officer [*see McGuckin v. United States (9th Cir 1990) 918 F2d 811, 813*]. However, under Rule 4, a party suing a government defendant must always serve both the U.S. attorney for the proper district and the Attorney General, and, in some instances, the

United States officer or employee in question [*Fed R Civ P 4(i)*]. There is some questionable authority that, by analogy to Rule 4, the amending party must serve *both* the U.S. Attorney and the Attorney General in order to meet the Rule 15 requirements for relation back [*see Allen v. Veterans Admin. (9th Cir 1989) 749 F2d 1386, 1390*].

Cross Reference:

Service requirements for United States governmental defendants, see Ch. 7, Service of Summons, see *§ 7.30*.

Discussion of conflict between Rule 4 and Rule 15(c), see 3 *Moore's Federal Practice, § 15.19[4]* (Matthew Bender 3d ed.).

9.14[3][f] Amendment Adding Plaintiff May Relate Back. Rule 15(c) applies to amendments changing a party "against whom a claim is asserted" and, therefore, does not explicitly apply to amendments adding plaintiffs. However, the attitude taken in Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs [*Fed R Civ P 15*, Committee Note of 1966]. An amendment adding a plaintiff relates back to the date of the original pleading only when (1) the original complaint gave the defendant adequate notice of the claims of the newly proposed plaintiff, (2) the relation back does not unfairly prejudice the defendant, and (3) there is an identity of interests between the original and newly proposed plaintiff [*Immigrant Assistance Project of L.A. County Fed'n of Labor v. INS (9th Cir 2002) 306 F3d 842, 857*].

Example:

The original complaint and the amended complaint were both filed on behalf of immigrants who were eligible for legalization but who had unlawfully been denied access to legalization benefits by the defendant, the INS. Both the original and amended complaints challenged the same INS regulations and practices. Under these circumstances; (1) the notice requirement was met; (2) the addition of new plaintiffs who were similarly situated to the original plaintiffs did not cause the INS any prejudice; and (3) there was identity of interest between the original and added plaintiffs because the circumstances giving rise to their claims were the same and because the same regulations and practices gave rise to both sets of claims [*Immigrant Assistance Project of L.A. County Fed'n of Labor v. INS (9th Cir 2002) 306 F3d 842, 857-859*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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Unit 3 Pleading Stage
CHAPTER 9 Amending and Supplementing Pleadings
IV. AMENDING PLEADINGS TO CONFORM TO EVIDENCE

2-9 MB Practice Guide: Fed Pretrial Civ Proc in CA 9.15

9.15 CHECKLIST: Amending Pleadings to Conform to Evidence.

☐ Determine whether issues outside the pleadings were tried by:

- ○ Express consent.
- ○ Implied consent, because the adverse party treated the issues as pleaded, either:
  - ☐ By failing to object to evidence relating only to those issues at trial.
  - ☐ By addressing the issues in papers filed with the court.

☐ Decide whether there is any reason to amend the pleadings, considering that failure to amend does not affect the trial of the issues tried by consent.

☐ If amendment is desired, move the court for leave to amend:

- ○ Prepare a notice of motion for leave to amend.
- ○ Attach a copy of the proposed amended pleading, with any attachments, to copies of the notice of motion to be served and filed. A local rule in the Central District requires an original and one copy of the proposed amended pleading to be lodged with the court.

- Follow standard noticed motion procedure.

- Prepare an order for the court's signature in the event it grants the motion.

Timing:

An amendment conforming the pleadings to the evidence may be made on motion of any party at any time, even after judgment.

Authority:

Fed R Civ P 15(b); *CD Cal Civ LR 15-1*

Discussion:

See *§§ 9.06*, *9.08[3]*, *9.17*

Forms:

See *§ 9.25* (notice of motion for leave to amend), see *§ 9.26* (order permitting amendment)

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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2-9 MB Practice Guide: Fed Pretrial Civ Proc in CA 9.16

9.16 Options and Strategy.

When issues are tried that were not raised bythe pleadings, the pleadings may be amended after trial so that they reflect the actual issues. This may be useful in clarifying the record on appeal or in determining the preclusive effects to be given to the judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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9.17 Party May Amend Pleadings After Trial to Conform to Evidence.

9.17[1] Amendment Is Not Required. When issues not raised by the pleadings are tried by express or implied consent of the parties, those issues must be treated in all respects as if they had been raised in the pleadings. Failure to amend does not affect the result of the trial of those issues [*Fed R Civ P 15(b)(2)*]. If an amendment to the pleadings to conform to the proof should have been made, an appellate court will presume that it is so made to support the judgment [*Dunn v. Trans World Airlines, Inc. (9th Cir 1978) 589 F2d 408, 412-413*].

Distinguish:

When evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, the party offering the evidence must amend the pleadings to support the trial of the issues. However, leave to amend must be freely granted [*Fed R Civ P 15(b)(1)*].

Cross Reference:

Discussion of procedure when evidence of matters outside the pleadings is objected to at trial, see *§ 9.18*.

9.17[2] Amendment May Be Made on Motion at Any Time. An amendment conforming the pleadings to the evidence may be made on motion of any party at any time, even after judgment [*Fed R Civ P 15(b)(2)*; *see Galindo v. Stoody Co. (9th Cir 1986) 793 F2d 1502, 1513*].

Cross References:

Form for notice of motion for leave to amend pleading to conform to evidence, see *§ 9.25*. Form for order permitting amendment of pleading to conform to evidence, see *§ 9.26*.

9.17[3] Applies to Issues Tried by Express or Implied Consent. An amendment to conform the pleadings to the evidence is appropriate when issues not raised by the pleadings are tried by "the parties' express or implied consent" [*Fed R Civ P 15(b)(2)*; *Prieto v. Paul Revere Life Ins. Co. (9th Cir 2004) 354 F3d 1005, 1012*].

To establish implied consent, the party must demonstrate that the adverse party understood evidence had been

introduced to prove the unpleaded issue, and that this issue had been directly addressed, not merely inferentially raised by incidental evidence. When evidence was also relevant to other issues at trial, it cannot be used to imply consent to try the unpleaded issue [*Acequia, Inc. v. Clinton (In re Acequia, Inc.) (9th Cir 1994) 34 F3d 800, 814*]. Implied consent may not be obtained over issues that are not directly addressed or that are only "inferentially suggested by incidental evidence in the record" [*Prieto v. Paul Revere Life Ins. Co. (9th Cir 2004) 354 F3d 1005, 1013*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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IV. AMENDING PLEADINGS TO CONFORM TO EVIDENCE

2-9 MB Practice Guide: Fed Pretrial Civ Proc in CA 9.18

9.18 Court Must Freely Allow Leave to Amend After Objection at Trial.

If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the evidence may be excluded. Alternatively, the court has discretion to allow the pleadings to be amended and must do so freely when the presentation of the merits of the action will be served and the objecting party fails to satisfy the court that the admission of the evidence would prejudice the objecting party in maintaining the party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence [*Fed R Civ P 15(b)(1)*].

In this situation, the court may not treat the pleadings as amended. Following an objection, the party offering the evidence must obtain leave to amend and then amend the pleadings so that they raise the relevant issues [*see Ostano Commerzanstalt v. Telewide Sys., Inc. (2d Cir 1989) 880 F2d 642, 646*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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V. SUPPLEMENTING PLEADINGS

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9.19 CHECKLIST: Supplementing Pleadings.

☐ Determine whether a supplemental pleading may be used to plead new facts or add claims or parties:

○ Facts pleaded in a supplemental pleading must have arisen after the original pleadings were filed.

○ The events must be related, but not necessarily transactionally related, to the original claims and defenses.

Authority:
Fed R Civ P 15(d)

Discussion:
See *§ 9.21*

☐ Consider advantages and disadvantages of bringing the newly arisen claims in the same action or in a separate, future action.

Discussion:
See *§ 9.21*

☐ Prepare the supplemental pleading.

Authority:
ED Cal Civ LR 220

Discussion:
See *§ 9.21[6]*

☐ Move the court for leave to supplement:

○ Prepare motion for leave to file supplemental pleading.

○ Attach copy of proposed supplemental pleading, with any attachments, to copies of notice of motion to be served and filed.

○ Follow standard noticed motion procedure.

○ Prepare an order for the court's signature in the event it grants the motion.

Timing:
The time limit for supplementing the pleadings will usually be set in the court's Rule 16 scheduling order.

Authority:
Fed R Civ P 15(d)

Discussion:
See *§ 9.21[4]*

Forms:
See *§ 9.27* (motion for leave to file supplemental pleading), *§ 9.28* (order granting leave)

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ If the motion is granted:

○ File a copy of the supplemental pleading with the court.

○ If a new party is joined or substituted, serve on new party as required by Rule 4.

Authority:
Fed R Civ P 4

Discussion:
Ch. 6, Drafting the Summons and Complaint; Ch. 7, Service of Summons

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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V. SUPPLEMENTING PLEADINGS

2-9 MB Practice Guide: Fed Pretrial Civ Proc in CA 9.20

9.20 Options and Strategy.

Supplemental pleadings, which are used to plead facts that have arisen *after* the party's original pleading was filed [*Fed R Civ P 15(d)*], may be useful in a variety of cases when the transaction or occurrence that is the subject of the suit extends over a long period of time, or when the consequences of an injury reveal themselves over time. Supplemental pleadings may be necessary, for example, when the defendant has repeated the injury or when new forms or types of injuries or damages have arisen after the plaintiff filed the complaint. A supplemental pleading may be used to seek additional relief that is appropriate under the new facts. Supplemental pleadings are not restricted to a plaintiff's complaint. A defendant may supplement an answer with facts relating to affirmative defenses, such as res judicata, based on after-occurring events [*see, e.g., Sanchez v. City of Santa Ana (9th Cir 1990) 915 F2d 424, 431-432*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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9.21 Court May Allow Supplemental Pleadings to Add Occurrences Since Date of Original Pleading.

9.21[1] Supplemental Pleading Adds New Events, Claims, and Parties. A supplemental pleading differs from an amendment in that is used to set forth "transactions or occurrences or events which have happened since the date of the pleading sought to supplemented" [*Fed R Civ P 15(d)*]. Thus, a supplemental pleading may be used to add new claims that have arisen after the original pleading [*Keith v. Volpe (9th Cir 1988) 858 F2d 467, 473-474*]. Similarly, a counterclaim maturing or acquired after the earlier pleading may be presented by supplemental pleading [*see Fed R Civ P 13(e)*]. A supplemental pleading may be used to add new parties when the joined persons participated in the events that happened after the original pleading [*see Griffin v. County Sch. Bd. of Prince Edward County (1964) 377 US 218, 227, 84 S Ct 1226, 12 L Ed2d 256*].

Distinguish:

An amended pleading, rather than a supplemental pleading, is restricted to pleading facts that existed at the time that the original pleading was filed. While the correct type of pleading should be used, a mislabeled pleading may be treated as the correct type of pleading by the court [*United States ex rel. Wulff v. CMA, Inc. (9th Cir 1989) 890 F2d 1070, 1073*].

9.21[2] Supplemental Pleading May Correct Defective Original Pleading. Permission to supplement may be granted even though the original pleading is defective in its statement of a claim for relief or defense [*Fed R Civ P 15(d)*].

9.21[3] Events Must Be Related to Original Claims or Defenses.

9.21[3][a] Transactional Relationship Is Not Required. The facts pleaded in a supplemental pleading must be related to the claims or defenses presented in the original pleading. However, the facts need not arise out of the same transaction. The transactional test, which is an integral part of other federal rules, is not required under Rule 15(d) [*Keith v. Volpe (9th Cir 1988) 858 F2d 467, 474*].

9.21[3][b] Supplemental Pleading May Plead Related Claim for Relief. The fact that a supplemental pleading states a new claim for relief is not a bar to its allowance, but only a factor to be considered by the court in the exercise

of its discretion [*Keith v. Volpe (9th Cir 1988) 858 F2d 467, 474*].

Example:

The plaintiffs in a class action successfully challenged a state parental consent abortion law, and four years later sought to supplement their complaint to challenge a separate statute that had been enacted. Because the original action had reached a final resolution and the district court did not retain jurisdiction, it was an abuse of discretion to allow the supplemental pleading rather than require the plaintiffs to initiate a new suit [*Planned Parenthood v. Neely (9th Cir 1997) 130 F3d 400, 402-403*].

9.21[3][c] Failure to Plead Related Claims Does Not Preclude Later Action. Supplemental pleadings are permissive with the parties and discretionary with the court. The failure to supplement an action with claims that have arisen since the action was filed does not create a bar to filing those claims in a future suit [*Baker Group, L.C. v. Burlington N. & Santa Fe Ry. Co. (8th Cir 2000) 228 F3d 883, 886* ; *SEC v. First Jersey Sec., Inc. (2d Cir 1996) 101 F3d 1450, 1464-1465* , *cert. denied*, *522 US 812 (1997)*]. If new facts create no new claims, but merely increase the amount of damages from the original claims, this must be litigated in the original suit.

Decision Point:

When new, related claims arise after the suit is filed, the pleader must decide whether to bring the claims through a supplemental pleading or file a later suit. Economy and convenience will usually militate in favor of the same suit, but the pleader should also consider whether a different judge or a different venue might be advantageous.

9.21[4] Leave of Court Is Required. A court may allow a supplemental pleading on motion of a party, with reasonable notice, and "on such terms as are just" [*Fed R Civ P 15(d)*; *Wagner v. Professional Eng'rs in Cal. Gov't (9th Cir 2004) 354 F3d 1036, 1052*]. Courts have broad discretion whether to grant or deny leave to supplement, but allowing supplementation is favored in the interest of judicial economy and convenience [*see Keith v. Volpe (9th Cir 1988) 858 F2d 467, 476*].

Distinguish:

Rule 15(a), governing amended pleadings, requires that leave to amend should be freely given "when justice so requires." While this same standard is usually applied to supplemental pleadings, Rule 15(d) contains no language explicitly requiring that leave be given "freely" [*see Burns v. Exxon Corp. (5th Cir 1998) 158 F3d 336, 343*].

Cross References:

Discussion of requirement that leave to amend be freely given, see *§ 9.08[5]*. Form for motion for leave to file supplemental pleading, see *§ 9.27*. Form for order granting leave to supplement pleading, see *§ 9.28*.

9.21[5] Supplemental Pleading May Relate Back to Date of Original Pleading. Because supplemental pleadings deal with facts that have arisen since the date of filing of the original complaint, there should rarely be any statute of limitations problems concerning the new matters raised in a supplemental pleading unless the amending party has been dilatory in raising the new matters. There should, at least in the vast majority of cases, be no need to worry about whether the new matters in the supplemental pleading "relate back" to the date of the filing of the original pleading for limitations purposes. Indeed, Rule 15(c), which governs relation back, speaks only of the relation back of "amendments," and does not refer to supplemental pleadings [*see Fed R Civ P 15(c)*]. Nonetheless, particularly because the distinction between supplemental pleadings and amended pleadings is often tenuous, courts have applied the relation back standards of Rule 15(c) to supplemental as well as to amended pleadings [*see FDIC v. Knostman (7th Cir 1992) 966 F2d 1133, 1138* ; *Fed R Civ P 15(c)*].

Cross Reference:

Discussion of relation back under Rule 15(c), see *§ 9.14*.

9.21[6] LOCAL PRACTICE: Supplemental Pleading Should Take Form of Completely Revised Pleading. In the Eastern District of California, unless prior approval to the contrary is obtained from the court, every pleading that is supplemented *must* be "retyped" and filed so that it is complete in itself without reference to the prior, superseded pleading. No pleading is deemed supplemented until the amending party complies with this rule [*ED Cal Civ LR 220*]. The local rules for the other districts in California provide similar requirements for *amended* pleadings [*see CD Cal Civ LR 15-2*; *ND Cal Civ LR 10-1*; *SD Cal Civ LR 15.1*], but are silent with respect to supplemental pleadings. Nonetheless, the best practice is to supplement pleadings by complete, replacement pleadings. It will always be more convenient for the court and the parties to deal with a single, unified document. And it would be unwise to rely too heavily on the distinction between amended and supplemental pleadings when the court's policy on these matters is clearly in favor of pleading documents that are complete in themselves without reference to other documents.

9.21[7] Court May Allow Response. If the court deems it advisable, it may order the adverse party to plead in response to the supplemental pleading. In this event, the court must also specify the time allowed for the responsive pleading [*Fed R Civ P 15(d)*]. A party is not entitled to respond to a supplemental pleading as a matter of course, but only if the court deems it advisable [*see Pratt v. Rowland (ND Cal 1991) 769 F Supp 1128, 1132*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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9.22 Notice of Motion and Motion for Leave to File Amended Pleading.

Notice of Motion and Motion for Leave to File Amended Pleading.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR
_____ [*name*],	)	LEAVE TO AMEND
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for leave to file a _____ [*specify pleading, e.g.,* First Amended Complaint].

_____ [*Party's status and name*] moves this Court for an order under *Rule 15(a) of the Federal Rules of Civil Procedure* granting _____ [him *or* her *or* it] leave to file the [*proposed pleading, e.g.,* a First Amended Complaint] in the form shown in the copy of the proposed _____ [*proposed pleading, e.g.,* a First Amended Complaint] that is attached to this motion as Exhibit A.

_____ [Plaintiff *or* Defendant] seeks leave to amend at this time because _____ [*reasons for motion, e.g.,* Plaintiff has just learned of the existence of additional facts that merit the assertion of additional theories of relief *or* justice requires that Plaintiff be given an opportunity to correct the defects in the original complaint, which was dismissed by order of this court]. The Declaration of _____ [*name of declarant*] shows that: _____ [*summarize facts set out in supporting declaration or declarations*].

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach copy of proposed pleading.*]

[*Attach certificate of service.*]

NOTES.

Authority:
Fed R Civ P 15(a)

Considerations in Granting Leave to Amend:
See *§ 9.08*

Contents of Motion:
See *§ 9.08[3]*

Timing:
See *§§ 9.08[1], [4]*

Additional Motion Forms for Rule 15(a) Amendment:
See 4 *Bender's Federal Practice Forms, Forms 15:1-15:21* (Matthew Bender)

Related Form of Order:
See *§ 9.23*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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VI. FORMS

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9.23 Proposed Order Granting Leave to amend.

Proposed Order Granting Leave to amend.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	ORDER GRANTING LEAVE TO AMEND
Defendant	)	
	)	
	)	

This matter came on for hearing on _____ [*date*], on _____ [Plaintiff's *or* Defendant's] duly noticed _____ [*specify, e.g.*, Motion for Leave to File Amended Complaint]. Having read the papers submitted in support of and in opposition to the motion and having considered the arguments of counsel, the Court finds that justice requires that leave to amend be granted. Accordingly,

IT IS ORDERED THAT:

1. The motion is GRANTED;

2. The _____ [Plaintiff *or* Defendant] is given leave to file the _____ [*specify, e.g.*, First Amended Complaint] that was attached as Exhibit A to the Motion.

3. The _____ [Plaintiff *or* Defendant] must file and serve this amended pleading no later than _____ [*date*].

4. The _____ [Defendant *or* Plaintiff] may respond to this amended pleading within _____ [*number*] days after service is completed.
Dated: _____

_____

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
Fed R Civ P 15(a)

Related Form of Motion:
See *§ 9.22*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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9.24 Stipulation Allowing Filing of Amended Pleading.

Stipulation Allowing Filing of Amended Pleading.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	STIPULATION FOR FILING OF
Defendant	)	_____
	)	[*TITLE OF PLEADING, E.G.,* FIRST AMENDED
	)	COMPLAINT]

_____ [*Name*], the plaintiff in this action, and _____ [*name*], the defendant, stipulate and consent, in writing, within the meaning of *Rule 15(a) of the Federal Rules of Civil Procedure*, that _____ [*party's status and name*] may file the _____ [*specify pleading, e.g.,* First Amended Complaint] in this action that is attached to this Stipulation as Exhibit A. [*Add if appropriate:* The parties further stipulate that the amendment will date and relate back to the date of filing of the original complaint.]
Dated: _____

_____ [*attorney signature*]

_____ [*typed name*]

Attorney for Plaintiff

_____ [*attorney signature*]

_____ [*typed name*]

Attorney for Defendant

SO ORDERED

_____ [*signature of judge*]

UNITED STATES DISTRICT COURT JUDGE

[*Attach copy of proposed amended pleading*]

NOTES.

Authority:
Fed R Civ P 15(a)

Requirements for Stipulation:
See *§§ 9.08[1], [2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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2-9 MB Practice Guide: Fed Pretrial Civ Proc in CA 9.25

9.25 Notice of Motion and Motion for Leave to Amend Pleading to Conform to Evidence.

Notice of Motion and Motion for Leave to Amend Pleading to Conform to Evidence.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*], Plaintiff vs. _____ [*name*], Defendant	Civil Action No. _____ NOTICE OF MOTION AND MOTION FOR LEAVE TO AMEND PLEADING TO CONFORM TO EVIDENCE Date of Hearing: _____ Time of Hearing: _____ Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for leave to amend _____ [*specify pleading, e.g.,* the Original Complaint] to conform to the evidence introduced at the trial in this action.

_____ [*Party's status and name*] moves this Court for an order permitting _____ [*specify pleading, e.g.,* the Original Complaint] to be amended to conform to the evidence presented at trial in a manner shown in the proposed _____ [*proposed pleading, e.g.,* First Amended Complaint] as attached to this motion as Exhibit A.

Amendment is necessary to add allegations with respect to _____ [*identify issue*], which was raised by the evidence at trial without objection and, therefore, tried with the implied consent of all parties. *Rule 15(b) of the Federal Rules of Civil Procedure* provides that issues not raised by the pleadings that are tried by the express or implied consent of the parties are treated as if they had been raised by the parties.

The excerpts from the transcript of this trial, duly authenticated by the Supporting Declaration of _____ [*name of declarant*], show that _____ [*identfy issue*] was indeed tried in this action without objection. According to Rule 15(b), the pleadings may be amended to conform to the trial evidence, even after judgment. As the Supporting Declaration also shows, the proposed amendment is necessary because this suit is one of several pending between these and related parties, and a clear record of the issues actually tried in this matter is essential to judicial efficiency, so that the doctrines of claim and issue preclusion may be applied properly in all future proceedings.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach copy of proposed pleading*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 15(b)(2)

Grounds for Amendment:
See *§§ 9.17[1], [3]*

Timing:
See *§§ 9.17[2]*

Related Form of Order:
See *§ 9.26*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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2-9 MB Practice Guide: Fed Pretrial Civ Proc in CA 9.26

9.26 Proposed Order Permitting Amendment of Pleading to Conform to Evidence.

Proposed Order Permitting Amendment of Pleading to Conform to Evidence.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	ORDER GRANTING LEAVE TO AMEND
Defendant	)	
	)	
	)	

_____ [Plaintiff *or* Defendant]'s Motion for Leave to Amend _____ [*specify pleading, e.g.*, the Complaint] to Conform to the Evidence, filed on _____ [*date*], was duly noticed and came on regularly for hearing on _____ [*date*]. Having read the papers submitted in support of and in opposition to the motion and having considered the arguments of counsel, the Court finds that justice would be served if the motion were granted. Accordingly,

IT IS ORDERED THAT:

1. The motion is GRANTED;

2. _____ [Plaintiff *or* Defendant] is granted leave to file the _____ [*proposed pleading, e.g.,* Amended Complaint] that was attached as Exhibit A to the Motion for Leave to amend.

3. The _____ [Plaintiff *or* Defendant] will file and serve this amended pleading no later than _____ [*date*].
Dated: _____

_____

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
Fed R Civ P 15(b)

Related Form of Motion:
See *§ 9.25*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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2-9 MB Practice Guide: Fed Pretrial Civ Proc in CA 9.27

9.27 Notice of Motion and Motion for Leave to File Supplemental Pleading.

Notice of Motion and Motion for Leave to File Supplemental Pleading.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR
_____ [*name*],	)	LEAVE TO FILE SUPPLEMENTAL PLEADING
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for leave to file a _____ [*proposed pleading, e.g.,* Supplemental Complaint] in this matter.

_____ [*Moving party, e.g.,* Plaintiff John Smith] moves this Court for an order permitting _____ [him *or* her *or* it] to file a _____ [*proposed pleading, e.g.,* Supplemental Complaint] in the form shown in the proposed _____ [*proposed pleading, e.g.,* Supplemental Complaint] that is as attached to this motion as Exhibit A.

_____ [Plaintiff *or* Defendant] seeks leave to supplement the pleadings at this time because, as the Supporting Declaration of _____ [*name of declarant*] shows:

1. Significant events, as set forth in the proposed _____ [*proposed pleading, e.g.,* Supplemental Complaint] have occurred since the time the original pleadings in this matter were filed.

2. The post-pleading events are sufficiently related to the issues and transactions that are already before the Court that joinder would not unduly delay the proceedings and would not prejudice any party.

The Court should grant _____ [plaintiff *or* defendant] leave to supplement the pleadings because the post-pleading events are so significantly intertwined with the pre-pleading event that the court could not properly determine the matters currently before it without consideration of these new facts, and it is in the interests of justice that all the issues between the parties be litigated in a single action.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]
[*Attach copy of proposed pleading.*]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 15(d)

Grounds and Requirements for Motion:
See *§ 9.21*

Related Form of Order:
See *§ 9.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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Unit 3 Pleading Stage
CHAPTER 9 Amending and Supplementing Pleadings
VI. FORMS

2-9 MB Practice Guide: Fed Pretrial Civ Proc in CA 9.28

9.28 Order Granting Leave to File Supplemental Pleading.

Order Granting Leave to Supplemental Pleading.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	ORDER GRANTING LEAVE TO FILE SUPPLE-
Defendant	)	MENTAL PLEADING
	)	
	)	

_____ [Plaintiff *or* Defendant]'s Motion for Leave to File a _____ [*proposed pleading, e.g.,* Supplemental Complaint], which was filed on _____ [*date*], was duly noticed and came on regularly for hearing on _____ [*date*]. Having read the papers submitted in support of and in opposition to the motion and having considered the arguments of counsel, the Court finds that justice would be served if the motion were granted. Accordingly,

IT IS ORDERED THAT:

1. The motion is GRANTED;

2. _____ [Plaintiff *or* Defendant] is granted leave to file the _____ [*proposed pleading*, *e.g.*, First Supplemental Complaint] that was attached as Exhibit A to the Motion for Leave to Supplement the Pleadings.

3. The _____ [Plaintiff *or* Defendant] will file and serve this supplemental pleading no later than _____ [*date*].

4. The _____ [Defendant *or* Plaintiff] may respond to this supplemental pleading within _____ [*number*] days after service is completed.

Dated: _____

_____

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:

Fed R Civ P 15(d)

Related Form of Motion:

See *§ 9.27*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.syn

§ 10.syn Synopsis to Chapter 10: Adding, Dropping, and Substituting Parties

10.01 Scope.

10.02 Objective and Strategy for Adding or Dropping Parties.

10.03 Objective and Strategy for Substituting Parties.

10.04 CHECKLIST: Adding Parties.

10.05 Options and Strategies Related to Addition of Parties.

10.05[1] New Parties May Be Added to Pending Civil Action.

10.05[2] Procedural Mechanism for Adding Party.

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10.06 Federal Rules Prescribe Requirements for Party Joinder.

10.07 Rule 19: Parties Needed for Adjudication Are Subject to Compulsory Joinder.

10.08 Rule 20: Permissive Joinder of Parties.

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10.09[4] Motion to Add Party May Be Made at Any Time.

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10.09[5][a] Court May Add Person Needed for Just Adjudication If Feasible.

10.09[5][b] Court May Not Add Person Needed for Just Adjudication If Joinder Is Not Feasible.

10.10 CHECKLIST: Dropping Parties.

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10.11[2] Procedural Mechanism for Dropping Party.

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10.11[2][b] Party May Drop Party by Amendment to Pleading.

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10.12 Court May Drop Party From Action Because of Misjoinder or for Any Other Just Reason.

10.12[1] Court May Drop Party Because of Misjoinder of Party.

10.12[1][a] Misjoinder Is Improper Inclusion of Person As Party.

10.12[1][b] Court May Use Procedural Rule to Cure Misjoinder.

10.12[2] Court May Drop Party From Action to Further Efficient Administration of Justice.

10.13 Procedural Considerations for Motion to Drop Party.

10.13[1] Only Current Party May Move to Drop Party.

10.13[2] Court Order Required to Drop Party.

10.13[3] Court May Act on Its Own Initiative to Order Party Dropped.

10.13[4] Motion to Drop Party May Be Made at Any Time.

10.14 Court May Order Severance of Claim.

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10.14[3] Severance of Claim Divides Action Into Two Separate Actions.

10.14[3][a] Severance Is Division of Legal Action Into Separate and Distinct Legal Actions.

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10.16[2] Substitution Is Procedural Mechanism for Use in Specified Circumstances.

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10.16[2][b] Use of Dropping and Adding Party As Alternative for Substitution.

10.16[2][c] Use of Amendment As Alternative for Substitution.

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10.17 Function of Substitution Procedure.

10.18 Substitution on Death of Party.

10.18[1] Court May Substitute on Death of Party During Pendency of Litigation.

10.18[2] Legal Representatives and Distributees Are Proper Parties to Substitute.

10.18[3] Party or Representative of Deceased Party Must File a Motion for Substitution on Death of Party.

10.18[4] Moving Person Must Serve Motion and a Notice of Hearing on All Other Parties and on Interested Nonparties.

10.18[5] Statement of Death Starts Limitation Period for Filing Motion for Substitution.

10.18[6] Claim of Deceased Must Survive Death to Provide Basis for Substitution.

10.18[6][a] Court May Substitute Party Only If Claim Is Not Extinguished by Death.

10.18[6][b] Court May Allow Action to Continue If Claim of Deceased Party Survives in Favor or Against Another Party.

10.19 Substitution on Account of Incompetency of Party.

10.19[1] Court May Substitute for Party That Becomes Incompetent.

10.19[2] Issue of Competence Is Substantive Matter Controlled by State Law.

10.19[3] Motion for Substitution Based on Incompetence Must Be Served on Parties and Interested Nonparties.

10.20 Substitution in Case of Transfer of Interest During Pendency of Litigation.

10.20[1] Court May Order Substitution of Party or Joinder of Person Because of Transfer of Interest.

10.20[2] Substitution or Joinder on Transfer Is Procedural Device for Court to Control Litigation.

10.20[3] Party or Transferee Must File Motion for Substitution on Transfer Occurring After Litigation Is Commenced.

10.20[4] Motion for Substitution Based on Transfer Must Be Served on Parties and Interested Nonparties.

10.21 Substitution in Case of Separation of Public Officer From Office.

10.21[1] Successor of Public Officer Is Automatically Substituted When Predecessor Leaves Office.

10.21[2] Public Officer May Be Named by Title.

10.21[3] Successor Is Subject to All Orders Binding on Predecessor.

10.21[4] Automatic Substitution Does Not Require Motion of Party or Order of Court.

10.22 Procedural Considerations for Motion for Substitution.

10.22[1] Substitution Does Not Affect Jurisdiction, Diversity of Citizenship, and Venue.

10.22[2] Moving Person Must Generally Serve Motion for Substitution.

10.22[2][a] Moving Party Must Serve Motion and Notice of Hearing.

10.22[2][b] Moving Party Must Serve Parties in Same Manner As Serving Pleadings and Papers Other Than Original Complaint.

10.22[2][c] Moving Party Must Serve Nonparties in Same Manner As Serving Summons and Original Complaint.

10.22[3] Appeal of Order Regarding Substitution.

10.23 Notice of Motion and Motion by Plaintiff to Add Defendant.

10.24 Notice of Motion and Motion by Defendant to Add Plaintiff.

10.25 Notice of Motion and Motion by Plaintiff to Drop Defendant Who Would Defeat Diversity.

10.26 Notice of Motion and Motion by Defendant to Drop Defendant As Misjoined.

10.27 Notice of Motion and Motion to Substitute for Party Who Has Died During Litigation.

10.28 Statement Noting Death of Party During Litigation.

10.29 Notice of Motion and Motion to Substitute for Party Who Has Become Incompetent During Litigation.

10.30 Notice of Motion and Motion to Substitute for Party Who Has Transferred Interest.

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
I. STRATEGY

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.01

10.01 Scope.

This chapter covers:

- Objectives and strategy related to adding parties to or dropping parties from pending civil action [*see 10.02*].
- Objectives and strategy related to substitution of parties from pending civil action [*see 10.03*].
- Use of procedure for adding parties [*see 10.04*, *10.05*].
- Grounds for party joinder under the Federal Rules [*see 10.06 -10.08*].
- Motion for adding party [*see 10.09*; *Forms 10.23*, *10.24*].
- Use of procedure for dropping parties [*see 10.10*, *10.11*].
- Grounds for dropping parties [*see 10.12*].
- Motion for dropping party [*see 10.13*; *Forms 10.25*, *10.26*].
- Grounds for court to sever claim of party [*see 10.14*].
- Use of procedure for substitution of parties [*see 10.15 -10.17*].
- Grounds for dropping parties [*see 10.18 -10.21*].
- Motion for substitution of party [*see 10.22*; *Forms 10.27 -10.30*].

Core Statutes: *Fed R Civ P 19*, *20*, *21*, *25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
I. STRATEGY

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.02

10.02 Objective and Strategy for Adding or Dropping Parties.

The court may add or drop a party to a pending civil action for two reasons:

- Nonjoinder: The party should have or could have previously been included in the action, as a proper or necessary party, but was not added at the time of the original pleading.

- In the interests of justice, which include the concepts of fundamental fairness and the efficient administration of the judicial system.

A party may add or drop another party either by motion or by an amendment to a pleading. Adding or dropping by amendment has the advantage that if the party makes the amendment before the 21-day window for amendment as a matter of course ends, the party does not need leave of court, and need not show grounds for the change [*see Fed R Civ P 15*].

When a person is added as a party, the court may grant judgment in favor of each plaintiff, including the added plaintiff, according to the respective rights to relief, and against each defendant, including each added defendant, according to the respective liabilities [*see Fed R Civ P 20(a)(3)*].

A person dropped as a party is not subject to any judgment rendered in the action [*Reynolds & Reynolds Co. v. Universal Forms, Labels & Sys. (CD Cal 1997) 965 F Supp 1392, 1397*]. Furthermore, unless the court specifies otherwise, the party is dropped without prejudice. Thus, a dropped party that had asserted a claim for relief could bring the claim in another action, and a dropped defendant could be subject to the same claim in another action [*Coughlin v. Rogers (9th Cir 1997) 130 F3d 1348, 1350*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
I. STRATEGY

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.03

10.03 Objective and Strategy for Substituting Parties.

When a party is unable to continue in a pending civil action, the successors or representatives of the party, or the other parties, frequently want the action to continue with respect to the claims of the party who is unable to continue. The effect of a substitution is that the new party steps into the exact position in the litigation that the original party occupied [Hilao v. Estate of Marcos (9th Cir 1996) 103 F3d 762, 766].

A party may move for substitution if another party dies, becomes incompetent, or transfers its interest in litigation [*Fed R Civ P 25 (a),(b),(c)*]. Automatic substitution occurs when a government official in an official capacity suit dies or otherwise leaves office [*Fed R Civ P 25(d)*]. For this automatic substitution, no motion has to be made for the substitution to take effect.

Because a substitution is, in practical effect, the dropping of a current party and the adding of a new one, a party may be able to use *Fed R Civ P 21* to effect substitution when *Fed R Civ P 25* substitution is not available, provided that the party by motion can obtain court approval to drop one party and add another.

Detailed Discussion/Forms:

4 Moore's Federal Practice, Ch. 19, Required Joinder of Parties; Ch. 20, Permissive Joinder of Parties; Ch. 21, Misjoinder and Nonjoinder of Parties; 6 Moore's Federal Practice, Ch. 25, Substitution of Parties (Matthew Bender 3d ed.).

5 Bender's Federal Practice Forms, Civil Rule 21, Misjoinder and Nonjoinder of Parties; Civil Rule 25, Substitution of Parties (Matthew Bender).

Cross References:

Discussion of joinder principles, see Ch. 4, Determining Parties to the Action. Discussion of joinder of parties in filing pleadings, see Ch. 6, Drafting the Summons and Complaint. Discussion of changing parties by amendment, see Ch. 9, Amending and Supplementing Pleadings. Discussion of adding third party, see Ch. 12, Third-Party Actions. Discussion of severance and separate trials of claims, see Ch. 18, Consolidation and Separate Trials.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
II. ADDING PERSONS AS PARTIES TO EXISTING ACTION

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.04

10.04 CHECKLIST: Adding Parties.

☐ Determine whether grounds exist for addition of party, including:

- ○ Nonjoinder; or
- ○ Interests of justice.

Authority:
Fed R Civ P 19(a), 20(a), 21

Discussion:
See *§ 10.05[1]*

☐ Determine basis to add particular prospective party, in that:

- ○ Prospective party should be joined as required party, because:
  - ☐ Joinder of prospective party is needed for just adjudication; and
  - ☐ Joinder of prospective party is feasible.

Authority:
Fed R Civ P 19(a)

Discussion:
See *§ 10.07*

○ Prospective party may be joined as proper party, in that:

☐ Claim for relief could be asserted by or against prospective party that relates to or arises out of same transaction or occurrence or series of transactions or occurrences as those claims currently being litigated; and

☐ Some questions of law or fact common to all prospective plaintiffs and defendants arise in the suit related to the claim for relief.

Authority:
Fed R Civ P 20(a)

Discussion:
See *§ 10.08*

☐ Determine method to add party:

○ By motion, requiring:

☐ Statement of grounds.

☐ Approval of court.

○ By amendment of pleading, which does not require statement of grounds and approval of court, provided amendment is made before the right to amend once terminates.

Authority:
Fed R Civ P 15(a), 21

Discussion:
See *§ 10.05[2]*

☐ Draft motion and notice of motion requesting order that adds party to litigation, stating applicable grounds.

Authority:
Fed R Civ P 21

Discussion:
See *§ 10.09*

Forms:
See *§§ 10.23, 10.24*

☐ Serve and file motion, following standard noticed motion procedure.

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
II. ADDING PERSONS AS PARTIES TO EXISTING ACTION

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.05

10.05 Options and Strategies Related to Addition of Parties.

10.05[1] New Parties May Be Added to Pending Civil Action. Parties may added by order of the court on motion of any party or sua sponte at any stage of the action and on such terms as are just [*Fed R Civ P 21*].

10.05[2] Procedural Mechanism for Adding Party.

10.05[2][a] Plaintiff May Elect to Join Proper Parties at Initiation of Action. A plaintiff will ordinarily have the option to join at the time of filing the complaint all persons who are proper parties under permissive joinder [*Fed R Civ P 20*; *Gibson v. Chrysler Corp. (9th Cir 2001) 261 F3d 927, 936 , cert. denied, 534 US 1104 (2002)* ; *see 10.08*]. However, the plaintiff is not required to join all proper parties at that time, and may later add parties by filing a motion for addition [*Fed R Civ P 21*; *see 10.05[2][c]*] or by amending a pleading [*Fed R Civ P 15(a)*; *see 10.05[2][d]*].

10.05[2][b] Defendant or Other Party May Add Parties by Joinder. Although the permissive party joinder rule gives the plaintiff great discretion to determine whether to include coplaintiffs and more than one defendant in the action, the defendant may be able to alter the plaintiff's choice by impleading third-party defendants [*see Fed R Civ P 14(a)*] or by moving for the joinder of persons required for just adjudication [*see Fed R Civ P 19(a)*]. Additionally, a defendant who files a counterclaim or crossclaim in the pending case is treated as a plaintiff for purposes of permissive party joinder [*see Fed R Civ P 13(h)* (persons other than those made parties to original action may be made parties to counterclaim or crossclaim in accordance with provisions of *Fed R Civ P 19* and *20*)].

10.05[2][c] Party May Add Party by Motion. Any current party may move the court to order the addition of another person at any stage of the action and on such terms as are just [*Fed R Civ P 21*; *see Abreu v. Ramirez (CD Cal 2003) 284 F Supp2d 1250, 1260* ; *see also 10.09*].

10.05[2][d] Party May Add Party by Amendment to Pleading. *Fed R Civ P 21* specifies the procedure for adding parties. On the other hand, *Fed R Civ P 15(a)* is a more specific provision that specifies the particular means by which a party may add a new party by an amendment to the pleadings [*Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc. (ND Cal 1999) 186 FRD 581, 583*]. The most important distinction between the procedures is that the amendment procedure provides that a party may make the addition without obtaining a court order:

- A plaintiff may properly add a party without leave of court before the 21-day window for amendment as a matter of course ends [*Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc. (ND Cal 1999) 186 FRD 581, 583* (order of court is not required for amendment adding party, decided under former *Fed R Civ P 15(a)*)]. A party may amend its pleading once "as a matter of course," that is, unilaterally without court permission or the consent of opposing parties, within 21 days after serving the pleading [*Fed R Civ P 15(a)(1)(A)*]. This simple, 21-day deadline applies to pleadings that do not require a responsive pleading [*see Fed R Civ P 15(a)(1)(A)*; *see also Fed R Civ P 7(a)* (list of responsive pleadings)]. If the pleading is one that does require a responsive pleading, a more complex time limit applies. In these circumstances, a party may amend its pleading either [*Fed R Civ P 15(a)(1)(B)*]:

  - Within 21 days after service of the responsive pleading; or
  - Within 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

- A defendant may join additional parties without leave of court through the mechanism of a counterclaim or crossclaim, provided the defendant raises the counterclaim or crossclaim in its responsive pleading [*Thompson v. Boggs (7th Cir 1994) 33 F3d 847, 858 , cert. denied, 514 US 1063 (1995)*].

Warning:

If a proposed amended pleading adds parties, be sure to ascertain whether the statute of limitations has run with respect to those parties [*see Fed R Civ P 15(c)(1)(A)*].

Cross Reference:

General discussion of requirements and procedures for amendment of pleadings, see Ch. 9, Amending and Supplementing Pleadings, see *§§ 9.03 -9.11*. Discussion of relation back of amendments for statute of limitations purposes, see Ch. 9, Amending and Supplementing Pleadings, see *§§ 9.12 -9.14*.

10.05[3] Party Added Is Subject to Judgment. When a person is added as a party, the court may grant judgment in favor of each added plaintiff according to the plaintiff's respective rights to relief, and against each added defendant according to the defendant's respective liabilities [*Fed R Civ P 20(a)(3)*; *see Fed R Civ P 18(b), 19(a)*]. Thus, when multiple plaintiffs or multiple defendants are properly joined under the joinder rules, claims by the joined plaintiffs or against the joined defendants may be asserted jointly, severally, or in the alternative [*see Fed R Civ P 8(a)*; *see also Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc. (ND Cal 1999) 186 FRD 581, 583*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.06 Federal Rules Prescribe Requirements for Party Joinder.

Rules 19 and 20 address compulsory and permissive joinder of parties, respectively. Rule 19 states that if an absent party is needed for a just adjudication of a case, the court will order his or her joinder if feasible; if not feasible, the court must determine "in equity and good conscience" whether it should proceed without the absent party or dismiss the action. If the court cannot proceed, the party is deemed indispensable [*Fed R Civ P 19(a), (b)*]. Under Rule 20, permissive joinder of parties is allowed if a party has some relation to the action but does not fall into a class of a party needed for adjudication under Rule 19. Such a person is a "proper party" and may be joined as plaintiff or defendant if the tests of Rule 20 are satisfied [*Fed R Civ P 20*].

Cross Reference:

Discussion of compulsory joinder, see *§ 10.07*. Discussion of permissive joinder, see *§ 10.08*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.07 Rule 19: Parties Needed for Adjudication Are Subject to Compulsory Joinder.

A person who is subject to service and whose joinder will not deprive a court of jurisdiction over the subject matter of the action, "must be joined as a party" if [*Fed R Civ P 19(a)(1)*]:

- In his or her absence, complete relief cannot be accorded among those already parties; or
- He or she claims an interest relative to the subject of the action and is so situated that the disposition of the action in his or her absence may:
  - as a practical matter impair or impede his or her ability to protect that interest, or
  - leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of his or her claimed interest.

If a party falls within this definition, but is not subject to service of process, or if the party's joinder would destroy diversity, the court must determine whether in equity and good conscience the action should proceed among the parties without the absent party, or in the alternative, be dismissed. Four factors for consideration by the court include [*Fed R Civ P 19(b)*]:

- The extent to which a judgment rendered in the person's absence might be prejudicial to the absent person or those already parties;
- The extent to which the prejudice could be lessened or avoided by protective provisions in the judgment, by the shaping of relief, or by other measures;
- Whether a judgment rendered in the person's absence will be adequate; and
- Whether the plaintiff would have an adequate remedy if the action is dismissed.

Exception:

The compulsory joinder rule does not apply when the class action rule [*see Fed R Civ P 23*] controls the circumstances of the case [*Fed R Civ P 19(d)*].

A plaintiff in its complaint, or a defendant in a counterclaim, or any other party making a claim for relief, may join all persons needed for just adjudication, but is not required to do so. However, if any necessary persons known to a party pleading a claim for relief are not specified in the pleading, the pleader must state the name of the absent persons and the reasons why they are not joined [*Fed R Civ P 19(c)*].

Cross Reference:

Detailed discussion of compulsory joinder, Ch. 4, Determining Parties to the Action, see *§§ 4.41 -4.51*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.08 Rule 20: Permissive Joinder of Parties.

Even though a person is not a required party needed for just adjudication under *Fed R Civ P 19(a)*, the person may qualify as a permissive joinder party under *Fed R Civ P 20* [*see Fed R Civ P 20(a)*].

The court has discretion to join all persons in one action as plaintiffs or defendants if two conditions are met [*Fed R Civ P 20(a)*]:

1. Each person asserts any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences.

2. Any question of law or fact common to each person will arise in the action.

A plaintiff or defendant may be permissively joined even though he or she has no interest in obtaining or defending against all the relief demanded [*Fed R Civ P 20(a)*].

Cross Reference:

Detailed discussion of permissive joinder, see Ch. 4, Determining Parties to the Action, see *§§ 4.03 -4.08*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.09 Procedural Considerations for Addition of Party by Motion.

10.09[1] Only Current Party May Move for Addition of New Party. A motion to add a person as a party may only be made by a party to the existing litigation [*Fed R Civ P 21*; *see Thompson v. Boggs (7th Cir 1994) 33 F3d 847, 858 n10 , cert. denied, 514 US 1063 (1995)*]. If a nonparty wants to make application to enter litigation that has already been initiated, the person should do so by a motion to intervene [*see Fed R Civ P 24*; *see also Hutchinson v. Pfeil (10th Cir 2000) 211 F3d 515, 518*].

Cross References:

Discussion of requirements and procedures for intervention, see Ch. 14, Intervention.

Intervention of right and permissive intervention, see 6 Moore's Federal Practice, Ch. 24, Intervention (Matthew Bender 3d ed.).

10.09[2] Court Order Required for Addition of Party. Parties may be added only by order of the court [*Fed R Civ P 21*]. Thus, the existing parties in an action do not have the power to unilaterally or by agreement add parties, and if the court makes no order of addition regarding a person, no adjudication may occur regarding that person [*see Kirkland v. Legion Ins. Co. (9th Cir 2003) 343 F3d 1135, 1142*].

Exception:

Because *Fed R Civ P 15* allows an existing party to add a new party by an amendment to the pleadings [*see Fed R Civ P 15(a)*], a plaintiff may properly add a party without leave of court, provided the plaintiff makes the amendment before the 21-day window for amendment as a matter of course ends [*Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc. (ND Cal 1999) 186 FRD 581, 583* (order of court is not required for amendment adding party, decided under former *Fed R Civ P 15(a)*)]. Similarly, a defendant may join additional parties without leave of court through a counterclaim or crossclaim, provided the defendant raises the counterclaim or crossclaim in its initial responsive pleading [*Thompson v. Boggs (7th Cir 1994) 33 F3d 847, 858 , cert. denied, 514 US 1063 (1995)*].

Cross Reference:

Unilateral right to amend, see *§ 10.05[2][d]*. Discussion of requirements and procedures for amendment, see Ch. 9, Amending and Supplementing Pleadings.

10.09[3] Court May Act on Its Own Initiative to Order Addition of Party. In addition to its discretion to make an order on the motion of a party, a court may by order add persons as parties on the court's own initiative [*Fed R Civ P 21*]. The court has considerable discretion in determining whether to add parties, and each case must be decided on its particular facts. However, in exercising its discretion under Rule 21, the court should consider principles of fundamental fairness and judicial efficiency, and should consider whether the order would prejudice any party [*Whitaker v. Garcetti (CD Cal 2003) 291 F Supp2d 1132, 1156 , aff'd in part, rev'd in part on other grounds,* Whitaker v. Garcetti (9th Cir 2007) 486 F3d 572] or would result in undue delay [*In re Merrill Lynch & Co. Research Reports Sec. Litig. (SDNY 2003) 214 FRD 152, 155 , vacated and remanded on other grounds, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71* (citing **Moore's**)].

10.09[4] Motion to Add Party May Be Made at Any Time. The court may order the addition of a party on motion of any party or of its own initiative at any stage of the action [*Fed R Civ P 21*]. A party may be added after trial has started, and even after judgment on appeal [*California Credit Union League v. City of Anaheim (9th Cir 1999) 190 F3d 997, 1001 , cert. denied, 528 US 1154 (2000)* (United States could be added as co-plaintiff at appellate level in interests of justice, when addition did not result in any prejudice to existing parties)]. However, in making its discretionary determination, the court may refuse to order addition of a party when the moving party has been dilatory in filing its motion [*Hensgens v. Deere & Co. (5th Cir 1987) 833 F2d 1179, 1182 , cert. denied, 493 US 851 (1989)*].

10.09[5] When Addition of Person Needed for Just Adjudication Is Not Feasible Court May Be Required to Dismiss Action.

10.09[5][a] Court May Add Person Needed for Just Adjudication If Feasible. In addition to nonjoinder of a proper party under permissive joinder rules [*see 10.08*], nonjoinder also occurs when the plaintiff or the court fails to join a person needed for a just adjudication of the pending litigation [*see 10.07*]. The failure to join such a party may be raised by motion to add the party under *Fed R Civ P 21* [*Presidential Comm'n on Good Gov't v. United States Dist. Court (9th Cir 2002) 309 F3d 1143, 1152*]. The court must join the absentee in the pending case if such joinder is feasible [*Fed R Civ P 19(a)*].

10.09[5][b] Court May Not Add Person Needed for Just Adjudication If Joinder Is Not Feasible. If joinder of an absentee needed for a just adjudication is not feasible, the court may have to dismiss the action. Joinder is not feasible, for example, when the court cannot obtain personal jurisdiction over the necessary party, when the necessary party's joinder would destroy diversity of citizenship jurisdiction, or when the necessary party has a valid objection to venue [*Fed R Civ P 19(a)*]. In such a situation, the court has only two choices: it must either proceed without adding the necessary party or dismiss the pending case because the absentee is indispensable. Thus, nonjoinder of such an absentee may not be cured by ordering addition of the absentee under *Fed R Civ P 21* [*see Moubry v. Kreb (D Minn 1999) 58 F Supp2d 1041, 1048*].

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10.10 CHECKLIST: Dropping Parties.

☐ Determine whether grounds exist for dropping existing party from pending action, including:

○ Misjoinder, which is inclusion of party in action who is not a proper party; or

○ Interests of justice, which include promotion of fundamental fairness and efficient administration of court system.

Authority:
Fed R Civ P 20(a), 21

Discussion:
See *§ 10.12*

☐ Determine basis to drop particular party, in that party is not proper party because:

○ No claim for relief could be asserted by or against party that relates to or arises out of same transaction or occurrence or series of transactions or occurrences as other claims currently before court; and

○ No question of law or fact common to all parties arises in the action related to the claim for relief.

Authority:
Fed R Civ P 20(a)

Discussion:
See *§ 10.12[1]*

☐ Determine method to drop party:

○ By motion, which requires statement of grounds and approval of court; or

○ Amendment of pleading, which does not require statement of grounds and approval of court, provided amendment is made before the right to amend once terminates.

Authority:
Fed R Civ P 15(a), 21

Discussion:
See *§ 10.11*

☐ If party is misjoined with respect to fewer than all claims, determine whether to make motion for court to sever misjoined claims.

Authority:
Fed R Civ P 21

Discussion:
See *§ 10.14*

☐ Draft motion and notice of motion requesting that court order party dropped from litigation, or that claims be severed from action, stating applicable grounds.

Authority:
Fed R Civ P 21

Discussion:
See *§ 10.13*

Forms:
See *§§ 10.25, 10.26*

☐ Serve and file motion, following standard noticed motion procedure.

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

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10.11 Options and Strategies Related to Dropping Parties.

10.11[1] Grounds for Dropping Named Party. The court may drop a party to a pending civil action for two reasons:

- Nonjoinder, which means that the party should have or could have previously been included in the action as a proper or necessary party [*see Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1028* ; *see also 10.12[1]*].

- The interests of justice, including fundamental fairness and the efficient administration of the judicial system [*Reynolds & Reynolds Co. v. Universal Forms, Labels & Sys. (CD Cal 1997) 965 F Supp 1392, 1397* ; *see 10.12[2]*].

10.11[2] Procedural Mechanism for Dropping Party.

10.11[2][a] Party May Drop Party by Motion. Any current party may move the court to order a party dropped at any stage of the action and on such terms as are just [*Fed R Civ P 21*; *see Abreu v. Ramirez (CD Cal 2003) 284 F Supp2d 1250, 1260* ; *see 10.13[4]*].

10.11[2][b] Party May Drop Party by Amendment to Pleading. *Fed R Civ P 21* is a general provision that specifies the procedure for dropping parties. On the other hand, Rule 15(a) is a more specific provision that specifies the particular means by which a party may drop a new party by an amendment to the pleadings [*Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc. (ND Cal 1999) 186 FRD 581, 583*]. The most important distinction between the procedures is that the amendment procedure provides that a party may drop a party without obtaining a court order in the following circumstances:

- A plaintiff may properly drop a party without leave of court before the right to amend once terminates [*Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc. (ND Cal 1999) 186 FRD 581, 583* (order of court is not required for amendment dropping party, decided under former *Fed R Civ P 15(a)*); *see Fed R Civ P 15(a)*].

- A defendant may drop a third party without leave of court by amending its counterclaim or crossclaim before the right to amend once terminates [*see Fed R Civ P 15(a)*].

Cross Reference:

Unilateral right to amend, see *§ 10.05[2][d]*. Discussion of requirements and procedures for amendment, see Ch. 9, Amending and Supplementing Pleadings.

10.11[3] Effect of Dropping Party. A party dropped from an action pursuant to *Fed R Civ P 21* is not subject to any judgment rendered in the action [*Reynolds & Reynolds Co. v. Universal Forms, Labels & Sys. (CD Cal 1997) 965 F Supp 1392, 1397*]. Additionally, when a court orders a party dropped from an action under Rule 21, unless the court specifies otherwise, the party is dropped without prejudice to the dropped party or the other parties in the case. Thus, a dropped party that had asserted a claim for relief could bring the claim in another action, and a dropped defendant could be subject to the same claim in another action [*Coughlin v. Rogers (9th Cir 1997) 130 F3d 1348, 1350*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.12 Court May Drop Party From Action Because of Misjoinder or for Any Other Just Reason.

10.12[1] Court May Drop Party Because of Misjoinder of Party.

10.12[1][a] Misjoinder Is Improper Inclusion of Person As Party. At any stage of the action, the court may order that a party be dropped on terms that are just, either on motion of any party or on the court's own initiative [*Fed R Civ P 21*]. Thus, a party should be dropped in the event of "misjoinder," a situation in which a party in the current action fails to satisfy the two preconditions necessary for the permissive joinder of parties [*Fed R Civ P 21*; *Diaz v. Allstate Ins. Group (CD Cal 1998) 185 FRD 581, 587*]:

- A claim for relief must be asserted by, or against, each plaintiff or defendant relating to or arising out of the same transaction or occurrence or series of transactions or occurrences.

- Some question of law or fact common to all parties must arise in the action related to the claim for relief.

For example, a misjoinder of parties is frequently declared because no relief is demanded from one or more of the parties joined as defendants [*Letherer v. Alger Group, L.L.C. (6th Cir 2003) 328 F3d 262, 267-268*].

Cross Reference:

Discussion of whether a person is a "proper party" under permissive joinder, see *§ 10.08*.

10.12[1][b] Court May Use Procedural Rule to Cure Misjoinder. The court may not cure misjoinder by dismissing an entire action; however, a court may drop one or more parties to cure misjoinder [*Fed R Civ P 21*]. Thus, Rule 21 is a procedural device designed to cure a "defect of parties." This discretionary power is used by the federal court to perfect its diversity jurisdiction by dropping a named, nondiverse party [*Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc. (ND Cal 1998) 23 F Supp2d 1151, 1157*], provided that the nondiverse party is dispensable to the action under *Fed R Civ P 19* [*Kirkland v. Legion Ins. Co. (9th Cir 2003) 343 F3d 1135, 1142*].

10.12[2] Court May Drop Party From Action to Further Efficient Administration of Justice. The courts have

recognized that a party may be dropped even in the absence of misjoinder, when required by fundamental fairness [*see Wynn v. NBC (CD Cal 2002) 234 F Supp2d 1067, 1078*]. Thus, the court has discretion to drop parties to promote the efficient administration of justice [*Stark v. Independent Sch. Dist. No. 640 (D Minn 1995) 163 FRD 557, 564*].

Example:

Fed R Civ P 21 provides the district courts and circuit courts of appeal [*CGB Occupational Therapy v. RHA Health Servs. (3d Cir 2004) 357 F3d 375, 382 , vacated in part and remanded on other grounds,* CGB Occupational Therapy, Inc. v. RHA Health Servs. (9th Cir 2007) 499 F3d 184] with authority to drop a dispensable nondiverse party at any time, even after judgment, in order for the court to maintain diversity of citizenship jurisdiction of the action [*Newman-Green, Inc. v. Alfonzo-Larrain (1989) 490 US 826, 838, 109 S Ct 2218, 104 L Ed2d 893*].

Cross Reference:

Discussion of dropping parties to further interests of fairness and justice, see 4 *Moore's Federal Practice, § 21.05* (Matthew Bender 3d ed.).

Legal Topics:

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10.13 Procedural Considerations for Motion to Drop Party.

10.13[1] Only Current Party May Move to Drop Party. A motion to drop a party from an action may only be made by another party to the action [*Fed R Civ P 21*; *see* Belford v. Farmers Ins. Group of Cos. (9th Cir 2002) 2002 US App LEXIS 18228, at *7-*8 (proper procedure to drop party is through motion by party under *Fed R Civ P 21*; unpublished opinion; generally not citable to court under 9th Cir R 36-3)].

10.13[2] Court Order Required to Drop Party. Parties may be dropped only by order of the court [*Fed R Civ P 21*; *see* Maynard v. Bonta (CD Cal 2003) 2003 US Dist LEXIS 16201, at *22-*23]. Thus, the existing parties in an action do not have the power to unilaterally or by agreement drop a party, and if the court makes no order dropping a party, that party continues as a named party in the action.

Exception:

Because *Fed R Civ P 15* allows an existing party to drop a party by an amendment to the pleadings [*see Fed R Civ P 15(a)*], a plaintiff may properly drop a party without leave of court, provided the plaintiff makes the amendment before the right to amend once terminates [*Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc. (ND Cal 1999) 186 FRD 581, 583* (order of court is not required for amendment dropping party, decided under former *Fed R Civ P 15(a)*); *see* Maynard v. Bonta (CD Cal 2003) 2003 US Dist LEXIS 16201, at *22-*23 (decided under former *Fed R Civ P 15(a)*)]. Similarly, a defendant may drop a party without leave of court through a counterclaim or crossclaim, [*see Fed R Civ P 15(a)*; *Fed R Civ P 15*, Committee Note of 2009].

Cross References:

Unilateral right to amend, see *§ 10.05[2][d]*. Discussion of requirements and procedures for amendment, see Ch. 9, Amending and Supplementing Pleadings. Discussion of counterclaims and crossclaims, see Ch. 11, Counterclaims, Crossclaims, and Replies.

10.13[3] Court May Act on Its Own Initiative to Order Party Dropped. In addition to its discretion to make an order on a party's motion, a court may drop a named party on the court's own initiative [*Fed R Civ P 21*]. The court has considerable discretion in determining whether to drop parties, and each case must be decided on its particular facts [

Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc. (ND Cal 1998) 23 F Supp2d 1151, 1158]. However, in exercising its discretion under Rule 21, the court should consider "principles of fundamental fairness and judicial efficiency" [*Verizon Md. Inc. v. RCN Telecom Servs. (D Md 2002) 232 F Supp2d 539, 547* (citing **Moore's**)], and should consider whether the order would prejudice any party [*see Whitaker v. Garcetti (CD Cal 2003) 291 F Supp2d 1132, 1156 , aff'd in part, vacated in part, and remanded on other grounds Whitaker v. Garcetti (9th Cir 2007) 486 F3d 572*] or would result in undue delay [*In re Merrill Lynch & Co. Research Reports Sec. Litig. (SDNY 2003) 214 FRD 152, 155 , vacated and remanded on other grounds,* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit (2006) 547 US 71 (citing **Moore's**)].

10.13[4] Motion to Drop Party May Be Made at Any Time. The court may order that a named party be dropped at any stage of the action [*Fed R Civ P 21*]. Thus, a party may be dropped after trial has started, and even after judgment on appeal. However, in making its discretionary determination, the court may refuse to drop a party when the moving party has been dilatory in filing its motion [*Newman-Green, Inc. v. Alfonzo-Larrain (1989) 490 US 826, 837, 109 S Ct 2218, 104 L Ed2d 893*].

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10.14 Court May Order Severance of Claim.

10.14[1] Court Has Discretion to Sever Claim to Cure Misjoinder. The court may order the severance of any claim against a party, and order that the severed claim proceed separately [*Fed R Civ P 21*]. The court typically will sever a claim to cure misjoinder, rather than dismissing the party from the action. For example, the court could order severance of a claim when the party is a proper party under joinder rules with respect to one claim, but an improper party with respect to another claim [*Koh v. Microtek Int'l, Inc. (ED Va 2003) 250 F Supp2d 627, 631-632*].

10.14[2] Court Has Discretion to Sever Claim to Further Efficient Administration of Justice. The court may sever a claim to further the efficient administration of justice, even in the absence of misjoinder [*see Acevedo-Garcia v. Monroig (1st Cir 2003) 351 F3d 547, 560* (misjoinder is not a prerequisite to severing parties or claims under *Fed R Civ P 21*)]. For example, the court may sever a claim against a party to facilitate transfer. Thus, a court may sever and transfer to a proper district court claims that are otherwise properly joined, but that are brought against parties over whom the court cannot exercise personal jurisdiction [*Apache Prods. Co. v. Employers Ins. of Wausau (SD Miss 1994) 154 FRD 650, 660* (citing **Moore's**)]. Severance may also be used to cure improper venue [*see Anrig v. Ringsby United (9th Cir 1978) 603 F2d 1319, 1325*].

Before it orders a severance under Rule 21, the court should ensure that the severance is based on principles of fundamental fairness, and should consider whether the order would prejudice any party or would result in undue delay [*see Universal Reinsurance Co. v. St. Paul Fire & Marine Ins. Co. (2d Cir 2003) 312 F3d 82, 89-90*].

10.14[3] Severance of Claim Divides Action Into Two Separate Actions.

10.14[3][a] Severance Is Division of Legal Action Into Separate and Distinct Legal Actions. When the court orders a severance [*Fed R Civ P 21*], it is dividing the legal action into two or more separate and independent or distinct legal actions. Therefore, if a severed claim is one of multiple claims asserted by a single plaintiff, the plaintiff is not dismissed from the original action. Rather, the plaintiff becomes involved in two separate actions, one for each claim [*Acevedo-Garcia v. Monroig (1st Cir 2003) 351 F3d 547, 558-559*].

10.14[3][b] Severance Is Distinguished From Separate Trial. It is important to distinguish severance from a

different procedural device under the federal rules, a Rule 42 order for separate trials of claims [*Fed R Civ P 42(a)*]. When separate trials are ordered, the court merely orders that the claims of a single action are to be tried separately; however, the trials remain part of the original, solitary action. An order of separate trials, therefore, does not result in the filing of separate cases; it merely leads to two or more separate factual determinations in the context of a single action. No matter how many separate trials the court may order, they remain part of a single action.

The most important distinction between these two procedural devices for partitioning litigation concerns the appealability of an order terminating the proceedings: The judgment in a severed action is final, enforceable, and appealable if it disposes of all parties and claims in the severed action. Conversely, the order entered at the conclusion of a separate trial is generally not an appealable final judgment until all the claims have been tried [*Acevedo-Garcia v. Monroig (1st Cir 2003) 351 F3d 547, 559*].

Cross Reference:

Discussion of separate trials, see Ch. 18, Consolidation and Separate Trials, see *§§ 18.21 -18.38*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderMisjoinder

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
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10.15 CHECKLIST: Substitution of Parties.

☐ Determine whether grounds exist for substitution of parties, such as:

- ○ Death of party during pendency of civil action.
- ○ Party becomes incompetent during pendency of civil action.
- ○ Party's transfer of interest during pendency of civil action.
- ○ Public officer dies or otherwise leaves office during pendency of civil action.

Authority:
Fed R Civ P 25

Discussion:
See *§ 10.16[1]*

☐ If substitution procedure is not appropriate, consider alternative procedure, including:

- ○ Dropping party and adding party; or

Authority:
Fed R Civ P 21

Discussion:
See *§ 10.16[2][b]*

○ Amending pleading.

Authority:
Fed R Civ P 15(a)

Discussion:
See *§ 10.16[2][c]*

☐ If party has died during pendency of litigation, determine whether to make motion for substitution, considering:

○ Whether claim of decedent has survived death;

Authority:
Fed R Civ P 25(a)(1)

Discussion:
See *§ 10.18[6]*

○ Proper parties to substitute, including:

☐ Deceased's legal representative such as executor or administrator; or

☐ If estate has been distributed, distributees.

Authority:
Fed R Civ P 25(a)(1)

Discussion:
See *§ 10.18[2]*

○ Ascertain deadline to file motion for substitution, based on whether suggestion of death has been filed on record.

Timing:
The court may dismiss a deceased party from the case if a motion to substitute has not been filed within 90 days of a suggestion of death [*see Bracken v. Harris & Zide, L.L.P. (ND Cal 2004) 219 FRD 481, 485*].

Authority:
Fed R Civ P 25(a)(1)

Discussion:
See *§ 10.18[5]*

☐ If party has become incompetent during pendency of litigation, determine whether to make motion for substitution, considering:

- ○ Issue of incompetence is matter of substantive law.
- ○ If plaintiff or defendant is already incompetent at time action is commenced, move to protect interests of incompetent person by appointment of representative under *Fed R Civ P 17*.

Authority:
Fed R Civ P 25(b)

Discussion:
See *§ 10.19*

☐ If party to civil action transfers interest that is subject of pending litigation, determine whether to make motion for substitution, considering:

- ○ If motion is not made, court may allow action to continue by or against original party;
- ○ If motion is made, court has discretion to either:
  - ☐ Order that transferee of interest be substituted in action; or
  - ☐ Order that transferee of interest be joined with original party.

Authority:
Fed R Civ P 25(c)

Discussion:
See *§ 10.20[1]*

☐ If public officer is party to action in official capacity and during pendency of action dies or otherwise ceases to hold office, note that:

- ○ Officer's successor is automatically substituted as party.
- ○ Although it is not necessary, court may make order changing names on record.

Authority:
Fed R Civ P 25(d)

Discussion:
See *§ 10.21*

☐ Except in case of officer leaving office, draft motion to substitute party, including:

- ○ Identification of original party;
- ○ Identification of substitute party;
- ○ Basis for substitution, such as;
  - ☐ Suggestion of death;
  - ☐ Order of appointment of representative for incompetent; or
  - ☐ Agreement transferring interest that is subject matter of litigation.

Authority:
Fed R Civ P 25

Discussion:
See *§ 10.22[2]*

Forms:
See *§§ 10.28*, *10.29*, *10.30*

☐ File motion for substitution, and serve on following persons:

- ○ Parties, in conformance to the service requirements of *Fed R Civ P 5*.
- ○ Interested nonparties such as representatives, guardians, successors, and transferees, in conformance to the service requirements of *Fed R Civ P 4*.

Authority: *Fed R Civ P 25(a)(3)*, *(b)*, *(c)*

Discussion: See *§ 10.22[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.16 Options and Strategies Related to Substitution of Parties.

10.16[1] Grounds for Substituting for Party. The federal civil rules provide a procedure for four specific situations in which a person may be substituted for a named party after a civil action has been commenced:

- On the death of a party during litigation [*Fed R Civ P 25(a)*; *see 10.18*].
- If a party becomes incompetent during the litigation [*Fed R Civ P 25(b)*; *see 10.19*].
- On the transfer of interest that constitutes the subject matter of existing litigation [*Fed R Civ P 25(c)*; *see 10.20*].
- In the event a public officer dies or is separated from office during litigation [*Fed R Civ P 25(d)*; *see 10.21*].

10.16[2] Substitution Is Procedural Mechanism for Use in Specified Circumstances.

10.16[2][a] Procedural Rule Does Not Control Substantive Rights Regarding Claim. Rule 25 substitution is a procedural device for use only in circumstances described in the rule, and does not affect the substantive law related to a claim in federal court. For example, *Fed R Civ P 25(a)* does not affect the law controlling whether a particular claim survives the death of a party; survival of claims is a matter of substantive law. Thus, in a diversity case involving the substantive rights related to substitution of a party, the district court must refer to state law [*First Idaho Corp. v. Davis (9th Cir 1989) 867 F2d 1241, 1242-1243*].

10.16[2][b] Use of Dropping and Adding Party As Alternative for Substitution. A party may use Rule 25 substitution only in the specific circumstances specified in the rule. However, because a substitution is, in practical effect, the dropping of a current party and the adding of a new one, a party may use *Fed R Civ P 21* to effect substitution, provided the party obtains court approval after motion, when substitution is not otherwise available under the particular requirements of *Fed R Civ P 25* [*see Persaud v. Exxon Corp. (EDNY 1994) 867 F Supp 128, 135-136*]. Thus, the court may order that a party that has been improperly joined be dropped from an action, and order that a

proper party under the joinder provisions be added as a party to the action [*see Denson v. Village of Bridgeview (ED Ill 1998) 19 F Supp2d 829, 832*].

10.16[2][c] Use of Amendment As Alternative for Substitution. Rule 25 substitution applies only when all of the proper parties have been joined in the action and substitution is warranted because of death, incompetency, transfer of interest by a party, or separation of an official from public office [*Fed R Civ P 25*; *see International Ass'n of Machinists v. Estate of Dickey (6th Cir 1987) 808 F2d 483, 485-486* (*Fed R Civ P 25* does not apply when the person for whom substitution is sought was never made party)]. However, a party that is attempting to bring in a proper party may use *Fed R Civ P 15* as an alternative at the court's discretion [*see Franks v. Kentucky Sch. for the Deaf (ED Ky 1996) 956 F Supp 741, 752*]. Under a Rule 15 amendment, a party may add or drop parties who should or could have been joined originally in the action, or may replace a party with a person who actually has the claim for relief or is liable under a claim for relief [*see Bracken v. Harris & Zide, L.L.P. (ND Cal 2004) 219 FRD 481, 485*].

Distinguish:

The distinction between amendment and substitution is important because, after substitution, the substituted party steps into the shoes of the person replaced and occupies the same relative position in the continued action as the person replaced [*see 10.11[3]*]. In contrast, when a party comes into the action by an amended pleading, the claim for relief with respect to the new party may or may not be an entirely new claim for relief [*see Herrera v. Singh (ED Wash 2000) 118 F Supp2d 1120, 1122*]. Whichever procedure is chosen, the moving party's attorney should ensure that all requirements for that procedure are met [*see Centifanti v. Nix (3d Cir 1989) 865 F2d 1422, 1431 n10* (for amendment, party must provide a copy of the proposed amended complaint when seeking leave to amend pursuant to *Fed R Civ P 15(a)*)].

Cross Reference:

Discussion of requirements and procedures for amendment, see Ch. 9, Amending and Supplementing Pleadings.

10.16[3] Substituted Party Assumes Exact Position in Litigation of Original Party. When a person is substituted for a party to a civil action, the substituted party stands in exactly the same position as the original party: The substituted party enters the action subject to all of the prior judicial orders and rulings [Hilao v. Estate of Marcos (9th Cir 1996) 103 F3d 762, 766]. Thus, after the substitution, the court will not disturb any prior orders and decrees entered in the civil action even if unfavorable to the substituted party [*Educational Credit Mgmt. Corp. v. Bernal (In re Bernal) (5th Cir 2000) 207 F3d 595, 598-599*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.17 Function of Substitution Procedure.

Rule 25 substitution is designed to provide a simple procedure for the court to order substitution of one person for a named party [*see Fed R Civ P 25*] when the named party is no longer in a position to participate in the litigation for the reasons specified in the rule [*see Bracken v. Harris & Zide, L.L.P. (ND Cal 2004) 219 FRD 481, 483* (substitution on death of party)]. Rule 25 is designed to control substitution only in civil actions in which all of the proper parties have been joined in the action; it is not designed to be used for cases of misjoinder, misnamed parties, or other error in party structure [*Persaud v. Exxon Corp. (EDNY 1994) 867 F Supp 128, 135-136* ; *see 10.16[2]*]. Furthermore, Rule 25 applies only to changes such as death or transfers of interest occurring during the pendency of the litigation, and not to those occurring before the litigation begins [*Andrews v. Lakeshore Rehab. Hosp. (11th Cir 2003) 140 F3d 1405, 1407* ; *Heath v. Warner Communs. (SDNY 1995) 891 F Supp 167, 173*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.18 Substitution on Death of Party.

10.18[1] Court May Substitute on Death of Party During Pendency of Litigation. If a party dies during the pendency of a civil action, and the claim is not extinguished by the death, the court has the discretion to order substitution of the proper party or parties to take the place of the deceased [*Fed R Civ P 25(a)(1)*]. The district court also has considerable discretion in addressing the timing of substitution in the event of the death of a party [*Jones Inlet Marina, Inc. v. Inglima (EDNY 2001) 204 FRD 238, 239* (citing **Moore's**)]. However, when a motion to substitute for a deceased plaintiff is made within the rule's 90-day time limit [*see 10.18[3]*], such discretion to deny the motion is rarely exercised [*see Saylor v. Bastedo (2d Cir 1980) 623 F2d 230, 236-237*].

10.18[2] Legal Representatives and Distributees Are Proper Parties to Substitute. On the death of a party, the court may order substitution of the proper party [*Fed R Civ P 25(a)(1)*]. Generally, the "proper party" to be substituted is the deceased's legal representative, for example, the executor or administrator. However, once the estate has been distributed, distributees are also proper parties for substitution [Sequoia Prop. & Equip. Ltd. P'ship v. United States (ED Cal 2002) 2002 US Dist LEXIS 15872, at *6-*7].

10.18[3] Party or Representative of Deceased Party Must File a Motion for Substitution on Death of Party. When a party dies during the pendency of a civil action, any party or the successors or representatives of the deceased party may file a motion for substitution [*Fed R Civ P 25(a)(1)*]. An attorney is not the representative of a deceased party for purposes of filing a motion for substitution [*Fariss v. Lynchburg Foundry (4th Cir 1985) 769 F2d 958, 962*]. Although not explicit in the rule, several courts have indicated that, because of the discretionary nature of the rule, a court may order substitution on death on its own initiative [*First Idaho Corp. v. Davis (9th Cir 1989) 867 F2d 1241, 1242* ; *see Siripongs v. Davis (9th Cir 2002) 282 F3d 755, 756* (district court could have raised issue of failure to substitute for deceased party)].

Timing:

The court may dismiss the deceased party if a motion to substitute has not been filed within 90 days of a "statement noting a party's death," which is a statement on the record that a party has died [*Bracken v. Harris & Zide, L.L.P. (ND Cal 2004) 219 FRD 481, 485* ; *see 10.18[5]*]. A statement of death may be

made at any time by any party or representative of the deceased, and must be served in the same manner as service of a motion for substitution itself, which requires service on both parties and interested nonparties, such as the deceased's representatives [*Fed R Civ P 25(a)(3)*; *see 10.22[2]*]. In an unpublished opinion, the Ninth Circuit held that the 90-day period for bringing a motion to substitute does not begin to run until a formal suggestion of death has been made on the record and served, regardless of any person's actual knowledge of the death [Braden v. Plumbing & Pipefitting Indus. Local 38 (9th Cir 1992) 1992 US App LEXIS 15436, at *3 , *cert. denied, 506 US 1020 (1992)* (unpublished circuit court opinion; generally not citable to court under 9th Cir R 36-3)].

Exception:

Because of the considerable discretion of the court regarding substitutions, the court may extend the time for filing the motion beyond the prescribed 90-day period [*Russell v. City of Milwaukee (7th Cir 2003) 338 F3d 662, 667-668*].

Cross Reference:

Discussion of 90-day period for bringing motion, see 6 *Moore's Federal Practice, § 25.13* (Matthew Bender 3d ed.).

10.18[4] Moving Person Must Serve Motion and a Notice of Hearing on All Other Parties and on Interested Nonparties. The person filing a motion for substitution must serve the motion and a notice of hearing on all other parties and on interested nonparties, including the successors or representatives of the deceased party. The moving person must serve the motion and notice on the parties as provided in *Fed R Civ P 5*, and on persons not parties in the manner provided in *Fed R Civ P 4* for the service of a summons [*Fed R Civ P 25(a)(3)*].

Cross Reference:

Discussion of requirements for service of motion for substitution, see *§ 10.22[2]*.

10.18[5] Statement of Death Starts Limitation Period for Filing Motion for Substitution. Any party or the successors or representatives of the deceased party may file a "statement noting a party's death," which is a formal statement on the record that a party has died [*Fed R Civ P 25(a)(1)*; *see Bracken v. Harris & Zide, L.L.P. (ND Cal 2004) 219 FRD 481, 485*]. The purpose of a statement of death is to inform all interested persons that the party has died [*Barlow v. Ground (9th Cir 1994) 39 F3d 231, 234-235*], and to prevent a situation in which a case is dismissed because a party never learned of the death of an opposing party [*Unicorn Tales v. Banerjee (2d Cir 1998) 138 F3d 467, 469-470*]. Thus, it must be served on both nonparties and parties [*Fed R Civ P 25(a)(3)*].

A statement of death, however, is not necessary for the court to consider a motion for substitution [*Miles, Inc. v. Scripps Clinic & Research Found. (SD Cal 1993) 810 F Supp 1091, 1102*]; it does start the period running in which a motion for substitution must be filed [*Fed R Civ P 25(a)(1)*].

Cross Reference:

Form of statement of death, see *§ 10.28*.

10.18[6] Claim of Deceased Must Survive Death to Provide Basis for Substitution.

10.18[6][a] Court May Substitute Party Only If Claim Is Not Extinguished by Death. If a party dies during the pendency of litigation, the court may order substitution of another party only if the deceased party's claim is not extinguished by the death [*Fed R Civ P 25(a)(1)*]. In other words, a court may order substitution only if the claim survives the death of the party. Because the survival of a claim is a matter of substantive law, whether the claim survives is controlled by federal law if jurisdiction of the claim is based on federal question, and is controlled by state law if jurisdiction of the claim is based on diversity [*see Asklar v. Honeywell, Inc. (D Conn 1982) 95 FRD 419, 422*].

10.18[6][b] Court May Allow Action to Continue If Claim of Deceased Party Survives in Favor or Against Another Party. In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death must be noted on the record and the action must proceed in favor of or against the surviving parties [*Fed R Civ P 25(a)(2)*].

Examples:

When the plaintiff husband died during litigation of a claim that survived only to the surviving spouse, the district court properly deleted the deceased husband's name from the caption and allowed the case to proceed in favor of his surviving spouse [*Little v. Cox's Supermarkets (7th Cir 1995) 71 F3d 637, 640 n1*].

If a named class representative dies during the pendency of the action, the action survives in favor of the class itself [*Chad v. City of Fort Lauderdale (SD Fla 1998) 66 F Supp2d 1242, 1244*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.19 Substitution on Account of Incompetency of Party.

10.19[1] Court May Substitute for Party That Becomes Incompetent. If a party becomes incompetent during the pendency of a civil action, the court has discretion to allow the action to be continued by or against the party's representative by substituting the representative for the incompetent party [*Fed R Civ P 25(b)*].

Rule 25(b) does not apply if the party has become incompetent prior to the action [Waldman v. Pediatric Servs. of Am., Inc. (ED Pa 1998) 1998 US Dist LEXIS 17322, at *10-*11]. If a plaintiff or defendant is already incompetent when the action is commenced, the court should not merely dismiss the action. Rather, the court should utilize Rule 17 to protect the interests of incompetent persons [*see Fed R Civ P 17(c)*] by allowing a representative to sue or defend on behalf of the incompetent [Waldman v. Pediatric Servs. of Am., Inc. (ED Pa 1998) 1998 US Dist LEXIS 17322, at *10-*11]. A *Fed R Civ P 15* motion, not a Rule 25 substitution, is the proper procedural device to substitute one representative for another [*Burns v. Phillips (ND Ga 1970) 50 FRD 187, 188*].

Cross Reference:

Motions to amend pleadings under Rule 15, see Ch. 9, Amending and Supplementing Pleadings.

10.19[2] Issue of Competence Is Substantive Matter Controlled by State Law. *Fed R Civ P 25(b)* does not provide criteria for the court to determine the status of incompetence. Competency and qualification of guardians and other representatives are matters controlled by state law of the person's domicile [*see Fed R Civ P 17(c)*; *Donnelly v. Parker (DC Cir 1973) 486 F2d 402, 406-407*].

10.19[3] Motion for Substitution Based on Incompetence Must Be Served on Parties and Interested Nonparties. The moving person must serve a motion to substitute on the basis of incompetence in the same manner as required for a motion to substitute on death under Rule 25(a) [*Fed R Civ P 25(b)*]. The moving person, therefore, must serve a motion to substitute for incompetence and a notice of a hearing regarding the motion on parties as provided in *Fed R Civ P 5*, and on persons not parties in the manner provided in *Fed R Civ P 4* for the service of a summons [*Fed R Civ P 25(a)(3), (b)*].

Cross Reference:

Discussion of requirements for service of motion for substitution, see *§ 10.22[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.20 Substitution in Case of Transfer of Interest During Pendency of Litigation.

10.20[1] Court May Order Substitution of Party or Joinder of Person Because of Transfer of Interest. If a party to a civil action transfers an interest that is the subject of the litigation, the court has three options [*Fed R Civ P 25(c)*]:

- The court may allow the action to continue by or against the original party;
- If a party makes a motion for substitution, the court may order that the transferee of the interest be substituted in the action; or
- If a party makes a motion, the court may order that the transferee of the interest be joined with the original party.

Choosing among the three options is in the discretion of the court [*Organic Cow, LLC v. Ctr. for New Eng. Dairy Compact Research (2d Cir 2003) 335 F3d 66, 71* (citing **Moore's**)]. The rule of substitution on transfer does not require either the court or the parties to take any action after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on the transferee, even though the transferee is not named. A court ordering substitution or joinder is merely making a discretionary determination that the transferee's presence would facilitate the conduct of the litigation [*Educational Credit Mgmt. Corp. v. Bernal (In re Bernal) (9th Cir 2000) 207 F3d 595, 598*].

10.20[2] Substitution or Joinder on Transfer Is Procedural Device for Court to Control Litigation. *Fed R Civ P 25* is merely a procedural device that provides the court with the authority to continue with the original parties or to substitute or join a successor in interest [*Educational Credit Mgmt. Corp. v. Bernal (In re Bernal) (9th Cir 2000) 207 F3d 595, 598*]. Whether a particular party has the status of a successor in interest or is subject to liability as a successor is a matter of substantive law [*Committee of the Russian Fed'n on Precious Metals & Gems v. United States (ND Cal 1997) 987 F Supp 1181, 1182*]. In diversity cases, therefore, the court will apply state law to determine the rights and liabilities of successors. In cases governed by federal law, successorship and successor liability are determined by the federal statute or by federal common law under the successorship doctrine [*Herrera v. Singh (ED Wash 2000) 118 F*

Supp2d 1120, 1122-1123].

10.20[3] Party or Transferee Must File Motion for Substitution on Transfer Occurring After Litigation Is Commenced. To substitute or join the transferee the party or transferee should make a motion in the same manner as a motion for substitution on death [*Fed R Civ P 25(c)*]. A Rule 25(c) motion may be made for any transfer of interest occurring at any time after an action is brought, including after judgment is entered [*American Fiber & Finishing, Inc. v. Tyco Healthcare Group (1st Cir 2004) 362 F3d 136, 140*].

Cross Reference:

Discussion of motion for substitution on death, see *§ 10.18[3]*.

10.20[4] Motion for Substitution Based on Transfer Must Be Served on Parties and Interested Nonparties. The moving party must serve a motion to substitute on the basis of transfer in the same manner as required for a motion to substitute on death under Rule 25(a) [*Fed R Civ P 25(c)*]. Thus, the moving person must serve a motion to substitute after a transfer, and a notice of a hearing regarding the motion, on parties as provided in *Fed R Civ P 5*, and on transferees not parties in the manner provided in *Fed R Civ P 4* for the service of a summons [*Fed R Civ P 25(a)(3), (c)*].

Cross Reference:

Discussion of requirements for service of motion for substitution, see *§ 10.22[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.21

10.21 Substitution in Case of Separation of Public Officer From Office.

10.21[1] Successor of Public Officer Is Automatically Substituted When Predecessor Leaves Office. When a public officer is a party to an action in an official capacity and during the pendency of the action dies or for any other reason ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party [*Fed R Civ P 25(d)*]. Federal law provides for automatic substitution of the new officer when the originally named officer has ceased to hold office because the officer is not litigating as an individual. Thus, if the officer is the plaintiff, the claim for relief is not for the officer personally but for the government, and when the officer is the defendant, the claim for relief is not against the officer personally, but against the government [*Cheney v. United States Dist. Court (2004) 541 US 913, 917-918, 124 S Ct 1391, 158 L Ed2d 225*]. Automatic substitution is only applicable to "official-capacity" claims in which the governmental entity, and not the named official, is the real party. In "personal-capacity" claims, which seek to impose individual liability on a government officer, such as certain civil rights claims, automatic substitution is not applicable [*Hafer v. Melo (1991) 502 US 21, 25, 112 S Ct 358, 116 L Ed2d 301*].

10.21[2] Public Officer May Be Named by Title. A public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name; however, to manage litigation effectively and to clarify issues, the court may require the officers' names to be added [*Fed R Civ P 17(d)*]. Following an automatic substitution of an official after the official leaves office, the litigation continues in the name of the substituted party. However, any misnomer of the official must be disregarded unless it affects the substantial rights of the parties [*Fed R Civ P 25(d)*].

10.21[3] Successor Is Subject to All Orders Binding on Predecessor. As is the case in other types of substitution, an automatically substituted officer steps into the exact position in the litigation as the predecessor. Consequently, a successor in office is bound by all orders and decrees of the predecessor, including consent decrees and court-approved agreements. Thus, the substitution of a public official by his or her successor in an official capacity suit is a procedural device, and does not affect the underlying action [*see Feliciano v. Rullan (1st Cir 2003) 303 F3d 1, 8*].

10.21[4] Automatic Substitution Does Not Require Motion of Party or Order of Court. When a public officer leaves office, the officer's successor is automatically substituted as a party in any official capacity suit involving the

predecessor [*Fed R Civ P 25(d)*]. Consequently, unlike other types of substitution, official capacity substitution does not require the filing of a motion, service, or hearing regarding the substitution. Additionally, even though to clarify the issues or circumstances the court may make an order regarding the automatic substitution at any time [*Fed R Civ P 25(d)*], or note the successor party's names in court documents [*see, e.g., Azami v. Apfel (CD Cal 1998) 24 F Supp2d 1007, 1007 n1*], an order is not necessary to effect the substitution, and the omission of an order does not affect the substitution or the conduct of the litigation [*Glassroth v. Houston (ND Ala 2004) 299 F Supp2d 1244, 1246*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsPublic Officers

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
IV. SUBSTITUTING PARTIES

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.22

10.22 Procedural Considerations for Motion for Substitution.

10.22[1] Substitution Does Not Affect Jurisdiction, Diversity of Citizenship, and Venue. When a new party is substituted for the original party to pending litigation, subject matter jurisdiction, diversity of citizenship, personal jurisdiction, and venue are not affected by the substitution [*Minnesota Mining & Mfg. Co. v. Eco-Chem, Inc. (Fed Cir 1985) 757 F2d 1256, 1264* (citing **Moore's** for proposition that there would be no logical rationale for concluding that substitution should destroy venue that was properly established initially); *Ransom v. Brennan (5th Cir 1971) 437 F2d 513, 518-519 , cert. denied, 403 US 904 (1971)*]. This rule has been promulgated under the principle that a substituted party steps into the place of the original party for all purposes [Hilao v. Estate of Marcos (9th Cir 1996) 103 F3d 762, 766].

10.22[2] Moving Person Must Generally Serve Motion for Substitution.

10.22[2][a] Moving Party Must Serve Motion and Notice of Hearing. Except in cases of automatic substitution, which occurs when a public officer leaves office [*Fed R Civ P 25(d)*; *see 10.21*], any motion for substitution under Rule 25 must be served on all parties, and nonparties who are potential successors in interest or representatives of the original party. At the time of service of the motion, the moving party must also serve the notice of hearing on the substitution [*Fed R Civ P 25(a)(3), (b), (c)*]. In cases of substitution on death, the party must file a statement noting death in the same manner [*Fed R Civ P 25(a)(3)*].

10.22[2][b] Moving Party Must Serve Parties in Same Manner As Serving Pleadings and Papers Other Than Original Complaint. All motions for substitution must be served on parties pursuant to Rule 5, in the same manner as any pleadings and papers other than the original complaint [*Fed R Civ P 25(a)(3), (b), (c)*; *see Fed R Civ P 5*]. Thus, Rule 25(a) incorporates Rule 5 as setting forth the manner in which a suggestion of death and any substitution of parties is to be served [*Barlow v. Ground (9th Cir 1994) 39 F3d 231, 233-234*]. A motion for substitution and notice of hearing must be served on each of the parties [*Fed R Civ P 5(a)*], and the motion, notice of hearing, and a certificate of the service must be filed with the court within a reasonable time after service [*Fed R Civ P 5(d)*]. All requirements of service of substitution are interpreted under Rule 5.

Example:

Because, under Rule 5, service is complete upon mailing, nonreceipt or nonacceptance of a suggestion of death by another party does not affect the validity of the service [*Russell v. City of Milwaukee (7th Cir 2003) 338 F3d 662, 667*].

Cross Reference:

Discussion of requirements for service on parties under Rule 5, see Ch. 5, Formatting, Serving, and Filing Papers, *§§ 5.15 -5.23*.

10.22[2][c] Moving Party Must Serve Nonparties in Same Manner As Serving Summons and Original Complaint. All motions for substitution must be served on nonparties, such as the representative of the original party, pursuant to Rule 4, which specifies the manner of service of summons and of the original complaint [*Fed R Civ P 25(a)(3), (b), (c)*; *see Fed R Civ P 4*]. Thus, Rule 25(a) incorporates Rule 4 as setting forth the manner in which a suggestion of death and any motion for substitution of parties is to be served on the representative or successor of the original party [*Russell v. City of Milwaukee (7th Cir 2003) 338 F3d 662, 666*]. Personal service of a suggestion of death alerts a nonparty to the consequences of death to a pending suit, and signals to the nonparty the need for action to preserve the claim for relief if the nonparty desires [*see Barlow v. Ground (9th Cir 1994) 39 F3d 231, 233-234* (while party may be served suggestion of death by service on his or her attorney, nonparty successors or representatives of deceased party must be served suggestion of death in manner provided by *Fed R Civ P 4* for the service of a summons)].

Cross Reference:

Discussion of requirements for service under Rule 4, see Ch. 7, Service of Summons.

10.22[3] Appeal of Order Regarding Substitution. A court order that grants or denies a motion to substitute for a party is deemed a discretionary, procedural order. Such an order generally is not immediately appealable, but is appealable only on final judgment [*Prop-Jets, Inc. v. Chandler (10th Cir 1978) 575 F2d 1322, 1324*]. However, appeal may be available under the collateral order doctrine if the order [*In re Covington Grain Co. (5th Cir 1981) 638 F2d 1357, 1360*]:

- Settles an important issue separate from the merits of the dispute;
- Conclusively determines the moving party's capability to prosecute the suit; and
- Would be a total bar to recovery because there would be no other person able to prosecute the action.

When an appeal is taken regarding a substitution motion, the application of Rule 25 by the district court is a question of law reviewed de novo, but factual findings relevant to application of Rule 25 are reviewed for clear error [*Barlow v. Ground (9th Cir 1994) 39 F3d 231, 233*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsMotions for Substitution

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
V. FORMS
A. Adding Parties

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.23

10.23 Notice of Motion and Motion by Plaintiff to Add Defendant.

Notice of Motion and Motion by Plaintiff to Add Defendant.
_____ .....[*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION BY
_____ [*name*],	)	PLAINTIFF TO ADD DEFENDANT
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order pursuant to *Fed R Civ P 21*, that _____ [*specify order sought, e.g.,* Mary Roe be added as a party Defendant]. The motion will be made on the grounds that _____ [*specify grounds, e.g.,* Mary Roe is a proper party Defendant to join in this legal action under *Fed R Civ P 20(a) OR* Mary Roe is needed as a Defendant for the just adjudication of this legal action under *Fed R Civ P 19(a) OR* Mary Roe should be joined as a party Defendant in the interests of justice pursuant to *Fed R Civ P 21*].

In support of this motion, Plaintiff establishes the following:

1. This is an action based on _____ [*describe parties, transactions, events, and claims that currently constitute subject matter of action*].

2. As stated in the attached Affidavit of _____ [*name of affiant*], _____ [*specify transactions and events that establish proposed party as proper Defendant*].

3. _____ [*Name of proposed party, e.g.,* Mary Roe] is also liable as a Defendant to Plaintiff because _____ [*state claims against proposed party*].

[*Add following Paragraph if proposed party is proper party within meaning of Rule 20(a)*]

4. The facts stated in Paragraphs 1 through 3 above establish that the claims asserted against _____ [*name of proposed party, e.g.,* Mary Roe] arise out of the same transactions, occurrences, or series of transactions or occurrences that are currently before the court in this action, and these claims will raise common issues of law or fact.

[OR, *add following Paragraph if proposed party is needed for just adjudication of action within meaning of Rule 19(a)*]

4. _____ [*Name of proposed party, e.g.,* Mary Roe] is a person required for just adjudication and therefore a person to be joined if feasible, within the meaning of *Rule 19(a) of the Federal Rules of Civil Procedure*, because in her absence, _____ [*add as many of following as are appropriate:* complete relief may not be adequately given to those already parties *OR* Mary Roe will not be able to protect her interest in the subject matter of this action *OR* Mary Roe may be subject to a substantial risk of inconsistent obligations because of Mary Roe's interest in the subject matter of this action].

[*Add the following paragraphs as appropriate*]

5. _____ [*Name of proposed party, e.g.,* Mary Roe] is _____ [*specify status, e.g.,* an individual *OR* a corporation organized and existing under the laws of the State of _____ with its principal place of business at _____].

6. Joinder of _____ [*name of proposed party, e.g.,* Mary Roe] will not extinguish this court's subject matter jurisdiction over this action.

7. This court may exercise personal jurisdiction over and may serve process on _____ [*name of proposed party, e.g.,* Mary Roe].

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 19(a), 20(a), 21

Overview of Joinder Principles:
See *§§ 10.06 -10.08*

Procedural Considerations for Adding Party by Motion:
See *§ 10.09*

Timing:
See *§ 10.09[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
V. FORMS
A. Adding Parties

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.24

10.24 Notice of Motion and Motion by Defendant to Add Plaintiff.

Notice of Motion and Motion by Defendant to Add Plaintiff.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION BY DE-
_____ [*name*],	)	FENDANT TO ADD PLAINTIFF
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for _____ an order pursuant to *Fed R Civ P 21*, that _____ [*specify name of proposed party and order sought, e.g.,* John Doe be added as a party Plaintiff]. The motion will be made on the grounds that _____ [*specify grounds, e.g.,* John Doe is required as a Plaintiff for just adjudication of this legal action within the meaning of *Fed R Civ P 19(a)*]. In the event that _____ [*name of proposed party, e.g.,* John Doe] refuses to be joined as a party Plaintiff, Defendant moves that _____ [*name of proposed party, e.g.,* John Doe] be ordered joined as a party Defendant or as an involuntary Plaintiff, as provided in *Fed R Civ P 19(a)*.

In support of this motion, Defendant asserts the following:

1. This is an action based on _____ [*describe parties, transactions, events, and claims that currently constitute subject matter of action*].

2. As stated in the attached Affidavit of _____ [*name of affiant*], _____ [*specify transactions and events that establish proposed party as Defendant needed for just adjudication*].

3. Even though Defendant contends that the claim of the existing Plaintiff is not valid, to the extent that Plaintiff has any arguable claim, _____ [*name of proposed party, e.g.,* John Doe] has a potential claim against the Defendants to the same extent and of the same type as the existing Plaintiff in this action. _____ [*Name of proposed party, e.g.,* John Doe] would also have a claim because _____ [*specify, e.g.,* John Doe has formed a joint venture with the existing Plaintiff in the purchase and sale of the goods that are the subject matter of this legal action and executed the sales contract, which has been attached to the Plaintiff's complaint as Exhibit A]. [*Add if applicable:* These facts are established by the Affidavit of Jane Lee, which is attached to this motion.]

4. The facts stated in Paragraphs 1 through 3 above establish that _____ [*name of proposed party, e.g.,* John Doe] is required for adjudication of this action as a party Plaintiff, and therefore a person to be joined if feasible in this action within the meaning of Rule 19(a) because, in his absence, _____ [*specify grounds, e.g.,* Defendant may be subject to a substantial risk of inconsistent obligations because of John Doe's interest in the subject matter of this action].

[*Add the following paragraphs as appropriate*]

5. _____ [*Name of proposed party, e.g.,* John Doe] is _____ [*specify status, e.g.,* an individual *OR* a corporation organized and existing under the laws of the State of _____ with its principal place of business at _____].

6. Joinder of _____ [*name of proposed party, e.g.,* John Doe] will not extinguish this court's subject matter jurisdiction over this action.

7. This court may exercise personal jurisdiction over and may served process on _____ [*name of proposed party, e.g.,* John Doe].

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service.*]

NOTES.

Authority:
Fed R Civ P 19(a), 21

Overview of Joinder Principles:
See *§§ 10.06 -10.08*

Procedural Considerations for Adding Party by Motion:
See *§ 10.09*

Timing:
See *§ 10.09[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
V. FORMS
B. Dropping Parties

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.25

10.25 Notice of Motion and Motion by Plaintiff to Drop Defendant Who Would Defeat Diversity.

Notice of Motion and Motion by Plaintiff to Drop Defendant Who Would Defeat Diversity.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION BY
_____ [*name*],	)	PLAINTIFF TO DROP DEFENDANT
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order pursuant to *Fed R Civ P 21*, that _____ [*specify order sought, e.g.,* Mary Roe be dropped as a party Defendant]. The motion will be made on the grounds that _____ [*specify grounds, e.g.,* the joinder of Mary Roe would destroy subject matter jurisdiction in this action based on diversity].

In support of this motion, Plaintiff establishes the following:

1. This is an action based on _____ [*describe parties, transactions, events, and claims that currently constitute subject matter of action*].

2. As stated in the attached Affidavit of _____ [*name of affiant*], Defendant _____ [*name*] is not required for a just adjudication in this action and is a dispensable party because Defendant _____ [*name*] _____ [*state grounds, e.g.,* is one of several Defendants who have joint and several liability to the Plaintiff in this action, and discovery indicates that Defendant Mary Jones' share of the liability to Plaintiff is less than 1% of total liability, so that the remaining Defendants would not be unduly prejudiced if they had to litigate their contribution rights against this Defendant in another forum].

3. Defendant _____ [*name*]'s presence in this action deprives this court of jurisdiction in that Defendant _____ [*name*] is a citizen of the State of _____ and _____ [*name*]'s continued presence in this action would eliminate complete diversity of citizenship between the existing Plaintiffs and Defendants.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 19(a), (b), 21

Interests of Justice As Grounds for Dropping Party:
See *§ 10.12[2]*

Timing:
See *§ 10.13[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderMisjoinder

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
V. FORMS
B. Dropping Parties

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.26

10.26 Notice of Motion and Motion by Defendant to Drop Defendant As Misjoined.

Notice of Motion and Motion by Defendant to Drop Defendant As Misjoined.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION TO DROP
_____ [*name*],	)	DEFENDANT
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order pursuant to *Fed R Civ P 21*, that _____ [*moving party, e.g.,* Defendant Mary Jones] _____ [*order sought, e.g.,* be dropped as a party Defendant and dismissed from this action]. The motion will be made on the grounds that _____ [*specify grounds, e.g.,* Defendant Mary Jones has been misjoined in this action because Mary Jones is not a proper party within the meaning of *Fed R Civ P 20(a)*].

In support of this motion, Defendant establishes the following:

1. This is an action based on _____ [*describe current parties, transactions, events, and claims that currently constitute subject matter of action*].

2. As stated in the attached Affidavit of _____ [*name of affiant*], _____ [*specify transactions and events that establish that Defendant is not a proper party, e.g.,* Defendant Mary Jones only purchase transaction with Plaintiff occurred on November 13, 2003, and in no way relates to the transaction that forms the basis of Plaintiff's complaint].

3. The facts stated in Paragraphs 1 and 2 above establish that _____ [*moving party, e.g.,* Defendant Mary Jones] is not a proper party under Rule 20(a) in that _____ [*specify reasons, e.g.,* Mary Jones' only contract for sale with Plaintiff does not arise out of the same transactions, occurrences, or series of transactions or occurrences that are currently before the court in this action, nor does that contract raise common issues of law or fact with the claims before the court in this action].

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 20(a), 21

Misjoinder As Grounds for Dropping Party From Action:
See *§ 10.12[1]*

Timing:
See *§ 10.13[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderMisjoinder

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
V. FORMS
C. Substituting Parties

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.27

10.27 Notice of Motion and Motion to Substitute for Party Who Has Died During Litigation.

Notice of Motion and Motion to Substitute for Party Who Has Died During Litigation.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR SUB-
_____ [*name*],	)	STITUTION OF PARTY
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order pursuant to *Fed R Civ P 25(a)(1)*, that substitutes _____ [*specify person that will substitute for deceased party, e.g.,* John Doe] in the place of _____ [*deceased party, e.g.,* Defendant Mary Jones]. The motion will be made on the grounds that _____ [*specify grounds, e.g.,* John Doe has been duly appointed as the executor of the estate of Defendant Mary Jones].

Grounds for Substitution

_____ [*Moving party, e.g.,* Plaintiff John Smith] moves the court to substitute _____ [*specify representative that will substitute for deceased party, e.g.,* John Doe] as Defendant in this action pursuant to *Rule 25(a)(1) of the Federal Rules of Civil Procedure* because the attached Affidavit of _____ [*name of affiant*] establishes the following matters:

1. _____ [*Deceased party, e.g.,* Defendant Mary Jones] answered the complaint in this action and appeared as a Defendant on _____ [*date*].

2. _____ [*Deceased party, e.g.,* Defendant Mary Jones] died on _____ [*date*], as stated on the Statement Noting a Party's Death attached as Exhibit _____.

3. Under the provisions of _____ [*federal or state law that establishes survival of claim, e.g., California Code of Civil Procedure, Section 377.20*], the claims of _____ [*moving party, e.g.,* Plaintiff John Smith] and against the deceased party Defendant in this action survive the death of the Defendant.

4. _____ [*Specify representative that will substitute for deceased party, e.g.,* John Doe] has been legally appointed as the legal representative of the Estate of _____ [*deceased party, e.g.,* Defendant Mary Jones] by the _____ [*specify court, e.g.,* the Superior Court California of California, County of Farallon] on _____ [*date*]. A certified copy of the appointment order is attached as Exhibit _____.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 25(a)(1)

Substitution on Death of Party:
See *§ 10.18*

Requirements for Substitution Motion:
See *§ 10.22*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsDeath of PartyCivil ProcedurePartiesSubstitutionsMotions for Substitution

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
V. FORMS
C. Substituting Parties

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.28

10.28 Statement Noting Death of Party During Litigation.

Statement of Death of Party During Litigation.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	STATEMENT NOTING DEATH OF
	)	_____ [*name*]
	)	

By this statement, _____ [*name of person making statement*] notes on the record that _____ [*name of deceased*], _____ [*party designation, e.g.,* Plaintiff] in this action has

died on _____ [*date*]. This suggestion is made pursuant to *Rule 25(a)(1) of the Federal Rules of Civil Procedure*.

[*Add the following optional paragraph if the person making statement knows a proper substitute*]

_____ [*Name of successor or representative of estate*] has been appointed _____ [*describe representative capacity, e.g.,* the duly appointed executor of the estate] of the deceased _____ [*name of deceased*], _____ [*party designation, e.g.,* Plaintiff].
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 25(a)

Requirements Regarding Statement Noting Death of Party:
See *§§ 10.18[3], [5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsDeath of PartyCivil ProcedurePartiesSubstitutionsMotions for Substitution

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
V. FORMS
C. Substituting Parties

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.29

10.29 Notice of Motion and Motion to Substitute for Party Who Has Become Incompetent During Litigation.

Notice of Motion and Motion to Substitute for Party Who Has Become Incompetent During Litigation.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR SUB-
_____ [*name*],	)	STITUTION OF PARTY
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order pursuant to *Fed R Civ P 25(b)*, that substitutes _____ [*specify representative that will substitute for incompetent party, e.g.,* John Doe] in the place of _____ [*incompetent party, e.g.,* Defendant Mary Jones]. The motion will be made on the grounds that _____ [*specify grounds, e.g.,* John Doe] has been duly appointed as the guardian of Defendant Mary Jones].

_____ [*Moving party, e.g.,* Plaintiff John Smith] moves the court to substitute _____ [*specify representative that will substitute for deceased party, e.g.,* John Doe] as Defendant in this action pursuant to *Rule 25(a)(1) of the Federal Rules of Civil Procedure* because the attached Affidavit of _____ [*name of affiant*] establishes the following:

1. _____ [*Incompetent party, e.g.,* Defendant Mary Jones] answered the complaint in this action and appeared as a Defendant on _____ [*date*].

2. _____ [*Incompetent party, e.g.,* Defendant Mary Jones] was declared incompetent to handle her own affairs on _____ [*date*], by the _____ Court of Farallon County.

3. _____ [*Specify representative that will substitute for deceased party, e.g.,* John Doe] was appointed _____ [*specify status of movant, e.g.,* Guardian of the Person and Estate] of _____ [*incompetent party, e.g.,* Defendant Mary Jones] on _____ [*date*]. Pursuant to _____ [*specify controlling law, e.g., California Probate Code Section 2462(b)*] _____ [*name of representative*] is the person designated to continue the defense of this action on behalf of _____ [*incompetent party, e.g.,* Defendant Mary Jones]. A certified copy of the order appointing John Doe as Guardian is attached as Exhibit _____.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 25(b)

Substitution on Party Becoming Incompetent During Pendency of Action:
See *§ 10.19*

Requirements for Substitution Motion:
See *§ 10.22*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsIncompetencyCivil ProcedurePartiesSubstitutionsMotions for Substitution

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Unit 3 Pleading Stage
CHAPTER 10 Adding, Dropping, and Substituting Parties
V. FORMS
C. Substituting Parties

2-10 MB Practice Guide: Fed Pretrial Civ Proc in CA 10.30

10.30 Notice of Motion and Motion to Substitute for Party Who Has Transferred Interest.

Notice of Motion and Motion to Substitute for Party Who Has Transferred Interest.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR SUB-
_____ [*name*],	)	STITUTION OF PARTY
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order pursuant to *Fed R Civ P 25(c)*, to substitute _____ [*name of transferee, e.g.,* John Doe] in the place of _____ [*transferor party, e.g.,* Plaintiff John Smith]. The motion will be made on the grounds that _____ [*transferor party, e.g.,* Plaintiff John Smith] has transferred all interest he has in the subject matter of this litigation to _____ [*name of transferee, e.g.,* John Doe].

_____ [*Name of transferee movant, e.g.,* John Doe] moves the court to substitute the moving party _____ [*specify representative that will substitute for deceased party, e.g.,* John Doe] in the place of _____ [*transferor party, e.g.,* Plaintiff John Smith] pursuant to *Rule 25(c) of the Federal Rules of Civil Procedure* because the attached Affidavit of _____ [*name of affiant*] establishes the following:

1. _____ [*Transferor party, e.g.,* Plaintiff John Smith] filed the complaint in this action as Party Plaintiff on _____ [*date*]. The complaint presented a claim to collect judgment on an account stated, and interest and attorney's fees.

2. On _____ [*date*], the current Plaintiff _____ [*transferor party, e.g.,* John Smith] assigned all of the right and interest of _____ [*transferor party, e.g.,* Plaintiff John Smith] in this action by _____ [*describe transfer transaction, e.g.,* assigning the account stated to movant _____ [*name of transferee, e.g.,* John Doe]. This assignment is valid and fully enforceable under the law of the State of California, which is the controlling law in this diversity action, as specified completely in the attached Memorandum of Points and Authorities.

3. Because of the assignment of the account stated, the original Plaintiff no longer has any interest in this action and the substitution of movant for the original Plaintiff is appropriate.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 25(c)

Substitution on Party Becoming Incompetent During Pendency of Action:
See *§ 10.20*

Requirements for Substitution Motion for Substitution:
See *§ 10.22*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedurePartiesSubstitutionsTransfers of Interests

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Unit 3 Pleading Stage
CHAPTER 11 Counterclaims, Crossclaims, and Replies

2-11 MB Practice Guide: Fed Pretrial Civ Proc in CA 11.syn

§ 11.syn Synopsis to Chapter 11: Counterclaims, Crossclaims, and Replies

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11.43[1] LOCAL PRACTICE: CD Cal Requirements.

11.43[1][a] LOCAL PRACTICE: CD Cal Requirements--Alleging Jurisdiction Over Crossclaims.

11.43[1][b] LOCAL PRACTICE: CD Cal Requirements--Extending the Time to Respond to the Initial Complaint.

11.43[1][c] LOCAL PRACTICE: CD Cal Requirements--Amended and Supplemental Pleadings.

11.43[2] LOCAL PRACTICE: ED Cal Requirements.

11.43[2][a] LOCAL PRACTICE: ED Cal Requirements--Alleging Jurisdiction Over Crossclaims.

11.43[2][b] LOCAL PRACTICE: ED Cal Requirements--Changed Pleadings.

11.43[2][c] LOCAL PRACTICE: ED Cal Requirements--Crossclaims in Class Actions.

11.43[3] LOCAL PRACTICE: ND Cal Requirements.

11.43[4] LOCAL PRACTICE: SD Cal Requirements.

11.43[4][a] LOCAL PRACTICE: SD Cal Requirements--Extension of Time to Answer.

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11.55 Answer and Crossclaim.

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Unit 3 Pleading Stage
CHAPTER 11 Counterclaims, Crossclaims, and Replies
I. STRATEGY

2-11 MB Practice Guide: Fed Pretrial Civ Proc in CA 11.01

11.01 Scope.

This chapter covers:

- Preparing and drafting counterclaims [*see 11.03 -11.25*; *Forms 11.52 -11.54*].
- Preparing and drafting crossclaims [*see 11.26 -11.43*; *Form 11.55*].
- Responding to counterclaims and crossclaims [*see 11.44 -11.51*; *Forms 11.56 -11.57*].

Core Rule: *Fed R Civ P 13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 11 Counterclaims, Crossclaims, and Replies
I. STRATEGY

2-11 MB Practice Guide: Fed Pretrial Civ Proc in CA 11.02

11.02 Objective and Strategy.

The use of counterclaims and crossclaims is an important aspect of the overall strategy of any case. Counterclaims are affirmative claims for relief against an opposing party [*Fed R Civ P 13(a), (b)*]. Counterclaims must be made in a responsive pleading, such as an answer [*Fed R Civ P 13(a), (b)*].

Counterclaims are either compulsory or permissive [*Fed R Civ P 13(a), (b)*]. A compulsory counterclaim arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim [*Fed R Civ P 13(a)*]. A counterclaim that does not arise out of the same transaction or occurrence, as well as a counterclaim arising out of the same transaction but meeting one of the exceptions in Rule 13(a), is a permissive counterclaim. [*Fed R Civ P 13(b)*].

It is important to determine whether counterclaims are compulsory or permissive because failure to properly plead compulsory counterclaims may result in a waiver of those claims, such that the claims may be barred in a subsequent action based on the same claim [*see, e.g., Hydranautics v. FilmTec Corp. (9th Cir 1995) 70 F3d 533, 536*].

Counterclaims are distinguishable from affirmative defenses in that counterclaims seek relief from an opposing party, whereas affirmative defenses challenge the plaintiff's legal right to bring an action without seeking damages or other relief [*see Katherine G. v. Kentfield Sch. Dist. (ND Cal 2003) 261 F Supp2d 1159, 1186*].

Crossclaims state affirmative claims for relief by a party against a coparty [*Fed R Civ P 13(g)*]. Crossclaims are generally considered to be permissive [*see Rainbow Mgmt. Group Ltd. v. Atlantis Submarines Hawaii LP (D Haw 1994) 158 FRD 656, 659-660*]. Nevertheless, a crossclaim must arise out of the same transaction or occurrence that is the subject matter of the original action or of a counterclaim, or must relate to property that is the subject matter of the original action [*Fed R Civ P 13(g)*].

Important jurisdictional issues are implicated by counterclaims and crossclaims. For example, counterclaims and crossclaims are subject to principles of supplemental jurisdiction [*28 USC § 1367*].

In addition, issues of conflicts with state statutes may be implicated by counterclaims and crossclaims. For example, counterclaims and crossclaims are subject to statutes of limitation, which are in turn subject to *Erie* principles governing conflicts between federal and state law [*see, e.g., Torre v. Brickey (9th Cir 2002) 278 F3d 917, 919-920*].

Rule 13(h) places the issue of joinder of additional parties under the provisions of Rules 19 and 20 [*Fed R Civ P 13(h)*]. This rule enables the court to join additional persons in order to adjudicate a claim that is already before the court [*Fed R Civ P 13(h)*]. Rule 13(h), however, does not apply to third-party claims, which are governed separately by *Fed R Civ P 14*.

Detailed Discussion/Forms:

3 Moore's Federal Practice, Ch. 13, Counterclaim and Crossclaim (Matthew Bender 3d ed.).

4 Bender's Federal Practice Forms, Ch. 13, Counterclaim and Crossclaim (Matthew Bender).

Cross References:

The use of counterclaims and crossclaims is only one of the many aspects to consider when determining the overall strategy of a case, and the use of either or both implicates many important issues. The following chapters contain information that is directly relevant to the use of counterclaims and crossclaims:

Ch. 2, Determining Forum (Jurisdiction and Venue);

Ch. 4, Determining Parties to the Action;

Ch. 5, Formatting, Serving, and Filing Papers;

Ch. 6, Drafting the Summons and Complaint;

Ch. 8, Answers and Responsive Motions Under Rule 12;

Ch. 9, Amending and Supplementing Pleadings;

Ch. 10, Adding, Dropping, and Substituting Parties;

Ch. 12, Third-Party Actions;

Ch. 13, Demanding a Jury Trial;

Ch. 18, Consolidation and Separate Trials;

Ch. 19, Preliminary Injunctions, TROs, and Other Provisional Remedies; and

Ch. 26, Pretrial Motion Practice.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 11 Counterclaims, Crossclaims, and Replies
II. PREPARING AND DRAFTING COUNTERCLAIMS

2-11 MB Practice Guide: Fed Pretrial Civ Proc in CA 11.03

11.03 CHECKLIST: Determining Whether Use of Counterclaim Is Appropriate.

☐ Verify that the claim will be asserted against an opposing party (because a claim asserted against a coparty is a crossclaim, not a counterclaim).

Authority:
Fed R Civ P 13(a), (b)

Discussion:
See *§ 11.18*

☐ Verify that the counterclaim makes an affirmative claim for relief.

Authority:
Katherine G. v. Kentfield Sch. Dist. (ND Cal 2003) 261 F Supp2d 1159

Discussion:
See *§ 11.17*

☐ Verify that the counterclaim is not an affirmative defense.

Authority:
Katherine G. v. Kentfield Sch. Dist. (ND Cal 2003) 261 F Supp2d 1159

Discussion:
See *§ 11.07*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 11 Counterclaims, Crossclaims, and Replies
II. PREPARING AND DRAFTING COUNTERCLAIMS

2-11 MB Practice Guide: Fed Pretrial Civ Proc in CA 11.04

11.04 CHECKLISTS: Identifying Counterclaims.

11.04[1] Compulsory Counterclaims.

☐ Verify that the claim arises from the same transaction or occurrence as the subject matter of the opposing party's claim.

Authority:
Fed R Civ P 13(a)

Discussion:
See *§ 11.09*

☐ Verify that there is a "logical relationship" between the opposing party's original claim and the counterclaim.

Authority:
Caesars World, Inc. v. Milanian (D Nev 2003) 247 F Supp2d 1171, 1201

Discussion:
See *§ 11.09[1]*

☐ Verify that the essential facts alleged by the opposing party constitute the basis of the counterclaim.

Authority:
Competitive Techs. v. Fujitsu Ltd. (ND Cal 2003) 286 F Supp2d 1118, 1135

Discussion:
See *§ 11.09[1]*

☐ Determine if the counterclaim is a recoupment claim.

Authority:
Reiter v. Cooper (1993) 507 US 258, 263, 113 S Ct 1213, 122 L Ed2d 604

Discussion:
See *§ 11.09[3][a]*

☐ Verify that the claim is not the subject of another pending action.

Authority:
Fed R Civ P 13(a)(2)(A)

Discussion:
See *§ 11.08*

☐ Verify that the claim was not compulsory in a prior action in which a final judgment was reached.

Authority:
Hydranautics v. FilmTec Corp. (9th Cir 1995) 70 F3d 533, 536

Discussion:
See *§ 11.08*

☐ Verify that the claim existed at the time the responsive pleading was served.

Authority:
Fed R Civ P 13(a)

Discussion:
See *§ 11.09[2]*

11.04[2] Permissive Counterclaims.

☐ Verify that the counterclaim does not arise out of the same transaction or occurrence as the opposing party's claim, or if it does, that it meets an exception under Rule 13(a).

Authority:
Fed R Civ P 13(b)

Discussion:
See *§ 11.09*

☐ Determine if the claim existed at the time the pleading was served.

Authority:
Fed R Civ P 13(a)

Discussion:
See *§ 11.09[2]*

☐ Determine whether the counterclaim is a claim for setoff.

Authority:
FDIC v. F.S.S.S. (D Alaska 1993) 829 F Supp 317, 322

Discussion:
See *§ 11.09[3][b]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory CounterclaimsCivil ProcedurePleading & PracticePleadingsCounterclaimsPermissive Counterclaims

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11.05 CHECKLISTS: Drafting Counterclaims.

11.05[1] Compulsory Counterclaims.

☐ Assert counterclaim in responsive pleading.

Authority:
Fed R Civ P 13(a)

Discussion:
See *§ 11.19*

☐ Comply with pleading standards.

Authority:
Fed R Civ P 8

Discussion:
See *§ 11.20*

☐ Allege subject matter jurisdiction.

Authority:
Fed R Civ P 8(a)(1)

Discussion:
See *§ 11.20[2]*

☐ Verify that the claim does not require the presence of a party over whom the court cannot acquire

jurisdiction.

Authority:
Fed R Civ P 13(a)

Discussion:
See *§ 11.09*

☐ Comply with applicable statutes of limitations.

Authority:
Reiter v. Cooper (1993) 507 US 258, 263, 113 S Ct 1213, 122 L Ed2d 604

Discussion:
See *§ 11.10*

☐ Preserve defenses available under *Fed R Civ P 12(b)*.

Authority:
Fed R Civ P 12

Discussion:
See *§ 11.16*

Serve answer containing counterclaim within 21 days after being served with summons and complaint.

Authority:
Fed R Civ P 12(a)(1)

Discussion:
See *§ 11.21*

☐ Properly serve answer containing counterclaim in accordance with local service requirements.

Authority:
Fed R Civ P 5

Discussion:
See *§ 11.25*

☐ Verify that counterclaim is being made against an opposing party.

Authority:
Fed R Civ P 13(a)

Discussion:
See *§ 11.18[1]*

☐ Clearly designate counterclaim as such in answer.

Authority:
Fed R Civ P 8

Discussion:
See *§ 11.20[1]*

☐ Distinguish counterclaim from affirmative defenses.

Authority:
Fed R Civ P 8

Discussion:
See *§ 11.07*

☐ Raise all compulsory counterclaims.

Authority:
Fed R Civ P 13(a)

Discussion:
See *§ 11.09*

☐ Raise any recoupment claims that may exist.

Authority:
Fed R Civ P 13(a)

Discussion:
See *§ 11.09[3][a]*

☐ Include jury demand, if desired.

Authority:
Fed R Civ P 38

Discussion:
See *§ 11.23*

11.05[2] Permissive Counterclaims.

☐ Assert counterclaim in responsive pleading.

Authority:
Fed R Civ P 13(b)

Discussion:
See *§ 11.19*

☐ Comply with pleading standards.

Authority:
Fed R Civ P 8

Discussion:
See *§ 11.20*

☐ Allege subject matter jurisdiction.

Authority:
Fed R Civ P 8(a)(1)

Discussion:
See *§ 11.20[2]*

☐ Comply with applicable statutes of limitations.

Authority:
City of Saint Paul, Alaska v. Evans (9th Cir 2003) 344 F3d 1029, 1033-1036

Discussion:
See *§ 11.10*

☐ Preserve defenses available under *Fed R Civ P 12(b)*.

Authority:
Fed R Civ P 12

Discussion:
See *§ 11.16*

☐ If asserting in answer, serve answer containing counterclaim within 21 days after being served with summons and complaint.

Authority:
Fed R Civ P 12(a)(1)

Discussion:
See *§ 11.21*

☐ Properly serve answer containing counterclaim in accordance with local service requirements.

Authority:
Fed R Civ P 5

Discussion:
See *§ 11.25*

☐ Verify that counterclaim is being made against an opposing party.

Authority:
Fed R Civ P 13(b)

Discussion:
See *§ 11.18[1]*

☐ Clearly designate counterclaim.

Authority:
Fed R Civ P 8

Discussion:
See *§ 11.20[1]*

☐ Distinguish counterclaim from affirmative defenses.

Authority:
Fed R Civ P 8

Discussion:
See *§ 11.07*

☐ Consider raising setoff claims.

Authority:
FDIC v. F.S.S.S. (D Alaska 1993) 829 F Supp 317, 322

Discussion:
See *§ 11.09[3][b]*

☐ Include jury demand, if desired.

Authority:
Fed R Civ P 38

Discussion:
See *§ 11.23*

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.06 Options and Strategy--Counterclaims.

A defendant must analyze the extent to which its defense to the plaintiff's claims might involve counterclaims and must do so quickly. Counterclaims must be filed and served at the time that the answer is filed, absent a stipulation or a motion [*see Fed R Civ P 13(a)*]. It may well be that under the facts of the case, the best defense is an offense--a claim for affirmative relief against the plaintiff.

Failure to plead "compulsory" counterclaims promptly may lead to their forfeiture, so serious consideration should be given to pleading every arguable counterclaim. If a potential claim against the plaintiff arises from the same transaction or occurrence that is the subject matter of the plaintiff's claim, the defendant's choices are limiting to pleading the counterclaim or forfeiting it. A defendant will be excused from pleading a compulsory counterclaim only when that counterclaim is already the subject of a pending action or when the court only has in rem jurisdiction over the defendant's property, and no general personal jurisdiction over the defendant [*Fed R Civ P 13(a)*].

Thus, a defendant must determine not only the existence of potential counterclaims, but whether they are so related to the transaction or occurrence that forms the basis of the plaintiff's claim that the counterclaim is compulsory. If this determination is not made in time to file the counterclaim with the answer, the defendant has the one-right "as a matter of course" to amend the answer within 21 days after serving it or within 21-days after service of a motion under *Fed R Civ P 12(b)*, *(e)*, or *(f)*, whichever is earlier [*see Fed R Civ P 15(a)(1)(B)*]. Otherwise, the defendant may amend its answer to add a counterclaim only with the plaintiff's written consent or the court's permission [*see Fed R Civ P 15(a)(2)*].

If a defendant identifies a potential counterclaim against the plaintiff, but that claim is not so related to the transaction or occurrence that forms the basis of the plaintiff's claim that is it not compulsory, forfeiture is not an issue [*see Fed R Civ P 13(b)*]. In that event, the defendant should analyze whether assertion of the "permissive" counterclaim in the pending action will assist in the defense of the plaintiff's claim or unduly complicate the case and raise the expense of seeking resolution of the plaintiff's claim. In making this determination, the defendant should consider whether additional parties need to be joined to the action in order to resolve the permissive counterclaim, whether their joinder is possible, and whether there is an alternative forum where joinder might be more easily accomplished or that might be more favorable to the permissive counterclaim for other reasons.

A defendant must make the same determinations for any counterclaims that may arise not only from the plaintiff's claims, but also from any crossclaims asserted against the defendant by codefendants. Once again, failure to plead compulsory counterclaims against codefendants who have crossclaims may result in forfeiture of those claims.

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.07 Counterclaims Are Distinguishable From Affirmative Defenses.

Counterclaims are distinguishable from affirmative defenses in that counterclaims seek relief from an opposing party, while affirmative defenses challenge the plaintiff's legal right to bring an action without seeking to recover damages or other relief. Essentially, the difference between a counterclaim and a defense is that a defense cannot possibly be adjudicated separately from the plaintiff's claim to which it applies, while a counterclaim can be [*Reiter v. Cooper (1993) 507 US 258, 265, 113 S Ct 1213, 122 L Ed2d 604* ; *see also Katherine G. v. Kentfield Sch. Dist. (ND Cal 2003) 261 F Supp2d 1159, 1186*].

However, if a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court may, in its discretion, treat the pleading as if there had been a proper designation. The court may do so if justice so requires and may condition doing so on whatever terms may be required to prevent prejudice to the other parties [*Fed R Civ P 8(c)(2)*].

Distinguish:

The Southern District of New York has stated that it is permissible to label a response to a plaintiff's claim for relief as both an affirmative defense and as a counterclaim [*see Dubied Mach. Co. v. Vermont Knitting Co. (SDNY 1990) 739 F Supp 867, 871* (court permitted labeling of claims for fraudulent misrepresentation and breach of warranty as both counterclaims and affirmative defenses)].

Cross References:

Discussion of pleading affirmative defenses, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.10*. Discussion of determining whether counterclaims are compulsory or permissive, see *§ 11.09*. Discussion of pleading counterclaims, see *§ 11.20*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory CounterclaimsCivil ProcedurePleading &

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11.08 Failure to Plead Compulsory Counterclaim Results in Waiver of the Claim.

Counterclaims are either compulsory or permissive. A compulsory counterclaim (1) arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim, and (2) does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction [*Fed R Civ P 13(a)*]. All other counterclaims are permissive [*Fed R Civ P 13(b)*].

Cross Reference:

Discussion of what constitutes "the same transaction or occurrence," see *§ 11.09*.

It is important to determine whether counterclaims are compulsory or permissive because failure to properly plead compulsory counterclaims will generally result in a waiver of those claims. A claim that was compulsory in a prior suit is barred in a subsequent action [*see Hydranautics v. FilmTec Corp. (9th Cir 1995) 70 F3d 533, 536* (if a party has a compulsory counterclaim and fails to plead it, it is lost, and cannot be asserted in a second, separate action after conclusion of the first)]. Indeed, a district court may enjoin the party from bringing the compulsory counterclaim in a subsequent action [*see Caesars World, Inc. v. Milanian (D Nev 2003) 247 F Supp2d 1171, 1202*].

Exception--When Claim Is Subject of a Pending Action:

A party need not plead an otherwise compulsory counterclaim if the claim is the subject of another pending action [*Fed R Civ P 13(a)(2)(A)*].

Exception--When Claim Requires Presence of a Party Over Whom Court Cannot Acquire Jurisdiction:

A party need not plead an otherwise compulsory counterclaim if the claim requires for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction [*Fed R Civ P 13(a)(1)(B)*].

Exception--Suit Does Not Confer in Personam Jurisdiction:

A party need not plead an otherwise compulsory counterclaim if the opposing party brought suit on the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim [*Fed R Civ P 13(a)(2)(B)*].

Exception--When Prior Proceeding Was Administrative Proceeding:

The failure to have presented an otherwise compulsory counterclaim in a prior administrative pleading

might not have a preclusive effect on a subsequent court action [*see Competitive Techs. v. Fujitsu Ltd. (ND Cal 2003) 286 F Supp2d 1118, 1140* (reasoning that the relief available in an administrative proceeding might not be the same as that available in a judicial proceeding)].

Strategic Points:

The waiver or forfeiture of a compulsory counterclaim is particularly dangerous because it may passed unnoticed until it is too late to seek a remedy. As a practical matter, the issue of whether a counterclaim is compulsory may be raised for the first time when a second action is brought in which the pleader attempts to raise a claim that is based on the same transaction or occurrence that was the basis of the first action, and the defendant in the second action defends against the claim by asserting should have been asserted as a compulsory counterclaim in the first action.

When faced with a contention in one action that a claim was actually a compulsory counterclaim that should have been asserted in a prior action and is now waived or forfeited, there are some responsive arguments available. The rule that compulsory counterclaims are barred in a second action does not apply when there is no final determination of the first action, or when a defendant in the first action has filed a motion to dismiss or a motion for summary judgment rather than a "responsive pleading" in which the defendant was obligated to assert the compulsory counterclaim.

Cross References:

Discussion of final determination in the context of counterclaims, see 3 Moore's Federal Practice, Ch. 13, Counterclaim and Crossclaim (Matthew Bender 3d ed.).

Further discussion of what constitutes a responsive pleading, see Ch. 8, Answers and Responsive Motions Under Rule 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.09 Distinguishing Between Compulsory and Permissive Counterclaims.

11.09[1] Compulsory Counterclaim Requires a "Logical Relationship" With the Primary Claim. A compulsory counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" [*Fed R Civ P 13(a)(1)(A)*]. The courts tend to use a policy-based flexible approach with regard to the factors that should be considered in determining when claims arise out of the transaction or occurrence that is the subject matter of the opposing party's claim.

The common theme is that in order for a claim to be compulsory, a "logical relationship" must exist between the claim and counterclaim in issue [*see Pochiro v. Prudential Ins. Co. (9th Cir 1987) 827 F2d 1246, 1249* (liberal "logical relationship" test to determine whether two claims arise out of the same transaction or occurrence)]. Among the factors courts consider in determining whether there is a logical relationship are whether the facts necessary to prove the two claims substantially overlap, and whether the collateral estoppel effect of the first action would preclude the counterclaim from being brought in a later action [*Competitive Techs. v. Fujitsu Ltd. (ND Cal 2003) 286 F Supp2d 1118, 1135* (citing *Pochiro v. Prudential Ins. Co. (9th Cir 1987) 827 F2d 1246, 1249)*]. The underlying query is whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all of the issues be resolved in one lawsuit [*Hydranautics v. FilmTec Corp. (9th Cir 1995) 70 F3d 533, 536* (quoting *Pochiro*)].

If a separate trial on each of the respective claims would involve a substantial duplication of time and effort by the parties and the court, a logical relationship will be found. It is not necessary for the facts or the legal theories to be the same or even substantially the same in both actions. As long as the facts of the later asserted claim are sufficiently related to the subject matter of the original action, they must be barred as compulsory claims [*Caesars World, Inc. v. Milanian (D Nev 2003) 247 F Supp2d 1171, 1202*].

Cross References:

Detailed discussion of the factors used to determine whether a counterclaim is compulsory or permissive, the different approaches taken, and examples of claims found to be compulsory under the various analyses, see 3 Moore's Federal Practice, Ch. 13, Counterclaim and Crossclaim (Matthew Bender 3d ed.).

11.09[2] Counterclaim Is Compulsory Only If It Existed When Pleading Is Served. A counterclaim is compulsory only if the claim exists at the time that the responsive pleading is served [*Fed R Civ P 13(a)(1)*]. A claim that either matured or was acquired by the pleader after serving a pleading may, however, with the permission of the court, be presented as a counterclaim by supplemental pleading [*Fed R Civ P 13(e)*; *see, e.g., Johnson v. Con-Vey/Keystone, Inc. (D Or 1994) 856 F Supp 1443, 1450-1451* (claims of unfair competition and intentional interference with business relationships arose after the filing of original patent infringement case and, therefore, were not compulsory)].

Example:

Defendant filed and served his answer to the complaint on June 1, 2004. A counterclaim that arose from the same transaction or occurrence as the primary claim stated in the complaint, but that did not accrue until June 30, 2004, is not compulsory in the action [*see, e.g., Pochiro v. Prudential Ins. Co. (9th Cir 1987) 827 F2d 1246, 1251* (defamatory statements that are sufficiently related to subject matter of original action are compulsory counterclaims, but defamatory statements made after filing of original complaint are not)].

11.09[3] Examples of Categorization of Counterclaims in the Ninth Circuit.

11.09[3][a] Recoupment Claims Are Compulsory. A claim in recoupment is one that arises from the same transaction or occurrence as the opposing claim, seeks relief of the same kind or nature back against the person asserting the original claim, and seeks relief back in an amount not in excess of the original, opposing claim [*FDIC v. Hulsey (10th Cir 1994) 22 F3d 1472, 1487* (tort based counterclaims against FDIC met test for recoupment in loan foreclosure action); *see Katherine G. v. Kentfield Sch. Dist. (ND Cal 2003) 261 F Supp2d 1159, 1187* (whether claim sounds in recoupment hinges on whether it arises out of same transaction on which plaintiff's claim is based)]. Because recoupment claims are, by definition, claims that arise from the same transaction or occurrence as the opposing claim, they are always compulsory counterclaims [*Reiter v. Cooper (1993) 507 US 258, 263, 113 S Ct 1213, 122 L Ed2d 604*].

11.09[3][b] Setoff Claims Are Permissive. Unlike a recoupment claim, setoff refers to a claim by a defendant against a plaintiff that will "set-off" or reduce the plaintiff's recovery, but that is unrelated to the plaintiff's original claim. The claim must either be for a liquidated amount or arise out of a contract or judgment [*see United States v. Iron Mountain Mines, Inc. (ED Cal 1993) 812 F Supp 1528, 1551-1552*]. A claim for "setoff" is a permissive counterclaim [*FDIC v. F.S.S.S. (D Alaska 1993) 829 F Supp 317, 322*].

11.09[3][c] Abuse of Process Claims Are Compulsory. The Ninth Circuit has found an abuse of process claim to be a compulsory counterclaim in the same action in which process is alleged to have been abused [*see Pochiro v. Prudential Ins. Co. (9th Cir 1987) 827 F2d 1246, 1252* (noting split of authority in other circuits, but favoring broad construction of "same transaction or occurrence")].

11.09[3][d] Malicious Prosecution Claims Are Permissive. Because malicious prosecution claims generally require the termination of the prior litigation favorably to the party asserting the claim, they would not be compulsory counterclaims in the action that is alleged to be malicious [*see Pochiro v. Prudential Ins. Co. (9th Cir 1987) 827 F2d 1246, 1252*].

11.09[3][e] Defamation Claims May Be Compulsory or Permissive. As long as the allegedly defamatory statements are sufficiently related to the subject matter of the original action, they are compulsory counterclaims [*see Pochiro v. Prudential Ins. Co. (9th Cir 1987) 827 F2d 1246, 1251*]. If, however, the defamatory statements were made after the filing of the original complaint, and thus are not related to the subject matter of the original action, a counterclaim for defamation is not compulsory [*see Pochiro v. Prudential Ins. Co. (9th Cir 1987) 827 F2d 1246, 1251*].

11.09[3][f] Antitrust Claims in Patent Infringement Actions Are Permissive. In a patent infringement action, an antitrust counterclaim is a permissive counterclaim [*see Hydranautics v. FilmTec Corp. (9th Cir 1995) 70 F3d 533, 536*].

Cross Reference:

Examples of additional claims that have found to be compulsory or permissive, see 3 Moore's Federal Practice, Ch. 13, Counterclaim and Crossclaim (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.10 Statutes of Limitations Apply to Counterclaims.

11.10[1] Statutes of Limitations May Bar Counterclaims. Counterclaims for affirmative relief must be filed within the applicable statutory limitations period. If a counterclaim is not brought within the requisite time period, the claim, even if compulsory, may be barred. A party may not revive time-barred claims by asserting the claims as compulsory counterclaims in a later action [*see City of Saint Paul, Alaska v. Evans (9th Cir 2003) 344 F3d 1029, 1033-1036*].

11.10[2] Recoupment Claims "Relate Back" to Filing of Plaintiff's Complaint. Counterclaims for "recoupment" relate back to the date of filing of the plaintiff's complaint [*see Reiter v. Cooper (1993) 507 US 258, 263, 113 S Ct 1213, 122 L Ed2d 604* ; *Katherine G. v. Kentfield Sch. Dist. (ND Cal 2003) 261 F Supp2d 1159, 1185-1186*].

Cross Reference:

Further discussion of what constitutes a recoupment claim, see *§ 11.09[3][a]*.

11.10[3] Amending Answer to Include Compulsory Counterclaim Relates Back to Filing of Answer. An amendment of a pleading relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading [*Fed R Civ P 15(c)(1)(B)*]. Therefore, if a pleader moves to amend its timely and previously filed answer to add a compulsory counterclaim the counterclaim will relate back to the filing of the original answer [*see, e.g., Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank (2d Cir 1984) 744 F2d 237, 243-244*].

Cross Reference:

Further discussion of amending pleadings, see Ch. 9, Amending and Supplementing Pleadings.

11.10[4] Compulsory Counterclaims Do Not Relate Back to Filing of Complaint. It is not fully resolved in the Ninth Circuit whether compulsory counterclaims that are not asserted in an amended pleading relate back to the time of the filing of the plaintiff's complaint. In deciding the issue of the timeliness of a party's counterclaim, the Northern

District of California decided not to adopt Fourth Circuit law that holds that a compulsory counterclaim relates back to the time of the filing of the plaintiff's complaint because "[d]espite an exhaustive search, the Court [was] unable to locate such an analogue or even a case that suggests that this holding is the rule in the Ninth Circuit" [*see Katherine G. v. Kentfield Sch. Dist. (ND Cal 2003) 261 F Supp2d 1159, 1185*].

11.10[5] Permissive Counterclaims Do Not Relate Back to Filing of Complaint. Although it is not fully resolved in the Ninth Circuit, there is authority for the proposition that permissive counterclaims do not relate back to the filing of the plaintiff's complaint. The Northern District of California has noted that "there is authority from outside the Ninth Circuit holding that a counterclaim that seeks separate relief for a wrong independent of the transaction and occurrence on which the plaintiff's claim is based does not relate back to the filing of the plaintiff's complaint" [*see Katherine G. v. Kentfield Sch. Dist. (ND Cal 2003) 261 F Supp2d 1159, 1187*].

Strategic Point:

Statutes of limitations issues are *substantive* law. Therefore, in diversity actions, or if the court is exercising supplemental jurisdiction over a state-law claim, it is important to consult the *state* statute of limitations and related principles [*see Torre v. Brickey (9th Cir 2002) 278 F3d 917*].

Cross Reference:

Detailed discussion of *Erie* principles, see 17A Moore's Federal Practice, Ch. 124, The Erie Doctrine and Applicable Law (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.11 Court May Have Supplemental Jurisdiction Over Counterclaims.

The district court may, of course, properly exercise jurisdiction over a counterclaim that has an independent basis of federal jurisdiction [*see Taylor v. Bryant, Inc. (D Nev 2003) 275 F Supp2d 1305, 1306*]. In addition, in any civil action of which the district courts have original jurisdiction, the district court has supplemental jurisdiction over all other claims that are so related to claims in the action within its original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution [*28 USC § 1367(a)*].

Exceptions:

In a diversity case [*see 28 USC § 1332*], the district courts do not have supplemental jurisdiction over claims by plaintiffs against persons made parties under *Fed R Civ P 14*, *19*, *20*, or *24*, or over claims by persons proposed to be joined as plaintiffs under Rule 19, or seeking to intervene as plaintiffs under Rule 24, if exercising supplemental jurisdiction over the claims would be inconsistent with the diversity jurisdictional requirements [*28 USC § 1367(b)*].

The court may decline to exercise supplemental jurisdiction over a claim in certain enumerated circumstances [*see 28 USC § 1367(c)*].

28 USC § 1367 was enacted effective December 1, 1990. Decisions based on law in effect before 1990 tended to hold that district courts could exercise ancillary jurisdiction over compulsory counterclaims as a matter of course, but not over permissive counterclaims [*see, e.g., O'Connell v. Erie Lackawanna R.R. (2d Cir 1968) 391 F2d 156, 163 , vacated as moot, 395 US 210 (1969)* (permissive counterclaims require independent ground for federal jurisdiction); *but see Ambromovage v. United Mine Workers (3d Cir 1984) 726 F2d 972* (determination that a counterclaim is permissive within meaning of *Fed R Civ P 13* is not dispositive of constitutional question whether there is federal jurisdiction over counterclaim)].

Under *28 USC § 1367*, it is unresolved whether the phrase "same case or controversy under Article III" in the statute has exactly the same meaning as the phrase "transaction or occurrence that is the subject matter of the opposing party's claim" in Rule 13. If so, then there is no supplemental jurisdiction for permissive counterclaims because under Rule 13, they are not the same "transaction or occurrence," and hence, they are also not the "same case or controversy" under § 1367 [*see, e.g., Naranjo v. County of Rio Arriba (DNM 1994) 862 F Supp 328, 334* (for counterclaim to form part of

"same case or controversy" as main claim, it must be compulsory rather than permissive)]. If not, then a permissive counterclaim can be supported by statutory supplemental jurisdiction, even though it does not arise from the same "transaction or occurrence" [*see, e.g., Jones v. Ford Motor Credit Co. (2d Cir 2004) 358 F3d 205, 210-214* (even though the relationship is not such as would make the counterclaims compulsory, the counterclaims and the underlying claim bear a sufficient factual relationship to constitute the same "case" within the meaning of Article III and hence of § 1367)].

Although the Ninth Circuit has not yet ruled on this issue, several district courts in the circuit have reached different results. The Central District of California has said that a permissive counterclaim may be supported by supplemental jurisdiction under § 1367 [*see Polaris Pool Sys. v. Letro Prods., Inc. (CD Cal 1995) 161 FRD 422, 425* (even if they are permissive counterclaims, state-law counterclaims form part of the same case or controversy as federal claims and are supported by supplemental jurisdiction under statute).]. However, the District Courts for Arizona and Nevada have required permissive counterclaims to have their own jurisdictional basis [*see Taylor v. Bryant, Inc. (D Nev 2003) 275 F Supp2d 1305, 1306* (federal courts have supplemental jurisdiction over compulsory counterclaims, but permissive counterclaims require their own jurisdictional basis); *Hart v. Clayton-Parker & Assocs. (D Ariz 1994) 869 F Supp 774, 776* (concluding that § 1367(a) itself implicitly recognizes that only compulsory counterclaim forms part of same case or controversy as claim giving rise to federal jurisdiction); *cf. Competitive Techs. v. Fujitsu Ltd. (ND Cal 2003) 286 F Supp2d 1118, 1142-1143* (noting issue and split of authority, but not reaching issue because it found counterclaims to be compulsory under Rule 13)].

Cross Reference:

Further analysis and for argument as to why the better view is that permissive counterclaims may be supported by supplemental jurisdiction under *28 USC § 1367*, see 16 *Moore's Federal Practice, § 106.25[1]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionAncillary JurisdictionCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewConstitutional LawThe JudiciaryJurisdictionSupplemental Jurisdiction

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11.12 Court Will Have Personal Jurisdiction Over Counter-Defendant.

A court has personal jurisdiction over a counter-defendant who has submitted to the jurisdiction of the court by bringing suit as the plaintiff [*Adam v. Saenger (1938) 303 US 59, 67-68, 58 S Ct 454, 82 L Ed 649* (by filing a lawsuit plaintiff consents to jurisdictional power and may not contest personal jurisdiction against counterclaim filed by defendant)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral Overview

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11.13 Compulsory Counterclaims May Be Used to Satisfy Amount-in-Controversy Requirement.

In cases originally filed in federal court, a compulsory counterclaim in excess of the jurisdictional minimum is sufficient to establish subject matter jurisdiction in a diversity case [*see Fenton v. Freedman (9th Cir 1984) 748 F2d 1358, 1359* ; *28 USC § 1332(a)*]. On the other hand, in cases removed from state court to federal court, most courts agree that a compulsory counterclaim may *not* be used to satisfy the amount-in-controversy requirement. Although the Ninth Circuit has not resolved the matter, the majority of courts in the Ninth Circuit that have addressed this issue in cases removed from state court have held that the amount in controversy is to be determined solely by reference to plaintiff's complaint [*see, e.g.,* Director RLA v. Cape Cod Biolab Corp. (ND Cal 2001) 2001 US Dist LEXIS 20294, at *7-*8].

Cross Reference:

Discussion of jurisdictional requirements, see Ch. 2, Determining Forum (Jurisdiction and Venue).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory Counterclaims

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11.14 Removal May Not Be Based on Federal-Question Counterclaim.

Removal of a case to federal court may not be based on a counterclaim in the state court action that raises a federal question [*see Redevelopment Agency of San Bernardino v. Alvarez (CD Cal 2003) 288 F Supp2d 1112, 1115*].

Cross Reference:

Discussion of removing an action to federal court, see Ch. 3, Removing a State Court Case to Federal Court.

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.15 The *Erie* Doctrine Applies to Counterclaims.

In diversity actions, or in cases in which a court is exercising supplemental jurisdiction over a state law claim, the *Erie* Doctrine [*see Erie R.R. Co. v. Tompkins (1938) 304 US 64, 78, 58 S Ct 817, 82 L Ed 1188*] applies. Therefore, a district court will construe the substantive issues raised by a counterclaim under applicable *state* law [*see, e.g., Carteret Sav. & Loan Ass'n, F.A. v. Jackson (1st Cir 1987) 812 F2d 36, 40*]. The Federal Rules of Civil Procedure, however, apply to the purely procedural aspects of the counterclaim [*see Karakas v. McKeown (ED Mich 1992) 783 F Supp 1028, 1033-1034* (federal court presiding over diversity case applies federal rules of procedure, and in event of conflict between state and federal rules, federal rule governing counterclaims prevails)].

Cross References:

3 *Moore's Federal Practice, § 13.123* (Matthew Bender 3d ed.). Detailed discussion of *Erie* principles, see 17A Moore's Federal Practice, Ch. 124, The Erie Doctrine and Applicable Law (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral Overview

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11.16 Jurisdiction and Venue Objections Must Be Preserved When Asserting Counterclaim.

Defenses of lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process may be waived unless raised by motion or included in a responsive pleading [*Fed R Civ P 12(h)(1)*]. Therefore, if a defendant files an answer and, without preserving objections to personal jurisdiction, seeks affirmative relief from the court by way of a counterclaim, the defendant may well have waived any objection to personal jurisdiction or venue [*see, e.g., Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1037 n5*]. The question in those circumstances is whether the waiver may be set aside in connection with a motion to amend the responsive pleadings to assert the objections to lack of personal jurisdiction or venue.

Assertion of a counterclaim does not necessarily involve a waiver of personal jurisdiction or venue objections, however. There is some dispute in other federal courts as to if and how a defendant may assert a counterclaim and still preserve these objections [*see Butte Mining PLC v. Smith (D Mont 1992) 15 F Supp2d 965, 968 n1*]. However, the law in the Ninth Circuit is clear. Defendants may assert both compulsory and permissive counterclaims without waiving personal jurisdiction or venue objections if appropriate steps are taken--either before filing the counterclaim or at the same time as filing the counterclaim--to preserve the objections [*Teyseer Cement Co. v. Halla Mar. Corp. (9th Cir 1986) 794 F2d 472, 478*].

Assertion of a compulsory counterclaim rarely, if ever, constitutes a waiver of jurisdictional or venue defenses [*Dragor Shipping Corp. v. Union Tank Car Co. (9th Cir 1967) 378 F2d 241, 244*].

Assertion of a permissive counterclaim will not constitute a waiver of jurisdictional or venue defenses if either: (1) the counterclaim is asserted *after* the defendant has made a Rule 12(b) motion asserting these defenses, or (2) the counterclaim and the jurisdictional defenses are asserted *in the same responsive pleading* [*Gates Learjet Corp. v. Jensen (9th Cir 1984) 743 F2d 1325, 1330 n1*].

Strategic Point:

The safest course of action always appears to be assertion of any personal jurisdiction or venue objections in a *Fed R Civ P 12(b)* motion or *28 USC § 1406(a)* motion made before filing the responsive pleading containing a counterclaim. This strategy has the added advantage of securing additional time for

filing the responsive pleading.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory CounterclaimsCivil ProcedurePleading & PracticePleadingsCounterclaimsPermissive Counterclaims

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11.17 Relief Available Through Counterclaims.

11.17[1] No Limit on Claims or Kinds of Relief. A party asserting relief as a counterclaim may join as many claims--legal, equitable, or maritime--as the party has against an opposing party [*Fed R Civ P 18(a)*].

11.17[2] Relief Diminishing, Defeating, or Exceeding Plaintiff's Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. Additionally, a counterclaim may claim relief that exceeds in amount of relief, or that seeks a different kind of relief, from that sought in the pleading of the opposing party [*Fed R Civ P 13(c)*].

11.17[3] Injunctive Relief. Injunctive relief may be sought through a counterclaim [*Moore v. New York Cotton Exch. (1926) 270 US 593, 610, 46 S Ct 367, 70 L Ed 750*].

Cross Reference:

Further discussion of seeking injunctive relief, see Ch. 19, Preliminary Injunctions, TROs, and Other Provisional Remedies.

11.17[4] Declaratory Relief. Declaratory relief is available through counterclaims. This is so even if the initial claim is for damages only [*Altvater v. Freeman (1943) 319 US 359, 363-364, 63 S Ct 1115, 87 L Ed 1450*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaimsCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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11.18 Determining Parties to Counterclaim.

11.18[1] Counterclaim May Be Brought Only Against an Opposing Party. Counterclaims are affirmative claims for relief made against an *opposing party* [*Fed R Civ P 13(a), (b)*]. "Opposing parties" have been defined as those that "formally oppose each other on a pleaded claim" [*Earle M. Jorgenson Co. v. T.I. United States, Ltd. (ED Pa 1991) 133 FRD 472, 475*]. With regard to counterclaims, the term "opposing party" refers only to a person or entity that is already a party to the action when the counterclaim is asserted [*see Youell v. Grimes (D Kan 2001) 203 FRD 503, 508*].

There is also limited authority for the proposition that coparties may become "opposing parties" within the meaning of *Fed R Civ P 13(a)* after one pleads a substantive crossclaim, as opposed to a claim that is just for contribution or indemnity, against the other [*see Rainbow Mgmt. Group, Ltd. v. Atlantis Submarines Hawaii, LP (D Haw 1994) 158 FRD 656, 659-660* (citing **Moore's**)].

Cross Reference:

Discussion of possibility of coparties becoming "opposing parties" after filing of crossclaim, see 3 *Moore's Federal Practice, § 13.90[2][a]* (Matthew Bender 3d ed.).

11.18[2] Counterclaim May Be Brought Against an Opposing Party Only in the Capacity in Which That Party Brought Suit. Generally, a party may assert a counterclaim only in the capacity in which the party has been sued, and against an opposing party only in the capacity in which the opposing party brought the original claim [*see Blanchard v. Katz (SDNY 1987) 117 FRD 527, 528*].

Example:

If a plaintiff brings a lawsuit only in a fiduciary capacity, any counterclaims brought against the plaintiff in his or her *individual* capacity should be challenged on the grounds that the plaintiff-fiduciary, in his or her individual capacity, is not an "opposing party" within the meaning of *Fed R Civ P 13(a)* and should, therefore, be dismissed [*see, e.g., Youell v. Grimes (D Kan 2001) 203 FRD 503, 508*].

There are exceptions to this general rule. For example, if a plaintiff sues in a representative capacity, but will benefit *individually* from any recovery, a counterclaim may be made against the plaintiff in his or individual capacity [*Blanchard v. Katz (SDNY 1987) 117 FRD 527, 528-529*]. In addition, a counterclaim may be made against a plaintiff in a capacity different than that in which he or she sued if principles of equity and judicial economy support such a counterclaim [*Blanchard v. Katz (SDNY 1987) 117 FRD 527, 528-529*].

11.18[3] Counterclaim May Be Brought by Third-Party Defendant Against Third-Party Plaintiff. A defendant to the original complaint may file a third-party complaint against a new party under *Fed R Civ P 14*. With regard to that pleading, the defendant is the third-party plaintiff, and the new party is the third-party defendant. The third-party defendant may then bring a counterclaim against the third-party plaintiff [*Fed R Civ P 14(a)(3)*].

Cross Reference:

Further discussion of third-party practice under *Fed R Civ P 14*, see Ch. 12, Third-Party Actions.

11.18[4] Counterclaim May Apply to Joined Parties. Persons other than those made parties to the original action may be made parties to a counterclaim in accordance with the provisions of *Fed R Civ P 19* (compulsory joinder) and 20 (permissive joinder) [*Fed R Civ P 13(h)*; *see, e.g., SAES Getters SpA v. Aeronex, Inc. (SD Cal 2002) 219 F Supp2d 1081, 1085* (demonstrating correlation between *Fed R Civ P 13(h)*, *Fed R Civ P 15(a)*, *Fed R Civ P 19*, and *Fed R Civ P 20*)]. *Fed R Civ P 13(h) does not* authorize third party claims, which are governed by *Fed R Civ P 14*, but rather applies to counterclaims that already exist before the court to which additional parties may be joined for the granting of complete relief [*Fed R Civ P 13(h)*].

Distinguish:

The term "opposing party" refers only to a person or entity that is already a party in the action when the counterclaim is asserted [*see Youell v. Grimes (D Kan 2001) 203 FRD 503, 508*].

Strategic Point:

Before joining multiple parties on a counterclaim, consider whether this joinder will create new issues concerning personal jurisdiction or venue. The existing parties also should weigh carefully whether additional counterclaims or crossclaims will result from this joinder, and whether these are likely to unduly lengthen or complicate the proceeding. Joinder should not be automatic merely because it is possible, but should be used only for indispensable parties or when there will be a significant advantage in resolving the pending litigation.

Cross References:

Discussion of joining additional parties, see Ch. 4, Determining Parties to the Action, and Ch. 10, Adding, Dropping, and Substituting Parties. Discussion of third party claims and actions, see Ch. 12, Third-Party Actions.

11.18[5] Counterclaim Against Governmental Entity Requires Waiver of Sovereign Immunity. A counterclaim may be filed against the United States, a state, or tribal entity only if the governmental entity has waived its sovereign immunity as to the counterclaim. However, in most cases, once a governmental entity invokes the jurisdiction of the federal courts, the entity waives its sovereign immunity to counterclaims that arise out of the same transaction or occurrence [*see, e.g., Competitive Techs. v. Fujitsu Ltd. (ND Cal 2003) 286 F Supp2d 1118, 1129*].

Courts have tended to limit this waiver of sovereign immunity to compulsory counterclaims only, however. A governmental entity does *not* waive its sovereign immunity for unrelated, permissive counterclaims, merely by invoking the jurisdiction of the federal court on the claims asserted in its pleading [*see, e.g., In re Lazar (9th Cir 2001) 237 F3d*

967, 978 ; *Competitive Techs. v. Fujitsu Ltd. (ND Cal 2003) 286 F Supp2d 1118, 1129* ; *FDIC v F.S.S.S. (D Alaska 1993) 829 F Supp 317, 322* (by bringing suit, the US waives sovereign immunity as to compulsory counterclaims, but permissive counterclaims require separate basis of waiver); *see also Aholelei v. Dep't of Public Safety (9th Cir 2007) 488 F3d 1144, 1147-1149* (state defendants did not waive their sovereign immunity by filing third-party complaint because they had timely asserted immunity prior to filing that complaint and complaint was defensive move that was not incompatible with intent to preserve sovereign immunity)].

That a party may assert a counterclaim against the United States through *Fed R Civ P 13* does not enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency of the United States [*Fed R Civ P 13(d)*]. Therefore, the relief that may be obtained by asserting counterclaims against the United States is limited.

In this regard, the Ninth Circuit has not reached the question of whether the scope of the waiver with respect to compulsory counterclaims is limited to recoupment of damages obtained by the plaintiff governmental entity, or goes further to allow an affirmative award of damages against the entity [*see Competitive Techs. v. Fujitsu Ltd. (ND Cal 2003) 286 F Supp2d 1118, 1129*]. Some district courts in the Ninth Circuit have concluded that the waiver would only allow for recoupment [*see, e.g., California Indep. Sys. Operator Corp. v. Reliant Energy Servs., Inc. (ED Cal 2001) 181 F Supp2d 1111, 1125*].

Cross Reference:

Discussion of some of the statutory and other legal restrictions on asserting counterclaims against the United States, and other issues pertaining to asserting counterclaims against government entities, see 1 Moore's Federal Practice, Ch. 13, Counterclaim and Crossclaim (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory CounterclaimsCivil ProcedurePleading & PracticePleadingsCounterclaimsPermissive CounterclaimsCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderPermissive Joinder

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11.19 Counterclaims Must Be Raised in Responsive Pleadings.

Counterclaims must be raised in a responsive pleading, such as the answer to the complaint or a reply to a counterclaim [*Fed R Civ P 13 (a), (b)*]. In the Ninth Circuit, compulsory counterclaims may be asserted in a plaintiff's reply to a counterclaim [*Frank Briscoe Co. v. Clark County (9th Cir 1988) 857 F2d 606, 610* , *cert. denied*, *490 US 1048 (1989)* ; *see also Davis & Cox v. Summa Corp. (9th Cir 1985) 751 F2d 1507, 1525* (although the Federal Rules of Civil Procedure do not expressly authorize a plaintiff's bringing of "counterclaims in reply" to a defendant's counterclaims, the weight of authority allows the plaintiff to file such pleadings if the counterclaims in reply are compulsory, but denies them if permissive)].

Cross References:

Discussion of amending an answer to include a counterclaim, see *§ 11.22*. Discussion of pleading standards for counterclaims, see *§ 11.20*. Form of answer containing a counterclaim, see *§ 11.52*. Form of notice of motion and motion that seeks leave to amend the answer to include counterclaims, see *§ 11.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.20 Pleading Standards for Counterclaims.

11.20[1] Counterclaim Must Be Properly Pleaded. Whether asserted in the answer or in a reply to a counterclaim, counterclaims are claims for relief and therefore must be pleaded in accordance with all applicable pleading standards [*Fed R Civ P 8(a)*].

Warning:

As is the case when pleading any claim, careful pleading of counterclaims is important because allegations in a pleading to which no responsive pleading is required or permitted are taken as denied or avoided [*Fed R Civ P 8(b)(6)*].

11.20[2] Pleading Must Set Forth Jurisdiction. A counterclaim must contain a short and plain statement of the grounds on which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it [*Fed R Civ P 8(a)(1)*].

11.20[3] Pleading Must Contain a Short and Plain Statement of Claim. A counterclaim must contain a short and plain statement of the claim showing the pleader is entitled to relief [*Fed R Civ P 8(a)(2)*].

11.20[4] Pleading Must Demand Relief. A counterclaim must contain a demand for judgment for the relief the pleader seeks [*Fed R Civ P 8(a)(3)*].

Cross References:

Discussion of pleading requirements in general, see Ch. 6, Drafting the Summons and Complaint, and Ch. 8, Answers and Responsive Motions Under Rule 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral Overview

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11.21 Counterclaims Must Be Properly and Timely Served.

Even when counterclaims are asserted in the answer, the answer must be served in accordance with the rules applicable to any other answer [*see Cripps v. Life Ins. Co. of N. Am. (9th Cir 1992) 980 F2d 1261, 1267*]. Under the applicable rules, a defendant generally must serve an answer within 21 days after being served with the summons and complaint [*Fed R Civ P 12(a)(1)*].

Cross References:

Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.15 -5.23* and Ch. 7, Service of Summons.

Strategic Point:

If it is determined that compulsory counterclaims will be asserted in the answer to the complaint, consider seeking from the court an extension of time in which to file the answer, to ensure sufficient time to determine which counterclaims are compulsory and must be included in the answer. Consult local rules and individual judges' standing orders for the proper procedure for obtaining such an extension.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory Counterclaims

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11.22 Omitted Counterclaim May Be Preserved Through Amendment of a Pleading.

A party who fails to set up a counterclaim has the one-time right "as a matter of course" to amend its pleading within 21 days after serving it or within 21-days after service of a motion under *Fed R Civ P 12(b)*, *(e)*, or *(f)*, whichever is earlier [*see Fed R Civ P 15(a)(1)(B)*]. Otherwise, the party may amend its pleading to add a counterclaim only with the opposing party's written consent or the court's permission [*Fed R Civ P 15(a)(2)*; *see IXYS Corp. v. Advanced Power Tech., Inc. (ND Cal 2004) 2004 US Dist LEXIS 804, at *4* (court must be "very liberal" in granting leave to amend)]. With the permission of the court, a party also may raise a counterclaim that matured or was acquired by the pleader after the service of the responsive pleading [*Fed R Civ P 13(e)*].

Strategic Point:

A motion to dismiss under *Fed R Civ P 12(b)* is not a responsive pleading [*see Mayes v. Leipziger (9th Cir 1984) 729 F2d 605, 608*].

Cross Reference:

For a list of pleadings that generally require a responsive pleading, see *§ 9.07*. Further discussion of responsive pleadings and motions under *Fed R Civ P 12(b)*, see Ch. 8, Answers and Responsive Motions Under Rule 12.

In the Ninth Circuit, leave to amend is granted with extraordinary liberality [IXYS Corp v. Advanced Power Tech., Inc. (ND Cal 2004) 2004 US Dist LEXIS 804, at *4]. The factors that a court will consider when deciding a motion for leave to amend pleadings are undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the opposing party [IXYS Corp v. Advanced Power Tech., Inc. (ND Cal 2004) 2004 US Dist LEXIS 804, at *5 ; *see also Cooper Dev. Co. v. Employers Ins. of Wausau (ND Cal 1991) 765 F Supp 1429, 1432*]. In addition, the court will consider whether the party's proposed amended counterclaim is compulsory or permissive [IXYS Corp. v. Advanced Power Tech., Inc. (ND Cal 2004) 2004 US Dist LEXIS 804, at *14].

Distinguish--Amendment Not Permitted When Delay Is Prejudicial:

Despite the generally favorable view of court towards permitting amendments to assert omitted

counterclaims, a defendant's delay in seeking leave to amend will be grounds to deny leave when the defendant's delay results in prejudice to the opposing party. Courts frequently find prejudice when a defendant seeks an amendment so late in the proceedings that it will unduly delay the trial, such as when the omitted counterclaim will require new or additional discovery or new or additional trial preparation [*see, e.g., Magnesystems, Inc. v. Nikken, Inc. (CD Cal 1996) 933 F Supp 944, 952-953* (leave to amend to include permissive patent infringement counterclaims was denied because addition of claims would require new discovery and would, therefore, greatly prolong the litigation and delay plaintiff's recovery)].

Cross Reference:

Discussion of amending pleadings, see Ch. 9, Amending and Supplementing Pleadings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory CounterclaimsCivil ProcedurePleading & PracticePleadingsCounterclaimsPermissive Counterclaims

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11.23 Demand for Jury Trial Must Be Served.

If a jury trial on a counterclaim is desired, a jury demand must be served on the other parties at any time after the commencement of the action, and not later than 14 days after the service of the last pleading directed to such issue [*Fed R Civ P 38*].

Cross Reference:

Discussion of making a jury demand, see Ch. 13, Demanding a Jury Trial, see *§ 13.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsGovernmentsLegislationStatutes of LimitationsTime Limitations

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Unit 3 Pleading Stage
CHAPTER 11 Counterclaims, Crossclaims, and Replies
II. PREPARING AND DRAFTING COUNTERCLAIMS

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11.24 Counterclaim May Be Severed for Separate Trial.

The court may order a separate trial on a counterclaim in furtherance of convenience, to avoid prejudice, or when separate trials will be conducive to expedition and economy [*Fed R Civ P 42(b)*; *see also Fed R Civ P 21* (any claim against a party may be severed and proceeded with separately)]. If a court orders separate trials as provided in *Fed R Civ P 42(b)*, judgment on a counterclaim may be rendered in accordance with *Fed R Civ P 54(b)* if the court has jurisdiction to do so, "even if the opposing party's claims have been dismissed or otherwise resolved" [*Fed R Civ P 13(i)*].

Cross References:

Discussion of seeking a separate trial, see Ch. 18, Consolidation and Separate Trials.

The court may enter a separate judgment on a compulsory counterclaim if the claim is legally distinct from the original claim and involves at least some separate facts [*see Olympia Hotels Corp. v. Johnson Wax Dev. Corp. (7th Cir 1990) 908 F2d 1363, 1367-1368*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory CounterclaimsCivil ProcedurePretrial MattersSeparate Trials

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11.25 LOCAL PRACTICE: Requirements for Counterclaims.

11.25[1] LOCAL PRACTICE: CD Cal Requirements.

11.25[1][a] LOCAL PRACTICE: CD Cal Requirements--Alleging Jurisdiction Over Counterclaims. The basis for the exercise of jurisdiction by the court must be plainly stated in the first paragraph of any document invoking the Court's jurisdiction [*CD Cal Civ LR 8-1*].

11.25[1][b] LOCAL PRACTICE: CD Cal Requirements--Extending the Time to Respond to the Initial Complaint. A stipulation extending the time within which to answer or otherwise respond to the initial complaint by not more than 30 days does not have to be approved by the judge [*CD Cal Civ LR 8-3*].

Distinguish:

This rule does not apply to answers, replies or other responses to crossclaims, counterclaims, third-party complaints, or any amended or supplemental pleadings [*CD Cal Civ LR 8-3*].

11.25[1][c] LOCAL PRACTICE: CD Cal Requirements--Amended and Supplemental Pleadings. A proposed amended pleading must be electronically filed as a document separate from a related motion or stipulation [*CD Cal Civ LR 15-1*].

Every amended pleading must be complete and may not refer to the prior, superseded pleading [*CD Cal Civ LR 15-2*].

Every amended pleading must be filed as a paper document [*CD Cal Civ LR 15-4*].

Warning:

Individual judges' standing orders regarding amended pleadings should be consulted, as some maintain special requirements for amending pleadings in certain types of actions [*CD Cal Civ LR 8-3*].

11.25[2] LOCAL PRACTICE: ED Cal Requirements.

11.25[2][a] LOCAL PRACTICE: ED Cal Requirements--Alleging Jurisdiction Over Counterclaims. When alleging the jurisdictional basis of a counterclaim, the following procedure must be followed:

- The allegation of jurisdiction must appear as the first allegation of the counterclaim;
- The allegation must be clearly labeled "Jurisdiction";
- The allegation must state the claimed statutory or other basis of federal jurisdiction; and
- The allegation must state the facts supporting the jurisdictional claim [*ED Cal Civ LR 204*].

11.25[2][b] LOCAL PRACTICE: ED Cal Requirements--Changed Pleadings. Unless prior approval to the contrary is obtained from the Court, every pleading to which an amendment or supplement is permitted as a matter of right or by permission of the court must be retyped and filed so that it is complete in itself without reference to the prior or superseded pleading [*ED Cal Civ LR 220*].

11.25[2][c] LOCAL PRACTICE: ED Cal Requirements--Counterclaims in Class Actions. Counterclaims alleged to be brought for or against a class are governed by *ED Cal Civ LR 205*.

Cross Reference:

Discussion of class actions, see Ch. 20, Class Actions.

11.25[3] LOCAL PRACTICE: ND Cal Requirements. Any party filing or moving to file an amended pleading must reproduce the entire proposed pleading and may not incorporate any part of a prior pleading by reference [*ND Cal Civ LR 10-1*].

Distinguish:

By its own terms, *ND Cal Civ LR 10-1* applies only to *amended* pleadings. Therefore, a counterclaim may be incorporated by reference into the answer as an affirmative defense [*ND Cal Civ LR 10-1*]. Because, however, it is important that counterclaims are clearly designated in the responsive pleading, it is advisable to clearly distinguish counterclaims from affirmative defenses.

11.25[4] LOCAL PRACTICE: SD Cal Requirements.

11.25[4][a] LOCAL PRACTICE: SD Cal Requirements--Extension of Time to Answer. The parties may not extend the time for response merely by their own agreement. "Extensions for time for answering, or moving to dismiss a complaint shall only be secured by obtaining the approval of a judicial officer, who shall base the decision on a showing of good cause" [*SD Cal Civ LR 12.1*].

11.25[4][b] LOCAL PRACTICE: SD Cal Requirements--Amended Pleadings. Unless prior approval from the court is obtained, every amended pleading must be retyped and filed so that it is complete in itself without reference to the superseded pleading [*SD Cal Civ LR 15.1*].

Legal Topics:

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11.26 CHECKLIST: Determining Whether Use of Crossclaim Is Appropriate.

☐ Claim is against a coparty.

Authority:
Fed R Civ P 13(g)

Discussion:
See *§ 11.29[1]*

☐ Claim either:

○ Arises from same transaction or occurrence that is subject matter of either the original action or a counterclaim; or

○ Relates to property that is subject matter of original action.

Authority:
Fed R Civ P 13(g)

Discussion:
See *§ 11.30*

☐ A logical relationship exists between the crossclaim and the original claim.

Authority:

Fed R Civ P 13(g)

Discussion:
See *§ 11.30*

☐ The court will have subject matter jurisdiction over the claim.

Authority:
28 USC § 1367

Discussion:
See *§ 11.33*

☐ The court will have personal jurisdiction over the cross-defendant.

Authority:
Chemco Int'l Leasing, Inc. v. Meridian Eng'g, Inc. (SDNY 1984) 590 F Supp 539, 544

Discussion:
See *§ 11.34*

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.27 CHECKLIST: Drafting Crossclaims.

☐ Assert crossclaim in pleading.

Authority:
Fed R Civ P 13(g)

Discussion:
See *§ 11.37*

☐ Comply with pleading standards.

Authority:
Fed R Civ P 8

Discussion:
See *§ 11.38*

☐ Allege subject matter jurisdiction.

Authority:
Fed R Civ P 8

Discussion:
See *§ 11.38[1]*

☐ Comply with applicable statutes of limitations.

Authority:
Kansa Reinsurance Co. v. Congressional Mortgage Corp. (5th Cir 1994) 20 F3d 1362, 1367

Discussion:
See *§ 11.32*

☐ If asserting crossclaim in answer, timely serve answer within 21 days after being served with summons and complaint.

Authority:
Fed R Civ P 12(a)(1)

Discussion:
See *§ 11.39*

☐ Verify that crossclaim is being made against a coparty.

Authority:
Fed R Civ P 13(g)

Discussion:
See *§ 11.29[1]*

☐ Include jury demand if desired.

Authority:
Fed R Civ P 38

Discussion:
See *§ 11.41*

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.28 Options and Strategy--Crossclaims.

Unlike counterclaims, crossclaims are always "permissive"--a matter of option or choice. Thus, a defendant considering whether to assert a crossclaim must always balance whether there will be some real advantage to doing so. Frequently, it will be advantageous to have the entire dispute among the parties resolved in a single action. With other crossclaims, the cost of bringing them in the present action, in terms of complicating and delaying the proceeding, will outweigh any conceivable advantage. It will usually be easier to make a considered analysis of these issues at the beginning of the litigation, and to forego asserting an unnecessary cross-complaint, than it will be to try to uncomplicate a proceeding at a later stage of the litigation, by bringing a noticed motion for severance of the cross-complaint.

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.29 Determining Parties to Crossclaims.

11.29[1] Crossclaims Are Made by a Party Against a Coparty. Crossclaims are made against a coparty [*Fed R Civ P 13(g)*]. Coparties have been defined as parties having like status [*see Hansen v. Shearson/Am. Express, Inc. (ED Pa 1987) 116 FRD 246*], as any party that is not an opposing party [*see Georgia Ports Authority v. Construzioni Meccaniche Industriali Genovesi SpA (SD Ga 1988) 119 FRD 693, 695*], or as a party on the same side of a litigation [*see Stahl v. Ohio River Co. (3d Cir 1970) 424 F2d 52, 55*].

There is some authority for the proposition that coparties may become "opposing parties" within the meaning of *Fed R Civ P 13(a)*, however. According to this authority, "coparties" may become "opposing parties" after one pleads a substantive crossclaim (as opposed to a crossclaim that is just for contribution or indemnity) against the other [*see Rainbow Mgmt. Group, Ltd. v. Atlantis Submarines Hawaii, LP (D Haw 1994) 158 FRD 656, 659-660* (citing Moore's)].

Cross Reference:

Discussion of possibility of coparties becoming "opposing parties" after filing of crossclaim, see 3 *Moore's Federal Practice, § 13.90[2][a]* (Matthew Bender 3d ed.).

11.29[2] Crossclaims May Be Made Only Against Existing Parties. Crossclaims may be made only against existing parties [*In re Street (Bankr D Ariz 2002) 283 BR 775, 781*]. A claim against a new party is a third-party claim [*see Fed R Civ P 14*].

11.29[3] Crossclaim May Be Brought Against Party Joined Under Fed R Civ P 14. A crossclaim may be brought against a party who has been brought into the suit by third-party complaint under *Fed R Civ P 14* [*Fed R Civ P 14(a)*].

11.29[4] Joined Parties May Be Parties to Crossclaim. Persons other than those made parties to the original action may be made parties to a crossclaim in accordance with the provisions of *Fed R Civ P 19* (compulsory joinder) and 20 (permissive joinder) [*Fed R Civ P 13(h)*; *see, e.g., SAES Getters SpA v. Aeronex, Inc. (SD Cal 2002) 219 F Supp2d 1081, 1085* (demonstrating correlation between *Fed R Civ P 13(h)*, *Fed R Civ P 15(a)*, *Fed R Civ P 19*, and *Fed*

R Civ P 20)].

11.29[5] Crossclaims Against Governmental Entity. A crossclaim may be filed against the United States, a state, or a tribal entity only if the governmental entity has waived its sovereign immunity as to the crossclaim [*see Wichita & Affiliated Tribes v. Hodel (DC Cir 1986) 788 F2d 765, 778* (sovereign immunity as to crossclaim by coparty was not waived by tribe's instituting action); United States v. 255. *21 Acres in Anne Arundel County (D Md 1989) 722 F Supp 235, 237* (when government has consented to suit with respect to particular claims, claim may be asserted in any manner procedural rules permit, whether as original action, counterclaim, crossclaim, or third-party claim)].

Cross Reference:

Discussion of some of the statutory and other legal restrictions on asserting crossclaims against the United States, and other issues pertaining to asserting crossclaims against governmental entities, see 3 Moore's Federal Practice, Ch. 13, Counterclaim and Crossclaim (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.30 Logical Relationship Must Exist Between Claim and Crossclaim.

A crossclaim must arise out of the same transaction or occurrence as the claim that is the subject matter of the original action or of a counterclaim [*Fed R Civ P 13(g)*]. To determine whether a claim and crossclaim arise from the "same transaction or occurrence," the inquiry is essentially the same as that used to determine whether a counterclaim is compulsory [*see Seattle Audubon Soc'y v. Lyons (WD Wash 1994) 871 F Supp 1286, 1290* (crossclaim "transaction or occurrence" standard is expansive, akin to the "logical relationship" test for compulsory counterclaims)]. Courts will looks to see whether the original claim and the crossclaim have a "logical relationship" to each other [*see Pochiro v. Prudential Ins. Co. (9th Cir 1987) 827 F2d 1246, 1249* (applying "logical relationship" test to determine if counterclaim is compulsory)]. In practical terms, this means that the facts to the original claim and the crossclaim are so related that judicial economy and fairness favor their resolution in a single lawsuit [*see Hydranautics v. Filmtec Corp. (9th Cir 1995) 70 F3d 533, 536*]. Thus, if separate trials of the original claim and the crossclaim would result in a substantial duplication of effort, the required "logical relationship" exists [*see* Caesar's World, Inc. v. Milanian (D Nev 2003 *247 F Supp2d 1171, 1202* (case dealing with compulsory counterclaim issue)].

Cross References:

Discussion of the application of "logical relationship" standard for determining whether a counterclaim is compulsory, see *11.09[1]*. Examples of cases finding counterclaims to be either compulsory or permissive, see *§ 11.09[3]*.

Further discussion of the factors used to determine whether a counterclaim or crossclaim arises from the same transaction or occurrence as the plaintiff's claim, see 3 Moore's Federal Practice, see *§§ 13.10 -13.13*, 13.70 (Matthew Bender 3d ed.).

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11.31 Crossclaims Are Permissive.

All crossclaims are permissive in the sense that the failure to bring the claim in one action does not bar the claim in a subsequent action [*Answering Serv., Inc. v. Egan (DC Cir 1984) 728 F2d 1500, 1503* (claim compulsory only when it is asserted against an opposing party); *see also United States v. Confederate Acres Sanitary Sewage & Drainage Sys., Inc. (6th Cir 1991) 935 F2d 796, 799* (potential crossclaims were not actually presented by defendant, and court could not compel defendant to litigate them because crossclaims are permissive)]. However, a permissive crossclaim is not the same as a permissive counterclaim in this regard. A permissive counterclaim is one that does not arise from the transaction or occurrence that is the subject matter of the opposing party's claim [*Fed R Civ P 13(b)*]. In contrast, even though the failure to bring it does not bar it in a later action, a crossclaim must arise from the same transaction or occurrence that is the subject matter of the original action [*Fed R Civ P 13(g)*]. In that regard, a crossclaim is more akin to a compulsory counterclaim [*see Fed R Civ P 13(a)*]. Unrelated crossclaims between coparties are not permitted.

Example:

P sues D in diversity, and D has an unrelated claim against P. D may bring the claim as a permissive counterclaim under Rule 13(b) because diversity provides subject matter jurisdiction. But if P sues D1 and D2, and D1 has an unrelated claim against D2, the claim may not be brought as a crossclaim because it does not arise from the same transaction or occurrence as required by Rule 13(g).

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.32 Crossclaims Must Comply With Applicable Statutes of Limitations.

Crossclaims that seek affirmative and independent relief are time barred if not filed within the applicable statute of limitations period [*Kansa Reinsurance Co. v. Congressional Mortgage Corp. (5th Cir 1994) 20 F3d 1362, 1367* (*Fed R Civ P 13(g)* governing crossclaims does not permit relation back of a crossclaim seeking affirmative and independent relief to the original complaint); *see United States for the Use of Bros. Builders Supply Co. v. Old World Artisans, Inc. (ND Ga 1988) 702 F Supp 1561, 1569* (common law rule that statutes of limitation do not run against pure defenses does not apply to setoffs, counterclaims, or crossclaims that are affirmative, independent causes of action)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.33 Court May Have Supplemental Jurisdiction Over Crossclaims.

Under the supplemental jurisdiction statute, courts may exercise jurisdiction over a crossclaim if it is so related to claims over which the court has original jurisdiction that they form part of the same case or controversy [*28 USC § 1367*]. Because crossclaims by definition arise out of the same transaction or occurrence as the main claim [*Fed R Civ P 13(g)*], the rule should be that they are always within the court's supplemental jurisdiction, as was the case before the statute was enacted [*see Allstate Ins. Co. v. James (11th Cir 1986) 779 F2d 1536, 1539* ; *In re Oil Spill by Amoco Cadiz (7th Cir 1983) 699 F2d 909, 913* ; *cf. Glaziers & Glassworkers Union Local 252 Annuity Fund v. Newbridge Sec., Inc. (ED Pa 1993) 823 F Supp 1191, 1197* (court exercised its discretion under *28 USC § 1367(c)* to decline supplemental jurisdiction over state law crossclaims for contribution and indemnification; implicit is assumption that claims would be within supplemental jurisdiction)].

Cross References:

Further discussion of supplemental jurisdiction with regard to counterclaims and the "same transaction or occurrence" standard, see *§ 11.11*.

Further discussion of the factors used to determine whether a counterclaim or crossclaim is within the court's statutory supplemental jurisdiction, see 3 *Moore's Federal Practice, § 13.110* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsTransactional Requirement

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11.34 Court Must Have Personal Jurisdiction Over Cross-Defendant.

A cross-defendant may raise the same jurisdictional defenses against the coparty crossclaimant as against the plaintiff [*National Trust for Historic Pres. v. 1750 K Inv. P'ship (ED Va 1984) 100 FRD 483, 487 , aff'd, (4th Cir 1985) 755 F2d 929* (even though crossclaimant filed crossclaim, court never had in personam jurisdiction over co-defendant, who was not properly served with original complaint, and crossclaim would, therefore, be dismissed as well)]. If, however, a court has personal jurisdiction over a defendant for purposes of the main claim, it will have personal jurisdiction for purposes of a crossclaim, which arises out the same transaction or occurrence as the original action [*Chemco Int'l Leasing, Inc. v. Meridian Eng'g, Inc. (SDNY 1984) 590 F Supp 539, 544* (court had jurisdiction over crossclaim arising from same transaction as subject matter of original action when plaintiff was properly before court on main claim)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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11.35 Removal May Not Be Based on Federal-Question Crossclaim.

Removal of a case to federal court may not be based on a crossclaim that raises a federal question [*see Redevelopment Agency of San Bernardino v. Alvarez (CD Cal 2003) 288 F Supp2d 1112, 1115*].

Cross Reference:

Discussion of removing an action to federal court, see Ch. 3, Removing a State Court Case to Federal Court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisFederal QuestionsCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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11.36 Relief Available Through Crossclaims.

A pleading may state as a crossclaim *any* claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim in the original action, or relating to any property that is the subject matter of the original action. A crossclaim may include a claim that the party against whom it is asserted is, or may be, liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant [*Fed R Civ P 13(g)*].

Legal Topics:

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11.37 Crossclaims Must Be Raised in Pleading.

A crossclaim must be stated in a pleading [*Fed R Civ P 13(g)*; *see Bernstein v. IDT Corp. (D Del 1984) 582 F Supp 1079, 1089* (citing **Moore's,** crossclaims are not pleadings but must be set forth in pleading)]. The rule is that a crossclaim must be asserted in the answer [*In re Cessna Aircraft Distributorship Antitrust Litig. (8th Cir 1976) 532 F2d 64, 67-68* ; *see Fed R Civ P 7(a)*].

Cross References:

Discussion of need to include crossclaim in answer, see 3 *Moore's Federal Practice, § 7.02[3][b]* (Matthew Bender 3d ed.).

Further discussion of what constitutes a responsive pleading, see Ch. 8, Answers and Responsive Motions Under Rule 12.

Legal Topics:

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11.38 Pleading Standards for Crossclaims.

11.38[1] Pleading Must Set Forth Jurisdiction. A crossclaim must contain a short and plain statement of the grounds on which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it [*Fed R Civ P 8(a)(1)*].

11.38[2] Pleading Must Contain a Short and Plain Statement of Claim. A crossclaim must contain a short and plain statement of the claim showing the pleader is entitled to relief [*Fed R Civ P 8(a)(2)*].

11.38[3] Pleading Must Demand Relief. A crossclaim must contain a demand for judgment for the relief the pleader seeks [*Fed R Civ P 8(a)(3)*].

Cross References:

Discussion of pleading requirements in general, see Ch. 6, Drafting the Summons and Complaint, and Ch. 8, Answers and Responsive Motions Under Rule 12.

Legal Topics:

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11.39 Crossclaims Must Be Properly and Timely Served.

An answer containing a crossclaim must be served as provided by *Fed R Civ P 4* [*see Cripps v. Life Ins. Co. of N. Am. (9th Cir 1992) 980 F2d 1261, 1267*]. Generally, a defendant must serve the answer within 21 days after being served with the summons and complaint [*Fed R Civ P 12(a)(1)(A)(i)*].

Cross References:

Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.15 -5.23* and Ch. 7, Service of Summons.

Legal Topics:

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11.40 Omitted Crossclaim May Be Presented Through Amendment of a Pleading.

A party may amend the answer to include an omitted crossclaim once as a matter of right, *i.e.*, without first obtaining permission from the court, within 21 days after serving it or within 21 days after service of a motion under *Fed R Civ P 12(b)*, *(e)*, or *(f)*, whichever is earlier [*see Fed R Civ P 15(a)(1)(B)*]. Otherwise, the party may amend its pleading to add a counterclaim only with the opposing party's written consent or the court's permission [*Fed R Civ P 15(a)(2)*].

In the Ninth Circuit, leave to amend is granted "with extraordinary liberality" [IXYS Corp v. Advanced Power Tech., Inc. (ND Cal 2004) 2004 US Dist LEXIS 804, at *4]. The factors that a court will consider when deciding a motion for leave to amend pleadings are undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the opposing party [IXYS Corp v. Advanced Power Tech., Inc. (ND Cal 2004) 2004 US Dist LEXIS 804, at *5 ; *see also Cooper Dev. Co. v. Employers Ins. of Wausau (ND Cal 1991) 765 F Supp 1429, 1432*].

Cross Reference:

Discussion of amending pleadings, see Ch. 9, Amending and Supplementing Pleadings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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III. PREPARING AND DRAFTING CROSSCLAIMS

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11.41 Demand for Jury Trial Must Be Served.

If a jury trial on a crossclaim is desired, a jury demand must be served on the other parties at any time after the commencement of the action, and not later than 14 days after the service of the last pleading directed to such issue [*Fed R Civ P 38*].

Cross Reference:

Discussion of making a jury demand, see Ch. 13, Demanding a Jury Trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsGovernmentsLegislationStatutes of LimitationsTime Limitations

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11.42 Crossclaims May Be Severed for Separate Trial.

Any claim against a party may be severed and proceeded with separately [*Fed R Civ P 21*].

Cross Reference:

Discussion of severing claims, see Ch. 18, consolidation and Separate Trials, see *§§ 18.21 -18.38*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePretrial MattersSeparate Trials

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III. PREPARING AND DRAFTING CROSSCLAIMS

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11.43 LOCAL PRACTICE: Requirements for Crossclaims.

11.43[1] LOCAL PRACTICE: CD Cal Requirements.

11.43[1][a] LOCAL PRACTICE: CD Cal Requirements--Alleging Jurisdiction Over Crossclaims. The basis for the exercise of jurisdiction by the court must be plainly stated in the first paragraph of any document invoking this court's jurisdiction [*CD Cal Civ LR 8-1*].

11.43[1][b] LOCAL PRACTICE: CD Cal Requirements--Extending the Time to Respond to the Initial Complaint. A stipulation extending the time within which to answer or otherwise respond to the initial complaint by not more than 30 days need not be approved by the judge, and will be filed [*CD Cal Civ LR 8-3*].

Distinguish:

This does not apply to extensions of time within which to answer answers, replies or other responses to crossclaims, counterclaims, third-party complaints, or any amended or supplemental pleadings [*CD Cal Civ LR 8-3*].

11.43[1][c] LOCAL PRACTICE: CD Cal Requirements--Amended and Supplemental Pleadings. A proposed amended pleading must be electronically filed as a document separate from a related motion or stipulation [*CD Cal Civ LR 15-1*].

Every amended pleading must be complete in and of itself, and may not refer to the prior, superseded pleading [*CD Cal Civ LR 15-2*].

Every amended pleading must be filed as a paper document [*CD Cal Civ LR 15-4*].

Individual judges' standing orders regarding amended pleadings should be consulted, as some maintain special requirements for amending pleadings in certain types of actions.

11.43[2] LOCAL PRACTICE: ED Cal Requirements.

11.43[2][a] LOCAL PRACTICE: ED Cal Requirements--Alleging Jurisdiction Over Crossclaims. When alleging the jurisdictional basis of a crossclaim, the following procedure must be followed [*ED Cal Civ LR 204*]:

- The allegation of jurisdiction must appear as the first allegation of the crossclaim;
- The allegation must be clearly labeled "Jurisdiction";
- The allegation must state the claimed statutory or other basis of federal jurisdiction; and
- The allegation must state the facts supporting the jurisdictional claim.

11.43[2][b] LOCAL PRACTICE: ED Cal Requirements--Changed Pleadings. Unless prior approval to the contrary is obtained from the Court, every pleading to which an amendment or supplement is permitted as a matter of right or by permission of the court, must be retyped and filed so that it is complete in itself without reference to the prior or superseded pleading [*ED Cal Civ LR 220*].

11.43[2][c] LOCAL PRACTICE: ED Cal Requirements--Crossclaims in Class Actions. Crossclaims alleged to be brought for or against a class are governed by *ED Cal Civ LR 205* [*ED Cal Civ LR 205*].

Cross Reference:

Discussion of class actions, see Ch. 20, Class Actions.

11.43[3] LOCAL PRACTICE: ND Cal Requirements. Any party filing or moving to file an amended pleading must reproduce the entire proposed pleading and may not incorporate any part of a prior pleading by reference [*ND Cal Civ LR 10-1*].

11.43[4] LOCAL PRACTICE: SD Cal Requirements.

11.43[4][a] LOCAL PRACTICE: SD Cal Requirements--Extension of Time to Answer. The parties may not extend the time for filing the answer and any included cross-complaints merely through their own agreement. Extensions of time for answering, or moving to dismiss a complaint may only be secured by obtaining the approval of a judicial officer, who must base the decision on a showing of good cause [*SD Cal Civ LR 12.1*].

11.43[4][b] LOCAL PRACTICE: SD Cal Requirements--Amended Pleadings. Unless prior approval from the court is obtained, every amended pleading must be retyped and filed so that it is complete in itself without reference to the superseded pleading [*SD Cal Civ LR 15.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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IV. RESPONDING TO COUNTERCLAIMS AND CROSSCLAIMS

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11.44 CHECKLIST: Analyze Counterclaim to Determine Appropriate Response.

☐ Determine whether counterclaim was compulsory to an earlier action.

Authority:
Hydranautics v. FilmTec Corp. (9th Cir 1995) 70 F3d 533, 536

Discussion:
See *§ 11.09*

☐ Determine whether counterclaim may be dismissed on motion.

Authority:
Fed R Civ P 12

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Discussion:
See *§ 11.08*

☐ Determine whether the counterclaim is being brought within the applicable statute of limitations.

Authority:
City of Saint Paul, Alaska v. Evans (9th Cir 2003) 344 F3d 1029, 1033-1036

Discussion:

See *§ 11.10*

☐ Determine if counterclaim is asserted by and against parties in their proper capacity.

Authority:
Fed R Civ P 13

Discussion:
See *§ 11.18[2]*

☐ Determine whether the court has jurisdiction over the counterclaim.

Authority:
28 USC § 1367

Discussion:
See *§ 11.11*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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11.45 CHECKLIST: Analyze Crossclaim to Determine Appropriate Response.

☐ Determine whether claim arises out of same transaction or occurrence as original claim.

Authority:
Fed R Civ P 13(g)

Discussion:
See *§ 11.30*

☐ Determine whether the court has personal jurisdiction over the cross-defendant.

Authority:
Fed R Civ P 12

Discussion:
See *§ 11.34*

☐ Determine whether the crossclaim is being brought within the applicable statute of limitations.

Authority:
Kansa Reinsurance Co. v. Congressional Mortgage Corp. (5th Cir 1994) 20 F3d 1362, 1367

Discussion:
See *§ 11.32*

☐ Determine if crossclaim is asserted by and against parties in their proper capacity.

Authority:
Fed R Civ P 13(g)

Discussion:
See *§ 11.29*

☐ Determine whether the court has jurisdiction over the crossclaim.

Authority:
28 USC § 1367

Discussion:
See *§ 11.33*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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11.46 Options and Strategy: Responding to Counterclaims and Crossclaims.

11.46[1] All Options Available to Attack Claim for Relief. Counterclaims and crossclaims state claims for affirmative relief. Therefore, all of the vehicles that are available with respect to answering and moving to dismiss claims in general are applicable when replying to counterclaims and crossclaims.

Cross Reference:

Discussion of answers and motions under *Fed R Civ P 12*, see Ch. 8, Answers and Responsive Motions Under Rule 12.

11.46[2] Consider Moving to Dismiss If Claim Was Compulsory Counterclaim to a Prior Suit. If a claim was a compulsory counterclaim in a prior suit, the pleader is barred from bringing the claim in the instant action [*see Hydranautics v. FilmTec Corp. (9th Cir 1995) 70 F3d 533, 536*].

Cross References:

Discussion, see *§ 11.08*.

Form of motion to dismiss a claim that should have been pleaded as a compulsory counterclaim in a prior action, see 4 *Bender's Federal Practice Forms, Form 13:23* (Matthew Bender).

11.46[3] Consider Motion to Dismiss Under Fed R Civ P 12. The sufficiency of a counterclaim or crossclaim may be challenged by a motion under *Fed R Civ P 12* [*Fed R Civ P 12(b)*].

Cross References:

Discussion of making motions under *Fed R Civ P 12(b)*, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§§ 8.14 -8.22*.

Form of motion to dismiss a counterclaim, see 4 *Bender's Federal Practice Forms, Form 13:20* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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11.47 Responsive Pleading to Counterclaim Is Reply.

A reply to a counterclaim must be designated as such [*Fed R Civ P 7(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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11.48 Responsive Pleading to Crossclaim Is Answer.

The pleading to be filed in response to a crossclaim is denominated an answer [*Fed R Civ P 7(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & Interpretation

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IV. RESPONDING TO COUNTERCLAIMS AND CROSSCLAIMS

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11.49 Responsive Pleading May Include Additional Claims.

11.49[1] Responsive Pleading May Include Compulsory Counterclaim. If the defendant's answer asserts counterclaims or crossclaims that, in turn, involve additional claims that the plaintiff or coparty has against the defendant, the plaintiff or coparty may assert these claims as counterclaims in the reply to the counterclaim or answer to the crossclaim [*see Fed R Civ P 13*; *see Frank Briscoe Co. v. Clark County (9th Cir 1988) 857 F2d 606, 610 , cert. denied, (1989) 490 US 1048* (in action by contractor against county, contractor was entitled to file counterclaims for breach of contract and warranty in its reply to county's answer stating counterclaims for breach)]. If these claims arise from the same transaction and occurrence as the defendant's counterclaim or crossclaim, then they are compulsory counterclaims and must be made in the reply or answer. Failure to do so may mean that they will be waived [*Fed R Civ P 13(a)*; *see Hydranautics v. FilmTec Corp. (9th Cir 1995) 70 F3d 533, 536*].

Cross References:

If a responsive pleading includes a compulsory counterclaim, all of the considerations for asserting a counterclaim are applicable; discussion, see *§§ 11.03 -11.25*. Discussion of the consequences of failing to plead compulsory counterclaims, see *§ 11.08*. Discussion of what constitutes the same transaction or occurrence, see *§ 11.09*.

11.49[2] Responsive Pleading May Include Permissive Counterclaim. Permissive counterclaims may be included in any pleading [*Fed R Civ P 13(b)*]. Therefore, the reply to a counterclaim or answer to a crossclaim may also include additional claims that do not arise from the same transaction or occurrence that is the subject matter of the defendant's counterclaim or crossclaim [*see Frank Briscoe Co. v. Clark County (9th Cir 1988) 857 F2d 606, 610 , cert. denied, 490 US 1048 (1989)*].

Cross References:

If a responsive pleading includes a permissive counterclaim, all of the considerations for asserting a counterclaim are applicable; discussion, see *§§ 11.03 -11.25*. Discussion of distinguishing between compulsory and permissive counterclaims, see *§ 11.09*.

11.49[3] Responsive Pleading May Include Crossclaim. Crossclaims against a coparty may also be included in any pleading, including a reply to a counterclaim or answer to a crossclaim. Crossclaims must arise from the same transaction or occurrence as the defendant's counterclaim [*Fed R Civ P 13(g)*].

Cross References:

If a responsive pleading includes a crossclaim, all of the considerations for asserting a crossclaim are applicable; discussion, see *§§ 11.26 -11.43*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral Overview

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11.50 Responsive Pleading Must Comply With Pleading Standards.

When asserting a reply to a counterclaim or answer to a crossclaim, all applicable pleading standards pertaining to assertion of denials and affirmative defenses must be followed [*Fed R Civ P 8(b)*]. Some of the important rules in this regard are:

- The responding party must state in short and plain terms the party's defenses to each claim asserted in the counterclaim or crossclaim and must admit or deny the averments on which the counterclaimant or crossclaimant relies [*Fed R Civ P 8(b)*].

- If the responding party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party must so state [*Fed R Civ P 8(b)*].

- If the responding party intends in good faith to deny only part or a qualification of an averment, the party must specify so much of it as is true and material and deny only the remainder [*Fed R Civ P 8(b)*].

- The responding party must set forth all applicable affirmative defenses [*Fed R Civ P 8(c)*].

Cross References:

Discussion of the pleading standards required for denials and affirmative defenses, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§§ 8.09*, *8.10*. Form of reply to a counterclaim, see *§ 11.56*. Form of answer to a crossclaim, see *§ 11.57*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview

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11.51 Responsive Pleading Must Be Timely Served.

A party served with a pleading stating a crossclaim against the party must serve an answer within 21 days after being served. Similarly, the plaintiff must serve a reply to a counterclaim in the defendant's answer within 21 days after service of the answer [*Fed R Civ P 12(a)(1)(A)*].

Warning:

Failure to respond to a pleading to which a response is required will result in an admission of the averment to which no response is made [*Fed R Civ P 8(b)(6)*]. Further, opposing counsel may seek to obtain a default judgment on a counterclaim or crossclaim to which no response is made [*Fed R Civ P 54(c)*].

Cross Reference:

Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.15 -5.23* and Ch. 8, Answers and Responsive Motions Under Rule 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral Overview

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11.52 Answer and Counterclaim.

Answer and Counterclaim.
_____[*attorney's name and California Bar number*]
_____[*attorney's street address*]
_____[*city, state, and zip code*]
_____[*phone number*]
_____[*fax number*]
_____[*attorney's e-mail address*]
Attorney for _____[*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CALIFORNIA
DIVISION

___ [*name*] , Plaintiff vs. ___ [*name*] , Defendant	Civil Action No. _____ DEFENDANT'S ANSWER AND COUNTER-CLAIM [*Add, if appropriate:* DEMAND FOR JURY TRIAL]

ANSWER

Defendant _____ [*name of defendant*] as and for its answer to the complaint states as follows:

[*In separate numbered paragraphs, set forth responses to each allegation of the complaint, such as* Deny the allegations set forth in paragraph 1 of the complaint, or Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the complaint.]

AFFIRMATIVE DEFENSES

[*In separate numbered paragraphs, set forth all affirmative defenses to the causes of action alleged in the complaint*.]

COUNTERCLAIM

PARTIES

[*In separate numbered paragraphs, allege the capacity of each party to the counterclaim*, *e.g.*, Counterclaimant/Defendant is a California corporation whose principal place of business is San Francisco, California.]

JURISDICTION

[*In separate numbered paragraphs, allege facts that demonstrate that the court has subject matter jurisdiction over the counterclaim, e.g.*, Jurisdiction is proper because the claims set out in this pleading form part of the same case or controversy as the original claim over which the Court has original jurisdiction and, therefore, falls within the supplemental jurisdiction of the Court under *section 1367 of Title 28 of the United States Code*.]

[*In separate numbered paragraphs, set forth the allegations for each counterclaim asserted. Separate headings may be used for each separate claim*.]

PRAYER FOR RELIEF

WHEREFORE, Defendant _____ [*name of party*] respectfully requests the following relief:

[*Set forth the requested relief in separate paragraphs*.]

[*If making a jury demand*:

DEMAND FOR JURY TRIAL

Counterclaimant/Defendant _____ (*name of party*) requests a trial by jury on its counterclaim for (*identify counterclaims, e.g.*, breach of contract).]
Dated: _____

Respectfully Submitted,

_____ [*firm name*]

By: _____ [*signature*]

_____ [*printed name*]

Attorneys for _____ [*name*]

NOTES.

Authority:
Fed R Civ P 7(a), 13

Preparing and Drafting Counterclaims:
See *§§ 11.03 -11.25*

Timing:
See *§ 11.21*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & ControversyCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedureCounselGeneral OverviewCivil ProcedureTrialsJury TrialsJury Demands

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V. FORMS

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11.53 Notice of Motion and Motion for Leave to File Amended Answer and Counterclaims.

Notice of Motion and Motion for Leave to File Amended Answer and Counterclaims.
_____[*attorney's name and California Bar number*]
_____[*attorney's street address*]
_____[*city, state, and zip code*]
_____[*phone number*]
_____[*fax number*]
_____[*attorney's e-mail address*]
Attorney for _____[*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CALIFORNIA
DIVISION

_____	Civil Action No.
_____	_____
_____	
___[*name*],	
Plaintiff	NOTICE OF MOTION AND MOTION FOR
vs.	LEAVE TO FILE AMENDED ANSWER AND
_____	COUNTERCLAIM
_____	
_____	Date of Hearing:
___[*name*],	_____
Defendant	_____
	Time of Hearing:

_____
_____
Courtroom No.
_____
_____

_____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

TAKE NOTICE that on _____[*date*] at _____[*time*], Defendant and Counterclaimant _____[*name of movant*] will move the Court under Federal Rule of *Civil Procedure 15(a)* for leave to file an Amended Answer and Counterclaim. Specifically, Defendant/Counterclaimant seeks to add this additional counterclaim against the Plaintiff and Counter-Defendant for _____[*state basis of counterclaim, e.g.,* defamation], because _____ [*state reason, e.g.*, the claim did not exist at the time Defendant/Counterclaimant filed Defendant/Counterclaimant's First Amended Answer *or* the counterclaim was omitted from the answer due to excusable neglect and justice requires that leave to amend be granted].

[*If the counterclaim was omitted from the pleading, add* The omission of the claim is not due to undue delay, bad faith or dilatory motive, and no prejudice to the opposing party will result as a result of the assertion of this counterclaim.]

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____[affidavit *or* declaration] of _____[*name*], ...[*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.

Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 15(a)

Preparing and Drafting Counterclaims:
See *§§ 11.03 -11.25*

Timing:
See *§ 11.21*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedureCounselGeneral Overview

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V. FORMS

2-11 MB Practice Guide: Fed Pretrial Civ Proc in CA 11.54

11.54 Notice of Motion and Motion to Join Party on Counterclaim.

Notice of Motion and Motion to Join Party on Counterclaim.
_____[*attorney's name and California Bar number*]
_____[*attorney's street address*]
_____[*city, state, and zip code*]
_____[*phone number*]
_____[*fax number*]
_____[*attorney's e-mail address*]
Attorney for _____[*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CALIFORNIA
DIVISION

_____	Civil Action No.
___ [*name*] , Plaintiff vs. _____ _____ _____ ___ [*name*] , Defendant	NOTICE OF MOTION AND MOTION TO JOIN PARTY ON COUNTERCLAIM Date of Hearing: _____ Time of Hearing: _____

Courtroom No.
_____
_____

_____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

TAKE NOTICE that on _____[*date*] at _____[*time*], Defendant and Counterclaimant _____[*name of movant*] will move the Court under Federal Rule of *Civil Procedure 13(h)* for an order joining _____[*name of third party, e.g.,* Martha Jones] as a defendant to this movant's counterclaim, and further directing that a summons be served on _____[*name of third party, e.g.,* Martha Jones] to respond to this movant's counterclaim.

Joinder of _____[*name of third party, e.g.,* Martha Jones] is proper under *Fed R Civ P 13(h)* because _____ [*insert applicable authority from Fed R Civ P 13(h), e.g.*, absent joinder of Martha Jones, complete relief cannot be accorded to movant from those already party to the action]. Further, joinder of _____[*name of third party, e.g.,* Martha Jones] is proper under *Fed R Civ P 19* because _____[*insert applicable authority from Fed R Civ P 19, e.g.*, joinder of Martha Jones will not deprive the court of jurisdiction over the subject matter of plaintiff's action]. Additionally, _____[*insert applicable authority under Fed R Civ P 20, e.g.*, movant's counterclaim against Martha Jones arises out of the same transaction or occurrence as plaintiff's original claim, and questions of law or fact common to all these persons will arise in the action].

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____[affidavit *or* declaration] of _____[*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.

Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 13(h), 19, 20

Preparing and Drafting Counterclaims:
See *§§ 11.03 -11.25*

Timing:
See *§ 11.21*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderPermissive JoinderCivil ProcedureCounselGeneral OverviewCriminal Law & ProcedurePreliminary ProceedingsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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Unit 3 Pleading Stage
CHAPTER 11 Counterclaims, Crossclaims, and Replies
V. FORMS

2-11 MB Practice Guide: Fed Pretrial Civ Proc in CA 11.55

11.55 Answer and Crossclaim.

Answer and Crossclaim.
_____[*attorney's name and California Bar number*]
_____[*attorney's street address*]
_____[*city, state, and zip code*]
_____[*phone number*]
_____[*fax number*]
_____[*attorney's e-mail address*]
Attorney for _____[*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CALIFORNIA
DIVISION

_____

_____	)	
_____	)	Civil Action No.
_____	)	_____
___ [*name*] ,	)	_____
Plaintiff	)	
vs.	)	
_____	)	DEFENDANT'S ANSWER AND CROSSCLAIM]
_____		[*Add, if appropriate:* DEMAND FOR JURY TRIAL]
_____		
___ [*name*] ,		
Defendant		

_____

ANSWER

Defendant _____[*name of defendant*] as and for its Answer to the Complaint states as follows:

[*In separate numbered paragraphs, set forth responses to each allegation of the complaint, such as* Deny the allegations set forth in paragraph 1 of the complaint *or* Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the complaint.]

AFFIRMATIVE DEFENSES

[*In separate numbered paragraphs, set forth all affirmative defenses to the causes of action alleged in the complaint*.]

CROSSCLAIM

PARTIES

[*In separate numbered paragraphs, allege the capacity of each party to the cross-complaint*, *e.g*., Cross-complainant/Defendant is a California corporation whose principal place of business is San Francisco, California.]

JURISDICTION

[*In separate numbered paragraphs, allege facts that demonstrate that the court has subject matter jurisdiction over the crossclaim, e.g.,* Jurisdiction is proper because the claims in this pleading form part of the same case or controversy as the original claim over which the Court has original jurisdiction and, therefore, falls within the supplemental jurisdiction of the Court under *section 1367 of Title 28 of the United States Code*.]

[*In separate numbered paragraphs, allege facts that demonstrate that the court may properly exercise personal jurisdiction over the cross-defendant, e.g*., The court may exercise personal jurisdiction over Cross-Defendant _____[*name*] as Cross-Defendant regularly conducts business in this district, and the acts that form the basis of the instant crossclaims arose from those contacts.]

[*In separate numbered paragraphs, set forth the allegations for each crossclaim asserted. Separate headings may be used for each separate claim*.]

PRAYER FOR RELIEF

WHEREFORE, Defendant _____[*name of party*] respectfully requests the following relief:

[*Set forth the requested relief in separate paragraphs*.]

[*Add, if appropriate:*

DEMAND FOR JURY TRIAL

Crossclaimant/Defendant _____(*name of party*) requests a trial by jury on its crossclaim for _____(*identify crossclaims, e.g.*, breach of contract).]
Dated: _____

Respectfully Submitted,

_____ [*firm name*]

By: _____ [*signature*]

_____ [*printed name*]

Attorneys for _____ [*name*]

NOTES.

Authority:
Fed R Civ P 13(g)

Preparing and Drafting Crossclaims:
See *§§ 11.26 -11.43*

Timing:
See *§ 11.39*

Related Forms of Crossclaim:
4 Bender's Federal Practice Forms, Forms 13:41, 13:42, 13:43

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & ControversyCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedureCounselGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsGovernmentsLocal GovernmentsClaims By & Against

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2-11 MB Practice Guide: Fed Pretrial Civ Proc in CA 11.56

11.56 Reply to Counterclaim.

Reply to Counterclaim.
_____[*attorney's name and California Bar number*]
_____[*attorney's street address*]
_____[*city, state, and zip code*]
_____[*phone number*]
_____[*fax number*]
_____[*attorney's e-mail address*]
Attorney for _____[*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CALIFORNIA
DIVISION

_____)	
_____)	Civil Action No.
_____)	_____
___ [*name*] ,)	_____
Plaintiff)	
vs.)	
_____)	PLAINTIFF'S REPLY TO COUNTERCLAIM OF
_____	[*name*]
_____	_____
___ [*name*] ,	_____
Defendant	[*Add, if appropriate:* DEMAND FOR JURY TRIAL]
_____	

REPLY TO COUNTERCLAIM

Plaintiff and Counter-Defendant _____ [*name of plaintiff*] as and for its Reply to the Defendant _____ [*name of defendant counterclaimaint*]'s Counterclaim states as follows:

[*In separate numbered paragraphs, set forth responses to each allegation of the counterclaim, such as* Denies the allegations set forth in paragraph 1 of the counterclaim *or* Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the counterclaim.]

AFFIRMATIVE DEFENSES

[*In separate numbered paragraphs, set forth all affirmative defenses to the causes of action alleged in the counterclaim*.]

[*Add, if appropriate:*

DEMAND FOR JURY TRIAL

Plaintiff and Counter-Defendant _____(*name*) requests a trial by jury on Defendant and Counterclaimant's counterclaim for _____(*identify, e.g.*, defamation).]

Dated:_____

Respectfully Submitted,

_____ [*firm name*]

By: _____ [*signature*]

_____ [*printed name*]

Attorneys for _____ [*name*]

NOTES.

Authority:

Fed R Civ P 7(a), 8, 13

Responding to Counterclaims and Crossclaims:

See *§§ 11.44 -11.51*

Timing:

See *§ 11.51*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedureCounselGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsComputer & Internet LawPrivacy & SecurityInvasion of Privacy

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2-11 MB Practice Guide: Fed Pretrial Civ Proc in CA 11.57

11.57 Answer to Crossclaim.

Answer to Crossclaim.
_____[*attorney's name and California Bar number*]
_____[*attorney's street address*]
_____[*city, state, and zip code*]
_____[*phone number*]
_____[*fax number*]
_____[*attorney's e-mail address*]
Attorney for _____[*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CALIFORNIA
DIVISION

___ [*name*] , Plaintiff vs. ___ [*name*] , Defendant	Civil Action No. _____ ANSWER TO CROSSCLAIM OF [*name*] _____ [*Add, if appropriate:* DEMAND FOR JURY TRIAL]

ANSWER TO CROSSCLAIM

Cross-Defendant _____[*name*] as and for its Answer to _____[*name of crossclaimant*] 's crossclaim states as follows:

[*In separate numbered paragraphs, set forth responses to each allegation of the crossclaim, such as* Deny the allegations set forth in paragraph 1 of the crossclaim, *or* Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the crossclaim.]

AFFIRMATIVE DEFENSES

[*In separate numbered paragraphs, set forth all affirmative defenses to the causes of action alleged in the crossclaim*.]

[*Add, if appropriate:*

DEMAND FOR JURY TRIAL

Cross-Defendant _____(*name*) requests a trial by jury on _____(*name of crossclaimant*)'s crossclaim for _____ (*identify, e.g.*, defamation).]
Dated:_____

Respectfully Submitted,

_____ [*firm name*]

By: _____ [*signature*]

_____ [*printed name*]

Attorneys for _____ [*name*]

NOTES.

Authority:
Fed R Civ P 7(a), 8, 13

Responding to Counterclaims and Crossclaims:
See *§§ 11.44 -11.51*

Timing:
See *§ 11.51*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedureCounselGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsComputer & Internet LawPrivacy & SecurityInvasion of PrivacyGovernmentsLocal GovernmentsClaims By & Against

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Unit 3 Pleading Stage
CHAPTER 12 Third-Party Actions

2-12 MB Practice Guide: Fed Pretrial Civ Proc in CA 12.syn

§ 12.syn Synopsis to Chapter 12: Third-Party Actions

12.01 Scope.

12.02 Objective and Strategy.

12.02[1] Impleader Avoids Need for Separate Lawsuits.

12.02[2] Separate Lawsuit May Be More Economical in Some Cases.

12.02[3] Permissive Joinder Under Rule 20 Is Potential Alternative.

12.02[4] Compulsory Joinder Under Rule 19 Is Potential Alternative.

12.02[5] Counterclaims or Crossclaims Are Alternatives for Those Already Parties.

12.03 CHECKLIST: Bringing Third-Party Claim.

12.04 Defendant May Implead Third Party.

12.04[1] Defending Party May Implead.

12.04[2] Only Nonparties May Be Impleaded.

12.04[3] Third-Party Claim May Be Brought Against Defendant Who Settled.

12.05 Third-Party Claim Must Be Derivative.

12.05[1] Claim Is Derivative When Liability Depends on Outcome of Main Case.

12.05[2] Contribution and Indemnity Are Typical Derivative Claims.

12.05[3] Third-Party Defendant Need Not Be Liable to Original Plaintiff.

12.05[4] Third-Party Defendant Need Not Be Automatically Liable If Defendant Loses Underlying Suit.

12.05[5] Once Impleader Proper, Impleading Party May Assert Other Claims Against Impleaded Third Party.

12.06 Impleader Is Always Discretionary.

12.06[1] No Absolute Right to Implead Claim.

12.06[2] Impleader Without Leave of Court Permitted Within 10 Days of Answer to Original Claim.

12.06[3] Leave of Court Required for Impleader Attempted More Than 10 Days After Answer Served.

12.06[4] Factors Used to Determine Appropriateness of Impleader.

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12.06[4][b] Efficiency and Lack of Prejudice to Plaintiff Favor Allowing Impleader.

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12.06[4][d] Joint Trial Favored When Claims Sufficiently Interrelated.

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12.07 Motion for Leave to File Third-Party Complaint.

12.07[1] Motion Must Be Served on All Parties.

12.07[2] LOCAL PRACTICE: CD Cal--Motion Papers.

12.07[3] LOCAL PRACTICE: ED Cal--Motion Papers.

12.07[4] LOCAL PRACTICE: ND Cal--Motion Papers.

12.07[5] LOCAL PRACTICE: SD Cal--Motion Papers.

12.08 Prerequisites to Bringing Third-Party Complaint.

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12.08[1][b] Federal Question Jurisdiction.

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12.08[1][d] Supplemental Jurisdiction Generally Supports Third-Party Claims Asserted by Defendants.

12.08[1][e] Supplemental Jurisdiction Will Not Support Third-Party Claim Asserted by Plaintiff in Diversity Case.

12.08[1][f] District Court Has Discretion to Decline Supplemental Jurisdiction.

12.08[2] Personal Jurisdiction Over Third-Party Defendant Required.

12.08[2][a] Third Party Must Have Sufficient Contacts With Forum for Court to Exercise Personal Jurisdiction.

12.08[2][b] Third Party Must Be Served With Summons.

12.08[2][c] Lack of Personal Jurisdiction May Be Waived.

12.08[3] Independent Venue Not Required.

12.08[4] Claim Must Be Brought Within Applicable Limitations Period.

12.09 Third-Party Claims by or Against United States: Special Problems.

12.09[1] United States May Implead Third Party Like Other Litigants.

12.09[2] Sovereign Immunity and Special Administrative Procedures Apply to Attempts to Implead United States.

12.09[3] Third-Party Claim Against United States Is Valid Only If Supported by Substantive Law.

12.10 Third-Party Claims in Admiralty and Maritime Suits: Special Problems.

12.10[1] In Admiralty Suits, Defendants and Persons With Interests in Seized Property May Implead Third Parties.

12.10[2] In Admiralty Suits, Impleader Reaches Broader Range of Claims Than in Ordinary Civil Actions.

12.10[3] In Admiralty Cases, Impleading Party May "Demand" Judgment Against Third-Party Defendant in Favor of Original Plaintiff.

12.10[4] "Demand" Requirement Easily Satisfied.

12.11 CHECKLIST: Responding to Impleader.

12.12 Options and Strategies for Responding to Impleader.

12.13 Opposing Propriety of Impleader Itself.

12.13[1] Any Party May Move to Strike Third-Party Claim.

12.13[2] Any Party May Move for Separate Trial or Move to Sever Claims.

12.14 Responding to Particulars of Third-Party Claim.

12.14[1] Third-Party Defendant May Assert Rule 12 Defenses by Answer or Motion to Dismiss.

12.14[2] Defenses May Be Waived If Not Raised by Timely Answer or Motion.

12.14[3] Third-Party Defendant May Assert Defenses of Third-Party Plaintiff Against Plaintiff.

12.14[4] Answer or Motion Must Be Served Within 21 Days After Service of Summons and Complaint.

12.15 Counterclaims Against Third-Party Plaintiff and Crossclaims Against Other Parties.

12.15[1] Third-Party Defendant Must Assert Compulsory Counterclaims and May Assert Permissive Counterclaims Against Impleading Party.

12.15[2] Third-Party Defendant May Assert Crossclaims Related to Impleader Claims Against Other Parties.

12.15[3] Third-Party Defendant May Join Other Claims.

12.15[4] Subject Matter Jurisdiction Must Exist for Claims.

12.16 Third-Party Defendant's Claim Against Plaintiff.

12.16[1] Third-Party Defendant May Assert Claim Against Plaintiff.

12.16[2] Procedure for Bringing Claim Is Unclear.

12.16[3] Joinder of Additional Claims.

12.16[4] Third-Party Defendant and Plaintiff Become Opposing Parties for Purpose of Counterclaim Rule.

12.16[5] Subject Matter Jurisdiction Must Exist for Claims.

12.16A CHECKLIST: Bringing Plaintiff's Claims Against Third-Party Defendant.

12.17 Plaintiff May Assert Claim Against Third-Party Defendant Arising Out of Same Transaction As Plaintiff's Claim.

12.18 Claim by Plaintiff Against Third-Party Defendant Is Permissive.

12.19 Subject Matter Jurisdiction Must Exist for Claims.

12.20 Independent Venue Not Required.

12.21 Procedure for Asserting Claim Is Unclear.

12.22 Third-Party Defendant Must Assert Any Defenses, Counterclaims, Crossclaims Under Rules 12, 13.

12.23 Notice of Motion and Motion for Leave to File Third-Party Complaint.

12.24 Third-Party Summons [ED Cal, ND Cal, SD Cal Only].

12.25 Third-Party Complaint.

12.26 Proposed Order Granting Motion for Leave to Serve Third-Party Complaint.

12.27 Notice of Motion and Motion to Dismiss Third-Party Complaint for Failure to State a Claim.

12.28 Answer to Third-Party Complaint.

12.29 Local District Court Forms.

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Unit 3 Pleading Stage
CHAPTER 12 Third-Party Actions
I. STRATEGY

2-12 MB Practice Guide: Fed Pretrial Civ Proc in CA 12.01

12.01 Scope.

This chapter covers:

- When defendants may implead third parties [*see 12.03 -12.10*].
- When plaintiffs may implead third parties [*see 12.04[1]*].
- Differences in impleader in admiralty and maritime cases [*see 12.10*].
- Permission to implead third parties [*see 12.06*; *Forms: 12.23 -12.26*].
- Service of process and pleadings by third-party plaintiffs [*see 12.08[2][b]*].
- Third-party defendants' responses to third-party claim [*see 12.11 -12.16*; *Forms: 12.27*, *12.28*].
- Third-party defendants' claims against other parties to action [*see 12.04[1]*].
- Direct claims by plaintiffs against third-party defendants [*see 12.17 -12.22*].

Core Rule:
Fed R Civ P 14.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleader

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Unit 3 Pleading Stage
CHAPTER 12 Third-Party Actions
I. STRATEGY

2-12 MB Practice Guide: Fed Pretrial Civ Proc in CA 12.02

12.02 Objective and Strategy.

12.02[1] Impleader Avoids Need for Separate Lawsuits. The objective of impleading a third party into an action is to reduce the number of lawsuits that must be brought to resolve a dispute [*see Southwest Adm'rs, Inc. v. Rozay's Transfer (9th Cir 1986) 791 F2d 769, 777*]. A third-party action, or impleader, is a procedural device that promotes judicial efficiency by eliminating additional, related suits against a third party who is or might be liable to the defendant [*United States v. Yellow Cab. Co. (1951) 340 US 543, 556, 71 S Ct 399, 95 L Ed 523*]. If the defendant contends that some third party will be liable to the defendant if the defendant is or may be liable to the plaintiff, the defendant is not limited to the plaintiff's choice of parties to the action, but may implead the derivatively liable third party. Thus, in the same suit in which plaintiff establishes the defendant's liability, the defendant may establish the impleaded third party's liability to the defendant for indemnity, contribution, subrogation, or some similarly "derivative" claim [*see Fed R Civ P 14(a)*].

Strategic Point--Impleader Is Always Permissive, Never Compulsory:

A defendant (or a plaintiff facing a counterclaim) *may* implead a third party derivatively liable for all or part of the defendant's liability to the plaintiff [*Fed R Civ P 14(a)(1)*]. Nothing in *Fed R Civ P 14* compels a defendant to do so, however, and a defendant may choose to resolve claims against a third party in a separate action. Separate actions are never barred merely because the defendant had the opportunity implead the third party into an earlier action, but declined to do so [*Atchison, Topeka & Santa Fe Ry. Co. v. Hercules, Inc. (9th Cir 1998) 146 F3d 1071, 1073-1074*].

12.02[2] Separate Lawsuit May Be More Economical in Some Cases. A defendant should not always implead every possible third party. A defendant must decide if impleading third-party claims will be economical or whether it will actually involve unnecessary costs, complications, and delays in resolving the plaintiff's claims. A defendant must also determine if adding third-party claims to the suit will actually help or burden the defense of plaintiff's claims. Finally, the defendant must weigh the cost of litigating a motion for permission to implead, or potential motions for severance or separate trials, which might destroy any advantages that impleader would otherwise offer.

Strategic Point--Impleader Might Be Fruitless:

All attempts to implead third-parties made more than 10 days after service of the original answer require court permission [*Fed R Civ P 14(a)(1)*]. The decision whether to permit impleader is left to the court's discretion. In deciding whether to permit impleader, a court will consider the following [*Irwin v. Mascott (ND Cal 2000) 94 F Supp2d 1052, 1056*]:

- Prejudice to the original plaintiff.
- Complication of issues at trial.
- Likelihood of trial delay.
- Timeliness of the motion to implead.

Thus even if a defendant satisfies the prerequisites for impleader, a court may, in its discretion, refuse to permit the proposed impleader. Furthermore, even if the court allows the impleader, any party may move to strike it, or may move to limit or eliminate its advantages by seeking a separate trial or to sever the impleaded claim [*Fed R Civ P 14(a)(4)*].

12.02[3] Permissive Joinder Under Rule 20 Is Potential Alternative. Under the permissive joinder rule, persons may be joined in an action as plaintiffs if their claims are transactionally related and share any common question of law or fact. Similarly, a plaintiff may join as defendant any person against whom it asserts any claim in which the right to relief arises from the same transaction and in which there will arise any question of law or fact common to all defendants [*see Fed R Civ P 20*].

Cross Reference:

Ch. 4, Determining Parties to the Action, see *§§ 4.41 -4.51*.

12.02[4] Compulsory Joinder Under Rule 19 Is Potential Alternative. A defendant may require the joinder of a party under the compulsory joinder rule. This rule requires the joinder of "required" parties, that is, parties needed for just adjudication of the claims [*see Fed R Civ P 19*].

Cross Reference:

Ch. 4, Determining Parties to the Action, see *§§ 4.41 -4.51*.

12.02[5] Counterclaims or Crossclaims Are Alternatives for Those Already Parties. A defendant may assert counterclaims against the plaintiff and crossclaims against other defendants. When doing so, the defendant acts as a plaintiff and may join other persons who were not originally joined by the plaintiff, if the joinder satisfies the permissive or compulsory joinder rules [*see Fed R Civ P 13, 19, 20*]. Joinder in these circumstances is based on a transactional relationship between the claim against the new party and the counterclaim or crossclaim against the already-existing party [*see Fed R Civ P 13*].

Distinguish:

By contrast, impleader is available only to those not already parties [*see Fed R Civ P 14(a)(1)* and *Fed R Civ P 14(a)(5)*].

Detailed Discussion/Forms:

3 Moore's Federal Practice, Ch. 14, Third-Party Practice (Matthew Bender 3d ed.).

4 Bender's Federal Practice Forms, Rule 14, Third-Party Practice (Matthew Bender).

Cross References:

Ch. 4, Determining Parties to the Action; Ch. 10, Adding, Dropping, and Substituting Parties; Ch. 11, Counterclaims, Crossclaims, and Replies.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleader

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Unit 3 Pleading Stage
CHAPTER 12 Third-Party Actions
II. BRINGING THIRD-PARTY CLAIM

2-12 MB Practice Guide: Fed Pretrial Civ Proc in CA 12.03

12.03 CHECKLIST: Bringing Third-Party Claim.

☐ Identify any persons or entities who might be liable to third-party plaintiff for all or part of claims asserted against third-party plaintiff [*see Fed R Civ P 14(a)(1)*].

☐ Determine, for each person or entity that might be liable to third-party plaintiff for claims asserted against third-party plaintiff, whether person or entity is a party or a nonparty.

Authority:
Fed R Civ P 14(a)

Discussion:
See *§ 12.04[2]*

☐ Determine, for each person or entity that might be liable to third-party plaintiff for claims asserted against third-party plaintiff, whether court will have subject matter jurisdiction over the third-party claim on one of the following bases:

○ Diversity jurisdiction.

○ Federal subject matter jurisdiction.

○ Supplemental jurisdiction.

Authority:

28 USC §§ 1331, 1332, 1367; Fed R Civ P 14, 82

Discussion:
See *§ 12.08[1]*

☐ Determine, for each person or entity that might be liable to third-party plaintiff for claims asserted against third-party plaintiff, whether court will have personal jurisdiction over person or entity, including whether:

○ Third-party defendant is subject to personal jurisdiction under jurisdictional statutes of the state in which the court sits.

○ Third-party defendant is subject to personal jurisdiction under a federal jurisdictional statute.

○ Third-party defendant may be served within 100 miles of the court.

Authority:
Fed R Civ P 4(k)

Discussion:
See *§ 12.08[2]*

Form:
See *§ 12.24*

☐ Analyze substantive basis for each potential impleader claim to determine whether it is derivative (i.e., whether person or entity is liable to third-party plaintiff if and when third-party plaintiff is found to be liable on claims asserted against it), such as claims for:

○ Contribution among tortfeasors.

○ Indemnity.

○ Subrogation.

○ Other derivative liability, including contractual liability.

Authority:
Fed R Civ P 14(a)

Discussion:
See *§§ 12.05[1], [2]*

Form:
See *§ 12.25*

☐ Analyze substantive basis for each potential impleader claim to determine whether impleader is not available for

the claim because third-party defendant has direct liability to plaintiff or counterclaimant, but no liability to third-party plaintiff.

☐ Analyze substantive basis for each potential impleader claim to determine whether impleader is not available for the claim because claim against third-party defendant is only transactionally related to plaintiff's or counterclaimant's claims, and not dependant on third-party plaintiff's liability to plaintiff or counterclaimant.

Authority:
Fed R Civ P 14(a)

Discussion:
See *§§ 12.05[1], [2]*

Form:
See *§ 12.25*

Timing:
Request leave of the court, if required, prior to serving third-party defendant with impleader claim:

○ If served within 10 days of the filing of the original answer, leave of the court is not required.

○ If not served within 10 days of the filing of the original answer, file a motion requesting leave of court, and serve the motion on all parties.

Authority:
Fed R Civ P 14(a)(1)

Discussion:
See *§§ 12.06[2], [3]*

Forms:
See *§§ 12.23 -12.26*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ Serve the third-party defendant with the third-party summons and complaint (and with the motion for leave to file and the order on the motion, if any) in the same manner as the original action.

Authority:
Fed R Civ P 4(e), 14(a)(1)

Discussion:
See *§ 12.08[2][b]*

Form:
See *§ 12.24*

☐ If a motion for leave is filed, participate in the hearing as required by the court.

☐ Once the third-party defendant is impleaded, consider asserting any other claims against the third-party defendant, whether transactionally related or not, under the rule allowing joinder of permissive claims.

Authority:
Fed R Civ P 14(a), 18

Discussion:
See *§ 12.05[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleader

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Unit 3 Pleading Stage
CHAPTER 12 Third-Party Actions
II. BRINGING THIRD-PARTY CLAIM

2-12 MB Practice Guide: Fed Pretrial Civ Proc in CA 12.04

12.04 Defendant May Implead Third Party.

12.04[1] Defending Party May Implead. A "defending party" (a party against whom a claim is asserted) may bring in or "implead" one who is not a party to the action [*Fed R Civ P 14(a)(1)*]. Although a "defending party" is usually a defendant, a plaintiff is "defending party" when faced with a claim [*Fed R Civ P 14(b)*]. In addition, a third-party defendant who has been impleaded and is facing a third-party claim may, in turn, implead other nonparties [*Fed R Civ P 14(a)(5)*; *see, e.g., Interstate Power Co. v. Kansas City Power & Light Co. (8th Cir 1993) 992 F2d 804, 806* (sometimes called "fourth party" claims)].

12.04[2] Only Nonparties May Be Impleaded. Impleader applies only to "a nonparty [*Fed R Civ P 14(a)(1)*; *see, e.g.*, Russo v. Blue Ocean Shipping, No. C-02-05079 EDL (ND Cal Aug 5, 2003) 2003 US Dist LEXIS 25002, at *4-*6]. Thus, one may not implead one who is already a party to the action [*see, e.g., Henz v. Superior Trucking Co. (MD Pa 1982) 96 FRD 219, 220*], but must use other devices, such as counterclaiming against an opposing party or crossclaiming against coparties [*Fed R Civ P 13(a), (b), (g)*]. However, claims for contribution or indemnity against existing parties are inchoate, and therefore not proper subjects of counterclaims or crossclaims. Some courts require severance of the contribution or indemnity claims into separate actions. Then the potential contributors or indemnitors are no longer parties to the action on the main claims; they may be impleaded and, once impleaded, all of the cases may be consolidated again [*see, e.g., Judd v. General Motors Corp. (MD Pa 1974) 65 FRD 612, 613-614*]. Other courts permit direct impleader of contribution or indemnity claims, even against already-existing parties, on the grounds that counterclaims or crossclaims are not available [*see, e.g., National Union Fire Ins. Co. v. Continental Ill. Corp. (ND Ill 1987) 658 F Supp 781, 794*].

12.04[3] Third-Party Claim May Be Brought Against Defendant Who Settled. A non-settling defendant may bring a third-party claim against a settling defendant. Once a defendant settles and the claim against that defendant is dismissed, that defendant becomes a nonparty who is subject to impleader [*Bank of the West v. Estate of Leo (D Ariz 2005) 231 FRD 386, 389* (citing **Moore's**)].

Cross References:

Use of counterclaim or ceossclaim to assert claim against person already a party, see Ch. 11,

Counterclaims, Crossclaims, and Replies.

3 *Moore's Federal Practice, § 14.09* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.05 Third-Party Claim Must Be Derivative.

12.05[1] Claim Is Derivative When Liability Depends on Outcome of Main Case. A defending party may implead a party who "is or may be liable to it for all or part of the claim against it" [*Fed R Civ P 14(a)(1)*]. In other words, a defendant may assert a third-party claim under *Fed R Civ P 14* only when the third party's liability is in some way dependent on the outcome of the main claim [*United States v. One 1977 Mercedes Benz (9th Cir 1983) 708 F2d 444, 452* ; *FMC Corp. v. Vendo Co. (ED Cal 2002) 196 F Supp2d 1023, 1037*]:

- **Third party must be liable to impleading party.** For impleader, the third-party defendant must have potential liability to the impleading party. Direct liability to the plaintiff will not suffice [*see, e.g., Banks v. City of Emeryville (ND Cal 1985) 109 FRD 535, 540*].

- **Third party's liability must relate to plaintiff's claim.** For impleader, the third party must be liable to the impleading party for losses that the impleading party will nor may suffer as a result of the plaintiff's original claim. An unrelated claim will not support impleader. An impleaded claim must be derivatively based on the original plaintiff's [*Bank of the West v. Estate of Leo (D Ariz 2005) 231 FRD 386, 389* ; *Johnson v. Rank (ND Cal 1986) 110 FRD 99, 101*].

- **"Transactionally-related" claims not necessarily derivative.** It is not enough that the impleaded claim arise from the same set of facts as the plaintiffs claim. Rule 14 does not permit impleader when the alleged third-party claim merely arises from the same transaction or set of facts as the plaintiff's original claim [*Irwin v. Mascott (ND Cal 2000) 94 F Supp2d 1052, 1056* ; *Johnson v. Rank (ND Cal 1986) 110 FRD 99, 101*]. A claim that arises from the same set of facts is not the same as a claim in which the third party is or might be liable *because* the impleading party is or might be liable to the plaintiff, the true standard for impleader.

Example:
The owner of a forfeited automobile filed a third-party claim against various law enforcement personnel and organizations alleging violations of her constitutional rights in connection with the seizure of the automobile. The claims were related to, but not

derivative of the original forfeiture claim [*United States v. One 1977 Mercedes Benz (9th Cir 1983) 708 F2d 444, 452*].

12.05[2] Contribution and Indemnity Are Typical Derivative Claims. Although *Fed R Civ P 14* is not limited to any particular type of claim, courts regularly authorize impleader for the following types of claims:

- **Indemnity.** A contractual agreement to reimburse another for loss will present a claim for derivative liability by an indemnitee against an indemnitor, provided that the original claim is within the terms of the indemnity contract [*see, e.g., Brogle v. South Carolina Elec. & Gas Co. (4th Cir 1975) 509 F2d 1216, 1217*], even when the indemnity claim is not viable under controlling state law until paid. The point of Rule 14 is to permit derivative claims such as indemnity to be dealt with in the same action as the underlying original claim [*see Jeub v. B/G Foods, Inc. (D Minn 1942) 2 FRD 238, 240*].

- **Subrogation.** A insurer who will be subrogated to its insured may pursue subrogation claims by means of Rule 14 impleader [*see, e.g., National Union Fire Ins. Co. v. FDIC (D Kan 1995) 887 F Supp 262, 264*].

- **Warranty.** The manufacturer of an allegedly defective product may bring a claim of breach of express and implied warranties against the supplier of an allegedly defective ingredient of the product [*see Beights v. W.R. Grace & Co. (WD Okla 1974) 62 FRD 546, 547*].

- **Contribution** among joint tortfeasors may be sought by Rule 14 impleader, either under common law [*see, e.g., Andrulonis v. United States (2d Cir 1994) 26 F3d 1224, 1233*] or under a statute providing for comparative fault [*see, e.g., Tietz v. Blackner (D Utah 1994) 157 FRD 510, 512-514*].

Prerequisite:

The basis for the derivative claim against the impleaded third party must exist in controlling state or federal law, apart from Rule 14. Rule 14 is a mere procedural device, and will not create a basis for derivative liability when it does not exist [*see, e.g., Kim v. Fujikawa (9th Cir 1989) 871 F2d 1427, 1434*].

12.05[3] Third-Party Defendant Need Not Be Liable to Original Plaintiff. Although an impleaded third party must have potential liability to the impleading party, *Fed R Civ P 14* does not require that the third-party defendant be directly liable to the original plaintiff [*see Fed R Civ P 14(a)*; *Irwin v. Mascott (ND Cal 2000) 94 F Supp2d 1052, 1056-1057* ; *Banks v. City of Emeryville (ND Cal 1985) 109 FRD 535, 540*].

12.05[4] Third-Party Defendant Need Not Be Automatically Liable If Defendant Loses Underlying Suit. Impleader is proper even if the third party will not be automatically liable if the impleading party loses on the underlying original claim. Impleader is permitted whenever there is some possibility that the third party may be liable for some of all of the impleading party's liability on the underlying original claim [*FDIC v. Loube (ND Cal 1991) 134 FRD 270, 272* , citing *Banks v. City of Emeryville (ND Cal 1985) 109 FRD 535, 540*].

12.05[5] Once Impleader Proper, Impleading Party May Assert Other Claims Against Impleaded Third Party. Once a defending party properly impleads a third party, the defending party may assert any additional claims it has against the third-party defendant, regardless of whether they would support impleader, provided that the claims are properly joined under the permissive claim-joinder rule [*see Fed R Civ P 18* (permissive joinder of claims and remedies)].

Cross Reference:

Discussion of permissive joinder of claims, see Ch. 4, Determining Parties to the Action, *§§ 4.03 -4.08*

Legal Topics:

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12.06 Impleader Is Always Discretionary.

12.06[1] No Absolute Right to Implead Claim. Formal leave of court normally is required to implead a third party. However, a party may implead a third party without formal leave of court if it does so within 10 days of serving the original answer to a claim [*Fed R Civ P 14(a)(1)*]. Even if formal leave of court is not required, however, the court always has the power to decide whether to permit impleader [*see Fed R Civ P 14*, Committee Note of 1963]. If the court does not do so sua sponte, any party may ask the court to rule on whether it will permit impleader by moving to strike the third-party claim, or by moving to have the claim severed or made the subject of a separate trial [*Fed R Civ P 14(a)(4)*].

12.06[2] Impleader Without Leave of Court Permitted Within 10 Days of Answer to Original Claim. The impleading party need not obtain leave to serve a third-party summons and complaint if he or she acts within "10 days after serving its original answer" [*Fed R Civ P 14(a)*].

12.06[3] Leave of Court Required for Impleader Attempted More Than 10 Days After Answer Served. A defending party may not implead a third party without formal leave of court if the attempt to implead is made more than 10 days after the service of the original answer. Leave of court must be obtained by means of a motion made on notice to all parties to the action [*Fed R Civ P 5(a)(1)(D)* and *Fed R Civ P 14(a)(1)*]. The decision to allow a third-party defendant to be impleaded under *Fed R Civ P 14* is entrusted to the trial court's sound discretion [*Southwest Adm'rs, Inc. v. Rozay's Transfer (9th Cir 1986) 791 F2d 769, 777* ; *United States v. One 1977 Mercedes Benz (9th Cir 1983) 708 F2d 444, 452*].

Cross References:

Discussion of motion procedure, see *§ 12.07*. Forms, see *§§ 12.23 -12.26*.

Additional form, see 4 *Bender's Federal Practice Forms, Form 14:1* (Matthew Bender).

12.06[4] Factors Used to Determine Appropriateness of Impleader.

12.06[4][a] Rule 14(a) Construed in Favor of Impleader When Possible. *Fed R Civ P 14(a)* was designed to

permit the liberal joinder of parties so that judicial energy could be conserved and consistency of results guaranteed [*FMC Corp. v. Vendo Co. (ED Cal 2002) 196 F Supp2d 1023, 1038*]. The rule is construed in favor of allowing impleader [*FDIC v. Loube (ND Cal 1991) 134 FRD 270, 272*].

12.06[4][b] Efficiency and Lack of Prejudice to Plaintiff Favor Allowing Impleader. Trying impleaded, derivative claims in the same suit as the original claim normally would result in an efficiency that will favor impleader. This efficiency will be offset only if a joint trial would prejudice the plaintiff, unduly complicate the trial, or foster an obviously unmeritorious claim [*FMC Corp. v. Vendo Co. (ED Cal 2002) 196 F Supp2d 1023, 1038*]. A court must balance the desire to avoid duplicative actions and the desire to obtain consistent results against any prejudice that the plaintiff might suffer by complicating the case [*Irwin v. Mascott (ND Cal 2000) 94 F Supp2d 1052, 1056*].

12.06[4][c] Impleader Favored If Impleading Party Has Same Ability to Defend As in Separate Action. Joint trial of the original and impleaded, derivative claims is favored if the moving party would not suffer any prejudice in its ability to defend against the original claim in the joint trial that it would not also suffer as a defendant in a separate action [*FMC Corp. v. Vendo Co. (ED Cal 2002) 196 F Supp2d 1023, 1038*].

12.06[4][d] Joint Trial Favored When Claims Sufficiently Interrelated. Joinder is favored when the original claims and the derivative, third-party claims are interrelated such that the interests of justice and efficiency favor consolidation into a single action [*see FMC Corp. v. Vendo Co. (ED Cal 2002) 196 F Supp2d 1023, 1039*].

Example--Impleader Granted:

In a suit for contribution among private parties based the clean up of contaminated groundwater under CERCLA [*see 42 USC § 9613(f)*], impleader was granted because "requiring a duplicitous separate lawsuit to address inextricably related claims over contiguous CERCLA sites, would unnecessarily multiply the litigation and waste judicial and party resources" [*FMC Corp. v. Vendo Co. (ED Cal 2002) 196 F Supp2d 1023, 1039*].

12.06[4][e] Impleader Disfavored If It Might Unduly Complicate Trial or Foster Unmeritorious Claim. Impleader will not be favored when it would prejudice the plaintiff, unduly complicate the trial, or would foster an obviously unmeritorious claim [*FMC Corp. v. Vendo Co. (ED Cal 2002) 196 F Supp2d 1023, 1038*]. Impleader might unduly complicate the trial or prejudice the plaintiff if impleader could [*see Irwin v. Mascott (ND Cal 2000) 94 F Supp2d 1052, 1056*]:

- Delay the trial.
- Unduly lengthen the trial.
- Increase the need for discovery on unrelated matters.
- Confuse, rather than elucidate, the issues presented by the original claims.
- Delay, rather than contribute to, possibility of early settlement or other resolution of case.

Example--Impleader Denied:

In a case against a debt-collection agency, the defendant moved for permission to serve a third-party complaint on its former attorneys for legal malpractice arising from legal advice allegedly given with respect to its debt-collection tactics. The debt-collection statutes were strict liability statutes, and reliance on legal advice was no defense to the original claims. The court denied the motion. Because the third-party malpractice claim was not closely related to plaintiffs' debt-collection claims, impleader of the malpractice claims would bring in all types of irrelevant factual and legal issues into the action. The court held that to permit defendants to implead third-party defendants would prejudice plaintiffs and not

save the court time, because the malpractice controversy would not help resolve plaintiffs' claims [*Irwin v. Mascott (ND Cal 2000) 94 F Supp2d 1052, 1056-1060*].

Legal Topics:

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12.07 Motion for Leave to File Third-Party Complaint.

12.07[1] Motion Must Be Served on All Parties. When a defending party wants to implead a third party more than 10 days after service of its original answer, the impleading party must seek leave of court to do so by means of a formal, noticed motion. [*see Fed R Civ P 5(a)(1)(D), 14(a)(1)*].

Distinguish--Proposed Third Party Need Not Be Served With Motion.

Although Rule 14(a) effectively requires notice to all parties [*see Fed R Civ P 5(a)(1)(D), 14(a)(1)*], the proposed third-party defendant is not a party at the time of the motion and need not be served. If the motion is granted and the third party is served with the third-party summons and complaint, the third party may, at that time, move to strike the third-party claim or move to have the court vacate its order permitting impleader.

Strategic Point--Attach Proposed Third-Party Complaint:

Even if local rules are silent on the subject, a party moving for leave to implead a third party should *always* attach a copy of the proposed third-party complaint to the motion itself or to a supporting affidavit or declaration [*see Liberty Folder v. Curtiss Anthony Corp. (SD Ohio 1981) 90 FRD 80, 84* (attaching proposed third-party summons and complaint is "better practice")]. The court will be unable to evaluate the proposed impleader without a copy of the proposed third-party complaint.

Cross Reference:

Discussion of motion to strike third-party claim, see *§ 12.13*.

12.07[2] LOCAL PRACTICE: CD Cal--Motion Papers. In the Central District of California, no motion will be considered by the Court unless it meets the requirements of *CD Cal Civ LR 7-4-7-8* [*CD Cal Civ LR 7-4*]. On the first page of the notice of motion and every other document filed in connection with any motion, there must be included, under the title of the document, the date and time of the motion hearing, and the name of the judicial officer before whom the motion has been noticed. The notice of motion must contain a concise statement of the relief or Court action

the movant seeks [*CD Cal Civ LR 7-4*].

12.07[3] LOCAL PRACTICE: ED Cal--Motion Papers. In the Eastern District of California, the moving party must file a notice of motion, motion, accompanying briefs, affidavits if appropriate, and copies of all documentary evidence that the moving party intends to submit in support of the motion [*ED Cal Civ LR 230(b)*; *see ED Cal Gen LR 101* ("briefs" include memoranda, points and authorities, and other written arguments, or compilations of authorities)].

12.07[4] LOCAL PRACTICE: ND Cal--Motion Papers. In the Northern District of California, a motion is limited to a single document not exceeding 25 pages in length, and must contain a notice of the motion including date and time of hearing, a concise statement of the relief sought, and the points and authorities in support of the motion. Each motion also must be accompanied by a proposed order [*ND Cal Civ LR 7-2(c)*].

12.07[5] LOCAL PRACTICE: SD Cal--Motion Papers. In the Southern District of California, each motion must be accompanied by a separate motion and notice of motion and another separate document captioned "Memorandum of Points and Authorities in support of [the motion]." A movant's failure to file any papers required under the local rules may be deemed as a waiver of the motion, or other request for ruling by the court [*SD Cal Civ LR 7.1(f.2.b)*].

Cross Reference:

Detailed discussion of requirements for noticed motions, see Ch. 26, Pretrial Motion Practice, see *§§ 26.12 -26.33*.

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12.08 Prerequisites to Bringing Third-Party Complaint.

12.08[1] Subject Matter Jurisdiction Requirements Must Be Met.

12.08[1][a] Rule 14 Does Not Convey Jurisdiction. Rule 14 prescribes the procedural circumstances in which certain claims may be asserted [*see Fed R Civ P 14*], but does not extend the jurisdiction of the federal courts [*Fed R Civ P 82* (rules do not extend jurisdiction)]. Therefore, any claim brought under this rule must satisfy federal subject matter jurisdiction requirements [*see Caterpillar, Inc. v. Lewis (1996) 519 US 61, 67 n1, 117 S Ct 467, 136 L Ed2d 437*].

Consider--Admiralty and Maritime Jurisdiction:

In admiralty and maritime claims, federal jurisdiction is established on those grounds [*see Fed R Civ P 9(h)*]. Although third-party claims that would in an independent suit be admiralty and maritime claims obviously fulfill the subject matter jurisdictional requirements, third-party claims in admiralty and maritime suits are not necessarily admiralty or maritime claims [*see, e.g., Galt G/S v. Hapag-Lloyd AG (9th Cir 1995) 60 F3d 1370, 1374-1375* (although main claim sounded in admiralty, third-party claim was ordinary civil claim that needed independent jurisdictional basis)].

12.08[1][b] Federal Question Jurisdiction. If a third-party claim arises under a federal statute or the United States Constitution, a federal district court will have "federal question" jurisdiction over the third-party claim [*see 28 USC § 1331*]. However, many claims for indemnity, warranty, subrogation, or contribution have no basis in a federal statute or the Constitution.

Cross Reference:

Discussion of federal question jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.03 -2.09*.

12.08[1][c] Diversity Jurisdiction. Most frequently, third-party claims are based on state law or common law. State law or common law claims may be asserted in federal court on the basis of "diversity of citizenship" jurisdiction. Essentially, "diversity" jurisdiction exists if the all third-party plaintiffs and all third-party defendants are citizens of

different states and the amount in controversy on the third-party claim exceeds $75,000, exclusive of interest and costs [*see 28 USC § 1332*].

Consider:

If federal jurisdiction is acquired on the ground of complete diversity of citizenship, it is unaffected by the subsequent joinder under *Fed R Civ P 14* of a party whose presence is not essential to a decision of the controversy between the original parties [*Caterpillar, Inc. v. Lewis (1996) 519 US 61, 67 n1, 117 S Ct 467, 136 L Ed2d 437*].

Cross Reference:

Discussion of diversity jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.10 -2.25*.

12.08[1][d] Supplemental Jurisdiction Generally Supports Third-Party Claims Asserted by Defendants. The general rule is that court may exercise supplemental jurisdiction over a third-party claim if the requirements of the supplemental jurisdiction statute are met. A district court has supplemental jurisdiction of a third-party claim if that claim is so related to the main claim that it forms part of the same "case or controversy" [*see 28 USC § 1367(a)*; *see* US Const, art III]. This is, in fact, the most common jurisdictional basis over third-party claims when asserted by defendants. Because impleader must involve a claims that is derivative of the main claim, the third-party claim ordinarily will be transactionally related to the main claim to an extent sufficient to sustain supplemental jurisdiction [*see, e.g., FMC Corp. v. Vendo Co. (ED Cal 2002) 196 F Supp2d 1023, 1039*].

Cross Reference:

Discussion of supplemental jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.26 -2.30*.

12.08[1][e] Supplemental Jurisdiction Will Not Support Third-Party Claim Asserted by Plaintiff in Diversity Case. There is a major exception to the applicability of supplemental jurisdiction to third-party claims, however. A *plaintiff* faced with a claim may implead a third party under *Fed R Civ P 14(b)*. However, if the court's subject matter jurisdiction over the plaintiff's original claim is based solely on diversity jurisdiction [*see 28 USC § 1332*], the court will *not* have supplemental jurisdiction over a third-party claim asserted by the plaintiff [*28 USC § 1367(b)*].

12.08[1][f] District Court Has Discretion to Decline Supplemental Jurisdiction. Even when supplemental jurisdiction is available to sustain a third-party claim, a district court may decline to exercise supplemental jurisdiction over a claim in the following circumstances [*28 USC § 1367(c)*]:

- The claim raises a novel or complex issue of state law;
- The claim substantially predominates over the claim or claims over which the district court has original jurisdiction;
- The district court has dismissed all claims over which it has original jurisdiction; or
- In exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Cross References:

Discussion of subject matter jurisdiction and supplemental jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.03 -2.30*.

Effect of subject matter jurisdiction restrictions on ability to assert claims under interpleader rule, see 3 *Moore's Federal Practice, § 14.41* (Matthew Bender 3d ed.)

12.08[2] Personal Jurisdiction Over Third-Party Defendant Required.

12.08[2][a] Third Party Must Have Sufficient Contacts With Forum for Court to Exercise Personal Jurisdiction. The impleader procedure attempts to bring a new party, the third-party defendant, into the case. This is possible only if the third-party defendant has sufficient contacts with the forum in which the action is pending that it is constitutionally permissible for the court to exercise general or specific personal jurisdiction over the third-party defendant.

Cross Reference:

Discussion of personal jurisdiction requirements, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.31 -2.41*.

12.08[2][b] Third Party Must Be Served With Summons. Even if, a third-party defendant had sufficient contacts with the forum to permit the court to exercise personal jurisdiction, the court will not be able to do so unless the impleading third-party plaintiff can serve the third-party defendant with a summons in a manner authorized by *Fed R Civ P 4* [*see Fed R Civ P 4* (service of summons)].

Cross Reference:

Form, see *§ 12.24*. Requirements for service of summons, see Ch. 7, Service of Summons.

12.08[2][c] Lack of Personal Jurisdiction May Be Waived. Lack of personal jurisdiction and improper service of process are waivable defenses (in contrast to subject matter jurisdiction, which cannot be waived). Thus, a third-party defendant may submit to personal jurisdiction voluntarily or waive jurisdiction by failing to assert the defense in a timely and appropriate fashion [*see Fed R Civ P 12(h)(1)*].

Cross Reference:

Raising lack of personal jurisdiction under Rule 12(h), see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.18*.

12.08[3] Independent Venue Not Required. The third-party plaintiff need not establish separate venue for the impleader claim. The venue statutes apply only to the original claim by the plaintiff against the defendant [*see 28 USC § 1391 et seq*.].

Cross Reference:

Discussion of no independent requirement for venue, see 3 *Moore's Federal Practice, § 14.42* (Matthew Bender 3d ed.).

12.08[4] Claim Must Be Brought Within Applicable Limitations Period. The applicable limitations period is a matter of substantive, rather than procedural, law. Therefore, when a third-party claim arises under state law, a federal court will apply the statute of limitations applicable in state court. If the third-party claim arises under federal law, the court must determine what statute of limitations applies under federal law [*see Guaranty Trust Co. v. York (1945) 326 US 99, 108, 65 S Ct 1464, 89 L Ed 2079*].

Cross References:

Form, see *12.28*. Discussion of defenses, counterclaims, and crossclaims by third-party defendant, see *§§ 12.14[1], [2], 12.15[1], [2]*.

See generally 3 *Moore's Federal Practice, § 14.29* (Matthew Bender 3d ed.).

Legal Topics:

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12.09 Third-Party Claims by or Against United States: Special Problems.

12.09[1] United States May Implead Third Party Like Other Litigants. The federal rules generally apply to civil actions by or against the United States. When the United States has been made a defending party properly, it may implead a third-party defendant under the same circumstances as could any other litigant [*see Fed R Civ P 14(a)*].

12.09[2] Sovereign Immunity and Special Administrative Procedures Apply to Attempts to Implead United States. A party's ability to join the United States under the impleader rule is limited by sovereign immunity principles. The Federal Tort Claims Act permits a private tortfeasor defendant to implead the United States as a joint tortfeasor [*see United States v. Yellow Cab Co. (1951) 340 US 543, 547-548, 71 S Ct 399, 95 L Ed 523* ; *see also 28 USC § 2671 et seq.* (Tort Claims Act)]. However, the administrative prerequisites of that Act, including the filing of an administrative claim before filing suit, apply to attempts to implead the United States as a third-party defendant under *Fed R Civ P 14*. Because the timely filing of an administrative claim is a jurisdictional prerequisite, a failure to file will deprive the district court of an independent basis of jurisdiction over the third-party claim against the United States [*see 28 USC § 2675(a)*].

12.09[3] Third-Party Claim Against United States Is Valid Only If Supported by Substantive Law. As with any other litigant, *Fed R Civ P 14* does not provide any substantive basis for asserting a third-party claim against the United States. A valid claim under substantive law must be established before a defending party may implead the United States as a third-party defendant [*see, e.g., Tinoco v. Belshe (ND Cal 1995) 916 F Supp 974, 984* (third-party claim against United States dismissed on ripeness and standing grounds)].

Cross Reference:

Discussion of impleader by and against United States, see 3 *Moore's Federal Practice, § 14.10* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.10 Third-Party Claims in Admiralty and Maritime Suits: Special Problems.

12.10[1] In Admiralty Suits, Defendants and Persons With Interests in Seized Property May Implead Third Parties. In any case in which the underlying claim asserted by plaintiff is an admiralty or maritime claim within the meaning of Rule 9(h) [*see Fed R Civ P 9(h)*], two classes of persons have the right to implead third parties. First, a defendant facing an in personam judgment to the plaintiff in the case may implead third parties. Second, if the case seeks an in rem judgment against arrested, attached, or libeled property, any person who has asserted a right in the property by complying with Supplemental Rule C [*see* Fed R Civ P Supp R C(6)(a)(i)] may implead third parties [*Fed R Civ P 14(c)(1)*].

12.10[2] In Admiralty Suits, Impleader Reaches Broader Range of Claims Than in Ordinary Civil Actions. In ordinary civil suits, a defending party may implead a third-party only if the third party is or may be liable to the defendant who is doing the impleading [*see Fed R Civ P 14(a)(1)*]. Impleader is available in admiralty suits. In an admiralty suit a defendant or a party claiming an interest in seized property may implead a third party with respect to any claim seeking "remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences" [*Fed R Civ P 14(c)(1)*]. Most importantly, in contrast to ordinary civil suits, a defendant or party claiming an interest in seized property may implead a third party on the basis that the third party is directly liable to the plaintiff (as well as or in place of potential liability to the impleading party) on a transactionally related claim. Any third party who "may be wholly or partly liable either to the plaintiff or to the third-party plaintiff" (i.e., impleading party) may be impleaded [*Fed R Civ P 14(c)(1)*].

Distinguish--Admiralty Third-Party Claim Asserted in Civil Action:

The more liberal admiralty impleader rules apply only in suits in which the plaintiff's original claim is an admiralty or maritime claim [*Fed R Civ P 14(c)(1)*]. If the plaintiff's original claim is an ordinary civil claim, the fact that the proposed third-party claim is an admiralty or maritime claim does not mean that the broader admiralty impleader rules of Rule 14(c) apply. A third-party claim that sounds in admiralty that is asserted in an ordinary civil suit must, instead, satisfy the ordinary civil impleader standards as set out in Rule 14(a). Indeed, the ordinary civil impleader rule anticipates possible admiralty or maritime third-party claims in otherwise ordinary civil actions by noting: "If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the 'summons'

includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(i) in the property arrested" [*Fed R Civ P 14(a)(6)*].

Distinguish--Civil Third-Party Claim Asserted in Admiralty Action:

In an admiralty case, a third-party claim need not necessarily sound in admiralty and, in fact, many do not. Under the terms of Rule 14(c), this should not make any difference. Rule 14(c) is worded such that as long as the plaintiff's original claim sounds in admiralty, all third-party claims should benefit from the liberal impleader standards established by Rule 14(c) [*see Fed R Civ P 14(c)(1)* ("If a plaintiff asserts an admiralty or maritime claim ...")]. Note, however, that the Ninth Circuit has stated in dicta that a civil third-party claim must always be judged under the regular Rule 14(a) standards rather than the admiralty standards, even if the third-party claim is asserted in an admiralty case [*Galt G/S v. Hapag-Lloyd AG (9th Cir 1995) 60 F3d 1370, 1372, 1375*].

12.10[3] In Admiralty Cases, Impleading Party May "Demand" Judgment Against Third-Party Defendant in Favor of Original Plaintiff. In an admiralty case, the party impleading the third-party "may also demand judgment against the third-party defendant in favor of the [original] plaintiff [*Fed R Civ P 14(c)*]. This means that the impleading party can force the third-party defendant to defend the claim of the plaintiff as well as the claim of the impleading party [*see Fed R Civ P 14(c)*]. This is in sharp contrast to impleader in civil actions, in which an impleading party may not tender the third-party defendant with the defense of a claim by the principal plaintiff [*see Galt G/S v. Hapag-Lloyd AG (9th Cir 1995) 60 F3d 1370, 1374 n2*].

In admiralty cases, the third-party defendant must respond to the plaintiff's complaint in the same manner as if the third-party defendant were one of the original defendants. The third-party's response to the complaint must satisfy Rule 12, just as would the response of an original defendant [*Fed R Civ P 14(c)(2) see Fed R Civ P 12*].

After the third-party defendant has responded to the complaint, the action then proceeds as if the plaintiff as well as the impleading party had commenced it against the third-party defendant [*Fed R Civ P 14(c)(2)*]. This procedure avoids a separate suit for contribution and repetitious pleadings and testimony on the part of the plaintiff and the third-party plaintiff. The original plaintiff is therefore not required to amend its complaint to assert specific claims against the third-party defendants [*Royal Ins. Co. of Am. v. Southwest Marine (9th Cir 1999) 194 F3d 1009, 1019*].

12.10[4] "Demand" Requirement Easily Satisfied. It is unclear what language is necessary for the third-party plaintiff to "demand" judgment against the third-party defendant in favor of the plaintiff [*Royal Ins. Co. of Am. v. Southwest Marine (9th Cir 1999) 194 F3d 1009, 1017* , citing 29 *Moore's Federal Practice, § 704.06* (Matthew Bender 3d ed.)]. Although some circuits have required formal pleading in order to invoke direct liability to the original plaintiff, the Ninth Circuit does not interpret the "demand" language of Rule 14(c) rigidly. In the Ninth Circuit, direct liability may be established by a third-party complaint praying that the third-party defendant "make its defenses and answer directly to the claims of the Plaintiff" [*Royal Ins. Co. of Am. v. Southwest Marine (9th Cir 1999) 194 F3d 1009, 1018* ; *Campbell Indus., Inc. v. Offshore Logistics Int'l (9th Cir 1987) 816 F2d 1401, 1406*].

Cross Reference:

Assertion of impleader claims in admiralty, see 3 *Moore's Federal Practice, §§ 14.50 -14.54* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesMaritime Tort ActionsMultiple DefendantsGeneral OverviewCivil ProcedurePleading & PracticePleadingsImpleader

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12.11 CHECKLIST: Responding to Impleader.

☐ Move to strike third-party claims if:

- ○ Impleading party failed to obtain leave of court, if required.
- ○ Claim asserted in third-party complaint is not derivative claim suitable for impleader.
- ○ Third-party claim in civil action attempts to assert liability to original plaintiff rather than to impleading party.

Authority:
Fed R Civ P 14(a)

Discussion:
See *§ 12.13*

☐ Move to dismiss third-party complaint within 21 days of service if:

- ○ Court lacks subject matter jurisdiction of third-party claim.
- ○ Court lacks personal jurisdiction over third-party defendant.

- ○ Third-party claim was improperly served on third-party defendant.
- ○ Third-party complaint fails to state claim on which relief may be granted.

Authority:
Fed R Civ P 12

Discussion:
See *§ 12.14*

Form:
See *§ 12.27*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ Answer complaint within 20 days of service, asserting all available defenses to the claim not raised in motion to dismiss, including:

- ○ Lack of subject matter jurisdiction.
- ○ Lack of personal jurisdiction.
- ○ Insufficiency of process or service.
- ○ Failure to state a claim on which relief may be granted.
- ○ Statute of limitations.

Authority:
Fed R Civ P 12

Discussion:
See *§ 12.14*

Form:
See *§ 12.28*

☐ Assert against the original plaintiff any defenses that the third-party plaintiff has to the plaintiff's claims.

☐ File any compulsory counterclaims against the third-party plaintiff.

☐ If desired, file any permissive counterclaims against the third-party plaintiff, and any crossclaims against other parties.

☐ If a counterclaim or crossclaim is filed against any party, consider filing any additional claims, whether or not transactionally related, against that party under the liberal claim-joinder rule.

☐ If desired, file any transactionally related claims against the original plaintiff, as allowed by the impleader rule.

☐ Consider impleading any additional parties that may be liable for all or part of the claim.

☐ Consider moving for separate trial of the impleader claim to avoid prejudice or for convenience.

Authority:
Fed R Civ P 13, *14*, *18*, *42(b)*

Discussion:
See *§§ 12.13 -12.16*

Form:
See *§ 12.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.12 Options and Strategies for Responding to Impleader.

All of the issues that weigh in a defending party's decision to implead a third party also weigh in a third-party defendant's determination to respond to the third-party claim on the merits or resist the impleader itself. The third-party defendant must consider:

- Whether it will be economic or efficient to have all issues resolved in a single action, or whether a separate action will be less complicated, quicker, and more likely to produce a favorable result.

- Whether a more favorable forum may is available for a separate action.

- Whether the court has subject matter jurisdiction over the impleaded third-party claim or whether any ruling of the court will be a nullity because the court lacks jurisdiction.

- The availability of legal reasons to oppose impleader, such as lack of court leave for impleader.

- The availability of factual reasons to oppose impleader, such as undue delay, prejudice to parties, complication or delay of trial.

In every case, a third-party defendant must weigh the benefits of sharing the costs and efforts for discovery and presenting evidence at trial against the possibility that a separate trial in another forum may produce a more favorable result.

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.13 Opposing Propriety of Impleader Itself.

12.13[1] Any Party May Move to Strike Third-Party Claim. A third-party defendant or any other party may move to strike the third-party claim [*see Fed R Civ P 14(a)(4)*]. This is the proper strategy if the third-party complaint was filed and served without the required leave of court. Although Rule 14(a) implies that a third-party defendant challenging impleader should file a motion to strike, one court has suggested that the proper motion is instead a motion asking the court to vacate its order granting leave to implead [*City of Orange Beach v. Scottsdale Ins. Co. (SD Ala 1996) 166 FRD 506, 509*].

Cross Reference:

Discussion of motion to strike or vacate improper impleader, see 3 *Moore's Federal Practice, § 14.24* (Matthew Bender 3d ed.).

12.13[2] Any Party May Move for Separate Trial or Move to Sever Claims. Even if there are no grounds to completely "strike" the third-party claim, any party may move to have the third-party claim treated like a separate proceeding by moving for separate trial or severance of the third-party claim [*Fed R Civ P 14(a)(4)*]. The grounds for granting a severance of a third-party claim should not differ from the grounds that would justify the severance of any claim [*see Fed R Civ P 21* ("The court may also sever any claim against a party.")]. Similarly, the grounds for granting a separate trial should not differ from the grounds that would justify a separate trial for any claim or issue [*see Fed R Civ P 42(b)* (court may grant separate trials for "convenience, to avoid prejudice, or to expedite and economize," to the extent permitted by jury trial rights guaranteed by *US Const, amend VII*)].

Example--Denial of Motion for Severance:

A severance motion based on Rule 14(a) was denied in a case in which the essential facts of the various claims were so logically connected that considerations of judicial economy and fairness dictated that all the issues be resolved in one lawsuit [*see FMC Corp. v. Vendo Co. (ED Cal 2002) 196 F Supp2d 1023, 1039*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.14 Responding to Particulars of Third-Party Claim.

12.14[1] Third-Party Defendant May Assert Rule 12 Defenses by Answer or Motion to Dismiss. The party served with the summons and third-party complaint (i.e., the third-party defendant) must assert defenses to the third-party claim in the manner provided in *Fed R Civ P 12* [*Fed R Civ P 14(a)(2)(A)*]. This means that the third-party defendant must assert its defenses in a responsive pleading, such as an answer [*see Fed R Civ P 12(b)*; *see also Fed R Civ P 7* (pleadings allowed)]. In the alternative, or in addition, the third-party defendant may assert the following defenses by means of a motion to dismiss [*Fed R Civ P 12(b)*]:

- Lack of subject matter jurisdiction.
- Lack of personal jurisdiction.
- Improper venue.
- Insufficiency of process.
- Insufficiency of service of process.
- Failure to state a claim on which relief can be granted.
- Failure to join a party under *Fed R Civ P 19*.

Cross Reference:

Discussion of asserting defenses in responsive pleading, see Ch. 8, Answers and Responsive Motions Under Rule 12.

12.14[2] Defenses May Be Waived If Not Raised by Timely Answer or Motion. Some defenses are so important that they may be raised at any time. The defense of failure to state a valid claim or defense, or the failure to

join an indispensable party under Rule 19 may even be raised for the first time at trial [*Fed R Civ P 12(h)(2)*]. The defense of lack of subject matter jurisdiction is never waived, and may be raised at any time [*see Fed R Civ P 12(h)(3)*]. All other defenses, may be waived unless timely raised in an answer or motion to dismiss. Rule 12(h) specifically lists the following defenses as waived if they are not included in the answer, an amendment to the answer, or a timely motion to dismiss [*Fed R Civ P 12(h)(1)*]:

- Lack of personal jurisdiction.
- Improper venue.
- Insufficiency of process.
- Insufficiency of service of process.

In addition, almost all affirmative defenses, including the statute of limitations, may be waived unless affirmatively stated in a responsive pleading [*see Fed R Civ P 8(c)*].

Cross References:

Forms, see *§§ 12.27*, *12.28*.

Discussion of statute of limitations in third-party practice, see 3 *Moore's Federal Practice, § 14.29* (Matthew Bender 3d ed.).

12.14[3] Third-Party Defendant May Assert Defenses of Third-Party Plaintiff Against Plaintiff. The third-party defendant may assert more than just its defenses against the impleading party (the "third-party plaintiff"). The third-party defendant may assert against the plaintiff any defenses that the impleading party has to the plaintiff's original claim [*Fed R Civ P 14(a)(2)(C)*]. In other words, the third party may claim not only that it is not liable to the impleading party, but that the impleading party is not liable to the original plaintiff. This provision protects the impleaded third-party defendant when the impleading party fails or neglects to assert a proper defense to the plaintiff's action. Although the plaintiff and the third-party defendant are not technically opposing parties, the impleader rule recognizes the derivative nature of the third-party defendant's potential liability and permits it essentially to stand in the defendant's shoes and assert its defenses [*see Fed R Civ P 14(a)*, Committee Note of 1946].

12.14[4] Answer or Motion Must Be Served Within 21 Days After Service of Summons and Complaint. Generally, an answer or a Rule 12 motion to dismiss must be served within 21 days after the third-party defendant is served with the summons and complaint [*see Fed R Civ P 12(a)(1)(A)(i)* (service of answer)]. If service of summons was waived under *Fed R Civ P 4(d)*, that period is extended to 60 days [*Fed R Civ P 12(a)(1)(A)(ii)*]. The United States, its agencies and departments, and its officers and employees also have a 60-day response period [*Fed R Civ P 12(a)(2)*, *(3)*].

Warning--Default for Failure to Respond:

Failure to answer or otherwise respond under Rule 12 may subject the third-party defendant to a default judgment [*see Fed R Civ P 55(a)*].

Cross Reference:

Discussion of default judgments, see Ch. 27, Default and Motions for Relief From Default.

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.15 Counterclaims Against Third-Party Plaintiff and Crossclaims Against Other Parties.

12.15[1] Third-Party Defendant Must Assert Compulsory Counterclaims and May Assert Permissive Counterclaims Against Impleading Party. A third-party defendant is treated as any other defendant under Rule 13 [*see Fed R Civ P 14(a)(2)(B)*]. The third-party defendant must assert any compulsory counterclaims it has against the impleading party. Compulsory counterclaims are those claims against the impleading party arising out of the subject matter of the third-party claim [*see Fed R Civ P 13(a)*]. In addition, the third-party defendant may assert permissive counterclaims, which are any other claims against the impleading party, even though the claims are not transactionally related [*see Fed R Civ P 13 (b)*].

Cross Reference:

Discussion of distinction between permissive and compulsory counterclaims, see Ch. 11, Counterclaims, Crossclaims, and Replies, see *§ 11.09*.

12.15[2] Third-Party Defendant May Assert Crossclaims Related to Impleader Claims Against Other Parties. A third-party defendant may assert any crossclaims against any other third-party defendants, provided the crossclaims arise from the transaction involved in the impleader claim [*see Fed R Civ P 13(g)*].

Cross Reference:

Preparing and drafting crossclaims, see Ch. 11, Counterclaims, Crossclaims, and Replies, see *§§ 11.26 -11.43*.

12.15[3] Third-Party Defendant May Join Other Claims. Once the third-party defendant has asserted a counterclaim or crossclaim against a party as permitted by the impleader rule, the third-party defendant may then join any other claims against the same party, whether transactionally related or not, under the claim-joinder rule [*see Fed R Civ P 18(a)*].

12.15[4] Subject Matter Jurisdiction Must Exist for Claims. *Fed R Civ P 14* prescribes the procedural circumstances in which certain claims may be asserted, but does not extend the jurisdiction of the federal courts [*see*

Fed R Civ P 82 (rules do not extend jurisdiction)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.16 Third-Party Defendant's Claim Against Plaintiff.

12.16[1] Third-Party Defendant May Assert Claim Against Plaintiff. The third-party defendant may assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the impleading party [*Fed R Civ P 14(a)(2)(D)*].

Cross Reference:

3 *Moore's Federal Practice, § 14.06* (Matthew Bender 3d ed.).

Consider:

This type of claim is permissive, rather than compulsory [*see Fed R Civ P 14(a)(2)(D)*].

12.16[2] Procedure for Bringing Claim Is Unclear. Rule 14(a) is silent with respect to how and when a third-party defendant's claim against the original plaintiff should be asserted. The Rule does not state that leave of court is required and thus the third-party defendant should be able to assert the claim without seeking court permission. However, there is no suggestion in the rule as to the correct procedural device for asserting the claim. The original plaintiff and the third-party defendant are not "opposing parties," so a counterclaim is not authorized [*Fed R Civ P 13(a), (b)*; *see Caterpillar, Inc. v. Lewis (1996) 519 US 61, 67 n1, 117 S Ct 467, 136 L Ed2d 437*]. In the past, courts have accepted without comment the designation of such a claim as a "crossclaim" [*see, e.g., L & E Co. v. United States ex rel. Kaiser Gypsum Co. (9th Cir 1965) 351 F2d 880, 882*]. However, the commentators unanimously disagree with this practice, pointing out that the original plaintiff and the third-party defendant are not "coparties" within the meaning of Rule 13 [*see, e.g.,* 3 *Moore's Federal Practice, § 14.06[1], [2]* (Matthew Bender 3d ed.); *see also Fed R Civ P 13(g)*]. Rule 14(a) authorizes only crossclaims against "an other third-party defendant" [*Fed R Civ P 14(a)(2)(B)*]. It is therefore safest for a third-party defendant to assert its claim against a plaintiff as something sui generis, and have the claim explicitly labeled as a "Rule 14(a) Claim by Third-Party Defendant Against Plaintiff" or something similar.

Cross References:

Ch. 4, Determining Parties to the Action; Ch. 11, Counterclaims, Crossclaims, and Replies, see *§§ 11.18, 11.29*.

12.16[3] Joinder of Additional Claims. *Fed R Civ P 14(a)* allows the third-party defendant to bring only transactionally related claims against the plaintiff. However, once the third-party defendant does assert a proper claim against the plaintiff under that rule, the third-party defendant may use the unlimited claim-joinder rule to join any additional claims against the plaintiff, whether the claims are transactionally related or not [*see Fed R Civ P 18(a)*].

12.16[4] Third-Party Defendant and Plaintiff Become Opposing Parties for Purpose of Counterclaim Rule. Once the third-party defendant asserts a claim against the original plaintiff, the two become "opposing parties" under the counterclaim rule. Therefore, the plaintiff must assert any transactionally related claims it has against the third-party defendant as compulsory counterclaims [*see Fed R Civ P 13(a)*], and may assert any unrelated claims against the third-party defendant as permissive counterclaims [*see Fed R Civ P 13(b)*].

12.16[5] Subject Matter Jurisdiction Must Exist for Claims. *Fed R Civ P 14* prescribes the procedural circumstances in which certain claims may be asserted, but does not extend the jurisdiction of the federal courts [*see Fed R Civ P 82* (rules do not extend jurisdiction)].

Cross Reference:

See *§ 12.08[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory CounterclaimsCivil ProcedurePleading & PracticePleadingsCounterclaimsPermissive CounterclaimsCivil ProcedurePleading & PracticePleadingsImpleader

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12.16A CHECKLIST: Bringing Plaintiff's Claims Against Third-Party Defendant.

☐ If third-party defendant has been impleaded, determine if claim should be asserted against that third-party defendant:

○ Does claim arise out of transaction or occurrence that is subject of plaintiff's claim against the impleading party?

Authority:
Fed R Civ P 14(a)(3)

Discussion:
See *§ 12.17*

○ Does subject matter jurisdiction exist for the claim?

Authority:
Fed R Civ P 82

Discussion:
See *§ 12.19*

○ Has the third-party defendant pleaded a claim directly against the plaintiff?

☐ If so, is the plaintiff's counterclaim compulsory?

☐ If the plaintiff's claim against the third party defendant is not a compulsory counterclaim, would a separate action be preferable?

Authority:
Fed R Civ P 14(a)(3); *Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc. (9th Cir 1998) 146 F3d 1071*

Discussion:
See *§ 12.18*

☐ If asserting claim against third-party defendant:

○ Assert as counterclaim if third party defendant brought claim against plaintiff.

○ If claim is not a counterclaim, assert claim specifically labeled as a Rule 14(a) claim against third-party defendant.

Authority:
Fed R Civ P 13, *14*

Discussion:
See *§ 12.21*

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.17 Plaintiff May Assert Claim Against Third-Party Defendant Arising Out of Same Transaction As Plaintiff's Claim.

Once a third-party defendant has been impleaded into the action, the plaintiff may assert any claim that it may have against the third-party defendant. However, the plaintiff may do so only if the claim arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the impleading party [*Fed R Civ P 14(a)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.18 Claim by Plaintiff Against Third-Party Defendant Is Permissive.

A plaintiff has a choice as to whether it should plead a claim against a third-party defendant impleaded into the action. Except when a third-party defendant pleads a claim directly against the plaintiff and the plaintiff has a compulsory counterclaim, claims by a plaintiff against a third-party defendant are permissive but not compulsory [*see Fed R Civ P 14(a)(3)*; *Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc. (9th Cir 1998) 146 F3d 1071, 1073*]. In the absence of another bar, such as the statute of limitations, a plaintiff has the option of filing these permissive claims in a separate action [*Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc. (9th Cir 1998) 146 F3d 1071, 1074*].

Example:

A district court erred by dismissing a complaint brought by a railroad company against a chemical company, after concluding that the suit violated a scheduling order in a separate action in which the railroad company, as the defendant, failed to join the chemical company within the allotted time for joinder. The court ruled that Rule 14 joinder is permissive, and thus allows the filing of a separate action [*Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc. (9th Cir 1998) 146 F3d 1071, 1073-1075*].

Legal Topics:

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12.19 Subject Matter Jurisdiction Must Exist for Claims.

Rule 14 prescribes the procedural circumstances in which certain claims may be asserted, but does not extend the jurisdiction of the federal courts [*see Fed R Civ P 82* (rules do not extend jurisdiction)]. The court must have subject matter jurisdiction of the claim asserted by plaintiff against the third-party defendant on some basis other than Rule 14. In cases in which the court's subject matter jurisdiction is based solely on diversity of citizenship, supplemental jurisdiction is not available for any Rule 14 claim asserted by a plaintiff [*28 USC § 1367(b)*].

Cross Reference:

Subject matter jurisdiction generally, see Ch. 2, Determining Forum (Jurisdiction and Venue).

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.20 Independent Venue Not Required.

The plaintiff need not establish that venue is proper for a claim against the third-party defendant. The venue statutes apply only to the original claim by the plaintiff against the defendant [*see 28 USC § 1391 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticePleadingsImpleader

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CHAPTER 12 Third-Party Actions
IV. BRINGING PLAINTIFF'S CLAIMS AGAINST THIRD-PARTY DEFENDANT

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12.21 Procedure for Asserting Claim Is Unclear.

Rule 14 does not specify the procedure for asserting a direct claim by the plaintiff against the third-party defendant [*see Fed R Civ P 14*]. Unless the third-party defendant files a Rule 14 claim against the plaintiff, the original plaintiff and the third-party defendant are not "opposing parties," so a counterclaim is not authorized [*Fed R Civ P 13(a), (b)*; *see Caterpillar, Inc. v. Lewis (1996) 519 US 61, 67 n1, 117 S Ct 467, 136 L Ed2d 437*]. Nor are the original plaintiff and the third-party defendant "coparties," so a crossclaim does not seem appropriate [*Fed R Civ P 13(g)*]. It is therefore safest for a plaintiff to assert its claim against a third-party defendant as something sui generis, and have the claim explicitly labeled as a "Rule 14(a) Claim by Plaintiff Against Third-Party Defendant" or something similar.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleader

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IV. BRINGING PLAINTIFF'S CLAIMS AGAINST THIRD-PARTY DEFENDANT

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12.22 Third-Party Defendant Must Assert Any Defenses, Counterclaims, Crossclaims Under Rules 12, 13.

If the plaintiff asserts a claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the impleading party, the third-party defendant must assert any defenses it has against the plaintiff's claim by the means and in the manner provided by Rule 12 [*Fed R Civ P 14(a)(3)*; *see Fed R Civ P 12*]. Similarly, the third-party defendant may, and in the case of compulsory counterclaims must, assert any counterclaims or crossclaims that are authorized by Rule 13 [*Fed R Civ P 14(a)*; *see Fed R Civ P 13*].

Cross References:

Ch. 8, Answers and Responsive Motions Under Rule 12; Ch. 11, Counterclaims, Crossclaims, and Replies.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsImpleader

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12.23 Notice of Motion and Motion for Leave to File Third-Party Complaint.

Notice of Motion and Motion for Leave to File Third-Party Complaint.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR
_____ [*name*],	)	LEAVE TO FILE THIRD-PARTY COMPLAINT
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order granting Defendant _____ [*name*] leave to serve the attached third-party summons and third-party complaint on _____ [*proposed Third-Party Defendant, e.g.,* XYZ Corporation].

Defendant _____ [*name*] should be granted leave to implead _____ [*proposed Third-Party defendant*] because:

1. In this action Plaintiff seeks to recover from Defendant _____ [*name*] on the basis that _____ [*summarize claims in complaint, e.g.,* Plaintiff was injured when a crane located on Defendant's construction site collapsed and caused debris to strike the Plaintiff].

2. As shown by the proposed Third-Party Complaint attached to this motion, the proposed Third-Party Defendant is or may be liable to Defendant _____ [*name*] for all or part of any liability Plaintiff may establish against Defendant _____ [*name*] in this case. In particular,_____ [*summarize proposed claim, e.g.,* the proposed Third-Party Defendant was the owner and operator of the crane that collapsed at the construction site. As part of its contract with the moving Defendant, the crane owner signed a contract containing an indemnity provision by which the crane operator agreed to indemnify the moving Defendant for any and all losses or liabilities that this Defendant might suffer in connection with operation of the crane on the construction site].

3. The proposed Third-Party Defendant is a person not a party within the meaning of Rule 14(a).

4. The claim asserted in the proposed Third-Party Complaint is meets all the criteria for impleader under the provisions of Rule 14(a).

5. The proposed Third-Party Defendant is subject to service of process issued by this court, and the joinder of the proposed Third-Party Defendant will not deprive the court of subject matter jurisdiction over this action.

6. As the Declaration of _____ [*name*] shows, Plaintiff will suffer no prejudice as a result of joining the Third-Party Defendant in this action, nor will the trial in this matter be appreciably complicated or delayed.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities], and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 14(a)(1)

Impleader of Third Party on Noticed Motion:
See *§§ 12.06[3], 12.07*

Related Form of Order:
See *§ 12.26*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedureCounselGeneral OverviewContracts LawContract Conditions & ProvisionsIndemnityTax LawFederal Taxpayer GroupsS CorporationsGeneral Overview

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CHAPTER 12 Third-Party Actions
V. FORMS

2-12 MB Practice Guide: Fed Pretrial Civ Proc in CA 12.24

12.24 Third-Party Summons [ED Cal, ND Cal, SD Cal Only].

Third-Party Summons [ED Cal, ND Cal, SD Cal Only].

UNITED STATES DISTRICT COURT
_____ District of _____

_____ [*name*],	)	
Plaintiff	)	
vs.	)	
_____ [*name*],	)	
Defendant	)	Civil Action No. _____
_____	)	
_____ [*name*],	)	THIRD-PARTY
Defendant and Third-Party Plaintiff	)	SUMMONS
vs.	)	
_____ [*name*],	)	
Third-Party Defendant	)	
	)	
	)	

TO THE THIRD-PARTY DEFENDANT LISTED ABOVE:

This document is a Summons. Served with this summons is a third-party complaint. You are required to serve an

Answer to the Third-Party Complaint within 20 days of the date of service on you of this summons. This 20-day period does not include the day on which you were served with this Summons and Third-Party Complaint.

Your Answer to the Third-Party Complaint must be served on each of the parties to this action. Your Answer must be served on _____ [*for each party to action, list name and complete address of attorney, client represented, and party designation in action, e.g.,* John Smith, 1234 Main Street, Anytown, CA 90159, attorney for John Doe Corporation, Defendant and Third-Party Plaintiff].

If you fail to serve an Answer to the Third-Party Complaint within the time permitted, judgment by default may be entered against you for the relief demanded in the Third-Party Complaint.

In addition to this Summons and the Third-Party Complaint, a copy of the Complaint of the Plaintiff in this suit also has been served on you. You may, at your option, also Answer the Complaint of the Plaintiff.

_____
[*signature of Clerk of the Court*]

[*seal of District Court*]

_____ [*date*]

NOTES.

Authority:
Fed R Civ P 4(a), (b), 14(a); *CD Cal Civ LR 4-1* (in Central District, attorney must prepare summons "upon forms supplied by Clerk")

Service of Process on Third-Party Defendant:
See *§ 12.08[2][b]*

Related Form of Complaint:
See *§ 12.25*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCriminal Law & ProcedurePreliminary ProceedingsGeneral OverviewGovernmentsCourtsClerks of Court

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CHAPTER 12 Third-Party Actions
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12.25 Third-Party Complaint.

Third-Party Complaint.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorneys for _____,
Defendant and Third-Party Plaintiff
UNITED STATES DISTRICT COURT
_____ District of _____

_____ [*name*],	)	
Plaintiff	)	
vs.	)	
_____ [*name*],	)	
Defendant	)	Civil Action No. _____
_____	)	
_____ [*name*],	)	THIRD-PARTY
Defendant and Third-Party Plaintiff	)	COMPLAINT
vs.	)	
_____ [*name*],	)	
Third-Party Defendant	)	
	)	
	)	

Jurisdiction

1. This Third-Party Claim is within the supplemental jurisdiction of the District Court under *28 USC § 1367(a)*.

Claim for Relief

2. _____ [*Short and plain statement of third-party claim, showing how Third-Party Defendant is liable to Defendant and Third-Party Plaintiff for all or part of Defendant and Third-Party Plaintiff's liability to original Plaintiff*].

Demand for Judgment

Defendant _____ [*name*] requests that judgment be entered as follows:

A. For Defendant and Third-Party Plaintiff _____ [*name*] and against _____ [*name of Third-Party Defendant*] for _____ [*specify relief sought through impleader, e.g.,* a declaration that Third-Party Defendant is liable to Defendant and Third-Party Plaintiff for any and all damages for which Defendant may be liable to Plaintiff in this action, up to and including the sum of $750,000];

B. For an award to Defendant and Third-Party Plaintiff _____ [*name*] of its costs, [attorney's fees,] and other disbursements in connection with the presentation of this Third-Party Complaint; and

C. For any other relief to which Defendant and Third-Party Plaintiff _____ [*name*] is entitled.

_____ [*date*]

_____ [*signature of attorney*]

_____ [*typed name*]

_____ [*firm name*]

Attorney for _____

Defendant and Third-Party Plaintiff

NOTES.

Authority:
Fed R Civ P 14(a)

Requirements for Third-Party Complaints:
See *§ 12.08*

Related Forms of Complaint:

Forms of complaint for specific types of cases, see 4 Bender's Federal Practice Forms, Form 14:8-14:16 (Matthew Bender)

Related Form of Summons:

See *§ 12.24*

Related Form of Answer:

See *§ 12.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedureCounselGeneral OverviewCriminal Law & ProcedureCounselRight to CounselGeneral Overview

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CHAPTER 12 Third-Party Actions
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2-12 MB Practice Guide: Fed Pretrial Civ Proc in CA 12.26

12.26 Proposed Order Granting Motion for Leave to Serve Third-Party Complaint.

Proposed Order Granting Motion for Leave to Serve Third-Party Complaint.

UNITED STATES DISTRICT COURT
_____ District of _____

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	ORDER GRANTING
Defendant	)	LEAVE TO FILE
_____	)	AND SERVE
and related Third-Party Action	)	THIRD-PARTY
	)	COMPLAINT
	)	

The motion of _____ [*name of Defendant/Third-Party Plaintiff*] for leave to file and serve a Third-Party Complaint against _____ [*name of Third-Party Defendant*] came on for hearing before this Court on _____ [*date*]. The motion was duly noticed.

[*Select one of following alternatives:*]

[*Alternative One. If motion contested and hearing held:*]

Moving Defendant _____ [*name of Defendant/Third-Party Plaintiff*] appeared through _____ [his *or* her *or* its] attorney _____ [*name of attorney*]. Plaintiff _____ [*name of original Plaintiff*] appeared through _____ [his *or* her *or* its] attorney _____ [*name of attorney*]. [*Continue with appearances as appropriate, noting which parties did not appear or oppose motion as well as those who appeared.*] The Court, having read the papers submitted, and having considered the authorities cited and the arguments of counsel, it is:

[*Alternative Two. If parties consent to joinder of third party:*]

The parties having consented that the motion may be granted, and the Court having reviewed the motion and finding no obstacle to the joinder of the third party, it is:

[*Continue as follows:*]

ORDERED that:

1. The motion is GRANTED;

2. Defendant and Third-Party Plaintiff _____ [*name of Defendant/Third-Party Plaintiff*] may file and serve the Third-Party Complaint attached to the motion on _____ [*name of Third-Party Defendant*].

3. The Clerk of this Court will issue a summons and deliver it to the moving Defendant and Third-Party Plaintiff for service on the Third-Party Defendant along with a copy of the Third-Party Complaint as shown in the attachment to the motion.

4. The moving Defendant and Third-Party Plaintiff must serve or cause to be served the Summons and Third-Party Complaint on the Third-Party Defendant in the manner specified in *Rule 4 of the Federal Rule of Civil Procedure* and must do so forthwith, and in no event later than _____ [*date*].
Dated: _____

_____ [*signature*]

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
Fed R Civ P 14(a)(1)

Related Form of Motion:
See *§ 12.23*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedurePleading & PracticeService of ProcessGeneral

OverviewCivil ProcedurePartiesJoinderGeneral OverviewCriminal Law & ProcedurePreliminary ProceedingsGeneral OverviewGovernmentsCourtsGeneral OverviewGovernmentsCourtsClerks of Court

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2-12 MB Practice Guide: Fed Pretrial Civ Proc in CA 12.27

12.27 Notice of Motion and Motion to Dismiss Third-Party Complaint for Failure to State a Claim.

Notice of Motion and Motion to Dismiss Third-Party Complaint for Failure to State a Claim.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR DIS-
_____ [*name*],	)	MISSAL OF THIRD-PARTY COMPLAINT OF
Defendant	)	_____ [*NAME*]
	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
		Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order dismissing the Third-Party Complaint of _____ [*name of Third-Party Plaintiff*].

The Third-Party Complaint should be dismissed under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* on the grounds that it fails to state a claim on which relief may be granted:

1. _____ [*First argument, with supporting authorities, why Third-Party Complaint fails to state claim*].

2. _____ [*Second argument, with supporting authorities, why Third-Party Complaint fails to state claim*].

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 14(a)(2)(A)

Responding to Particulars of Third-Party Complaint:
See *§ 12.14*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedureCounselGeneral OverviewCivil ProcedureDismissalsGeneral OverviewCivil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCriminal Law & ProcedurePretrial Motions & ProceduresGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstTax LawFederal Taxpayer GroupsS CorporationsGeneral Overview

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CHAPTER 12 Third-Party Actions
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12.28 Answer to Third-Party Complaint.

Answer to Third-Party Complaint.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorneys for _____,
Third-Party Defendant
UNITED STATES DISTRICT COURT
_____ District of California

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	ANSWER TO
Defendant	)	THIRD-PARTY
_____	)	COMPLAINT
and related Third-Party Action	)	
	)	
	)	

Third-Party Defendant, _____ [*name*] responds to the Third-Party Complaint of

_____ [*name*] as follows:

Admissions and Denials

1. Third-Party Defendant _____ [*name*] admits the allegations of Paragraphs _____ of the Third-Party Complaint.

2. Third-Party Defendant _____ [*name*] denies each and every allegation of Paragraphs _____ of the Third-Party Complaint.

3. Responding to the allegations of Paragraph _____ of the Third-Party Complaint, Third-Party Defendant admits that _____ [*facts admitted, e.g.,* that it is a Delaware corporation doing business in the State of California] but denies each and every remaining allegation in that paragraph.

4. Responding to the allegations of Paragraph _____ of the Third-Party Complaint, Third-Party defendant admits that _____ [*facts admitted*], but has insufficient information reasonably available to it at this time admit or deny _____ [*disputed allegation*]. Therefore, Third-Party defendant denies this allegation for lack of information and belief as to its truth or falsity.

[*Continue specifically admitting or denying each allegation in each paragraph*]

Affirmative Defenses.

5. As its First Affirmative Defense, Third-Party Defendant alleges that _____ [*first affirmative defense, e.g.,* the claim asserted in the Third-Party Complaint is barred by the applicable statute of limitations, _____ (*cite*), in that it accrued more than _____ years prior to the commencement of this action].

6. As its Second Affirmative Defense, Third-Party Defendant alleged that _____ [*second affirmative defense, e.g.,* the indemnity contract alleged in the Third-Party Complaint was procured by fraud. In particular _____ (*plead facts of fraud with particularity*)].

[*Continue asserting all possible affirmative defenses*]

[*Optional. Use to assert claim against third-party plaintiff*]

Counterclaim

7. As a counterclaim against Third-Party Plaintiff, ... [*name*], Third-Party Defendant alleges that _____ [*facts of counterclaim, e.g.,* Third-Party plaintiff has failed to pay and refuses to pay the agreed compensation promised to Third-Party Defendant that was the consideration for the indemnity agreement alleged in the Third-Party Complaint. To the extent that the agreement has any validity in the face of this breach of contract, Third-Party Plaintiff owes Third-Party Defendant the sum of $250,000 together with interest at the contract rate from December 1, 2002, and attorney's fees as provided in the contract].

Demand for Judgment.

Third-Party Defendant _____ [*name*] requests judgment as follows:

A. That Third-Party Plaintiff _____ [*name*] take nothing;

B. That Third-Party Defendant _____ [*name*] have judgment against Third-Party Plaintiff on the Counterclaim for:

1. Damages in the sum of $_____;

2. Interest at the contract rate on that sum from _____[*date*] until the date of judgment; and

3. Reasonable attorney's fees in the amount of $_____;

C. That Third-Party Defendant _____[*name*] be awarded its costs; and

D. That Third-Party Defendant have any other relief to it may be entitled.

_____ [*date*]

_____ [*signature of attorney*]

_____ [*typed name*]

_____ [*firm name*]

Attorney for _____,

Third-Party Defendant

NOTES.

Authority:
Fed R Civ P 14(a)(2)

Responding to Particulars of Third-Party Complaint:
See *§ 12.14*

Related Form of Complaint:
See *§ 12.25*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedureCounselGeneral OverviewComputer & Internet LawCivil ActionsDamagesContracts LawContract Conditions & ProvisionsIndemnityContracts LawDefensesFraud & MisrepresentationGeneral OverviewCriminal Law & ProcedureAccusatory InstrumentsComplaintsGeneral OverviewCriminal Law & ProcedureCounselRight to

CounselGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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Unit 3 Pleading Stage
CHAPTER 12 Third-Party Actions
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12.29 Local District Court Forms.

Local district court forms relating to matters addressed in this chapter are listed below.

Central District

Summons on a Third-Party Complaint (AO 441)

Click here to view image.

Eastern District

Summons on a Third-Party Complaint (AO 441)

Click here to view image.

Northern District

Third Party Summons in a Civil Action (AO 441)

Click here to view image.

Southern District

Third Party Summons in a Civil Action (AO 441)

Click here to view image.

Go to Interactive Fillable Form.

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Cross Reference:

Automated HotDocs(R) and PDF versions of these forms may be accessed and filled in from the online version of this publication, and are also available at www.LexisOne.com/forms.

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Unit 3 Pleading Stage
CHAPTER 13 Demanding a Jury Trial

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§ 13.syn Synopsis to Chapter 13: Demanding a Jury Trial

13.01 Scope.

13.02 Objective and Strategy.

13.03 CHECKLIST: Obtaining Jury Trial.

13.03[1] Party Seeking Jury Trial.

13.03[2] Party Opposing Jury Demand.

13.04 Options and Strategy.

13.04[1] Determine Whether Jury Is Desirable.

13.04[2] Determine Whether There Is a Right to Jury Trial.

13.04[2][a] Federal Law Determines Right to Jury.

13.04[2][b] Procedural Rules Neither Enlarge Nor Restrict Right to Jury.

13.04[3] Seventh Amendment Preserves Common-Law Right to Jury.

13.04[3][a] Actions at Law Generally Are Triable by Jury.

13.04[3][b] Actions in Equity Generally Are Not Triable by Jury.

13.04[3][c] Admiralty Proceedings Generally Are Not Triable by Jury.

13.04[3][d] Declaratory Relief May Be Either at Law or in Equity.

13.04[4] Right to Jury Trial in Statutorily Created and Special Actions and Proceedings.

13.04[4][a] Test for Determining Whether Jury Right Applies.

13.04[4][b] Actions and Proceedings Triable by Jury.

13.04[4][c] Actions and Proceedings Not Triable by Jury.

13.04[5] Court May Order Jury Trial If All Parties Consent.

13.04[6] Determine Whether Jury Demand Is Necessary.

13.04[6][a] In Action Commenced in Federal Court.

13.04[6][b] In Removed Action.

13.04[7] Determine Whether to Rely on Another Party's Jury Demand.

13.04[7][a] Parties May Rely on Demand for Issues It Covers.

13.04[7][b] Parties May Not Rely on Demand for Other Issues.

13.04[7][c] Parties May Not Rely on Demand by Party that Has No Jury Right.

13.04[8] Determine Whether to Limit Jury Demand to Certain Issues.

13.05 Demanding Jury.

13.05[1] Include Jury Demand in Pleading.

13.05[1][a] Inclusion in Pleading Is Sufficient.

13.05[1][b] LOCAL PRACTICE: CD Cal Requirements.

13.05[1][c] LOCAL PRACTICE: ED Cal Requirements.

13.05[1][d] LOCAL PRACTICE: ND Cal Requirements.

13.05[1][e] LOCAL PRACTICE: SD Cal Requirements.

13.05[2] Prepare Separate Jury Demand.

13.05[3] Indicating Jury Demand on Civil Cover Sheet Is Insufficient.

13.05[4] Specify Issues for Jury Trial.

13.05[4][a] Demanding Jury Trial on Specific Issues.

13.05[4][b] Supplementing Another Party's Jury Demand.

13.05[5] Sign Jury Demand.

13.05[5][a] Complying With Signature Requirement.

13.05[5][b] LOCAL PRACTICE: Signing by Electronic Means.

13.05[5][c] Determining Proper Person to Sign Jury Demand.

13.05[5][d] LOCAL PRACTICE: CD Cal Requirements.

13.05[5][e] LOCAL PRACTICE: ED Cal Requirements.

13.05[5][f] LOCAL PRACTICE: SD Cal Requirements.

13.06 Serve and File Jury Demand.

13.06[1] Service of Demand Must Be Timely.

13.06[1][a] In Action Commenced in Federal Court, Serve Demand Within 10 Days After Service of Last Pleading on Issue.

13.06[1][b] "Last Pleading" on Issue Defined.

13.06[1][c] In Removed Action, Serve Demand Within 14 Days After Filing or Service of Removal Petition.

13.06[1][d] Serve Supplemental Jury Demand Within 14 Days After Another Party's Limited Jury Demand.

13.06[1][e] In Condemnation Proceeding, Serve Demand Within Time for Answer or As Ordered by Court.

13.06[2] File Jury Demand.

13.06[2][a] File Demand Within Reasonable Time After Service.

13.06[2][b] LOCAL PRACTICE: CD Cal Requirements.

13.06[2][c] In Condemnation Proceeding, File Demand Within Time for Answer or As Ordered by Court.

13.07 Practice When Jury Right Applies.

13.07[1] Jury to Decide Factual Issues.

13.07[2] Jury's Role When Case Involves Legal and Equitable Claims With Common Factual Issues.

13.07[3] Jury's Role When Case Involves Legal and Equitable Claims Without Common Factual Issues.

13.08 Opposing Jury Demand.

13.08[1] Court's Power to Strike Jury Demand.

13.08[2] Grounds for Striking Jury Demand.

13.09 CHECKLIST: Obtaining Relief From Waiver of Jury.

13.09[1] Petitioning Party.

13.09[2] Opposing Party.

13.10 Waiver of Jury Right.

13.10[1] Waiver by Previous Agreement.

13.10[2] Waiver by Failure to Make Timely Jury Demand.

13.10[3] Waiver by Participation in Bench Trial.

13.11 Moving for Relief From Waiver of Jury.

13.11[1] Prepare Motion for Relief From Waiver.

13.11[2] Moving Party Must Show More Than Oversight or Inadvertence.

13.11[2][a] Oversight or Inadvertence Is Insufficient.

13.11[2][b] Narrow Discretion to Grant Relief in Ninth Circuit.

13.12 Opposing Motion for Relief From Waiver of Jury.

13.13 Obtaining Relief From Court's Denial of Jury Trial.

13.13[1] File Petition for Writ of Mandamus.

13.13[2] File Petition for Interlocutory Appeal.

13.13[2][a] Interlocutory Appeal Available at Discretion of Appellate Court.

13.13[2][b] Request Trial Court to Certify Order for Appeal.

13.13[2][c] File Application for Interlocutory Appeal With Court of Appeals.

13.13[3] Take Appeal From Final Judgment.

13.14 CHECKLIST: Withdrawing Jury Demand.

13.15 Consent of Affected Parties Is Required.

13.16 Consent May Be by Oral or Written Stipulation.

13.17 CHECKLIST: Obtaining Advisory Jury.

13.17[1] Petitioning Party.

13.17[2] Opposing Party.

13.18 Determine Whether to Request Advisory Jury.

13.18[1] Court's Power to Use Advisory Jury.

13.18[2] Function of Advisory Jury.

13.18[3] Use of Advisory Jury When Jury Trial Has Been Waived.

13.19 Prepare Motion for Advisory Jury.

13.19[1] Court May Empanel Advisory Jury on Party's Motion.

13.19[2] Moving Party Must Show Unique Circumstances.

13.19[3] Any Objection to Denial of Jury Trial Must Be Stated on Record.

13.20 Opposing Motion for Advisory Jury.

13.21 Demand for Jury Trial.

13.22 Notice of Motion and Motion to Strike Jury Demand.

13.23 Notice of Motion and Motion for Relief From Waiver of Jury Trial.

13.24 Consent to Bench Trial Despite Jury Demand.

13.25 Notice of Motion and Motion for Advisory Jury.

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Unit 3 Pleading Stage
CHAPTER 13 Demanding a Jury Trial
I. STRATEGY

2-13 MB Practice Guide: Fed Pretrial Civ Proc in CA 13.01

13.01 Scope.

This chapter covers:

- Determining right to jury trial [*see 13.04*].
- Demanding jury trial [*see 13.05*, *13.06*; *Form: 13.21*].
- Opposing jury demand or request [*see 13.08*; *Form: 13.22*].
- Obtaining relief from waiver of jury [*see 13.09 -13.13*; *Form: 13.23*].
- Withdrawing jury demand [*see 13.14 -13.16*; *Form: 13.24*].
- Obtaining advisory jury [*see 13.17 -13.20*; *Form: 13.25*].

Core Rules:
Fed R Civ P 38, *39*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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Unit 3 Pleading Stage
CHAPTER 13 Demanding a Jury Trial
I. STRATEGY

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13.02 Objective and Strategy.

For cases in which the right to trial by jury is guaranteed, counsel may elect to demand a jury trial or have the action heard by the court. In deciding whether to demand a jury trial, counsel should balance the expenses of a jury trial, including the extra time needed, with the potential benefits of having the action heard and decided by a jury.

Judge's Perspective:

Jury verdicts are harder to overturn on appeal than court verdicts. Also, if a verdict is reached, there is no need to wait for the judge's decision. On the other hand, the unanimity requirement makes a hung jury a risk. And complex cases, e.g., patent cases, are difficult to explain to a jury. If you know the judge, you can assess the wisdom of a court trial.

Detailed Discussion

/Forms: 8 Moore's Federal Practice, Ch. 38, Right to a Jury Trial; Demand; Ch. 39, Trial by Jury or by the Court (Matthew Bender 3d ed.).

4 Bender's Federal Practice Forms, Rule 38, Right to a Jury Trial; Demand Rule 39, Trial by Jury or by the Court (Matthew Bender).

Cross Reference:

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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Unit 3 Pleading Stage
CHAPTER 13 Demanding a Jury Trial
II. OBTAINING TRIAL BY JURY

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13.03 CHECKLIST: Obtaining Jury Trial.

13.03[1] Party Seeking Jury Trial.

☐ Review each claim in action to determine whether claim is triable of right by jury.

○ If claim arises from common law, determine whether:

☐ Claim is legal in nature and therefore triable to jury.

☐ Claim is equitable in nature and therefore not triable to jury.

○ If claim arises from statute:

☐ Determine whether federal statute expressly confers or denies right to jury trial.

☐ If no statutory jury right applies, examine nature of action and remedies sought to determine whether action involves legal rights triable to jury, or equitable rights not triable to jury.

Authority:
US Const, amend VII; *Fed R Civ P 38(a)*

Discussion:
See *§§ 13.04[2] -[4]*

☐ Determine whether jury trial is desirable, considering factors such as:

- ○ Demographics of trial venue and likely composition of jury panel.
- ○ History and reputation of trial judge, if known.
- ○ Anticipated length of trial.
- ○ Complexity of factual issues in case.

Discussion:
See *§ 13.04[1]*

☐ If claim is not triable of right, but jury trial is desirable:

- ○ Obtain consent of all parties to jury trial.
- ○ Request that court order trial by jury.

Exception:
Jury trial by consent is not available in an action against the United States for which a federal statute provides for trial without a jury.

Authority:
Fed R Civ P 39(c)

Discussion:
See *§ 13.04[5]*

☐ If claim is triable of right and jury trial is desirable, determine whether jury demand is necessary.

○ If action was commenced in federal district court, determine whether any other party has made effective jury demand covering issues for which jury is desired.

○ If action was removed to federal district court, determine whether any party made effective jury demand before removal.

Authority:
Fed R Civ P 38(b), 81(c)

Discussion:
See *§ 13.04[6], [7]*

☐ If jury demand is necessary, determine whether to limit demand to certain issues.

Authority:
Fed R Civ P 38(c)

Discussion:
See *§ 13.04[8]*

☐ Prepare jury demand.

○ Either:

☐ Include jury demand in pleading in accordance with requirements of local rules; or

☐ Draft jury demand separate from pleadings.

○ If appropriate, specify in jury demand issues for which jury trial is demanded.

○ Sign jury demand.

Authority:
Fed R Civ P 11(a), (b), 38(b), (c); *CD Cal Civ LR 38-1*; *ED Cal Civ LR 201*; *ND Cal Civ LR 3-6(a)*; *SD Cal Civ LR 5.1(j.3)*, see § 38.1

Discussion:
See *§ 13.05*

Form:
See *§ 13.21*

☐ Timely serve jury demand on all other parties.

○ Generally, serve jury demand within 10 days after service of last pleading directed to issues on which jury trial is demanded.

○ If action was removed to federal court after all necessary pleadings were served:

☐ If party making jury demand removed action, serve jury demand within 10 days after petition for removal is filed.

☐ Serve other party's jury demand within 10 days after service on that party of notice of filing removal petition.

○ If supplementing other party's jury demand, serve supplementary demand within 10 days after service of other party's demand, or within any lesser time ordered by court.

○ In condemnation proceeding, serve jury demand within time allowed for answer, or within any later time set by court.

Authority:
Fed R Civ P 38(b), 71.1(h)(1)(B), 81(c)

Discussion:
See *§ 13.06[1]*

☐ Timely file jury demand.

○ Generally, file jury demand within reasonable time after service or within time specified by any applicable local rules.

○ In condemnation proceeding, file jury demand within time allowed for answer, or within any later time set by court.

Authority:
Fed R Civ P 5(d), 38(b), 71.1(h)(1)(B); CD Cal Civ LR 38-2

Discussion:
See *§ 13.06[2]*

13.03[2] Party Opposing Jury Demand.

☐ If opposing jury demand, prepare written motion to strike demand.

○ Make motion as soon as possible, before court and other parties have made substantial preparation for jury trial in reliance on jury demand.

○ Establish grounds for striking jury demand, such as:

☐ One or more issues covered by jury demand are not properly triable by jury.

☐ Jury demand was not timely served or filed.

☐ One or more initially apparent jury issues are not actually presented by case.

○ Follow standard noticed motion procedure.

Authority:
Fed R Civ P 39(a)

Discussion:
See *§ 13.08*

Form:

See *§ 13.22*

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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Unit 3 Pleading Stage
CHAPTER 13 Demanding a Jury Trial
II. OBTAINING TRIAL BY JURY

2-13 MB Practice Guide: Fed Pretrial Civ Proc in CA 13.04

13.04 Options and Strategy.

13.04[1] Determine Whether Jury Is Desirable. In deciding whether to demand a jury trial, the relevant factors may include the following:

- The demographics of the trial venue, and the likely composition of the jury panel.
- The history and reputation of the trial judge, if known.
- Whether potential biases of the jurors, or of the judge (e.g., relating to the parties, nature of the case, amount of damages sought, potential witnesses) argue in favor of or against a jury trial.
- The anticipated length of trial.
- In complex civil litigation, whether the subject matter is beyond the comprehension of most lay jurors and thus better-suited to decision by a judge.
- Whether the law is favorable and, thus, whether an appeal to "layman" jurors would have a greater chance of success.
- Whether the possibility of hung jury (because of the unanimity requirement) is an advantage or disadvantage.
- Whether potential biases of the jurors, or of the judge (e.g., relating to the parties, nature of the case, amount of damages sought, potential witnesses) argue in favor of or against a jury trial.
- Whether the detailed rulings usually issued by, or required of, federal judges would benefit a potential future appeal, particularly in complex litigation, or whether a simpler jury verdict is preferable.

- Whether the nature of the case is such that the voir-dire and peremptory challenge process with respect to jurors would be preferable to the very limited ability to disqualify a judge.

- Whether the differential treatment of evidence is relevant to the case. If there is highly prejudicial evidence, it may be preferable to have a jury that can be isolated from evidentiary disputes and rulings. On the other hand, a judge is better able to render a verdict based on admissible evidence only, while a jury exposed to excluded evidence or improper questions or statements of counsel may be less able to understand jury instructions and differentiate between admissible and inadmissible matters.

Many of the traditional axioms regarding juries may require reexamination, particularly in light of the current drive for universal jury service. Professionals, executives, scientists, and artists are increasingly serving on federal juries. Knowing that intelligent, sophisticated jurors may determine the case can affect the decision to demand a jury.

Decision Point--Plaintiff:

Because federal practice requires an early demand for a jury [*see Fed R Civ P 38(b)*], a prospective plaintiff must weigh the availability and desirability of a jury as part of the process of planning the litigation and drafting the complaint. If the need for an early jury demand is overlooked while drafting the complaint, counsel may find it necessary to make a hurried and perhaps ill-considered decision.

Evaluating Jury Demographics Using Online Resources:

Many resources are available online for investigating jury demographics within a specific city or county. For example, helpful resources at *lexis.com* include:

- Legal tab> Area of Law--By Topic> Human Resources> Investigate Person, Property & Business> Geodemographic Reference> ZIP Demographics.

  - Sample Search: Try the following Terms and Connectors search to find demographic information for a particular ZIP code: *zip (92843)*

- Legal tab> Area of Law--By Topic> Human Resources> Investigate Person, Property & Business> Geodemographic Reference> County Demographics.

  - Sample Search: Try the following Terms and Connectors search to find demographic information for a particular county: *county (orange) and state (cal!)*

Cross References:

Discussion of preparing the complaint, see *Ch. 6, Drafting the Summons and Complaint, 6.03 -6.17*. Discussion of timing on making a jury demand, see *§ 13.06[1]*. Form, see *§ 13.21*.

13.04[2] Determine Whether There Is a Right to Jury Trial.

13.04[2][a] Federal Law Determines Right to Jury. In federal court, even in diversity cases, the right to a jury trial is governed by federal law [*Simler v. Conner (1963) 372 US 221, 222, 83 S Ct 609, 9 L Ed2d 691*]. In a civil case brought in federal district court, the right to a jury trial is established under either the *Seventh Amendment* or a federal statute or rule [*Fed R Civ P 38(a)*; *see Fed R Civ P 71.1(h)(1)(B)*].

Cross References:

Discussion of the right to a jury trial under the *Seventh Amendment*, see *13.04[3]*. Discussion of the right to a jury trial under federal statutes, see *§ 13.04[4]*.

13.04[2][b] Procedural Rules Neither Enlarge Nor Restrict Right to Jury. *Fed R Civ P 38* and *39* govern the procedures for obtaining a jury trial. The Rules do not enlarge or restrict the right to a jury trial under the *Seventh Amendment* or federal statutes [*see Fed R Civ P 38(a)*; *Craig v. Atlantic Richfield Co. (9th Cir 1994) 19 F3d 472, 475*].

13.04[3] Seventh Amendment Preserves Common-Law Right to Jury.

13.04[3][a] Actions at Law Generally Are Triable by Jury. The *Seventh Amendment* preserves the right to jury trial in actions at law in which the amount in controversy exceeds twenty dollars [*US Const, amend VII*]. This right to jury trial applies not only to common-law actions cognizable when the *Seventh Amendment* was adopted, but also to newly created legal rights that would, under common-law principles, be enforceable in a suit at common law [*Pernell v. Southall Realty (1974) 416 US 363, 374-376, 94 S Ct 1723, 40 L Ed2d 198*].

Examples:

Actions traditionally deemed to be "at law" generally are those that seek "legal" remedies, such as money damages [*see United States v. Missouri River Breaks Hunt Club (9th Cir 1981) 641 F2d 689, 692*]. Some examples are the following:

- Assault and battery claims [*see Ross v. Bernhard (1970) 396 US 531, 533, 90 S Ct 733, 24 L Ed2d 729* (dictum, citing **Moore's**)].
- *Bivens* actions for damages against government agents and employees [*Nurse v. United States (9th Cir 2000) 226 F3d 996, 1005*].
- Breach-of-contract actions seeking damages [*Ross v. Bernhard (1970) 396 US 531, 542, 90 S Ct 733, 24 L Ed2d 729*].
- Conversion claims [*see Ross v. Bernhard (1970) 396 US 531, 533, 90 S Ct 733, 24 L Ed2d 729* (dictum, citing **Moore's**)].
- Defamation claims [*see Ross v. Bernhard (1970) 396 US 531, 533, 90 S Ct 733, 24 L Ed2d 729* (dictum, citing **Moore's**)].
- Ejectment actions [*Pernell v. Southall Realty (1974) 416 US 363, 370-376, 94 S Ct 1723, 40 L Ed2d 198* ; *Ross v. Bernhard (1970) 396 US 531, 533, 90 S Ct 733, 24 L Ed2d 729*].
- False imprisonment claims [*see Beckwith v. Bean (1878) 98 US 266, 276, 25 L Ed 124*].
- Fraud and deceit actions seeking damages [*see In re U.S. Fin. Secs. Litig. (9th Cir 1979) 609 F2d 411, 429-431*].
- Malicious prosecution claims [*Smoot v. Fox (6th Cir 1965) 353 F2d 830, 833* (citing **Moore's**)].
- Negligence claims [*Barron v. United States (9th Cir 1981) 654 F2d 644, 650*].
- Trespass actions [*United States v. Williams (5th Cir 1971) 441 F2d 637, 643-644* ; *United States v. Connolly (D Mont 1943) 3 FRD 417, 419*].

- Intellectual property infringement actions in which damages are sought [*Oiness v. Walgreen Co. (D Colo 1993) 838 F Supp 1420, 1421* (right to jury trial in action for damages for patent infringement)].

- Employment discrimination actions for damages under the Civil Rights Act of 1964 (for conduct occurring on or after January 1, 1991) [*Buddingh v. South Chicago Cable, Inc. (ND Ill 1993) 830 F Supp 437, 440*].

- Civil rights claims under *42 USC §§ 1981* and *1983* in which damages are sought [*Goodgame v. American Cast Iron Pipe Co. (11th Cir 1996) 75 F3d 1516, 1520* (court cannot treat jury as advisory on § 1981 claim); *Perez-Serrano v. DeLeon-Velez (1st Cir 1989) 868 F2d 30, 32* (claim seeking damages under § 1983 is characterized properly as legal for purposes of the *Seventh Amendment*)].

Cross Reference:

Discussion of actions traditionally deemed to be at law, see 8 Moore's Federal Practice, see *§ 38.30* (Matthew Bender 3d ed.).

13.04[3][b] Actions in Equity Generally Are Not Triable by Jury. Actions traditionally deemed to be "in equity" are generally not triable by a jury [*Tull v. United States (1987) 481 US 412, 417, 107 S Ct 1831, 95 L Ed2d 365*].

Examples:

Actions deemed to be in equity generally are those that seek "equitable" remedies such as injunctive relief [*see United States v. Missouri River Breaks Hunt Club (9th Cir 1981) 641 F2d 689, 692*]. Some examples are the following:

- Actions for reformation of contracts [*Enserch Corp. v. Shand Morahan & Co. (5th Cir 1992) 952 F2d 1485, 1502*].

- Actions for rescission or cancellation of contracts [*Dollar Sys., Inc. v. Avcar Leasing Sys., Inc. (9th Cir 1989) 890 F2d 165, 170-171*].

- Actions for specific performance of contracts [*Adams v. Johns-Manville Corp. (9th Cir 1989) 876 F2d 702, 709-710* (citing **Moore's**)].

- Foreclosures of liens and mortgages [*Perera Co. v. Goldstone (9th Cir 1974) 491 F2d 386, 387*].

- Actions to set aside fraudulent conveyances [*Granfinanciera, S.A. v. Nordberg (1989) 492 US 33, 44, 109 S Ct 2782, 106 L Ed2d 26*].

- Claims against the stake in an interpleader action [*Ross v. Bernhard (1970) 396 US 531, 541 n15, 90 S Ct 733, 24 L Ed2d 729*].

- Actions to quiet title to property if the possession of property is sought [*Lombardo Turquoise Milling & Mining Co. v. Hemanes (D Nev 1977) 430 F Supp 429, 433*].

- Actions for restitution [*Teamsters v. Terry (1990) 494 US 558, 570, 110 S Ct 1339, 108 L Ed2d 519* ; *Simpson v. Office of Thrift Supervision (9th Cir 1994) 29 F3d 1418, 1423-1424*].

- Actions seeking accounting for trusts [*American Universal Ins. Co. v. Pugh (9th Cir 1987) 821 F2d 1352, 1356* ; *Dardo-vitch v. Haltzman (3d Cir 1999) 190 F3d 125, 133-134 n1*].

- Actions for breach of trust [*Nedd v. United Mine Workers (3d Cir 1977) 556 F2d 190, 207*].

- Actions to declare constructive trusts [*American Universal Ins. Co. v. Pugh (9th Cir 1987) 821 F2d 1352, 1356*].

Cross Reference:

Discussion of actions traditionally deemed to be in equity, see 8 Moore's Federal Practice, see *§ 38.31* (Matthew Bender 3d ed.).

13.04[3][c] Admiralty Proceedings Generally Are Not Triable by Jury. There is no general constitutional right of trial by jury in a case that is within the district court's admiralty or maritime jurisdiction, unless there is an alternative basis for federal jurisdiction [*Fed R Civ P 38(e)*; *Craig v. Atlantic Richfield Co. (9th Cir 1994) 19 F3d 472, 476*].

Exceptions:

Certain admiralty proceedings may be tried to a jury:

- When claims at law and in admiralty arise out of the same incident and are so intertwined as to require trial by a single fact finder [*Fitzgerald v. United States Lines Co. (1963) 374 US 16, 21, 83 S Ct 1646, 10 L Ed2d 720*].

- Admiralty and maritime claims arising on the Great Lakes and connecting navigable waters [*28 USC § 1873*].

- Claims under the Jones Act by an injured seaman, or the personal representative of the seaman in case of death [*46 USC app § 688*; *Craig v. Atlantic Richfield Co. (9th Cir 1994) 19 F3d 472, 475-476*].

- The "saving to suitors" clause of the statutory provision conferring admiralty and maritime jurisdiction permits claims to be brought as actions at law if the requisite diversity and jurisdictional amount are present [*28 USC § 1333*].

13.04[3][d] Declaratory Relief May Be Either at Law or in Equity. Declaratory relief is neither strictly equitable nor legal. A particular declaratory judgment draws its equitable or legal substance from the nature of the underlying controversy [*Transamerica Occidental Life Ins. Co. v. Digregorio (9th Cir 1987) 811 F2d 1249, 1251* (because action involved contractual claim to insurance benefits, the source of the case was clearly a legal one, and had suit gone to trial, defendant could have demanded a jury)].

13.04[4] Right to Jury Trial in Statutorily Created and Special Actions and Proceedings.

13.04[4][a] Test for Determining Whether Jury Right Applies. A statutory claim for relief may expressly confer or deny a right to a jury trial [*see, e.g., 28 USC § 2402*]. In other instances, to determine whether the *Seventh Amendment* right to a jury trial applies, the court must determine whether the case will resolve legal rights or only equitable rights [*Tull v. United States (1987) 481 US 412, 417-418, 107 S Ct 1831, 95 L Ed2d 365*]. This inquiry requires the court to examine [*Tull v. United States (1987) 481 US 412, 417-418, 107 S Ct 1831, 95 L Ed2d 365* ; *SEC v. Rind (9th Cir 1993) 991 F2d 1486, 1493*]:

- The nature of the action and whether it is analogous to historical legal or equitable actions; and

- The nature of the remedy sought, whether legal or equitable.

The Supreme Court has repeatedly stressed that the second factor--identifying the relief sought as legal or equitable--is the more important of the two [*see Wooddell v. International Bhd. of Elec. Workers (1991) 502 US 93, 97, 112 S Ct 494, 116 L Ed2d 419* ; *Teamsters v. Terry (1990) 494 US 558, 565, 110 S Ct 1339, 108 L Ed2d 519*].

13.04[4][b] Actions and Proceedings Triable by Jury. If Congress creates an action that did not exist at common law, the *Seventh Amendment* requires that trial by jury be available if that action invokes rights and remedies of the kind traditionally enforced in an action at law [*Curtis v. Loether (1974) 415 US 189, 193, 94 S Ct 1005, 39 L Ed2d 260*]. In addition, a federal statute or rule may expressly provide for trial by jury in instances in which the *Seventh Amendment* would not otherwise guarantee a jury trial [*Standard Oil Co. v. Arizona (9th Cir 1984) 738 F2d 1021, 1023*].

Examples:

The following are examples of statutory and special proceedings in which jury trial is available:

- Actions under the Age Discrimination in Employment Act seeking damages [*29 USC § 626(c)(2)*].
- Antitrust actions for treble damages [*Standard Oil Co. v. Arizona (9th Cir 1984) 738 F2d 1021, 1027-1032*].
- Civil rights actions under *42 USC § 1983* seeking damages [*City of Monterey v. Del Monte Dunes at Monterey, Ltd. (1999) 526 US 687, 729-730, 119 S Ct 1624, 143 L Ed2d 882*].
- Liability issues in actions under the Clean Water Act [*Tull v. United States (1987) 481 US 412, 422-427, 107 S Ct 1831, 95 L Ed2d 365* ; *see 33 USC § 1319(d)*].
- Compensation issues in condemnation proceedings involving the traditional exercise of eminent domain power by the United States (but not in inverse condemnation actions), unless the court appoints a commission to determine the compensation issue [*Fed R Civ P 71.1(h)*; *KLK, Inc. v. United States Dep't of Interior (9th Cir 1994) 35 F3d 454, 457* ; *see 28 USC § 1358*].
- Copyright infringement actions seeking statutory damages [*Feltner v. Columbia Pictures Television, Inc. (1998) 523 US 340, 353, 118 S Ct 1279, 140 L Ed2d 438*].
- Damages claims for housing discrimination under the Fair Housing Act [*Curtis v. Loether (1974) 415 US 189, 195, 94 S Ct 1005, 39 L Ed2d 260* ; *see 42 USC § 3612*].
- Actions for damages under the Family and Medical Leave Act [*Frizzell v. Southwest Motor Freight (6th Cir 1998) 154 F3d 641, 643* ; *29 USC § 2601 et seq.*].
- Proceedings under the Great Lakes Act [*28 USC § 1873*].
- Jones Act proceedings, but only at the plaintiff's option [*46 USC app § 688*; *Craig v. Atlantic Richfield Co. (9th Cir 1994) 19 F3d 472, 475-476*].
- Actions for breach of collective bargaining agreements under the Labor Management Relations Act [*Chauffeurs, Teamsters & Helpers v. Terry (1990) 494 US 558, 569-570, 110 S Ct 1339, 108 L Ed2d 519* ; *see 29 USC § 185*].

- Union members' suits under the Labor Management Reporting and Disclosure Act [*Wooddell v. International Bhd. of Elec. Workers (1991) 502 US 93, 97, 112 S Ct 494, 116 L Ed2d 419* ; *see 29 USC § 401 et seq.*].

- Actions under the Migrant and Seasonal Agricultural Worker Protection Act [*Calderon v. Witvoet (7th Cir 1993) 999 F2d 1101, 1109* ; *see 29 USC § 1854(c)(1)*].

- Actions for compensatory damages under the Petroleum Marketing Practices Act [*Thompson v. Kerr-McGee Ref. Corp. (10th Cir 1981) 660 F2d 1380, 1386* ; *see 15 USC § 2805*].

- Actions for damages under federal securities laws [*In re U.S. Fin. Secs. Litig. (9th Cir 1979) 609 F2d 411, 422-426*].

- Seizures and forfeitures, except in admiralty cases [*see C.J. Hendry Co. v. Moore (1943) 318 US 133, 153, 63 S Ct 499, 87 L Ed 663*].

- Shareholders' derivative suits seeking damages for fraud, negligence, or breach of contract [*Ross v. Bernhard (1970) 396 US 531, 542, 90 S Ct 733, 24 L Ed2d 729*].

- Actions against the United States to recover erroneously or illegally collected taxes or penalties [*28 USC § 2402*; *see 28 USC § 1346(a)(1)*].

- Title VII discrimination claims seeking damages [*42 USC § 1981a(c)*].

- Trademark infringement actions seeking damages [*Dairy Queen, Inc. v. Wood (1962) 369 US 469, 473-479, 82 S Ct 894, 8 L Ed2d 44*].

Cross Reference:

Discussion of jury rights in statutorily created and special actions and proceedings, see 8 Moore's Federal Practice, see *§ 38.33* (Matthew Bender 3d ed.).

13.04[4][c] Actions and Proceedings Not Triable by Jury. A statutory action that did not exist at common law will not be triable by a jury if the action invokes rights and remedies of the kind traditionally enforced in an equitable action [*Curtis v. Loether (1974) 415 US 189, 193, 94 S Ct 1005, 39 L Ed2d 260*]. Also, statutes may expressly deny trial by jury [*see, e.g., 28 USC § 2402*].

Examples:

The following are examples of statutory and special proceedings in which jury trial is not available:

- Actions under the Age Discrimination in Employment Act seeking front pay, injunctive relief, and reinstatement [*Duke v. Uniroyal, Inc. (4th Cir 1991) 928 F2d 1413, 1424* ; *see 29 USC § 626(c)(2)*].

- Civil rights actions seeking back pay and reinstatement, other than Title VII actions seeking compensatory or punitive damages [*McFerren v. County Bd. of Educ. (6th Cir 1972) 455 F2d 199, 200*].

- Penalties issues in actions under the Clean Water Act [*Tull v. United States (1987) 481 US 412, 425-427, 107 S Ct 1831, 95 L Ed2d 365* ; *see 33 USC § 1319(d)*].

- Actions under the Employee Retirement Income Security Act [*Spinelli v. Gaughan (9th Cir 1993) 12 F3d 853, 857* ; *see 29 USC § 1001 et seq*.].

- Actions under the Federal Tort Claims Act [*28 USC § 2402*].

- Habeas corpus proceedings [*28 USC § 2243*].

- Inverse condemnation actions [*KLK, Inc. v. United States Dep't of Interior (9th Cir 1994) 35 F3d 454, 457*].

- Patent claim construction issues [*Markman v. Westview Instruments, Inc. (1996) 517 US 370, 376-377, 116 S Ct 1384, 134 L Ed2d 577*].

- Actions for injunctive relief under the Resource Conservation and Recovery Act [*United States v. Northeastern Pharm. & Chem. Co. (8th Cir 1986) 810 F2d 726, 749* ; *see 42 USC § 6973 et seq*.].

- Securities and Exchange Commission civil actions for disgorgement or injunctive relief [*SEC v. Rind (9th Cir 1993) 991 F2d 1486, 1492-1493* ; *Crane Co. v. American Standard, Inc. (2d Cir 1973) 490 F2d 332, 342-343* (citing **Moore's**)].

- Actions against the United States, unless the statute waiving sovereign immunity and creating the right of action also expressly provides a right to trial by jury [*KLK, Inc. v. United States Dep't of Interior (9th Cir 1994) 35 F3d 454, 456* ; *see 28 USC § 2402*].

Cross Reference:

Discussion of jury rights in statutorily created and special actions and proceedings, see 8 Moore's Federal Practice, see *§ 38.33* (Matthew Bender 3d ed.).

13.04[5] Court May Order Jury Trial If All Parties Consent. In an action not otherwise triable of right by a jury, the court may order a jury trial with the consent of all parties, except in an action against the United States for which a federal statute provides for trial without a jury [*Fed R Civ P 39(c)(2)*].

Distinguish:

In an action against the United States for which a federal statute provides for trial without a jury, the court may try any issue with an advisory jury, even if the parties do not consent to an advisory jury [*Fed R Civ P 39(c)(1)*].

Cross Reference:

Discussion of advisory juries, see *§§ 13.17 -13.20*.

13.04[6] Determine Whether Jury Demand Is Necessary.

13.04[6][a] In Action Commenced in Federal Court. A party seeking a jury trial of any issue triable of right by a jury must make a timely demand for a jury trial [*Fed R Civ P 38(b)(1)*; *see Fed R Civ P 71.1(h)(1)(B)*].

Exception:

If one party has demanded a jury trial, the other parties generally need not make their own demands as to those issues [*Fuller v. City of Oakland (9th Cir 1995) 47 F3d 1522, 1531* ; *see Fed R Civ P 38(c), (d)*].

Cross References:

Discussion of timing for making a jury demand, see *§ 13.06[1]*. Discussion of reliance on another party's jury demand, see *§ 13.04[7]* and *§ 13.05[4][b]*.

13.04[6][b] In Removed Action. In a case that has been removed from state court, a party seeking to preserve a right to a jury trial must make a formal jury demand unless either of the following circumstances exists:

- The party, before removal, already made an express demand for trial by jury in accordance with state law [*Fed R Civ P 81(c)(3)(A)*].

- The party, before removal, already made an express demand for trial by jury that would have complied with the requirements of *Fed R Civ P 38(b)*, even if it did not comply with the requirements of state law [*Mondor v. United States Dist. Court (9th Cir 1990) 910 F2d 585, 585-587* ; *see, e.g., Lutz v. Glendale Union High Sch., Dist. No. 205 (9th Cir 2005) 403 F3d 1061, 1066* (while state complaint adequately demanded jury trial on remedial issues of back pay and damages for pain and suffering, it did not contain jury demand on issue of liability)].

- State law applicable in the court from which the case was removed does not require the parties to make express jury demands, and the federal court has not directed that they do so [*Fed R Civ P 81(c)(3)(A)*].

Warning:

Jury demands in California superior court litigation may be asserted much later than in federal district court litigation [*compare* Cal Rules Ct, Rule 3.721, 3.727(13) (first case management conference, at which jury demand must be asserted, may be 180 days after filing of complaint); *CCP § 631(d)(4)* (jury trial waived if not asserted when case is set for trial) *with Fed R Civ P 38(b)(1)* (jury demand must be made within 10 days after filing of last pleading directed to issue)].

Cross References:

Discussion of Central District requirements for jury demand for removed case, see *§ 13.06[2][b]*; discussion of removal from state court, see *Ch. 3, Removing a State Court Case to Federal Court, §§ 3.03 -3.22*.

13.04[7] Determine Whether to Rely on Another Party's Jury Demand.

13.04[7][a] Parties May Rely on Demand for Issues It Covers. Once one party makes a jury demand, all other parties are entitled to rely on that demand for the issues it covers. They need not make their own separate demands, because the first demand cannot be withdrawn without the consent of all affected parties [*Fuller v. City of Oakland (9th Cir 1995) 47 F3d 1522, 1531* ; *see Fed R Civ P 38(c), (d)*]. The reliance on the jury demand of another must be reasonable to be effective, and otherwise the right to jury trial will be waived by the failure to file a demand [*California Scents v. Surco Prods., Inc. (9th Cir 2005) 406 F3d 1102, 1106*]. Whether a demand covers an issue depends on whether the issue "turns on the same matrix of facts" and "concerns the same general area of dispute" as the claim or counterclaim for which a jury trial was demanded [*California Scents v. Surco Prods., Inc. (9th Cir 2005) 406 F3d 1102, 1109*].

Exception--Condemnation Proceedings:

In condemnation proceedings there is no constitutional or statutory right to a jury trial; rather, the availability of a jury trial is based solely on *Fed R Civ P 71.1(h)(1)(B)*. A party in a condemnation proceeding may unilater-ally withdraw its jury demand without obtaining the consent of the adverse

party [*United States v. Keller (4th Cir 1998) 142 F3d 718, 720* ; *see Fed R Civ P 38(d)*]. A party desiring a jury trial in a condemnation proceeding should file a timely demand and should not rely on a demand filed by any other party, because any such demand can be unilaterally revoked.

Strategic Point--Plaintiff:

A plaintiff may rely on a defendant's demand for jury trial on its counterclaims for jury trial of the claims in the complaint only when the counterclaims embrace the "same issues" as the claims in the complaint. However, whether or not the counterclaims and claims embrace the same issues may be disputed and the safest course is to make one's own demand. For example, a district court determined that a defendant's business disparagement and business defamation counterclaims did not embrace the same issues as the plaintiff's trade dress infringement and unfair competition claims and ruled that the plaintiff was not entitled to rely on the defendant's jury demand to preserve its own right to jury trial on its complaint. Although the Ninth Circuit ultimately disagreed and remanded for jury trial after a bench trial resulted in a defense verdict, the decision to rely on the defendant's demand was a costly one [*see California Scents v. Surco Prods., Inc. (9th Cir 2005) 406 F3d 1102, 1105-1110*].

13.04[7][b] Parties May Not Rely on Demand for Other Issues. If a party's jury demand is limited to certain issues, the other parties may not rely on that demand to preserve the right to have a jury decide other issues [*see Fed R Civ P 38(c)*].

Example:

A defendant may file a third-party claim that raises issues not addressed in the complaint and answer. The defendant may not rely on the plaintiff's jury demand to preserve the right to have a jury try the new issues raised in the third-party complaint [*Rosen v. Dick (2d Cir 1980) 639 F2d 82, 92* (citing **Moore's**)].

13.04[7][c] Parties May Not Rely on Demand by Party that Has No Jury Right. If a party that has no jury right nevertheless demands a jury, the other parties will not be entitled to rely on that demand [*Craig v. Atlantic Richfield Co. (9th Cir 1994) 19 F3d 472, 476-477*].

Example:

Under the Jones Act, only the plaintiff has a right to demand a jury trial [*46 USC app § 688*]. Therefore, if the defendant makes a jury demand, the plaintiff is not entitled to rely on it and must make his or her own jury demand [*Craig v. Atlantic Richfield Co. (9th Cir 1994) 19 F3d 472, 476-477*].

13.04[8] Determine Whether to Limit Jury Demand to Certain Issues. A jury demand may specify the issues for trial by jury [*Fed R Civ P 38(c)*].

If the jury demand does not specify any issues, the party making the demand will be deemed to have demanded a jury on all issues triable by jury [*Fed R Civ P 38(c)*].

Strategic Point--Party Making Demand:

Although the party making the demand may specify issues to be tried to a jury, a general demand to try all of the issues so triable usually is advisable. A narrower demand effectively waives the jury trial right as to certain issues that may not be apparent at the outset. If there are issues of law not appropriate to a jury, the court can always rule or instruct on these issues at a later time [*see Fed R Civ P 39(a)(2)*].

Judge's Perspective:

A general demand is the better practice. The court will sort out the issues for jury trial if it is necessary.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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Unit 3 Pleading Stage
CHAPTER 13 Demanding a Jury Trial
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13.05 Demanding Jury.

13.05[1] Include Jury Demand in Pleading.

13.05[1][a] Inclusion in Pleading Is Sufficient. A demand for a trial by jury may be included in a pleading [*Fed R Civ P 38(b)*]. The usual method of including the demand in a pleading is to place a notation such as "Demand for Jury Trial" on the first page of the complaint [*see CD Cal Civ LR 38-1*; *ED Cal Civ LR 201*; *ND Cal Civ LR 3-6(a)*; *SD Cal Civ LR 5.1(j.3)*, *38.1*]. Local rules may require a separate demand in the body of the pleading, in addition to the endorsement [*see, e.g., CD Cal Civ LR 38-1*; *ND Cal Civ LR 3-6(a)*].

Decision Point--Plaintiff:

Usually, a party demanding a jury will include the demand in the party's pleading, although the demand can be made as late as 14 days after the last relevant pleading [*see Fed R Civ P 38(b)(1)*]. Following this procedure is no doubt the safest method to ensure that waiver does not inadvertently occur. For the plaintiff, however, there is one significant advantage to waiting. The district judge is not assigned until the complaint is filed [*see, e.g., ND Cal Civ LR 3-3(a)*]. If the identity of the judge may affect the decision to demand a jury, the plaintiff should consider omitting a jury demand from the complaint and waiting to decide whether to demand a jury until after the judge is assigned.

Judge's Perspective:

One minor risk in waiting is that the judge will assume that counsel wanted to see the assignment, and may take some offense if a jury trial is then demanded. But, this is a fairly minimal consideration.

Distinguish:

If a local rule requires that the jury demand appear in the body of the pleading, an additional requirement that the first page of the pleading contain a notation of the jury demand will not be deemed essential, unless the rule indicates that the demand itself is to be made by placing the notation on the first page [*Pradier v. Elespuru (9th Cir 1981) 641 F2d 808, 810-811* ; *see Rutledge v. Electric Hose & Rubber Co. (9th Cir 1975) 511 F2d 668, 674-675*].

13.05[1][b] LOCAL PRACTICE: CD Cal Requirements. If a jury demand is included in a pleading, the caption of the pleading must contain the words "DEMAND FOR JURY TRIAL." The demand itself must be set forth at the end of the pleading and be signed by counsel [*CD Cal Civ LR 38-1*].

13.05[1][c] LOCAL PRACTICE: ED Cal Requirements. A jury demand made in a pleading must appear immediately following the title of the pleading. Alternatively, a jury demand may be made in any other document permitted by Fed Civ P 38(b) [*ED Cal Civ LR 201*].

Cross Reference:

Discussion of Rule 38(b)'s requirements for jury demand, see *§ 13.06[1]*.

13.05[1][d] LOCAL PRACTICE: ND Cal Requirements. If the jury demand is included in a pleading, the caption of the pleading must state "DEMAND FOR JURY TRIAL" immediately following the designation of the pleading. The demand itself must be set forth at the end of the pleading and be signed by counsel [*ND Cal Civ LR 3-6(a)*].

13.05[1][e] LOCAL PRACTICE: SD Cal Requirements. If a jury is demanded in a pleading, the words "Demand for Jury Trial" must appear on the first page of the pleading, to the right of center, across from the title of the action and following the designation of the document [*SD Cal Civ LR 5.1(j.3)*, *38.1*].

13.05[2] Prepare Separate Jury Demand. A party who has not demanded a jury trial in a pleading may serve and file a separate jury demand [*Fed R Civ P 38(b)*].

Cross References:

Form, see *§ 13.21*. Discussion of timing, see *§ 13.06[1]*.

13.05[3] Indicating Jury Demand on Civil Cover Sheet Is Insufficient. Indicating on the civil cover sheet that a jury is demanded does not constitute a valid demand for jury trial [*Wall v. National R.R. Passenger Corp. (9th Cir 1983) 718 F2d 906, 909* ; *CD Cal Civ LR 38-3*; *ED Cal Civ LR 200*, *201*; *ND Cal Civ LR 3-6(b)*; *SD Cal Civ LR 38.1*].

Exception:

A civil cover sheet that includes an indication that a jury is demanded may be deemed sufficient to constitute a separate jury demand if it is served contemporaneously with the summons and complaint [*see Favors v. Coughlin (2d Cir 1989) 877 F2d 219, 220*].

Cross Reference:

Discussion of the preparation of the civil cover sheet, see Ch. 6, Drafting the Summons and Complaint, see *§ 6.20*.

13.05[4] Specify Issues for Jury Trial.

13.05[4][a] Demanding Jury Trial on Specific Issues. If desired, specify the issues to be tried by the jury [*see Fed R Civ P 38(c)*].

Consider:

If the jury demand does not specify any issues, the party making the demand will be deemed to have demanded a jury on all issues triable by jury [*Fed R Civ P 38(c)*].

Cross Reference:

Form, see *§ 13.21*.

13.05[4][b] Supplementing Another Party's Jury Demand. If a party has demanded trial by jury for only some of the issues, any other party may serve a demand for trial by jury of any other or all issues of fact in the action [*Fed R Civ P 38(c)*].

Cross Reference:

Form, see *§ 13.21*.

13.05[5] Sign Jury Demand.

13.05[5][a] Complying With Signature Requirement. The pleading or other document containing the jury demand must be signed [*Fed R Civ P 11(a)*]. The signature must be accompanied by the signer's address, e-mail address, and telephone number, if any [*Fed R Civ P 11(a)*].

An unsigned pleading or separate jury demand will be stricken if the omission is not corrected promptly after being called to the attention of the attorney or party [*Fed R Civ P 11(a)*].

Warning:

A person who signs a jury demand or other paper that is filed with the court makes certain implicit certifications to the court [*Fed R Civ P 11(b)*]. For example, a person signing a jury demand implicitly certifies that the demand is not being presented for any improper purpose, such as to cause unnecessary delay or needless increase in the cost of litigation [*Fed R Civ P 11(b)(1)*].

Cross Reference:

Coverage of the certifications implicit in a signature, see Ch. 6, Drafting the Summons and Complaint, see *§ 6.14*.

13.05[5][b] LOCAL PRACTICE: Signing by Electronic Means. A court may by local rule permit or require papers to be filed, signed, or verified by electronic means [*Fed R Civ P 5(d)(3)*; *see, e.g., ND Cal Civ LR 5-4*; ND Cal General Order 45].

Cross Reference:

Coverage of electronic filing, see *Ch. 5, Formatting, Serving, and Filing Papers, §§ 5.29 -5.31*.

13.05[5][c] Determining Proper Person to Sign Jury Demand. If the party demanding a jury is represented by counsel, the document containing the jury demand must be signed by at least one attorney of record. The signature must be in the attorney's individual name [*Fed R Civ P 11(a)*].

If the party demanding a jury is appearing pro se, the document containing the jury demand must be signed by the party [*Fed R Civ P 11(a)*].

13.05[5][d] LOCAL PRACTICE: CD Cal Requirements. The name of the person signing must be clearly typed below the signature line [*CD Cal Civ LR 11-1*]. If the person signing is a member of a law firm, the firm's name should also be indicated [*see CD Cal Civ LR 83-2.5.2*].

13.05[5][e] LOCAL PRACTICE: ED Cal Requirements. The name of the person signing must be clearly typed below the signature line [*ED Cal Gen LR 131(b)*].

13.05[5][f] LOCAL PRACTICE: SD Cal Requirements. The name of the person signing must be typed below the signature line [*SD Cal Civ LR 5.1(j.5)*].

Legal Topics:

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

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13.06 Serve and File Jury Demand.

13.06[1] Service of Demand Must Be Timely.

13.06[1][a] In Action Commenced in Federal Court, Serve Demand Within 10 Days After Service of Last Pleading on Issue. A jury demand must be served on all parties within 14 days after service of the last pleading directed to the issues on which a jury trial is demanded, except in condemnation actions [*Fed R Civ P 38(b)(1)*].

Trap:

Failure to serve a timely jury demand waives the right to a jury trial [*Fed R Civ P 38(d)*].

Judge's Perspective The decision about whether to demand a jury trial must be made within the time required. The Ninth Circuit *rarely* allows a tardy request to prevail.

Exception--Demand Endorsed on Pleading:

A jury demand need not be served separately from the party's pleading, if the pleading itself contains a proper jury demand [*Fed R Civ P 38(b)*].

Exception--Three Additional Days if Pleading Not Served by Hand Delivery:

If the last pleading directed to the issue was served by a method other than hand delivery [*see Fed R Civ P 5(b)(2)(C)-(F)*], three days are added to the time for demanding a jury trial [*Fed R Civ P 6(d)*].

Cross References:

Discussion of the time for serving a jury demand in condemnation proceedings, see *§ 13.06[1][e]*. Discussion of waiver of jury rights, see *§§ 13.09 -13.13*. Discussion of jury demands made in pleadings, see *§ 13.05[1]*. Discussion of the available methods of service, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.22*.

13.06[1][b] "Last Pleading" on Issue Defined. The "last pleading directed to" an issue is not the pleading that

raises a matter, but the pleading that contests it. Normally, that pleading is the answer to a complaint (or the reply to a counterclaim). Accordingly, if the pleadings are limited to a complaint and an answer, the time for serving a jury demand by either party is measured from service of the answer [*Fed R Civ P 38(b)(1)*].

Example--Answer by Last Defendant:

If there are multiple defendants, the fact that one defendant has served its answer does not begin the running of the 10-day period as against the plaintiff with regard to any issues that are also alleged against a second defendant, if the second defendant has not yet served its answer. A jury demand is timely if served within 10 days after the last defendant has served its answer [*Bentler v. Bank of Am. Nat'l Trust & Sav. Ass'n (9th Cir 1992) 959 F2d 138, 141*]. Further, if one of the defendants files a counterclaim with its answer, and the counterclaim involves factual issues common to the plaintiff's original claim, then a jury demand is timely if served within 10 days after the plaintiff's reply, or the last defendant's answer, whichever is later [*Bentler v. Bank of Am. Nat'l Trust & Sav. Ass'n (9th Cir 1992) 959 F2d 138, 141 n4*].

Example--Answer to Intervenor Complaint:

In a case in which intervention is authorized, the answer to the intervenor complaint, rather than the answer to the original complaint, is considered the last pleading directed to the triable issues. Thus, a party's jury demand made within 10 days of service of that answer entitles that party to a jury trial, even if the jury right may previously have been waived with respect to the original complaint [*United States v. California Mobile Home Park Mgmt. Co. (9th Cir 1997) 107 F3d 1374, 1378-1379*].

Warning--Amended Pleadings:

Unless an amended pleading raises new *factual* issues (not just new legal theories), it does not restart the time within which a jury demand must be served [Lutz v. Glendale Union High Sch., Dist. No. 205 *(9th Cir 2005) 403 F3d 1061, 1066*]. The addition of a new party to a claim does not by itself create a new issue of fact [*Daniel Int'l Corp. v. Fischbach & Moore, Inc. (5th Cir 1990) 916 F2d 1061, 1063-1064*].

13.06[1][c] In Removed Action, Serve Demand Within 14 Days After Filing or Service of Removal Petition.

In a case that has been removed from state court after all necessary pleadings have been served, a party entitled to trial by jury must serve any necessary jury demand within 14 days after the petition for removal is filed if the party is the petitioner. A jury demand by any other party must be served within 14 days after service on that party of the notice of filing the removal petition [*Fed R Civ P 81(c)(3)(B)*].

Exception--Removal Petition Not Served by Hand Delivery:

If the removal petition was served by a method other than hand delivery [*see Fed R Civ P 5(b)(2)(C)-(F)*], three days are added to the time for a party other than the petitioner to demand a jury trial [*Fed R Civ P 6(d)*].

Distinguish:

If the case is removed before all necessary pleadings have been served, the time within which to make any necessary jury demand is determined as if the case had been commenced in federal court [*see Fed R Civ P 38(b), 81(c)*].

Cross References:

Discussion of the determination whether a jury demand is necessary in a removed case, see *§ 13.04[6][b]*. Discussion of the available methods of service, see *Ch. 5, Formatting, Serving, and Filing Papers, 5.22*. Discussion of removal from state court, see *Ch. 3, Removing a State Court Case to Federal Court, §§ 3.03 -3.22*.

13.06[1][d] Serve Supplemental Jury Demand Within 14 Days After Another Party's Limited Jury Demand. If a party has demanded trial by jury for only some of the issues, any other party may, within 14 days after service of the demand or a lesser time ordered by the court, serve a demand for trial by jury of any other or all issues of fact in the action [*Fed R Civ P 38(c)*].

Exception--Three Additional Days if Other Party's Demand Not Served by Hand Delivery:

Three days are added to the time for supplementing another party's demand for a jury trial if that demand was served by a method other than hand delivery [*Fed R Civ P 6(d)*; *see Fed R Civ P 5(b)(2)(C)-(F)*].

Strategic Point--Defendant:

If the plaintiff has demanded a jury trial on only some of the issues, *Fed R Civ P 38(c)* should not be applied to cut off the jury right of a defendant who fails to make a jury demand within 14 days after service of the complaint. Even if the defendant allows Rule 38(c)'s 14-day period to lapse, the defendant may demand a jury under *Fed R Civ P 38(b)*, which authorizes a jury demand up to 14 days after service of the *last* pleading directed to the issue. That last pleading presumably will be the defendant's answer, which generally may be served up to 21 days after service of the complaint [*Fed R Civ P 12(a)(1)(A)(i)*].

Cross Reference:

Coverage of the available methods of service, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.22*.

13.06[1][e] In Condemnation Proceeding, Serve Demand Within Time for Answer or As Ordered by Court. In a condemnation proceeding, any jury demand should be served within the time allowed for the answer, 21 days after service of notice of commencement of the proceeding, or within any later time set by the court [*Fed R Civ P 71.1(h)(1)(B)*; *see Fed R Civ P 71.1(e)*].

Warning:

Fed R Civ P 71.1(h)(1)(B) specifies the time for *filing* a jury demand [*see 13.06[2][c]*], but it does not specify a time for *service*. However, it is prudent to serve the demand within the time prescribed for filing the demand.

13.06[2] File Jury Demand.

13.06[2][a] File Demand Within Reasonable Time After Service. The party demanding a jury trial generally must file the demand with the court, together with a certificate of service, within a reasonable time after service of the demand on the other parties, except in condemnation actions [*Fed R Civ P 5(d)(1)*, *38(b)(2)*].

Trap:

The failure to file a timely jury demand constitutes a waiver of any right to a jury trial [*Fed R Civ P 38(d)*].

Strategic Point:

A sure way to comply with the filing requirement is to include the jury demand in the party's pleading [*see Fed R Civ P 38(b)*]. The filing requirement for the jury demand will automatically be satisfied when the pleading is filed.

Cross References:

Discussion of the time for filing a jury demand in condemnation proceedings, see *§ 13.06[1][e]*. Discussion of waiver of jury rights, see *§ 13.10*. Discussion of including jury demands in pleadings, see *§ 13.05[1]*.

13.06[2][b] LOCAL PRACTICE: CD Cal Requirements. In a case that has been removed from state court that is not at issue at the time of removal, the jury demand must be filed within 10 days after service of the last pleading directed to the issues on which a jury trial is demanded [*CD Cal Civ LR 38-2*]. If the matter is already at issue at the time of removal, a jury demand by the removing party must be filed within 10 days after the filing of the notice of removal, and a jury demand by any other party must be filed within 10 days after "service of filing" [sic--probably should be "service or filing"] of the notice of removal [*CD Cal Civ LR 38-2*].

13.06[2][c] In Condemnation Proceeding, File Demand Within Time for Answer or As Ordered by Court. In a condemnation proceeding, any jury demand must be filed within the time allowed for the answer, 21 days after service of notice of commencement of the proceeding, or within any later time set by the court [*Fed R Civ P 71.1(h)(1)(B)*; *see Fed R Civ P 71.1(e)*].

Legal Topics:

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

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13.07 Practice When Jury Right Applies.

13.07[1] Jury to Decide Factual Issues. When a jury right applies to a given claim or issue, the jury decides all *factual* issues necessary to resolve that claim or issue; questions of *law* are decided by the court [*see City of Monterey v. Del Monte Dunes at Monterey, Ltd. (1999) 526 US 687, 720, 119 S Ct 1624, 143 L Ed2d 882* ; *Bentler v. Bank of Am. Nat'l Trust & Sav. Ass'n (9th Cir 1992) 959 F2d 138, 141*].

13.07[2] Jury's Role When Case Involves Legal and Equitable Claims With Common Factual Issues. When the issues underlying legal and equitable claims overlap, the jury must decide the factual issues necessary to resolve not only the legal claims but also any factual issues common to both kinds of claims. The court, in later ruling on the equitable claims, will be bound by the jury's factual findings on those common issues [*Lytle v. Household Mfg., Inc. (1990) 494 US 545, 551-553, 110 S Ct 1331, 108 L Ed2d 504*].

Consider:

When legal and equitable claims have common factual issues, the jury trial on the legal claims must occur before the court determines the equitable claims [*Beacon Theatres, Inc. v. Westover (1959) 359 US 500, 510-511, 79 S Ct 948, 3 L Ed2d 988*].

13.07[3] Jury's Role When Case Involves Legal and Equitable Claims Without Common Factual Issues. When legal and equitable claims without common factual issues are joined, the right to a jury trial on the legal claims remains intact [*Lytle v. Household Mfg., Inc. (1990) 494 US 545, 551-553, 110 S Ct 1331, 108 L Ed2d 504*].

Consider:

When legal and equitable claims are joined but have no common factual issues, the court has discretion to try the equitable claims first [*Granite States Ins. Co. v. Smart Modular Techs., Inc. (9th Cir 1996) 76 F3d 1023, 1027*].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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13.08 Opposing Jury Demand.

13.08[1] Court's Power to Strike Jury Demand. The court may strike an action from the jury trial list on motion by a party or on its own initiative [*Fed R Civ P 39(a)(2)*].

Timing:

There is no specific deadline in the Federal Rules by which a motion to strike a jury demand must be filed [*see Fed R Civ P 39(a)*]. However, it is prudent to bring the motion as early as possible in the case, before the parties and court expend substantial time preparing for a jury trial in reliance on the jury demand.

Cross Reference:

Form, see *§ 13.22*.

13.08[2] Grounds for Striking Jury Demand. A motion to strike a jury demand should establish one or more of the following:

- One or more issues covered by the jury demand are not properly triable by a jury [*Fed R Civ P 39(a)*].
- The jury demand was not timely made [*see Fed R Civ P 38(d)*].
- One or more jury issues that initially were apparent are not actually presented by the case [*see Armco, Inc. v. Armco Burglar Alarm Co. (5th Cir 1982) 693 F2d 1155, 1158*].

Examples:

If the only claims triable to a jury have been abandoned or dismissed by court order, or if the court could enter summary judgment or a directed verdict on those issues, the court may strike the jury demand, because the case presents no bona fide issue to be determined by a jury [*see Armco, Inc. v. Armco*

Burglar Alarm Co. (5th Cir 1982) 693 F2d 1155, 1158 ; *Monroe Auto Equip. Co. v. Heckethorn Mfg. & Supply Co. (6th Cir 1964) 332 F2d 406, 412*].

Cross References:

Discussion of timing for making a jury demand, see *§ 13.06[1]*. Form of motion to strike a jury demand, see *§ 13.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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Unit 3 Pleading Stage
CHAPTER 13 Demanding a Jury Trial
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2-13 MB Practice Guide: Fed Pretrial Civ Proc in CA 13.09

13.09 CHECKLIST: Obtaining Relief From Waiver of Jury.

13.09[1] Petitioning Party.

☐ If jury trial is desired and has not been demanded, determine whether motion for relief from waiver of jury trial may be made.

○ Verify that issues for which jury trial is desired are subject to constitutional or statutory right to trial by jury.

○ Verify that time for making jury demand has expired, i.e., that more than 14 days have passed since last pleading directed to issues for which jury trial is desired.

Authority:
Fed R Civ P 38(b), (d), 39(b)

Discussion:
See *§§ 13.04[1] -[4], 13.06[1], 13.10*

☐ Prepare written motion for relief from waiver.

○ Specify circumstances beyond oversight or inadvertence of party or counsel as grounds for relief.

○ Follow standard noticed motion procedure.

Authority:
Fed R Civ P 39(b)

Discussion:
See *§ 13.11*

Form:
See *§ 13.23*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ If district court issues order denying motion for relief, consider following options:

○ Filing petition with court of appeals for writ of mandamus.

○ Seeking interlocutory appeal:

☐ Request that district court certify order for appeal.

☐ Within 10 days after entry of district court's order, file application with court of appeals for interlocutory appeal.

○ Requesting district court to impanel advisory jury.

○ Taking appeal from final judgment, preserving error by making clear objection on record before participating in bench trial before district court, with or without advisory jury.

Authority:
28 USC §§ 1292(b), 1651; *Fed R Civ P 39(c)(1)*

Discussion:
See *§ 13.13*

13.09[2] Opposing Party.

☐ If opposing other party's motion for relief from waiver of jury:

○ Calendar dates for filing and serving opposition to motion and for hearing.

○ Prepare opposition, establishing that movant's failure to make timely jury demand was nothing more than result of oversight or inadvertence.

○ Follow standard noticed motion procedure.

Authority:
Fed R Civ P 39(b)

Discussion:

See *§ 13.12*

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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13.10 Waiver of Jury Right.

13.10[1] Waiver by Previous Agreement. The right to a jury trial may be waived by contractual agreement [*Okura & Co. v. Careau Group (CD Cal 1991) 783 F Supp 482, 488*].

Contractual waivers of jury rights are narrowly construed, and the party attempting to enforce a purported waiver has the burden of proving that it was knowing and intentional [*Paracor Fin., Inc. v. General Elec. Capital Corp. (9th Cir 1996) 96 F3d 1151, 1166 n21* ; *Phoenix Leasing, Inc. v. Sure Broad., Inc. (D Nev 1994) 843 F Supp 1379, 1384-1385, 1388*]. In determining whether a waiver was knowing and intentional, courts generally consider the following factors [MZ Ventures, LLC v. Mitsubishi Motor Sales of Am., Inc. (CD Cal 1999) 1999 US Dist LEXIS 14421, at *44-*45 ; *Phoenix Leasing, Inc. v. Sure Broad., Inc. (D Nev 1994) 843 F Supp 1379, 1384-1385*]:

- Negotiability of the contract terms.
- Disparity in bargaining power between the parties.
- Business or professional experience of the party opposing the waiver.
- Conspicuousness of the jury-waiver provision.

13.10[2] Waiver by Failure to Make Timely Jury Demand. Failure to serve and file a timely jury demand waives the right to a jury trial [*Fed R Civ P 38(d)*].

Warning:

A plaintiff may not use a voluntary dismissal to revive a jury trial right that was forfeited by the failure to make a timely jury demand [*see, e.g., Russ v. Standard Ins. Co. (9th Cir 1997) 120 F3d 988, 990*].

Cross References:

Discussion of the time for making a jury demand, see *§ 13.06[1]*. Discussion on relief from waiver of

jury demand, see *§§ 13.10 -13.13*. Form of relief from waiver, see *§ 13.23*. Discussion of voluntary dismissal, see Ch. 30, Voluntary Dismissal.

13.10[3] Waiver by Participation in Bench Trial. Knowing participation in a bench trial without objection may constitute a waiver of the right to a jury trial, even despite prior service of a timely jury demand. Particularly when a party's participation in the bench trial is vigorous, that party's failure to remind the court of its previously served jury demand cannot be presumed to be the result of mere inadvertence, but can only be ascribed to knowledgeable relinquishment of the prior jury demand [*White v. McGinnis (9th Cir 1990) 903 F2d 699, 703* (en banc)].

Distinguish:

Absent a clear waiver, the right to a jury trial remains intact. For example, a pro se litigant's failure to comply with a local rule requiring the pretrial submission of proposed jury instructions does not constitute an implied waiver of jury trial [*Lawson v. Kolender (9th Cir 1981) 658 F2d 1362, 1371-1372*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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13.11 Moving for Relief From Waiver of Jury.

13.11[1] Prepare Motion for Relief From Waiver. Despite a party's failure to make a timely jury demand in an action in which a demand might have been made of right, the court in its discretion, on motion, may order a jury trial of any or all issues [*Fed R Civ P 39(b)*].

Fed R Civ P 39(b) suggests that filing a formal motion for a jury trial is the proper procedure to follow to obtain relief from the waiver resulting from failure to make a timely jury demand. However, the Rule does not specify any formalities, and an informal application or other act may be deemed sufficient to constitute a motion for relief [*Moores v. Greenberg (1st Cir 1987) 834 F2d 1105, 1108* (citing **Moore's**)]. For example, the following have been construed as motions for relief from a waiver of jury trial:

- The late filing of a jury demand [*Merritt v. Faulkner (7th Cir 1983) 697 F2d 761, 767*].
- A letter from counsel requesting a jury [*Moores v. Greenberg (1st Cir 1987) 834 F2d 1105, 1108-1109* (citing **Moore's**)].
- A jury request made in a pretrial memorandum [*FDIC v. Palermo (10th Cir 1987) 815 F2d 1329, 1333-1334*].

Cross Reference:

Discussion of the circumstances constituting waiver of the right to a jury trial, see *§ 13.10*.

13.11[2] Moving Party Must Show More Than Oversight or Inadvertence.

13.11[2][a] Oversight or Inadvertence Is Insufficient. Mere oversight or inadvertence by a litigant or counsel does not constitute sufficient grounds for granting a motion for relief from a waiver [*Zivkovic v. Southern Cal. Edison Co. (9th Cir 2002) 302 F3d 1080, 1086-1087* ; *Pacific Fisheries Corp. v. H.I.H. Cas. & Gen. Ins., Ltd. (9th Cir 2001) 239 F3d 1000, 1002*].

Distinguish--Relief From Waiver May Be Available If Process Server Failed to Serve Jury Demand on Parties:

Although oversight or inadvertence of a litigant or counsel do not justify relief, one district court granted relief in a case in which counsel had filed a jury demand and submitted it to a process server who, without any knowledge or fault on counsel's part, failed to serve the demand on the other parties in the case [*Ruiz v. Rodriguez (ED Cal 2002) 206 FRD 501, 504-505*].

13.11[2][b] Narrow Discretion to Grant Relief in Ninth Circuit. The Ninth Circuit's view of the scope of the district court's discretion to grant relief from a waiver of jury trial is narrower than that of other circuits. Decisions from other circuits granting relief based on circumstances that might be characterized as oversight or inadvertence will not be persuasive in a district court in the Ninth Circuit [*Raya v. Maryatt Indus. (ND Cal 1993) 829 F Supp 1169, 1175* ; *see Lewis v. Time, Inc. (9th Cir 1983) 710 F2d 549, 556-557*].

Example--Voluntary Dismissal:

The district court's discretion under *Fed R Civ P 41* to allow a voluntary dismissal without prejudice may not be applied to frustrate the purpose of *Fed R Civ P 38* and *39*. Thus, the court lacks the authority to dismiss an action to allow the plaintiff a second chance to assert a jury demand that had not been timely asserted in the original action because of inadvertence [*Russ v. Standard Ins. Co. (9th Cir 1997) 120 F3d 988, 990*].

Example--Removed Cases:

Although some circuits apply a more flexible standard in deciding whether relief from a waiver of jury trial should be granted to a party who has been involuntarily removed to federal court [*see, e.g., Cascone v. Ortho Pharm. Corp. (2d Cir 1983) 702 F2d 389, 392*], the Ninth Circuit has held that mere mistake (including a misinterpretation of applicable rules or law) or inadvertence on the part of counsel who is unfamiliar with federal procedure does not justify relief [*Pacific Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd. (9th Cir 2001) 239 F3d 1000, 1002-1003* ; Jimena v. UBS Ag Bank, Inc. (ED Cal 2008) 2008 US Dist LEXIS 64584, at *6-*7 (party that intentionally waives right to jury trial cannot show cause beyond mere inadvertence)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury Trial

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13.12 Opposing Motion for Relief From Waiver of Jury.

A memorandum opposing a motion for relief from a waiver of jury trial should establish that the movant's failure to make a timely jury demand was the result of oversight or inadvertence, which are not sufficient grounds for granting a motion for relief from a waiver [*Pacific Fisheries Corp. v. H.I.H. Cas. & Gen. Ins., Ltd. (9th Cir 2001) 239 F3d 1000, 1002* ; *Beckham v. Safeco Ins. Co. of Am. (9th Cir 1982) 691 F2d 898, 905*].

Exception:

Although the Ninth Circuit does not permit relief for oversight or inadvertence, at least of a litigant or counsel, one district court has granted relief in a case in which counsel had filed a jury demand and submitted it to a process server who, without any knowledge or fault on counsel's part, failed to serve the demand on the other parties in the case [*Ruiz v. Rodriguez (ED Cal 2002) 206 FRD 501, 504-505*].

Cross Reference:

Discussion of narrow discretion to grant relief from waiver in Ninth Circuit, see *§ 13.11[2][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureTrialsJury TrialsRight to Jury Trial

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13.13 Obtaining Relief From Court's Denial of Jury Trial.

13.13[1] File Petition for Writ of Mandamus. An order denying a claimed right to a jury trial is reviewable by petition for a writ of mandamus [*Dairy Queen, Inc. v. Wood (1962) 369 US 469, 480, 82 S Ct 894, 8 L Ed2d 44* ; *Owens-Illinois, Inc. v. United States Dist. Court (9th Cir 1983) 698 F2d 967, 969* ; *see 28 USC § 1651*].

Generally, ordinary reversible error by the district court is insufficient to justify the issuance of a writ of mandamus; the petitioner must establish a clear and indisputable right to the writ, such as by showing the district court abused its power or discretion [*see, e.g., Bankers Life & Cas. Co. v. Holland (1953) 346 US 379, 382-384, 74 S Ct 145, 98 L Ed 106*]. This substantial burden is always met in a case involving the denial of a jury trial, which is so important and fundamental that the only question before the appellate courts is whether the district court erred in denying the request for a jury trial [*Wilmington Trust v. United States Dist. Court (9th Cir 1991) 934 F2d 1026, 1028*].

Strategic Point--Petitioner:

If a writ of mandamus is sought and denied on the merits, the decision to deny a jury trial becomes the law of the case, and the issue ordinarily will not be reconsidered on appeal from the final judgment [*see Maldonado v. Flynn (2d Cir 1982) 671 F2d 729, 732*]. This makes the decision to pursue mandamus difficult, as courts often deal with mandamus petitions summarily.

Cross Reference:

Use of writ of mandamus, see 19 Moore's Federal Practice, Ch. 204, Extraordinary Writs (Matthew Bender 3d ed.).

13.13[2] File Petition for Interlocutory Appeal.

13.13[2][a] Interlocutory Appeal Available at Discretion of Appellate Court. As an alternative to mandamus review, a denial by the trial court of a claimed right to a jury trial may be reviewed on interlocutory appeal, if the district court certifies its order for appeal, and the court of appeals exercises its discretion to hear the appeal [*see 28*

USC § 1292(b); *see, e.g., McLaughlin v. Owens Plastering Co. (9th Cir 1988) 841 F2d 299, 299*].

13.13[2][b] Request Trial Court to Certify Order for Appeal. If the district judge is of the opinion that (1) an interlocutory order denying a jury trial involves a controlling question of law as to which there is substantial ground for difference of opinion, and that (2) an immediate appeal from the order may materially advance the ultimate determination of the litigation, he or she must so state in writing in the order [*28 USC § 1292(b)*].

Strategic Point--Appellant:

The party seeking district court certification for interlocutory appeal of an order denying a jury trial should point out that if it succeeds on appeal after a bench trial, a new trial would be mandated, so an interlocutory appeal could result in the conservation of judicial resources.

13.13[2][c] File Application for Interlocutory Appeal With Court of Appeals. On application to the court of appeals within 10 days after entry of the district court's order, the court of appeals has discretion to permit an appeal to be taken from the order [*28 USC § 1292(b)*].

Cross Reference:

Review of interlocutory orders, see 19 Moore's Federal Practice, Ch. 203, Interlocutory Orders (Matthew Bender 3d ed.).

13.13[3] Take Appeal From Final Judgment. A denial by the trial court of a claimed right to a jury trial may be reviewed on appeal from the final judgment [*see, e.g., California Scents v. Surco Prods., Inc. (9th Cir 2005) 406 F3d 1102*], absent conduct of the parties that makes it clear that they have waived any claimed the right to a jury trial [*National Union Elec. Corp. v. Wilson (6th Cir 1970) 434 F2d 986, 988*]. The erroneous denial of a jury trial is subject to harmless error analysis; a denial is harmless only when no reasonable jury could have found for the losing party and a directed verdict could have been granted for the prevailing party [*California Scents v. Surco Prods., Inc. (9th Cir 2005) 406 F3d 1102, 1109* ; *Fuller v. City of Oakland (9th Cir 1995) 47 F3d 1522, 1531*].

Consider:

If a writ of mandamus is sought and denied on the merits, the decision to deny a jury trial becomes the law of the case, and the issue ordinarily will not be reconsidered on appeal from the final judgment [*see Maldonado v. Flynn (2d Cir 1982) 671 F2d 729, 732*].

Warning:

Although denominated a "waiver" of jury trial [*see Fed R Civ P 38(d)*], the forfeiture of jury rights that results from a failure to make a timely jury demand does not prevent a party from appealing the trial court's denial of a jury trial [*see National Union Elec. Corp. v. Wilson (6th Cir 1970) 434 F2d 986, 988*]. However, an *actual, affirmative* waiver of jury rights (such as by participating without objection in a bench trial) will result in the loss of the right to appeal from the trial court's denial of a jury trial [*see White v. McGinnis (9th Cir 1990) 903 F2d 699, 703* (en banc)]. Therefore, if the trial court denies a jury trial, counsel should make a clear objection on the record before participating in a bench trial.

Cross Reference:

Appeal of final judgment, see 19 Moore's Federal Practice, Ch. 202, Final Judgments (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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13.14 CHECKLIST: Withdrawing Jury Demand.

☐ If jury trial has been demanded and bench trial is desired, obtain consent of parties to withdrawal of jury demand.

- ○ Obtain consent of all parties that are entitled to rely on jury demand.
- ○ Memorialize each party's consent, either:
  - ☐ In written stipulation filed with court.
  - ☐ By oral stipulation made in open court and entered in record.
- ○ Once necessary consents have been placed in record, request that court take case off jury calendar.

Authority:
Fed R Civ P 39(a)(1)

Discussion:
See *§§ 13.15*, *13.16*

Form:
See *§ 13.24*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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13.15 Consent of Affected Parties Is Required.

Once a party has demanded a jury trial, the demand may be withdrawn only with the consent of all affected parties or their attorneys of record [*Fed R Civ P 38(d)*].

Exception:

A party that opposed a jury demand cannot be said to have relied on that demand, and the consent of that party is not needed for the demand to be validly withdrawn before the start of trial [*Reid Bros. Logging Co. v. Ketchikan Pulp Co. (9th Cir 1983) 699 F2d 1292, 1304*]. However, this exception ceases to apply once trial has begun; a party cannot allow a jury trial to proceed and then unilaterally withdraw its jury demand, simply because the other party initially opposed the demand [*Fuller v. City of Oakland (9th Cir 1995) 47 F3d 1522, 1531-1532*].

Distinguish:

Fed R Civ P 38(d) appears to give each party to the action an effective veto over the withdrawal of a previously filed jury demand. However, a party's consent to withdrawal of a jury demand is required only to the extent that the demand covered that party's issues, so that the party would have been entitled to rely on the demand. If a party is unaffected by a jury demand as to certain issues, its consent to withdrawal as to those issues is not required [*see Rosen v. Dick (2d Cir 1980) 639 F2d 82, 92* (citing **Moore's**); *see also Reid Bros. Logging Co. v. Ketchikan Pulp Co. (9th Cir 1983) 699 F2d 1292, 1304*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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13.16 Consent May Be by Oral or Written Stipulation.

Consent of the parties for the withdrawal of a previously filed jury demand may be obtained by written stipulation filed with the court, or by oral stipulation made in open court and entered in the record [*Fed R Civ P 39(a)(1)*].

Cross References:

Requirements for stipulations, see *Ch. 26, Pretrial Motion Practice, § 26.09*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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CHAPTER 13 Demanding a Jury Trial
V. OBTAINING ADVISORY JURY

2-13 MB Practice Guide: Fed Pretrial Civ Proc in CA 13.17

13.17 CHECKLIST: Obtaining Advisory Jury.

13.17[1] Petitioning Party.

☐ If jury trial of right is not available or has been waived, determine whether to request advisory jury, considering following:

- ○ Court's use of advisory jury is wholly discretionary.
- ○ Function of advisory jury is to enlighten trial court but not to replace court as trier of fact.
- ○ Use of advisory jury probably will increase expense and duration of trial.

Authority:
Fed R Civ P 39(c)(1)

Discussion:
See *§ 13.18*

☐ Prepare written motion for advisory jury:

- ○ Establish that jury trial of right is not available.
- ○ Demonstrate exceptional circumstances justifying use of advisory jury.

○ Follow standard noticed motion procedure.

Authority:
Fed R Civ P 39(c)(1)

Discussion:
See *§ 13.19*

Form:
See *§ 13.25*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, § 26.12

13.17[2] Opposing Party.

☐ If opposing other party's motion for advisory jury:

○ Calendar dates for filing and serving opposition to motion and for hearing.

○ Prepare opposition, establishing either:

☐ Particular issue or issues under consideration are triable of right by jury, and jury right has not been waived.

☐ If jury trial of right is not available, there are no exceptional circumstances to justify using advisory jury.

○ Follow standard noticed motion procedure.

Authority:
Fed R Civ P 39(c)(1)

Discussion:
See *§ 13.20*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, § 26.37

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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13.18 Determine Whether to Request Advisory Jury.

13.18[1] Court's Power to Use Advisory Jury. In any action not triable of right by a jury, the court, on motion or on its own initiative, may try any issue with an advisory jury [*Fed R Civ P 39(c)(1)*; *see Poston v. United States (D Haw 1966) 262 F Supp 22, 24*].

The use of an advisory jury is wholly discretionary, and the trial court's action on a request for an advisory jury is not reviewable on appeal or by mandamus [*Cox v. Babcock & Wilcox Co. (4th Cir 1972) 471 F2d 13, 14* ; *In re Pan-American Life Ins. Co. (5th Cir 1951) 188 F2d 833, 834* (per curiam); *McCook v. Standard Oil Co. (CD Cal 1975) 393 F Supp 256, 258 n2*].

An advisory jury may not be substituted for a jury of right under the *Seventh Amendment*. If the trial court erroneously denies a party the right to a jury trial, the judgment will reversed and the case remanded for a new trial by jury, even if an advisory jury was impaneled and the trial court accepted the advisory verdict [*Pradier v. Elespuru (9th Cir 1981) 641 F2d 808, 811*].

Judge's Perspective:

Advisory juries are a bad idea. The risk of confusion is great. And if the judge disagrees with the advisory jury's result, this risks raising appellate issues. It also adds unnecessary time and expense.

13.18[2] Function of Advisory Jury. The function of the advisory jury is to enlighten the trial court. An advisory jury does not replace the court as trier of fact in the case; the responsibility for rendering a decision as the trier of fact remains with the judge, and the verdict of the advisory jury has no binding effect on the court [*Wilson v. Prasse (3d Cir 1972) 463 F2d 109, 116* ; *Frostie Co. v. Dr. Pepper Co. (5th Cir 1966) 361 F2d 124, 126* ; *McCook v. Standard Oil Co. (CD Cal 1975) 393 F Supp 256, 258 n2*].

Consider:

The court must make special findings of fact and separately state its conclusions of law; it may not simply enter judgment on the advisory jury's verdict [*Fed R Civ P 52(a)(1)*].

13.18[3] Use of Advisory Jury When Jury Trial Has Been Waived. *Fed R Civ P 39(c)* expressly authorizes advisory juries in all actions not triable of right by a jury. However, the Rule does not address the situation in which there is a jury trial right, but it has been waived. Nevertheless, there is authority to suggest that the court may use an advisory jury in such a case also [*see Hargrove v. American Cent. Ins. Co. (10th Cir 1942) 125 F2d 225, 228-229; (American) Lumbermens Mut. Cas. Co. v. Timms & Howard, Inc. (2d Cir 1939) 108 F2d 497, 500* (citing **Moore's**)]. Thus, if the court denies a party's motion to be relieved of a jury trial waiver, the party may consider requesting an advisory jury.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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13.19 Prepare Motion for Advisory Jury.

13.19[1] Court May Empanel Advisory Jury on Party's Motion. The court may exercise its discretion to empanel an advisory jury on motion by any party [*Fed R Civ P 39(c)(1)*]. The motion should establish the following:

- Jury trial of right is not available on the particular issue involved [*Fed R Civ P 39(c)*].

- Exceptional circumstances exist, justifying the use of an advisory jury [*see Moss v. Lane Co. (4th Cir 1973) 471 F2d 853, 855*].

Cross References:

Form of motion for an advisory jury, see *§ 13.25*. Coverage of waiver of jury rights by participation in a bench trial, see *§ 13.10[3]*.

13.19[2] Moving Party Must Show Unique Circumstances. Advisory juries are not favored, and the court's discretion to empanel an advisory jury will be exercised only in an exceptional case involving peculiar and unique circumstances [*Moss v. Lane Co. (4th Cir 1973) 471 F2d 853, 855*].

Circumstances that may tend to support the use of an advisory jury include the following:

- If an action involves both jury and nonjury claims or issues, the court may submit all issues of fact to the jury, which may act in an advisory capacity with regard to the nonjury issues [*Poston v. United States (D Haw 1966) 262 F Supp 22, 24*].

- Certain issues or types of claims are traditionally considered to be appropriate for jury resolution including questions of negligence in personal injury or wrongful death actions, and questions turning upon the credibility of witnesses. Thus, although the Federal Tort Claims Act provides that most actions against the federal government are to be tried by the court without a jury [*28 USC §§ 1346, 2402*], an advisory jury is not prohibited [*Poston v. United States (D Haw 1966) 262 F Supp 22, 24* (quoting

Moore's)].

Consider:

Some courts have declined to use advisory juries in Federal Tort Claims Act cases, noting that a verdict consistent with the court's views would be of no assistance, and giving any effect to a verdict inconsistent with the court's views would be an abdication of the court's responsibility [*see, e.g., Wright v. United States (D Mont 1978) 80 FRD 478, 480*].

13.19[3] Any Objection to Denial of Jury Trial Must Be Stated on Record. If the district court grants a motion for an advisory jury in conjunction with a decision to deny a request for a regular jury, the decision to deny a jury trial of right will be reviewable on appeal after final judgment [*see Pradier v. Elespuru (9th Cir 1981) 641 F2d 808, 811*]. However, to preserve an objection to the denial of a jury trial of right, counsel should make a clear objection on the record before participating in a bench trial with an advisory jury [*see White v. McGinnis (9th Cir 1990) 903 F2d 699, 703* (en banc)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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CHAPTER 13 Demanding a Jury Trial
V. OBTAINING ADVISORY JURY

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13.20 Opposing Motion for Advisory Jury.

A memorandum opposing a motion for an advisory jury should establish either of the following:

- The particular issue or issues under consideration are triable of right by a jury, and the jury right has not been waived [*Fed R Civ P 39(c)*].

- If a jury trial of right is not available, there are no exceptional circumstances to justify using an advisory jury [*see Moss v. Lane Co. (4th Cir 1973) 471 F2d 853, 855*].

Examples:

Arguments that may help persuade the court not to use an advisory jury include the following:

- Empanelling an advisory jury would not provide effective assistance for the court, because a verdict consistent with the court's views would be superfluous, and giving any effect to a verdict inconsistent with the court's views would be an abdication of the court's responsibility to hear and determine the factual issues [*see Wright v. United States (D Mont 1978) 80 FRD 478, 480* ; *see also Fed R Civ P 52(a)(1)*].

- A bench trial may result in a saving of the court's and the parties' resources, by eliminating the time and expense involved in selecting a jury, presenting the case to a jury, and instructing a jury.

- If the court has denied a request for a regular jury, the use of an advisory jury as a form of "compromise" will not eliminate the need for a new trial if the denial of a regular jury is reversed on appeal, because an advisory jury cannot be substituted for a constitutional jury of right [*see Pradier v. Elespuru (9th Cir 1981) 641 F2d 808, 811*].

The use of an advisory jury is wholly discretionary; therefore, if the court decides to empanel an advisory jury over a party's objection, that decision will not be reviewable on appeal or by mandamus [*see Cox v. Babcock & Wilcox Co. (4th Cir 1972) 471 F2d 13, 14* ; *In re Pan-American Life Ins. Co. (5th Cir 1951) 188 F2d 833, 834* (per curiam);

McCook v. Standard Oil Co. (CD Cal 1975) 393 F Supp 256, 258 n2].

Distinguish:

If the district court decides to empanel an advisory jury in conjunction with a decision to deny a request for a regular jury, the decision to deny a jury trial of right will be reviewable on appeal [*see Pradier v. Elespuru (9th Cir 1981) 641 F2d 808, 811*].

Cross Reference:

Coverage of the court's discretion to use an advisory jury, see *§ 13.18[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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CHAPTER 13 Demanding a Jury Trial
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13.21 Demand for Jury Trial.

Demand for Jury Trial.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	DEMAND FOR A JURY TRIAL
	)	
	)	

NOTICE IS HEREBY GIVEN that _____ [*party's status and name*] demands a jury trial in this action [*if jury trial is to be limited to specific issues, add:* as to the following issues: _____].

_____ [*date*]

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 38(b), (c)

Format Requirements:
See *§ 13.05*

Timing:
See *§ 13.06[1]*

Service and Filing of Demand:
See *§ 13.06*

Related Form:
See *§ 13.22*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury TrialTax LawFederal Taxpayer GroupsS CorporationsGeneral Overview

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2-13 MB Practice Guide: Fed Pretrial Civ Proc in CA 13.22

13.22 Notice of Motion and Motion to Strike Jury Demand.

Notice of Motion and Motion to Strike Jury Demand.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION TO STRIKE
_____ [*name*],	)	JURY DEMAND
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for the following:

(A) pursuant to *Rule 39(a) of the Federal Rules of Civil Procedure*, an order striking the demand for jury trial dated _____ [*date*] and filed by _____ [*identify party, e.g.,* Defendant Mary Jones], on the grounds that _____ [*specify, e.g.,* the jury demand was not timely made *or* the issues specified in the jury demand are not properly triable by a jury]; and

(B) an order granting further relief as may be appropriate.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 38(b), (d), 39(b)

Availability of Motion Procedure to Strike Jury Demand:
See *§ 13.08[1]*

Grounds for Striking Jury Demand:
See *§ 13.08[2]*

Related Form:
See *§ 13.21*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewTax LawFederal Taxpayer GroupsS CorporationsGeneral Overview

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Unit 3 Pleading Stage
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13.23 Notice of Motion and Motion for Relief From Waiver of Jury Trial.

Notice of Motion and Motion for Relief From Waiver of Jury Trial.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR RE-
_____ [*name*],	)	LIEF FROM WAIVER OF JURY TRIAL
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for the following:

(A) pursuant to *Rule 39(b) of the Federal Rules of Civil Procedure*, an order granting a jury trial in this action, on the grounds that _____ [*specify, e.g.,* the failure to serve the Plaintiff's jury demand resulted from circumstances beyond the knowledge or control of the Plaintiff or Plaintiff's counsel]; and

(B) an order granting further relief as may be appropriate.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service.*]

NOTES.

Authority:
Fed R Civ P 39(b)

Availability of Motion Procedure to Obtain Relief From Waiver of Jury:
See *§ 13.11[1]*

Grounds for Granting Motion:
See *§ 13.11[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCriminal Law & ProcedurePreliminary ProceedingsGeneral OverviewTax LawFederal Taxpayer GroupsS CorporationsGeneral Overview

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13.24 Consent to Bench Trial Despite Jury Demand.

Consent to Bench Trial Despite Jury Demand.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	CONSENT TO TRIAL BY COURT
	)	
	)	

IT IS HEREBY STIPULATED AND AGREED that this action may be tried by the court without a jury, notwithstanding the demand for jury trial dated _____ [*date*] and filed by _____ [*party's status and name*]. It is further stipulated and agreed that that demand for jury trial is withdrawn.

_____ [*date*]

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

_____ [*address, phone number, and fax number*]

Attorney for _____ [*party's status and name*]

.....

_____ [*date*]

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

_____ [*address, phone number, and fax number*]

Attorney for _____ [*party's status and name*]

.....

[*Add additional signature lines for each additional party.*]
SO ORDERED:

_____

United States District Judge

NOTES.

Authority:
Fed R Civ P 39(a)

Requirements and Format for Consent to Withdrawal of Demand:
See *§§ 13.15, 13.16*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsJury DemandsCriminal Law & ProcedurePreliminary ProceedingsGeneral OverviewGovernmentsCourtsGeneral OverviewTax LawFederal Taxpayer GroupsS CorporationsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 13 Demanding a Jury Trial
VI. FORMS

2-13 MB Practice Guide: Fed Pretrial Civ Proc in CA 13.25

13.25 Notice of Motion and Motion for Advisory Jury.

Notice of Motion and Motion for Advisory Jury.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR AD-
_____ [*name*],	)	VISORY JURY
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on .....[*date*] at .....[*time of day*], or as soon thereafter as the parties may be heard, _____ [*identify moving party, e.g.,* Defendant Mary Jones] will move this Court, at the United States Courthouse located at _____ .....[*address*], Courtroom .....[*courtroom number*], for the following:

(A) pursuant to *Rule 39(c) of the Federal Rules of Civil Procedure*, an order determining that the Court will empanel an advisory jury at the trial of this action, on the grounds that _____ [*specify, e.g.,* the findings of an advisory jury would be helpful to the court in deciding issues of negligence and credibility of witnesses, matters that are particularly appropriate for jury resolution]; and

(B) an order granting further relief as may be appropriate.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service.*]

NOTES.

Authority:
Fed R Civ P 39(c)

Availability of Advisory Jury:
See *§ 13.18*

Motion for Advisory Jury:
See *§ 13.19*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCriminal Law & ProcedurePreliminary ProceedingsGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 14 Intervention

2-14 MB Practice Guide: Fed Pretrial Civ Proc in CA 14.syn

§ 14.syn Synopsis to Chapter 14: Intervention

14.01 Scope.

14.02 Objective and Strategy.

14.02[1] Objective of Intervention Is to Make Nonparty a Party to Existing Action.

14.02[2] Nonparty's Need to Become Full-Fledged Party Depends on Many Factors.

14.02[2][a] Nonparty Is Rarely Obligated to Intervene.

14.02[2][b] Nonparty's Interest May Be Foreclosed by Judgment in Existing Suit, Even If Res Judicata Does Not Apply.

14.02[2][c] Nonparty's Interest May Be Represented Adequately by Existing Parties or by Amicus Curiae Status.

14.02[3] Timing of Intervention Is Critical.

14.02[4] Alternatives to Intervention.

14.02[4][a] Informally Assisting Existing Parties.

14.02[4][b] Requesting Existing Parties to Join or Add Nonparty.

14.02[4][c] Filing Separate Action.

14.02[4][d] Requesting Leave to File Amicus Curiae Brief.

14.03 CHECKLISTS: Drafting Motion to Intervene.

14.03[1] CHECKLIST: Drafting Motion to Intervene As of Right.

14.03[2] CHECKLIST: Drafting Motion for Permissive Intervention.

14.04 Scope of Intervention.

14.04[1] Intervention Gives Intervenor Party Status.

14.04[2] Nonparty May Choose to Intervene for Limited Purpose.

14.04[3] Intervention to Appeal Is Common Form of Limited Intervention.

14.05 Motion to Intervene Must Be Timely.

14.05[1] Timeliness Has No Fixed Deadline, but Is Measured by Circumstances.

14.05[2] Three Timeliness Factors.

14.05[3] Timeliness Requirement Construed More Strictly for Permissive Intervention.

14.06 Moving to Intervene As of Right Based on Federal Statute.

14.06[1] Statutory Right Must Be Unconditional.

14.06[2] Some Federal Statutes Provide Private Persons With Right to Intervene.

14.06[3] Some Federal Statutes Provide Government With Right to Intervene.

14.07 Moving to Intervene As of Right Based on Movant's Interest in Subject Matter of Case.

14.07[1] Four-Part Test for Subject-Matter Intervention As of Right.

14.07[2] Movant Must Have "Significant Protectable Interest" in Subject Matter of Action.

14.07[2][a] Significant Protectable Interest Has Two Aspects.

14.07[2][b] Interest Must Be Legally Protectable.

14.07[2][c] Interest Must Relate to Plaintiff's Claims.

14.07[2][d] Existing Parties May Amend Away Intervenor's Interest in Case.

14.07[3] Movant Must Have Interest That May Be Impaired Unless Intervention Granted.

14.07[3][a] Practical, Not Theoretical, Impairment Required.

14.07[3][b] Stare Decisis May Provide Practical Impairment.

14.07[4] Existing Parties Must Represent Movant's Interest Inadequately.

14.07[4][a] Movant Has Burden of Showing Inadequate Representation.

14.07[4][b] Adequate Representation Depends on Whether Party Will Make All of Intervenor's Arguments and Whether Intervenor Would Offer Additional Necessary Elements.

14.07[4][c] Comparison of Interests Is Key Consideration

14.07[4][d] Presumption That Representation by Government Entity Is Adequate.

14.07[4][e] Disagreements Over Litigation Strategy Do Not Establish Inadequate Representation.

14.07[5] Whether Movant Must Show Independent Basis for Standing Is Unsettled Question.

14.08 Moving for Permissive Intervention Based on Federal Statute.

14.08[1] Person May Be Permitted to Intervene When Federal Statute Confers Conditional Right to Intervene.

14.08[2] Some Federal Statutes Provide Private Persons With Opportunity to Intervene.

14.08[3] Some Federal Statutes Provide Government With Opportunity to Intervene.

14.09 Moving for Permissive Intervention Based on Common Question of Law or Fact.

14.09[1] Three-Part Test for Evaluation of Permissive Intervention Motion.

14.09[2] Even After Test Satisfied, Intervention Still Discretionary.

14.09[3] Federal or State Officer or Agency May Be Permitted to Intervene When Party's Claim or Defense Is Based on Statute, Regulation, or Executive Order.

14.09[4] In Exercising Discretion, Court Considers Prejudice to Existing Parties and Delay.

14.09[5] Courts Are Favorably Disposed to Intervention When Movant Can Make Contribution to Case.

14.09[6] Limited Intervention to Attack Confidentiality Orders Is Routine.

14.10 Requirements for Motion to Intervene.

14.10[1] Rule 24(c) Requirements for Motion.

14.10[2] Rule 24(c) Procedures Apply Regardless of Basis for Intervention.

14.10[3] LOCAL PRACTICE: CD Cal--Motion Papers.

14.10[4] LOCAL PRACTICE: ED Cal--Motion Papers.

14.10[5] LOCAL PRACTICE: ND Cal--Motion Papers.

14.10[6] LOCAL PRACTICE: SD Cal--Motion Papers.

14.10[7] Motion Should Have Factual Support, but Court Will Accept Nonconclusory Allegations As True.

14.11 When Suit Challenges Constitutionality of Statute, Party Must Give Notice to Facilitate Governmental Intervention.

14.11[1] Party Must Notify United States Attorney General When Federal Statutes Are Challenged.

14.11[2] Party Must Notify State Attorney General When State Statutes Are Challenged.

14.11[3] Court Must Certify That Constitutional Challenge Exists.

14.11[4] LOCAL PRACTICE: ED Cal--Duty to Warn Extended to Challenges to Federal or State Regulations.

14.12 CHECKLISTS: Opposing Motion to Intervene.

14.12[1] CHECKLIST: Drafting Memorandum Opposing Motion to Intervene As of Right.

14.12[2] CHECKLIST: Drafting Memorandum Opposing Motion for Permissive Intervention.

14.13 Refuting Timeliness of Motion to Intervene.

14.14 Refuting Basis for Motion to Intervene As of Right.

14.15 Refuting Basis for Motion for Permissive Intervention.

14.16 LOCAL PRACTICE: CD Cal--Opposition Papers and Service.

14.17 LOCAL PRACTICE: ED Cal--Opposition Papers and Service.

14.18 LOCAL PRACTICE: ND Cal--Opposition Papers and Service.

14.19 LOCAL PRACTICE: SD Cal--Opposition Papers and Service.

14.19A CHECKLIST: Appealing Denial of Motion to Intervene.

14.20 Order Denying Intervention Is Appealable Final Order; Order Permitting Intervention Is Not.

14.21 Order Denying Intervention As of Right Reviewed De Novo.

14.22 Order Denying Permissive Intervention Reviewed for Abuse of Discretion.

14.23 Permissive Intervenor Must Have Independent Jurisdictional Grounds to Appeal Final Judgment.

14.24 Notice of Motion and Motion for Intervention.

14.25 Opposition to Motion to Intervene As of Right.

14.26 Opposition to Motion for Permissive Intervention.

14.27 Proposed Order Permitting Intervention As Plaintiff.

14.28 Proposed Order Permitting Intervention As Defendant.

14.29 Proposed Order Denying Intervention.

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Unit 3 Pleading Stage
CHAPTER 14 Intervention
I. STRATEGY

2-14 MB Practice Guide: Fed Pretrial Civ Proc in CA 14.01

14.01 Scope.

This chapter covers:

- Scope and effect of intervention [*see 14.02[1]*, *14.04*].
- Alternatives to intervention [*see 14.02[4]*].
- Timing of motions to intervene [*see 14.05*].
- Motions to intervene as of right [*see 14.03[1]*, *14.06*, *14.07*, *14.10*; *Form: 14.24*].
- Motions for permissive intervention [*see 14.03[2]*, *14.08 -14.10*; *Form: 14.24*].
- Opposing motions for intervention [*see 14.12 -14.19*; *Forms: 14.25*, *14.26*].
- Review of decisions on motions for intervention [*see 14.20 -14.23*].

Core Rule:
Fed R Civ P 24.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionRight to Intervene

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Unit 3 Pleading Stage
CHAPTER 14 Intervention
I. STRATEGY

2-14 MB Practice Guide: Fed Pretrial Civ Proc in CA 14.02

14.02 Objective and Strategy.

14.02[1] Objective of Intervention Is to Make Nonparty a Party to Existing Action. Intervention is a procedural device that authorizes a nonparty to an existing lawsuit to become a party to it. As a general rule, once admitted to a suit, an intervenor may litigate fully, to the same extent as an original party [*see League of United Latin Am. Citizens v. Wilson (9th Cir 1997) 131 F3d 1297, 1304*]. Thus, prior to moving to intervene, a nonparty must decide whether he or she has a real need to be a party.

14.02[2] Nonparty's Need to Become Full-Fledged Party Depends on Many Factors.

14.02[2][a] Nonparty Is Rarely Obligated to Intervene. No person may be compelled to intervene in any lawsuit, even if his or her interests may be severely affected by the outcome. It is up to the existing parties to join or compel joinder of all persons needed to make the judgment in the case feasible. In most cases, if a nonparty is not joined and decides not to intervene, he or she is *not* bound by any judgment and may relitigate his or her interests in a separate suit [*Martin v. Wilks (1989) 490 US 755, 762-765, 109 S Ct 2180, 104 L Ed2d 835* ("Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree")]. There are only limited exceptions to this general rule. These include representative suits, such as class actions, in which nonparty class members *are* bound by a judgment by against representative parties [*see Fed R Civ P 23*] There are statutory types of litigation that are brought by one party against the world, such a probate and bankruptcy proceedings, in which all claimants must participate or be barred [*Martin v. Wilks (1989) 490 US 755, 762 n2, 109 S Ct 2180, 104 L Ed2d 835*]. Another exception is vicarious liability. If the nonparty will be vicariously liable for the conduct of an existing party to a lawsuit, the nonparty may litigate the propriety of imposing vicarious liability in a separate suit, but will be bound by the liability judgment against the existing party [*In re Dominelli (9th Cir 1987) 820 F2d 313, 317-318*]. Apart from these exceptions, the nonparty might be better off not intervening, letting a suit go to judgment, and relitigating the nonparty's interests in a separate suit.

14.02[2][b] Nonparty's Interest May Be Foreclosed by Judgment in Existing Suit, Even If Res Judicata Does Not Apply. A party who does not intervene in an existing suit is not bound by any judgment in the suit [*see Martin v. Wilks (1989) 490 US 755, 761-762, 109 S Ct 2180, 104 L Ed2d 835*]. Nonetheless, as a practical matter, a nonparty's

claim may still be foreclosed by a judgment in an existing suit. The most obvious example involves the application of the doctrine of stare decisis.

Example--Stare Decisis May Render Separate Litigation Futile.

When an existing suit will create a ruling on a legal question, under the doctrine of stare decisis, nonparties with claims or defenses turning on the same legal issue may, as a practical matter, have little to litigate following the court's ruling in the existing suit [*see, e.g., Greene v. United States (9th Cir 1993) 996 F2d 973, 977* (substantial impairment of nonparty's interest may be present when precedential effect of ruling will be controlling)]. A nonparty's chance of getting a different result on a claim or defense presenting substantially similar facts to the facts in the existing case is remote [*Natural Res. Def. Council v. NRC (10th Cir 1978) 578 F2d 1341, 1345*].

14.02[2][c] Nonparty's Interest May Be Represented Adequately by Existing Parties or by Amicus Curiae Status. Even when a nonparty's interest cannot be protected by merely sitting on the sidelines and bringing separate litigation, a nonparty's interest may, as a practical matter, be fully and adequately represented by the existing parties. A court may deny intervention if the existing parties adequately represent a nonparty's interest [*Fed R Civ P 24(a), (b)*]. If a nonparty's interests are jeopardized by the existing suit, and if the existing parties do not adequately represent the nonparty's interests, amicus curiae status will not be sufficient. A court may not deny intervention in these circumstances merely by offering the movant amicus curiae status [*see, e.g., Forest Conservation Council v. United States Forest Serv. (9th Cir 1995) 66 F3d 1489, 1498*]. Nonetheless, if there are insurmountable obstacles to intervention, and if the nonparty wants to assert only legal issues, status as an amicus curiae may be sufficient.

14.02[3] Timing of Intervention Is Critical. An attempt to intervene will be successful only if it is "timely" [*see Fed R Civ P 24(a), (b)* ("timely motion" required)]. Timeliness depends on many factors. A court will balance the need for or desirability of intervention when it is asserted. The stronger the rights or interests, the greater the need to assert them in the existing case, the later intervention stays "timely." The stronger the prejudice to the existing parties from injecting a new party in the action, the earlier intervention becomes "untimely." Much of the decision concerning the timing of a motion to intervene is outside the hands of the movant for intervention--it depends on when the movant discovered the existing case and its issues. Thus, if a nonparty learns of the existing lawsuit only when it is close to trial, it may be too late, as a practical matter, to have the court agree to permit intervention.

14.02[4] Alternatives to Intervention.

14.02[4][a] Informally Assisting Existing Parties. A nonparty may consider assisting the existing parties to the litigation as an alternative to intervention, especially when a party and nonparty share similar, although not identical interests. A nonparty may assist the existing party by providing financial assistance, counsel, support staff, documents, technical advice, or witnesses.

Warning--Do Not Attempt to Control Litigation:

The nonparty must take care not to attempt to control the litigation, or risk being bound by the outcome of the litigation. Providing mere financial assistance will not be considered controlling the litigation [*see Rumford Chem. Works v. Hygienic Chem. Co. (1909) 215 US 156, 160, 30 S Ct 45, 54 L Ed 137*].

14.02[4][b] Requesting Existing Parties to Join or Add Nonparty. Decisions concerning the parties to the suit, and even motions to join necessary and indispensable parties are solely the prerogative of the existing parties to the suit [*see Fed R Civ P 19, 20*]. Without the cooperation or assistance of an existing party, a nonparty may insert itself into the action only by means of a motion to intervene [*see Fed R Civ P 24*]. As a practical matter, however, informal negotiations with an existing party may result in one or more of the existing parties amending their pleadings to join a nonparty. The standards for amendment of pleadings and joinder of parties are often less stringent than the standards governing a motion to intervene [*compare Fed R Civ P 15, 19-* 21 *with Fed R Civ P 24*].

Cross References:

Discussion of joinder principles, see *Ch. 4, Determining Parties to the Action, 4.03 -4.19, 4.41 -4.51*. Discussion of procedure for amending pleadings before trial, see *Ch. 9, Amending and Supplementing Pleadings, 9.03 -9.11*. Discussion of procedure for adding parties, see Ch. 10, Adding Dropping, and Substituting Parties, see *§ 10.04 -10.09*.

14.02[4][c] Filing Separate Action. In some cases, the nonparty's interests may be protected most effectively by filing a separate action [*see, e.g., Warren v. Commissioner (9th Cir 2002) 302 F3d 1012, 1014-1016* (separate taxpayer suit more advantageous because of "weighty nature" of movant's constitutional arguments)]. Furthermore, if the separate action is filed in the same court as the existing lawsuit, it may be possible to consolidate the actions and effectively achieve the same result as intervention [*see Fed R Civ P 42(a)*] Factors that determine whether intervention or a separate action is more effective include the following:

- **Timing of the respective actions:** When the original litigation will determine all related claims, a separate action will be practical only if the original suit can be stayed or transferred to the forum of the second suit, or if the second action can be decided first.

- **Convenience of the forum:** A different forum may be more convenient to the nonparty and may offer advantageous rules of law.

- **Existing parties and counsel:** In some cases, associating with or sharing control of the litigation with parties and counsel from the original litigation is not advisable.

- **Court's prior rulings:** The court's prior rulings in the existing action or in prior cases involving the same subject matter may dictate a preference for filing an independent action in a different forum.

Cross Reference:

6 *Moore's Federal Practice, § 24.23* (Matthew Bender 3d ed.).

14.02[4][d] Requesting Leave to File Amicus Curiae Brief. As noted above, if a nonparty seeks to argue only legal issues, amicus curiae status may suffice in lieu of intervention [*see 14.02[2][c]*]. Even a party that has been denied intervention should consider seeking leave to file an amicus curiae brief [*see, e.g., United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 400-401* (amicus curiae status granted after denial of motion for intervention although, on appeal, Ninth Circuit ruled amicus status insufficient to protect nonparty's interests); *see also Newdow v. United States Cong. (9th Cir 2002) 313 F3d 495, 496-497* (although U.S. Senate unsuccessfully sought intervention under *Fed R Civ P 24(a)* in pledge-of-allegiance case, Court of Appeal was willing to accept the petition and brief as an amicus brief)]. However, amicus curiae status does not allow a nonparty to formally raise issues and does not provide a right of appeal [*see, e.g., NGV Gaming, Ltd. v. Upstream Point Molate, LLC (ND Cal 2005) 355 F Supp2d 1061, 1068*].

Detailed Discussion

/Forms: 6 Moore's Federal Practice, Ch. 24, Intervention (Matthew Bender 3d ed.).

5 Bender's Federal Practice Forms, Rule 24, Intervention (Matthew Bender).

Cross Reference:

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionRight to Intervene

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14.03 CHECKLISTS: Drafting Motion to Intervene.

14.03[1] CHECKLIST: Drafting Motion to Intervene As of Right.

☐ Identify basis for intervention as of right as either:

- ○ Right conferred by federal statute; or
- ○ Interest in property or transaction that is subject of action.

☐ If basis for intervention as of right is statute:

- ○ Cite controlling statute; and
- ○ Explain how statutory right is unconditional, rather than merely permissive.

☐ If basis for intervention as of right is interest in subject matter of action:

- ○ Define interest as direct, legally protectable interest in the property or transaction that is the subject matter of the action.
- ○ Explain how disposition of action may, as practical matter, impair or impede movant's ability to protect that interest.
- ○ State how and why movant's interest is not adequately represented by existing

parties.

☐ Ask for permissive intervention as alternative form of relief, including matters in checklist for motion for permissive intervention.

Warning--Nonparty Should Seek Intervention on All Possible Grounds:

Intervention as of right and permissive intervention are not necessarily exclusive. If a nonparty has a strong enough interest to warrant a motion to intervene, the nonparty should seek to intervene on all possible grounds, Whenever feasible, therefore, a movant should seek intervention as of right and, in the alternative, permissive intervention [*see, e.g., Donnelly v. Glickman (9th Cir 1998) 159 F3d 405, 407* ; *LG Elecs., Inc. v. Q-Lity Computer Inc. (ND Cal 2002) 211 FRD 360, 366* (movant entitled to intervene under either *Fed R Civ P 24(a)* or *Fed R Civ P 24(b)*); *SEC v. TLC Invs. & Trade Co. (CD Cal 2001) 147 F Supp2d 1031, 1034*].

☐ Argue that motion is "timely" by:

- ○ Explaining how and when movant first became aware of action and movant's interest in it;
- ○ Summarizing actions taken to bring intervention motion as quickly as possible;
- ○ Reviewing status of action;
- ○ Providing realistic estimate of delays, if any, that intervention will cause;
- ○ Evaluating any prejudice that intervention might cause to existing parties;
- ○ Comparing potential prejudice to existing parties with prejudice to movant if intervention is denied; and
- ○ Summarizing benefits that intervention will bring to court and all parties, such as any special expertise or access to relevant evidence that movant may possess.

☐ Attach declaration[s] establishing all facts set forth in argument.

☐ Provide legal authority for all relevant claims, such as claim that interest in subject matter of action is direct, legally protectable interest.

☐ Include a pleading setting forth the proposed claim or defense.

☐ If appropriate, request a hearing on the motion to intervene.

☐ If required by local rule, draft the proposed court order.

Authority:
Fed R Civ P 24(a)

Discussion:
See *§§ 14.06*, *14.07*, *14.10*

Forms:
See *§§ 14.24*, *14.27*, *14.28*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

14.03[2] CHECKLIST: Drafting Motion for Permissive Intervention.

☐ Analyze possible motion for intervention as of right, and of seeking permissive intervention as alternative relief.

☐ Identify basis for permissive intervention as either:

- ○ Right conferred by federal statute; or
- ○ Common questions of law or fact or both between movant's claim or defense and main action.

☐ If basis for intervention is statute:

- ○ Cite controlling statute;
- ○ Explain how movant meets criteria for conditional right to intervene under statute; and
- ○ Argue how intervention in existing case will serve policy of statute.

☐ If basis for intervention is common questions of law or fact:

- ○ Provide details of common questions for movant's claim or defense and for existing suit;
- ○ Define how and why movant will benefit from presenting common questions in existing suit;
- ○ Review any potential prejudice to existing parties, including:
  - ☐ Comparison of potential prejudice to existing parties if intervention allowed with certain prejudice to movant if intervention denied;

☐ Explanation of any expertise or unique access to evidence that will aid rather than prejudice existing parties;

☐ Discussion of how addition of movant will not unduly complicate or delay proceedings.

○ Explain how judicial efficiency and consistency will benefit from resolving common questions in single proceeding.

☐ Argue that motion is "timely" by:

○ Explaining how and when movant first became aware of action and movant's interest in it;

○ Summarizing actions taken to bring intervention motion as quickly as possible;

○ Reviewing status of action; and

○ Providing realistic estimate of delays, if any, that intervention will cause.

☐ If necessary, include a detailed discussion of the legal basis supporting intervention in the accompanying memorandum of points and authorities.

☐ Include a pleading setting forth the claim or defense.

☐ If appropriate, request a hearing on the motion to intervene.

☐ If required by local rule, draft the proposed court order.

☐ Attach declaration[s] establishing all facts set forth in argument.

☐ Provide legal authority for all relevant claims, such as claim that interest in subject matter of action is direct, legally protectable interest.

Discussion:
See *§§ 14.08 -14.10*

Forms:
See *§§ 14.25*, *14.26*, *14.29*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to Intervene

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14.04 Scope of Intervention.

14.04[1] Intervention Gives Intervenor Party Status. The purpose of intervention is to obtain party status in an existing case. As a general rule, once admitted to a suit, an intervenor obtains the same rights in the case as an original party [*see League of United Latin Am. Citizens v. Wilson (9th Cir 1997) 131 F3d 1297, 1304*].

However, the presence of a nondiverse and not indispensable defendant intervenor will not destroy complete diversity [Mattel, Inc. v. Bryant (9th Cir 2006) 446 F3d 1011, 1013].

14.04[2] Nonparty May Choose to Intervene for Limited Purpose. There is no requirement in Rule 24 that a nonparty intervene for all purposes in every case [*see Fed R Civ P 24*]. Although Rule 24 is silent on the possibility, courts regularly permit nonparties to intervene for limited purposes only [*see, e.g., Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 472* (intervention for limited purpose of modifying protective order); *Koike v. Starbucks Corp. (ND Cal 2009) 602 F Supp2d 1158, 1159]* .

Example:

In a patent case, a nonparty successfully moved to intervene for the limited purpose of opposing the plaintiff's motion to amend its infringement contentions to include the movant's products. The district court allowed the intervention for that limited purpose [*see LG Elecs., Inc. v. Q-Lity Computer Inc. (ND Cal 2002) 211 FRD 360, 363-366*].

The Ninth Circuit has interpreted one intervention statute as authorizing only limited intervention. *28 USC § 2403(b)* authorizes intervention by a state when federal court proceedings challenge a State statute's constitutionality. The Ninth Circuit held that this statute grants only the right to present evidence and make arguments as to the statute's constitutionality, and not the right to intervene as a party after judgment in order to appeal the judgment [*Yniguez v. Arizona (9th Cir 1991) 939 F2d 727, 738*].

14.04[3] Intervention to Appeal Is Common Form of Limited Intervention. If the original parties choose not to appeal a judgment, a movant may seek limited intervention to appeal, provided the motion is filed promptly after the entry of final judgment. Intervention for the purpose of appealing is not limited to representative suits [*see United*

Airlines, Inc. v. McDonald (1977) 432 US 385, 396 n16, 97 S Ct 2464, 53 L Ed2d 423], but has been particularly common in such suits, including class actions, when the representative plaintiffs decide not to appeal from an adverse judgment [*United Airlines, Inc. v. McDonald (1977) 432 US 385, 395-396, 97 S Ct 2464, 53 L Ed2d 423*]. Of course, in class actions, unnamed class members need not always intervene in order to appeal. If the appeal concerns a court order approving a class action settlement, and an unnamed class member has appeared and objected to the proposed settlement, the class member may appeal without intervening [*Devlin v. Scardelletti (2002) 536 US 1, 10, 122 S Ct 2005, 153 L Ed2d 27*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14.05 Motion to Intervene Must Be Timely.

14.05[1] Timeliness Has No Fixed Deadline, but Is Measured by Circumstances. A motion to intervene, even one seeking intervention "as of right," will be granted only if the motion is "timely" [*see Fed R Civ P 24(a), (b)*]. There is no fixed deadline for whether a motion is "timely." Instead, a court considers all the facts and circumstances of a case and exercises its discretion, based on those facts and circumstances, to determine whether the motion is or is not "timely" [*see NAACP v. New York (1973) 413 US 345, 366, 93 S Ct 2591, 37 L Ed2d 648*].

Example:

Although the state of Hawaii "could have and should have" intervened earlier, in a § 1983 suit brought by Native Hawaiians against the Trustees of the Office of Hawaiian Affairs (OHA), the Native Hawaiians would not be prejudiced by the state's intervention two years after the appellate decision that each Native Hawaiian had an individual right to enforce the trust terms by filing a § 1983 suit. Considering "all the circumstances" of the case in ascertaining whether the state's motion to intervene was timely, the Ninth Circuit permitted intervention to allow further consideration of an important issue [*Day v. Apoliona (9th Cir 2007) 505 F3d 963, 965-966]* .

Mere passage of time, by itself, does not automatically render a motion untimely. The timeliness requirement also measures the interval between the time at which a diligent movant first becomes aware of the need to intervene and the time a motion to intervene is filed. For example, the mere fact of extensive settlement negotiations did not render a motion to intervene untimely when it was made shortly after the movant first realized that the existing parties were not, in fact, adequately representing the movant's interest in the case [*United States v. Carpenter (9th Cir 2002) 298 F3d 1122, 1124-1125*].

14.05[2] Three Timeliness Factors. The court will evaluate three factors to determine whether a motion to intervene is timely [*see, e.g., California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc. (9th Cir 2002) 309 F3d 1113, 1119* ; *San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1101*]:

- **Stage of proceedings.** This factor measures the amount of time that has passed since the

commencement of the action. If pretrial proceedings are substantially complete and the case is ready for trial, this factor weighs against intervention [*see League of United Latin Am. Citizens v. Wilson (9th Cir 1997) 131 F3d 1297, 1303*]. On the other hand, if the parties have not taken depositions or filed any dispositive motions, intervention might still be timely despite the passage of a considerable period of time [*see, e.g., Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder (3d Cir 1995) 72 F3d 361, 369* (four years had elapsed, but with little activity by parties)]. A motion to intervene was also found to be timely when made during the discovery phase of protracted litigation [*Nikon Corp. v. ASM Lithography B.V. (ND Cal 2004) 222 FRD 647, 649*]. Although intervention for the purposes of challenging confidentiality order or for appeal are common forms of limited intervention, courts generally disfavor post-judgment intervention [*see, e.g., Calvert v. Huckins (9th Cir 1997) 109 F3d 636, 638*].

- **Prejudice to existing parties.** This factor is related to the stage of proceedings factor in that, if the parties have fully prepared their case and are ready for trial, any intervention that delays that trial or expands the scope of the proceedings is likely to be prejudicial to the existing parties [*see Stallworth v. Monsanto Co. (5th Cir 1977) 558 F2d 257, 265*]. However, the question is whether the delay in seeking intervention causes this prejudice, not whether intervention itself will delay the proceedings or expand their scope [*United States v. Union Elec. Co. (8th Cir 1995) 64 F3d 1152, 1159* ; *see, e.g., Day v. Apoliona (9th Cir 2007) 505 F3d 963, 965-966* (state's delay in filing did not cause prejudice to plaintiffs, because intervention did not interject new issues into litigation and practical result of intervention---filing of petition for rehearing--would have occurred whenever state joined proceedings); *Smith v. Marsh (9th Cir 1999) 194 F3d 1045, 1051* (potential expansion of scope of case coupled with 15-month delay resulted in prejudice)]. On the other hand, there is authority for the proposition that the court may also consider the potential prejudice to the movant if intervention is denied [*see, e.g., Reich v. ABC/York-Estes Corp. (7th Cir 1995) 64 F3d 316, 321*]. Not all courts agree, however, that potential prejudice to the movant is relevant to the issue of timeliness [*see, e.g., United States v. Jefferson County (11th Cir 1983) 720 F2d 1511, 1517*].

- **Length of delay and reason for delay.** A movant must seek to intervene as soon as he or she knows or has reason to know that his or her interests might be adversely affected by the outcome of the litigation [*California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc. (9th Cir 2002) 309 F3d 1113, 1120* ; *see, e.g., United States v. Carpenter (9th Cir 2002) 298 F3d 1122, 1125* (intervenors acted as soon as they had notice that proposed settlement was contrary to their interests)]. The "timeliness clock begins ticking" from the time a proposed intervenor should have been aware that its interests would no longer be protected adequately by the parties [*League of United Latin Am. Citizens v. Wilson (9th Cir 1997) 131 F3d 1297, 1307*]. Therefore, a movant has an obligation to explain any obvious delay [*see, e.g., Smith v. Marsh (9th Cir 1999) 194 F3d 1045, 1052* (intervenor offered no explanation of delay in excess of one year)].

Cross Reference:

6 *Moore's Federal Practice, § 24.21* (Matthew Bender 3d ed.).

14.05[3] Timeliness Requirement Construed More Strictly for Permissive Intervention. There is authority for the proposition that a court should construe all requirements for intervention in favor of intervention [*see, e.g., Arakaki v. Cayetano (9th Cir 2003) 324 F3d 1078, 1083 , cert. denied sub nom. Hoohuli v. Lingle, 540 US 1017 (2003)* (parties conceded application was timely in this case)]. In applying this principle to the timeliness requirements, a court will be more lenient when a movant seeks intervention "as of right" [*see United States v. Oregon (9th Cir 1984) 745 F2d 550, 552*]. In contrast, a court will be less lenient when a movant seeks permissive intervention [*see League of United Latin Am. Citizens v. Wilson (9th Cir 1997) 131 F3d 1297, 1308*].

Legal Topics:

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

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14.06 Moving to Intervene As of Right Based on Federal Statute.

14.06[1] Statutory Right Must Be Unconditional. A nonparty may intervene "as of right" in existing litigation when "a statute of the United States confers an unconditional right to intervene" [*Fed R Civ P 24(a)(1)*]. If the statute requires the nonparty to fulfill prerequisites, or even to prove that he or she has an interest in the action that has or may be impaired or impeded, then the statute provides only a conditional right to intervene [*see, e.g., United States v. Union Elec. Co. (8th Cir 1995) 64 F3d 1152, 1157-1168* ; *see California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc. (9th Cir 2002) 309 F3d 1113, 1118-1119* (intervention must be judged by *Fed R Civ P 24(a)(2)* standards, not by *Fed R Civ P 24(a)(1)* standards)].

14.06[2] Some Federal Statutes Provide Private Persons With Right to Intervene. The following federal statutes are among those that provide private persons with an unconditional right to intervene:

- **Judicial Review of Agency Order.** A person adversely affected by an agency proceeding has a direct right of judicial review [*see 5 USC § 702*]. Communities, associations, corporations, firms, or individuals whose interests would be affected by an agency order, but who were not joined as parties to the agency proceeding, may intervene in the judicial review process [*see 28 USC § 2348*].

- **Enforcement of Environmental Statute.** Private persons may intervene in government suits to enforce the provisions of various environmental statutes, if the private persons would have been entitled to bring "citizen's suits" in the absence of governmental action [*see, e.g., 42 USC § 4911(b)(1)(B)* (noise control action); *42 USC § 6972(b)(1)* (hazardous waste action); *30 USC § 1270(b)(1)(B)* (surface coal mining environmental regulations)].

- **Civil Rights Actions.** A person aggrieved may intervene in a civil rights action brought by the Equal Employment Opportunity Commission or in an action brought by the United States Attorney General that involves a political entity [*see 42 USC § 2000e-5(f)(1)*]. Many of the procedures of the Civil Rights Act have been incorporated into the Americans with Disabilities Act of 1990. Thus, a person alleging discrimination on the basis of disability may intervene in a related action brought by the EEOC or the Attorney General [*see 42 USC § 12117(a)* (incorporating by reference *42 USC § 2000e-5*)].

- **FHA Actions.** A person aggrieved by an alleged violation of the Fair Housing Act may intervene in an action brought on his or her behalf by the Attorney General [*see 42 USC § 3612(o)(2)*]. Similarly, an aggrieved party may intervene when the Attorney General brings an action to remedy discriminatory housing practices that are part of a "pattern or practice" of resistance to the full enjoyment of rights protected under the Constitution or federal laws [*see 42 USC § 3614(a), (b), (e)*].

- **Bankruptcy Trustee.** The trustee of the debtor's estate in a Chapter 11 bankruptcy case may intervene in a proceeding before the Tax Court to which the debtor is a party. Intervention in such a case is solely on behalf of the debtor's estate [*see 26 USC § 7464*].

- **Surface Transportation Board Actions.** Interested communities, associations, corporations, firms, or individuals may intervene in a proceeding or judicial action brought by the Attorney General that relates to an order of the Surface Transportation Board (formerly the ICC). Such an action may be to enjoin or suspend a rule, regulation, or order, or to enforce an order that does not involve the payment of money or collection of fines. The Attorney General cannot discontinue the action over the objection of an intervenor, who may prosecute, defend, or continue the action regardless of the Attorney General's "action or nonaction" [*see 28 USC §§ 2321, 2323*].

- **FCC Hearings.** Parties interested in the outcome of a Federal Communications Commission license hearing may "acquire the status of a party to the proceeding" by filing a petition that shows the basis for their interest. The movant and all parties in interest are entitled to participate in the hearing [*see 47 USC § 309(e)*].

14.06[3] Some Federal Statutes Provide Government With Right to Intervene. The following federal statutes are among those that provide the government and government agencies with an unconditional right to intervene:

- **Private Civil Rights Actions.** When a private civil rights action is certified by the Attorney General to be of general public importance, the federal government may intervene [*see 42 USC § 2000h-2*].

- **Private ERISA Actions.** When a private action under the Employee Retirement Income Security Act (ERISA) is brought for a purpose other than for the recovery of benefits due under an employee benefit plan, the Secretary of Labor and the Secretary of the Treasury must be served with a copy of the complaint by certified mail. The Secretary of Labor may intervene of right in such an action, and the Secretary of the Treasury may intervene unless the action is brought under the fiduciary responsibility section of the federal labor statutes [*see 29 USC § 1132(h)*].

- **Patent and Trademark Cases.** When a party to an interference is dissatisfied with a decision of the Board of Patent Appeals and Interferences and commences a civil suit for relief, the Director of Patents may intervene [*see 35 USC § 146*]. The Director of Patents may also intervene when a movant for registration of a trademark appeals a decision of the Director or a decision of the Trademark Trial and Appeal Board [*see 15 USC § 1071*].

- **Private Action Under False Claims Act.** A private person may bring an action in the name of the government under the False Claims Act, which provides a claim for relief for knowingly making a false or fraudulent claim when seeking payment from the government. In such a case, the Attorney General must be provided with a copy of the complaint and written disclosure of substantially all material evidence. The Attorney General may intervene as of right within 60 days from receipt of these materials [*see 31 USC § 3730(b)(2)*].

- **Private Action to Enforce Deepwater Ports Regulation.** A private person may bring an action requesting equitable relief for the violation of deepwater ports regulations, if the Secretary of Transportation or Attorney General are not diligently prosecuting such an action in federal court. The Secretary of Transportation or the Attorney General may intervene in such an action [*see 33 USC § 1515(b)(1)*].

- **Challenge to Constitutionality of Federal Statute Affecting Public Interest.** The United States may intervene when the constitutionality of a federal statute affecting the public interest is at issue, and the United States or an agency, officer, or employee thereof is not initially made a party to the action. The court must notify the Attorney General in such a case, and permit the United States to present evidence and argue the constitutionality issue [*28 USC § 2403(a)*].

- **State Attorney General Intervention When Constitutionality of State Statute Raised.** When the constitutionality of a state statute is at issue, the state attorney general must be notified and given an opportunity to intervene, unless an agency, officer, or employee of state is already party to action. The state is given the opportunity to present evidence and to argue the constitutionality question [*28 USC § 2403(b)*].

- **Senate Resolution:** The United States Senate may intervene or appear as amicus curiae when directed to do so by a resolution adopted by the Senate [*see 2 USC § 288b(c)*]. The Senate may not intervene under this statute unless it demonstrates constitutional standing (minimally, that it suffered an injury in fact), by contrast to merely defending any statute enacted by Congress [*Newdow v. United States Cong. (9th Cir 2002) 313 F3d 495, 498-500*].

Cross Reference:

6 *Moore's Federal Practice, § 24.02* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionStatutory Right to Intervene

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Unit 3 Pleading Stage
CHAPTER 14 Intervention
II. MOVING TO INTERVENE

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14.07 Moving to Intervene As of Right Based on Movant's Interest in Subject Matter of Case.

14.07[1] Four-Part Test for Subject-Matter Intervention As of Right. If a federal statute does not confer an unconditional right to intervene, a nonparty may still intervene as of right if four criteria are met: (1) timeliness, (2) an interest relating to the subject of the litigation, (3) practical impairment of an interest of the party seeking intervention if intervention is not granted, and (4) inadequate representation by the parties to the action [*Fed R Civ P 24(a)(2)*; *see, e.g., DBSI/TRI IV Ltd. Partnership v. United States (9th Cir 2006) 465 F3d 1031, 1037* ; State ex rel. Lockyer v. United States (9th Cir 2006) 450 F3d 436, 440-441]. This test is conjunctive: to merit intervention as of right, all four criteria must be satisfied [*Nikon Corp. v. ASM Lithography B.V. (ND Cal 2004) 222 FRD 647, 649*]. The rule is construed liberally in favor of the proposed intervenor [*Sierra Club v. EPA (9th Cir 1993) 995 F2d 1478, 1481* ; *W. Watersheds Projects v. U.S. Forest Serv. (ND Cal 2008) 2008 US Dist LEXIS 60529, at *7]* . The timeliness requirement was analyzed in detail in 14.05. The remaining three requirements are analyzed below.

14.07[2] Movant Must Have "Significant Protectable Interest" in Subject Matter of Action.

14.07[2][a] Significant Protectable Interest Has Two Aspects. A movant must have an interest in the subject matter of the action in order to intervene as of right [*Fed R Civ P 24(a)(2)*]. Only an interest that is a "significant protectable interest" will justify intervention as of right, however. A movant has a "significant protectable interest" in an action only if (1) the movant asserts an interest protected by some law, and (2) the movant's interest is related to the interests asserted by the existing parties [*see, e.g.,* State ex rel. Lockyer v. United States (9th Cir 2006) 450 F3d 436, 441; *United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 397*]. The interest asserted cannot be contingent or speculative [*United States v. Acorn Eng'g Co. (CD Cal 2004) 221 FRD 530, 538*].

Example:

In a case concerning grazing rights that arose under the National Environmental Policy Act (NEPA) [*42 USC § 4321 et seq.*], the district court denied the California Cattlemen's Association (CCA)'s motion to intervene. The court rejected the argument that when the private party will have some legal obligation under the laws at issue, that party may intervene as a matter of right, despite the fact that the underlying claims in the case were environmental claims that targeted only the government's conduct. The CCA did not have a significantly protectable interest in the question whether the Forest Service violated NEPA

and the other statutes asserted [*W. Watersheds Projects v. U.S. Forest Serv. (ND Cal 2008) 2008 US Dist LEXIS 60529, at *12-*15]* .

14.07[2][b] Interest Must Be Legally Protectable. The movant must assert an interest that is protected under some law [*see Dilks v. Aloha Airlines, Inc. (9th Cir 1981) 642 F2d 1155, 1157*]; that interest must be one that a substantive law recognizes as belonging to or being owned by the movant [*United States v. Acorn Eng'g Co. (CD Cal 2004) 221 FRD 530, 538*].

The "interest" test is not clear-cut because no specific legal or equitable interest need be established [*United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 398* ; *Southwest Ctr. for Biological Diversity v. Berg (9th Cir 2001) 268 F3d 810, 818* ; *Portland Audubon Soc'y v. Hodel (9th Cir 1989) 866 F2d 302, 308*]. Rather, the "interest" test directs courts to make a threshold inquiry. It is primarily a practical guide to reducing the number of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process in a single suit [*United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 398* ; *Hilao v. Estate of Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.) (9th Cir 2008) 536 F.3d 980, 984-985*]. Obviously, a movant with a direct property interest in the subject matter of an action has a sufficient interest [*see, e.g., N.L. Indus. v. Secretary of the Interior (9th Cir 1985) 777 F2d 433, 435* (movant had mining claim in direct competition with mining claims being litigated)]. However, not every general economic interest is sufficient [*see Greene v. United States (9th Cir 1993) 996 F2d 973, 976*].

An economic interest must be both concrete and specifically related to the underlying subject matter of the action to trigger the right to intervene. For example, landowners had a "significant protectable interest" in not having their property executed upon pursuant to a judgment that had expired and, therefore, had a right to intervene in the extension of judgment proceeding [*Hilao v. Estate of Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.) (9th Cir 2008) 536 F.3d 980, 987]* . Conversely, alleging a prospective impaired ability to collect a judgment arising from a past claim against the defendant does not by itself support the right to intervene [*United States v. Alisal Water Corp. (9th Cir 2004) 370 F3d 915, 920*]. Likewise, alleging a prospective loss in business income if litigation against the movant's sole customer is successful does not support the right to intervene in that litigation [*Nikon Corp. v. ASM Lithography B.V. (ND Cal 2004) 222 FRD 647, 650-651*].

An interest need not be economic to be protectable [*see, e.g., United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 398-400* (union could intervene when consent decree between parties would contradict existing collective bargaining agreement)]. For example, a company would have a direct, protectable interest in litigation concerning pollution rules governing its own, particular industry, but not in general air quality standards [*American Lung Ass'n v. Reilly (2d Cir 1992) 962 F2d 258, 261* (utilities denied intervention because injury to them was too contingent)].

Example--Injunctive Relief Directly Affects Intervenor:

A movant for intervention demonstrates a significantly protectable interest when the injunctive relief sought by the plaintiffs against defendant will have direct, immediate, and harmful effects on the movant's interests [*LG Elecs., Inc. v. Q-Lity Computer Inc. (ND Cal 2002) 211 FRD 360, 365*].

Strategic Point--Protectable Interest in One Phase of Litigation Might Support Limited Intervention:

A nonparty that has an insufficient interest in one phase of the action may nevertheless have a sufficient protectable interest in another phase of the same action. In those circumstances, an attempt to intervene may be more successful if the nonparty seeks only limited intervention in the applicable phase of the case [*see, e.g., Churchill County v. Babbitt (9th Cir 1998) 150 F3d 1072, 1077 , amended, 158 F3d 491 (1998)* (motion for intervention granted only with respect to remedial phase); *see also Donnelly v. Glickman (9th Cir 1998) 159 F3d 405, 410-411, n4* (although proposed intervenors lacked interest in

liability phase of plaintiff's action, they could theoretically still intervene in remedial phase)].

14.07[2][c] Interest Must Relate to Plaintiff's Claims. For intervention as of right there must be a relationship between the movant's legally protected interest and the plaintiff's claims. The relationship requirement is met if the resolution of plaintiff's claims will actually affect the movant [*Arakaki v. Cayetano (9th Cir 2003) 324 F3d 1078, 1084 , cert. denied sub nom. Hoohuli v. Lingle, 540 US 1017 (2003)* ; *United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 398*].

Example--Request for Similar Relief Does Not Establish Required Relationship:

Male employees sought to intervene in a sex discrimination case brought by female employees against the common employer of both groups. The male employees also asserted sex discrimination claims against the employer. However, the claims of discrimination against male employees were unrelated to the female employees' particular claims of hostile work environment discrimination. Because the male employees asserted a different form of gender-based discrimination, a resolution of the female employees' hostile work environment claims would not affect their discrimination claims. It was not enough that both groups asserted discrimination claims against the same defendants [*Donnelly v. Glickman (9th Cir 1998) 159 F3d 405, 409-410*].

14.07[2][d] Existing Parties May Amend Away Intervenor's Interest in Case. In some cases, amended pleadings, court orders, disclaimers, or waivers may narrow the potential scope of an action and thereby affect the availability of intervention. In ruling on a motion to intervene, the court must consider the intervenor's potential interest in the case as the case stands at the time of the motion, rather than assessing the movant's potential interest based on the original pleadings [*see, e.g., Arakaki v. Cayetano (9th Cir 2003) 324 F3d 1078, 1083 , cert. denied sub nom. Hoohuli v. Lingle, 540 US 1017 (2003)* (intervention as of right inappropriate after public trust claim raised by intervenor was no longer subject of plaintiff's action)].

Cross Reference:

6 *Moore's Federal Practice, § 24.03* (Matthew Bender 3d ed.).

14.07[3] Movant Must Have Interest That May Be Impaired Unless Intervention Granted.

14.07[3][a] Practical, Not Theoretical, Impairment Required. A movant may intervene as of right only if the disposition of the action may, as a practical matter, impair or impede the movant's ability to protect his or her interest [*Fed R Civ P 24(a)(2)*; *see* State ex rel. Lockyer v. United States (9th Cir 2006) 450 F3d 436, 441; *Donnelly v. Glickman (9th Cir 1998) 159 F3d 405, 409* (in determining whether intervention is appropriate, court is guided primarily by practical and equitable considerations)]. The movant does not have to be bound by the judgment in the case. The movant need only show how his or her interest might be impaired or impeded, in some practical sense, by the judgment in the case [*Fed R Civ P 24*, Committee Note of 1966]. However, the emphasis is on practicality, and speculative or theoretical impairments are not sufficient [*see, e.g., Elk Grove Unified Sch. Dist. v. Newdow (2004) 542 US 1, 12-18, 124 S Ct 2301, 159 L Ed2d 98, 110-113* (noncustodial father, who was barred by state law from acting as next friend to child, had conflicting view with custodial mother, who had sole right under state law to represent child); *Southmark Corp. v. Cagan (7th Cir 1991) 950 F2d 416, 418-419* (foreclosure action against piece of real estate partnership's property had only speculative effect on tort claimant of partnership)].

14.07[3][b] Stare Decisis May Provide Practical Impairment. Under the doctrine of stare decisis, a movant's interest may be impaired or impeded, making separate litigation futile [*see, e.g., United States v. Oregon (9th Cir 1988) 839 F2d 635, 638*]. If a controlling legal issue will be determined in the existing suit, and if a movant's claims or defenses turn on the same legal issue, the movant may have little to litigate following the court's ruling in the existing suit [*see, e.g., Greene v. United States (9th Cir 1993) 996 F2d 973, 977* (substantial impairment of nonparty's interest may be present when precedential effect of ruling will be controlling)]. A nonparty's chance of getting a different result on a claim or defense presenting substantially similar facts to the facts in the existing case is remote [*Natural Res. Def.*

Council v. NRC (10th Cir 1978) 578 F2d 1341, 1345].

Cross Reference:

Discussion of stare decisis, see 18 *Moore's Federal Practice, §§ 134.01 -134.06* (Matthew Bender 3d ed.).

14.07[4] Existing Parties Must Represent Movant's Interest Inadequately.

14.07[4][a] Movant Has Burden of Showing Inadequate Representation. A court will grant a motion for intervention only if the existing parties do not represent the movant's interest adequately [*Fed R Civ P 24(a)(2)*; *see, e.g., Californians for Safe & Competitive Dump Truck Transp. v. Mendonca (9th Cir 1998) 152 F3d 1184, 1190*]. The movant bears the burden of demonstrating that existing parties do not represent its interests adequately [*United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 398*]. The burden of showing inadequacy is minimal. The requirement of inadequate representation is satisfied if the movant shows that representation of his or her interest by existing parties *may be* inadequate [*Prete v. Bradbury (9th Cir 2006) 438 F3d 949, 956* ; *Sagebrush Rebellion, Inc. v. Watt (9th Cir 1983) 713 F2d 525, 528*].

Distinguish:

When a person is seeking to intervene as of right in an action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the burden is on the government to show that the person's interests are adequately represented by the existing parties [*42 USC § 9613(i)*; *United States v. Acorn Eng'g Co. (CD Cal 2004) 221 FRD 530, 533*].

14.07[4][b] Adequate Representation Depends on Whether Party Will Make All of Intervenor's Arguments and Whether Intervenor Would Offer Additional Necessary Elements. To determine whether the existing parties adequately represent a movant's interest, the court considers the following [*Arakaki v. Cayetano (9th Cir 2003) 324 F3d 1078, 1083* , *cert. denied sub nom. Hoohuli v. Lingle, 540 US 1017 (2003)* ; *United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 398* ; *LG Elecs., Inc. v. Q-Lity Computer Inc. (ND Cal 2002) 211 FRD 360, 365*]:

- Whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments;
- Whether the present party is capable and willing to make those arguments; and
- Whether the intervenor would offer any necessary elements to the proceedings that other parties would neglect.

Example:

In a voting rights action between the United States and the State of Georgia challenging redistricting plans, a three-judge district court allowed African-American registered voters in Georgia to intervene and present expert testimony on the ground that their "analysis of the ... redistricting pla[n] identifies interests that are not adequately represented by the existing parties" [*Georgia v. Ashcroft (2003) 539 US 461, 123 S Ct 2498, 156 L Ed2d 428, 449*].

14.07[4][c] Comparison of Interests Is Key Consideration The most important factor in determining the adequacy of representation is how the nonparty's interest compares with the interests of existing parties. When a motion for intervention and an existing party have the same ultimate objective, there is a presumption of adequacy of representation [*Arakaki v. Cayetano (9th Cir 2003) 324 F3d 1078, 1086* , *cert. denied sub nom. Hoohuli v. Lingle, 540 US 1017 (2003)* , citing *League of United Latin Am. Citizens v. Wilson (9th Cir 1997) 131 F3d 1297, 1305* ; *see SEC v. TLC Invs. & Trade Co. (CD Cal 2001) 147 F Supp2d 1031, 1042*]. If the movant's interest is identical to that of one of the present parties, a compelling showing is required to demonstrate inadequate representation [*Arakaki v. Cayetano*

(9th Cir 2003) 324 F3d 1078, 1086 , cert. denied sub nom. Hoohuli v. Lingle, 540 US 1017 (2003)].

14.07[4][d] Presumption That Representation by Government Entity Is Adequate. A presumption of adequate representation arises when the movant's interests in a case are represented be a governmental body or officer charged by law with representing those interests [*Arakaki v. Cayetano (9th Cir 2003) 324 F3d 1078, 1086 , cert. denied sub nom. Hoohuli v. Lingle, 540 US 1017 (2003)* ; *United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 401-402* (plaintiff United States adequately represented interests of community groups seeking to intervene in action against city based on alleged unconstitutional police misconduct in violation of federal statute)].

Distinguish--Presumption Inapplicable in Face of Actual Conflicting Interests:

The presumption of adequate governmental representation has not been applied to governmental parties who may have substantially conflicting interests with those of movants. This is particularly true when a governmental party and a movant are antagonists in the collective bargaining process if the governmental representative in an existing case is an employer and the movant is an employee or an employee union. The actual conflict of interest prevents the application of the presumption of adequate representation. For example, a defendant city was an inadequate representative of the interests of a police protective league in a suit brought in which the United States sued the city alleging police misconduct and sought an injunction against the city that would govern police conduct in the future [*see United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 401-402* ; *see also Sagebrush Rebellion, Inc. v. Watt (9th Cir 1983) 713 F2d 525, 528* (overcoming presumption when defendant U.S. Secretary of Interior had been president of legal foundation representing plaintiffs prior to his appointment)].

14.07[4][e] Disagreements Over Litigation Strategy Do Not Establish Inadequate Representation. When parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention. Intervention protects interests in the subject matter of an action, not the interests of movants and movants' attorneys in controlling the strategy of any particular case [*see United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 402*]. A disagreement over the substance of the property or issues in dispute, by contrast to a disagreement in trial strategy, will support intervention [*see League of United Latin Am. Citizens v. Wilson (9th Cir 1997) 131 F3d 1297, 1306* ; *SEC v. TLC Invs. & Trade Co. (CD Cal 2001) 147 F Supp2d 1031, 1042*].

14.07[5] Whether Movant Must Show Independent Basis for Standing Is Unsettled Question. The Supreme Court has declined to decide whether a movant attempting to intervene as of right based on its interest in the subject matter of an action must satisfy Article III standing requirements [*see Diamond v. Charles (1986) 476 US 54, 68-69, 106 S Ct 1697, 90 L Ed2d 48*]. The Ninth Circuit has stated that the standing requirement is at least implicitly addressed by the requirement that the movant must assert an interest that relates to the property or transaction that is the subject of the action [*see, e.g., Southwest Ctr. for Biological Diversity v. Berg (9th Cir 2001) 268 F3d 810, 822* ; *Portland Audubon Soc'y v. Hodel (9th Cir 1989) 866 F2d 302, 308 n1*].

Cross References:

Discussion of appellate standing of permissive defendant-intervenor, see *§ 14.23*.

Discussion of unsettled question regarding standing under *Fed R Civ P 24(a)(2)*, see 6 *Moore's Federal Practice, § 24.03* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionRight to Intervene

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CHAPTER 14 Intervention
II. MOVING TO INTERVENE

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14.08 Moving for Permissive Intervention Based on Federal Statute.

14.08[1] Person May Be Permitted to Intervene When Federal Statute Confers Conditional Right to Intervene. On timely application, a court may permit a movant to intervene in an action when a statute of the United States confers a conditional right to intervene [*Fed R Civ P 24(b)(1)(A)*]. Even if a movant fulfills all of the conditions of a statute, however, there is no "right" to intervene. The statute merely informs the court that this is a situation in which Congress deemed that intervention *might* be appropriate.

Cross Reference:

6 *Moore's Federal Practice, § 24.12[1]* (Matthew Bender 3d ed.).

14.08[2] Some Federal Statutes Provide Private Persons With Opportunity to Intervene. The following federal statutes are among those that provide private persons with a conditional right to intervene:

- **Bankruptcy:** A "party in interest" may intervene in a case brought under the Bankruptcy Code on a showing of cause [*see Fed R Bankr P 2018(a)*].

- **School Desegregation:** A parent or guardian may intervene in a school desegregation action brought pursuant to the Equal Education Opportunities Act by showing that implementation of a court busing order poses a risk to the health or education of a child [*see 20 USC § 1717*].

14.08[3] Some Federal Statutes Provide Government With Opportunity to Intervene. The following federal statutes are among those that provide governmental entities or officers with a conditional right to intervene:

- **Tax Lien:** The United States may intervene in an action that involves property against which it claims a tax lien [*see 26 USC § 7424*].

- **EEOC:** When issues of public importance are involved, the Equal Employment Opportunity Commission or the Attorney General may intervene in a private employment discrimination action [*see*

42 USC § 2000e-5(f)(1)].

- **Civil Rights of Institutionalized Persons:** The Attorney General may intervene in an action under the Civil Rights of Institutionalized Persons Act with a showing that the conditions that are the basis of the action are part of a pattern or practice of constitutional violations [*see 42 USC § 1997c(a)(1)*].

Cross Reference:

6 Moore's Federal Practice, see *§§ 24.10*, *24.11* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionStatutory Right to Intervene

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14.09 Moving for Permissive Intervention Based on Common Question of Law or Fact.

14.09[1] Three-Part Test for Evaluation of Permissive Intervention Motion. If the application is timely, a court may permit a movant to intervene in a case when a movant's claim or defense and the main action have a common question of law or fact [*Fed R Civ P 24(b)(1)(B)*]. If the prospective intervenor's claim or defense contains no question of law or fact that is also raised by the main action, the court must deny permissive intervention. However, if there is a common question of law or fact, the movant has satisfied the preconditions of the rule, and the court has discretion to allow intervention [*Kootenai Tribe of Idaho v. Veneman (9th Cir 2002) 313 F3d 1094, 1108*]. Therefore, a movant who seeks permissive intervention must meet three threshold requirements [*Southern Cal. Edison Co. v. Lynch (9th Cir 2002) 307 F3d 794, 803* ; *Donnelly v. Glickman (9th Cir 1998) 159 F3d 405, 412*]:

- The movant's claim or defense must share a common question of law or fact with the main action;
- The motion must be timely; and
- The court must have an independent basis for jurisdiction.

Distinguish--Direct Interest Not Required:

The movant for permissive intervention does not have to show a direct interest in the litigation, as is required for intervention of right under *Fed R Civ P 24(a)(2)* [*SEC v. United States Realty & Improvement Co. (1940) 310 US 434, 459, 60 S Ct 1044, 84 L Ed 1293* ; *see, e.g., Nikon Corp. v. ASM Lithography B.V. (ND Cal 2004) 222 FRD 647, 650-652*].

14.09[2] Even After Test Satisfied, Intervention Still Discretionary. Even if a movant satisfies the threshold requirements, the district court retains discretion to deny permissive intervention [*Donnelly v. Glickman (9th Cir 1998) 159 F3d 405, 412*]. Because discretion is the essence of permissive intervention, courts grant or deny permissive intervention on a case-by-case basis [*see United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 403*].

14.09[3] Federal or State Officer or Agency May Be Permitted to Intervene When Party's Claim or Defense Is Based on Statute, Regulation, or Executive Order. A court may grant permissive intervention to a federal or state

officer or agency when a party bases its claim or defense on a statute or executive order administered by the movant federal or state governmental officer or agency or on any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order [*Fed R Civ P 24(b)(2)*].

14.09[4] In Exercising Discretion, Court Considers Prejudice to Existing Parties and Delay. In exercising its discretion, the court must consider whether the intervention will unduly delay the proceedings or prejudice the rights of the original parties [*Fed R Civ P 24(b)(3)*]. There may be undue delay or prejudice when:

- Delay is inevitable and probably prejudicial because the motion is made at a late stage in the proceedings [*see, e.g., Garza v. County of Los Angeles (9th Cir 1990) 918 F2d 763, 777*], such as on the eve of settlement [*Aleut Corp. v. Tyonek Native Corp. (9th Cir 1984) 725 F2d 527, 530*].

- The movant seeks relief that may interfere with the relief sought by an existing party [*see, e.g., Donnelly v. Glickman (9th Cir 1998) 159 F3d 405, 412* ; *UMG Recordings, Inc. v. Bertelsmann AG (ND Cal 2004) 222 FRD 408, 415*].

- Movant's claims would require court to decide new and complex issues [*see, e.g., Venegas v. Skaggs (9th Cir 1989) 867 F2d 527, 531 , aff'd sub nom Venegas v. Mitchell (1990) 495 US 82, 110 S Ct 1679, 109 L Ed2d 74*], or would otherwise render litigation "unmanageable" [*see, e.g., Taylor Communications Group, Inc. v. Southwestern Bell Tel. Co. (5th Cir 1999) 172 F3d 385, 389* ; *W. Watersheds Projects v. U.S. Forest Serv. (ND Cal 2008) 2008 US Dist LEXIS 60529, at *16* (quoting **Moore's Federal Practice** for proposition that courts considering motions to intervene give primary consideration to trial convenience, equity, and judicial economy)]..

On the other hand, the court will not presume prejudice or undue delay. The original parties must make those claims and provide some sort of showing on them before the court will consider prejudice or delay as a basis for denying permissive intervention [*Venegas v. Skaggs (9th Cir 1989) 867 F2d 527, 530 , aff'd sub nom Venegas v. Mitchell (1990) 495 US 82, 110 S Ct 1679, 109 L Ed2d 74*].

Cross Reference:

6 *Moore's Federal Practice § 24.10[1]* (Matthew Bender 3d ed.)

14.09[5] Courts Are Favorably Disposed to Intervention When Movant Can Make Contribution to Case. In some cases, the movant may bring unique qualifications that will assist in developing the legal or factual issues of a case. Intervention is favored in such cases. One example is the Audubon Society's intervention in an environmental action involving strip mining. Intervention was favored because the Audubon Society has "a long-standing interest in and familiarity with strip-mining, expertise that may be helpful in clarifying the facts and issues" [*Natural Res. Def. Council v. TVA (SDNY 1971) 340 F Supp 400, 408-409 , rev'd on other grounds, 459 F2d 255 (2d Cir 1972)* ; *see also General Motors Corp. v. Burns (D Haw 1970) 50 FRD 401, 405* (intervenors had unique knowledge of Hawaiian auto industry and would help fully present facts in case)].

14.09[6] Limited Intervention to Attack Confidentiality Orders Is Routine. Nonparties may use permissive intervention to seek postjudgment modification or nullification of a confidentiality or a protective order [*Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 473*]. Even this limited form of intervention requires the movant to show a common issue. In most cases, however, when the movant shows its interest in the information protected by the confidentiality or protective order, and shows how it intends to use the information, the movant will have shown sufficient common issues or fact or law [*see, e.g., Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 474*].

This limited form of intervention may excuse the movant from showing independent jurisdictional grounds because the

intervention attacks an order over which the court may already have jurisdiction [*see, e.g., Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 473*].

Legal Topics:

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Unit 3 Pleading Stage
CHAPTER 14 Intervention
II. MOVING TO INTERVENE

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14.10 Requirements for Motion to Intervene.

14.10[1] Rule 24(c) Requirements for Motion. Rule 24(c) sets out a number of requirements for motions to intervene. These requirements do not differ substantially from the best practices required for all types of motions [*see Fed R Civ P 7(b)*], and include the following requirements [*Fed R Civ P 24(c)*]:

- **Service.** The motion to intervene must be served on all existing parties to the action in the manner set out in Rule 5 [*see Fed R Civ P 5(b)* (methods for service)].

- **Statement of grounds.** A motion to intervene must state the grounds on which it is based. All motions must do so, of course [*see Fed R Civ P 7(b)(1)* (all motions must be written and must "state with particularity the grounds for seeking the order")]. As noted below, however, the federal district courts in California have differing requirements as to whether separate memoranda of points and authorities are required or whether the statement of grounds and the argument and citation of authorities must all be filed in a single document.

- **Copy of proposed pleading.** The motion to intervene must be accompanied by a pleading setting forth the claim or defense for which the movant seeks intervention. Although it is always best practice to include a pleading, courts have excused this requirement when limited, postjudgment intervention is sought to attack collateral orders, such as confidentiality or protective orders [*see, e.g., Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 474*].

14.10[2] Rule 24(c) Procedures Apply Regardless of Basis for Intervention. Rule 24(c) does not distinguish between motions to intervene as of right and motions for permissive intervention.

14.10[3] LOCAL PRACTICE: CD Cal--Motion Papers. In the Central District of California, no motion will be considered by the Court unless it meets the requirements of *CD Cal Civ LR 7-4-7-8* [*CD Cal Civ LR 7-4*]. On the first page of the notice of motion and every other document filed in connection with any motion, there must be included, under the title of the document, the date and time of the motion hearing, and the name of the judicial officer before whom the motion has been noticed. The notice of motion must contain a concise statement of the relief or Court action

the movant seeks [*CD Cal Civ LR 7-4*].

14.10[4] LOCAL PRACTICE: ED Cal--Motion Papers. In the Eastern District of California, the moving party must file with the Clerk a notice of motion, motion, accompanying briefs, affidavits, if appropriate, and copies of all documentary evidence that the moving party intends to submit in support of the motion [*ED Cal Civ LR 230*; *see ED Cal Gen LR 101* ("briefs" include memoranda, points and authorities, and other written arguments, or compilation of authorities)].

14.10[5] LOCAL PRACTICE: ND Cal--Motion Papers. In the Northern District of California a motion is limited to a single document not exceeding 25 pages in length, that must contain the noticed hearing date and time, a notice of the motion including date and time of hearing, a concise statement of the relief sought, and the points and authorities in support of the motion. Each motion also must be accompanied by a proposed order [*ND Cal Civ LR 7-2(c)*].

14.10[6] LOCAL PRACTICE: SD Cal--Motion Papers. In the Southern District of California, each motion must be accompanied by a separate motion and notice of motion and another separate document captioned "Memorandum of Points and Authorities in support of [the motion]." When appropriate, a separate statement of material facts must be supplied [*SD Cal Civ LR 7.1(f.1)*]. A movant's failure to file any papers required under the local rules may be deemed as a waiver of the motion, or other request for ruling by the court [*SD Cal Civ LR 7.1(f.2.b)*].

Cross References:

More detailed explanations of general requirements for motions, see Ch. 26, Pretrial Motion Practice, see *§§ 26.12 -26.36*. Forms, see *§§ 14.24*, *14.27*, *14.28*.

Additional forms, see 4 *Bender's Federal Practice Forms, Forms 24:2*, *24:30* et seq. (Matthew Bender).

14.10[7] Motion Should Have Factual Support, but Court Will Accept Nonconclusory Allegations As True. The right to intervene does not depend on proof of the validity of a movant's underlying claim or defense, only its relationship with the claims or defense already at issue [*see generally Fed R Civ P 24(a)*,*(b)*]. Even when moving to intervene as of right based on an interest in the subject matter of the action, the movant need not prove that its interest definitely *will* be impaired unless intervention is granted, only that its interest *may* be impaired [*see Fed R Civ P 24(a)(2)*].

As with every motion, the movant should support all factual claims needed to meet the procedural requirements of Rule 24 with declarations or affidavits [*see, e.g., ED Cal Civ LR 230(h)*; *ND Cal Civ LR 7-2(d)*; *SD Cal Civ LR 7.1(f.2.a)*]. However, the district court will accept as true the well-pleaded nonconclusory allegations made in support on an intervention motion or in a proposed complaint or answer in intervention [*Southwest Ctr. for Biological Diversity v. Berg (9th Cir 2001) 268 F3d 810, 819-820*].

Cross Reference:

6 Moore's Federal Practice, § 24.14 (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to Intervene

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14.11 When Suit Challenges Constitutionality of Statute, Party Must Give Notice to Facilitate Governmental Intervention.

14.11[1] Party Must Notify United States Attorney General When Federal Statutes Are Challenged. When the constitutionality of a federal statute is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the party making the constitutional challenge must file a notice of constitutional question stating the question and identifying the paper that raises it, and must serve that notice on the Attorney General of the United States [*28 USC § 2403(a)*; *Fed R Civ P 5.1(a)*]. The United States has a right to intervene for the limited purpose of argument on the constitutionality of the statute in question [*28 USC § 2403(a)*].

14.11[2] Party Must Notify State Attorney General When State Statutes Are Challenged. When the constitutionality of any statute of a State is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the party making the constitutional challenge must file a notice of constitutional question stating the question and identifying the paper that raises it, and must serve that notice on the attorney general of the State [*28 USC § 2403(b)*; *Fed R Civ P 5.1(a)*]. The State in question has a right to intervene for the limited purpose of argument on the constitutionality of the State statute in question [*28 USC § 2403(b)*].

14.11[3] Court Must Certify That Constitutional Challenge Exists. The court must certify to the Attorney General of the United States that there is a constitutional challenge to a federal statute, or certify to the state attorney general that there is a constitutional challenge to a state statute [28 USC § 2403; Fed R Civ P 5.1(b)].

Cross Reference:

Forms based on intervention by government; notification requirements, see 5 *Bender's Federal Practice Forms, Forms 24:10*-24:16 (Matthew Bender).

14.11[4] LOCAL PRACTICE: ED Cal--Duty to Warn Extended to Challenges to Federal or State Regulations. If a party challenges a federal administrative regulation's constitutionality and neither the United States nor any of its officers, agencies, or employees is a party, the party making the constitutional challenge must file a notice. The notice must be filed immediately on making the constitutional challenge. The notice must identify the regulation in question and must set forth why and in what respect the party claims that the regulation is unconstitutional.

Thereupon, or sua sponte, the court must serve a copy of the notice on the United States Attorney General, on the United States Attorney, and on the other parties. If the party required to file and serve the notice fails to do so, every other party must file and serve this notice. As soon as one party has filed and served this notice, all other parties are relieved of this obligation [*ED Cal Gen LR 132(a)*].

A similar requirement applies when a party challenges a State regulation's constitutionality and neither the State nor any of its officers, agencies, or employees is a party. The party making the constitutional challenge must immediately file a notice with the clerk identifying the regulation and setting forth the nature of the constitutional challenge. Thereupon, or sua sponte, the court must serve a copy of the notice on the State Attorney General and on all other parties. If the party required to file and serve the notice fails to do so, every other party must file and serve the notice, provided that as soon as one party actually does so, all other parties are relieved of this obligation [*ED Cal Gen LR 132(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14.12 CHECKLISTS: Opposing Motion to Intervene.

14.12[1] CHECKLIST: Drafting Memorandum Opposing Motion to Intervene As of Right.

☐ Argue why motion to intervene is untimely:

- ○ Set out how long action has been pending and current stage of proceedings;
- ○ Explain how and when movant should have known of claimed interest in action;
- ○ Set out detailed account of time that elapsed between time when movant knew or should have known of interest in action and filing of motion, including all steps taken by existing parties in interim;
- ○ Estimate any delays in resolution of action that existing parties will suffer if intervention is granted;
- ○ Explain any prejudice to existing parties caused by intervention, with as many detailed examples as possible; and
- ○ Set out every new issue and argument that will be added to action as part of argument concerning unmanageability of action if intervention is granted.

☐ If motion based on statute:

- ○ Explain why statute is not applicable to movant's claim or defense;
- ○ Analyze statute to show that right to intervene granted by statute is conditional right, not unconditional right.

☐ If motion based on movant's purported interest in action:

- ○ Attack assertion that interest is protected by law;
- ○ Attack assertion that movant's interest relates to plaintiff's interest;
- ○ Argue that strength of interest is insufficient to justify intervention;
- ○ Explain that complications of intervention would add to existing suit, making it less efficient than separate litigation by movant;
- ○ Dispute contentions concerning adequacy of representation of movant's interest by existing parties.

☐ If appropriate, challenge admissibility or persuasiveness of any evidence offered in support of motion, including supplying counter-declarations and exhibits.

☐ If required by local practice, attach proposed order denying motion.

Authority:
Fed R Civ P 24(a)

Discussion:
See *§§ 14.06*, *14.07*, *14.13*, *14.14*, *14.16 -14.19*

Form:
See *§§ 14.25*, *14.29*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.37*

14.12[2] CHECKLIST: Drafting Memorandum Opposing Motion for Permissive Intervention.

☐ Argue why motion to intervene is untimely:

- ○ Set out how long action has been pending and current stage of proceedings;
- ○ Explain how and when movant should have known of claimed interest in action;

- ○ Set out detailed account of time that elapsed between time when movant knew or should have known of interest in action and filing of motion, including all steps taken by existing parties in interim;
- ○ Estimate any delays in resolution of action that existing parties will suffer if intervention is granted;
- ○ Explain any prejudice to existing parties caused by intervention, with as many detailed examples as possible; and
- ○ Set out every new issue and argument that will be added to action as part of argument concerning unmanageability of action if intervention is granted.

☐ If motion based on statute, explain why statute is not applicable to movant's claim or defense.

☐ If motion based on common questions of law or fact:

- ○ Dispute existence of each claimed common issue of law or fact;
- ○ Argue insignificance of each claimed common issue of law or fact to existing case as a whole;
- ○ Compare importance of claimed common issues with non-common issues in case as whole;
- ○ Enumerate all factors that establish prejudice to existing parties;
- ○ Enumerate all potential delays caused by intervention;
- ○ Assert any potential manageability caused by intervention; and
- ○ Argue suitability of all less-intrusive alternatives to intervention, from separate litigation to amicus curiae status.

☐ If appropriate, challenge admissibility or persuasiveness of any evidence offered in support of motion, including supplying counter-declarations and exhibits.

☐ If required by local practice, attach proposed order denying motion.

Authority:
Fed R Civ P 24(b)

Discussion:

See *§§ 14.08*, *14.09*, *14.13*, *14.15 -14.19*

Forms:
See *§ 14.26*, *14.29*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionRight to Intervene

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14.13 Refuting Timeliness of Motion to Intervene.

A party opposing a motion to intervene should raise the issue of timeliness if any delay exists between (1) the point at which the movant knew or had reason to know of the litigation's potential adverse affects and (2) the filing of the motion [*see California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc. (9th Cir 2002) 309 F3d 1113, 1119-1120*]. A motion to intervene must always be timely [*Fed R Civ P 24(a), (b)*], and any adverse effects of the movant's delay should be brought to the court's attention [*see Petrol Stops Northwest v. Continental Oil Co. (9th Cir 1981) 647 F2d 1005, 1010* (prejudice may be most important factor in determining timeliness)]. "[A]ny substantial lapse of time weighs heavily against intervention" [*League of United Latin Am. Citizens v. Wilson (9th Cir 1997) 131 F3d 1297, 1302* , quoting *United States v. State of Washington (9th Cir 1996) 86 F3d 1499, 1503*].

Example:

Intervention was untimely when the motion was filed after the parties had settled, more than six years after litigation had commenced, and on the same day that a party moved for judicial approval of the consent decree [*see California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc. (9th Cir 2002) 309 F3d 1113, 1119*].

Cross Reference:

Discussion of timeliness requirements, see *§ 14.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionTimeliness

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14.14 Refuting Basis for Motion to Intervene As of Right.

An existing party may refute a motion for intervention as of right by challenging whether the movant has satisfied any of the requirements for the motion as set forth above [*see Fed R Civ P 24(a)*]. The following examples illustrate appropriate arguments:

- **Movant's Interests Not Impaired:** Community activists could not intervene as of right in an action brought by the United States against local law enforcement because their interests would not be adversely affected by any judgment in the action. No judgment in the action would prevent any individual from initiating a suit against the defendant local governments, law enforcement agencies, or police officers who engaged in unconstitutional practices, or against the city defendants for engaging in unconstitutional practices. No judgment in the action would in any way prevent community activists from continuing to work on police reform [*United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 401* ; *see also Cunningham v. David Special Commitment Ctr. (9th Cir 1998) 158 F3d 1035, 1037-1038*].

- **Movant's Economic Interest Too Speculative:** A federally recognized Indian tribe could not intervene in an action brought by a nonrecognized Indian tribe against the United States. The unrecognized tribe sought federal recognition. The movants were concerned that federal recognition of the plaintiff tribe might dilute the movants' fishing rights under a federal treaty, but this speculation concerning potential future consequences of a possible judgment in the action was not a substantial enough interest to justify intervention. Federal recognition of the plaintiff tribe would not automatically revise existing treaties and treaty rights [*Greene v. United States (9th Cir 1993) 996 F2d 973, 976-977*].

- **Movant's Interest Only That of Creditor of Party:** Energy suppliers did not have a sufficient interest in an action by an energy provider against the California Public Utilities Commission seeking injunctive and declaratory relief based on the Commission's refusal to raise rates. The energy suppliers contended that the plaintiff owed them $260 million that the plaintiff was unable to pay because of the Commissioners' actions. The court refused intervention because the pending litigation would not resolve the movants' claims. A successful result might give the plaintiff more money, but it would not directly

affect the creditors' claims. An unsecured third-party creditor of one of the parties to an action does not have a sufficiently direct interest in the action to justify intervention [*see Southern Cal. Edison Co. v. Lynch (9th Cir 2002) 307 F3d 794, 803*].

- **Government Is Sole Proper Party:** The federal government is the only proper defendant in an action to compel compliance with the National Environmental Policy Act (NEPA) (*42 USC § 4321 et seq.*) [*Kootenai Tribe of Idaho v. Veneman (9th Cir 2002) 313 F3d 1094, 1108* , citing *Wetlands Action Network v. United States Army Corps of Eng'rs (9th Cir 1999) 222 F3d 1105, 1114*]; *see W. Watersheds Projects v. U.S. Forest Serv. (ND Cal 2008) 2008 US Dist LEXIS 60529, at *9-*15* (even third party permit holders whose rights might be affected were not exempt from rule against private party intervention in cases that involve the government's compliance with NEPA, despite private party's argument that case involved more than just a NEPA claim)]. Whether intervention is allowed in an SEC action without the consent of the SEC is an unsettled question [*see SEC v. TLC Invs. & Trade Co. (CD Cal 2001) 147 F Supp2d 1031, 1039-1040* (not addressing this question but citing conflicting authorities)].

Cross References:

Discussion of grounds for intervention as of right, see *§§ 14.06 -14.07*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionRight to Intervene

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14.15 Refuting Basis for Motion for Permissive Intervention.

An existing party may refute a motion for permissive intervention by attacking whether the movant has satisfied any of the requirements for the motion as explained above [*see Fed R Civ P 24(b)*]. The following examples illustrate appropriate arguments:

- **Movant Failed to Assert Common Question.** A discharged attorney with a large lien for fees could not intervene in his former client's Section 1983 action. The attorney, as creditor of one of the parties, does not assert any question of fact or law in common with those already existing in the action. The situation is different only when reasonableness of fees award is being litigated [*Venegas v. Skaggs (9th Cir 1989) 867 F2d 527, 530 , aff'd sub nom Venegas v. Mitchell (1990) 495 US 82, 110 S Ct 1679, 109 L Ed2d 74*].

- **Movant's Common Question Unrelated to Existing Claims.** Landowners and assorted public officials could not intervene in action over regional environmental plan. The movants wanted to attack the standing of one of the parties, a regional planning agency, by asserting that it was not legally constituted. This issue was unrelated to the issues in the existing action [*California v. Tahoe Reg'l Planning Agency (9th Cir 1986) 792 F2d 775, 778-779*].

- **Action Requires Prompt Resolution and Intervention Will Cause Delay.** Intervention is frequently denied in voting rights actions, election challenges, and suits over campaign financing laws because those actions must be resolved quickly in order to permit elections to continue. Intervention may improperly delay resolution of these actions [*see, e.g., Garza v. County of Los Angeles (9th Cir 1990) 918 F2d 763, 777* (candidate's intervention in voting rights action would improperly delay resolution); *see also Daggett v. Commission on Governmental Ethics & Election Practices (1st Cir 1999) 172 F3d 104, 112* (challenge to campaign financing law needed quick resolution)].

- **Movant Would Introduce Too Many Collateral Issues.** A plaintiff's wife was not allowed to intervene in her husband's civil rights action. The plaintiff alleged that the search of his luggage by FBI agents violated his *Fourth Amendment* rights and sought damages as a result. Permissive intervention was denied because permitting the wife to intervene would have unduly expanded the litigation to

include disputes over ownership interest in the luggage in question and tax liability of the various parties [*Sellers v. United States (11th Cir 1983) 709 F2d 1469, 1472*].

Cross References:

Discussion of grounds for permissive intervention, see *§§ 14.08*, *14.09*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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14.16 LOCAL PRACTICE: CD Cal--Opposition Papers and Service.

In the Central District of California, opposition papers are due not later than 21 days before the hearing date [*CD Cal Civ LR 7-9*]. Opposition papers consist of a brief (i.e., a memorandum of points and authorities) and evidence (i.e., declarations and exhibits to them, such as documents, photographs, deposition excerpts, etc.) [*CD Cal Civ LR 7-9*; *see CD Cal Civ LR 7-6* (evidence on motions)].

Warning:

A party who will not oppose a motion must file written statement to that effect within the time for filing opposition papers [*CD Cal Civ LR 7-9*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to Intervene

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14.17 LOCAL PRACTICE: ED Cal--Opposition Papers and Service.

In the Eastern District of California, opposition papers are due not less than 14 days preceding the noticed (or continued) hearing date. A party may not be heard at oral argument unless that party has timely filed opposition papers. A responding party who has no opposition to granting the motion must serve and file a statement to that effect, specifically designating the motion in question [*ED Cal Civ LR 230(c)*]. Factual contentions must be initially presented and heard on affidavits. The court may, in its discretion, require or allow oral examination of witnesses [*ED Cal Civ LR 230(h)*; *see ED Cal Gen LR 142* (form of affidavit)].

Warning:

A party who does not oppose a motion must serve and file a written statement to that effect within the time for filing opposition papers [*ED Cal Civ LR 230(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14.18 LOCAL PRACTICE: ND Cal--Opposition Papers and Service.

In the Northern District of California, opposition papers are due not less than 21 days before the hearing date. Opposition papers may include a proposed order, affidavits or declarations, and a brief or memorandum. Any brief or memorandum must comply with the requirements of Local Rule 7-4 [*ND Cal Civ LR 7-3(a)*]. Under Local Rule 7-4, briefs are limited to a maximum of 25 pages, and any brief exceeding 10 pages must include a table of contents and a table of authorities [*ND Cal Civ LR 7-4*]. Factual contentions must be supported by an affidavit or declaration and by appropriate references to the record. Extracts from depositions, interrogatory answers, requests for admission, and other evidentiary matters must be appropriately authenticated by an affidavit or declaration [*ND Cal Civ LR 7-5(a)*; *see ND Cal Civ LR 7-5(b)* (form of affidavit)].

Warning:

A party who does not oppose the motion must file a written statement to that effect within the time for filing opposition papers [*ND Cal Civ LR 7-3(b)*; *see, e.g., PG&E v. Lynch (ND Cal 2002) 216 F Supp2d 1016, 1024*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14.19 LOCAL PRACTICE: SD Cal--Opposition Papers and Service.

In the Southern District of California, opposition papers are due not less than 14 calendar days before the date set for the hearing [*SD Cal Civ LR 7.1(e.2)*]. Opposition papers must be served within the same time, except that papers must be served even earlier if service is by mail. Opposition papers served by mail extend the service period by three days. Even if the period for service is lengthened, the time for court filing remains the same. And even if the motion to intervene was served by a means other than personal delivery, *Fed R Civ P 6(d)* will not alter the time for filing service of opposition papers [*SD Cal Civ LR 7.1(e.4)*]. Failure to serve and file opposition papers in a timely manner may be taken as a consent to the motion [*SD Cal Civ LR 7.1(f.3.c)*] Opposition papers consist of a brief (an answering memorandum of points and authorities and a complete statement of all reasons in opposition to the position taken by the movant) and copies of all opposition evidence [*SD Cal Civ LR 7.1(f.3.b)*]. Brief are limited to 25 pages maximum, and a brief exceeding 10 pages must contain a table of contents and a table of authorities [*SD Cal Civ LR 7.1(h)*].

Warning:

A party who does not oppose the motion must file a written statement to that effect within the time for filing opposition papers [*SD Cal Civ LR 7.1(f.3.a)*].

Cross References:

Form in opposition to motion to intervene as of right, see 5 *Bender's Federal Practice Forms, Form 24:40*; forms in opposition to intervention in particular types of cases, see 5 Bender's Federal Practice Forms, Forms 24:50- 24:58; forms in opposition to motion for permissive intervention, see 5 Bender's Federal Practice Forms, Form 24:60 (Matthew Bender).

General motion procedures, see Ch. 26, Pretrial Motion Practice, see *§ 26.37 -26.43*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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14.19A CHECKLIST: Appealing Denial of Motion to Intervene.

☐ If motion for intervention, either as of right or permissive, has been denied, determine whether to appeal, considering that:

Authority:
United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391 ; *San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096*

Discussion:
See *§ 14.20*

○ Denial of motion to intervene as of right will be reviewed de novo.

Authority:
Southern Cal. Edison Co. v. Lynch (9th Cir 2002) 307 F3d 794

Discussion:
See *§ 14.21*

○ Denial of motion for permissive intervention will be reviewed for abuse of discretion.

Authority:
San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096

Discussion:

See *§ 14.22*

Legal Topics:

For related research and practice materials, see the following legal topics:
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IV. APPELLATE REVIEW OF INTERVENTION RULINGS

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14.20 Order Denying Intervention Is Appealable Final Order; Order Permitting Intervention Is Not.

A district court's denial of a motion for intervention is an appealable final decision [*see, e.g., United States v. City of Los Angeles (9th Cir 2002) 288 F3d 391, 397* (denial of motion for intervention as of right is appealable final decision); *San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1099* (denial of motion for permissive intervention in civil case is directly appealable)].

Distinguish--Partial Denials Not Appealable:

An order denying full intervention as of right but granting limited intervention for the remedial phase of the trial may not be appealed as a final order, because the intervenor may appeal the final judgment [*see Churchill County v. Babbitt (9th Cir 1998) 150 F3d 1072, 1082*].

An order permitting intervention is not a final order. The order is purely interlocutory and no statute makes it appealable. Therefore, an order permitting intervention is reviewable only on appeal from the final judgment [*Alsea Valley Alliance v. DOC (9th Cir 2004) 358 F3d 1181, 1187*]. Then, even if the district court erred in granting intervention as of right, the judgment will not be reversed unless that error affected the "substantial rights of the parties" [*Prete v. Bradbury (9th Cir 2006) 438 F3d 949, 959-960*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionRight to Intervene

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CHAPTER 14 Intervention
IV. APPELLATE REVIEW OF INTERVENTION RULINGS

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14.21 Order Denying Intervention As of Right Reviewed De Novo.

The Ninth Circuit reviews a district court's denial of a motion to intervene as of right de novo [*see, e.g., Arakaki v. Cayetano (9th Cir 2003) 324 F3d 1078, 1082 , cert. denied sub nom. Hoohuli v. Lingle, 540 US 1017 (2003)* ; *Southern Cal. Edison Co. v. Lynch (9th Cir 2002) 307 F3d 794, 802*].

Distinguish--Timeliness Finding Reviewed for Abuse of Discretion:

While a district court's ruling concerning the right of a movant to intervene is reviewed de novo, the court's findings concerning timeliness are generally reviewed for abuse of discretion [*Southern Cal. Edison Co. v. Lynch (9th Cir 2002) 307 F3d 794, 802* ; *Donnelly v. Glickman (9th Cir 1998) 159 F3d 405, 409*]. However, if the district court makes no finding regarding timeliness, that factor is reviewed de novo [*League of United Latin Am. Citizens v. Wilson (9th Cir 1997) 131 F3d 1297, 1302*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedureAppealsStandards of ReviewDe Novo Review

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IV. APPELLATE REVIEW OF INTERVENTION RULINGS

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14.22 Order Denying Permissive Intervention Reviewed for Abuse of Discretion.

A motion for permissive intervention is directed to the sound discretion of the district court [*San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1099*]. Therefore, a decision denying permissive intervention is reviewed under an abuse of discretion standard [*see, e.g., Southern Cal. Edison Co. v. Lynch (9th Cir 2002) 307 F3d 794, 802*].

Distinguish--Legal Rulings Still Reviewed De Novo:

Even though a district court's ruling on permissive intervention is primarily a discretionary decision, it may involve a ruling on a question of law. When the district court's decision turns on a legal question, the court of appeals reviews the legal determination de novo [*San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1100* ; *see Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 472*].

Cross Reference:

6 Moore's Federal Practice, see *§ 24.24* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive Interventions

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CHAPTER 14 Intervention
IV. APPELLATE REVIEW OF INTERVENTION RULINGS

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14.23 Permissive Intervenor Must Have Independent Jurisdictional Grounds to Appeal Final Judgment.

Once a movant is allowed to intervene in an action, he or she is a party to the action [*see League of United Latin Am. Citizens v. Wilson (9th Cir 1997) 131 F3d 1297, 1304*]. Furthermore, a movant needs to show an independent ground for the district court's subject matter jurisdiction in order to be granted permissive intervention [*see Southern Cal. Edison Co. v. Lynch (9th Cir 2002) 307 F3d 794, 803* (jurisdiction one of three elements); *Donnelly v. Glickman (9th Cir 1998) 159 F3d 405, 412*].

In the Ninth Circuit, a permissive intervenor must also have independent jurisdictional grounds on which to pursue an appeal of the final judgment in the case, absent an appeal by the party on whose side the intervenor intervened [*Diamond v. Charles (1986) 476 US 54, 68, 106 S Ct 1697, 90 L Ed2d 48* ; *Kootenai Tribe of Idaho v. Veneman (9th Cir 2002) 313 F3d 1094, 1109*]. The permissive intervenor must also have independent Article III standing to pursue the appeal [*see Kootenai Tribe of Idaho v. Veneman (9th Cir 2002) 313 F3d 1094, 1109*].

Consider:

An interest strong enough to permit intervention is not necessarily a sufficient basis to pursue an appeal abandoned by other parties [*Kootenai Tribe of Idaho v. Veneman (9th Cir 2002) 313 F3d 1094, 1109*].

Cross Reference:

Discussion of subject matter jurisdiction, see 15 Moore's Federal Practice, Ch. 100 et seq. (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityAdverse Determinations

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CHAPTER 14 Intervention
V. FORMS

2-14 MB Practice Guide: Fed Pretrial Civ Proc in CA 14.24

14.24 Notice of Motion and Motion for Intervention.

Notice of Motion and Motion for Intervention.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR IN-
Defendant	)	TERVENTION
_____ [*name*],	)	
Proposed Intervenor	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order that _____ [he *or* she *or* it] may intervene as a _____ [plaintiff *or* defendant] in this action as a matter of right under *Rule 24(a)(_) of the Federal Rules of Civil Procedure* or, in the alternative, allowing _____ [*name*] permissive intervention as a _____ [plaintiff *or* defendant] in this matter under *Rule 24(b)(_) of the Federal Rules of Civil Procedure*.

_____ [Claim(s) *or* Defense(s)] to Be Asserted

By intervening in this action, _____ [*name*] seeks to assert _____ [*claim, defense, or collateral relief sought, e.g.,* the claim set out in the attached Complaint in Intervention].

Grounds for Intervention

Intervention as of Right

_____ [*Name of intervenor*] is entitled to intervene in this action as a matter of right because:

[*If statute guarantees right to intervene*]

1. _____ [*Name*] has a right to intervene in this action pursuant to _____ [*statutory cite*].

2. _____ [*Name*] qualifies to intervene under this statute because _____ [*facts showing applicability of statute*].

[*If intervenor has qualifying interest in subject of action*]

1. _____ [*Name*] has a legally protectable interest in the subject matter of this action because _____ [*intervenor's relationship to action*].

2. _____ [*Name*]'s interests in the action will be substantially impaired or impeded if _____ [he *or* she *or* it] is not allowed to intervene because _____ [*facts showing impairment*].

3. The existing parties in this action do not adequately represent _____ [*name*]'s interest in the action because _____ [*facts showing inadequate representation*].

Permissive Intervention

In the alternative, if _____ [*name*]'s motion for intervention as of right is denied,

_____ [*name*] should be allowed permissive intervention in this action because:

[*If statute provides conditional right to intervene*]

4. A federal statute, _____ [*citation*], grants persons such as _____ [*name*] a conditional right to intervene in actions like the present action.

5. The statute applies in this action because _____ [*facts showing applicability of statute*].

[*If intervenor assert common questions of fact or law*]

4. The _____ [claim(s) *or* defense(s)] that _____ [*name*] desires to assert in this action if permitted to intervene share[s] common questions of _____ [fact *or* law *or* fact and law] with the _____ [claims *or* defenses] currently at issue in the action. These common questions are _____ [*description of all common questions of law, fact, or both*].

5. Judicial economy will be served by allowing intervention because _____ [*summary of efficiencies*].

6. The motion for intervention was timely made in that _____ [*facts demonstrating timeliness*].

7. This court has subject matter jurisdiction over [all of] the _____ [claim(s) *or* defense(s)] proposed to be added by _____ [*name*] because _____ [*summary of jurisdictional facts*].

8. _____ [*Name*] has attached its proposed _____ [*name of pleading, e.g.,* Complaint *or* Answer] to this Motion, as required by *Rule 24(c) of the Federal Rules of Civil Procedure*.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities], and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for proposed intervenor _____[*name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 24

Timing:
See *§ 14.05*

Forms of Proposed Orders:
See *§§ 14.27*, *14.28*

Opposition Forms:
See *§§ 14.25*, *14.26*, *14.29*

Related Forms of Motion:
Motion to intervene in class actions, see 5 *Bender's Federal Practice Forms, Forms 24:20*, *24:21*.
Motions to intervene in particular types of cases, see 5 *Bender's Federal Practice Forms, Forms 24:30*-24:37 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionConditional Right to InterveneCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionTimelinessCivil ProcedureCounselGeneral OverviewCriminal Law & ProcedurePreliminary ProceedingsGeneral OverviewGovernmentsLocal GovernmentsClaims By & Against

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14.25 Opposition to Motion to Intervene As of Right.

Opposition to Motion to Intervene As of Right.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
_____ District of California

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	_____ [*NAME*]'S
_____ [*name*],	)	OPPOSITION TO
Defendant	)	MOTION TO INTERVENE
_____ [*name*],	)	
Proposed Intervenor	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____
	)	

_____ [*Name of party*], _____ [*status, e.g.,* Plaintiff], opposes intervention by _____ [*name of intervenor*] because:

_____ [*First Argument, e.g.,* Motion Is Untimely]

1. The motion to intervene is untimely because _____ [*facts and legal authorities supporting argument of untimeliness*].

_____ [*Second Argument, e.g.,* Statute Provides Only Conditional Right to Intervene]

2. The statute relied on to establish the right to intervention does not satisfy the requirements of Rule 24(a)(1) because it provides only a conditional right to intervene. In particular, _____ [*facts and legal authorities supporting argument that statute fails to provide unconditional right to intervene*].

_____[*Third Argument, e.g.,* Intervenor Lacks Sufficient Interest in Case]

3. Any disposition of this action will not impair or impede the intervenor's interest, as required by Rule 24(a)(2), because _____ [*facts and legal authorities supporting argument that intervenor lacks significant, protectable interest in subject matter of action*].

_____ [*Fourth Argument, e.g.,* Intervenor's Interests Are Fully Represented]

4. Contrary to the intervenor's claim, _____ [his *or* her *or* its] interests are fully represented in this action because _____ [*facts and legal authorities supporting argument that intervenor's interests adequately represented*].

[*Continue making all relevant arguments*]

Conclusion

For all of the reasons stated above, _____ [*name of party*] respectfully requests that the motion to intervene be denied.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 24(a)

Discussion:
See *§§ 14.12 -14.14*, *14.16 -14.19*

Related Motion:
See § *14.24*

Form of Proposed Order:
See § *14.29*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionConditional Right to InterveneCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionTimelinessCivil ProcedureCounselGeneral Overview

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Unit 3 Pleading Stage
CHAPTER 14 Intervention
V. FORMS

2-14 MB Practice Guide: Fed Pretrial Civ Proc in CA 14.26

14.26 Opposition to Motion for Permissive Intervention.

Opposition to Motion for Permissive Intervention.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
_____ District of California

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	_____ [*NAME*]'S
_____ [*name*],	)	OPPOSITION TO
Defendant	)	MOTION TO INTERVENE
_____ [*name*],	)	
Proposed Intervenor	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____
	)	

_____ [*Name of party*], _____ [*status, e.g.,* Plaintiff], opposes intervention by _____ [*name of intervenor*] because:

_____ [*First Argument, e.g.,* Motion Is Untimely]

1. The motion to intervene is untimely because _____ [*facts and legal authorities supporting argument of untimeliness*].

_____ [*Second Argument, e.g.,* Movant Has Failed to Assert Any Truly Common Questions]

2. The questions that movant claims are common are, in fact, not common at all. They are only similar and do not, in fact, relate to any questions of fact or law raised by the plaintiff in this matter. In particular, _____ [*facts and legal authorities supporting argument that movant asserts only similar questions, not common questions*].

_____ [*Third Argument, e.g.,* Court Lacks Jurisdiction Over Intervenor's _____ (Claims *or* Defenses)]

3. Permissive intervention is possible only when the movant establishes an independent basis for the court's subject matter jurisdiction over its claims or defenses. There is no subject matter jurisdiction for the claims asserted by the movant in _____ [his *or* her *or* its] proposed pleading because _____ [*facts and legal authorities supporting argument that court lacks subject matter jurisdiction over movant's claims or defenses*].

_____ [*Fourth Argument, e.g.,* Intervention Would Prejudice Existing Parties]

4. The court should exercise its discretion and refuse intervention in this case because the proposed intervention would prejudice the existing parties and unfairly delay the proceedings. In particular, _____ [*facts and legal authorities supporting argument that intervention would prejudice existing parties or unduly delay proceedings*].

[*Continue making all relevant arguments*]

Conclusion

For all of the reasons stated above, _____ [*name of party*] respectfully requests that the motion to intervene be denied.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 24(b)

Discussion:
See *§§ 14.12*, *14.13*, *14.15 -14.19*

Related Form of Order:
See *§ 14.29*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionTimelinessCivil ProcedureCounselGeneral OverviewGovernmentsLocal GovernmentsClaims By & Against

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CHAPTER 14 Intervention
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14.27 Proposed Order Permitting Intervention As Plaintiff.

Proposed Order Permitting Intervention As Plaintiff.

UNITED STATES DISTRICT COURT
_____ District of California

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	[PROPOSED] ORDER
Defendant	)	GRANTING MOTION
_____ [*name*],	)	INTERVENE
Intervenor	)	
	)	
	)	

The motion of _____ [*name of intervenor*], to intervene as a plaintiff in this action, _____ [came on for hearing *or* was submitted for decision] on _____ [*date*].

The court has reviewed the papers submitted and considered the argument of counsel and the authorities cited. After due consideration, the court is convinced that the application to intervene is timely and that:

[*If intervention as of right based on statutory authority:*]

1. _____ USC § _____ authorizes _____ [*name of intervenor*] to intervene as of right in this action.

[*If intervention as of right is based on interest in subject of action:*]

2. _____ [*Name of intervenor*] has an interest in the subject of this action and is so situated that the disposition of the action may impair of impede _____ [his *or* her *or* its] ability to protect that interest. No party to this action adequately represents this interest of _____ [*name of intervenor*].

[*If permissive intervention is based on statutory authority:*]

3. _____ USC § _____ authorizes _____ the court to permit _____ [*name of intervenor*] to intervene in this action.

[*If permissive intervention is based on common questions:*]

4. _____ [*Name of intervenor*] asserts claims with sufficient common questions of law or fact, permissive intervention would serve the interests of judicial economy; and the existing parties would not be unduly prejudiced by intervention in this matter.

Therefore, IT IS ORDERED that:

1. The motion to intervene is GRANTED;

2. _____ [*Name of intervenor*] is made a party plaintiff to this action;

3. _____ [*Name of intervenor*]'s proposed complaint, as attached to and served with the motion for intervention, is deemed filed and served as of the date that this Order is signed;

4. The defendant[s] must respond to the complaint of _____ [*name of intervenor*] no later than _____ [*date*]. [Defendant(s) may respond by filing and serving a notice adopting the previously filed pleadings in this matter].
Dated: _____

_____ [*signature*]

UNITED STATES DISTRICT JUDGE

NOTES:

Authority:
Fed R Civ P 24(a), (b)

Related Form of Motion:
See *§ 14.24*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionStatutory Right to InterveneCivil ProcedurePartiesInterventionTimelinessCriminal Law & ProcedurePreliminary ProceedingsGeneral OverviewGovernmentsCourtsGeneral Overview

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14.28 Proposed Order Permitting Intervention As Defendant.

Proposed Order Permitting Intervention As Defendant.

UNITED STATES DISTRICT COURT
_____ District of California

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	[PROPOSED] ORDER
Defendant	)	GRANTING MOTION
_____ [*name*],	)	INTERVENE
Intervenor	)	
	)	
	)	

The motion of _____ [*name of intervenor*], to intervene as a defendant in this action, _____ [came on for hearing *or* was submitted for decision] on _____ [*date*].

The court has reviewed the papers submitted and considered the argument of counsel and the authorities cited. After due consideration, the court is convinced that the application to intervene is timely and that

[*If intervention as of right based on statutory authority:*]

1. _____ USC § _____ authorizes _____ [*name of intervenor*] to intervene as of right in this action.

[*If intervention as of right is based on interest in subject of action:*]

2. _____ [*Name of intervenor*] has an interest in the subject of this action and is so situated that the disposition of the action may impair of impede [his *or* her *or* its] ability to protect that interest. No party to this action adequately represents this interest of _____ [*name of intervenor*].

[*If permissive intervention is based on statutory authority:*]

3. _____ USC § _____ authorizes the court to permit _____ [*name of intervenor*] to intervene in this action.

[*If permissive intervention is based on common questions:*]

4. _____ [*Name of intervenor*] asserts defenses with sufficient common questions of law or fact, permissive intervention would serve the interests of judicial economy; and the existing parties would not be unduly prejudiced by intervention in this matter.

Therefore, IT IS ORDERED that:

1. The motion to intervene is GRANTED;

2. _____ [*Name of intervenor*] is made a party defendant to this action;

3. _____ [*Name of intervenor*]'s proposed answer, as attached to and served with the motion for intervention, is deemed filed and served as of the date that this Order is signed.
Dated: _____

_____ [*signature*]

UNITED STATES DISTRICT JUDGE

NOTES:

Authority:
Fed R Civ P 24(a), (b)

Related Form of Motion:
See *§ 14.24*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionStatutory Right to InterveneCivil ProcedurePartiesInterventionTimelinessCriminal Law &

ProcedurePreliminary ProceedingsGeneral OverviewGovernmentsCourtsGeneral Overview

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14.29 Proposed Order Denying Intervention.

Proposed Order Denying Intervention.

UNITED STATES DISTRICT COURT
_____ District of California

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	[PROPOSED] ORDER
Defendant	)	DENYING MOTION
_____ [*name*],	)	INTERVENE
Intervenor	)	
	)	
	)	

The motion of _____ [*name of intervenor*], to intervene in this action, _____ [came on for hearing *or* was submitted for decision] on _____ [*date*]. The court has reviewed the papers submitted and considered the argument of counsel and the authorities cited. After due consideration, the court is convinced that:

[*If application was untimely:*]

1. The application to intervene is untimely and that intervention at this stage of the proceedings would unduly delay matters and prejudice the existing parties.

[*If statute cited does not authorize intervention as of right:*]

2. The statute cited by the proposed intervenor, _____ USC § _____, does not authorize _____ [*name of intervenor*] to intervene as of right in this action.

[*If intervenor lacks sufficient interest in action:*]

3. _____ [*Name of intervenor*] does not have a direct, substantial, or legally protectable interest in this action to justify intervention as of right.

[*If intervenor's interest is adequately represented:*]

4. Any interest of _____ [*name of intervenor*] in this action is adequately represented by the existing [plaintiff(s) *or* defendant(s)] so that _____ [*name of intervenor*] has no right to intervene in this action.

[*If statute cited does not authorize permissive intervention:*]

5. _____ [*Name of intervenor*] has not satisfied all of the conditions under which _____ USC § _____ might authorize _____ [his *or* her *or* its] permissive intervention in this action.

[*If insufficient common questions of law or fact exist:*]

6. There are insufficient common questions of law or fact presented by _____ [*name of intervenor*] to overcome the inherent delays or the prejudice to the existing parties that would result if permissive intervention were allowed in this action.

Therefore, IT IS ORDERED that the motion to intervene is DENIED.
Dated: _____

_____ [*signature*]

UNITED STATES DISTRICT JUDGE

NOTES:

Authority:
Fed R Civ P 24(a), (b)

Related Form of Motion:
See *§ 14.25*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionRight to InterveneGovernmentsCourtsGeneral Overview

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Unit 4 Required Conferences and Case Management
Special Alert to Chapter 15

2- MB Practice Guide: Fed Pretrial Civ Proc in CA Scope

Scope

Editor's Note: The following proposed amendment to Rule 26 will take effect on December 1, 2010, barring any Congressional action. Set forth below is a comparison of the amended rule with the rule as it appeared before the amendment. New matter is underlined; matter to be omitted is lined through. Asterisks indicate unaffected material. The explanatory Advisory Committee Note is also set forth below.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

* * *

(2) ***Disclosure of Expert Testimony***.

(A) *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data The material within the following brackets is overstruck in the original. [or other information] considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(The material within the following brackets is overstruck in the original. [C] D) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(The material within the following brackets is overstruck in the original. [D] E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

* * *

(b) Discovery Scope and Limits.

* * *

(3) *Trial Preparation: Materials*.

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts*.

(A) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(The material within the following brackets is overstruck in the original. [**B**] **D)** *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(The material within the following brackets is overstruck in the original. [**C**] **E)** *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (The material within the following brackets is overstruck in the original. [B] D); and

(ii) for discovery under (The material within the following brackets is overstruck in the original. [B] D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

* * *

Committee Note of 2010

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and--with three specific exceptions--communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including--for many experts--an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts--one for purposes of consultation and another to testify at trial--because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications. The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic

manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii)--that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

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Unit 4 Required Conferences and Case Management
CHAPTER 15 Rule 26(f) Conference and Initial Disclosures

2-15 MB Practice Guide: Fed Pretrial Civ Proc in CA 15.syn

§ 15.syn Synopsis to Chapter 15: Rule 26(f) Conference and Initial Disclosures

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15.32 Disclosures Must Be Made in Writing, Signed, and Served.

15.33 Disclosures Should Not Be Filed.

15.34 Parties Must Supplement Disclosures.

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15.38 Initial Disclosure Statement Under Rule 26(a)(1).

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Unit 4 Required Conferences and Case Management
CHAPTER 15 Rule 26(f) Conference and Initial Disclosures
I. STRATEGY

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15.01 Scope.

This chapter covers:

- The initial conference of the parties required under *Fed R Civ P 26(f)* [*see 15.03 -15.14*; *Form: 15.37*].
- Initial disclosures required under *Fed R Civ P 26(a)(1)* [*see 15.15 -15.26*; *Form: 15.38*].
- Expert-witness disclosures required under *Fed R Civ P 26(a)(2)* [*see 15.27 -15.34*; *Form: 15.39*].
- Failure to comply with disclosure requirements [*see 15.35*, *15.36*].

Core Rule: *Fed R Civ P 26(a)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsExpert Witness Discovery

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Unit 4 Required Conferences and Case Management
CHAPTER 15 Rule 26(f) Conference and Initial Disclosures
I. STRATEGY

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15.02 Objective and Strategy.

The Rule 26(f) conference (also referred to as the initial status, case management, or discovery conference) permits the parties to explore the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case. The meeting allows the parties to arrange for disclosures and develop a proposed discovery plan that reflects the parties' views. Discovery helps to remove surprise from trial preparation, enabling the parties to obtain the evidence necessary to evaluate and resolve their dispute. Discovery also narrows and clarifies the issues and facts that are in dispute and require trial. Thus, the initial Rule 26(f) conference is an important mechanism that can be used to streamline cases and promote judicial efficiency.

One aspect of the Rule 26(f) conference involves making or arranging for the disclosures required by Rule 26(a)(1). Rule 26(a)(1) requires parties to make "initial disclosures" of specified information early in the pretrial phase, without a formal discovery request from the opposing party. If it appears that a required disclosure is not appropriate in the circumstances of the case, objections may be stated in the Rule 26(f) discovery plan. Unexcused failure to make the required disclosures is a basis for sanctions.

Rule 26(a)(2) requires a party to make certain disclosures concerning expert witnesses without a formal discovery request from the opposing party. The key requirement is that the expert's report delivered to opposing counsel be complete, containing a comprehensive statement of all opinions to be offered by the witness, as well as the basis for the opinions, the data relied on, exhibits to be used, and other specified information. The expert will not be allowed to testify to opinions or matters not disclosed in the report. Note that questions often can arise concerning the discoverability of the data and information considered by the expert, some of which might be attorney work product. To the extent possible, counsel should avoid providing its opinion work product to any expert likely to be designated under Rule 26(a)(2).

Detailed Discussion/Forms:

6 Moore's Federal Practice, Ch. 26, Duty to Disclose; General Provisions Governing Discovery (Matthew Bender 3d ed.).

6 Bender's Federal Practice Forms, Rule 26, Duty to Disclose; General Provisions Governing Discovery (Matthew Bender).

Cross Reference:

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryPrivileged MattersWork ProductOpinion Work Product

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CHAPTER 15 Rule 26(f) Conference and Initial Disclosures
II. SCHEDULING AND ATTENDING RULE 26(f) CONFERENCE

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15.03 CHECKLIST: Preparing for and Attending Rule 26(f) Conference.

☐ Determine whether proceeding is exempt from Rule 26(f) conference and initial disclosure requirements.

Discussion:
See *§ 15.05*

☐ If proceeding is not exempt, schedule initial conference of parties to be held at least 21 days before scheduling conference is held or scheduling order is due under *Fed R Civ P 16(b)*.

○ Consult local rules, as well as individual judges' rules, regarding timing of initial conference of parties.

○ Seek guidance from the clerk of the court if unfamiliar with court or judge or unsure of their rules.

○ Review topics required to be discussed.

○ Note that generally, discovery must await completion of Rule 26(f) conference.

Authority:
Fed R Civ P 26(a)(1), (d), (f)

Discussion:

See *§§ 15.06 -15.08*

☐ Ensure that appropriate persons attend the Rule 26(f) conference.

Authority:
Fed R Civ P 26(f); *ND Cal Civ LR 16-3*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 15.12*, *15.13*

☐ Draft Rule 26(f) report and proposed discovery plan for consultation with opposing counsel and parties.

Authority:
Fed R Civ P 26(f); *ED Cal Civ LR 240(b)*; *ND Cal Civ LR 16-9*

Discussion:
See *§ 15.14*

Form:
See *§ 15.37*

☐ If appropriate, avoid or modify initial disclosure requirements.

○ Stipulate with other parties.

○ Seek relief from court from initial disclosure requirements.

○ Plan to object at initial conference, that initial disclosures are not appropriate under the circumstances of the case, and state objection in discovery plan.

Authority:
Fed R Civ P 26(a)(1)

Discussion:
See *§ 15.11[3]*

☐ Prepare Rule 26(f) proposed discovery plan at initial conference of parties. Consult local rules, as well as individual judges' rules, regarding contents of proposed discovery plan.

Authority:
Fed R Civ P 26(f)

Discussion:
See *§ 15.14[2]*

☐ File report outlining discovery plan within 14 days after the initial conference of parties. Consult local rules, as well as individual judges' rules, regarding filing requirements and possible expedited deadlines.

Authority:

Fed R Civ P 26(f); *ED Cal Civ LR 240(b)*; *ND Cal Civ LR 16-9*

Discussion:

See *§ 15.14[3]*, *[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersConferencesScheduling Conferences

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CHAPTER 15 Rule 26(f) Conference and Initial Disclosures
II. SCHEDULING AND ATTENDING RULE 26(f) CONFERENCE

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15.04 Options and Strategies.

Before attending the Rule 26(f) conference, take the time to prepare a list of everything you want, and try to anticipate any disputes in advance and have resolutions and tradeoffs to propose ready if disputes should arise.

Judge's Perspective:

Judges appreciate it when the parties not only have prepared a complete plan, but also have reached stipulated agreements on some issues such as stipulated facts, ways to shorten or expedite discovery, and anything else that indicates an attempt to be reasonable. In advance of the Rule 26(f) conference, think about concessions that you can make or ideas you can offer that put you in the role of the "good guy."

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral Overview

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15.05 Specific Categories of Proceedings Are Exempt From Rule 26(f) Conference and Initial Disclosure Requirements.

The following categories of proceedings are exempt from the Rule 26(f) requirement that the parties confer to consider the nature of their claims and defenses, to consider the possibilities of settlement or resolution of the case, to make or arrange for the initial disclosures that Rule 26(a)(1) requires, and to develop a proposed discovery plan [*Fed R Civ P 26(a)(1)(B), (f)*]:

- An action for review on an administrative record;
- A forfeiture action in rem arising from a federal statute;
- A petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;
- An action brought without counsel by a person in custody of the United States, a state, or a state subdivision;
- An action to enforce or quash an administrative summons or subpoena;
- An action by the United States to recover benefit payments;
- An action by the United States to collect on a student loan guaranteed by the United States;
- A proceeding ancillary to proceedings in other courts; and
- An action to enforce an arbitration award.

Cross Reference:

Discussion of exempt proceedings, see 6 *Moore's Federal Practice, § 26.26* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral Overview

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15.06 Generally No Discovery May Occur Until Parties Have Rule 26(f) Conference.

Except in exempted proceedings [*see 15.05*], or when authorized under the federal rules or by order or agreement of the parties, a party may not seek discovery from any source before the Rule 26(f) conference [*Fed R Civ P 26(d)(1)*].

Cross Reference:

Seeking expedited, pre-conference discovery, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.11[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulations

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15.07 Timing of Rule 26(f) Conference.

15.07[1] Rule 26(f) Conference Must Occur at Least 21 Days Before Scheduling Conference or Order. The initial conference between opposing counsel mandated by Rule 26(f) is the parties' first pretrial conference [*Fed R Civ P 26(a), (f)*].

Timing:

Except in categories of cases exempted under *Rule 26(a)(1)(B)* [*see 15.05*] or when otherwise ordered, the parties must hold the Rule 26(f) conference as soon as practicable, and in any event at least 21 days before the Rule 16(b) scheduling conference is held or the scheduling order is due [*Fed R Civ P 26(f)(1)*].

Exception:

Local rules may provide for expedited schedules [*see 15.07[2]*].

15.07[2] Expedited Schedules May Be Required Under Local Rules. If necessary to comply with a court's expedited schedule for Rule 16(b) conferences, the court may, by local rule [*Fed R Civ P 26(f)(4)*]:

- Require that the Rule 26(f) conference occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b);

- Require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties; or

- Excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

Cross Reference:

Rule 16(b) conferences, see Ch. 16, Case Management Conferences, see *§§ 16.04, 16.14 -16.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management

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15.08 LOCAL PRACTICE: Scheduling of Rule 26(f) Conference.

15.08[1] LOCAL PRACTICE: CD Cal Requirements. The Central District has no specific local rule on timing of the Rule 26(f) conference.

15.08[2] LOCAL PRACTICE: ED Cal Requirements. After an action has been filed, the assigned judge or magistrate judge will order the holding of one or more status conferences for the purpose of entering a pretrial scheduling order. Further status conferences may be held at any time thereafter, with or without the request of any party [*ED Cal Civ LR 240(a)*]. Counsel can calculate back from the status conference date to schedule the Rule 26(f) conference.

15.08[3] LOCAL PRACTICE: ND Cal Requirements. Except in categories of cases excluded under the Federal Rules of Civil Procedure local rules or orders of the court, the court will issue an Order Setting Initial Case Management Conference and ADR Deadlines to the filing party when an action is filed. The Order will set the date for the Initial Case Management Conference, which must be on the first date available on the assigned Judge's calendar that is not less than 90 days after the action was filed [*ND Cal Civ LR 16-2(a)*].

The order must state a deadline for filing the ADR Certification required by *ND Cal Civ LR 16-8(b)* and either a Stipulation Selecting an ADR Process or a Notice of Need for ADR Phone Conference as required by *ND Cal Civ LR 16-8(c)* and *ND Cal ADR LR 3-5(c)*. Plaintiff must serve a copy of the order on each defendant, together with the supplementary materials specified by *ND Cal Civ LR 4-2* [*ND Cal Civ LR 16-2(a)*]. Counsel can calculate back from the initial case management conference date to schedule the Rule 26(f) conference.

In categories exempt from Rule 26(f) conference and initial disclosure requirements [*Fed R Civ P 26(a)(1)(B)*; *see 15.05*], the assigned judge will schedule a case management conference (or issue a case management order without a conference) promptly after the commencement of an action, unless otherwise provided in the Northern District Local Rules [*ND Cal Civ LR 16-7*].

Any stipulation by the parties to change any conference date must be approved by the assigned judge [*ND Cal Civ LR 16-2(e)*].

If the case has been initially assigned to a magistrate judge, the parties must either file written consent to the jurisdiction of the magistrate judge, or request reassignment to a district judge, by the deadline for filing the initial case management conference statement [*ND Cal Civ LR 73-1(a)(1)*].

15.08[4] LOCAL PRACTICE: SD Cal Requirements. A Rule 26(f) conference addressing all disputed issues is required before a court may entertain a discovery motion pursuant to *Fed R Civ P 26-37* [*SD Cal Civ LR 26.1(a)*].

All counsel must meet to discuss discovery and endeavor to resolve any disputes at a reasonable time before initial case management conference [*SD Cal Civ LR 16.1(d)*].

If counsel for the moving party seeks to arrange a Rule 26(f) conference and counsel for the party against whom the motion will be made willfully refuses or fails to meet and confer, the judge (absent a prior order dispensing good cause with such a meeting) may order a payment of reasonable expenses, including attorney's fees [*SD Cal Civ LR 26.1(a)*; *see Fed R Civ P 37*; *see also SD Cal Civ LR 83.1*].

The Southern District's local rules do not address the timing of the conference. Rule 26(f) requires the conference to be held at least 21 days before the date of the scheduling conference or the date the order is due [*Fed R Civ P 26(f)(1)*; *see 15.07*].

A party may file a written request with the judicial officer assigned to supervise discovery, at any time after the complaint is filed but before an answer is filed, asking the assigned judicial officer to hold a discovery conference. Copies of the request must be sent to counsel for the parties and the parties whose addresses are known to the requesting counsel [*SD Cal Civ LR 16.1(c.1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral Overview

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15.09 LOCAL PRACTICE: Obtaining Relief From Case Management Schedule.

15.09[1] LOCAL PRACTICE: CD Cal Requirements. In the Rule 26(f) report, the parties may suggest that the matter should not be subject to the pretrial procedures in Local Rules 16-2 through 16-10 and may request the court to order a waiver. The report must explain why the attorneys request the waiver [*CD Cal Civ LR 16-11*].

If the court agrees that waiver is appropriate, the court will so indicate in its scheduling order [*CD Cal Civ LR 16-11.1*].

Unless otherwise ordered by the Court, waivers apply only to cases that are realistically estimated to consume no more than two trial days [*CD Cal Civ LR 16-11.3*].

Cross Reference.

Discussion of obtaining relief from final pretrial conference, see *Ch. 17, Final Pretrial Conference, 17.04[2][a].*

15.09[2] LOCAL PRACTICE: ED Cal Requirements. The Eastern District has no specific rule on obtaining relief from the usually applicable case management schedule.

15.09[3] LOCAL PRACTICE: ND Cal Requirements. By serving and filing a motion with the assigned judge pursuant to Local Rule 7, a party, including a party added later in the case, may seek relief from any obligation imposed by *Fed R Civ P 16* or *26* or the Order Setting Initial Case Management Conference. The motion must [*ND Cal Civ LR 16-2(d)*]:

- Describe the circumstances that support the request;

- Affirm that counsel for the moving party has conferred with all other counsel in an effort to reach agreement about the matter and, for each other party, report whether that party supports or opposes the request for relief;

- Be accompanied by a proposed revised case management schedule; and
- If applicable, indicate any changes required in the ADR process or schedule in the case.

15.09[4] LOCAL PRACTICE: SD Cal Requirements. The Southern District has no specific rule on obtaining relief from the usually applicable case management schedule.

Legal Topics:

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

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15.10 Preparing for Rule 26(f) Conference.

15.10[1] Topics to Be Discussed at Conference. At the Rule 26(f) conference, the parties must confer to accomplish the following [*Fed R Civ P 26(f)(2)*]:

- Consider the nature and basis of their claims and defenses;
- Consider the possibilities for a prompt settlement or other resolution of the case;
- Consider if the parties will stipulate to a protective order as to documents produced in discovery;
- Make or arrange for the required initial disclosures of documents and witnesses [*see Fed R Civ P 26(a)(1)*; *see also 15.11*]; and
- Discuss any issues relating to preserving discoverable information, particularly electronically stored information;
- Develop a proposed discovery plan to assist in crafting an appropriate scheduling order.

The Rule 26(f) conference should include a discussion of any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced [*Fed R Civ P 26(f)(3)(C)*], and whether the parties intend to produce such material, whether each other's software is compatible, whether there are any privilege issues requiring redaction, and how to allocate costs involved with the foregoing [*see In re Bristol-Myers Squibb Secs. Litig. (DNJ 2002) 205 FRD 437, 444*].

15.10[2] LOCAL PRACTICE: Rule 26(f) Meeting Topics.

15.10[2][a] LOCAL PRACTICE: CD Cal Requirements. In addition to the matters addressed by Rule 26(f), the parties must discuss the following matters at the conference [*CD Cal Civ LR 26-1*]:

- *Complex Cases*. The complexity of the case, and whether all or part of the procedures of the Manual for Complex Litigation, Fourth should be utilized. Counsel may propose to the Court modifications of the procedures in the Manual to facilitate the management of a particular action.

- *Motion Schedule*. The dispositive or partially dispositive motions that are likely to be made, and a cutoff date by which all such motions must be made.

- *Settlement*. The likelihood of settlement, whether settlement discussions have taken place or are scheduled, and which mandatory settlement procedure should be utilized under *CD Cal Civ LR 16-15*.

- *Trial Estimate*. A preliminary estimate of the time required for trial.

- *Additional Parties*. The likelihood of appearance of additional parties.

- *Expert Witnesses*. The proposed timing of disclosures under *Fed R Civ P 26(a)(2)*.

The parties must include their views and proposals on the above matters in their written report required by Rule 26(f) [*CD Cal Civ LR 26-1*].

The parties need also discuss whether to seek a waiver from the pretrial procedures mandated by Local Rules 16-2 through 16-10. The Rule 26(f) report may request the court to order a waiver, explaining why counsel request the waiver [*CD Cal Civ LR 16-11*; *see 15.09[1]*].

15.10[2][b] LOCAL PRACTICE: ED Cal Requirements. The Eastern District has no specific rule on additional matters for discussion at the Rule 26(f) conference.

15.10[2][c] LOCAL PRACTICE: ND Cal Requirements. For patent cases, the parties must discuss and address in the Case Management Statement the following topics in addition to the matters addressed by Rule 26(f) [*ND Cal Patent LR 2-1(a)*]:

- Proposed modification of the deadlines provided for in the Patent Local Rules, and the effect of any such modification on the date and time of the Claim Construction Hearing, if any;

- Whether the Court will hear live testimony at the Claim Construction Hearing;

- The need for and any specific limits on discovery relating to claim construction, including depositions of witnesses, including expert witnesses;

- The order of presentation at the Claim Construction Hearing; and

- The scheduling of a Claim Construction Prehearing Conference to be held after the Joint Claim Construction and Prehearing Statement provided for in *ND Cal Patent LR 4-3* has been filed.

To the extent that some or all of the matters provided for in *ND Cal Patent LR 2-1(a)(1)-(5)* are not resolved or decided at the Initial Case Management Conference, the parties must propose dates for further Case Management Conferences when those matters will be decided [*ND Cal Patent LR 2-1(b)*].

15.10[2][d] LOCAL PRACTICE: SD Cal Requirements. The Southern District has no specific rules on additional matters for discussion at the Rule 26(f) conference.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management

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15.11 Initial Disclosures.

15.11[1] Disclosures Must Ordinarily Be Made Within 14 Days of Rule 26(f) Conference. Unless the court directs or the parties stipulate otherwise, or a party objects, the initial disclosures must be made within 14 days of the Rule 26(f) conference [*Fed R Civ P 26(a)(1)(C)*].

Any party joined after the Rule 26(f) conference has 30 days after being served or joined within which to make its initial disclosures. The court or the parties may modify the schedule for any subsequently joined party's initial disclosures [*Fed R Civ P 26(a)(1)(D)*].

Cross References:

Detailed discussion of Rule 26(a)(1) initial disclosures, see *15.15 -15.26*. Form of initial disclosures statement under Rule 26(a)(1), see *§ 15.38*.

15.11[2] Categories of Cases Exempt From Initial Disclosure Requirements. The same categories of cases that are exempt from the Rule 26(f) conference requirement are exempt from the initial disclosure requirements [*Fed R Civ P 26(a)(1)(B)*]. These categories are listed in *15.05*.

Consider:

District courts retain authority to issue case-specific orders requiring initial disclosure in any case included within the enumerated list when appropriate. The parties may also stipulate that they will make the disclosures. Further, a court may order that the parties exchange information, even in proceedings exempted from initial disclosures and in cases in which the parties have stipulated to forego the initial disclosures, in the course of exercising its case management authority under Rule 16 [*Fed R Civ P 26(a)(1)*, Committee Note of 2000; *see Fed R Civ P 16*].

15.11[3] Avoiding or Delaying Initial Disclosures.

15.11[3][a] Initial Disclosures Stayed Pending Objection of Party. Any party can avoid making the initial disclosures at the time required by Rule 26(a)(1) by [*Fed R Civ P 26(a)(1)(C)*]:

- Objecting that initial disclosures are not appropriate in the circumstances of the action at the Rule 26(f) conference; and

- Restating the objection in the discovery plan reflecting the occurrences at the conference.

Stating the objection in the discovery plan allows the objecting party to present its objection to the court before any party is required to make any of the initial disclosures. Thus, all parties to the action are relieved of the obligation to make their initial disclosures at the time specified in Rule 26(a)(1) by the filing of an objection by only one party [*Fed R Civ P 26(a)(1)*, Committee Note of 2000].

A court ordinarily rules on objections to initial disclosures when it issues the Rule 16(b) scheduling order. However, it may rule on the objection in a different fashion and at a different time. The court's ruling should encompass any disclosures to be made, and when they should be made. The advisory committee notes that even when the circumstances of the case warrant suspending some disclosure obligations, others, such as the disclosure of damages and insurance information under *Fed R Civ P 26(a)(1)(A)(iii)-(iv)* may continue to be appropriate [*Fed R Civ P 26(a)(1)*, Committee Note of 2000].

Strategic Points:

The right to delay or to partially or completely avoid the initial disclosures does not permit fewer than all of the parties to the action to opt out of the initial disclosures unilaterally. That result can be achieved only if all of the parties so stipulate or the court so orders [*Fed R Civ P 26(a)(1)*, Committee Note of 2000].

The Ninth Circuit has held that the Private Securities Litigation Reform Act of 1995, which requires the court to stay "all discovery and other proceedings" during the pendency of a motion to dismiss any action the Act covers [*see 15 USC § 78u-4(b)(3)(B)*], similarly requires a stay of the obligation to provide initial disclosures [*Medhekar v. United States Dist. Court (9th Cir 1996) 99 F3d 325, 328*].

15.11[3][b] Parties' Stipulation to Modify, Eliminate, or Delay Initial Disclosures. The parties may stipulate to modify or eliminate the initial disclosure requirements in any proceeding [*Fed R Civ P 26(a)(1)*, Committee Note of 2000].

The parties may also need to consider whether a stipulation extending the deadline for making the initial disclosures would be appropriate. For example, an extension may be appropriate when a defendant who received service of process late would have less than 60 days after being served in which to make its initial disclosures [*see Fed R Civ P 26(f)*, Committee Note of 1993].

15.11[3][c] Inadequate Disclosure by Opponent Does Not Excuse Noncompliance. A party must make the initial disclosures based on then reasonably available information and is not excused from making disclosures because the party challenges the sufficiency of another party's disclosures or another party has not made its disclosures [*Fed R Civ P 26(a)(1)(E)*].

15.11[3][d] Party's Incomplete Investigation Does Not Excuse Noncompliance. A party must make the initial disclosures based on then reasonably available information and is not excused from making disclosures because it has not fully completed its investigation of the case [*Fed R Civ P 26(a)(1)(E)*]. Each disclosing party must conduct a sufficiently diligent investigation into the evidence it has or controls to permit it to disclose the information concerning each category of the required initial disclosures of which the party has or should have knowledge [Lintz v. American Gen. Fin., Inc. (D Kan 1999) 1999 US Dist LEXIS 12572, at *4-*5 ; *see Fed R Civ P 26(a)(1)(E)*].

15.11[4] Matters Subject to Initial Disclosure Requirements. In making the initial disclosures, the disclosing party must provide to the other parties all of the following [*Fed R Civ P 26(a)(1)(A)*]:

- The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

- A copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

- A computation of each category of damages claimed by the disclosing party, making available for inspection and copying [*see Fed R Civ P 34*] the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

- For inspection and copying any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Cross Reference:

Contents of initial disclosures, see *§§ 15.18 -15.21*.

15.11[5] Sanctions for Noncompliance. The penalty for failure to make any of the disclosures required by *Fed R Civ P 26(a)* without substantial justification can be substantial [*see Fed R Civ P 37(c)(1)*].

Cross Reference:

Discussion of sanctions for failure to disclose, see *§ 15.36*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral Overview

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15.12 Who Must Participate in Rule 26(f) Conference.

15.12[1] Counsel and Unrepresented Parties Must Confer. All parties and unrepresented parties must confer to discuss the nature and the basis of their claims and defenses [*Fed R Civ P 26(f)(2)*]. Attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging for the conference and attempting in good faith to agree on the proposed discovery plan [*Fed R Civ P 26(f)(2)*].

15.12[2] LOCAL PRACTICE: Participating in Conference.

15.12[2][a] LOCAL PRACTICE: CD Cal Requirements. The Central District has no local rule on who must participate in the Rule 26(f) conference.

15.12[2][b] LOCAL PRACTICE: ED Cal Requirements. The Eastern District has no local rule on who must participate in the Rule 26(f) conference.

15.12[2][c] LOCAL PRACTICE: ND Cal Requirements. Unless otherwise ordered, the conferring and planning mandated by *Fed R Civ P 26(f)* (and by *ND Cal ADR LR 3-5*) must be done by lead trial counsel for each party [*ND Cal Civ LR 16-3*].

15.12[2][d] LOCAL PRACTICE: SD Cal Requirements. Parties' counsel must meet and confer regarding discovery as mandated by *Fed R Civ P 26(f)*. If counsel have offices in the same county, they are to meet in person. If counsel have offices in different counties, they are to confer by telephone. Under no circumstances may the parties satisfy the meet and confer requirement by exchanging written correspondence [*SD Cal Civ LR 26.1(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.13 Rule 26(f) Conference Need Not Be Attended in Person Unless Court Orders It.

The court may order the parties or attorneys to attend the conference in person [*Fed R Civ P 26(f)(2)*]. Otherwise, the parties may conduct the conference by other means.

Strategic Point:

For the most part, the parties are not required to meet face-to-face unless the court orders that the parties or attorneys attend the conference in person [*Fed R Civ P 26(f)(2)*; *see Fed R Civ P 26(f)*, Committee Note of 2000; *but see SD Cal Civ LR 26.1(a)* (written correspondence insufficient)]. The parties may confer by telephone or email. However, the better practice is to meet in person. Meeting in person is more likely to further the objectives of the conference and establish a positive relationship with opposing counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial Conferences

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15.14 Drafting and Filing Rule 26(f) Report and Proposed Discovery Plan.

15.14[1] Parties and Attorneys Must Participate in Good Faith. All parties and their attorneys must participate in good faith in the development and submission of the requisite proposed discovery plan [*Fed R Civ P 37(f)*; *see Fed R Civ P 26(f)(2)*].

Warning:

If a party or a party's attorney fails to participate in good faith, the court may require the party or attorney to pay the reasonable expenses, including attorney's fees, caused by the failure [*Fed R Civ P 37(f)*].

Cross Reference:

Sanctions for failure to participate, see Ch. 25, Motions to Compel and Discovery Sanctions, see *§§ 25.81 -25.90*.

15.14[2] Contents of Plan. The proposed discovery plan must indicate the parties' views and proposals concerning [*Fed R Civ P 26(f)(3)*]:

- What changes should be made in the timing, form, or requirement for disclosures under *Fed R Civ P Rule 26(a)*, including a statement as to when disclosures under *Fed R Civ P Rule 26(a)(1)* were made or will be made [*see Fed R Civ P 26(a)*];

- The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

- Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

- Any issues relating to claims of privilege or work product protection, including, if the parties agree on a procedure to assert such claims after production, whether to ask the court to include that agreement

in an order;

- What changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

- Any other protective orders or limited discovery orders that should be entered by the court [*see Fed R Civ P 16(b), (c)*, 26(c)].

This list is not exclusive. Other matters for consideration at the discovery conference and inclusion in the discovery plan include the time when any dispositive motions must be filed and when the case should be ready for trial [*see Fed R Civ P 26(f)*, Committee Note of 1993]. The plan should also outline the competing positions of the parties on issues as to which they were unable, in good faith, to come to an agreement [*see Fed R Civ P 26(f)*, Committee Note of 1993].

Cross Reference:

Form of Rule 26(f) report and proposed discovery plan, see *§ 15.37*.

15.14[3] Responsibility for Filing Rule 26(f) Report and Discovery Plan Is Joint. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for submitting the written report to the court outlining the agreements they reached at their discovery conference [*Fed R Civ P 26(f)(2)*].

Timing:

The report must be submitted within 14 days after the Rule 26(f) conference. District courts may, by local rule, require counsel to file their discovery plan report fewer than 14 days after the initial conference [*Fed R Civ P 26(f)(4)(B)*].

15.14[4] LOCAL PRACTICE: Filing Rule 26(f) Report and Discovery Plan.

15.14[4][a] LOCAL PRACTICE: CD Cal Requirements. The Central District has no specific local rule on filing the Rule 26(f) Report and Discovery Plan.

15.14[4][b] LOCAL PRACTICE: ED Cal Requirements. Except in those types of cases specifically exempted from initial disclosure by *Fed R Civ P 26(a)(1)(B)*, the parties must submit reports to the court concerning their proposed discovery plan within 14 days after their discovery conference. The court may require the submission of preconference reports on some or all of the subjects listed in *ED Cal Civ LR 240(a)* [*ED Cal Civ LR 240(b)*; *see ED Cal Civ LR 271(d)(2)* (voluntary dispute resolution)].

15.14[4][c] LOCAL PRACTICE: ND Cal Requirements. Unless otherwise ordered, counsel must file a Joint Case Management Statement addressing all of the topics listed in the Standing Order for All Judges of the Northern District of California--Contents of Joint Case Management Statement. This standing order can be found on the Court's website at http://www.cand.uscourts.gov [*ND Cal Civ LR 16-9(a)*].

The parties may file separate statements if one or more of the parties is not represented by counsel. In addition, a party who is unable, despite reasonable efforts, to obtain the cooperation of another party in the preparation of a joint statement may file a separate case management statement. The separate statement must be accompanied by a declaration describing the conduct of the uncooperative party which prevented the preparation of a joint statement. Separate statements must also address all of the topics listed in the standing order governing the contents of the joint management statement [*ND Cal Civ LR 16-9(a)*].

Any party seeking to maintain a case as a class action must include in the Case Management Statement the following additional information [*ND Cal Civ LR 16-9(b)*]:

- The specific paragraphs of *Fed R Civ P 23* under which the action is maintainable as a class action;
- A description of the class or classes in whose behalf the action is brought;
- Facts showing that the party is entitled to maintain the action under *Fed R Civ P 23(a)*, *(b)*; and
- A proposed date for the court to consider whether the case can be maintained as a class action.

Cross Reference:

Class actions, see Ch. 20, Class Actions. ADR Multi-Option program, see Ch. 32, Court Annexed ADR, see *§ 32.06*.

15.14[4][d] LOCAL PRACTICE: SD Cal Requirements. The Southern District has no specific local rule on filing the Rule 26(f) Report and Discovery Plan.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial Conferences

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15.15 CHECKLIST: Initial Disclosures Under Rule 26(a)(1).

The following checklist may be used in connection with the initial disclosure requirements of *Fed R Civ P 26(a)(1)*:

☐ Avoid or modify initial disclosure requirements by, either:

- ○ Stipulating with other parties.
- ○ Asking the court for relief from requirements.
- ○ Objecting during the *Fed R Civ P 26(f)* conference that initial disclosures are not appropriate in the circumstances of the case, and stating the objection in the Rule 26(f) discovery plan.

Authority:
Fed R Civ P 26(a)(1), (f)

Discussion:
See *§ 15.16*

Timing:
Prepare and file initial disclosures within 14 days after discovery planning meeting held pursuant to *Fed R Civ P 26(f)*.

Authority:
Fed R Civ P 26(a)(1)

Discussion:
See *§ 15.17*

☐ Determine matters to which the initial disclosures apply:

- ○ Witnesses and documents that the disclosing party may use to support its claims or defenses.
- ○ Information then reasonably available.

☐ Provide the following information for all witnesses the disclosing party may use to support is claims and defenses:

- ○ Name.
- ○ Individual's address, if known.
- ○ Individual's telephone number, if known.
- ○ Subject of person's information.

☐ Provide a copy of, or describe by category and location, all of the following that the disclosing party may use to support its claims or defenses, unless solely for impeachment:

- ○ Documents.
- ○ Electronically Stored Information.
- ○ Tangible things.

Authority:
Fed R Civ P 26(a)(1)

Discussion:
See *§§ 15.18*, *15.19*, *15.22*

☐ For each category of damages claimed:

- ○ Provide a computation of damages.
- ○ Make available for inspection and copying as under *Fed R Civ P 34* any nonprivileged or otherwise unprotected documents, electronically stored information, or other evidentiary material on which the computation was based.
- ○ Include materials bearing on the nature and extent of injuries suffered.

☐ Parties need not disclose as part of the computation of damages disclosures of *Fed R Civ P 26(a)(1)(A)(iii)*, the following:

- ○ Information already possessed by other parties.
- ○ Privileged or otherwise protected materials.

Authority:
Fed R Civ P 26(a)(1)(A)(iii), *34*

Discussion:
See *§ 15.20*

☐ Make available for inspection and copying as under Rule 34 any liability insurance policies that may be liable to either:

- ○ Satisfy a judgment that may be entered.
- ○ Indemnify or reimburse payments made to satisfy the judgment.

Authority:
Fed R Civ P 26(a)(1), *34*

Discussion:
See *§ 15.21*

☐ For any privilege or protection claimed, including work-product protection, assert the privilege in the initial disclosure, briefly describing withheld materials.

Authority:
Fed R Civ P 26(b)(5)(A)

Discussion:
See *§ 15.16*

☐ Prepare initial disclosures in writing.

☐ At least one attorney of record must sign initial disclosures. The signature certifies that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

☐ Serve initial disclosures on the other parties.

☐ Do not file initial disclosures with the court.

Authority:
Fed R Civ P 5(d), 26(a)(1), (4), (g)(1)

Discussion:
See *§§ 15.24, 15.25*

Form:
See *§ 15.38*

☐ Supplement disclosures to include later-acquired information.

Authority:
Fed R Civ P 26(e)

Discussion:
See *§ 15.26*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral Overview

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15.16 Options and Strategies.

15.16[1] Review Documents and Electronically Stored Information for Privileged Material. Before complying with pretrial disclosure requirements, counsel should consider the possibility that some privileged information may be involved. A party asserting a privilege must make the claim expressly, and describe the nature of the information not produced in a manner that, without revealing information itself privileged, will enable other parties to assess the applicability of the privilege [*Fed R Civ P 26(b)(5)(A)*]. The party asserting a privilege must, at a minimum, claim the privilege and briefly describe the information withheld [*see Moloney v. United States (D Mass 2001) 204 FRD 16, 21*]. The usual practice is for the parties to exchange "privilege logs" listing the documents and other information as to which privilege is claimed, and generally describing the information withheld.

Cross Reference:

Privileges, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, see *§§ 24.12 -24.28*, *24.103*.

15.16[2] Determine Whether Work Product Protection Applies. Counsel must review documents and electronically stored information that might be covered by work product protection. The work product doctrine provides that a party may not obtain discovery of documents, information, or other tangible things prepared in anticipation of litigation or trial by or for another party or that other party's representative, unless the party seeking discovery (1) has substantial need of the materials in the preparation of his or her case, and (2) the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means [*see Fed R Civ P 26(b)(3)(A)*].

In ordering discovery of such materials when the required showing has been made, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation [*see Fed R Civ P 26(b)(3)(B)*].

A party asserting protection must make the claim expressly, and describe the nature of the information not produced in a manner that, without revealing information itself protected, will enable other parties to assess the applicability of the protection [*Fed R Civ P 26(b)(5)(A)*].

Example:

A defense counsel located a former employee of plaintiff corporation near the end of the discovery period, from whom he then took a sworn statement based on an interview. A few days later, the defendant disclosed the name and address of that and other newly disclosed witnesses. Approximately one month later, the defendant filed the declaration in support of a summary judgment motion. The plaintiff objected, arguing among other things, that the declaration should be stricken because the defendant had a duty to disclose it under *Fed R Civ P 26(a)(1)*. The district court held that the declaration was not a "document" subject to discovery under Rule 26(a). Moreover, the court stated that the declaration was work product until the moment it was filed [*see Intel Corp. v. Via Techs., Inc. (ND Cal 2001) 204 FRD 450, 451-452 , aff'd, 319 F3d 1357 (Fed Cir 2003)*].

15.16[3] Consider Stipulation Covering Contents and Schedule for Disclosures. Counsel should consider asking other parties to join in stipulating to disclosure schedules and content. Parties may avoid or modify the initial disclosure requirements by stipulation [*see Fed R Civ P 26(a)(1)(A)*]. Note that although the parties can stipulate to avoid or modify initial disclosures and expert disclosures [*see Fed R Civ P 26(a)(1), (2)*], only the court can modify or eliminate the requirements regarding pretrial disclosures [*Fed R Civ P 26(a)(3)(B)*].

Warning:

Even in a case where the parties stipulate to bypass disclosure, the court can order exchange of similar information in managing the action under *Fed R Civ P 16*, which concerns case management and pretrial conferences [*see Fed R Civ P 26(a)*, Committee Note of 2000].

Cross Reference:

Stipulations, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§§ 22.03 -22.13*.

15.16[4] Consider Requesting Extension of Time. If there are particular problems in complying with the time limits of Rule 26(a), counsel should request an extension of time [*see Quevedo v. Trans-Pac. Shipping, Inc. (9th Cir 1998) 143 F3d 1255, 1258* (the court refused to consider expert's report because it was filed one-and-a-half months late and plaintiff could have asked for an extension of time)].

15.16[5] Consider Protective Orders on Confidential, Proprietary, or Trade Secret Information. The parties should consider whether to enter into a protective order governing confidential, proprietary, and/or trade secret information. The parties may want to stipulate to such an order or one party may want to move for such an order in advance of making their initial disclosures [*Fed R Civ P 26(c)*; *see In re Terra Int'l, Inc. (5th Cir 1998) 134 F3d 302, 306-307*]. Further, the parties may want to mention this provision in the Rule 26(f) discovery plan [*Fed R Civ P 26(f)*].

Cross Reference:

Discovery plan, see *Ch. 21, Discovery Strategy and Planning, 21.03 -21.08*. Stipulations, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§§ 22.03 -22.13*.

15.16[6] Consider Stipulating to Format and Contents of Privilege Log. The parties may wish to reach agreement on the format and contents of privilege logs for initial (and later) disclosures [*see Fed R Civ P 26(b)(5)(A)*].

Cross Reference:

Privilege logs, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, see *§ 24.103*.

15.16[7] Object to Disclosures at Rule 26(f) Conference. A party may also object during the Rule 26(f) conference that initial disclosures are not appropriate in the circumstances of the action; the objection must be stated in

the Rule 26(f) discovery plan [*see Fed R Civ P 26(a)(1)(C)*].

Cross Reference:

Discussion of Rule 26 conference, see *§§ 15.03 -15.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductScope

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15.17 Timing of Disclosures Under Rule 26(a)(1).

15.17[1] Disclosures Must Be Made 14 Days After Rule 26(f) Conference. The disclosures required under *Fed R Civ P 26(a)(1)* must be made at or within 14 days after the *Fed R Civ P 26(f)* conference, unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan [*Fed R Civ P 26(a)(1)(C)*]. In ruling on an objection, the court will determine what disclosures, if any, are to be made, and set the time for disclosure [*Fed R Civ P 26(a)(1)(C)*].

This 14-day provision coincides with the requirement that the Rule 26(f) conference be held 21 days before the *Fed R Civ P 16(b)* scheduling conference or scheduling order; and that the report on the Rule 26(f) conference be submitted to the court 14 days after the conference. These deadlines provide an orderly opportunity for the parties to review the disclosures, and for the court to consider the report. In many instances, the Rule 26(f) conference and the effective preparation of the case would benefit from disclosure before the conference; earlier disclosure is encouraged [*see Fed R Civ P 26(a)*].

15.17[2] Disclosure Date Inapplicable If Party Objects to Initial Disclosures During Rule 26(f) Conference. The presumptive disclosure date does not apply if a party objects to the initial disclosures during the Rule 26(f) conference and states its objection in the Rule 26(f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to "opt out" of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be "inappropriate in the circumstances of the action" [*see Fed R Civ P 26(a)*, Committee Note of 2000].

Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosures. The court must then rule on the objection and determine what disclosures, if any, should be made. Ordinarily, this determination would be included in the *Fed R Civ P 16(b)* scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others such as the damages and insurance information called for by *Fed R Civ P 26(a)(1)(A)(iii)-(iv)*, may continue to be appropriate [*see Fed R Civ P 26(a)*, Committee Note of 2000].

Cross References:

Scheduling conference or order, see Ch. 16, Case Management Conferences, see *§§ 16.03 -16.13*.

3 Moore's Federal Practice, Ch. 16, Pretrial Conferences; Scheduling; Management (Matthew Bender 3d ed.).

15.17[3] Party Joined After Rule 26(f) Conference Must Make Disclosures Within 30 Days. Any party first served or otherwise joined after the *Fed R Civ P 26(f)* conference must make the disclosures required under *Fed R Civ P 26(a)(1)* within 30 days after being served or joined, unless a different time is set by stipulation or court order [*Fed R Civ P 26(a)(1)(D)*]. "First served or otherwise joined" refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a claimant or an intervener [*see Fed R Civ P 26(a)*, Committee Note of 2000].

Therefore, absent court order or stipulation, a new party has 30 days in which to make its initial disclosures. However, later-added parties should ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form [*see Fed R Civ P 26(a)*, Committee Note of 2000].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral Overview

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15.18 Each Party Must Disclose Information About Witnesses.

15.18[1] Names and Addresses. A party must, without awaiting a discovery request, provide to other parties the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment [*Fed R Civ P 26(a)(1)(A)(i)*].

The parties must provide specific names of the individuals they might use as witnesses [*see Biltrite Corp. v. World Rd. Markings, Inc. (D Mass 2001) 202 FRD 359, 362* (noting that disclosure requirement's purpose is to give the opposing party information as to the identification and location of persons with knowledge so that they can be contacted in connection with the litigation, either for purposes of serving a proposed amended complaint, or for being interviewed, or being deposed, or for doing background investigation)].

15.18[2] Description of Topics of Witness's Knowledge. The disclosing party must identify the subjects of the information known by the witness [*Fed R Civ P 26(a)(1)(A)(i)*]. It is not necessary to provide a detailed narrative of all of the facts known to each witness; a brief description of the general topics of each witness's knowledge will suffice [Bick v. Harrah's Operating Co. (ND Ill 2000) 2000 US Dist LEXIS 1764, at *8-*11].

The prudent course is to produce information for all individuals that counsel anticipates he or she will use [*Fed R Civ P 26(a)(1)*, Committee Note of 2000]:

- To support its own allegations, claims, or defenses;
- To question a witness during a deposition;
- During a pretrial conference;
- During discovery (other than merely to frame a response to a discovery request);
- On motion practice, at least motions bearing on the merits (e.g., summary judgment, preliminary

injunction);

- To support a claim;
- To support a denial or rebuttal of the allegations, claims, or defenses of another party; or
- If "the need [otherwise] arises."

15.18[3] Disclosure Is Not Required for Impeachment Witnesses. Parties are not required to disclose identifying information for persons whose knowledge extends only to matters of impeachment [*Fed R Civ P 26(a)(1)(A)(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial Conferences

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15.19 Parties Must Disclose Documents, Electronically Stored Information, and Tangible Things.

15.19[1] Copy or Description and Location Required. A party must, without awaiting a discovery request, provide other parties with a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party, and that the disclosing party may use to support its claims or defenses, unless solely for impeachment [*Fed R Civ P 26(a)(1)(A)(ii)*].

The term "electronically stored information" has an expansive meaning and includes any type of information that is stored electronically in any medium. The term is broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments [Fed R Civ P 26(a)(1)(B), Committee Note of 2006; Fed R Civ P 34(a), Committee Note of 2006].

Cross Reference:

Disclosure of documents, electronically stored information, and tangible things, see 6 *Moore's Federal Practice, § 26.22[4][b]* (Matthew Bender 3d ed.).

15.19[2] Itemized Listing Not Required. Although an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including electronically stored information, sufficiently to enable opposing parties: (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests [*see Fed R Civ P 26(a)*, Committee Note of 1993].

15.19[3] Information Used for Impeachment Need Not Be Disclosed. The disclosure duty of *Fed R Civ P 26(a)(1)(A)(ii)* requires counsel to provide to all other parties a description by category and location of all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party, and that the disclosing party may use to support its claims or defenses, unless solely for impeachment. Alternatively, counsel can produce these materials rather than describe them [*see Fed R Civ P 26(a)(1)(A)(ii); Intel Corp. v. Via Techs., Inc. (ND Cal 2001) 204 FRD 450, 451 , aff'd, 319 F3d 1357 (Fed Cir 2003)*]. Materials that a party does not intend to use to

support its claims or defenses need not be disclosed.

Judge's Perspective:

Counsel should be careful not to construe narrowly the disclosure obligations under Rule 26 and, in particular, not to rely on the "impeachment" exception if there is any prospect that the nondisclosed item will be needed to support a claim or defense [*see, e.g., Fed R Civ P 26(a)(1)(A)(i)-(ii)*]. Courts generally take the Rule 26 obligation very seriously, and even after a case has proceeded through other forms of discovery may "look back" to see if disclosure should have been made under Rule 26 at the outset. Moreover, parties should not assume that other rules, such as the Patent Local Rules for the Northern District of California, operate to relieve parties of the Rule 26 disclosure obligations [*see ND Cal Patent LR 3-1 et seq*.].

15.19[4] Party Need Not Disclose Declaration Signed by Disclosed Potential Witness. A party who has disclosed a potential witness is not required also to reveal a declaration signed by that witness for use on an impending summary-judgment motion. A typical declaration gathered in the anticipation of a summary-judgment motion is not a "document" within the meaning of *Fed R Civ P 26(a)(1)(A)(ii)* [*see Intel Corp. v. Via Techs., Inc. (ND Cal 2001) 204 FRD 450, 451-452 , aff'd, 319 F3d 1357 (Fed Cir 2003)*].

Strategic Point--Party Seeking Discovery:

Prior to the discovery cutoff, a party on notice of an opposing party's witness should contact that witness and obtain its own statements. A party that fails to do so within the allotted time risks being surprised with testimony that might have warranted a timely deposition or search for other relevant witnesses [*see Intel Corp. v. Via Techs., Inc. (ND Cal 2001) 204 FRD 450, 452 , aff'd, 319 F3d 1357 (Fed Cir 2003)*].

Warning--Work Product Protection Issues:

Disclosure of a declaration taken by the attorney of his or her own witness also raises work-product protection issues [*see Intel Corp. v. Via Techs., Inc. (ND Cal 2001) 204 FRD 450, 451-452 , aff'd, 319 F3d 1357 (Fed Cir 2003)* (party allowed to file declaration in support of summary-judgment motion after disclosing witness information close to discovery cut-off date but not disclosing declaration)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral Overview

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15.20 Detailed Computation of Damages Required.

A detailed computation of any category of claimed damages is required [*Fed R Civ P 26(a)(1)(A)(iii)*]. The party claiming the damages must make available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, on which the computation is based, including materials bearing on the nature and extent of injuries suffered [*Fed R Civ P 26(a)(1)(A)(iii)*].

The plaintiff should provide more than a lump sum statement of the damages allegedly sustained; to make the disclosure obligation meaningful, a more detailed specification of damages is apparently required: for example, in a personal injury case, the nature and extent of any injuries suffered must be disclosed, including amounts claimed for pain, suffering or disfigurement, as well as medical bills, lost wages, cost of repairing damaged property, etc. [*City & County of San Francisco v. Tutor-Saliba Corp. (ND Cal 2003) 218 FRD 219, 221*].

Moreover, plaintiff must update its disclosure and provide greater detail as to its calculations as discovery progresses [*City & County of San Francisco v. Tutor-Saliba Corp. (ND Cal 2003) 218 FRD 219, 222*].

Parties need not disclose as part of the computation of damages disclosures of information already possessed by other parties or privileged or otherwise protected materials [*Fed R Civ P 26(a)(1)(A)(iii)*].

Cross Reference:

Discussion of damages computation, see 6 *Moore's Federal Practice, § 26.22[4][c]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.21 Disclosure of Insurance Agreements Required.

Disclosure of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy the judgment, or indemnify or reimburse payment of the judgment is required. This information must be made available for inspection and copying [*Fed R Civ P 26(a)(1)(A)(iv)*]. Only an insurance policy or other agreement that gives rise to an insurer's obligation to indemnify or hold its insured harmless for a judgment must be disclosed under *Fed R Civ P 26(a)(1)(A)(iv)*, which does not require the production of all agreements relating to insurance [*Excelsior College v. Frye (SD Cal 2006) 233 FRD 583, 585*].

The disclosure of insurance information under Rule 26(a)(1)(A)(iv) does not render that information admissible in evidence [*see Fed R Evid 411*; *see also Fed R Civ P 26(a)*, Committee Note of 1993].

Cross Reference:

Inadmissibility of evidence of liability insurance, see 2 Weinstein's Federal Evidence, Ch. 411, Liability Insurance (Matthew Bender 2d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresEvidenceRelevanceLiability Insurance

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15.22 Reasonable Inquiry Into Facts Required.

A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures [*Fed R Civ P 26(a)(1)(E)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.23 Exemptions From Initial Disclosure Requirements.

15.23[1] Rule 26(a)(1)(B) Enumerates Exempt Proceedings. The following categories of proceedings are exempt from initial disclosure [*Fed R Civ P 26(a)(1)(B)*]:

- An action for review on an administrative record [*Fed R Civ P 26(a)(1)(B)(i)*];
- A forfeiture action in rem arising from a federal statute [*Fed R Civ p 26(a)(1)(B)(ii)*];
- A petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence [*Fed R Civ P 26(a)(1)(B)(iii)*];
- An action brought without counsel by a person in custody of the United States, a state, or a state subdivision [*Fed R Civ P 26(a)(1)(B)(iv)*];
- An action to enforce or quash an administrative summons or subpoena [*Fed R Civ P 26(a)(1)(B)(v)*];
- An action by the United States to recover benefit payments [*Fed R Civ P 26(a)(1)(B)(vi)*];
- An action by the United States to collect on a student loan guaranteed by the United States [*Fed R Civ P 26(a)(1)(B)(vii)*];
- A proceeding ancillary to proceedings in other courts [*Fed R Civ P 26(a)(1)(B)(viii)*]; and
- An action to enforce an arbitration award [*Fed R Civ P 26(a)(1)(B)(ix)*].

Cross Reference:

6 *Moore's Federal Practice, § 26.120 et seq.* (Matthew Bender 3d ed.).

15.23[2] Exemptions Apply to "Proceedings" Rather Than "Actions." Rule 26(a)(1)(B) refers to categories of "proceedings" rather than categories of "actions" because some might not properly be labeled "actions" [*see Fed R Civ P 26(a)*, Committee Note of 2000].

Case designations made by the parties or the clerk's office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties, and, when needed, the courts, with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories [*see Fed R Civ P 26(a)*, Committee Note of 2000].

15.23[3] LOCAL PRACTICE: ND Cal--Discovery in Exempt Cases. Unless otherwise provided, the Northern District of California Local Rules, in categories of proceedings that are exempted by *Fed R Civ P 26(a)(1)(B)* from the initial disclosure requirements of *Fed R Civ P 26(a)(1)*, promptly after the commencement of the action the assigned judge will schedule a Case Management Conference or issue a case-management order without the conference. Discovery shall proceed in those cases only at the time, and to the extent, authorized by the judge in the case-management order [*ND Cal Civ LR 16-7*]

Cross Reference:

Ch. 16, Case Management Conferences, §§ 16.03- 16 .13.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory Disclosures

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15.24 Disclosures Must Be Made in Writing, Signed, and Served.

Unless the court orders otherwise, all disclosures under Rule 26(a) must be made in writing, signed, and served [*Fed R Civ P 26(a)(4)*].

The signature on the initial or pretrial disclosure is a certification under *Fed R Civ P 26(g)(1)* that it is complete and correct as of the time when made.

Cross References:

Serving papers, Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.15 -5.23*.

Certification and signature, 6 *Moore's Federal Practice, § 26.151 et seq*. (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.25 Disclosures Should Not Be Filed.

Disclosures under *Fed R Civ P 26(a)(1)* must not be filed until they are used in the proceeding or the court orders filing [*Fed R Civ P 5(d)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory Disclosures

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15.26 Parties Must Supplement Disclosures.

A party who has made a Rule 26(a)(1) disclosure is under a duty to supplement or correct the disclosure to include later-acquired information [*Fed R Civ P 26(e)*; *see, e.g., City & County of San Francisco v. Tutor-Saliba Corp. (ND Cal 2003) 218 FRD 219, 222* (as discovery proceeds, plaintiffs must supplement their initial damages disclosure to reflect the information obtained through discovery)]. The burden is not on the opposing party to request updated information as it becomes available [*Adams v. Teck Cominco Alaska, Inc. (D Alaska 2005) 231 FRD 578, 580*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.27 CHECKLIST: Expert-Witness Disclosures Under Rule 26(a)(2).

The following checklist may be used with respect to the expert witness disclosure requirements of *Fed R Civ P 26(a)(2)*.

☐ Determine which witnesses must be included in the disclosures as experts:

- ○ Those retained or specially employed to provide expert testimony in the case.
- ○ Those whose duties as an employee of the party regularly involve giving expert testimony.
- ○ Testifying experts.
- ○ Consultants (nontestifying consultants do not have to be disclosed).
- ○ Treating physicians.
- ○ Direct expert witnesses.
- ○ Cross-examination witnesses.
- ○ Rebuttal expert witnesses (30 days after other parties' disclosures).

Authority:

Fed R Civ P 26(a)(2)

Discussion:
See *§§ 15.28*, *15.30*

☐ At least 90 days before trial, unless otherwise stipulated or ordered by the court, prepare and provide expert-witness disclosures.

☐ Within 30 after the disclosure made by the other party, unless otherwise stipulated or ordered by the court, prepare and provide expert witness contradictory or rebuttal disclosures.

Authority:
Fed R Civ P 26(a)(2)(C)

Discussion:
See *§ 15.29*

☐ Have each expert witness subject to the disclosure requirements prepare a written report. Counsel may provide assistance, but cannot prepare the report:

- ○ A complete statement of all opinions that the witness will express and their bases and reasons.
- ○ The data or other information that forms the bases of the witness's opinion.
- ○ Any exhibits to be used as a summary of or in support of the witness's opinions.
- ○ The witness's qualifications, including a list of all publications written by the witness within the preceding 10 years.
- ○ The compensation to be paid for the study and testimony.
- ○ A list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Authority:
Fed R Civ P 26(a)(2)(B)

Discussion:
See *§ 15.31*

☐ Prepare the expert-witness disclosures in writing.

☐ Have each expert sign his or her written report.

☐ Serve the expert-witness disclosures on the other parties.

☐ Do not file the initial disclosures with the court unless filing is required under local rules.

Authority:
Fed R Civ P 26(a)(3), (4)

Discussion:
See *§§ 15.32, 15.33*

Form:
See *§ 15.39*

☐ Supplement disclosures to include any changes to information provided.

Authority:
Fed R Civ P 26(e)

Discussion:
See *§ 15.34*

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.28 Parties Must Disclose Expert Witnesses.

15.28[1] Experts to Be Used at Trial. In addition to the initial disclosures required by Rule 26(a)(1), parties must disclose to other parties the identity of any person who may be used at trial to present evidence under *Fed R Evid 702*, *703*, or *705*, that is, expert witnesses [*Fed R Civ P 26(a)(2)*].

Judge's Perspective:

As the particular time and sequence of expert-witness disclosures under Rule 26(a)(2) is subject to setting by the court at the Rule 16 conference, the parties should carefully consider the preferred schedule to request [*see Fed R Civ P 26(a)(2)(C)*]. For example, in some instances it may be preferable to provide for the close of non-expert discovery entirely before triggering the expert disclosure requirement. Moreover, if disclosure of expert reports, such as on the question of damages, are necessary for a meaningful ADR process to occur, the parties may seek to accelerate the timing for those disclosures.

15.28[2] LOCAL PRACTICE: ED Cal--Required List. In the Eastern District of California, the Pretrial Statement must include a list (names and addresses) of all prospective witnesses, whether offered in person or by deposition or interrogatory, designating those who are expert witnesses [*ED Cal Civ LR 281(b)(10)*]. Parties are not required to identify experts acting solely as nontestifying consultants.

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.29 Disclosures Must Be Made 90 Days Before Trial Date.

15.29[1] Absent Court Order or Stipulation. The disclosures required under Rule 26(a)(2) must be made at the times and in the sequence directed by the court [*Fed R Civ P 26(a)(2)(C)*; *see, e.g., Continental Lab. Prods., Inc. v. Medax Int'l, Inc. (SD Cal 2000) 195 FRD 675, 676*]. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial [*Fed R Civ P 26(a)(2)(C)(i)*].

15.29[2] LOCAL PRACTICE: CD Cal--Timing Set at Rule 26(f) Conference. In the Central District of California, the parties must discuss the proposed timing of expert-witness disclosures [*CD Cal Civ LR 26-1(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.30 Disclosure of Contradiction or Rebuttal Evidence Must Be Made Within 30 Days After Other Party's Disclosure.

If the expert-witness evidence required to be disclosed under Rule 26(a)(2) is intended solely to contradict or rebut evidence on the same subject matter identified by another party under *Fed R Civ P 26(a)(2)(B)*, a party must disclose it within 30 days after the disclosure made by the other party [*Fed R Civ P 26(a)(2)(C)(ii)*; *see Yeti by Molly Ltd. v. Deckers Outdoor Corp. (9th Cir 2001) 259 F3d 1101, 1106*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.31 Expert Witness Reports Are Required.

15.31[1] Expert Witnesses Must Prepare and Sign Reports. Rule 26(a)(2) requires the parties to disclose the identity of each expert witness accompanied by a written report prepared and signed by the witness [*Fed R Civ P 26(a)(2)(B)*; *see Yeti by Molly, Ltd. v. Deckers Outdoor Corp. (9th Cir 2001) 259 F3d 1101, 1105-1106*].

Except as otherwise stipulated or ordered by the court, the identification of any expert who may testify must be accompanied by a written report prepared and signed by the witness. Specifically, this report is required from [*Fed R Civ P 26(a)(2)(B)*]:

- Witnesses who are retained or specially employed to provide expert testimony in the case.
- Witnesses whose duties as an employee of the party regularly involve giving expert testimony.

For purposes of the rule, the term "retained or specially employed to provide expert testimony" has been held to include any expert witnesses who will receive consideration, whether monetary or otherwise, different than the statutory fees and allowances ordinarily prescribed by law [*Smith v. State Farm Fire & Cas. Co. (SD W Va 1995) 164 FRD 49, 56* (indicating that expert witness not receiving consideration of some kind would not be required to prepare and sign report); *see also 28 USC § 1821* (statutory fees and allowances); *Fed R Evid § 702*].

Example:

Reports were not necessary for eighteen percipient experts, because they were retained "months or years before the litigation in this case began for the purposes of investigating Plaintiff's original insurance claim[,]" not for the purpose of testifying at trial. Therefore, they were not "retained experts" from whom expert reports and disclosures were required [*350 W.A. LLC v. Chubb Group of Ins., (SD Cal 2007) 2007 US Dist LEXIS 89881, at *36-*41]* .

Fourteen "percipient expert witnesses" who were experts in the fields of law or science, and who were "involved in the underlying litigation or were eyewitnesses to certain scientific studies" related to the case, rather than being retained for the purpose of giving expert testimony at trial, were permitted to

testify about their observations based on personal knowledge. However, they could not give opinion testimony based on information they acquired from other sources [*Matsuura v. E.I. du Pont de Nemours & Co. (D Haw 2007) 2007 US Dist LEXIS 7891, at *16-*17* (analogizing witnesses' positions to those of treating physicians who use their expertise in medicine to treat and diagnose patients, and who are allowed to testify at trial without giving expert reports)].

Warning:

Fed R Civ P 37(c) gives teeth to this requirement by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed [*see Yeti by Molly Ltd. v. Deckers Outdoor Corp. (9th Cir 2001) 259 F3d 1101, 1106*].

15.31[2] Report Must Contain Opinions, Bases for Opinions, Data, Information, Exhibits, Qualifications, and Previous Cases. The expert-witness report must contain the following [*Fed R Civ P 26(a)(2)(B)*]:

- A complete statement of all opinions to be expressed and the basis and reasons for them;
- The data or other information considered by the witness in forming the opinions;
- Any exhibits to be used as a summary of or support for the opinions;
- The qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years;
- The compensation to be paid for the study and testimony; and
- A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Exceptions:

Parties need not provide the reports if a stipulation so specifies, or a court order so directs [*Fed R Civ P 26(a)(2)(B)*]. Rule 26(a)(2)(B) also does not require the production of an expert's working notes [*McDonald v. Sun Oil Co. (D Or 2006) 423 F Supp2d 1114, 1122* ; *see Gillespie v. Sears, Roebuck & Co. (1st Cir 2004) 386 F3d 21, 34-35*].

Warning:

An opposing party is entitled to discover not only the opinions of a testifying expert witness, but also the basis for those opinions, so that any factual or other information relied on by the expert in forming opinions is subject to discovery [*Fed R Civ P 26(a)(2)(B)(i)*]. Accordingly, if an attorney communicates work product to a testifying expert and that information is considered or relied on in forming the expert's opinion, the attorney should operate on the assumption that the information is discoverable as part of the basis of the expert's opinion and the work product protection is waived [*United States v. City of Torrance (CD Cal 1995) 163 FRD 590, 593-594* ; *Intermedics, Inc. v. Ventritex, Inc. (ND Cal 1991) 139 FRD 384, 388-389*]. Accordingly, counsel should take pains not to provide its opinion work product to any expert likely to be designated pursuant to Rule 26(a)(2).

Also, because preliminary expert reports and drafts will be discoverable in this manner, an expert should avoid producing multiple drafts, which may give the appearance of contradiction or indecision.

Strategic Point--Demonstrative Evidence:

Demonstrative evidence, such as graphics, that an expert witness may present at trial must be disclosed under Rule 26(a)(2)(B). Be sure that all such material is contained in the relevant expert report. Failure to do so may result in exclusion of the evidence at trial.

Strategic Point--Assistance to Experts:

Fed R Civ P 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports; indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and must be signed by the witness [*see Fed R Civ P 26(a)*, Committee Note of 1993].

15.31[3] Expert Report Must Be Detailed Statement of Direct Examination Testimony. The expert report must be a detailed and complete statement of the testimony of the expert on direct examination [*Salgado by Salgado v. GMC (7th Cir 1998) 150 F.3d 735, 742* ; *Atmel Corp. v. Information Storage (ND Cal 1999) 189 FRD 410, 415*].

15.31[4] Expert Testimony Is Limited to Opinions and Bases Disclosed in Report. Under the normal operation of *Fed R Civ P 26* and *37*, an expert may not extend his or her direct testimony beyond the opinions and bases disclosed in the report and may not, on direct examination, cover new work done thereafter [*Atmel Corp. v. Information Storage (ND Cal 1999) 189 FRD 410, 411*]. Further, the failure to make timely disclosures under *Fed R Civ P 26(a)(2)(B)* can limit the conclusions that an expert may testify to at trial. An expert will be limited to testifying to only those otherwise admissible conclusions that were timely disclosed in his or her report [*Olson v. Montana Rail Link, Inc. (D Mont 2005) 227 FRD 550, 553*].

Warning:

The expert should conduct a professionally responsible search and review of the relevant material on which to base his or her opinions. An expert who consciously decides, at the suggestion of litigation counsel, not to review the relevant universe of literature or to consult colleagues familiar with techniques known and unknown during the relevant time period, and who chooses instead merely to rest on an inability to recall may be precluded on direct examination from expressing broad opinions concerning what relevant matters were and were not generally known [*see, e.g., Atmel Corp. v. Information Storage (ND Cal 1999) 189 FRD 410, 411*].

15.31[5] Treating Physician May Not Be Required to File Report. To the extent that a treating physician testifies only to the care and treatment of the patient, the physician is not considered to be a "specially employed" expert and is not subject to the written report requirement of *Fed R Civ P 26(a)(2)(B)*, notwithstanding that the witness may offer opinion testimony under the Federal Rules of Evidence [*Brown v. Best Foods (ND Ala 1996) 169 FRD 385, 387*].

Opinions of a party's treating physicians that are based on information acquired in the course of treatment of the party do not trigger the report requirement of *Fed R Civ P 26(a)(2)(B)*. Opinions of a physician that are based on information received from outside sources do trigger the report requirement of Rule 26(a)(2)(B) [*Shapardon v. West Beach Estates (D Haw 1997) 172 FRD 415, 417*].

Example:

In a personal injury case, the opinions of plaintiff's treating physicians that were based on information acquired in the course of treatment of plaintiff were allowed to be offered into evidence, and did not

trigger the report requirement of Rule 26(a)(2)(B). Opinions that were based on information received from an independent medical examination report provided to the physician by plaintiff's counsel, did trigger the report requirement of Rule 26(a)(2)(B) [*see Shapardon v. West Beach Estates (D Haw 1997) 172 FRD 415, 417*].

Cross Reference:

Treating-physician exception, see 6 *Moore's Federal Practice, § 26.23[2]* (Matthew Bender 3d ed.).

Trap:

Some district courts have suggested that if the Rule 26(a)(2)(A) testimony exceeds the scope of treatment and ventures into more general expert opinion testimony, a report may be necessary [*see, e.g., Zarecki v. National R.R. Passenger Corp. (ND Ill 1996) 914 F Supp 1566, 1573* ; *Wreath v. United States (D Kan 1995) 161 FRD 448, 449-450* ; *contra McCloughan v. City of Springfield (CD Ill 2002) 208 FRD 236, 240-242*]. Since the law is unsettled with respect to the requirement of reports from treating medical personnel and the risk of exclusion of testimony as a sanction is great, counsel should provide reports from treating medical personnel.

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.32 Disclosures Must Be Made in Writing, Signed, and Served.

Unless the court orders otherwise, expert-witness disclosures must be made in writing, signed, and served [*Fed R Civ P 26(a)(4)*].

The signature on the disclosures is a certification that it is complete and correct as of the time when made [*see Fed R Civ P 26(g)(1)*].

Cross References:

Service of papers, Ch. 5 Formatting, Serving, and Filing Papers, see *§§ 5.15 -5.23*.

1 Moore's Federal Practice, Ch. 5, Service and Filing of Pleadings and Other Papers (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.33 Disclosures Should Not Be Filed.

Disclosures made under *Fed R Civ P 26(a)(2)* must not be filed until they are used in the proceeding or the court orders filing [*Fed R Civ P 5(d)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.34 Parties Must Supplement Disclosures.

The parties must supplement the disclosures made pursuant to Rule 26(a)(2) when required under *Fed R Civ P 26(e)(1)* [*Fed R Civ P 26(a)(2)(D)*]. A party must make these disclosures at the times and in the sequence that the court orders [*Fed R Civ P 26(a)(2)(C)*].

With respect to testimony of an expert from whom a report is required under *Fed R Civ P 26(a)(2)(B)*, the duty extends both to information contained in the report and to information provided through a deposition of the expert [*Fed R Civ P 26(e)(2)*]. Any additions or other changes to this information must be disclosed by the time the party's disclosures under *Fed R Civ P 26(a)(3)* are due [*Fed R Civ P 26(e)(2)*; *see United States v. 14.3 Acres of Land (SD Cal 2008) 2008 US Dist LEXIS 66667, at *10, *23-*26* (examining relationship between *Fed R Civ P 26(a)(2)(C)*, requiring strict compliance with court-ordered deadlines, and *Fed R Civ P 26(e)*, which relaxes these deadlines to accommodate parties' duties to supplement their previous expert disclosures, and concluding that plaintiff's reports qualified as supplemental reports, timely submitted in accordance with *Fed R Civ P 26(a)(2)(D)* and *Fed R Civ P 26(e)*)]. Unless otherwise directed by the court, disclosures under Rule 26(a)(3) must be made at least 30 days before trial [*Fed R Civ P 26(a)(3)(B)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.34A CHECKLIST: Motions to Compel and for Sanctions When Required Disclosure Is Not Made.

☐ If party fails to make disclosure required by *Fed R Civ P 26(a)*:

○ Confer or make good faith attempt to confer with nondisclosing party in attempt to obtain disclosure without court intervention.

○ If attempt at resolution is unsuccessful, move to compel disclosure and for appropriate sanctions.

☐ Include certification concerning unsuccessful attempt at resolution.

Authority:
Fed R Civ P 37(a)(1)

Discussion:
See *§ 15.35*

☐ If seeking sanction that evidence should be excluded, support claim that nondisclosure is neither substantially justified nor harmless.

Authority:
Fed R Civ P 37(c)(1)

Discussion:
See *§§ 15.36[1], 15.36[2]*

☐ Make motion promptly after unsuccessful attempt at resolution.

Authority:

Intercargo Ins. Co. v. Burlington N. Santa Fe R.R. (CD Cal 2001) 185 F Supp2d 1103, 1106-1107

Discussion:

See *§ 15.36[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.35 Motions to Compel.

If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions [*Fed R Civ P 37(a)(3)(A)*; *Intercargo Ins. Co. v. Burlington N. Santa Fe R.R. (CD Cal 2001) 185 F Supp2d 1103, 1107* (defendants' remedy for an inadequate expert report is to seek an order compelling adequate discovery)].

Example:

In an action for breach of contract and fraud in connection with airport construction contracts, the court granted defendant's motion to compel further supplementation of disclosures regarding damages, specifying that the supplemental damages disclosures be completed within 30 days of its order and the production of documents supporting those computations be made within 45 days of the order [*City & County of San Francisco v. Tutor-Saliba Corp. (ND Cal 2003) 218 FRD 219, 222*].

The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action [*Fed R Civ P 37(a)(1)*].

Cross References:

Motions to compel, Ch. 25, Motions to Compel and Discovery Sanctions, 25.03-25.57.

Methods for raising failure to make mandatory disclosure, 7 *Moore's Federal Practice, § 37.60* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.36 Failure to Comply With Disclosure Requirements May Result in Sanctions.

15.36[1] Evidence May Be Excluded. A party that without substantial justification fails to disclose information required by *Fed R Civ P 26(a)* is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed [*Fed R Civ P 37(c)(1)*; *see Yeti by Molly Ltd. v. Deckers Outdoor Corp. (9th Cir 2001) 259 F3d 1101, 1106-1107*].

Warning:

If a disclosing party fails to supplement its disclosures as required by *Fed R Civ P 26(e)*, that supplemental evidence is also subject to the sanction of exclusion under *Fed R Civ P 37(c)(1)* [*see, e.g., Adams v. Teck Cominco Alaska, Inc. (D Alaska 2005) 231 FRD 578, 581*].

Cross Reference:

Sanctions for nondisclosure, Ch. 25, Motions to Compel and Discovery Sanctions, see *§§ 25.50 -25.58*.

15.36[2] "Substantially Justified" or "Harmless" Failure to Comply May Not Be Sanctioned. Two express exceptions ameliorate the harshness of Rule 37(c)(1): the information may be introduced if the parties' failure to disclose the required information is substantially justified or harmless [*Fed R Civ P 37(c)(1)*; *Wong v. Regents of the Univ. of Cal. (9th Cir 2005) 410 F3d 1052, 1062* ; *Yeti by Molly, Ltd. v. Deckers Outdoor Corp. (9th Cir 2001) 259 F3d 1101, 1106-1107*].

The burden is on the party facing sanctions to prove harmlessness [*Yeti by Molly, Ltd. v. Deckers Outdoor Corp. (9th Cir 2001) 259 F3d 1101, 1106-1107*]. The party requesting sanctions is not required to articulate how it would be prejudiced if it were not provided an expert witness report [*Torres v. City of Los Angeles (9th Cir 2009) 548 F3d 1197, 1213]* .

Example--Disclosure of Documents Shortly After Creation "Substantially Justifies" Tardiness:

A party's late disclosure of bankruptcy documents was "substantially justified" when party disclosed them shortly after they were first created [*Payne v. Exxon Corp. (9th Cir 1997) 121 F3d 503, 508*].

Example--Nondisclosure Not "Harmless" and Exclusion Proper:

A party's failure to disclose a metallurgist's opinion that defect in manufacture caused failure of bicycle frame, resulting in injury to party, was not "harmless" because of prejudice to other party and disruption of court's trial docket that would result from continuance to allow other party to alleviate prejudice [*Trost v. Trek Bicycle Corp. (8th Cir 1998) 162 F3d 1004, 1008*].

Cross References:

Trial court's discretion in imposing sanctions, 6 *Moore's Federal Practice, § 26.27* (Matthew Bender 3d ed.).

Sanctions for nondisclosure, Ch. 25, Motions to Compel and Discovery Sanctions, see *§§ 25.50 -25.58*.

15.36[3] Court May Require Prompt Notification of Failure to Disclose. Counsel should move to compel or for sanctions as soon as the failure to properly disclose is discovered [*Intercargo Ins. Co. v. Burlington N. Santa Fe R.R. (CD Cal 2001) 185 F Supp2d 1103, 1107* (because defendants did not seek to compel a more adequate disclosure within a reasonable time of service of the expert reports, court denied defendants' motions to strike expert witness designation)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCriminal Law & ProcedureDiscovery & InspectionDiscovery MisconductGeneral OverviewLegal EthicsSanctionsGeneral Overview

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15.37 Rule 26(f) Report and Proposed Discovery Plan.

Rule 26(f) Report and Proposed Discovery Plan.

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	RULE 26(f) REPORT AND PROPOSED DISCOV-
	)	ERY PLAN
	)	

1. Rule 26(f) Conference; Counsel:

Pursuant to *Fed R Civ P 26(f)*, a meeting was held on _____ [*date*] at _____ [*location*]. The meeting was attended by:

_____ [*name of counsel*] for Plaintiff _____ [*name*]
_____ [*name of counsel*] for Plaintiff _____ [*name*]
_____ [*name of counsel*] for Defendant _____ [*name*]
_____ [*name of counsel*] for Defendant _____ [*name*]

The address and telephone numbers of counsel are as follows: _____.

2. Description of Case:

Plaintiff's claims are as follows: _____.

Defendant's defenses are as follows: _____.

3. Pre-Discovery Disclosures:

[*Include if applicable*] The parties request the following changes in the _____ [Rule 26(a) *or local rule*] disclosure requirements: _____.

Disclosures as required by _____ [*Fed R Civ P 26(a)(1) or local rule*] _____ [*were/will be*] made on _____ [*date*].

4. Discovery Plan:

The parties jointly propose the following discovery plan: _____ [*specify plan, using separate paragraphs for matters of disagreement*].

Discovery may be needed on the following subjects: _____.

Discovery should be completed by _____ [*date*].

[*Use the following as appropriate:*]

Electronically stored information should be produced as follows: _____.

The following procedure is to be used for asserting claims of privilege or of work product protection after production: _____.

Discovery should be conducted in phases because: _____.

Discovery should be limited as follows: _____.

The following modifications should be made to the limitations imposed on discovery by the Federal Rules or local rules: _____.

The following protective orders should be issued: _____.

The maximum number of interrogatories: Plaintiff: _____. Defendant _____.

The maximum number of request for admissions: Plaintiff: _____. Defendant _____.

The maximum number of depositions: Plaintiff: _____. Defendant _____.

Reports from expert witnesses are due on _____ [*date*] for Plaintiff and _____ [*date*] for Defendant. The parties propose to exchange disclosures from expert witnesses under *Fed R Civ P 26(a)(2)* on _____ [*date*].

[*Continue with the following:*]

5. Settlement Potential:

Counsel participated in settlement discussions as required by _____ [*Federal Rules of Civil Procedure, Rule 26(f) and/or any applicable local rule*].

All parties were promptly informed of all offers of settlement, and, following discussion by all counsel, it appears that _____ [*choose:* a possibility of settlement before discovery exists *or* a possibility of settlement after discovery exists *or* a possibility of settlement exists but a conference with the judge is needed *or* no possibility of settlement exists *or* the prospects for settlement cannot be evaluated at this time].

Counsel _____ [*do/do not*] intend to hold additional settlement conferences among themselves prior to the close of discovery. [*Optional:* The proposed date of the next settlement conference is _____ [*date*].]

[*Use the following as appropriate:*]

The following specific problems have created a hindrance to settlement of this case: _____ [*specify problems hindering settlement*].

The parties believe that most appropriate mandatory settlement procedure for this case is: _____.

The parties believe that settlement prospects may be enhanced by _____ [*specify alternative dispute resolution mechanism*].

[*Continue with the following:*]

6. Other Trial Matters:

Counsel _____ [*do/do not*] request a conference with the court before the issuance of the scheduling order.

The estimated time required for trial: _____. The case should be ready for trial _____ [*date*].

Counsel _____ [*do/do not*] consider that this case is complex.

[*If case is complex, add as appropriate:*]

_____ [All of the procedures of the Manual for Complex Litigation should be used *or* The following procedures of the Manual for Complex Litigation should be used: _____].

Counsel jointly propose the following modifications of the procedures in the Manual to facilitate the management of this action: _____.

[*Continue with the following:*]

All dispositive or partially dispositive motions should be filed by _____ [*date*]. All such motions must be made no later than _____ [*date*].

The appearance of additional parties _____ [*is/is not*] likely.

[*If additional parties are likely, add:*]

Plaintiff may join additional parties until _____ [*date*] and may amend the pleadings until _____ [*date*].

Defendant may join additional parties until _____ [*date*] and may amend the pleadings until _____ [*date*].

[*Continue with the following, as appropriate:*]

Counsel jointly request a waiver from the pretrial procedures mandated by _____ [*specify, e.g.*, for Central District, Local Rules 16-2 through 16-9]. The basis for this request is _____ [*state reasons for requesting waiver*].

[*Continue with the following:*]

Date: _____

PLAINTIFF:

By: _____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*name and designation of party*]

_____
[*attorney's or firm's address, telephone number, and any other identifying information required by local district court rules*]

DEFENDANT:

By: _____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*name and designation of party*]

_____
[*attorney's or firm's address, telephone number, and any other identifying information required by local district court*

rules]

NOTES.

Authority:
Fed R Civ P 26(f)

Timing:
See *§ 15.14[3]*

Contents of Plan:
See *§ 15.14[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCriminal Law & ProcedurePreliminary ProceedingsGeneral OverviewCriminal Law & ProcedurePretrial Motions & ProceduresGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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15.38 Initial Disclosure Statement Under Rule 26(a)(1).

Initial Disclosure Statement Under Rule 26(a)(1).

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	____ _____ [*NAME OF PARTY*]'S INITIAL
	)	DISCLOSURES
	)	(*Fed R Civ P 26(a)(1)*)

Pursuant to *Rule 26(a)(1) of the Federal Rules of Civil Procedure*, and Local Rule _____ [*local rule number*] of the _____ [*name of district*] District of _____ [*name of state*], _____ [*party designation and name of disclosing party*] hereby presents _____ [*his or her or its*] initial disclosure.

The following is a list of individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses, together with the subjects of such information:

_____ [*name, address, telephone number of witness*]
_____ [*name, address, telephone number of witness*]
_____ [*name, address, telephone number of witness*]

_____ [*subject of information*]
_____ [*subject of information*]
_____ [*subject of information*]

The following is a description by category and location of all documents, electronically stored information, and tangible things in the possession, custody, or control of the disclosing party that the disclosing party may use to support its claims or defenses:

_____ [*Include appropriate description by category and location; alternatively, include copies of all documents, data compilations, and tangible things in the disclosing party's possession*].

The following is a computation of damages claimed by the disclosing party:

_____ [*Set forth appropriate computation*].

[*ADD, if applicable*]

This disclosing party shall provide to all other parties for inspection and copying as under *Rule 34 of the Federal Rules of Civil Procedure* any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in this action, or to indemnify or reimburse for payments made to satisfy the judgment.

[*CONTINUE*]

The undersigned attorney of record certifies that to the best of _____ [*his or her*] knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the disclosure is complete and correct as of the time it is made.

_____ [*date*]

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*name and designation of party*]

NOTES.

Authority:
Fed R Civ P 26(a)(1)

Related Form for Northern District of California:
See ND Cal, Local Rules Appendix A

Required Disclosures:
See *§§ 15.18 -15.21*

Timing:
See *§ 15.17*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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Unit 4 Required Conferences and Case Management
CHAPTER 15 Rule 26(f) Conference and Initial Disclosures
VI. FORMS

2-15 MB Practice Guide: Fed Pretrial Civ Proc in CA 15.39

15.39 Expert Witness Disclosure Statement Under Rule 26(a)(2).

Expert Witness Disclosure Statement Under Rule 26(a)(2).

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	____ _____ [*NAME OF PARTY*]'S EXPERT
	)	WITNESS DISCLOSURE STATEMENT
	)	(*Fed R Civ P 26(a)(2)*)

_____ [*Party designation and name of disclosing party*] intends to call the following persons to testify as expert witnesses:

_____ [*name*]
_____ [*name*]
_____ [*name*]
_____ [*name*]

[*For each witness, attach a report that contains the following:*

(1) a complete statement of all opinions the witness will express, including the basis and reasons for the opinions;

(2) any data or other information that forms the basis for the opinions;

(3) the witness's qualifications, including a list of all publications written in the last 10 years;

(4) the compensation for study and testimony paid to the witness; and

(5) a list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.]

[*For each witness, attach a list of exhibits that will be used as a summary or in support of the witness's opinions*.]

_____ [*date*]

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*name and designation of party*]

NOTES.

Authority:
Fed R Civ P 26(a)(2)

Required Disclosures:
See *§§ 15.28*, *15.31*

Timing:
See *§ 15.29*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCriminal Law & ProcedureWitnessesPresentationEvidenceTestimonyGeneral OverviewEvidenceTestimonyExpertsGeneral Overview

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Unit 4 Required Conferences and Case Management
CHAPTER 16 Case Management Conferences

2-16 MB Practice Guide: Fed Pretrial Civ Proc in CA 16.syn

§ 16.syn Synopsis to Chapter 16: Case Management Conferences

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16.25[6][c] LOCAL PRACTICE: ND Cal Requirements.

16.25[6][d] LOCAL PRACTICE: SD Cal Requirements.

16.26 Proposed Scheduling Order.

16.27 Local District Court Forms.

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Unit 4 Required Conferences and Case Management
CHAPTER 16 Case Management Conferences
I. STRATEGY

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16.01 Scope.

This chapter covers case management, pretrial conferences, and scheduling. *Fed R Civ P 16* is explicitly intended to encourage the active judicial management of the case development process and of trial in most civil actions. The chapter discusses the effective use of pretrial conferences, including the initial scheduling conference and all interim pretrial conferences, and is organized by the chronological sequence in which counsel are most likely to encounter the operation of *Fed R Civ P 16* and related local rules. The chapter includes:

- An evaluation of the scope of Rule 16 and practice considerations under the Rule and related local rules [*see 16.02 -16.04*].
- Advice concerning the drafting and filing of scheduling orders, as well as other Rule 16 orders [*see 16.06 -16.09*; *Form: 16.26*].
- Attending discretionary scheduling conferences [*see 16.10*, *16.11*].
- Seeking modification of scheduling order [*see 16.12*].
- Attending interim pretrial conferences and settlement conferences [*see 16.14 -16.23*].
- Referring cases to magistrate judges [*see 16.24*].
- Appointing masters for case management [*see 16.25*].

Core Statutes:
Fed R Civ P 16.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesTrial by Consent & AppealCivil ProcedureJudicial OfficersMastersAppointmentsCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial

MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

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Unit 4 Required Conferences and Case Management
CHAPTER 16 Case Management Conferences
I. STRATEGY

2-16 MB Practice Guide: Fed Pretrial Civ Proc in CA 16.02

16.02 Objective and Strategy.

Federal practice emphasizes court involvement in managing litigation. Early and regular court involvement in the planning and conduct of litigation yields a more efficient, less expensive, and less rancorous process. *Fed R Civ P 16* requires judges to fix deadlines for completing the major pretrial tasks and encourages judges to participate actively in designing case-specific plans for positioning litigation as efficiently as possible for disposition by settlement, motion, or trial. Rule 16 authorizes and regulates the use of a wide range of case management tools and powers--principally through pretrial conferences.

Participation in pretrial conferences requires parties to contemplate and articulate a plan of action throughout the course of litigation. Accordingly, it is extremely important at the earliest possible time, and certainly no later than the initial meeting between counsel, for counsel to develop an overall theme or theory for the case, and to identify its strengths and weaknesses. Well-prepared counsel can use Rule 16 conferences to affect the basic structure and timing of the pretrial process and to fix important terms of the trial itself.

Detailed Discussion/Forms:

3 Moore's Federal Practice, Ch. 16, Pretrial Conferences; Scheduling; Management (Matthew Bender 3d ed.).

5 Bender's Federal Practice Forms, Rule 16, Pretrial Conferences; Scheduling; Management (Matthew Bender).

Practice Before Federal Magistrates (Matthew Bender).

Cross References:

Discussion of Rule 26(f) conference, see Ch. 15, Rule 26(f) Conference and Initial Disclosures.
Discussion of final pretrial conference, see Ch. 17, Final Pretrial Conference.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConferencesScheduling Conferences

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Unit 4 Required Conferences and Case Management
CHAPTER 16 Case Management Conferences
II. PARTICIPATING IN PRETRIAL CONFERENCES
A. Scheduling Conferences and Orders

2-16 MB Practice Guide: Fed Pretrial Civ Proc in CA 16.03

16.03 CHECKLIST: Participating in Scheduling Conference.

The following checklist may be used in connection with scheduling conferences and orders [*see Fed R Civ P 16(b)*]:

☐ Determine whether proceeding is exempt from Rule 16 scheduling order requirements.

Authority:
Fed R Civ P 16(b); *CD Cal Civ LR 16-12*; *ED Cal Civ LR 240*; *ND Cal Civ LR 16-7*; *SD Cal Civ LR 16.1(e)*

Discussion:
See *16.08*

☐ If not exempt, determine time scheduling order is due.

Authority:
Fed R Civ P 16(b)(2)

Discussion:
See *16.06[3], [4]*

☐ Determine method for prior contact between litigants and court.

Authority:
Fed R Civ P 16(b)

Discussion:
See *16.06[2]*

☐ Evaluate topics to be addressed by scheduling order.

Authority:
Fed R Civ P 16(b); *ED Cal Civ LR 240(a)*; *ND Cal Civ LR 16-10(b)*; *SD Cal Civ LR 16.1(d.2)*

Discussion:
See *16.07*

☐ Determine who will draft proposed scheduling order.

☐ Determine whether court will hold formal scheduling conference.

○ Consult local rules, as well as individual judges' rules, regarding timing of scheduling conference of parties.

○ Seek guidance from the clerk of the court if unfamiliar with court or judge or unsure of their rules.

○ Review topics required to be discussed at scheduling conference.

Authority:
Fed R Civ P 16(b); *ED Cal Civ LR 240(a)*; *ND Cal Civ LR 16-1*, *16-2*; *SD Cal Civ LR 16.1(d.2)*

Discussion:
See *16.06[2]*, *16.10*

☐ Ensure that appropriate persons attend scheduling conference.

Authority:
Fed R Civ P 16(b); *CD Cal Civ LR 16-13*; *ED Cal Civ LR 240(a)*; *ND Cal Civ LR 16-10(a)*; *SD Cal Civ LR 16.1(d)*

Discussion:
See *16.11*

☐ If warranted, request that conference proceedings be recorded.

☐ If reasonably anticipated to be necessary, seek modification of scheduling order on showing of good cause.

Authority:
Fed R Civ P 16(b)(4); *CD Cal Civ LR 16-14*; *ND Cal Civ LR 16-2(d)*

Discussion:
See *16.12*

☐ If necessary and available, seek immediate appellate review.

Discussion:
See *16.13*

Legal Topics:

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

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16.04 Pretrial Conferences Promote Active Judicial Case Management.

16.04[1] Rule 16 Is Primary Source of Court's Case Management Authority. Rule 16 is the principal source of authority for district courts to achieve the fundamental purpose stated in Rule 1 of securing "the just, speedy, and inexpensive determination of every action and proceeding" [*Fed R Civ P 16*; *see Fed R Civ P 1*; *see also FMC Corp. v. Vendo Co. (ED Cal 2002) 196 F Supp2d 1023, 1030*].

Rule 16 promotes a concept of active judicial management of the case development process in most civil actions to reach a swift, inexpensive, and just resolution of litigation, with the participation and cooperation of counsel and the parties [*see Navellier v. Sletten (9th Cir 2001) 262 F3d 923, 941 , cert. denied sub nom. McLachlan v. Simon, 536 US 941 (2002)* (trial courts have broad authority to set time limits to prevent undue delay, waste, or needless introduction of cumulative evidence)].

16.04[2] General Use of Pretrial Conferences. Rule 16 authorizes and regulates the use of a wide range of case management tools and powers, principally through pretrial conferences, and authorizes a wide range of sanctions for violations of pretrial orders [*Fed R Civ P 16*].

Cross Reference:

Discussion of sanctions under Rule 16, see *Ch. 17, Final Pretrial Conference, 17.17*.

A federal court has discretion to direct the attorneys for the parties and any unrepresented parties to appear for a pretrial conference or conferences for case management purposes, including the following [*Fed R Civ P 16(a)*]:

- Expediting the disposition of the action, including narrowing issues and defenses.

- Establishing early and continuing control so that the case will not be protracted because of lack of management.

- Discouraging wasteful pretrial activities, including unnecessary discovery.
- Improving the quality of the trial by requiring more thorough preparation.
- Facilitating settlement or the use of alternative dispute resolution mechanisms.

Cross Reference:

Discussion of objectives and case management philosophy of Rule 16, see 3 *Moore's Federal Practice, § 16.02* (Matthew Bender 3d ed.).

16.04[3] Importance of Local Rules and Individual Judges' Practices. Although the Federal Rules of Civil Procedure generally promote some commonality of practice between different judges and between different federal courts, so much flexibility has been built into *Fed R Civ P 16* that the Rule itself does relatively little to advance the cause of uniformity. To allow judges to fashion case development plans that are tailored to the needs to individual cases, Rule 16 necessarily confers a great deal of discretion on the individual judges who apply it [*see Zivkovic v. Southern Cal. Edison Co. (9th Cir 2002) 302 F3d 1080, 1087* (district courts have broad discretion in supervising pretrial activities); *see also Navellier v. Sletten (9th Cir 2001) 262 F3d 923, 941 , cert. denied sub nom. McLachlan v. Simon, 536 US 941 (2002)* (trial courts have broad authority to set time limits to prevent undue delay, waste, or needless introduction of cumulative evidence)]. In addition, Rule 16 recognizes the authority of district courts, by local rule, to create specialized sets of procedures for various categories of actions. Responding to this invitation, many courts have adopted elaborate sets of specialized provisions that apply only to certain kinds of cases.

Warning:

The variety of practices under Rule 16 among sitting federal judges can be confusing. Therefore, at the outset, counsel must consult the local rules of the particular district, and also the individual judge's rules.

Cross Reference:

Variety of judicial practices under Rule 16, see 3 *Moore's Federal Practice, § 16.03* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesSanctionsGovernmentsCourtsRule Application & Interpretation

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16.05 Terminology.

Different district courts use different labels to describe pretrial conferences. The initial "meet and confer" contact between counsel is variously referred to as the Rule 26(f) conference or the discovery planning conference. This meeting is discussed in Ch. 15, Rule 26(f) Conference and Initial Disclosures.

Further, district courts use different terms to refer to the first conference conducted by the judge or magistrate judge. Some districts label the conference a scheduling conference, while others call it an initial status conference, an initial pretrial conference, an initial case management conference, a Rule 16 conference, or a first discovery conference. This chapter uses the term scheduling conference in the general text, but uses each district's specific term in the local practice discussions.

District courts also use different labels to describe periodic, interim pretrial conferences authorized by *Fed R Civ P 16(c)*. District courts use the following terms: interim pretrial conferences, status conferences, discovery planning conferences, Rule 16 conferences, interim or intermediate case management conferences, and, as appropriate, settlement conferences. This chapter uses the term interim pretrial conference to refer to all pretrial conferences other than the scheduling conference and the final pretrial conference.

Finally, courts use varying terms to refer to the final pretrial conference. This conference is discussed in Ch. 17, Final Pretrial Conference.

Local rules may prescribe the appropriate terminology. For example, the Northern District designates "scheduling," "discovery," or "status" conferences under *Fed R Civ P 16* and *26* as "case management conferences." All statements, proposed orders, or other documents prepared in connection with such conferences must be referred to as such [*ND Cal Civ LR 16-1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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16.06 Preparing and Filing Scheduling Order.

16.06[1] Scheduling Order Mandatory Unless Exempted by Local Rule. Except in categories of actions expressly exempted by local district court rule [*see 16.08*], the judge or magistrate judge must enter a pretrial scheduling order, after receiving the Rule 26(f) proposed discovery report from the parties [*see* Ch. 15, Rule 26(f) Conference and Initial Disclosures], or after consulting with the attorneys for the parties and any unrepresented parties by conference, telephone, mail, or other suitable means [*Fed R Civ P 16(b)*].

The scheduling order is the court's primary method to control its calendar, assert control over the case management process, and define the parameters of the case [*see Navellier v. Sletten (9th Cir 2001) 262 F3d 923, 941 , cert. denied sub nom. McLachlan v. Simon, 536 US 941 (2002)*]. The requirement of a scheduling order permits the court to intervene early to set realistic deadlines for discovery and other aspects of pretrial case development, as well as to position the case for settlement, alternative dispute resolution, or trial.

Strategic Point:

A judge's failure to issue a mandatory scheduling order is not ordinarily deemed by appellate courts to be sufficient grounds, by itself, for any significant relief. Because it is probable that these failures are more often due to oversight than to deliberate decision, and because the absence of a scheduling order can result in lack of focus, inefficiency, and delays in disposition, if so inclined, counsel should consider proposing a scheduling order or request a scheduling or case management conference when a judge has failed to act in accordance with Rule 16's mandates. In some districts the clerk issues the initial scheduling order when the complaint is filed. If the judge fails to issue an order after the conference, the parties should try to stipulate or submit their proposed orders to the judge for approval.

16.06[2] Judge and Litigants Must Have Contact Before Issuance of Scheduling Order.

16.06[2][a] Purpose of Mandatory Contact. A federal judge may not issue a scheduling order without having

first either received from the litigants the proposed discovery plan report, or consulted with the attorneys for the parties and any unrepresented parties by a scheduling conference [*see 16.10*], telephone, mail, or other suitable means [*Fed R Civ P 16(b)(1)*].

This preliminary contact serves the following purposes:

- The court may assert control over the litigation and the parties from the outset.
- The parties have an opportunity, at the outset, to inform the court of potential procedural, evidentiary, and substantive problems, as well as personal scheduling conflicts, that might affect the pretrial schedule.
- The court may tailor the scheduling order to the needs of the individual case.

16.06[2][b] Manner of Initial Contact Not Prescribed. *Fed R Civ P 16* does not require that this initial contact between the judge and the litigants be in person or by telephone. The manner of contact is discretionary, and it is sufficient to solicit and receive input from counsel in writing or electronically. The receipt of a written report outlining the discovery plan is one method to satisfy this requirement [*Fed R Civ P 26(f)*].

16.06[2][c] Scope of Consultation Varies. The scope and the nature of the matters on which the court seeks the parties' input varies considerably from court to court, judge to judge, and case to case. Some judges solicit only the most skeletal of input, simply asking for three proposed deadlines: to join parties and amend pleadings, to file motions, and to complete discovery. Other judges solicit detailed submissions not only on all mandatory and discretionary matters covered by Rule 16(b) [*see 16.07*], but also on most of the subjects that are identified in Rule 16(c) as possible agenda items in any pretrial conference [*Fed R Civ P 16(b), (c)*].

Warning:

Practices as to the initial contact between the judge and the litigants vary between courts, between individual judges in the same court, and between types of cases. Counsel should consult the pertinent local rules, as well as any individual judges' rules and general or standing orders.

Cross Reference:

Discussion of contact between judge and litigants before issuance of scheduling order, see 3 *Moore's Federal Practice, § 16.11* (Matthew Bender 3d ed.).

16.06[3] Time for Order. Regardless of whether a district court holds a formal scheduling conference, the scheduling order must be issued as soon as practicable, and in any event is due within 90 days of the date any defendant first enters its appearance (whether by answer or motion) or, if earlier, within 120 days of the date of service of the complaint on any defendant [*Fed R Civ P 16(b)(2)*].

Consider:

The timing of the scheduling order may present problems in multidefendant litigation. The trial court may issue the scheduling order before all defendants have been served and appear in the action. Local rules may permit a party, including a party added later in the case, to seek relief from an obligation imposed by *Fed R Civ P 16* or *26* or the Order Setting Initial Case Management Conference [*see, e.g., ND Cal Civ LR 16-2(d)*]. As an alternative approach, it is always wise to request a stipulation of opposing counsel as to the scheduling order in the first instance.

16.06[4] LOCAL PRACTICE: Scheduling Orders.

16.06[4][a] LOCAL PRACTICE: CD Cal Requirements. The Central District rules are silent with respect to the timing of scheduling orders.

Cross Reference:

Exemptions from scheduling order requirement, see *16.08[2][a]*.

16.06[4][b] LOCAL PRACTICE: ED Cal Requirements. After an action is filed, the assigned judge or magistrate judge will order the holding of one or more status conferences for the purpose of entering a pretrial scheduling order [*ED Cal Civ LR 240(a)*]. Scheduling orders are mandatory unless specifically exempt [*see Fed R Civ P 16(b)*; *ED Cal Civ LR 240(c)*].

Cross Reference:

Exemptions from scheduling order requirement, see *16.08[2][b]*.

16.06[4][c] LOCAL PRACTICE: ND Cal Requirements. "Scheduling," "discovery," or "status" conferences under *Fed R Civ P 16* and *26* must be designated as "case management conferences." All statements, proposed orders, or other documents prepared in connection with such conferences must be referred to as such [*ND Cal Civ LR 16-1*]. Unless excluded under the Federal Rules of Civil Procedure, or the Northern District's local rules or court orders, the trial court must issue to the filing party an Order Setting Initial Case Management Conference and ADR Deadlines when the action is filed. A copy of the order must be served by the plaintiff on each defendant, along with any required supplementary materials [*ND Cal Civ LR 16-2(a)*; *see ND Cal Civ LR 7-12*; *see also ND Cal Civ LR 16-2(b)*, *(c)* (removed and transferred cases)].

Consider--Rescheduled Conference for Related Case:

When a case is reassigned as a related case, the case management conference will be rescheduled by the newly assigned judge. The parties must adjust the dates for the conference, and all disclosures and statements. Any dates for hearing noticed motions are vacated and the motions must be renoticed before the new judge. However, if a case is ordered related after the initial case management conference, unless the new judge orders otherwise, any deadlines established in the case management order continue to govern, except for trial date which will be rescheduled by the new judge [*ND Cal Civ LR 3-12(g)*].

Cross Reference:

Exemptions from scheduling order requirement, see *16.08[2][c]*.

16.06[4][d] LOCAL PRACTICE: SD Cal Requirements. Following the initial case management conference, the presiding judicial officer will prepare a case management order [*SD Cal Civ LR 16.1(d.2)*]. For discussion of the requisite contents, see *16.07[2][d]*.

Cross Reference:

Exemptions from scheduling order requirement, see *16.08[2][d]*.

Legal Topics:

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16.07 Topics to Be Addressed by Scheduling Order.

16.07[1] Mandatory and Optional Scheduling Order Topics. The scheduling order *must* limit the time to join other parties, to amend the pleadings, to file substantive motions, and to complete discovery [*Fed R Civ P 16(b)(3)(A)*].

The scheduling order *may* also include [*Fed R Civ P 16(b)(3)(B)*]:

- Modifications of the times for disclosures under *Fed R Civ P 26(a), (e)(1)*, and of the extent of the discovery to be permitted.
- Provisions for disclosure or discovery of electronically stored material.
- Any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production.
- The dates for interim pretrial conferences, a final pretrial conference, and trial.
- Any other matters appropriate in the circumstances of the case.

Example:

A district court has the authority to require a defendant to prepare a Martinez report through a *Fed R Civ P 16* scheduling order [*Goddard v. United States Dist. Court (In re Arizona) (9th Cir 2008) 528 F3d 652, 657-658*]. The purpose of a Martinez report is to give the court the benefit of detailed factual information that may help in identifying a case involving a constitutional challenge to an important, complicated correctional practice, particularly one that may affect more than the inmate who has filed the action [*Goddard v. United States Dist. Court (In re Arizona) (9th Cir 2008) 528 F3d 652, 656*]. In this § 1983 case, the court issued the order in connection with its customary pretrial management prerogatives as a way to create an administrative record to assist the court and to structure the direction of the litigation. The information to be provided was consistent with ordinary pretrial obligations and

reporting requirements in non-prisoner civil rights cases, in which both parties have an affirmative duty to allege at the pretrial conference all factual and legal bases on which they wish to litigate the case [*Goddard v. United States Dist. Court (In re Arizona) (9th Cir 2008) 528 F3d 652, 657*].

Warning:

Consult your district's local rules [*see 16.07[2]*], as well as the individual judge's rules, for any provisions regarding topics to be addressed in the scheduling order.

Cross Reference:

Contents of scheduling order, see 3 *Moore's Federal Practice, § 16.13[1], [2]* (Matthew Bender 3d ed.).

16.07[2] LOCAL PRACTICE: Topics to Be Addressed by Scheduling Order.

16.07[2][a] LOCAL PRACTICE: CD Cal Requirements. The Central District does not prescribe specific items for the scheduling order, although individual judges specify what must be addressed in the Rule 26(f) conference report. Rule 16(b) requires that the order reflect all actions taken at the scheduling conference [*see Fed R Civ P 16(b)*].

16.07[2][b] LOCAL PRACTICE: ED Cal Requirements. The scheduling order must reflect all actions taken at the scheduling conference. Conference topics include [*ED Cal Civ LR 240(a)*]:

- Service of process on parties not yet served;
- Jurisdiction and venue;
- Whether the action must be heard by a district court composed of three judges [*see ED Cal Civ LR 203*], or whether the action draws in issue the constitutionality of a statute or regulation under circumstances requiring notice as set forth in *28 USC § 2403*, *Fed R Civ P 5.1* or *ED Cal Gen LR 132*;
- Joinder of additional parties and amendment of pleadings;
- The formulation and simplification of the issues, including elimination of frivolous claims and defenses;
- The appropriateness of any variance from the usual filing and service requirements applicable to the action;
- The disposition of pending motions, the timing of a motion for class certification [*see ED Cal Civ LR 205*], the appropriateness and timing of summary adjudication under *Fed R Civ P 56*, and other anticipated motions;
- The propriety of initial disclosures as contemplated by *Fed R Civ P 26(a)(1)*, the results of the initial discovery conference, anticipated or outstanding discovery, including the necessity for relief from discovery limits, and the control and scheduling of discovery, including deferral of discovery whether to hold further discovery conferences, and other orders affecting discovery pursuant to *Fed R Civ P 26* and *29- 37* ;
- The avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Fed R *Evid 702*;
- The possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof,

stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

- Further proceedings, including setting dates for further conferences, for the completion of motions and discovery and for pretrial and trial; the appropriateness of an order adopting a plan for disclosure of experts under *Fed R Civ P 26(a)(2)(B)*, *CCP § 2034.010 et seq*., or an alternative plan; and the appropriateness of an order establishing a reasonable limit on the time allowed for presenting evidence;

- Modification of the standard pretrial procedures specified by the local rules because of the relative simplicity or complexity of the action;

- The appropriateness of an order for a separate trial pursuant to *Fed R Civ P 42(b)* with respect to a claim, counterclaim, crossclaim, or third-party claim, or affirmative defense, or with respect to any particular issue in the case;

- The appropriateness of an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under *Fed R Civ P 50(a)* or a judgment on partial findings under *Fed R Civ P 52(c)*;

- The appropriateness of special procedures, such as reference to a special master or magistrate judge or the judicial panel on multidistrict litigation, or application of the Manual for Complex Litigation;

- The prospects for settlement and the use of special procedures to assist in resolving the dispute; however, counsel may not, absent written stipulation, reveal any offers made or rejected during settlement negotiations, and counsel must specify whether they will stipulate to the trial judge or magistrate judge acting as settlement judge and waive any disqualification;

- The appropriateness of alternate dispute resolution, such as this District's Voluntary Dispute Resolution Program (VDRP), or any other alternative dispute resolution procedure;

- Any other matters that may facilitate the just, speedy and inexpensive determination of the action.

Note also that the scheduling order will prescribe the form and the content of the pretrial statement [*see ED Cal Civ LR 281(a)*].

Cross Reference:

Content of pretrial statement as determined by scheduling order in Eastern District, see Ch. 17, Final Pretrial Conference, see *§ 17.10[1]*.

16.07[2][c] LOCAL PRACTICE: ND Cal Requirements. After any case management conference, the judge must enter a case management order or sign the joint case management statement and proposed order submitted by the parties. This order must comply with *Fed R Civ P 16(b)* and identify the principal issues in the case, establish deadlines for joining parties and amending pleadings, identify and set the date for filing any motions that should be considered early in the pretrial period, establish a disclosure and discovery plan, set appropriate limits on discovery and refer the case to ADR unless such a referral would be inappropriate. In addition, the Court may establish deadlines for [*ND Cal Civ LR 16-10(b)*]:

- Commencement and completion of any ADR proceedings;

- Disclosure of proposed expert or other opinion witnesses pursuant to *Fed R Civ P 26(a)(2)*, as well

as supplementation of those disclosures;

- Conclusion of pretrial discovery and disclosure;

- Hearing pretrial motions;

- Counsel to meet and confer to prepare joint final pretrial conference statement and proposed order and coordinated submission of trial exhibits and other material;

- Filing joint final pretrial conference statement and proposed order;

- Lodging exhibits and other trial material, including copies of all exhibits to be offered and all schedules, summaries, diagrams and charts to be used at the trial other than for impeachment or rebuttal. Each proposed exhibit must be premarked for identification. On request, a party must make the original or the underlying documents of any exhibit available for inspection and copying;

- Serving and filing briefs on all significant disputed issues of law, including procedural and evidentiary issues;

- In jury cases, serving and filing requested voir dire questions, jury instructions, and forms of verdict; or in court cases, serving and filing proposed findings of fact and conclusions of law;

- Serving and filing statements designating excerpts from depositions (specifying the witness and page and line references), from interrogatory answers and from responses to requests for admission to be offered at the trial other than for impeachment or rebuttal;

- A date by which parties objecting to receipt into evidence of any proposed testimony or exhibit must advise and confer with the opposing party with respect to resolving such objection;

- A final pretrial conference and any necessary court hearing to consider unresolved objections to proposed testimony or exhibits;

- A trial date and schedule;

- Determination of whether the case will be maintained as a class action; and

- Any other activities appropriate in the management of the case, including use of procedures set forth in the Manual for Complex Litigation.

16.07[2][d] LOCAL PRACTICE: SD Cal Requirements. The initial case management order will [*SD Cal Civ LR 16.1(d.2)*]:

- Include a discovery schedule;

- Set a time for a further case management conference, if necessary;

- If appropriate, set a time for the proponent of each issue to identify expert witnesses, a time for the responding party to identify expert witnesses in reply, a time for the depositions of experts, a time for the supplementation of expert designation depending on the circumstances;

- Set a deadline for filing pretrial motions; and

- Set a date for a pretrial hearing before the district judge who will try the case. The date for this hearing must be approved by the trial judge.

Legal Topics:

For related research and practice materials, see the following legal topics:
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16.08 Categories of Cases Exempt From Scheduling Order Requirement.

16.08[1] Only Local Rules May Exempt Categories of Cases. Local district court rules provide the only means for exempting categories of cases from the scheduling order requirement [*Fed R Civ P 16(b)*]. This limitation precludes individual judges, acting on their own initiative and their own authority, from issuing standing orders that purport to exempt certain categories of their cases from the scheduling order requirement.

The fact that a particular category of cases is properly exempted from the scheduling order requirement does not mean that the case is to be left in management limbo. Rather, courts establish an appropriate alternative system for managing, monitoring, and disposing of each category of exempted case.

If one party is pro se, counsel should keep in mind that most judges are reluctant to impose a lot of procedural rules on pro se parties, other than what the Federal Rules of Civil Procedure require.

Consider:

Counsel litigating cases that have been exempted from the scheduling order requirement can generally find any special rules that apply to their matters in local rules, general orders, or standing orders.

Cross Reference:

Exemption of categories of cases by local rule, see 3 *Moore's Federal Practice, § 16.10[3]* (Matthew Bender 3d ed.).

16.08[2] LOCAL PRACTICE: Scheduling Order Exemptions.

16.08[2][a] LOCAL PRACTICE: CD Cal Requirements. Unless otherwise required by the court, the following categories of cases are exempted from the requirements for a scheduling order [*CD Cal Civ LR 16-12*]:

- Petitions filed under *28 USC § 2241 et seq*. (habeas corpus), or their functional equivalents;

- Actions for judicial review of a decision by the Commissioner of Social Security under *42 USC § 405(g)*;

- Any case in which the plaintiff is appearing *pro se*, is in custody, and is not an attorney;

- Any case removed to the Central District from the small claims division of a municipal or justice court;

- Appeals from the bankruptcy court;

- Extradition cases;

- Actions to enforce or quash an administrative summons or subpoena; and

- Actions by the United States to collect on a student loan guaranteed by the United States.

16.08[2][b] LOCAL PRACTICE: ED Cal Requirements. The following categories of civil actions are exempt from the mandatory scheduling order requirement [*ED Cal Civ LR 240(c)*]:

- Actions brought solely under USC Title 42 to review a final decision of the Secretary of Health and Human Services;

- Actions brought to enforce Internal Revenue Service summonses filed pursuant to *26 USC §§ 7402(b)* and *7604(a)*, and actions to quash administrative summonses filed pursuant to *26 USC § 7609(b)(2)*;

- Actions for writs of entry in connection with the enforcement of Internal Revenue Service tax liens;

- Actions to enforce collection on promissory notes involving federally insured loans and direct federal loans in which the prayer for relief is less than $25,000;

- Actions to enforce cease and desist orders issued by the National Labor Relations Board;

- Actions to enforce arbitration awards;

- Actions under *46 USC §§ 2302*, *4311(d)* and *12309(c)*;

- Prisoner actions as defined in *ED Cal Gen LR 101*;

- Petitions for writs of habeas corpus by incarcerated persons;

- Extradition proceedings;

- Discovery disputes originating from out-of-district actions;

- Civil commitment proceedings; and

- Federal Debt Collection proceedings.

16.08[2][c] LOCAL PRACTICE: ND Cal Requirements. Unless otherwise provided by local rule, the

categories of cases that are exempted from the initial disclosure requirements [*see Fed R Civ P 26(a)(1)*] by *Fed R Civ P 26(a)(1)(B)* are exempt from the requirement of a scheduling order [*ND Cal Civ LR 16-7*].

Cross Reference:

Cases exempt from initial disclosure requirements, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, see *§ 15.05*.

16.08[2][d] LOCAL PRACTICE: SD Cal Requirements. The assigned judge has discretion to exempt actions from Early Neutral Evaluation (ENE) and case management conferences in the following categories of cases [*SD Cal Civ LR 16.1(e)*]:

- Habeas corpus cases;
- Cases reviewing administrative rulings;
- Social Security Cases;
- Default proceedings;
- Cases in which a substantial number of defendants have not answered;
- Actions to enforce judgments; and
- Bankruptcy appeals.

ENE conferences will not be set in Section 1983 prisoner cases [*SD Cal Civ LR 16.1(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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16.09 Scheduling Order Controls Course of Litigation Unless Modified.

The scheduling order controls the course of the litigation unless modified by the court [*Fed R Civ P 16(b)*; *Zivkovic v. Southern Cal. Edison Co. (9th Cir 2002) 302 F3d 1080, 1087-1088* ; *Johnson v. Mammoth Recreations, Inc. (9th Cir 1992) 975 F2d 604, 609-610* (scheduling order is not idly entered, and should not be cavalierly ignored by counsel)].

Example:

A motion to join new parties filed after the deadline set forth in the scheduling order may be denied as untimely [*Johnson v. Mammoth Recreations, Inc. (9th Cir 1992) 975 F2d 604, 609-610* (summary judgment granted in favor of party who repeatedly stated it was not responsible party); *see also Robinson v. Twin Falls Highway Dist. (D Idaho 2006) 233 FRD 670, 672* (motion to add party over three months after discovery deadline as untimely)].

Scheduling orders are generally binding through the subsequent course of the litigation. Unless the party requests modification of the scheduling order [*see 16.10*], motions filed after the relevant deadlines may be denied solely on the basis that the motion was untimely [*Johnson v. Mammoth Recreations, Inc. (9th Cir 1992) 975 F2d 604, 609-610*]. Nevertheless, trial courts should not so rigidly adhere to time limits as to sacrifice justice in the name of judicial efficiency [*Navellier v. Sletten (9th Cir 2001) 262 F3d 923, 941 , cert. denied sub nom. McLachlan v. Simon, 536 US 941 (2002)* (quoting *General Signal Corp. v. MCI Telecomms. Corp. (9th Cir 1995) 66 F3d 1500, 1509)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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16.10 Scheduling Conference Is Discretionary Unless Required by Local Rule.

Federal judges may, but are not required to, hold a scheduling conference before issuing a scheduling order. Although the court and the parties must communicate, that communication may be by [*Fed R Civ P 16(b)(1)*]:

- Scheduling conference;
- Report outlining the proposed discovery plan [*see* Ch. 15, Rule];
- Telephone communication;
- Mail communication;
- Other suitable means.

Warning:

Consult the local rules of the particular district, as well as the individual judge's rules, regarding any scheduling conference requirements.

Cross Reference:

Scheduling conferences, see 3 *Moore's Federal Practice, § 16.13[3]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConferencesScheduling ConferencesGovernmentsCourtsRule Application & Interpretation

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16.11 Attending Scheduling Conference.

16.11[1] Counsel and Unrepresented Parties Must Attend. Because the court must consult with parties' counsel and unrepresented parties before issuing a scheduling order, they should attend the scheduling conference [*Fed R Civ P 16(b)(1)*].

16.11[2] LOCAL PRACTICE: Attending Conference.

16.11[2][a] LOCAL PRACTICE: CD Cal Requirements. Each party appearing at any scheduling conference held under *Fed R Civ P 16* must be represented by the attorney (or the party if *pro se*) who is then contemplated to have charge of the conduct of the trial on behalf of that party [*CD Cal Civ LR 16-13*].

16.11[2][b] LOCAL PRACTICE: ED Cal Requirements. All parties receiving notice of any status conference must appear in person or by counsel and be prepared to discuss all subjects as may be specified in the order noticing the conference. That person must have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed [*ED Cal Civ LR 240(a)*].

16.11[2][c] LOCAL PRACTICE: ND Cal Requirements. Unless excused by the judge, lead trial counsel for each party must attend the initial case management conference. Requests to participate in the conference by telephone must be filed and served at least seven days before the conference or in accordance with the standing orders of the assigned judge [*ND Cal Civ LR 16-10(a)*].

16.11[2][d] LOCAL PRACTICE: SD Cal Requirements. The parties who have responsibility over the litigation and the counsel who is respon-sible for the case must attend the case management conference. The judicial officer may approve attendance of a party or counsel by telephonic conference call [*SD Cal Civ LR 16.1(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesScheduling ConferencesGovernmentsCourtsRule Application &

Interpretation

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16.12 Seeking Modification of Scheduling Order Based on Good Cause.

16.12[1] Party Seeking Modification Must Show Good Cause. A scheduling order may not be modified except by leave of court on a showing of good cause [*Fed R Civ P 16(b)(4)*; *Zivkovic v. Southern Cal. Edison Co. (9th Cir 2002) 302 F3d 1080, 1087-1088* ; *Matrix Motor Co. v. Toyota Motor Corp. (CD Cal 2003) 218 FRD 667, 671*].

The Rule 16(b) "good cause" standard, rather than the more liberal standard of *Fed R Civ P 15(a)*, governs a motion to amend pleadings filed after the deadline set in the scheduling order for amending the pleadings [*see Coleman v. Quaker Oats Co. (9th Cir 2000) 232 F3d 1271, 1294 , cert. denied, 533 US 950 (2001)* (good cause required for modification); *see also Eckert Cold Storage, Inc. v. Behl (ED Cal 1996) 943 F Supp 1230, 1232*].

Strategic Point:

A court is far more likely to respond favorably to a motion seeking an extension if counsel files the motion promptly on discovering scheduling difficulties and does not wait until the last minute to file the request. A request filed after the passage of the relevant deadline may in fact violate local rules.

Cross Reference:

Modification of scheduling orders, see 3 *Moore's Federal Practice, § 16.14* (Matthew Bender 3d ed.).

16.12[2] Good Cause Requires Due Diligence. The good cause standard primarily considers the diligence of the party seeking modification [*Matrix Motor Co. v. Toyota Motor Corp. (CD Cal 2003) 218 FRD 667, 671*].

Modification will only be permitted if the party seeking the extension demonstrates that the schedule cannot reasonably be met even with the exercise of due diligence [*Matrix Motor Co. v. Toyota Motor Corp. (CD Cal 2003) 218 FRD 667, 671-672* ; *Zivkovic v. Southern Cal. Edison Co. (9th Cir 2002) 302 F3d 1080, 1087-1088*].

If the party was not diligent, the inquiry ends and the motion to modify should be denied [*Zivkovic v. Southern Cal.*

Edison Co. (9th Cir 2002) 302 F3d 1080, 1087-1088 ; *Johnson v. Mammoth Recreations, Inc. (9th Cir 1992) 975 F2d 604, 609*]. Carelessness is not a basis for granting relief [*FMC Corp. v. Vendo Co. (ED Cal 2002) 196 F Supp2d 1023, 1030* ; *Zivkovic v. Southern Cal. Edison Co. (9th Cir 2002) 302 F3d 1080, 1087-1088*].

Strategic Point:

The party seeking modification should demonstrate diligence in working with the court in crafting a new scheduling order, and that the party filed the request for modification as soon as practicable [*see Jackson v. Laureate, Inc. (ED Cal 1999) 186 FRD 605, 608*].

Judge's Perspective:

Keep in mind that a party that was well prepared and cooperative at the initial conference stands a better chance of a favorable response when seeking a modification.

16.12[3] LOCAL PRACTICE: Modification of Scheduling Orders.

16.12[3][a] LOCAL PRACTICE: CD Cal Requirements. Any application to modify a scheduling order (and any other Rule 16 order) must be made to the judicial officer who entered the order [*CD Cal Civ LR 16-14*].

16.12[3][b] LOCAL PRACTICE: ED Cal Requirements. The local rules of the Eastern District do not specify a modification procedure for scheduling orders.

16.12[3][c] LOCAL PRACTICE: ND Cal Requirements. Any party, including a party added later in the case, may file a motion seeking relief from an obligation imposed by *Fed R Civ P 16* or *26* or the Order Setting Initial Case Management Conference. The motion must [*ND Cal Civ LR 16-2(d)*]:

- Describe the circumstances that support the request;
- Affirm that counsel for the moving party has conferred with all other counsel in an effort to reach agreement about the matter and, for each other party, report whether that party supports or opposes the request for relief;
- Be accompanied by a proposed revised case management schedule; and
- If applicable, indicate any changes required in the ADR process or schedule in the case.

16.12[3][d] LOCAL PRACTICE: SD Cal Requirements. The local rules of the Southern District do not specify a modification procedure for scheduling orders.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersContinuancesGovernmentsCourtsRule Application & Interpretation

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16.13 Appellate Review of Scheduling Orders.

16.13[1] Immediate Appellate Review Ordinarily Unavailable. In general, most scheduling orders are interlocutory in nature, rather than final [*see Miera v. First Sec. Bank, N.A. (10th Cir 1985) 776 F2d 902, 906* , *appeal after remand*, *925 F2d 1237 (10th Cir 1991)*]. They deal with preliminary matters, and may still be modified by the court during the pretrial period [*see Fed R Civ P 16(b), (d)*]. Review is ordinarily deferred until after final judgment; however, a timely objection must be registered with the trial court [*see Jauregui v. City of Glendale (9th Cir 1988) 852 F2d 1128, 1133-1134* (pretrial order establishing facts of discrimination in employment)].

16.13[2] Extraordinary Circumstances May Permit Immediate Review. In rare circumstances, a scheduling order may be immediately appealable either by direct appeal or by writ of mandamus [*see Miera v. First Sec. Bank, N.A. (10th Cir 1985) 776 F2d 902, 906* , *appeal after remand*, *925 F2d 1237 (10th Cir 1991)* (citing **Moore's,** pretrial orders that effectively resolve all triable issues are reviewable)]. This could occur concerning (1) a decision whether an action must be heard by a district court composed of three judges, or (2) a pretrial order establishing liability [*see Miera v. First Sec. Bank, N.A. (10th Cir 1985) 776 F2d 902, 906* , *appeal after remand*, *925 F2d 1237 (10th Cir 1991)*].

Cross References:

Discussion of availability of immediate review in extraordinary circumstances, see 3 *Moore's Federal Practice, § 16.38[2]*. Discussion of review of "collateral" orders that conclusively determine a disputed question, see 19 *Moore's Federal Practice, § 202.07*. Discussion of application of final judgment rule to pretrial orders, see 19 *Moore's Federal Practice, § 202.11* (Matthew Bender 3d ed.).

16.13[3] Scheduling Order Decisions Reviewed for Abuse of Discretion. Challenges to a trial court's management of a case are reviewed for abuse of discretion [*Zivkovic v. Southern Cal. Edison Co. (9th Cir 2002) 302 F3d 1080, 1087-1088* ; *Johnson v. Mammoth Recreations, Inc. (9th Cir 1992) 975 F2d 604, 607-609*]. Decisions as to the preclusive effect of a pretrial order will not be disturbed unless they evidence a clear abuse of discretion [*Johnson v. Mammoth Recreations, Inc. (9th Cir 1992) 975 F2d 604, 607-609*].

16.13[4] Modification Ruling Reviewed for Abuse of Discretion. District courts have broad discretion to supervise the pretrial phase of litigation, including setting reasonable time limits. The decision to modify a scheduling order is within the trial court's broad discretion to expedite the completion of trials [*see Navellier v. Sletten (9th Cir 2001) 262 F3d 923, 941 , cert. denied sub nom. McLachlan v. Simon, 536 US 941 (2002)* (trial courts have broad authority to set time limits to prevent undue delay, waste, or needless introduction of cumulative evidence); *FMC Corp. v. Vendo Co. (ED Cal 2002) 196 F Supp2d 1023, 1030*].

Distinguish:

Although trial courts have discretion to expedite trials, they cannot so rigidly adhere to time limits as to sacrifice justice in the name of judicial efficiency [*Navellier v. Sletten (9th Cir 2001) 262 F3d 923, 941 , cert. denied sub nom. McLachlan v. Simon, 536 US 941 (2002)* (quoting *General Signal Corp. v. MCI Telecomms. Corp. (9th Cir 1995) 66 F3d 1500, 1509)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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16.14 CHECKLISTS: Participating in Interim Pretrial Conferences and Settlement Conferences.

16.14[1] CHECKLIST: Interim Pretrial Conferences.

☐ Determine whether facts and circumstances warrant one or more interim pretrial conferences, considering:

- ○ Assigned judge's or magistrate judge's attitude toward active case management.
- ○ The complexity of the case.
- ○ Whether the scheduling order deadlines are still viable.
- ○ Whether discovery has taken the case in a new direction.
- ○ Whether some claims and defenses may be eliminated from the case, especially with the court's assistance.
- ○ Cooperation of counsel.

Discussion:
See *16.16*

☐ If conference is warranted, determine applicable procedure:

- Request court to schedule conference.
- If required, prepare and file preconference statements.

Authority:
ED Cal Civ LR 240(a); *ND Cal Civ LR 16-10(c)*, *(d)*; *SD Cal Civ LR 16.1(d.2)*

Discussion:
See *16.16*, *16.17*

☐ Determine who must participate at interim conference.

Authority:
Fed R Civ P 16(c)(1); *ED Cal Civ LR 240(a)*; *ND Cal Civ LR 16-10(c)*

Discussion:
See *16.18*

☐ At the conference, the following matters may be discussed:

- Seeking summary adjudication if feasible.
- Attempting to narrow the issues for trial and eliminate unsupported claims and defenses.
- Amending the pleadings.
- Settlement.
- References to magistrate judge or master.
- Identifying witnesses and documents.
- Obtaining stipulations and advance court rulings on the admissibility of evidence.
- Dates for future interim conferences, motions, the final pretrial conference, and trial.
- The order of calling witness, presenting proof, and reasonable time limits for trial.
- Bifurcation.
- Adopting special procedures for complicated cases.

Authority:

Fed R Civ P 16(c)(2)

Discussion:
See *16.19*

☐ Determine who will draft interim pretrial conference order.

Authority:
Fed R Civ P 16(d)

Discussion:
See *16.20*

16.14[2] CHECKLIST: Settlement Conferences.

☐ If appropriate, stipulate to preferences for one or more judges, magistrate judges, or other presiding neutrals as prospective settlement judges.

☐ Ascertain the attitude and methods towards settlement conferences of the settlement judge.

☐ Ascertain whether the client needs to attend or remain available for consultation by telephone.

☐ Prepare extensively with the client, regardless of whether the client will be present at the conference:

- ○ Review contentions, summaries of proposed testimony, and settlement demands with client.
- ○ Rationalize damage theories, make and test damage calculations, and organize proof of damages.
- ○ Explore settlement possibilities with client, including ramifications of settlement.
- ○ Explore and test client's goals, as well as minimums.
- ○ Prepare client for questions that may be put to him or her directly at the conference.
- ☐ Decide in advance what will and will not be said about the underlying facts.
- ☐ Inform the client that the neutral may find it useful to emphasize the problems with the client's case, so that the client will not react inappropriately or unproductively.

☐ Analyze and anticipate the adversary's settlement approach.

☐ Determine whether any meet and confer obligations must be met before settlement conference.

☐ If no meet and confer duty applies, consider whether counsel should confer with coparties, regarding any conflicting contentions and overall settlement.

☐ If required, prepare settlement conference statement before conference, clearly stating any conditions applicable to offer or demand for settlement, such as nondisclosure requirement.

☐ Prepare to candidly respond to settlement inquiries by settlement judge, avoiding any representations that contradict client's expectations and counsel's own settlement authority.

☐ Prepare to use the conference as a testing ground for the facts, theories, and damage calculations and proof.

☐ Consider requesting court annexed or private ADR.

☐ Determine who will draft settlement conference statement.

Authority:

Fed R Civ P 16(c)(2)(I); *CD Cal Civ LR 16-15*; *ED Cal Civ LR 270*; *ND Cal ADR LR 7-1 et seq.*; *SD Cal Civ LR 16.3*

Discussion:

See *16.23*

Legal Topics:

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

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16.15 Interim Pretrial Conferences Offer Opportunity to Review Pretrial Developments and Streamline Case.

An interim pretrial conference provides an opportunity for the presiding judicial officer and counsel to revisit the issues in the case; to determine whether the case is progressing as scheduled; and to refine the operative scheduling or interim pretrial order. Judges and counsel are encouraged not to assume that the case will develop as fashioned in the scheduling order. As disclosures, discovery, motion activity, and developments external to the litigation present the parties with new information or change the litigation circumstances, judges and counsel may make adjustments to the original plan, or even move the pretrial process in a much different direction.

Interim pretrial conferences may cover virtually any procedural or substantive issue relevant to the case. In particular, developments in the discovery process will most likely to be relevant to the parties' views about settlement. Therefore, settlement is almost always revisited at interim pretrial conferences.

Warning:

The Federal Rules of Civil Procedure rules do not prescribe specific procedures for interim pretrial conferences. Rather, local rules, and more typically, individual judge's rules may specify conference procedures.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesPretrial ConferencesGovernmentsCourtsRule Application & Interpretation

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16.16 Interim Pretrial Conferences Discretionary Unless Required by Local Rule.

16.16[1] Judge May Hold One or More Interim Pretrial Conferences. The assigned judge or magistrate judge has discretion to hold one or more interim pretrial conferences [*see Fed R Civ P 16(a)*]. Whether any interim pretrial conferences will be held is a matter committed to the sound discretion of the assigned district judge or magistrate judge [*see Mescal v. United States (D NM 1995) 161 FRD 450, 451-452*].

Factors relevant to the decision to hold one or more interim pretrial conferences include:

- The case management philosophy of the assigned judge;
- The complexity of the case;
- The expertise or experience of counsel; and
- The level of cooperation or friction between counsel or across party lines.

Local district court rules may require judges to hold interim pretrial conferences in specified categories of cases, or in specified circumstances [*see 16.16[2]*]. Counsel should consult the individual judge's rules, which often contain provisions regarding interim pretrial conferences, as well as any general or standing orders.

Cross Reference:

Discussion of scheduling interim case management conferences, see *3 Moore's Federal Practice, § 16.60* (Matthew Bender 3d ed.).

16.16[2] LOCAL PRACTICE: Interim Pretrial Conferences.

16.16[2][a] LOCAL PRACTICE: CD Cal Requirements. The Central District has no local rules on interim

pretrial conferences.

16.16[2][b] LOCAL PRACTICE: ED Cal Requirements. After an action has been filed, the assigned judge or magistrate judge may hold additional status conferences at any time after the scheduling conference, with or without the request of any party [*ED Cal Civ LR 240(a)*].

16.16[2][c] LOCAL PRACTICE: ND Cal Requirements. The assigned judge or magistrate judge may, *sua sponte* or in response to a stipulated request or motion, schedule subsequent case management conferences during the pendency of an action [*ND Cal Civ LR 16-10(c)*].

Unless otherwise ordered, the parties must file a Joint Case Management Statement at least seven days before any subsequent case management conference. The statement must report progress or changes since the last statement was filed and make proposals for the remainder of the case development process. The statement must report the parties' views about whether using some form of ADR would be appropriate [*ND Cal Civ LR 16-10(d)*].

Judge's Perspective:

Some judges prefer that the prior statement be updated so that it is complete (i.e., contains all matters, even those that have not changed) rather than a statement that refers only to changes. Other judges prefer a less formal procedure for follow-up conferences, such as a joint status letter.

16.16[2][d] LOCAL PRACTICE: SD Cal Requirements. At the end of the scheduling conference the judicial officer will prepare a case management order setting a time for further case management conferences, if necessary [*SD Cal Civ LR 16.1(d.2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial ConferencesGovernmentsCourtsRule Application & Interpretation

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16.17 Requesting Interim Pretrial Conference.

If a case might benefit from an interim pretrial conference, counsel should consider making a request to the assigned judge. A request for an interim pretrial conference signifies that counsel are taking pretrial responsibilities seriously.

Counsel are usually better able than the assigned judge to observe developing pretrial matters. Counsel should state any changed circumstances that give rise to the need for a conference, explain how a conference would contribute to the pretrial case development process, and propose an agenda.

Legal Topics:

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

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16.18 Attending Interim Pretrial Conference.

16.18[1] Mandatory Participants. Rules and practices related to participation in interim case management conferences are not materially different from the rules and practices for scheduling or initial case management conferences [*see 16.11*]. At a minimum, every unrepresented party and at least one attorney for each represented party must participate in every interim pretrial conference unless otherwise ordered by the court. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement of the dispute [*Fed R Civ P 16(c)(1)*].

At least one of the participating attorneys for each represented party must have authority to enter stipulations and make admissions with respect to any matter that he or she should reasonably anticipate may be discussed at the conference [*Fed R Civ P 16(c)(1)*]. Courts may impose a broad range of sanctions if no appearance is made on behalf of a party at an interim pretrial conference [*Fed R Civ P 16(f)*].

Consider:

Attendance requirements for interim pretrial conferences are ordinarily determined by the nature of the conference and the topics to be addressed.

16.18[2] Judicial Authority to Compel Attendance. Federal courts may require a party or the party's representative to be present or reasonably available by other means to discuss settlement when appropriate [*see Fed R Civ P 16(c)(1)*]. Courts may direct the appearance of corporate officers with settlement authority [*see Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc. (9th Cir 2001) 275 F3d 762, 769*].

Cross Reference:

Attendance requirements, see *3 Moore's Federal Practice, § 16.61* (Matthew Bender 3d ed.).

16.18[3] LOCAL PRACTICE: Attendance at Interim Pretrial Conferences.

16.18[3][a] CD Cal and SD Cal Requirements. In the Central and Southern Districts, local rules are silent as to

attendance at interim pretrial conferences.

16.18[3][b] ED Cal Requirements. All parties receiving notice of any status conference must appear in person or by counsel and be prepared to discuss any subjects specified in the order noticing the conference and have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed [*ED Cal Civ LR 240(a)*].

16.18[3][c] LOCAL PRACTICE: ND Cal Requirements. Each party must be represented at any subsequent case management conferences by counsel having authority with respect to matters under consideration [*ND Cal Civ LR 16-10(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesSanctions

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16.19 Topics for Consideration at Interim Pretrial Conference.

16.19[1] Rule 16(c) Lists Broad Range of Conference Topics. All subjects listed in Rule 16 (b) and (c) may appear on the agenda at an interim conference. *Fed R Civ P 16(b)* topics are discussed in *16.07*. Rule 16(c) provides that the following matters may be considered and acted on at any pretrial conference [*Fed R Civ P 16(c)(2)*]:

- The formulation and simplification of the issues, including the elimination of frivolous claims and defenses;
- The necessity or desirability of amending the pleadings;
- The possibility of obtaining admissions of fact and of documents to avoid unnecessary proof, stipulations as to the authenticity of documents, and advance rulings on evidence admissibility;
- The avoidance of unnecessary proof and cumulative evidence, and any limitations or restrictions on the use of expert testimony under Fed R *Evid 702*;
- The appropriateness and timing of summary adjudication;
- The control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to *Fed R Civ P 26* and *Fed R Civ P 29-37*;
- The identification of witnesses and documents;
- The need and schedule for filing and exchanging pretrial briefs;
- The date or dates for further conferences and for trial;

- The advisability of referring some or all of the case to a magistrate judge or special master;
- Settlement, and the use of any authorized ADR methods;
- The form and substance of the pretrial order;
- The disposition of pending motions;
- The need for adopting special procedures for managing potentially difficult or protracted actions involving complex issues, multiple parties, difficulty legal questions, or unusual proof problems;
- An order for separate trial pursuant to *Fed R Civ P 42(b)* with respect to a claim, counterclaim, crossclaim, or third party claim, or with respect to any particular issue in the case;
- An order directing a party or parties to present certain evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for judgment as a matter of law under *Fed R Civ P 50(a)*, or a judgment on partial findings under *Fed R Civ P 52(c)*;
- An order setting a reasonable limit on the time allowed for presenting evidence; and
- Any other matters that might facilitate the just, speedy, and inexpensive disposition of the action.

Cross Reference:

Subjects addressed at interim case management conferences, see *3 Moore's Federal Practice, § 16.62* (Matthew Bender 3d ed).

16.19[2] Case-Specific Developments Dictate Topics. Although Rule 16(c)(2) broadly describes the topics that may be addressed at the interim pretrial conferences over the course of the litigation [*see 16.19[1]*], topics such as the identification of disputed legal and factual issues and the control and scheduling of disclosures and discovery, are more likely to be addressed at the beginning and interim stages of the pretrial period. Other items, such as reviewing remaining claims and defenses, are more likely to be considered at the final pretrial conference [*see* Ch. 17, Final Pretrial Conference].

Usually developments specific to an individual case dictate which subjects are actually considered at the conference. For example, the conference might address whether to change the motion schedule, or the sequence in which specified motions will be filed [*see, e.g., Tran v. Captain Glyn, Inc. (D Haw 1995) 909 F Supp 727, 731* (deadline to file summary judgment motion addressing court's subject matter jurisdiction extended)].

In addition, counsel and unrepresented parties may suggest agenda items for these conferences.

Warning:

Because individual judges' rules often set forth additional interim pretrial conference topics, counsel must consult these rules as well as local rules. Judges have broad discretion to ensure that the trial goes forward only on matters involving genuine disputes of fact or law [*see Campbell Indus. v. M/V Gemini Indus. (9th Cir 1980) 619 F2d 24, 27*].

16.19[3] Using Court-Appointed Experts. A judge may consider and propose the use of a court-appointed expert at a scheduling or interim pretrial conference [*see Fed R Evid 706*]. A court-appointed expert may help provide an early foundation for stipulations, reduce the scope of discovery, facilitate early settlement, reduce the adversarial nature of the

proceedings and conflicts between the parties' experts, and potentially identify, clarify, and narrow the disputed issues.

Before the appointment of a court-appointed expert, the judge must issue an order to show cause why expert witnesses should not be appointed [*Fed R Evid 706*]. Under Ninth Circuit law, district courts enjoy wide latitude to make appointments of independent experts [*Monolithic Power Sys. v. O2 Micro Int'l Ltd. (Fed Cir 2009) 558 F3d 1341, 1348* (upholding appointment of independent expert in unusually complex patent infringement case with starkly conflicting expert testimony, even though trial court made extemporaneous comments at case management conference suggesting that independent expert would greatly influence jury's determination)]. The judge may solicit nominations for the appointment from the parties [*see Fed R Evid 706*]; when one of the primary purposes of an appointment is to encourage an early settlement, the appointment of an expert who enjoys the confidence of all of the parties may be particularly beneficial. The court may consider specifying a date by which the expert must complete the investigation and file a report.

Strategic Point:

Although this procedure is relatively rare, it can be an effective tool to propose, particularly if the proponent is confident regarding an appropriate issue.

Cross Reference:

Discussion of court appointed experts, see 4 Weinstein's Federal Evidence, Ch. 706, Court-Appointed Experts (Matthew Bender 2d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersEvidenceTestimonyExpertsCourt-Appointed ExpertsGeneral Overview

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Unit 4 Required Conferences and Case Management
CHAPTER 16 Case Management Conferences
II. PARTICIPATING IN PRETRIAL CONFERENCES
B. Interim Pretrial Conferences and Settlement Conferences

2-16 MB Practice Guide: Fed Pretrial Civ Proc in CA 16.20

16.20 Interim Pretrial Conference Orders.

16.20[1] Court May Enter Interim Pretrial Conference Order. After any Rule 16 pretrial conference, the court should issue an order reciting all actions taken and rulings made [*Fed R Civ P 16(d)*]. The Supreme Court has ruled that the word "shall," as used in the rule authorizes, but does not compel, judicial action [*Gutierrez De Martinez v. Lamagno (1995) 515 US 417, 432-433 n9, 115 S Ct 2227, 132 L Ed2d 375*].

16.20[2] Drafting Proposed Interim Pretrial Conference Order. Counsel should consult the local rules, as well as the individual judge's rules, to determine whether interim pretrial conference orders are required, and if so, the requirements of the order and whether it is counsel's responsibility to draft a proposed order. Even when an order is not required, counsel should nevertheless consider requesting the opportunity to present a proposed order, or at least a memorandum summarizing the results of the conference. An order (or memorandum) stating the decisions and stipulations made at the pretrial conference assists the parties in keeping track of the litigation; reduces the risk of confusion, friction between parties, inefficiency, and unfairness; and provides a record for appellate review.

16.20[3] Order Controls Litigation Until Modified. Interim pretrial conference orders control the subsequent course of the action unless modified by subsequent order [*Fed R Civ P 16(d)*; *Eagle v. AT&T Corp. (9th Cir 1985) 769 F.2d 541, 548 , cert. denied, 475 US 1084 (1985)* (claim is barred unless implicitly included in pretrial order); *see 16.21*].

Cross Reference:

Orders following interim case management conferences, see 3 *Moore's Federal Practice, § 16.63* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersGovernmentsCourtsRule Application &

Interpretation

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16.21 Modification of Interim Pretrial Conference Orders.

Interim pretrial conference orders are subject to modification. The standard judges apply in deciding whether to grant a party's request to modify an interim pretrial conference order is the same standard used when determining whether to modify the scheduling order [*see Fed R Civ P 16* Committee Note of 1993]. Accordingly, a party must show good cause before the court will grant a request to modify an interim pretrial conference order [*see 16.12*].

Strategic Point:

A showing of good cause ordinarily requires that counsel establish an inability to meet the scheduled deadlines despite exercising due diligence. Accordingly, counsel should describe with specificity the actions that have been taken to comply with the order. Counsel should also propose a new schedule that will make the case trial-ready as quickly as possible under the changed circumstances. The proposed new dates should be as close to the dates originally fixed as feasible, and that fact should be pointed out in the request.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersContinuances

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16.22 Appellate Review.

16.22[1] Appellate Review Is Ordinarily Deferred. In general, interim pretrial conference orders are interlocutory in nature, rather than final. They deal with preliminary and procedural matters, leading up to, but not including, trial, and may still be modified by the court on a showing of good cause [*Fed R Civ P 16(b), (d)*]. Because the court is still able to make adjustments as needed, no irreversible legal consequences flow from these orders. Therefore, appellate review of most interim pretrial conference orders must await a final judgment in the action [*see In re Recticel Foam Corp. (1st Cir 1988) 859 F2d 1000, 1002* (final pretrial order)].

16.22[2] Trial Management Decisions Reviewed for Abuse of Discretion. Challenges to the trial court's management of a case are reviewed for abuse of discretion. For example, trial courts have broad authority to impose and enforce reasonable time limits for each side's presentation of the case [*see Navellier v. Sletten (9th Cir 2001) 262 F3d 923, 941 , cert. denied sub nom. McLachlan v. Simon, 536 US 941 (2002)*]. However, trial courts may not rigidly adhere to time limits as to "sacrifice justice in the name of efficiency" [*General Signal Corp. v. MCI Telecomms. Corp. (9th Cir 1995) 66 F3d 1500, 1509 , cert. denied, 516 US 1146 (1996)*].

Cross Reference:

Discussion of application of abuse of discretion standard, see *16.13[3], [4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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16.23 Settlement Conferences.

16.23[1] Settlement Conferences Are Discretionary Unless Mandated by Local Rule. Although settlement may be discussed at every pretrial conference, courts may also hold conferences specifically for the purpose of discussing and encouraging settlement [*Fed R Civ P 16(c)(2)(I)*].

Counsel should consult the local rules [*see 16.23[6]*], as well as the individual judge's rules, to determine whether settlement conferences are mandatory or discretionary, and whether counsel may initiate a request for a settlement conference.

Strategic Point:

If not required by local rule, counsel should consider requesting a judicially hosted settlement conference. Settlement conferences can help the parties understand their respective positions, the evidence, and reasoning that supports those positions, and identify what the parties must do by way of disclosures, discovery, or motion to favorably position the case. Settlement prospects may be enhanced when the person hosting the negotiations is a sitting judge other than a judge assigned to try the case. Judges almost never suffer from a conflict of interest (or an appearance of such a conflict) that might compromise parties' feelings about the judges' ability to be neutral and fair.

Cross Reference:

Discussion of preparation for settlement and settlement conferences, see *Ch. 31, Settlement Agreements and Offers of Judgment, 31.03 -31.12*. Discussion of settlement procedures required under local rules, see Ch. 32, Court Annexed ADR.

16.23[2] Courts Cannot Coerce Settlement. Federal jurisprudence encourages pretrial settlement discussions and favors the settlement of civil actions. However, although the presiding judicial officer has discretion in determining the

applicable settlement conference procedure, federal judicial officers may not coerce settlement [*see Kothe v. Smith (2d Cir 1985) 771 F2d 667, 669*].

16.23[3] Evaluating Benefits of Settlement Conferences. Settlement conferences may be beneficial to the litigants even if an early settlement is not achieved. The advantages of settlement conferences include the following:

- Assisting the parties in understanding the factual and legal issues in the case, including identifying the strengths and weaknesses of their own positions;
- Highlighting remaining disclosure, discovery, or motion practice needed to position the case for settlement or trial;
- Providing an opportunity for extended dialogue across party lines regarding the pertinent evidence and law;
- Offering the litigants an opportunity to present the equities of their case to a representative of the court system.

16.23[4] Referring Settlement Conference to Magistrate Judge or Special Master. Federal district court judges typically refer the settlement conference to a magistrate judge, special master, or other neutral mediator, particularly in nonjury cases [*see 16.24*, *16.25*].

Strategic Point:

If the district judge volunteers involvement in settlement discussions, and seeks the consent of all parties to that involvement, a dilemma is presented, particularly in nonjury cases. Counsel should make every possible effort to find others who have participated in settlement conferences with the assigned judge, in an effort to gain as much insight as possible into the judge's settlement approach.

16.23[5] Preparing and Filing Settlement Conference Statement. Settlement conference statements, if required, ordinarily outline the facts of the case, the contentions of the parties, and the damages. Counsel should consult the individual judge's rules to determine whether settlement conference statements must be filed.

Cross References:

General coverage of settlement, see Ch. 31, Settlement Agreements and Offers of Judgment.

Discussion of use of settlement conferences hosted by magistrate judge or district judge, see 3 *Moore's Federal Practice, § 16.53[9]* (Matthew Bender 3d ed.).

16.23[6] LOCAL PRACTICE: Settlement Conferences.

16.23[6][a] LOCAL PRACTICE: CD Cal Requirements. Unless exempted by the trial judge, the parties in each civil case must participate in one of the settlement procedures prescribed by rule or as otherwise approved by the trial judge [*CD Cal Civ LR 16-15.1*]. Except as otherwise ordered by the court, a Notice of Settlement Procedure Selection, signed by counsel for both sides, must be filed no later than 14 days after entry of the scheduling order. The parties must participate in the settlement procedures selected by the court, unless otherwise ordered, no later than 45 days before the final pretrial conference [*CD Cal Civ LR 16-15.2*]. If the parties do not file a timely Notice of Settlement Procedure Selection, the trial judge may order the parties to participate in any of the prescribed settlement procedures [*CD Cal Civ LR 16-15.3*].

16.23[6][b] LOCAL PRACTICE: ED Cal Requirements. A settlement conference is mandatory in all actions unless otherwise ordered by the court on objection of a party or for other good cause. Counsel must notify the court when the settlement conference is set if the litigation is unusual or complex and if there is a need to provide for additional time or special arrangements to ensure that the settlement conference will be meaningful [*ED Cal Civ LR 270(a)*]. The assigned judge or magistrate judge assigned to try the action will not conduct the settlement conference unless all parties affirmatively request that the assigned judge or magistrate judge participate in the conference and waive in writing any claim of disqualification on that basis to act as judge or magistrate judge subsequently in the action [*ED Cal Civ LR 270(b)*; *see ED Cal Civ LR 240(a)(16)*].

16.23[6][c] LOCAL PRACTICE: ND Cal Requirements. The court may refer a case to a settlement conference on its own initiative, on the request of a party, or on the stipulation of the parties [*ND Cal ADR LR 7-2*]. A party may file a motion seeking referral with the assigned judge at any time (unless the case has been assigned to the ADR Multi-Option Program) [*ND Cal ADR LR 7-3*]. Although ordinarily conducted by a magistrate judge, the assigned judge has discretion to conduct the settlement conference on the written stipulation of all parties [*ND Cal ADR LR 7-2*].

16.23[6][d] LOCAL PRACTICE: SD Cal Requirements. In every civil action, a mandatory settlement conference must be scheduled before the assigned magistrate judge (or other judicial officer as the assigned district judge may direct). If the judicial officer assigned to conduct the settlement conference determines that a case is ready for a settlement conference before the scheduled date, the judge may order the parties and counsel to appear for an early conference [*SD Cal Civ LR 16.3(a)*; *SD Cal Civ LR 16.1(d.4)*]. The judge conducting the settlement conference may require the parties or representatives of a party other than counsel, who have authority to negotiate and enter into a binding settlement, to be present at the settlement conference [*SD Cal Civ LR 16.3(b)*]. The judge conducting the settlement conference may schedule as many follow-up settlement conferences as the judge finds appropriate in light of the complexity of the matter or any circumstances in the case [*SD Cal Civ LR 16.3(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial ConferencesGovernmentsCourtsRule Application & Interpretation

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II. PARTICIPATING IN PRETRIAL CONFERENCES
C. Referring Cases to Magistrate Judges

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16.24 Judges May Appoint Magistrate Judges.

16.24[1] Magistrate Judge May Handle Significant Pretrial Activity. As a result of the congested dockets in district courts, and the need to allocate judicial resources, district judges may appoint magistrate judges to handle significant pretrial activity, particularly with respect to scheduling and planning [*see 28 USC § 636*].

16.24[2] Scope of Assignments Varies. The types of assignments that may be given to magistrate judges vary significantly, even within the same court. Some district judges assign all responsibility for handling all discovery disputes in all their cases to magistrate judges, while others almost never refer discovery matters to magistrate judges, and others selectively refer particular discovery disputes to magistrate judges. Further, some judges assign substantial case management responsibilities to magistrate judges, whereas others never assign substantial case management responsibilities.

Counsel should consult the local rules of the particular district, as well as the individual judge's rules, regarding assignment of cases to magistrate judges [*see 16.24[3]*].

Consider:

Referring case management, discovery, or settlement work to magistrate judges can be advantageous because the magistrate judge may be able to devote substantially more time to the case than district judges. The magistrate judge may be better able to learn the details of the pertinent evidence and law and provide closer supervision and more detailed guidance concerning the development of the case. However, the referral may also result in delay stemming from requests for review of the magistrate judge's findings, proposed findings, or recommendations.

Investigating Magistrate Judges Using Online Resources.

Many resources are available online for investigating magistrate judges. These resources can help you find information and cases pertaining to your assigned magistrate judge. For example, helpful resources at lexis.com include:

- Legal tab> Reference> Law> Judicial Staff Directory.
  - Sample Search: For biographical information on a magistrate judge currently sitting on a federal bench, use a NAME segment search: *name (First Name /3 Last Name)*.
- Legal tab> Reference> Biographies> Biographies.
  - Sample Search: For biographical information on a particular magistrate judge, use a NAME segment search: *name (First Name /3 Last Name)*.
- Legal tab> Federal Legal--U.S.> Federal Courts by Circuit> Federal Cases by Circuit> 9th Circuit--US Court of Appeals Cases & Bankruptcy Appellate Panel
  - Sample Search: For appellate decisions on a magistrate judge's rulings in a particular procedural setting or on a particular substantive topic, use the HISTORY segment with the judge's last name in this format plus words for finding the specific topic, for example: summary judgment and history *(First Name /3 Last Name /3 j or judge or hon!)*.
- News & Business tab> Combined Sources> News, All (English, Full Text)
  - Sample Search: For news articles on a particular magistrate judge, try a simple search: *First Name /3 Last Name*.

Cross References:

Role of magistrate judges, see 3 *Moore's Federal Practice, § 16.04[2][a][i]*; 14 Moore's Federal Practice, Ch. 72, Magistrate Judges; Pretrial Orders; Ch. 73, Magistrate Judges; Trial by Consent and Appeal Options (Matthew Bender 3d ed).

Practice Before Federal Magistrates (Matthew Bender).

Manual for Complex Litigation, Fourth, § 11.53.

16.24[3] LOCAL PRACTICE: Assigning Case to Magistrate Judge.

16.24[3][a] LOCAL PRACTICE: CD Cal Requirements. Magistrate judges are authorized to perform all of the duties and functions prescribed and authorized by *28 USC § 636*, or any other statutes or rules authorizing magistrate judges to perform judicial duties or functions, as set forth in General Order No. 01-13, or any successor General Order. Magistrate judges have the inherent power of judicial officers to implement and enforce their own orders and to regulate proceedings before them, to the extent permitted by law [*CD Cal Civ LR 72-1*]. The magistrate judge's ruling as to non-dispositive motions remains in effect unless the ruling is stayed or modified by the magistrate judge or the district judge [*CD Cal Civ LR 72-2.2*].

16.24[3][b] LOCAL PRACTICE: ED Cal Requirements. The appropriateness of a referral to a magistrate judge will be discussed at status conferences [*ED Cal Civ LR 240(a)(15)*].

The status (pretrial scheduling) conference will be held before the assigned judge *unless* all parties reach a prior agreement to consent to the jurisdiction of the magistrate judge. At the time the action is filed, the plaintiff or removing defendant will ordinarily receive a form to consent to the exercise of jurisdiction by a magistrate judge. If the parties agree to submit to the jurisdiction of the magistrate judge before the scheduling conference, the parties should promptly notify the assigned judge so the scheduling conference may be rescheduled before the assigned magistrate judge.

16.24[3][c] LOCAL PRACTICE: ND Cal Requirements. The assigned district judge may designate a magistrate judge to conduct the initial case management conference and, subject to *28 USC § 636*, other pretrial proceedings in the case [*ND Cal Civ LR 16-10(a)*]. Whether the parties will consent to a magistrate judge to conduct the trial will be discussed at case management conferences [*ND Cal Civ LR 16-2*]. Debt collection cases involving the federal government are automatically assigned to magistrate judges [*see, e.g., ND Cal Civ LR 16-6*].

When a case is initially assigned to a magistrate judge, unless the magistrate judge sets a different deadline, the parties must either file written consent to the jurisdiction of the magistrate judge, or request reassignment to a district judge, by the deadline for filing the initial case management conference statement [*ND Cal Civ LR 73-1(a)(1)*]. If a motion that cannot be heard by the magistrate judge without the consent of the parties [*see 28 USC § 636(c)*] is filed before the initial case management conference, the parties must either file written consent to the jurisdiction of the magistrate judge, or request reassignment to a district judge, no later than seven days after the motion is filed [*ND Cal Civ LR 73-1(a)(2)*].

16.24[3][d] LOCAL PRACTICE: SD Cal Requirements. Civil matters are assigned to the magistrate judges either as a matter of course by the court clerk or by an order of special designation by a district judge of the court [*SD Cal Civ LR 72.2(a)*; *see 28 USC § 636(b), (c)*]. Further, the clerk will notify the parties in all civil cases that they may consent to have a magistrate judge conduct any or all proceedings in the case and order the entry of a final judgment [*SD Cal Civ LR 73.1(a)*]. The clerk will not accept a consent form unless it has been signed by all the parties in a case. The plaintiff is responsible for securing the execution of a consent form by the parties and for filing the form with the clerk [*SD Cal Civ LR 73.1(b)*].

16.24[4] Seeking Review of Magistrate Judge's Ruling. Procedures for review of a magistrate judge's ruling are ordinarily prescribed by local rule.

Example:

> The Central District provides that a party objecting to a magistrate judge's ruling on a pretrial matter not dispositive of a claim or defense must file a motion for review by the assigned district judge, designating the specific portions of the ruling objected to and stating the grounds for the objection, within (1) 14 days of service of a written ruling or (2) 14 days of an oral ruling that the magistrate Judge indicates will not be followed by a written ruling [*see, e.g., CD Cal Civ LR 72-2.1*].

When reconsidering a magistrate judge's ruling or report and recommen-dation, the standard of review applied by a district court varies with the type of decision made, and the basis for the decision. Interlocutory scheduling orders issued by a magistrate judge, for example, may be reviewable by a district judge under the *clearly erroneous* or the *abuse of discretion standard*. The *clearly erroneous* standard is applied to findings of fact made by magistrate judges that support rulings on non-dispositive motions, or the exercise of case-management discretion [see *28 USC § 636(b)(1)(A)*].

When reviewing aspects of a magistrate judge's decision that involve interpretations of applicable law, district courts apply the *contrary to law* standard, meaning de novo review. District judges must also apply the de novo standard when ruling on objections to a magistrate judge's report and recommendation on a potentially dispositive motion [*see 28 USC § 636(b)(1), (c)(4)*; *Fed R Civ P 72*].

Strategic Point:

Parties may ask the assigning judge to reconsider a scheduling order entered by a magistrate judge by filing a challenge within 14 days after being served with a copy of the order. Any objections not timely filed are waived [*Fed R Civ P 72(a)*].

Cross References:

Discussion of review by district judge, see 14 *Moore's Federal Practice, § 72.11* (Matthew Bender 3d ed).

Discussion of appeal from magistrate's decision on non-dispositive motion, see *Practice Before Federal Magistrates, § 16.07* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral OverviewCivil ProcedureJudicial OfficersMagistratesPretrial OrdersCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsJudgesGovernmentsCourtsRule Application & Interpretation

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II. PARTICIPATING IN PRETRIAL CONFERENCES
D. Appointing Masters for Case Management

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16.25 Use of Masters.

16.25[1] Referring Case to Master Is Exception. Relying on their inherent authority and *Fed R Civ P 53*, district judges may appoint a master to perform a wide range of pretrial functions, including assigning responsibility for case management, discovery, settlement, and ADR processes; and conducting evidentiary hearings for major pretrial motions.

Referrals are ordinarily made in complex or unusually contentious jury cases, in nonjury actions for matters of account and difficult computation of damages, in nonjury actions on a showing that the appointment is required by some exceptional condition, and when the parties consent to the appointment of a magistrate judge to serve as master [*see Fed R Civ P 53(a)*]. A magistrate judge is subject to the masters rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under Rule 53 [*Fed R Civ P 53(h)*].

Referrals to a master are the exception rather than the rule, and occur with less frequency than referrals to magistrate judges [*see Fed R Civ P 53(a)*].

Strategic Point:

Referring case management, discovery, or settlement work to masters can be advantageous because the special master may be able to devote substantially more time to the case than a district judge. The master may be better able to learn the details of the pertinent evidence and law and provide closer supervision and more detailed guidance concerning the development of the case. However, the referral may cause significant additional costs and delay. The district court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay [*Fed R Civ P 53(a)(3)*].

16.25[2] Prior Notice and Hearing Required. The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment [*Fed R Civ P 53(b)(1)*].

16.25[3] Authority of Master. Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to fairly and efficiently perform the assigned duties. The master may by order impose on a party any noncontempt sanction [see *Fed R Civ P 37*, *45*], and may recommend a contempt sanction against a party and sanctions against a nonparty [*Fed R Civ P 53(c)(2)*]. A master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence, unless the appointing order expressly directs otherwise [*Fed R Civ P 53(c)(1)(C)*]. A master is not required to follow the Federal Rules of Evidence or Federal Rules of Civil Procedure, absent a reference order that requires the master to do so [*see United States v. Clifford Matley Family Trust (9th Cir 2004) 354 F3d 1154, 1161*].

16.25[4] Compensation. In general, the court fixes the master's compensation before or after judgment on the basis and terms stated in the order of appointment. However, the court may set a new basis and terms after notice and an opportunity to be heard [*Fed R Civ P 53(g)(1)*]. The court determines whether the master's compensation is to be charged to a party, the parties, or paid out of a fund or subject matter of the action that is in the court's custody or control [*see Fed R Civ P 53(g)(2)*].

16.25[5] Seeking Review of Master's Determination. After the master files the required report or recommendation, or enters and files an order, any party may, within 21 days of service, object to it, or move to adopt or modify it [*Fed R Civ P 53(f)(2)*; *see Sea Coast Foods, Inc. v. Lu-Mar Lobster & Shrimp, Inc. (9th Cir 2001) 260 F3d 1054, 1058* (party required to pay special master's fee over objection to appointment of master)].

In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard, may receive evidence, and may take any of the following actions [*Fed R Civ P 53(f)(1)*]:

- Adopt or affirm;
- Modify;
- Wholly or partly reject or reverse; or
- Resubmit to the master with instructions.

The trial court must ordinarily decide de novo any party's timely objections to findings of fact made or recommended by the master. However, the parties may stipulate, with the trial court's consent, that the master's findings (1) will be reviewed for clear error, or (2) will be final respecting matters that were referred to the master with the consent of all of the parties or matters relating to pretrial or posttrial proceedings [*Fed R Civ P 53(f)(3)*]. The court must decide de novo all objections to conclusions of law made or recommended by a master [*Fed R Civ P 53(f)(4)*]. The court may set aside a master's ruling on a procedural matter only for an abuse of discretion, unless the order of appointment establishes a different standard of review [*Fed R Civ P 53(f)(5)*].

Cross References:

Discussion of referral to masters, 3 *Moore's Federal Practice, §§ 16.04[2][a][ii]*, *16.53[8]*; 9 *Moore's Federal Practice, §§ 53.10*, *53.12*, *53.42* (Matthew Bender 3d ed).

Manual for Complex Litigation, Fourth, § 11.52.

16.25[6] LOCAL PRACTICE: Use of Masters.

16.25[6][a] LOCAL PRACTICE: CD Cal Requirements. The court may appoint a master by written order [*CD Cal Civ LR 53-1*]. The master's fees and expenses, when approved by the court, will be paid as ordered by the court. These amounts are recoverable as costs [*CD Cal Civ LR 53-2*; *see CD Cal Civ LR 54-4.10*]. In the Central District,

masters are not commonly used except in cases where special expertise is required or cases involving contentious and protracted discovery.

16.25[6][b] LOCAL PRACTICE: ED Cal Requirements. The appropriateness of a referral to a special master will be discussed at status conferences [*ED Cal Civ LR 240(a)(15)*].

16.25[6][c] LOCAL PRACTICE: ND Cal Requirements. Fees paid to masters are allowable as costs [*ND Cal Civ LR 54-3(f)*]. In the Northern District, masters are generally appointed only in very unusual circumstances, due the expense of the procedure.

16.25[6][d] LOCAL PRACTICE: SD Cal Requirements. A magistrate judge may be designated by a judge to serve as a special master in appropriate civil cases [*see 28 USC § 636(b)(2)*; *Fed R Civ P 53*]. On the parties' consent, a magistrate judge may be designated by a judge to serve as a special master in any civil case [*SD Cal Civ LR 72.1(f)*].

Any party may seek review of, or action on, a master's report filed by a magistrate judge in accordance with the provisions of *Fed R Civ P 53(e)* [*SD Cal Civ LR 53.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureJudicial OfficersMastersAppointmentsCivil ProcedureJudicial OfficersMastersCompensationCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsJudges

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CHAPTER 16 Case Management Conferences
III. FORMS

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16.26 Proposed Scheduling Order.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	PROPOSED SCHEDULING ORDER
	)	
	)	

A scheduling conference was held in this case on _____ [*date*] pursuant to the provisions of *Federal Rules of Civil Procedure, Rule 16(b)*. The conference was held _____ [in person *or* by telephone conference call].

The parties appeared as follows: _____ [*set forth all appearances*]

After consultation with the parties, the Court orders as follows:

1. New parties must be joined and served by _____ [*date*].

2. Third-party practice must be commenced by _____ [*date*].

3. Amendments to pleadings must be filed by _____ [*date*].

4. All motions must be filed and heard on or before _____ [*date*].

5. Discovery must be completed by _____ [*date*].

6. Counsel will exchange proposed exhibits and a list of witnesses, together with their addresses, by _____ [*date*]. Exhibits and witnesses not exchanged as required by this order will not be permitted to be received in evidence or testify, respectively, except by agreement of counsel or upon order of the Court, or in proper rebuttal.

7. Plaintiff must file and serve the trial memorandum by _____ [*date*].

8. Defendant must respond to plaintiff's trial memorandum by _____ [*date*]. Plaintiff must reply to defendant's response to plaintiff's trial memorandum by _____ [*date*].

9. Plaintiff must designate its experts by _____ [*date*].

10. Plaintiff must file its experts reports by _____ [*date*].

11. Defendant must designate its experts by _____ [*date*].

12. Defendant must file its experts reports by _____ [*date*].

13. The joint pretrial conference statement is due on _____ [*date*].

14. The pretrial conference will be held on _____ [*date*]. Trial counsel must attend and be prepared to discuss all aspects of the suit and trial, including settlement.

15. Trial is set for _____ [*date*].

16. The trial will be _____ [jury *or* nonjury].
Date: _____

PLAINTIFF:

By _____

_____ [*typed name and signature of counsel*]

_____ [*firm name, if applicable*]

_____

[*attorney's or firm's address, telephone number, and any other identifying information required by local district court rules*]

.....
DEFENDANT:

By _____

_____ [*typed name and signature of counsel*]

_____ [*firm name, if applicable*]

_____

[*attorney's or firm's address, telephone number, and any other identifying information required by local district court rules*]

NOTES.

Authority:
Fed R Civ P 16(b)

Timing of Scheduling Order:
See *16.06[3]*

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Unit 4 Required Conferences and Case Management
CHAPTER 16 Case Management Conferences
III. FORMS

2-16 MB Practice Guide: Fed Pretrial Civ Proc in CA 16.27

16.27 Local District Court Forms.

Local district court forms relating to matters addressed in this chapter are listed below.

Central District

Statement of Consent to Proceed Before a United States Magistrate Judge Pursuant to Title 28 USC § 636(c) (CIV-11)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Eastern District

Notice, Consent, and Order of Reference -- Exercise of Jurisdiction by a United States Magistrate Judge (AO 85)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Northern District

Consent to Proceed before a Magistrate Judge

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Declination to Proceed before a Magistrate Judge and Request for Reassignment

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Joint Case Management Statement and Order

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Supplemental Case Management Statement and Proposed Order

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Southern District

Consent to Proceed Before a United States Magistrate Judge (AO 85)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Cross Reference:

Automated HotDocs(R) and PDF versions of these forms may be accessed and filled in from the online version of this publication, and are also available at www.LexisOne.com/forms.

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Unit 4 Required Conferences and Case Management
CHAPTER 17 Final Pretrial Conference

2-17 MB Practice Guide: Fed Pretrial Civ Proc in CA 17.syn

§ 17.syn Synopsis to Chapter 17: Final Pretrial Conference

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17.09[1] Counsel Must Meet to Discuss Specified Matters at Least 40 Days Before Date Set for Final Pretrial Conference.

17.09[2] Parties Must Serve and File Memorandum of Contentions of Fact and Law at Least 21 Days Before Final Pretrial Conference.

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17.13 Final Pretrial Order Defines Scope of Trial.

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17.13[2][a] Order Guides and Controls Subsequent Course of Action Unless Modified.

17.13[2][b] Order May Relieve Party of Need to Prove Certain Matters at Trial.

17.13[2][c] Stipulations in Pretrial Order Are Binding at Trial.

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17.13[3] Final Pretrial Order Has Preclusive Effect.

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17.15 Immediate Appellate Review of Final Pretrial Orders Is Generally Not Available.

17.15[1] Appellate Review Is Ordinarily Deferred.

17.15[2] Trial Management Decisions Reviewed for Abuse of Discretion.

17.16 CHECKLIST: Sanctions for Failure to Comply With Pretrial Duties.

17.17 Imposing Sanctions to Enforce Final Pretrial Order and Other Pretrial Duties.

17.17[1] Sanctionable Conduct.

17.17[1][a] Failing to Attend or Substantially Prepare for Conference.

17.17[1][b] Failing to Participate in Good Faith in Pretrial Conference.

17.17[1][c] Failing to Obey Pretrial Order.

17.17[1][d] Violating Local Rules.

17.17[2] Bad Faith Not Required.

17.17[3] Sanctions May Be Imposed on Motion or Sua Sponte.

17.17[4] Offending Party Must Have Notice and Opportunity to Show Cause.

17.17[5] Court Has Broad Discretion to Select Appropriate Sanction.

17.17[5][a] Selection of Sanction Is Discretionary.

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17.19 Information About Witnesses, Documents, Exhibits, and Other Evidence Must Be Given to Other Parties and Filed With Court

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17.19[2] Identification of Witnesses.

17.19[3] Deposition Testimony to Be Used.

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17.20 LOCAL PRACTICE: Rule 26(a)(3) Disclosures.

17.20[1] LOCAL PRACTICE: CD Cal Requirements.

17.20[1][a] LOCAL PRACTICE: CD Cal Requirements--Witness List.

17.20[1][b] LOCAL PRACTICE: CD Cal Requirements--Exhibit List.

17.20[2] LOCAL PRACTICE: ED Cal Requirements.

17.20[2][a] LOCAL PRACTICE: ED Cal Requirements--Witness List.

17.20[2][b] LOCAL PRACTICE: ED Cal Requirements--Exhibit List.

17.20[3] LOCAL PRACTICE: ND Cal Requirements.

17.20[4] LOCAL PRACTICE: SD Cal Requirements.

17.20[4][a] LOCAL PRACTICE: SD Cal Requirements--Witness List.

17.20[4][b] LOCAL PRACTICE: SD Cal Requirements--Exhibit List.

17.21 Disclosures Must Be Made 30 Days Before Trial.

17.22 Objections to Certain Evidence Must Be Filed Within 14 Days.

17.23 Disclosures Must Be Made in Writing, Signed, and Served.

17.24 Parties Must Supplement or Correct Rule 26(a) Disclosures to Include Later-Acquired Information.

17.24[1] Duty Applies to Pretrial Disclosures.

17.24[2] Changes to Expert Witness Disclosures Must Be Disclosed by Time Pretrial Disclosures Are Due.

17.25 Pretrial Disclosure Statement Under Rule 26(a)(3).

17.26 Local District Court Forms.

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Unit 4 Required Conferences and Case Management
CHAPTER 17 Final Pretrial Conference
I. STRATEGY

2-17 MB Practice Guide: Fed Pretrial Civ Proc in CA 17.01

17.01 Scope.

This chapter covers:

- Determining whether a final pretrial conference is required [*see 17.04*].
- General requirements for final pretrial conferences [*see 17.05 -17.07*].
- General requirements for final pretrial orders [*see 17.08*].
- Local rule requirements for pretrial conferences and orders [*see 17.09 -17.12*].
- Effect of final pretrial orders [*see 17.13*].
- Modification and review of final pretrial orders [*see 17.14 -17.15*].
- Sanctions for failure to comply with pretrial duties [*see 17.16 -17.17*].
- Making pretrial disclosures concerning witnesses and evidence [*see 17.18 -17.24*; *Form, 17.25*].

Core Rules:
Fed R Civ P 16, 26.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConferencesSanctions

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Unit 4 Required Conferences and Case Management
CHAPTER 17 Final Pretrial Conference
I. STRATEGY

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17.02 Objective and Strategy.

Federal court practice encourages court involvement in managing litigation. Early and regular court involvement in the planning and conduct of litigation is intended to yield a more efficient, less expensive, and less rancorous process.

Purposes of the final pretrial conference include [*see Fed R Civ P 16(a)(4), (5)*]:

- Improving the quality of trial through more thorough preparation;
- Facilitating settlement; and
- Securing a just, speedy, and inexpensive determination.

The critical importance of the final pretrial order cannot be overemphasized. The order supersedes the pleadings; governs who may be called as witnesses (and possibly impeachment witnesses and rebuttal witnesses); may contain binding stipulations; and may limit the questions, evidence, exhibits, and legal theories to be presented at trial. Matters not preserved in the final pretrial order are eliminated from the case [*see Patterson v. Hughes Aircraft Co. (9th Cir 1993) 11 F3d 948, 950* ; *Southern Cal. Retail Clerks Union v. Bjorklund (9th Cir 1984) 728 F2d 1262, 1264* ; *see 17.13*]. If counsel is unprepared for the final pretrial conference, he or she exposes the client to the risk of unwarranted adverse rulings, including sanctions, and squanders an opportunity to affect the substance and shape of the trial.

Be sure to consult local rules as well as individual judges' standing orders. These provisions will address whether final pretrial conferences will be held, either generally or by category of case, and will address specific procedural requirements.

Detailed Discussion/Forms:

3 Moore's Federal Practice, Ch. 16, Pretrial Conferences; Scheduling; Management (Matthew Bender 3d ed.).

5 Bender's Federal Practice Forms, Rule 16, Pretrial Conferences; Scheduling; Management (Matthew Bender).

Cross References:

Discussion of related topics, see Ch. 15, Rule 26(f) Conference and Initial Disclosures; Ch. 16, Case Management Conferences; Ch. 32, Court Annexed ADR.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Orders

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Unit 4 Required Conferences and Case Management
CHAPTER 17 Final Pretrial Conference
II. PARTICIPATING IN FINAL PRETRIAL CONFERENCE

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17.03 CHECKLIST: Participating in Final Pretrial Conference.

☐ Ascertain applicable procedure for final pretrial conference, consulting local rules, general orders, individual judge's standing orders, and plans.

Authority:
Fed R Civ P 16(e)

Discussion:
See *§§ 17.04 -17.07*, *17.09 -17.12*

☐ Prepare for final pretrial conference:

○ Review factual and legal bases of case, including contentions, summaries of proposed testimony, and judicial involvement to date.

○ Review all previous pleadings and rulings in case.

○ List witnesses, evidence, and exhibits for trial.

○ Review settlement possibilities with client.

☐ Draft any preliminary papers required by local rule, general orders, plans, and judge's standing orders.

Authority:
CD Cal Civ LR 16-4, *16-6*; *ED Cal Civ LR 281*; *ND Cal Civ LR 16-10(d)*; *SD Cal Civ LR 16.1(f.2)*, *(f.3)*

Discussion:
See *§§ 17.09[2]*, *17.10[1]*, *17.11[3]*, *17.12[1]*

☐ If required by local rule or individual judge's standing order, meet with opposing counsel before conference.

Authority:
CD Cal Civ LR 16-2; *ND Cal Civ LR 16-10(b)(5)*, *(6)*; *SD Cal Civ LR 16.1(f.4.a)*

Discussion:
See *§§ 17.09[1]*, *17.11[2]*, *17.12[2]*

☐ Prepare and mark exhibits, as required by local rules and individual judge's standing orders.

Authority:
CD Cal Civ LR 16-6; *ED Cal Civ LR 282(4)*; *ND Cal Civ LR 16-10(b)(5)*; *SD Cal Civ LR 16.1(f.2.c)*, *(f.4)*

☐ Participate in conference.

Authority:
Fed R Civ P 16(e); *ED Cal Civ LR 282*; *SD Cal Civ LR 16.1(f.5)*

Discussion:
See *§§ 17.05 -17.07*, *17.09[6]*, *17.10[2]*, *17.11[4]*, *17.12[4]*

☐ Prepare to respond candidly to court's inquiries.

☐ With regard to settlement, avoid any representations that contradict client's expectations and counsel's own settlement authority.

☐ Comply with requirements for drafting and filing pretrial order as required by local rules and individual judge's standing orders, keeping in mind that:

○ Order controls subsequent course of the action (e.g., supersedes pleadings) unless modified by subsequent order.

○ Order will be subject to modification only to prevent manifest injustice.

Authority:
Fed R Civ P 16(e); *CD Cal Civ LR 16-7-16-7.2*; *ED Cal Civ LR 283*; *SD Cal Civ LR 16.1(f.6.a)-(f.6.c)*

Discussion:
See *§§ 17.09[4]*, *17.10[3]*, *17.12[3]*, *17.13*

☐ Consider whether to file objections to proposed final pretrial order.

Authority:
ED Cal Civ LR 283(a); *SD Cal Civ LR 16.1(f.6.a)*

Discussion:
See *§§ 17.10[3][b]*, *17.12[3]*

☐ Consider having transcript of conference prepared for future reference in guiding the litigation.

☐ Prepare and file trial brief, if required or permitted by local rules:

Authority:
CD Cal Civ LR 16-10; *ED Cal Civ LR 285*

Discussion:
See *§§ 17.09[7]*, *17.10[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersGovernmentsCourtsRule Application & Interpretation

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Unit 4 Required Conferences and Case Management
CHAPTER 17 Final Pretrial Conference
II. PARTICIPATING IN FINAL PRETRIAL CONFERENCE

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17.04 Determining Whether Final Pretrial Conference Will Be Held.

17.04[1] Local Rules Must Be Consulted. A federal district court judge may, but is not required to, hold a final pretrial conference under the Federal Rules [*see Fed R Civ P 16(e)*]. District court judges have discretion to determine whether to hold the conference and to set the conference agenda.

Warning:

Counsel must consult the district's local rules, as well as the individual judge's standing orders, to determine whether a conference will be required and to ascertain the applicable procedures and agenda.

Consider--Terminology:

Different district courts use different labels to describe pretrial conferences. Courts use the terms *pretrial conference*, *final pretrial conference*, or *case management conference*. Local rules may prescribe the appropriate terminology. For example, the Northern District designates "scheduling," "discovery," or "status" conferences under *Fed R Civ P 16* and *26* as "case management conferences." All statements, proposed orders, or other documents prepared in connection with these conferences must be referred to as such [*ND Cal Civ LR 16-1*]. This chapter uses the term "final pretrial conference" in the general text, but the appropriate, district-specific term in the local practice discussions.

Cross Reference:

Discussion of final pretrial conference as discretionary, see 3 *Moore's Federal Practice, § 16.71* (Matthew Bender 3d ed.).

17.04[2] LOCAL PRACTICE: Determination of Whether District Requires Final Pretrial Conference.

17.04[2][a] LOCAL PRACTICE: CD Cal Requirements. The Central District generally requires a final pretrial conference [*CD Cal Civ LR 16-8*].

Exception:

The final pretrial conference may be waived for cases that are realistically estimated to take no more than two trial days, unless the court orders otherwise [*CD Cal Civ LR 16-11.3*].

The following categories of cases are also exempted from the requirements for a final pretrial conference under *Fed R Civ P 16* [*CD Cal Civ LR 16.12(a)-(h)*]:

- Petitions filed under *28 USC § 2241 et seq*., (habeas corpus) or their functional equivalents;
- Actions for judicial review of a decision by the Commissioner of Social Security under *42 USC § 405(g)*;
- Any case in which the plaintiff is appearing *pro se* and is not an attorney;
- Any case removed to the Central District from the small claims division of a state court;
- Appeals from the bankruptcy court;
- Extradition cases;
- Actions to enforce or quash an administrative summons or subpoena; and
- Actions by the United States to collect on a student loan guaranteed by the United States.

Cross Reference:

Discussion of obtaining relief from case management schedule in Central District, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, see *§ 15.09[1]*.

17.04[2][b] LOCAL PRACTICE: ED Cal Requirements. The Eastern District requires a final pretrial conference [*see ED Cal Civ LR 282*].

17.04[2][c] LOCAL PRACTICE: ND Cal Requirements. The assigned judge or magistrate judge may, *sua sponte* or in response to a stipulated request or motion, schedule case management conferences subsequent to the initial conference. Each party must be represented at any subsequent case management conference by counsel having authority with respect to matters under consideration [*ND Cal Civ LR 16-10(b)(12), (c)*].

Judge's Perspective:

Although not required by local rule, most judges in the Northern District do conduct a final pretrial conference.

17.04[2][d] LOCAL PRACTICE: SD Cal Requirements. The Southern District requires a final pretrial conference [*SD Cal Civ LR 16.1(d.2.e)*] unless the court has waived pretrial procedures [*SD Cal Civ LR 16.1(a.2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial ConferencesGovernmentsCourtsRule Application & Interpretation

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17.05 At Least One Attorney for Each Party Attends Final Pretrial Conference.

The final pretrial conference must be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties [*Fed R Civ P 16(e)*]. At least one of the participating attorneys for each party must have authority to enter into stipulations, and to make admissions regarding all matters that might reasonably be anticipated to be discussed [*Fed R Civ P 16(c)(1)*].

Additional attendance requirements may be imposed by local rules, or by the individual judge's standing orders [*see CD Cal Civ LR 16-8*, *16-13*; *ND Cal Civ LR 16-3*; *SD Cal Civ LR 16.1(f.7.d)*].

Cross Reference:

Discussion of mandatory participants in final pretrial conference, see 3 *Moore's Federal Practice, § 16.75* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Conferences

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17.06 Final Pretrial Conference Is Held Near Time of Trial.

The final pretrial conference is held as close to the time of trial as is reasonable under the circumstances [*Fed R Civ P 16(e)*]. How close to the trial date is reasonable under the circumstances is left to the sound discretion of the assigned judge [*Fed R Civ P 16*, Committee Note of 1983].

Relevant factors in setting the conference date include:

- The complexity of the case;
- The number of parties;
- The amount and nature of the evidence likely to be proffered at trial;
- The number, difficulty, and importance of unresolved issues;
- The relative clarity or obscurity of the applicable law; and
- The need for specialized jury instructions.

A key variable that can affect a judge's decision about when to hold the final pretrial conference is the implementation of pretrial disclosures under *Fed R Civ P 26(a)(3)* [*see 17.18 -17.24*]. The court coordinates the timing of the final pretrial disclosures and the listing of objections mandated by the rule. In most circumstances, the court will need to give counsel at least three weeks between the time they make their final pretrial disclosures and the time they file their final pretrial conference statements. It is likely to take counsel that long to digest what they learn through the disclosures, to develop lists of possible objections, to confer in an effort to resolve as many disputes as possible without judicial intervention, to prepare any necessary motions in limine, and to frame oppositions to those motions.

Strategic Point:

Counsel who conclude that the date that the court has fixed for the final pretrial conference is appreciably

too close to or too far in advance of the trial date might propose an alternative schedule. Such a proposal is likely to receive the best reception if made jointly, in writing, and if the proposal describes with particularity why the change is necessary.

Timing

Most judges have their own formula and work backwards from the trial date to set the schedule. Time is allocated to allow for all anticipated motions and other matters. If there is a particular need to deviate from the judge's schedule, the need should be raised at the conference.

Judge's Perspective:

An extensive number of in limine motions may create a problem for the court if there is not enough time between their filing and the date of the final pretrial conference.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Conferences

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II. PARTICIPATING IN FINAL PRETRIAL CONFERENCE

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17.07 Agenda Items for Final Pretrial Conference.

17.07[1] Formulation of Trial Plan. The primary purpose of a final pretrial conference is to formulate a specific plan for trial, including a program for facilitating the admission of evidence [*Fed R Civ P 16(e)*]. A detailed plan might address the following matters:

- The juncture at which opening statements will be made (a defendant may elect to give some or all of its opening statement after the plaintiff has presented its case in chief), and the scope, content, and time allotted for the opening statements;

- The order in which each witness will testify (except those called solely for impeachment or rebuttal) or each deposition excerpt will be read, and the time allotted for each direct and cross-examination;

- The sequence in which documentary and other exhibits will be introduced, and identification of the witnesses who will sponsor the exhibits;

- When any demonstrations will be performed or site visits made;

- The junctures, if any, at which interim summarizations or arguments may be presented by counsel; and

- The scope, content, and time allotted for the closing arguments, and the order in which they will be presented.

A judge may impose reasonable time limits on the trial, and reasonable limits on the time each party has to present his or her case. These limits will be enforced at trial and upheld on appeal unless their enforcement would deny a party due process [*General Signal Corp. v. MCI Telecomms. Corp. (9th Cir 1995) 66 F3d 1500, 1508 , cert. denied, 516 US 1146 (1996)* ; *Monotype Corp. PLC v. International Typeface Corp. (9th Cir 1994) 43 F3d 443, 451* (time limits were reasonable even though less than parties' estimates)].

17.07[2] Substantive Issues. Although the primary purpose of a final pretrial conference is to formulate a specific plan for the trial of the action [*Fed R Civ P 16(e)*; *see 17.07[1]*], counsel should consult the local rules and the individual judge's standing orders for any specific final pretrial conference agenda requirements [*see 17.09[6]*, *17.10[2]*, *17.11[4]*, *17.12[4]*].

Counsel should anticipate that the following topics will be discussed at the final pretrial conference:

- Remaining or renewed prospects for settlement;

- Remaining claims and defenses, to ensure that the parties agree as to the nature of the claims and defenses to be tried, to ascertain whether any pleadings require amendment, and to determine whether any claims or defenses can be eliminated voluntarily or by order;

- Clarification of remaining parties, particularly if parties have been added to or dismissed from the case;

- Bifurcation of trial issues, such as liability and damages, or sequencing the trial of a particular claim or defense, a related cluster of claims or defenses, or a specific issue or set of issues;

- The resolution of any remaining discovery or disclosure disputes, and if appropriate, the need for any orders mandating the prompt completion of any unfinished but clearly necessary discovery activity;

- Identifying any factual, evidentiary, and procedural matters that can be resolved by stipulation (particularly regarding foundational evidentiary issues) or additional admissions;

- Rulings on the admissibility of evidence and motions in limine;

- Identification and marking of proffered documents and other exhibits;

- Remaining disputes about demonstrative evidence, visual aids, summaries, charts, or other graphics, including the submission and exchange of all proposed items;

- The scope, purposes, form, and projected duration of each witness's testimony, including testimony to be read to the jury or into the record from deposition transcripts;

- Any time limits imposed on the parties for particular parts of the trial or for all trial purposes;

- Whether and how to present input from special masters or any court-appointed neutral experts;

- What the law governing the case is (and, in a jury trial, what the jury will be told about it);

- For jury trials, the composition and voir dire of the jury (including degree of attorney input and possible use of jury questionnaire), the number of alternate jurors, proposed jury instructions, as well as court policy toward jurors regarding written copies of instructions, taking and using notes, and whether and how jurors may ask questions;

- For nonjury trials, any disputes regarding proposed findings of fact and conclusions of law submitted to the court; and

- Resolving any disputes regarding verdict forms and previously submitted special interrogatories.

Warning:

Counsel should consider that any subject listed in *Fed R Civ P 16(c)* is fair game at the conference. These matters will be addressed from the perspective of organizing, streamlining, and expediting the trial rather than discovery.

Cross Reference:

Substantive items on final pretrial conference agenda, see 3 *Moore's Federal Practice, § 16.77* (Matthew Bender 3d ed.).

17.07[3] Logistical Matters. Counsel and the court should review logistical matters at the final pretrial conference, such as the following:

- The dates and times for trial;
- The hours each day that the court will keep the trial in session, including lunch breaks;
- Whether the trial will be interrupted because of other court responsibilities, such as a motion calendar;
- Any arrangements for special equipment or facilities, such as video-monitors, slide projectors, software, displays for large graphics, or equipment and space for demonstrations, and the prospect of sharing equipment or operators;
- Security for sensitive trial materials and access to the courtroom when trial is not in session;
- Arrangements for expedited transcripts;
- Arrangements for interpreters.

Timing:

Unless previously set, the trial will ordinarily be set at the earliest date permitted by the court's calendar [*see, e.g., CD Cal Civ LR 16-8.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Conferences

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17.08 Preparing Final Pretrial Order.

17.08[1] Determining Who Will Draft Proposed Final Pretrial Order. After any Rule 16 pretrial conference, including a final pretrial conference, an order "should" be entered reciting all actions taken and rulings made [*Fed R Civ P 16(d)*]. The Supreme Court has ruled that the word "shall," as used in the rule authorizes, but does not compel, judicial action [*Gutierrez De Martinez v. Lamagno (1995) 515 US 417, 432-433 n9, 115 S Ct 2227, 132 L Ed2d 375*]. Therefore, Rule 16 does not specify who must prepare the order. Counsel should consult the local rules, as well as the individual judge's standing orders, to determine whether a final pretrial conference order is required, and if so, the requirements of the order, and whether it is counsel's responsibility to draft the proposed order [*see 17.09[4]*, *17.10[3]*, *17.11[1]*, *17.12[3]*].

Consider:

Most federal judges require a final pretrial order. Even if a final pretrial conference order is not required, counsel should nevertheless consider requesting the opportunity to present a proposed order. An order stating the decisions and stipulations made at the final pretrial conference reduces the risk of confusion, and provides a record for appellate review.

The final pretrial conference order should recite all actions taken and rulings made in the case, whether taken at the conference or earlier [*Fed R Civ P 16(d)*]. Because the order is designed to memorialize the actions and rulings at the conference, the order must be clear and comprehensive.

17.08[2] Form of Order. Some local rules require the use of a specified form. Counsel should consult the local rules, as well as the judge's standing orders to determine proper procedure.

17.08[3] Illustrative Contents. Before preparing the order, counsel should consult the applicable local rules and the trial judge's standing orders. For illustrative purposes, a final pretrial order should clearly address the following topics [*see, e.g., Manual for Complex Litigation, Fourth, §§ 11.61-11.67*; Civil Litigation Management Manual, Pt. VI (Federal Judicial Center) (3d ed.)]:

- Facts establishing jurisdiction and venue;

- A statement of the case;
- The date and time that the trial will commence;
- All rulings made at the final pretrial conference, and any earlier rulings that still govern;
- A summary of all factual and legal issues to be tried, and any issues to be severed and tried separately;
- A final list of witnesses to be called, identifying the subject of their testimony and any deposition excerpts to be read;
- Expert witnesses to be called, and a summary of their qualifications;
- Exhibits and visual aids to be presented at trial; identification of exhibits to be admitted without objection, and summary of any objections;
- Discovery excerpts from stenographic and video depositions, responses to interrogatories, and requests for admission;
- Undisputed facts and judicially noticed facts;
- Order of proof, including procedures for presenting testimony and exhibits;
- Whether additional or specified evidence is precluded;
- If jury trial, procedures for selection, management, and instruction of jury, including deadlines for submitting proposed voir dire questions and jury instruction;
- If non-jury trial, proposed findings of fact and conclusions of law;
- Any objections that are sustained, denied, or deemed waived;
- Status of discovery, disclosure, and motions;
- Procedures for consolidation, severance, or transfer of cases;
- Estimated length of trial;
- Verdict stipulations;
- Statement that the order may not be modified except to prevent manifest injustice [*see Fed R Civ P 16(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial

MattersConferencesPretrial OrdersGovernmentsCourtsRule Application & Interpretation

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17.09 LOCAL PRACTICE: CD Cal Requirements--Procedures for Pretrial Conferences and Orders.

17.09[1] Counsel Must Meet to Discuss Specified Matters at Least 40 Days Before Date Set for Final Pretrial Conference. At least 40 days in advance of the final pretrial conference date, counsel for the parties must meet together in person at a convenient time and place to:

- Ensure themselves of federal subject matter jurisdiction [*CD Cal Civ LR 16-2.1*];
- Stipulate to facts [*CD Cal Civ LR 16-2.2*];
- Exchange exhibits, witness lists, and other graphic and illustrative material [*CD Cal Civ LR 16-2.3*, *16-2.4*, *16-3*];
- Discuss status of expert witnesses [*CD Cal Civ LR 16-2.5*];
- Resolve objections to the admission of oral and documentary evidence [*CD Cal Civ LR 16-2.6*];
- Organize and share deposition testimony to be used at trial [*CD Cal Civ LR 16-2.7*];
- Make contentions of law and fact [*CD Cal Civ LR 16-2.8*]; and
- Exhaust settlement possibilities [*CD Cal Civ LR 16-2.9*].

17.09[2] Parties Must Serve and File Memorandum of Contentions of Fact and Law at Least 21 Days Before Final Pretrial Conference. At least 21 days before the final pretrial conference, each party must serve and file a Memorandum of Contentions of Fact and Law containing a summary of the party's basic factual contentions supported by legal authority in the form of a legal brief [*CD Cal Civ LR 16-4*].

The memorandum must contain:

- A brief but complete summary statement of plaintiff's claims or defendant's counterclaims and affirmative defenses [*see CD Cal Civ LR 16-4.1(a), (d)*].

- The list of the elements required to establish the claims or counterclaims and affirmative defenses [*see CD Cal Civ LR 16-4.1(b), (e)*].

- A brief description of key evidence required to support each claim or counterclaim and affirmative defense and to rebut counterclaims and affirmative defenses [*see CD Cal Civ LR 16-4.1(c), (f)*].

- Claims and defenses and supporting statements for all third parties [*see CD Cal Civ LR 16-4.1(g)*].

- A legal brief addressing any anticipated evidentiary problems and issues of law [*see CD Cal Civ LR 16-4.1(h), (i)*].

- If appropriate, requests for bifurcation, jury trial, and attorney's fees [*see CD Cal Civ LR 16-4.3, 16-4.4*, 16.4.5].

- A statement of any pleaded claims or affirmative defenses that have been abandoned [*see CD Cal Civ LR 16-4.6*].

17.09[3] Parties Must Serve and File Witness Lists and Exhibit Lists at Same Time As Memorandum of Contentions of Facts and Law. At the time of serving the Memorandum of Contentions of Facts and Law, each party must serve and file under separate cover, a witness list containing the information required by *Fed R Civ P 26(a)(3)(A)(i), (ii)* [*CD Cal Civ LR 16-5*].

Cross Reference:

Disclosure of witness lists, see *§ 17.20[1][a]*.

In addition, all parties must jointly file a single document, under separate cover, setting forth a joint list of exhibits containing the information required by *Fed R Civ P 26(a)(3)(A)(iii)* [*CD Cal Civ LR 16-6.1*].

Cross Reference:

Disclosure of exhibit lists, see *§ 17.20[1][b]*.

Counsel must obtain and prepare official exhibit tags to be placed on exhibits for trial. These exhibit tags may be obtained from the Clerk [*CD Cal Civ LR 16-6.4*].

17.09[4] Plaintiff's Counsel Prepares Final Pretrial Conference Order and Files Order at Least Eleven Days Before Final Pretrial Conference. Plaintiff's counsel prepares the final pretrial conference order, which must be signed by all counsel. All counsel are obligated to cooperate with plaintiff's counsel in the preparation and submission of this order [*CD Cal Civ LR 16-7, 16-7.1*].

Timing:

The plaintiff must file the final pretrial conference order at least eleven days before the date set for the final pretrial conference [*CD Cal Civ LR 16-7.1*].

Warning:

Counsel's failure to cooperate in the preparation and submission of the pretrial order will subject counsel to possible sanctions for violation of local rules and for multiplying proceedings "unreasonably and

vexatiously" [*CD Cal Civ LR 16-7*; *see 28 USC § 1927*, *CD Cal Civ LR 83-7*].

Strategic Point:

The parties are strongly encouraged to come to an agreement on all aspects of the pretrial order. However, should the parties fail to reach agreement on an issue, the disagreement should be noted in the proposed pretrial order. The parties should each state their position on the issue and request judicial assistance on that matter.

The order must substantially comply with the form shown in Pretrial Form No. 1 set forth in Appendix A to the Local Rules [*CD Cal Civ LR 16-7.2*]. Sections 7 and 8 of the Final Pretrial Conference Order should state only *ultimate issues* of fact and law, respectively. Evidentiary and subsidiary issues, the resolution of which is not necessary to rendering a verdict or judgment, should not be listed [*see CD Cal Civ LR 16-7.2*, CD Cal Civ LR App A, Pretrial Form No 1, PP 7, 8]. A list of objections required by *Fed R Civ P 26(a)(3)* must be included in the proposed final pretrial conference order [*CD Cal Civ LR 16-6.3*].

Cross Reference:

Disclosure of exhibit lists, see *17.20[1][b]*.

17.09[5] Continuance of Final Pretrial Conference May Be Available on Timely Stipulation or Motion. No continuances will be granted merely on the parties' stipulation. If the court is satisfied that counsel are preparing the case with diligence and additional time is required to comply with the pretrial conference rules, the Final Pretrial Conference may be continued on submission of a timely stipulation signed by all counsel setting forth the reasons for the requested continuance. The stipulation should also set forth what has been accomplished in preparing the case for the Final Pretrial Conference [*CD Cal Civ LR 16-9*].

Timing:

No continuance will be granted unless the stipulation has been lodged *before* the date on which the Final Pretrial Conference Order must be lodged with the court [*CD Cal Civ LR 16-9*].

Counsel must inform the court clerk immediately by telephone or other expeditious means when a stipulation is to be submitted for continuance of the Final Pretrial Conference [*CD Cal Civ LR 16-9*].

In addition to the stipulation procedure, local rules authorize a motion for continuance of the final pretrial conference [*CD Cal Civ LR 16-9*].

Timing:

The motion for continuance may be noticed on five days' notice to be heard no later than the last motion day before the date for which the Final Pretrial Conference has been set [*CD Cal Civ LR 16-9*].

17.09[6] Special Matters for Consideration at Final Pretrial Conference.

17.09[6][a] Unserved Parties. Any party not already dismissed who is unserved at the time of the Final Pretrial Conference will be dismissed from the action without prejudice [*CD Cal Civ LR 16-8.1*].

17.09[6][b] Other Matters. At the Final Pretrial Conference, the court will address any matter arising from the memorandums of contentions of fact and law, witness or joint exhibit lists, proposed final pretrial conference order, or other matter [*CD Cal Civ LR 16-8.2*].

17.09[6][c] Setting for Trial. The court expects that at the Final Pretrial Conference the parties will then be ready to proceed to trial. Unless previously set, the trial must be set at the earliest date permitted by the court calendar [*CD Cal Civ LR 16-8.3*].

17.09[7] Trial Brief Generally Required at Least Seven Days Before Trial. Unless the court otherwise orders, at least seven days before trial is scheduled to commence, each counsel may file and serve a trial brief that may [*CD Cal Civ LR 16-10*]:

- Supplement the contention memorandum briefly by citing newly decided cases;
- Brief such legal matters as directed by the court;
- Reply to the contention memorandum briefing of any other party; and

Warning:

Before preparing a trial brief, consult your judge's standing orders, which may set forth different deadlines for the matters required in the brief.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Orders

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17.10 LOCAL PRACTICE: ED Cal Requirements--Procedures for Pretrial Conferences and Orders.

17.10[1] Pretrial Statement Is Required, Either Joint or Separate.

17.10[1][a] Type of Statement Specified in Scheduling Order. Counsel must file either separate pretrial statements or a joint pretrial statement, as specified by the scheduling order [*ED Cal Civ LR 281(a)*].

17.10[1][b] Timing of Separate Statements. If separate pretrial statements are filed, counsel for the plaintiff must personally serve and file a pretrial statement in the prescribed form at least 14 days before the date set for the final pretrial conference. Not less than seven days before the date set for the pretrial conference, counsel for all other parties must serve on all parties and file pretrial statements that may adopt by reference any of the matters contained in the plaintiff's pretrial statement [*ED Cal Civ LR 281(a)(1)*]. Electronic filers must also concurrently submit an electronic copy of their statement in Word or Word Perfect format, following the procedures for proposed orders [*ED Cal Civ LR 281(a)(3)*; *see ED Cal Gen LR 137(b)*].

17.10[1][c] Timing of Joint Statement. If a joint pretrial statement is filed, counsel for all parties must file in the statement in the form prescribed by local rule or by the court at least seven days before the pretrial conference date, or at another time as ordered by the court [*ED Cal Civ LR 281(a)(2)*]. Electronic filers must also concurrently submit an electronic copy of their statement in Word or Word Perfect format, following the procedures for proposed orders [*ED Cal Civ LR 281(a)(3)*; *see ED Cal Gen LR 137(b)*].

17.10[1][d] Contents of Statement. The statement must provide the name of the party or parties on whose behalf it is presented and set forth the nature of the action [*ED Cal Civ LR 281(b)*]. In addition, the statement must address the numerous matters listed in *ED Cal Civ LR 281(b)*. These matters include, among other things [*ED Cal Civ LR 281(b)*]:

- Jurisdiction and venue;
- Undisputed facts;
- Disputed factual and evidentiary issues;

- Jury trial issues;
- Relief sought;
- Points of law;
- Abandoned issues;
- Witnesses;
- Exhibits;
- Discovery documents;
- Further discovery or motions;
- Stipulations;
- Amendments of pleadings and dismissals of parties;
- Settlement negotiations;
- Agreed statements;
- Separate trial of issues;
- Any special handling of trial exhibits and a statement of advisability of court retention of exhibits pending appeal;
- Use of experts; and
- Attorney's fees.

These disclosures satisfy the requirements of *Fed R Civ P 26(a)(3)* [*ED Cal Civ LR 281(d)*].

17.10[1][e] Claims of Privilege in Statement. If any privilege against disclosure is claimed with respect to a specific element of the statement, and the court has not yet determined the validity of the claim, a party may omit the element and include instead a statement of the privilege claim and the grounds therefor [*ED Cal Civ LR 281(c)*].

17.10[2] Agenda for Pretrial Conference. The agenda for the final pretrial conference includes discussion of the following [*ED Cal Civ LR 282*]:

- The items set forth in the pretrial statements filed pursuant to *ED Cal Civ LR 281*,
- The matters set forth in *Fed R Civ P 16(c)*;
- The filing of trial briefs on designated points of law likely to be presented at trial [*see ED Cal Civ LR 285*];

- The procedures for voir dire and the filing of proposed voir dire questions and proposed jury instructions [*see ED Cal Gen LR 163*];

- The filing and exchange of lists of documentary and other exhibits, summaries, schedules, and other illustrative exhibits to be offered at trial, statements waiving or reserving objections to the exhibits listed by other parties, and the marking and indexing of exhibits;

- The filing of statements designating portions of depositions, admissions and answers to interrogatories that the respective parties intend to offer at the trial (except portions to be used only for impeachment or rebuttal);

- The inspection of originals of listed exhibits and of reports of experts who will be called as witnesses [*see ED Cal Civ LR 281*]; and

- The filing of proposed findings of fact and conclusions of law.

All of the foregoing agenda items will be subject to any appropriate claims of privilege from disclosure [*ED Cal Civ LR 282*; *see ED Cal Civ LR 281(c)*].

17.10[3] Pretrial Order Must Be Submitted After Pretrial Conference.

17.10[3][a] Court May Direct Preparation by Party. The court, or a party if directed by the court, will prepare a proposed pretrial order, serve a copy on all parties, and lodge the original [*ED Cal Civ LR 283(a)*].

Timing:

If directed by the court, a party must serve and lodge the proposed order within 14 days after the pretrial conference [*ED Cal Civ LR 283(a)*].

Strategic Point:

In the Eastern District, judges typically prepare the pretrial orders, which contain a substantial number of standard provisions the particular judge has worked out over time. Counsel can best prepare for the pretrial conference by reviewing a recent pretrial order issued by the particular judge and drafting any proposed alternative language ahead of time.

17.10[3][b] Parties May Submit Objections to Pretrial Order. Any party on whom the proposed pretrial order is served may, within the time permitted in the proposed pretrial order, submit objections to the proposed pretrial order. Objections must state the bases of the objections and any changes to be made in the proposed pretrial order [*ED Cal Civ LR 283(a)*].

17.10[3][c] Contents of Pretrial Order. All pretrial orders must recite the appearances and representations (and any non-appearances) at the pretrial conference, the actions taken by the court; and agreements made by the parties with respect to each of the items discussed at the conference, except that parties may not refer to settlement negotiations. All pretrial orders must conclude by setting the date for the trial and stating the court's estimate of the number of court days required for the trial [*ED Cal Civ LR 283(b)*].

17.10[4] Trial Briefs. Counsel for each party must file and serve on all other parties within the time set by the court, but no less than 14 days before trial, a brief setting forth [*ED Cal Civ LR 285(a)*]:

- A short statement of facts;

- All admissions and stipulations not recited in the pretrial order; and

- A summary of points of law, including reasonably anticipated disputes concerning admissibility of evidence, legal arguments, and citation of authority in support thereof.

Opposing counsel may file and serve on all other parties an answering brief within the time set by the court but not less than seven days before trial [*ED Cal Civ LR 285(b)*].

For any evidentiary questions raised in a trial brief by one party and not also addressed in the opposing party's opening brief, a brief must be filed by the opposing party on those issues at least seven days before trial [*ED Cal Civ LR 285(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersGovernmentsCourtsRule Application & Interpretation

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17.11 LOCAL PRACTICE: ND Cal Requirements--Procedures for Pretrial Conferences and Orders.

17.11[1] Procedures Can Vary Significantly From Judge to Judge. In the Northern District, procedures for pretrial conferences, statements, and orders can vary significantly from judge to judge.

Judge's Perspective:
It is extremely important to pay attention to your judge's requirements. You must determine if the judge has standing orders regarding pretrial conferences and orders.

17.11[2] Case Management Order May Address Scheduling. A court may establish deadlines in the initial or any subsequent case management order for (1) counsel to meet and confer to prepare the joint final pretrial conference statement and proposed order and coordinated submission of trial exhibits and other material; and (2) filing the joint final pretrial conference statement and proposed order [*ND Cal Civ LR 16-10(b)(5), (6)*].

17.11[3] Joint Pretrial Conference Statement. Consult your judge's standing orders to determine:

- Whether the judge has published instructions or guidelines for pretrial preparation.
- Whether the court requires a joint pretrial conference statement or a different type of paper (e.g., joint proposed final pretrial order).
- Whether there are prerequisites to preparation and submission of the paper, such as:
  - Requirements that parties exchange specified types of information or papers.
  - Requirements that parties meet and confer.
- Whether the judge requires use of specific forms.

- Deadlines for submission of required papers.
- Items to be included in the pretrial conference statement or similar paper, such as:
  - A brief description of the substance of claims and defenses that remain to be decided;
  - A detailed statement of all of the relief claimed;
  - A statement of undisputed facts;
  - A statement of disputed factual issues;
  - A statement assessing whether all or part of the action may be presented on an agreed statement of facts;
  - A statement of requested or proposed stipulations;
  - A statement of disputed points of law;
  - A list of witnesses likely to be called (other than for impeachment or rebuttal) with summaries of their planned testimony;
  - A list of all documents and other items to be offered as exhibits at the trial (other than for impeachment and rebuttal) with descriptive information for each item;
  - An estimate of trial time;
  - A statement concerning the status of settlement negotiations.
- Items the court requires to be submitted separately, such as:
  - Exhibits;
  - Proposed findings of fact and conclusions of law;
  - Papers relating to jury trial (e.g., instructions, preliminary statement, voir dire questions, form of verdict);
  - Motions in limine.

17.11[4] Final Pretrial Conference. Review individual judge's standing orders to determine requirements for the final pretrial conference.

Judge's Perspective:

The final pretrial conference will be your last opportunity for significant input on how smoothly the trial will go, or to get the judge to agree to any special procedures that you may request. It is extremely important to be very well prepared and to alert the court to any potential problems or unusual issues, e.g., taking a witness out of order, scheduling problems, etc. If you will be challenging an expert witness under *Daubert*, let the judge know. Very few judges like to be surprised in the middle of a trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersGovernmentsCourtsRule Application & Interpretation

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17.12 LOCAL PRACTICE: SD Cal Requirements--Procedures for Pretrial Conferences and Orders.

17.12[1] Memorandum of Contentions of Fact and Law Generally Required at Least 15 Days Before Pretrial Hearing. Unless the court specifies otherwise, each party must serve on the other and file with the clerk a "Memorandum of Contentions of Fact and Law" no later than 5:00 p.m. 28 days before the pretrial hearing [*SD Cal Civ LR 16.1(f.2.a)*].

The memorandum must contain a concise statement of the material facts and the points of law claimed by the party and cite the authorities on which the party intends to rely at trial [*SD Cal Civ LR 16.1(f.2.a)*].

Each party must set forth a statement of any issues raised by the pleadings that have been abandoned [*SD Cal Civ LR 16.1(f.2.b)*].

In the memorandum, each party must set forth a list of all exhibits that the party expects to offer at the trial (other than those to be used for impeachment) with a description of each exhibit sufficient for identification. The list must be substantially in the form set out in Local Rule 16.1(f) [*SD Cal Civ LR 16.1(f.2.c)*].

The memorandum must set forth the names and addresses of all prospective witnesses, except impeaching witnesses. In the case of expert witnesses, a brief narrative statement of the witness's qualifications and the expected substance of the testimony must be stated [*SD Cal Civ LR 16.1(f.2.d)*].

Counsel must address additional items if the case involves negligence, wrongful death, contract, eminent domain, or patent law [*see SD Cal Civ LR 16.1(f.3)*].

17.12[2] Parties Must Meet and Confer at Least 10 Days Before Pretrial Hearing. At least 21 days before the pretrial hearing, and after each party has filed and served its memorandum of contentions of fact and law, the attorneys for the parties must convene at a suitable time and place. The purpose of the meeting is to arrive at stipulations and agreements resulting in simplification of the triable issues and to confer concerning the content of the pretrial order. Plaintiff's counsel is responsible for arranging for meetings of counsel and for preparation of the draft order [*SD Cal Civ LR 16.1(f.4.a)*].

When counsel meet to attempt to reach stipulations and discuss the form of the pretrial order, all exhibits other than those to be used for impeachment must be displayed or exchanged [*SD Cal Civ LR 16.1(f.4.a)*, *(f.4.b)*]. Each photograph, map, drawing and the like must contain a legend on its face or reverse side, stating by date the relevant matters of fact as to what the party offering the exhibit claims is fairly depicted [*SD Cal Civ LR 16.1(f.4.c)*]. The failure to display and/or exchange exhibits to or with opposing counsel may result in the exclusion of the evidence [*SD Cal Civ LR 16.1(f.4.d)*].

17.12[3] Plaintiff's Counsel Prepares Pretrial Order. Plaintiff's counsel prepares a proposed pretrial order and arranges the requisite meetings of counsel [*SD Cal Civ LR. 16.1(f.6.a)*].

Timing:

Not less than 14 days before the pretrial hearing, plaintiff's counsel must provide opposing counsel with the proposed pretrial order for review and approval [*SD Cal Civ LR 16.1(f.6.a)*].

Opposing counsel must promptly communicate with plaintiff's attorney concerning any objections to form or content of the pretrial order, and both parties should attempt promptly to resolve any differences concerning the order [*SD Cal Civ LR 16.1(f.6.a)*]. The order must substantially comply with the form set forth in the Local Rules [*SD Cal Civ LR 16.1(f.6.c)*].

Timing:

The plaintiff must file the pretrial order with the judge's chambers seven days before the pretrial hearing [*SD Cal Civ LR 16.1(f.6.b)*].

17.12[4] Matters for Consideration at Pretrial Hearing. The court will consider the following matters at the final pretrial hearing [*SD Cal Civ LR 16.1(f.5)*]:

- The pleadings, proposed amendments to the pleadings, and papers and exhibits then on file including stipulations, statements and memoranda filed pursuant to *SD Cal Civ LR 16.1(f.3)* and *(f.4)* and all matters referred to in *Fed R Civ P 16*;

- All motions and other proceedings then pending;

- The possibilities for settlement and other matters that may be presented concerning parties, process, pleading or proof with a view to simplifying issues and bringing about a just, speedy and inexpensive determination of the matter;

- The date on which the case is set for trial; and.

- Whether the parties will consent to a magistrate judge to conduct the trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersGovernmentsCourtsRule Application & Interpretation

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17.13 Final Pretrial Order Defines Scope of Trial.

17.13[1] Final Pretrial Order Supersedes the Pleadings. The court will issue an order after the final pretrial conference, reciting all actions taken at the conference [*Fed R Civ P 16(d)*].

This final pretrial order supersedes the pleadings [999 v. *C.I.T. Corp. (9th Cir 1985) 776 F2d 866, 870-871* (issue included in final order may be presented at trial even if omitted from pleadings); *Eagle v. AT&T Corp. (9th Cir 1985) 769 F2d 541, 548 , cert. denied, 475 US 1084 (1986)* (claims raised in pleadings but omitted from final order are precluded)].

Example:

If an issue is included in the final pretrial order, it can be raised at trial even though not raised by the pleadings [*see In re Hunt (9th Cir 2000) 238 F3d 1098, 1101-1102*].

17.13[2] Final Pretrial Order Guides Course of Action.

17.13[2][a] Order Guides and Controls Subsequent Course of Action Unless Modified. The final pretrial order guides and controls the subsequent course of the action unless modified by a subsequent order [*Fed R Civ P 16(e)*; *ED Cal Civ LR 283(c)*; *see also DP Aviation v. Smiths Indus. Aerospace & Def. Sys. LTD (9th Cir 2001) 268 F3d 829, 841* ; *Sousa v. Unilab Corp. Class II (Non-Exempt) Members Group Benefit Plan (ED Cal 2002) 252 F Supp2d 1046, 1058*].

Warning:

The critical importance of the final pretrial order cannot be overemphasized. The final pretrial order supersedes the pleadings, and governs who may be called as witnesses (and possibly impeachment witnesses and rebuttal witnesses); may contain binding stipulations; and may limit the questions, evidence, exhibits, and legal theories to be presented at trial [*see Southern Cal. Retail Clerks Union v. Bjorklund (9th Cir 1984) 728 F2d 1262, 1264*]. In other words, the parties are bound by the order's contents and cannot assert at trial claims raised in the pleadings but omitted from the order [*DP*

Aviation v. Smiths Indus. Aerospace & Def. Sys. LTD (9th Cir 2001) 268 F3d 829, 842 ; *see Patterson v. Hughes Aircraft Co. (9th Cir 1993) 11 F3d 948, 950*].

17.13[2][b] Order May Relieve Party of Need to Prove Certain Matters at Trial. If a matter has been agreed to in the final pretrial order, the proponent need not offer proof on the issue at trial [*United States v. First Nat'l Bank of Circle (9th Cir 1981) 652 F2d 882, 886-887*].

17.13[2][c] Stipulations in Pretrial Order Are Binding at Trial. Stipulations embodied in the order are binding at trial [*Malhiot v. Southern Cal. Retail Clerks Union (9th Cir 1984) 735 F2d 1133, 1136-1137 , cert. denied, 469 US 1189 (1984)*].

17.13[2][d] Issues Resolved by Agreement at Pretrial Conference May Not Be Raised Again at Trial. Issues resolved by agreement at the conference and set forth in the order may not be raised again at trial [*Islamic Republic of Iran v. Boeing Co. (9th Cir 1985) 771 F2d 1279, 1290-1291 , cert. dismissed, 479 US 957 (1986)*].

17.13[3] Final Pretrial Order Has Preclusive Effect. In general, a party may not offer evidence or advance theories at trial that are not included in the final pretrial order or that contradict its terms. In other words, matters not preserved in the final pretrial order are eliminated from the case [*see Southern Cal. Retail Clerks Union v. Bjorklund (9th Cir 1984) 728 F2d 1262, 1264*]. This rule serves to encourage timely and orderly litigation and to prevent unfair surprise [*Sousa v. Unilab Corp. Class II (Non-Exempt) Members Group Benefit Plan (ED Cal 2002) 252 F Supp2d 1046, 1058*].

Exception--Waiver:

If an issue omitted from the final pretrial order is tried without objection, the objection is waived and the pretrial order is deemed amended to conform to the proof [*Fed R Civ P 15(b)*; *see Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc. (9th Cir 1985) 772 F2d 505, 515* ; *Sauers v. Alaska Barge (9th Cir 1979) 600 F2d 238, 244* (litigated issue omitted from final pretrial order presented to jury; pretrial order conformed to proof)].

17.13[4] Scope of Final Pretrial Order. The final pretrial order typically disposes of all pending motions. The order may dispose of frivolous claims or defenses. Further, the order may address trial issues, such as identifying who may be called as witnesses (and possibly impeachment witnesses and rebuttal witnesses), and issues remaining. The order may contain binding stipulations and limit the questions, evidence, exhibits, and legal theories to be presented at trial [*see Southern Cal. Retail Clerks Union v. Bjorklund (9th Cir 1984) 728 F2d 1262, 1264* ; *see also Higgins v. Harden (9th Cir 1981) 644 F2d 1348, 1353*].

A court may sua sponte grant partial or full summary judgment in appropriate cases without the need for formal motion [*see Portsmouth Square, Inc. v. Shareholders Protective Comm. (9th Cir 1985) 770 F2d 866, 869* (particularly close scrutiny when summary judgment granted without motion)].

Cross Reference:

Discussion of grant of summary judgment sua sponte, see Ch. 29, Summary Judgment, see *§§ 29.07[1], 29.31[1].*

If a party has raised an issue of foreign law [*see Fed R Civ P 44.1*], the foreign law issue must be incorporated into the final pretrial order [*DP Aviation v. Smiths Indus. Aerospace & Def. Sys. LTD (9th Cir 2001) 268 F3d 829, 848*].

17.13[5] Final Pretrial Orders Should Be Liberally Construed. A final pretrial order should be liberally construed to permit any issues at trial that are reasonably embraced within its language [*DP Aviation v. Smiths Indus. Aerospace & Def. Sys. LTD (9th Cir 2001) 268 F3d 829, 841* ; *Sousa v. Unilab Corp. Class II (Non-Exempt) Members Group Benefit Plan (ED Cal 2002) 252 F Supp2d 1046, 1058*]. However, the theories raised at trial must at least be

implicit in the order [*Eagle v. AT&T Corp. (9th Cir 1985) 769 F2d 541, 548 , cert. denied, 475 US 1084 (1986)*]. Particular evidence or theories that are not at least implicitly included in the order are barred unless the final order is modified before trial [*DP Aviation v. Smiths Indus. Aerospace & Def. Sys. LTD (9th Cir 2001) 268 F3d 829, 841* ; *United States v. First Nat'l Bank of Circle (9th Cir 1981) 652 F2d 882, 886-887*].

District courts have broad discretion to determine the preclusive effect of a final pretrial order on the determination of issues of law and fact at trial [*Miller v. Safeco Title Ins. Co. (9th Cir 1985) 758 F2d 364, 369* ; *see, e.g., El-Hakem v. BJY Inc. (9th Cir 2005) 415 F3d 1068, 1076-1077* (in employment discrimination case, district court had discretion to implicitly modify pretrial order to allow "same decision" defense to be asserted to wage retaliation claim when that defense was listed in pretrial order, albeit with respect to different claim, and no prejudice resulted to plaintiff)].

Legal Topics:

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

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17.14 Modification of Final Pretrial Order.

17.14[1] Order May Be Modified to Prevent Manifest Injustice. Because the purpose of the final pretrial order is to guide the course of the litigation, it should not be changed without significant reasons [*Sousa v. Unilab Corp. Class II (Non-Exempt) Members Group Benefit Plan (ED Cal 2002) 252 F Supp2d 1046, 1058*]. The order is only modifiable to prevent manifest injustice [*Fed R Civ P 16(e)*; *Byrd v. Guess (9th Cir 1998) 137 F3d 1126, 1132* , *cert. denied*, *525 US 963 (1998)*].

17.14[2] Factors to Determine Manifest Injustice. Rule 16 does not define manifest injustice. However, the manifest injustice standard is more stringent than the standards applied when deciding whether to grant motions to modify orders entered after earlier pretrial conferences [*see Fed R Civ P 16*, Committee Note of 1983].

The Ninth Circuit applies a four-factor test to determine whether to modify a final pretrial order [*see, e.g., Galdamez v. Potter (9th Cir 2005) 415 F3d 1015, 1020* ; *Byrd v. Guess (9th Cir 1998) 137 F3d 1126, 1132* , *cert. denied*, *525 US 963 (1998)*]:

- The degree of prejudice or surprise to the nonmoving party if the order is modified;
- The ability of the nonmoving party to cure any prejudice;
- The impact of the modification on the orderly and efficient conduct of the case; and
- Any degree of willfulness or bad faith on the part of the party seeking the modification.

Other factors to consider are:

- Whether the moving party should have anticipated the circumstances that give rise to the need for modification [*see Acorn v. City of Phoenix (9th Cir 1986) 798 F2d 1260, 1272-1273*];
- Whether granting the modification would unfairly impair the opposing party's ability to litigate the

merits of the case;

- Whether the modification would impose unjustifiable expense or disruption on another party;

- Whether the nonmoving party should have known that the movant intended to proceed in the manner proposed in the motion;

- Whether the need for the modification is the result of a good faith oversight;

- Prejudice to the movant if the motion were denied; and

- Whether the proposed changes are extensive or modest.

Judge's Perspective:

Judges rarely modify a final pretrial order. Extremely good cause must be shown.

17.14[3] Party Seeking Modification Has Burden of Proof. The party seeking to modify the order bears the burden of establishing the manifest injustice that will occur if the order is not modified [*Byrd v. Guess (9th Cir 1998) 137 F3d 1126, 1132*].

Strategic Point:

Manifest injustice may be difficult to establish. If feasible, counsel should consider crafting the argument in terms of seeking clarification of the final pretrial conference order.

Cross Reference:

Discussion of modification of pretrial order, see 3 *Moore's Federal Practice, § 16.78[4]* (Matthew Bender 3d ed.).

17.14[4] LOCAL PRACTICE: CD Cal--Modification of Final Pretrial Order. Any application to modify a pretrial order must be made to the judicial officer who entered the order [*CD Cal Civ LR 16-14*].

Legal Topics:

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

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17.15 Immediate Appellate Review of Final Pretrial Orders Is Generally Not Available.

17.15[1] Appellate Review Is Ordinarily Deferred. In general, most final pretrial orders are interlocutory in nature, rather than final. They deal with preliminary matters, leading up to, but not including, trial, and may still be modified by the court on a showing of manifest injustice [*Fed R Civ P 16(e)*; *see 17.14*].

Although critically important in narrowing issues, clarifying factual contentions, and structuring the trial, a final pretrial order is a procedural step. Because the court is able to reassess the content of a final pretrial order and make adjustments as needed, no irreversible legal consequences flow from these orders. Therefore, most final pretrial orders are not subject to immediate appellate review; rather, appellate review ordinarily must await a final judgment in the action [*see In re Recticel Foam Corp. (1st Cir 1988) 859 F2d 1000, 1002*].

17.15[2] Trial Management Decisions Reviewed for Abuse of Discretion. The court of appeals reviews a district court's case management decisions under the "abuse of discretion" standard. The court of appeals may reverse a district court's case management decision if the district court relied on an erroneous view of the law, made a clearly erroneous assessment of the evidence, or struck an unreasonable balance of the relevant factors [*Doe v. Advanced Textile Corp. (9th Cir 2000) 214 F3d 1058, 1069*]

Example--Adherence to Time Limits:

Trial courts have broad authority to impose and enforce reasonable time limits for each side's presentation of the case [*see Navellier v. Sletten (9th Cir 2001) 262 F3d 923, 941 , cert. denied, 536 US 941*]. However, trial courts may not rigidly adhere to time limits as to "sacrifice justice in the name of efficiency" [*General Signal Corp. v. MCI Telecomms. Corp. (9th Cir 1995) 66 F3d 1500, 1509 , cert. denied, 516 US 1146 (1996)*].

Cross Reference:

Discussion of appellate intervention with and review of final pretrial orders, see 3 *Moore's Federal Practice, § 16.79* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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17.16 CHECKLIST: Sanctions for Failure to Comply With Pretrial Duties.

☐ Ascertain whether opposing parties have engaged in any of the following sanctionable conduct:

- ○ Failure to attend or substantially prepare for pretrial conference;
- ○ Failure to participate in good faith in pretrial conference;
- ○ Failure to obey pretrial order;
- ○ Violation of local district court rules

☐ If conduct is sanctionable, consider appropriateness and availability of particular types of sanctions:

- ○ Reprimand;
- ○ Imposition of costs, including attorney's fees, caused by the violation;
- ○ Exclusion of evidence, witnesses, or a claim or defense;
- ○ Striking pleadings or parts of pleadings;

- ○ Granting or denying additional time for discovery;
- ○ Continuing or staying the proceedings;
- ○ Contempt;
- ○ Dismissal of a claim or the action;
- ○ Default judgment.

☐ Bring motion for sanctions, or otherwise bring sanctionable conduct to attention of court.

Authority:
Fed R Civ P 16(f)

Discussion:
See *§ 17.17*

Standard Procedure Checklist:
Noticed motion procedure, see Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConferencesSanctionsCivil ProcedureSanctionsGeneral Overview

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17.17 Imposing Sanctions to Enforce Final Pretrial Order and Other Pretrial Duties.

17.17[1] Sanctionable Conduct.

17.17[1][a] Failing to Attend or Substantially Prepare for Conference. Courts may impose sanctions if a party or party's attorney fails to attend a scheduled pretrial conference, or to substantially prepare for the conference without sufficient excuse [*Fed R Civ P 16(f)*; *see Fed R Civ P 37(b)(2)(A)(ii)-(vii)*; *see also Dahl v. City of Huntington Beach (9th Cir 1996) 84 F3d 363, 366*].

Example--Failure to Attend Settlement Conference:
Sanctions may be imposed for failing to attend a settlement conference [*Ayers v. City of Richmond (9th Cir 1990) 895 F2d 1267, 1270*].

Example--Sending Unprepared Attorney to Attend Final Pretrial Conference:
Sanctions may be imposed if the lead counsel does not attend a final pretrial conference, but instead sends a substantially unprepared attorney [*see Ha-Lo Indus., Inc. v. Your Favorite Producers, Inc. (ND Ill 1995) 164 FRD 233, 234*].

17.17[1][b] Failing to Participate in Good Faith in Pretrial Conference. Courts have broad authority to sanction a party or an attorney who fails to participate in good faith in a pretrial conference [*Fed R Civ P 16(f)*; *see Fed R Civ P 37(b)(2)(A)(ii)-(vii)*]. Courts may also impose sanctions for failing to participate in good faith in the development and submission of a proposed discovery plan [*Fed R Civ P 26(f), 37(f)*].

17.17[1][c] Failing to Obey Pretrial Order. Courts may impose sanctions if a party or party's attorney fails to obey a pretrial order without sufficient excuse [*Fed R Civ P 16(f)*; *see Fed R Civ P 37(b)(2)(A)(ii)-(vii)*].

17.17[1][d] Violating Local Rules. Local rules may authorize the imposition of sanctions for failing to comply with local rules [*see Zambrano v. City of Tustin (9th Cir 1989) 885 F2d 1473, 1479* ; *Miranda v. Southern Pac. Transp. Co. (9th Cir 1983) 710 F2d 516, 519*].

Example:

The Southern District's local rules provide that the failure of counsel for any party to appear before the court at pretrial proceedings, or to complete the necessary preparations for any proceeding, may be considered an abandonment or failure to prosecute or defend diligently, and judgment may be entered against the defaulting party either with respect to a specific issue or on the entire case [*SD Cal Civ LR 16.1(f.8)*].

Cross Reference:

Discussion of sanctions for failure to comply with local rules, see Ch. 34, Other Sanction Provisions, see *§§ 34.26 -34.30*.

17.17[2] Bad Faith Not Required. The imposition of sanctions under Rule 16 does not require that the party was acting (or not acting) in bad faith. Thus, sanctions are possible for negligently failing to appear as required [*Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc. (9th Cir 2001) 275 F3d 762, 769* ; *Ayers v. City of Richmond (9th Cir 1990) 895 F2d 1267, 1270*].

17.17[3] Sanctions May Be Imposed on Motion or Sua Sponte. Sanctions for failing to comply with a pretrial order or other pretrial conference obligation may be imposed on motion, or on the judge's own initiative. The court may sanction a party, a party's attorney, or both [*Fed R Civ P 16(f)*].

Judge's Perspective:

Rule 16(f) is an area in which courts often act sua sponte to impose sanctions because a failure to appear or to follow the pretrial order often imposes significant burdens on the court itself.

17.17[4] Offending Party Must Have Notice and Opportunity to Show Cause. The offending party must be afforded notice and an opportunity to show cause why sanctions should not be imposed before sanctions may be imposed [*Ayers v. City of Richmond (9th Cir 1990) 895 F2d 1267, 1270* ; *Ford v. Alfaro (9th Cir 1986) 785 F2d 835, 840*].

17.17[5] Court Has Broad Discretion to Select Appropriate Sanction.

17.17[5][a] Selection of Sanction Is Discretionary. Rule 16(f) leaves courts with broad discretion in fashioning a remedy by making such orders as are "just" [*Fed R Civ P 16(f)*, *Fed R Civ P 37(b)(2)(A)(ii)-(vii)*]. The remedies listed in Rule 16(f) are neither mandatory nor exhaustive [*see Mallinckrodt, Inc. v. Masimo Corp. (CD Cal 2003) 254 F Supp2d 1140, 1156*].

In exercising its discretion, the court will typically examine the following factors [*see Thompson v. Housing Auth. of L.A. (9th Cir 1986) 782 F2d 829, 831-832 , cert. denied, 479 US 829 (1986)*]:

- The nature and consequences of the violation;
- The extent and nature of the alleged violation, and its effect on the other parties (e.g., prejudice);
- The mental state or degree of culpable behavior; willfulness, recklessness, negligence, or bad faith is not required, but may affect the severity of the sanction;
- Who is responsible for the violation; counsel, party, or both;
- Whether the violation resulted from forces beyond the party's control;
- Whether the violation is an isolated incident, or part of a pattern of conduct; and

- Public interest matters, such as the effect of the violation on the administration of justice, the public policy favoring expeditious resolution of litigation, docket management, and the availability of less drastic sanctions.

In lieu of or in addition to any other sanction, the judge will require the party or the attorney representing that party or both to pay the reasonable expenses incurred because of any noncompliance with Rule 16, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust [*Fed R Civ P 16(f)*].

Strategic Point:

To ensure an adequate record for appellate review, counsel should request that the court memorialize its findings and reasons on the record, or in a written order [*see In re Eisen (9th Cir 1994) 31 F3d 1447, 1451*].

17.17[5][b] Broad Range of Available Sanctions. The range of sanctions available for failing to comply with a pretrial order or other pretrial conference obligation is extremely broad, and includes [*see Fed R Civ P 16(f), 37(b)(2)*]:

- Reprimand;
- Imposition of costs, including attorney's fees, caused by the violation;
- Exclusion of evidence, witnesses, or a claim or defense;
- Striking pleadings or parts of pleadings;
- Granting or denying additional time for discovery;
- Continuing or staying the proceedings;
- Contempt;
- Dismissal of a claim or the action; and
- Default judgment.

Judge's Perspective:

Sanctions are not a frequent occurrence. In determining the appropriate sanction, the specific facts are very important, including how much prejudice has been caused, both to the other parties and to the court. Courts will sometimes rule in favor of a monetary sanction over dismissal or default judgment in order to minimize the risk of reversal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConferencesSanctionsCivil ProcedureSanctionsGeneral Overview

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17.18 CHECKLIST: Pretrial Disclosures Under Rule 26(a)(3).

☐ Prepare, serve, and file pretrial disclosures at least 30 days before trial unless otherwise ordered by the court.

Authority:
Fed R Civ P 26(a)(3)(B)

Discussion:
See *§ 17.21*

☐ Do not include evidence to be offered solely for impeachment purposes.

Authority:
Fed R Civ P 26(a)(3)(A)

Discussion:
See *§ 17.19[5]*

☐ Provide the following information about each witness:

- ○ Name;
- ○ Address, if not previously disclosed;

- ○ Telephone number, if not previously disclosed.

☐ Separately identify witnesses that the party:

- ○ Expects to testify at trial;
- ○ May call if the need arises.

☐ Follow any court order or local rules regarding differentiation of the two types of witnesses.

☐ Identify witnesses expected to testify by deposition.

☐ If not taken stenographically (e.g., by audio or video tape), provide a transcript of the pertinent portions of testimony.

☐ If required by court or local rule, designate portions of stenographic depositions that will be used at trial.

☐ Identify exhibits, listing each separately.

☐ For voluminous items of a similar or standardized character, describe by meaningful categories.

☐ Separately identify exhibits the party:

- ○ Expects to present at trial;
- ○ May present if the need arises.

☐ Follow any court order or local rules regarding differentiation of the two types of exhibits.

☐ Assure that all exhibits are identified. Omitted exhibits will not be admitted without substantial justification.

Authority:
Fed R Civ P 26(a)(3)

Discussion:
See *§ 17.19*

☐ Prepare pretrial disclosures in writing.

☐ At least one attorney of record must sign pretrial disclosures. Signing certifies that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

☐ Serve pretrial disclosures on the other parties.

☐ File pretrial disclosures promptly with the court.

Authority:
Fed R Civ P 26(a)(3), (4), (g)(1)

Form:
See *§ 17.25*

☐ Serve and file objections to another party's pretrial disclosures within 14 days, unless court specifies different time, by listing:

○ Any objections to the use of a deposition designated by another party under *Fed R Civ P 26(a)(3)(A)(ii)*;

○ Any objection, and its grounds, that may be made to the admissibility of exhibits identified under *Fed R Civ P 26(a)(3)(A)(iii)*.

☐ Objections not so disclosed will be deemed waived.

Authority:
Fed R Civ P 26(a)(3)(B)

Discussion:
See *§ 17.22*

☐ Supplement disclosures, as appropriate.

Authority:
Fed R Civ P 26(e)

Discussion:
See *§ 17.24*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedurePretrial MattersConferencesGeneral Overview

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17.19 Information About Witnesses, Documents, Exhibits, and Other Evidence Must Be Given to Other Parties and Filed With Court

17.19[1] Information Related to Evidence to Be Presented at Trial. In addition to the disclosures required by *Fed R Civ P 26(a)(1)* and *(2)*, a party must provide to other parties and promptly file with the court information regarding the evidence that it may present at trial other than solely for impeachment [*Fed R Civ P 26(a)(3)(A)*].

17.19[2] Identification of Witnesses. A party must provide to other parties and promptly file with the court the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises [*Fed R Civ P 26(a)(3)(A)(i)*].

17.19[3] Deposition Testimony to Be Used. A party must provide to other parties and promptly file with the court the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony [*Fed R Civ P 26(a)(3)(A)(ii)*].

17.19[4] Identification of Documents and Exhibits. A party must provide to other parties and promptly file with the court an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those that the party expects to offer and those that the party may offer if the need arises [*Fed R Civ P 26(a)(3)(A)(iii)*].

17.19[5] Impeachment Information Excluded. Pretrial disclosure of information solely for impeachment is not required [*Fed R Civ P 26(a)(3)*]. If information is both substantive and impeaching, it must be disclosed [*Klonoski v. Mahlab (1st Cir 1998) 156 F3d 255, 270*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedureTrialsDepositionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition TranscriptsEvidenceTestimonyCredibilityImpeachmentGeneral Overview

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17.20 LOCAL PRACTICE: Rule 26(a)(3) Disclosures.

17.20[1] LOCAL PRACTICE: CD Cal Requirements.

17.20[1][a] LOCAL PRACTICE: CD Cal Requirements--Witness List. In the Central District, each party must serve and file under separate cover, at the same time as the Memorandum of Contentions of Fact and Law, a witness list containing the information required by *Fed R Civ P 26(a)(3)(A)(i)-(ii)*. An asterisk must be placed next to the names of those witnesses whom the party may call if the need arises. [*CD Cal Civ LR 16-5*]. Any objections to the use under *Fed R Civ P 32* of a deposition designated under *Fed R Civ P 26(a)(3)(A)(ii)* must be stated in the final pretrial conference order [*CD Cal Civ LR 16-5*].

Cross Reference:

Discussion of service of memorandum of contentions of fact and law, see *§ 17.09[2]*.

17.20[1][b] LOCAL PRACTICE: CD Cal Requirements--Exhibit List. In the Central District of California, all parties must jointly file a single document under separate cover, at the same time as the Memorandum of Contentions of Fact and Law, setting forth a joint list of exhibits containing the information required by *Fed R Civ P 26(a)(3)(A)(iii)*. The exhibits must be listed in numerical order. An asterisk must be placed next to the exhibits that a party may offer if the need arises. The court may choose to treat these disclosures as the disclosures under Rule 26(a)(3) and to adopt them as part of the Final Pretrial Conference Order. Accordingly, all objections must be separately stated and attached to the proposed Final Pretrial Conference Order [*CD Cal Civ LR 16-6.1* (also containing form and requirements for identification and numbering at deposition and trial)].

Cross Reference:

Discussion of service of memorandum of contentions of fact and law, see *§ 17.09[2]*.

17.20[2] LOCAL PRACTICE: ED Cal Requirements.

17.20[2][a] LOCAL PRACTICE: ED Cal Requirements--Witness List. In the Eastern District of California, the Pretrial Statement must include a list (names and addresses) of all prospective witnesses, whether their testimony

will be offered in person or by deposition or interrogatory, and designating those who are expert witnesses. Only witnesses listed are permitted to testify at trial [*ED Cal Civ LR 281(b)(10)*]. Counsel must serve and file the statement before the date set by the court for the final pretrial conference [*see ED Cal Civ LR 281(a)(1)*].

17.20[2][b] LOCAL PRACTICE: ED Cal Requirements--Exhibit List. In the Eastern District, the Pretrial Statement must include a list of documents and other exhibits the party expects to offer at trial [*ED Cal Civ LR 281(b)(11)*]. The statement must also state whether any special handling of trial exhibits is required and whether or not it is advisable for the exhibits to be retained by the court pending appeal [*ED Cal Civ LR 281(b)(21)*]. Counsel must serve and file the statement before the date set by the court for the final pretrial conference [*see ED Cal Civ LR 281(a)(1)*].

17.20[3] LOCAL PRACTICE: ND Cal Requirements. The Northern District rules do not address Rule 26(a)(3) disclosures. Consult individual judge's standing orders.

17.20[4] LOCAL PRACTICE: SD Cal Requirements.

17.20[4][a] LOCAL PRACTICE: SD Cal Requirements--Witness List. In the Southern District, each party must set forth, with the Memorandum of Contentions of Fact and Law, the names and addresses of all prospective witnesses, except impeaching witnesses, and for expert witnesses, a brief narrative statement of the qualifications of each witness and the substance of the testimony the witness is expected to give. Only witnesses listed are permitted to testify at trial [*SD Cal Civ LR 16.1(f.2.d)*]. Counsel must serve and file the statement not less than 28 days before the pretrial hearing [*SD Cal Civ LR 16.1(f.2.a)*].

Cross Reference:

Discussion of service of memorandum of contentions of fact and law, see *§ 17.12[1]*.

17.20[4][b] LOCAL PRACTICE: SD Cal Requirements--Exhibit List. In the Southern District, each party must set forth, with the Memorandum of Contentions of Fact and Law, a list of exhibits the party expects to offer at trial, other than exhibits to be used for impeachment, with a description of each exhibit sufficient for identification, including specified information about each exhibit. The exhibits must be numbered numerically for plaintiffs and alphabetically for defendants, and should be listed in the order to be presented at trial [*SD Cal Civ LR 16.1(f.2.c)*]. Counsel must serve and file the statement not less than 28 days before the pretrial hearing [*SD Cal Civ LR 16.1(f.2.a)*].

Cross Reference:

Discussion of service of memorandum of contentions of fact and law, see *§ 17.12[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedurePretrial MattersConferencesGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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CHAPTER 17 Final Pretrial Conference
IV. MAKING PRETRIAL DISCLOSURES PURSUANT TO RULE 26(a)(3)

2-17 MB Practice Guide: Fed Pretrial Civ Proc in CA 17.21

17.21 Disclosures Must Be Made 30 Days Before Trial.

Unless otherwise directed by the court, Rule 26(a)(3) disclosures must be made at least 30 days before trial [*Fed R Civ P 26(a)(3)(B)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedurePretrial MattersConferencesGeneral Overview

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17.22 Objections to Certain Evidence Must Be Filed Within 14 Days.

Within 14 days after a party makes disclosures pursuant to Rule 26(a)(3), unless a different time is specified by the court, a party may serve and promptly file a list disclosing the following objections [*Fed R Civ P 26(a)(3)(B)*]:

- Any objections to the use under *Fed R Civ P 32(a)* of a deposition designated by another party under *Fed R Civ P 26(a)(3)(A)(ii)* and

- Any objection, together with the grounds for it, that may be made to the admissibility of materials identified under *Fed R Civ P 26(a)(3)(A)(iii)* (regarding identification of documents and other exhibits).

Objections not so disclosed, other than objections under *Fed R Evid 402* and *403*, are waived unless excused by the court for good cause [*Fed R Civ P 26(a)(3)(B)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedurePretrial MattersConferencesGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsObjections & Offers of ProofTimeliness

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IV. MAKING PRETRIAL DISCLOSURES PURSUANT TO RULE 26(a)(3)

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17.23 Disclosures Must Be Made in Writing, Signed, and Served.

Unless the court orders otherwise, all disclosures under *Fed R Civ P 26(a)(1)-(3)* must be made in writing, signed, and served [*Fed R Civ P 26(a)(4)*].

The signature on the pretrial disclosure is a certification that it is complete and correct as of the time when made [*Fed R Civ P 26(g)(1)(A)*].

Warning:

The court may later impose sanctions if it finds certification was made without substantial justification [*Fed R Civ P 26(g)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesSanctions

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IV. MAKING PRETRIAL DISCLOSURES PURSUANT TO RULE 26(a)(3)

2-17 MB Practice Guide: Fed Pretrial Civ Proc in CA 17.24

17.24 Parties Must Supplement or Correct Rule 26(a) Disclosures to Include Later-Acquired Information.

17.24[1] Duty Applies to Pretrial Disclosures. A party who has made a pretrial disclosure under *Fed R Civ P 26(a)(3)* is under a duty to supplement or correct the disclosure to include later-acquired information [*Fed R Civ P 26(e)*].

Judge's Perspective:
This duty with regard to later-acquired information continues even after the trial has started.

17.24[2] Changes to Expert Witness Disclosures Must Be Disclosed by Time Pretrial Disclosures Are Due. With respect to testimony of an expert from whom a report is required, the duty extends to both information contained in the report and to information provided through a deposition of the expert. Any additions or changes to this information must be disclosed by the time the Rule 26(a)(3) disclosures are due [*Fed R Civ P 26(e)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedurePretrial MattersConferencesGeneral Overview

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17.25 Pretrial Disclosure Statement Under Rule 26(a)(3).

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	_____ [*NAME OF PARTY*]'S PRE-TRIAL DISCLOSURE STATEMENT (*Fed R Civ P 26(a)(3)*)

1. _____ [*Party designation and name of party*] intends to call the following persons to testify as witnesses:

a. _____ [*name, address, telephone number of witness*]

b. _____ [*name, address, telephone number of witness*]

2. _____ [*Party designation and name of party*] intends to call the following persons to testify as witnesses if the need arises:

a. _____ [*name, address, telephone number of witness*]

b. _____ [*name, address, telephone number of witness*]

3. _____ [*Party designation and name of party*] intends to present by deposition the testimony of the following persons:

a. _____ [*name, address, telephone number of witness*]

b. _____ [*name, address, telephone number of witness*]

4. _____ [*Party designation and name of party*] intends to introduce the following exhibits at trial:

_____ [*Describe or list exhibit*].
_____ [*Describe or list exhibit*].
_____ [*Describe or list exhibit*].

5. _____ [*Party designation and name of party*] intends to introduce the following exhibits at trial if the need arises:

_____ [*Describe or list exhibit*].
_____ [*Describe or list exhibit*].
_____ [*Describe or list exhibit*].

_____ [*date*]

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*name and designation of party*]

_____
[*Attorney's or firm's address, telephone number, and any other identifying information required by local district court rules*]

NOTES.

Authority:
Fed R Civ P 26(a)(3)

Related form for Central District of California:
See *CD Cal Civ LR 16-6.1*

Required Disclosures:

See *§ 17.20*

Timing:

See *§ 17.21*

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17.26 Local District Court Forms.

Local district court forms relating to matters addressed in this chapter are listed below.

Eastern District

Exhibit and Witness List (AO 187)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Exhibit and Witness List Continuation (AO 187A)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Northern District

Contents of Joint Case Management Statement

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Supplemental Case Management Statement and Proposed Order

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Cross Reference:

Automated HotDocs(R) and PDF versions of these forms may be accessed and filled in from the online version of this publication, and are also available at www.LexisOne.com/forms.

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CHAPTER 18 Consolidation and Separate Trials

2-18 MB Practice Guide: Fed Pretrial Civ Proc in CA 18.syn

§ 18.syn Synopsis to Chapter 18: Consolidation and Separate Trials

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18.02[4] Consolidation May Be for Limited Purpose.

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18.02[5][a] Order Can Be Reviewed by Appellate Court As Interlocutory Appeal.

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18.02[6][c] Multidistrict Litigation.

18.03 LOCAL PRACTICE: Notice of Related Cases, or an Administrative Motion to Consider Whether Cases Should Be Related, Must Be Filed.

18.03[1] LOCAL PRACTICE: CD Cal Requirements--Notice of Related Cases.

18.03[1][a] File and Serve on All Parties.

18.03[1][b] Include Explanatory Statement.

18.03[1][c] Serve With Complaint.

18.03[1][d] Counterstatement Opposing Transfer.

18.03[2] LOCAL PRACTICE: ED Cal Requirements--Notice of Related Cases.

18.03[2][a] Definition of Related Case.

18.03[2][b] File Notice Promptly.

18.03[2][c] Contents of Notice.

18.03[3] LOCAL PRACTICE: ND Cal Requirements--Administrative Motion to Consider Whether Cases Should Be Related.

18.03[3][a] Definition of Related Case.

18.03[3][b] File Motion Promptly.

18.03[3][c] Serve Copies on All Parties.

18.03[3][d] Contents of Motion.

18.03[3][e] Response to Motion.

18.03[4] LOCAL PRACTICE: SD Cal Requirements--Notice of Related Cases.

18.03[4][a] Definition of Related Action.

18.03[4][b] Duties of Counsel.

18.04 Objectives and Strategy: Separate Trials (Bifurcation).

18.04[1] Distinguish Rule 21 Severance.

18.04[2] Bifurcation Is Considered Exception Not Rule.

18.04[3] Evaluate Case.

18.04[3][a] Bifurcation Is Effective for Resolving Key Issues.

18.04[3][b] Bifurcation May Speed-Up Litigation.

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18.05 CHECKLIST: Moving for Consolidation.

18.06 Consider Effects of Consolidation.

18.06[1] Actions Remain Separate.

18.06[2] Consolidation Does Not Affect Diversity Jurisdiction.

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18.06[6] Consolidation Does Not Merge Actions for Subject Matter Jurisdiction Purposes.

18.06[7] Consolidation for Discovery Does Not Merge Suits.

18.06[8] Court May Appoint Lead Counsel.

18.06[9] Court May Require Consolidated Pleadings.

18.06[10] Only One Set of Witness Fees Allowed As Costs.

18.07 Determine Whether Common Questions of Law or Fact Exist.

18.07[1] Common Question Is Key.

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18.08 Cases Must Properly Be Pending Before Same Court.

18.09 Parties Should Consider Stipulation to Consolidate.

18.10 Only Party Can Move to Consolidate.

18.11 Seek Consolidation Early.

18.12 Less than Entire Action May Be Consolidated.

18.13 Contents of Motion for Consolidation.

18.14 Factors Court Will Consider.

18.14[1] Risk of Delay.

18.14[2] Risk of Prejudice and Jury Confusion.

18.14[3] Burden on Parties, Witnesses, and Judicial Resources.

18.15 Moving Party Has Burden of Proof.

18.16 Consolidation Is Encouraged in Securities Litigation.

18.17 CHECKLIST: Opposing Motion for Consolidation.

18.18 Any Party Can Oppose Consolidation.

18.19 Review Grounds for Opposing Motion.

18.19[1] Existence of Common Issues Does Not Require Consolidation.

18.19[2] Consolidation Will Cause Prejudice.

18.19[3] Consolidation Will Cause Jury Confusion.

18.19[4] Consolidation Will Cause Delay.

18.19[5] Consolidation Will Cause Burden on Parties, Witnesses, and Judicial Resources.

18.20 Draft Jury Instructions to Minimize Risk of Prejudice and Confusion.

18.21 CHECKLIST: Moving for Bifurcation.

18.22 Counsel Should Weigh Factors to Determine Whether Action Is Amenable to Bifurcation.

18.23 Parties Can Stipulate to Bifurcation.

18.24 Court Can Order Bifurcation Sua Sponte.

18.25 Any Party Can Move for Bifurcation.

18.26 Requests for Separate Trials Will Be Considered at Pretrial Conferences.

18.26[1] Rule 16 Applies.

18.26[2] LOCAL PRACTICE: CD Cal Requirements--Memorandum of Contentions of Fact and Law.

18.26[3] LOCAL PRACTICE: ED Cal Requirements--Status Conference and Pretrial Statement.

18.26[4] LOCAL PRACTICE: SD Cal Requirements--Contents of Pretrial Order.

18.27 Move for Bifurcation As Soon As Possible.

18.28 Bifurcation Should Further Convenience.

18.29 Bifurcation Should Not Prejudice Any Party.

18.30 Bifurcation Should Be Conducive to Expedition and Economy.

18.31 Right to Jury Trial Must Be Preserved.

18.32 Not All Rule 42(b) Factors Need Be Present to Bifurcate.

18.33 Moving Party Has Burden of Proof.

18.34 Power to Separate Trials Includes Power to Stay Proceedings.

18.35 Bifurcation Is Effective in Particular Types of Actions.

18.35[1] Tort Actions.

18.35[2] Patent Cases.

18.35[3] Bifurcation Is Rule Rather Than Exception in Title VII Cases.

18.36 CHECKLIST: Opposing Motion for Separate Trials.

18.37 Prepare to Oppose Rule 42(b) Motion at or Before Initial Case Management Conference.

18.38 Review Grounds for Objecting to Bifurcation.

18.38[1] Bifurcation Will Prejudice Party.

18.38[2] Bifurcation Will Not Be Conducive to Expedition and Economy.

18.38[3] Right to Jury Trial Implications.

18.39 Notice of Motion and Motion for Consolidation of Actions.

18.40 Notice of Motion and Motion for Joint Trial.

18.41 Order Granting Consolidation of Actions or Joint Trial.

18.42 Notice of Motion and Motion for Separate Trials.

18.43 Order Granting Separate Trials.

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Unit 4 Required Conferences and Case Management
CHAPTER 18 Consolidation and Separate Trials
I. STRATEGY

2-18 MB Practice Guide: Fed Pretrial Civ Proc in CA 18.01

18.01 Scope.

This chapter discusses consolidation and separate trials under *Fed R Civ P 42*, including:

- Objectives and strategy for consolidation [*see 18.02*].
- Moving for consolidation [*see 18.05 -18.16*; *Forms 18.39 -18.41*].
- Opposing motion for consolidation [*see 18.17 -18.20*].
- Objectives and strategy for separate trial [*see 18.04*].
- Moving for separate trials [*see 18.21 -18.35*; *Forms 18.42*, *18.43*].
- Opposing motion for separate trials [*see 18.36 -18.38*].

Local rules relating to requirements for notifying the court of related cases are also discussed [*see 18.03*].

Core Rule:
Fed R Civ P 42.

Detailed Discussion/Forms:
8 Moore's Federal Practice, Ch. 42, Consolidation; Separate Trials (Matthew Bender 3d ed.).

9 Bender's Federal Practice Forms, Rule 42, Consolidation; Separate Trials (Matthew Bender).

Cross Reference:

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMultidistrict LitigationCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate TrialsGovernmentsCourtsRule Application & Interpretation

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I. STRATEGY

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18.02 Objectives and Strategy: Consolidation.

18.02[1] Advantages of Consolidating Actions.

18.02[1][a] Promotes Efficiency. Where common questions of fact and law exist, consolidation of actions can avoid duplication of discovery and presentation of evidence, as well as accelerating the litigation process [Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *11 ; *see Johnson v. Celotex Corp. (2d Cir 1990) 899 F2d 1281, 1285*].

18.02[1][b] Avoids Inconsistent Results. The purpose of consolidation is to enhance court efficiency (i.e., to avoid unnecessary duplication of evidence and procedures) and to avoid substantial danger of inconsistent adjudications (i.e., different results because tried before different juries or judges) [*EEOC v. HBE Corp. (8th Cir 1998) 135 F3d 543, 551* ; Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255].

18.02[1][c] Reduces Costs. Where common questions of fact and law exist, consolidation of actions can reduce costs [Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *11].

18.02[2] Court May Consolidate *Sua Sponte*. Even if none of the parties move for consolidation, the trial court may consolidate cases *sua sponte* [*In re Adams Apple, Inc. (9th Cir 1987) 829 F2d 1484, 1487* ; *Yousefi v. Lockheed Martin Corp. (CD Cal 1999) 70 F Supp2d 1061, 1065*].

Cross Reference:

Court's power to consolidate *sua sponte*, see 8 *Moore's Federal Practice, § 42.10[2][b]* (Matthew Bender 3d ed.).

18.02[3] Balance Savings in Time and Effort Against Possibility of Delay and Prejudice. Consolidation is within the broad discretion of the district court [*In re Adams Apple, Inc. (9th Cir 1987) 829 F2d 1484, 1486* ; Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *12]. The judge must balance the gains in judicial efficiency with any threats of prejudice and confusion to determine the most efficient method of disposition that preserves access to a fair and impartial trial [*Johnson v. Celotex Corp. (2d Cir 1990) 899 F2d 1281, 1284*].

Cross Reference:

Court's broad discretion to consolidate, see 8 *Moore's Federal Practice, § 42.10[2][a]* (Matthew Bender 3d ed.).

18.02[4] Consolidation May Be for Limited Purpose. The court may limit consolidation to particular issues, and order a joint trial of those issues only, as, for example, the consolidation of over 150 cases arising out of an airplane crash for the purpose of a trial on the issue of liability only [*In re Air Crash Disaster at Detroit Metro. Airport (ED Mich 1989) 737 F Supp 391, 393-395*].

Consolidation may be expressly limited to pretrial proceedings, including pleadings and discovery [*Katz v. Realty Equities Corp. (2d Cir 1975) 521 F2d 1354, 1358-1359* (court ordered consolidated complaint)].

18.02[5] Consider Appellate Issues.

18.02[5][a] Order Can Be Reviewed by Appellate Court As Interlocutory Appeal. An order to consolidate actions can be heard by the reviewing court as an interlocutory appeal pursuant to *28 USC § 1292(b)* [*see United Airlines, Inc. v. Wiener (9th Cir 1961) 286 F2d 302, 304* ; *see also Oregon Egg Producers v. Andrew (9th Cir 1972) 458 F2d 382, 383*].

18.02[5][b] Order Disposing of Only One Consolidated Case Is Not Appealable Absent Certification. A district court judgment disposing of only one of two or more consolidated cases is not appealable under *28 USC § 1291* absent certification under *Fed R Civ P 54(b)* [*Durfey v. E.I. DuPont de Nemours (9th Cir 1995) 59 F3d 121, 124* ; *Huene v. United States (9th Cir 1984) 743 F2d 703, 703-705*]. If the absence of Rule 54(b) certification in consolidated cases is cured after the notice of appeal is filed and there is no prejudice to the parties, the appellate court has jurisdiction over the appeal [*Fadem v. United States (9th Cir 1994) 42 F3d 533, 535*].

Cross Reference:

Certification for appeal under Rule 54(b), see 10 *Moore's Federal Practice, §§ 54.23 -54.29* (Matthew Bender 3d ed.).

Distinguish--Mandamus May Be Available:

Review of a consolidation order may be sought by a petition for mandamus directed to the district court to correct an abuse of discretion [*see In re Repetitive Stress Injury Litig. (2d Cir 1993) 11 F3d 368, 373*].

18.02[6] Consider Alternative Procedures.

18.02[6][a] Permissive Joinder. A plaintiff may join multiple defendants in a single action if the claims arise from the same transaction or occurrence [*Fed R Civ P 20(a)*].

Cross Reference:

Discussion of permissive joinder, see Ch. 10, Adding, Dropping, and Substituting Parties, see *§§ 10.04 -10.09*.

18.02[6][b] Class Actions. Class action certification may be available when such a large number of plaintiffs or defendants exists that joinder of all members is impracticable, there are common questions of law and fact, the class representatives present claims or defenses typical of the class, and the class representatives can adequately represent the class [*Fed R Civ P 23*, *see Ch. 20, Class Actions, 20.06*].

Cross Reference:

Discussion of class actions, see Ch. 20, Class Actions.

18.02[6][c] Multidistrict Litigation. When civil actions involving one or more common questions of fact are pending in different judicial districts, the Judicial Panel on Multidistrict Litigation may consolidate and transfer them to a single district for coordinated or consolidated pretrial proceedings [*28 USC § 1407*].

Cross Reference:

Discussion of multidistrict litigation, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.61 -2.73*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & PartiesCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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Unit 4 Required Conferences and Case Management
CHAPTER 18 Consolidation and Separate Trials
I. STRATEGY

2-18 MB Practice Guide: Fed Pretrial Civ Proc in CA 18.03

18.03 LOCAL PRACTICE: Notice of Related Cases, or an Administrative Motion to Consider Whether Cases Should Be Related, Must Be Filed.

18.03[1] LOCAL PRACTICE: CD Cal Requirements--Notice of Related Cases.

18.03[1][a] File and Serve on All Parties. At the time a civil action is filed, or as soon as known thereafter, the attorney must file and serve on all parties who have appeared a Notice of Related Case(s), stating whether any action previously filed or currently pending in the Central District and the action being filed appear [*CD Cal Civ LR 83-1.3.1*]:

- To arise from the same or substantially identical transactions, happenings or events; or
- To involve the same patent, trademark or copyright, except where in one or both actions the same patent, trademark or copyright is joined with other patents, trademarks or copyrights which do not cover the same or substantially identical subject matter; or
- To call for determination of the same or substantially identical questions of law and fact; or
- Likely for other reasons to entail substantial duplication of labor if heard by different judges.

Distinguish:
Assignment of related cases is not the same as consolidation. Ordinarily, if a court determines that two cases are sufficiently related, both cases will be assigned to the judge of the court having the lower-numbered case. Whether to consolidate the cases is then within the discretion of the assigned judge. Consult the local rules in each district.

18.03[1][b] Include Explanatory Statement. The Notice of Related Case(s) must include a brief factual statement setting forth the basis for the attorney's belief that the action qualifies for related case transfer [*CD Cal Civ LR 83-1.3.1*].

18.03[1][c] Serve With Complaint. The Notice of Related Case(s) must be served concurrently with service of

the complaint [*CD Cal Civ LR 83-1.3.1*].

18.03[1][d] Counterstatement Opposing Transfer. Within five days of the service of the Notice of Related Cases(s) or first appearance, a party opposing a related case transfer may file and serve a counterstatement setting forth the reasons the action does not qualify for related case transfer [*CD Cal Civ LR 83-1.3.2*].

18.03[2] LOCAL PRACTICE: ED Cal Requirements--Notice of Related Cases.

18.03[2][a] Definition of Related Case. An action is related to another action within the meaning of Local Rule 123 when [*ED Cal Gen LR 123(a)*]:

- Both actions involve the same parties and are based o the same or a similar claim;
- Both actions involve the same property, transaction, or event;
- Both actions involve similar questions of fact and the same question of law and their assignment to the same judge or magistrate judge is likely to effect a substantial savings of judicial effort, either because the same result should follow in both actions or otherwise; or
- For any other reasons, it would entail substantial duplication of labor if the actions were heard by different judges or magistrate judges.

18.03[2][b] File Notice Promptly. Counsel who has reason to believe that an action on file or about to be filed is related to another action on file (whether or not dismissed or otherwise terminated) shall promptly file in each action and serve on all parties in each action a Notice of Related Cases [*ED Cal Gen LR 123(b)*].

18.03[2][c] Contents of Notice. This notice shall set forth the title and number of each possibly related action, together with a brief statement of their relationship and the reasons why assignment to a single judge or magistrate judge is likely to effect a savings of judicial effort and other economies [*ED Cal Gen LR 123(b)*].

18.03[3] LOCAL PRACTICE: ND Cal Requirements--Administrative Motion to Consider Whether Cases Should Be Related.

18.03[3][a] Definition of Related Case. Any action is related to another when both concern [*ND Cal Civ LR 3-12(a)*]:

1. Substantially the same parties, property, transaction or event; and

2. When it appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different judges.

18.03[3][b] File Motion Promptly. Whenever a party knows or learns that an action, filed in or removed to the Northern District is (or the party believes that the action may be) related to an action that is or was pending in the Northern District as defined in *ND Cal Civ LR 3-12(a)*, the party must promptly file in the earliest-filed case an Administrative Motion to Consider Whether Cases Should Be Related [*ND Cal Civ LR 3-12(b)*].

18.03[3][c] Serve Copies on All Parties. The filing party must serve a copy of the motion on all known parties to each apparently related action and lodge a chambers copy of the motion with the assigned judge in each apparently related case [*ND Cal Civ LR 3-12(b)*].

18.03[3][d] Contents of Motion. An Administrative Motion to Consider Whether Cases Should Be Related must comply with *ND Cal Civ LR 7-11* [*ND Cal Civ LR 3-12(b)*], and must contain [*ND Cal Civ LR 3-12(c)*]:

1. The title and case number of each apparently related case; and

2. A brief statement of the relationship of the actions according to the criteria set forth in *ND Cal Civ LR 3-12(a)*.

18.03[3][e] Response to Motion. Any opposition to or support of a Motion to Consider Whether Cases Should Be Related must be filed in the earliest-filed case and specifically address the issues raised in the motion. The response must be served on all parties and lodged with the chambers of all judges identified in the motion. If the motion identifies more than two potentially related cases, and a party contends that not all of the cases are related, the party must address whether any of the cases are related to one another [*ND Cal Civ LR 3-12(e)*].

18.03[4] LOCAL PRACTICE: SD Cal Requirements--Notice of Related Cases.

18.03[4][a] Definition of Related Action. An action or proceeding is related to another action or proceeding when both of them [*SD Cal Civ LR 40.1(f)*]:

(1) Involve some of the same parties and are based on the same or similar claims, or

(2) Involve the same property, transaction, or event, or

(3) Involve substantially the same facts and the same questions of law.

18.03[4][b] Duties of Counsel. Whenever counsel has reason to believe that a pending action or proceeding on file or about to be filed is related to another pending action or proceeding on file in this or any other federal or state court (whether pending, dismissed, or otherwise terminated), counsel must promptly file and serve on all known parties to each related action or proceeding a notice of related case, stating the title, number and filing date of each action or proceeding believed to be related, together with a brief statement of their relationship and the reasons why assignment to a single district judge is or is not likely to effect a saving of judicial effort and other economies [*SD Cal Civ LR 40.1(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConsolidation of ActionsGovernmentsCourtsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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CHAPTER 18 Consolidation and Separate Trials
I. STRATEGY

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18.04 Objectives and Strategy: Separate Trials (Bifurcation).

18.04[1] Distinguish Rule 21 Severance. *Rule 21 of the Federal Rules of Civil Procedure* furnishes the mechanism for separating a case into separate actions; any claim against a party may be severed and proceeded with separately [*Fed R Civ P 21*]. *Fed R Civ P 42(b)*, on the other hand, authorizes courts to divide a single action into separate trials that remain under the umbrella of the original solitary action [*McDaniel v. Anheuser-Busch, Inc. (5th Cir 1993) 987 F2d 298, 304* ; *Acevedo-Garcia v. Monroig (1st Cir 2003) 351 F3d 547, 558-560*]. The judgment in a severed action is final, enforceable and appealable when it disposes of all parties and issues; conversely, the order entered at the conclusion of a separate trial is often interlocutory because a final and appealable judgment cannot be rendered until all of the controlling issues have been tried and decided [*Acevedo-Garcia v. Monroig (1st Cir 2003) 351 F3d 547, 558-560* (the trial court's references to Rule 42(b) notwithstanding, its clearly articulated intent was to sever the plaintiffs pursuant to *Fed R Civ P 21*)].

Cross References:

Rule 21 severance, see Ch. 4, Determining Parties to the Action, see *§§ 4.07[3], 4.08[2].*

4 Moore's Federal Practice, Ch. 21, Misjoinder and Nonjoinder of Parties (Matthew Bender 3d ed.).

18.04[2] Bifurcation Is Considered Exception Not Rule. While bifurcation is considered the exception rather than the rule, in some instances, separate trials are necessary to serve the ends of justice [Wechsler v. Hunt Health Sys. (SDNY 2003) 2003 US Dist LEXIS 13775, at *19]. While separation of issues for trial is not to be routinely ordered, it is important it be encouraged where experience has demonstrated its worth [*Hamm v. American Home Prods. Corp. (ED Cal 1995) 888 F Supp 1037, 1039* ; *Fed R Civ P 42(b)*, Committee Note of 1996].

The court should cautiously apply Rule 42(b); the piecemeal trial of separate issues in a single suit is not to be the usual course, but should be resorted to only in the exercise of informed discretion when the court believes that separation will achieve the purposes of the rule [*Hangarter v. Paul Revere Life Ins. Co. (ND Cal 2002) 236 F Supp2d 1069, 1094-1095*].

Motions to bifurcate are to be granted on a case by case basis only when the separation will result in judicial economy and will not unduly prejudice any party [*Calmar, Inc. v. Emson Research, Inc. (CD Cal 1994) 850 F Supp 861, 865-866*].

18.04[3] Evaluate Case.

18.04[3][a] Bifurcation Is Effective for Resolving Key Issues. The district court has broad discretion to bifurcate a trial to permit deferral of costly and possibly unnecessary proceedings pending resolution of potentially dispositive preliminary issues [*Fed R Civ P 42(b)*; *Exxon Co. v. Sofec, Inc. (9th Cir 1995) 54 F3d 570, 575 , aff'd, 517 US 830 (1996)*].

Example:

The district court decided that, before addressing any of the parties' claims, an initial determination should be made whether the parties had entered into a valid agreement and, if so, what that agreement entailed. As the court explained: a determination as to which agreement actually embodied the parties' intent was of primary importance to all claims. The appellate court stated that the district court's approach was a reasonable way to promote clarity and judicial economy, because the validity of the contract directly informed the resolution of the other claims [*Jinro Am., Inc. v. Secure Invs., Inc. (9th Cir 2001) 266 F3d 993, 998*].

18.04[3][b] Bifurcation May Speed-Up Litigation. Bifurcation of some issues can result in more efficient litigation, for example:

- *Davis & Cox v. Summa Corp. (9th Cir 1985) 751 F2d 1507, 1517* (attorney brought action for fees and corporate client counterclaimed for malpractice and breach of fiduciary duties; bifurcation allowed trial on issues in complaint to proceed without delay).

- *Carlisle Corp. v. Hayes (SD Cal 1986) 635 F Supp 962, 967* (separate trial of antitrust counterclaims in patent infringement suit is particularly advantageous in view of extensive and protracted discovery inherent in trial of antitrust issues).

- *Exxon Co. v. Sofec, Inc. (9th Cir 1995) 54 F3d 570, 575 , aff'd on other grounds, 517 US 830 (1996)* (no abuse of discretion in bifurcating causation issues in admiralty action).

18.04[4] Consider Appellate Issues. If the court orders separate trials under *Fed R Civ P 42(b)*, a judgment entered on the first claim or issue may not be separately appealable. Until judgment is entered on all claims, the district court must certify the individual judgment for appeal under *Fed R Civ P 54(b)* for the appellate court to have jurisdiction. Without the district court's express determination or direction required by *Fed R Civ P 54(b)*, the district court chooses to treat the judgment as subject to revision at any time before entry of judgment on all claims, so that the judgment is not appealable as a final order under *28 USC § 1291* [*Burkhart v. United States (9th Cir 1954) 210 F2d 602, 605*].

Cross Reference:

Rule 54(b) determination, see 10 *Moore's Federal Practice, § 54.21 et seq.* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderMisjoinderCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & Parties

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CHAPTER 18 Consolidation and Separate Trials
II. MOVING FOR CONSOLIDATION

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18.05 CHECKLIST: Moving for Consolidation.

☐ Review advantages of consolidation.

Authority:
Fed R Civ P 42(a)

Discussion:
See *§ 18.02[1]*

☐ Consider appellate issues.

Authority:
Fed R Civ P 42(a)

Discussion:
See *§ 18.02[5]*

☐ Consider alternative procedures.

Authority:
Fed R Civ P 42(a)

Discussion:
See *§ 18.02[6]*

☐ Ascertain whether opposing counsel will stipulate to consolidation.

Authority:
Fed R Civ P 42(a)

Discussion:
See *§ 18.09*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, *§ 26.08*

☐ Determine common questions of law or fact.

Authority:
Fed R Civ P 42(a)

Discussion:
See *§ 18.07*

☐ Ensure that cases are properly pending before same court.

Authority:
Fed R Civ P 42(a)

Discussion:
See *§ 18.08*

☐ Determine whether to seek consolidation of the entire cases or to move for limited consolidation of particular issues.

Authority:
Fed R Civ P 42(a)

Discussion:
See *§ 18.12*

☐ Move for consolidation early in the proceedings to maximize judicial economy.

Authority:
Fed R Civ P 42(a)

Discussion:
See *§ 18.11*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ Draft motion and requested order.

Authority:
Fed R Civ P 42(a)

Discussion:
See *§ 18.13*

Forms:
See *§§ 18.39 -18.41*

☐ Prepare to meet burden of proof.

Authority:
Fed R Civ P 42(a)

Discussion:
See *§§ 18.14*, *18.15*

☐ Calendar response and hearing dates.

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersConsolidation of Actions

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18.06 Consider Effects of Consolidation.

18.06[1] Actions Remain Separate. Actions do not lose their separate identity merely because of consolidation [*International Soc'y for Krishna Consciousness, Inc. v. Los Angeles (CD Cal 1984) 611 F Supp 315, 319*]. Consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another [*Johnson v. Manhattan Ry. Co. (1933) 289 US 479, 496-497, 53 S Ct 721, 77 L Ed 1331*].

Example:

An organization sued a city in state court to invalidate a municipal resolution banning *First Amendment* activity in an airport terminal as violating state and federal law. That action was removed to federal court. The city sued in federal court for a declaration that the resolution was constitutional and an injunction to stop the organizations from violating it. The district court did not have subject matter jurisdiction over the city's action; consolidation did not save the city's action from dismissal because consolidated actions retain their separate identities [*International Soc'y for Krishna Consciousness, Inc. v. Los Angeles (CD Cal 1984) 611 F Supp 315, 319*].

Cross Reference:

Effects of consolidation, see 8 *Moore's Federal Practice, § 42.13[2]* (Matthew Bender 3d ed.).

18.06[2] Consolidation Does Not Affect Diversity Jurisdiction. For purposes of diversity jurisdiction, consolidation of cases does not make parties in one suit parties in another [*Continental Airlines v. Goodyear Tire & Rubber Co. (9th Cir 1987) 819 F2d 1519, 1523 n1*].

18.06[3] Right to Jury Trial Is Not Affected. Consolidation under *Fed R Civ P 42* does not alter the right to a jury trial [*In re U.S. Fin. Secs. Litig. (9th Cir 1979) 609 F2d 411, 428 n58 , cert. denied sub nom. Gant v. Union Bank, 446 US 929 (1980)*].

18.06[4] Consolidation Does Not Affect Parties' Substantive Rights. Consolidation does not affect the parties' substantive rights [*Johnson v. Manhattan Ry. Co. (1933) 289 US 479, 496-497, 53 S Ct 721, 77 L Ed 1331* ; *J. G.*

Link & Co. v. Continental Cas. Co. (9th Cir 1972) 470 F2d 1133 , cert. denied, 414 US 829 (1973)].

18.06[5] Unclear If Actions Are Merged for Personal Jurisdiction Purposes. The extent to which consolidation does or does not merge the actions into a single cause for purposes of personal jurisdiction is unsettled in the Ninth Circuit [*see Schnabel v. Lui (9th Cir 2002) 302 F3d 1023, 1035-1036* (court would not resolve whether consolidated actions in general retain their separate character or are merged for purposes of determining personal jurisdiction)].

18.06[6] Consolidation Does Not Merge Actions for Subject Matter Jurisdiction Purposes. The consolidation of actions does not merge them for subject matter purposes, so that if the court does not have subject matter jurisdiction over one of the actions, it does not gain that jurisdiction because it has subject matter jurisdiction over an action consolidated with that action [*International Soc'y for Krishna Consciousness, Inc. v. Los Angeles (CD Cal 1984) 611 F Supp 315, 319*].

18.06[7] Consolidation for Discovery Does Not Merge Suits. Consolidation for discovery purposes does not merge suits into a single claim for relief [*Geddes v. United Fin. Group (9th Cir 1977) 559 F2d 557, 561*].

18.06[8] Court May Appoint Lead Counsel. When consolidating two or more actions, the court may need to appoint lead counsel for the consolidated cases [*In re Wirebound Boxes Antitrust Litig. (D Minn 1989) 128 FRD 256, 258* (plaintiffs' lead counsel should play a vital role in assuring that the litigation is conducted efficiently and effectively)]. This is most commonly done when many separate actions are consolidated.

Example:

In consolidating 246 Medicare reimbursement actions, the court ordered that four law firms be designated "coordinating counsel"; as coordinating counsel, their responsibilities were to coordinate with all other plaintiffs' counsel to reach agreements on briefing schedules, number and lengths of briefs, and other matters that concern the core issues involved in all or most of the now consolidated cases, to communicate and coordinate with government counsel, and to attempt to negotiate any disagreements with the government before filing any motions or otherwise bringing such matters to the attention of the Court [*Baystate Health Sys. v. Thompson (DDC 2003) 254 F Supp2d 80, 82*].

Consider:

An advantage to being lead counsel is having the most power to direct the litigation, which may secure the primary role in depositions, pretrial proceedings, and trial. Disadvantages include having to maintain a fiduciary relationship with individual litigants while representing the group, and maintaining communication with the entire group. In addition, attorney's fees issues can arise between lead counsel and other counsel.

Cross Reference:

Lead counsel, 8 *Moore's Federal Practice, § 42.13[6]* (Matthew Bender 3d ed.).

18.06[9] Court May Require Consolidated Pleadings. The court may order that the plaintiffs file a consolidated complaint [*Katz v. Realty Equities Corp. (2d Cir 1975) 521 F2d 1354, 1358* ; *see Bowman v. Legato Sys., Inc. (ND Cal 2000) 195 FRD 655, 656-657* (consolidation of 31 securities class actions alleging that defendants disseminated a series of false and misleading statements concerning a company's operations and financial performance)].

Consider:

A consolidated complaint eliminates the need for multiple answers, and may streamline discovery and pretrial motions. However, it may be difficult to effectively combine each individual party's facts into one document and to reach agreement on the pleadings among all the parties.

Cross Reference:

Consolidated pleadings, 8 Moore's Federal Practice, see *§ 42.13[5]* (Matthew Bender 3d ed.).

18.06[10] Only One Set of Witness Fees Allowed As Costs. Under *Fed R Civ P 42(a)*, which authorizes consolidation to avoid unnecessary costs or delay, when cases are consolidated for trial the prevailing party or parties can only recover one set of witness fees as costs, because the witnesses testify only once [*Reynolds Metals Co. v. Yturbide (9th Cir 1958) 258 F2d 321, 335* , *cert. denied, 358 US 840 (1958)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureCounselGeneral OverviewCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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18.07 Determine Whether Common Questions of Law or Fact Exist.

18.07[1] Common Question Is Key. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions, or order the actions consolidated [*Fed R Civ P 42(a)(1), (2)*].

The key is that the cases involve a common question of law or fact [*see, e.g., Mutual Life Ins. Co. v. Hillmon (1892) 145 US 285, 292, 12 S Ct 909, 36 L Ed 706* (consolidating two cases with common question of insurance coverage under statute, now superseded by *Fed R Civ P 42*); *In re Adams Apple, Inc. (9th Cir 1987) 829 F2d 1484, 1486-1487* (consolidating bankruptcy petitions)]. Rule 42 does not require that the actions be identical [*Takeda v. Turbodyne Techs., Inc. (CD Cal 1999) 67 F Supp2d 1129, 1133*]. See for example:

- **Securities Class Actions Based on Same Set of Corporate Misrepresentations.** Fifty-four separate class actions predicated on the same set of misstatements by corporate officials, causing an artificial inflation and then a corrective drop in share prices, presented common questions of fact [*Aronson v. McKesson HBOC, Inc. (ND Cal 1999) 79 F Supp2d 1146, 1150*]. However, there appeared to be a viable argument that a common-law shareholders derivative suit should not be consolidated with the others, because it sought recovery on behalf of the corporation, which was a conflict with the other complaints, which sought recovery from the corporation [*Aronson v. McKesson HBOC, Inc. (ND Cal 1999) 79 F Supp2d 1146, 1151-1152*].

- **Slightly Differing Class Periods Would Not Defeat Consolidation of Securities Actions.** The district court consolidated six cases involving nearly identical claims of six related securities class actions, even though the asserted class periods differed slightly. All of the claims were based on the same alleged misrepresentations and omissions. Plaintiffs purchased and sold their shares in the same two markets. There was substantial overlap of defendants. Absent class members would best be served by consolidation because they would have just one case to monitor as it proceeded through litigation [*Takeda v. Turbodyne Techs., Inc. (CD Cal 1999) 67 F Supp2d 1129, 1133*].

- **Differing Damages Claims Do Not Defeat Consolidation.** The district court consolidated two actions against a ski resort stating claims for violation of the Americans With Disabilities Act, the state civil rights act, and California disabled access laws. The actions were directed against the same defendants and were based on the same alleged barriers and policies. Both actions sought class-based declaratory and injunctive relief and abolition of a no-wheelchairs policy and improved disability access, class-wide remedies which turn on liability under the common claims. The only differences involved damages for the particular injuries sustained by the individual plaintiffs as a result of the barriers and policies, and the need to separately litigate individual damages does not defeat consolidation when common issues predominate. Jury confusion would be no more likely than in any case with more than one plaintiff, and the court could structure the trial to deal with the issues in an orderly fashion [Leiken v. Squaw Valley Ski Corp. (ED Cal 1994) 1994 US Dist LEXIS 21281, at *6-*7].

- **Challenges to Immigration Policy Relating to Unaccompanied Minors Present Common Question.** The court consolidated separate actions by minors challenging the policies of the Immigration and Naturalization Service with regard to its voluntary departure policy as applied to unaccompanied minors. The actions presented the identical question of law requiring the determination of the nature and extent of the due process guarantees extended to unaccompanied minors faced with deportation. They additionally presented the identical question of fact of the degree to which the INS coerces unaccompanied minors to consent to voluntary departure. Additionally, one action generated hundreds of pages of pleadings and testimony pertinent to other action. To require the separate prosecution of the actions would have resulted in the duplication of effort, unnecessary costs, and delays *Fed R Civ P 42(a)* was designed to avoid [*Perez-Funez v. District Dir., INS (CD Cal 1984) 611 F Supp 990, 994*].

- **Patent Infringement Actions Can Present Common Questions.** The court consolidated two related patent infringement actions when it found that both lawsuits would require the court to construe the terms of three patents and address the validity of each, and each lawsuit required a jury to understand the same underlying technology and the same claim terms to determine if the products at issue infringed. Although one action involved an additional patent, the technology of that patent appeared to be related to the other three in issue. Because of these similarities, the court granted the motion to consolidate, stating that to do so would serve "judicial efficiency" [*Paxonet Communications, Inc. v. Transwitch Corp. (ND Cal 2003) 303 F Supp2d 1027, 1029*].

18.07[2] Common Question Need Not Predominate. Common questions of law and fact need not predominate; individual questions of law and fact may well predominate over common ones [Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *11].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of Actions

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18.08 Cases Must Properly Be Pending Before Same Court.

Consolidation only applies to cases that are properly before the same court [*Fed R Civ P 42(a)*]. If the cases to be consolidated are not properly before the same court, they cannot be consolidated [*Oregon Egg Producers v. Andrew (9th Cir 1972) 458 F2d 382, 383* ; *see* Italian Colors Rest. v. American Express Co. (ND Cal 2003) 2003 US Dist LEXIS 20338, at *20-*21].

The district court has broad discretion to consolidate actions pending in the same district, even if those actions are pending before different judges [*see Investors Research Co. v. United States District Court for the Cent. Dist. of Cal. (9th Cir 1989) 877 F2d 777*].

Distinguish--Forum Non Conveniens:

For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division, where it might have been brought [*28 USC § 1404(a)*; *see* Ch. 2, Determining Forum (Jurisdiction and Venue), 2.57, 2.60].

Example--Action Brought in State Court Could Not Be Removed and Consolidated With Pending Action:

A plaintiff sued a defendant in state court to recover on an account stated. The defendant counterclaimed for damages allegedly sustained by plaintiff's discriminatory pricing. The plaintiff moved to remove the action to federal court on the theory that the counterclaim raised a federal question. In the meantime, the defendant filed an antitrust action against the plaintiff in federal court. However, the plaintiff could not effectuate removal to a federal court even though the plaintiff could have originated the action in federal court and even though the counterclaim stated a claim cognizable in a federal court. Thus, the plaintiff could not invoke *Fed R Civ P 42* to seek consolidation with the antitrust action, since the original action was not properly in the federal court [*Oregon Egg Producers v. Andrew (9th Cir 1972) 458 F2d 382, 383*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureVenueForum Non ConveniensCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConsolidation of Actions

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18.09 Parties Should Consider Stipulation to Consolidate.

The parties can stipulate to consolidation [*see* Model Stipulation and Proposed Consolidation Order for Securities Fraud Class Actions, ND Cal, September 5, 2001].

Example--Court Enforced Stipulation to Consolidate State and Federal Cases:

An employee who was terminated sued in state court for wrongful discharge and tortious interference with contract and in federal court for discrimination and discriminatory retaliation. The parties stipulated to consolidate the state action with the suit in federal court. After the Ninth Circuit upheld the district court's grant to the employer of summary judgment on the discrimination claims but remanded the retaliation claim for trial, the district court again ordered the state and federal claims consolidated. The employee moved to stay the federal action pending resolution of the state claim in state court, but the employer moved to enforce the consolidation stipulation, which the district court granted and as to which the Ninth Circuit denied the employee's petition for writ of mandamus and which the Ninth Circuit upheld on appeal [*Payne v. Norwest Corp. (9th Cir 1999) 185 F3d 1068, 1070-1072*].

Cross Reference:

Discussion of preparing stipulations, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.03[2].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedurePretrial MattersConsolidation of Actions

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18.10 Only Party Can Move to Consolidate.

Only a party to an action can move for consolidation of that action with another [*Yousefi v. Lockheed Martin Corp. (CD Cal 1999) 70 F Supp2d 1061, 1065* ; *see* EEOC v. U.S. Steel (ED Pa 2002) 2002 US Dist LEXIS 11388, at *8 (employee's motion to intervene and consolidate actions granted)].

Example--Unnamed Class Members Cannot Move for Consolidation:
One hundred-thirty four unnamed class members who purchased stock during the period of time covered by the complaints could not move to consolidate that class action with two other related securities class actions [*Yousefi v. Lockheed Martin Corp. (CD Cal 1999) 70 F Supp2d 1061, 1065*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedurePretrial MattersConsolidation of Actions

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18.11 Seek Consolidation Early.

Fed R Civ P 42(a) does not require that a motion for consolidation be brought at any particular time during the proceedings. However, *Fed R Civ P 16* specifies that consideration should be given at pretrial conferences to matters that may facilitate the just, speedy, and inexpensive disposition of the action [*Fed R Civ P 16(c)(2)(P)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConsolidation of Actions

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18.12 Less than Entire Action May Be Consolidated.

The court may limit consolidation to particular issues and order a joint trial of those issues only [*Fed R Civ P 42(a)(1)*].

Example:

The court granted plaintiff's motion for partial consolidation of actions involving patent infringement, over another plaintiff's argument that full consolidation would be a preferable alternative [Wang Labs., Inc. v. Mitsubishi Elecs. Am., Inc. (CD Cal 1993) 1993 US Dist LEXIS 21372, at *6-*8]. Consolidated pretrial proceedings also may be ordered [*In re Equity Funding Corp. of Am. Sec. Litig. (CD Cal 1976) 416 F Supp 161, 175* ; Hopkins v. Dow Corning Corp. (ND Cal 1992) 1992 US Dist LEXIS 8580, at *1-*3].

Consider:

Consolidation for specified purposes can have advantages. For example, parties may want to consolidate for discovery but still conduct separate trials. Further, parties may want consolidated proceedings on one issue, such as liability, but separate proceedings on others, such as damages and punitive damages. One disadvantage to partial consolidation is that it does not always offer the savings and efficiency of full consolidation, and so is not as likely to be granted by the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of Actions

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18.13 Contents of Motion for Consolidation.

A motion for consolidation should argue the following [Certified/LVI Envtl. Servs. v. PI Constr. Corp. (WD Tex 2003) 2003 US Dist LEXIS 5474, at *6 ; *see Frazier v. Garrison ISD (5th Cir 1993) 980 F2d 1514, 1532* ; *Hendrix v. Raybestos-Manhattan, Inc. (11th Cir 1985) 776 F2d 1492, 1495-1497* ; and *In re Repetitive Stress Injury Litig. (2d Cir 1993) 11 F3d 368, 373*]:

- The cases proposed for consolidation are pending either before the same court for all purposes or before two different courts within the same judicial district;
- The cases involve a common party;
- The cases involve common issues of law;
- The cases involve common issues of fact;
- There is no risk of prejudice or possible confusion if the cases are consolidated, or if there is any risk, it is outweighed by the risk of inconsistent adjudications of factual and legal issues if the cases are tried separately;
- Consolidation will not result in an unfair advantage;
- Consolidation will conserve judicial resources;
- Consolidation will reduce the time for resolving the cases when compared to separate trials; and
- Consolidation will reduce the expense of trying the cases separately.

Note that the motion for consolidation must be filed in both lawsuits.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial MattersConsolidation of Actions

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18.14 Factors Court Will Consider.

18.14[1] Risk of Delay. The court may decline to consolidate cases involving common questions of law or fact when the cases are at different stages of preparedness for trial and consolidation would delay the case ready for disposition [Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *14].

18.14[2] Risk of Prejudice and Jury Confusion. The risk of prejudice and confusing the jury from consolidating separate cases must be weighed against the risk of inconsistent adjudications if they are not consolidated [Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *14].

A consolidated trial that confuses the jury does not serve its essential purpose, and should be avoided [*Southwest Marine, Inc. v. Triple A Mach. Shop, Inc. (ND Cal 1989) 720 F Supp 805, 807*].

18.14[3] Burden on Parties, Witnesses, and Judicial Resources. In deciding whether to consolidate cases, the court must consider whether added time will be required in trying multiple lawsuits consolidated for trial, with greater inconvenience and expense to all concerned [Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *14-*15].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConsolidation of Actions

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18.15 Moving Party Has Burden of Proof.

The party moving for consolidation bears the burden of proving that consolidation is desirable [Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *11]. The movant must prove that the actions to be consolidated are based on common questions of law and fact and that considerations of efficiency outweigh any prejudice or confusion that might result from consolidation [Ocean Ships v. Stiles (SDNY 2003) 2003 US Dist LEXIS 20876, at *3-*4].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersConsolidation of ActionsEvidenceProcedural ConsiderationsBurdens of ProofAllocation

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18.16 Consolidation Is Encouraged in Securities Litigation.

The Private Securities Litigation Reform Act of 1995 dictates that the district court should consolidate securities actions when they assert "substantially the same claim" [*15 USC § 78u-4(a)(3)(B)(ii)*]. They need not be identical [*Takeda v. Turbodyne Techs., Inc. (CD Cal 1999) 67 F Supp2d 1129, 1133*]. See Model Stipulation and Proposed Consolidation Order for Securities Fraud Class Actions, ND Cal, September 5, 2001.

Cross References:

Proceedings in securities class actions, see Ch. 20, Class Actions, see *§§ 20.45 -20.57*.

Special procedures for securities litigation, see 5 *Moore's Federal Practice, §§ 23.190 -23.192* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of ActionsSecurities LawLiabilityPrivate Securities LitigationGeneral Overview

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18.17 CHECKLIST: Opposing Motion for Consolidation.

☐ Review grounds for opposing consolidation.

☐ Determine whether objection can be based on procedural posture of cases.

Authority:
Fed R Civ P 42(a)

Discussion:
See *§ 18.19*

☐ Prepare and serve a response to your opponent's motion to consolidate.

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.37*

☐ Consider asking for consolidation of only part of the proceedings, such as consolidation for pretrial purposes only, for discovery only, etc.

Authority:
Fed R Civ P 42(a)

Discussion:
See *§ 18.12*

☐ If cases are consolidated, draft appropriate jury instructions to minimize juror confusion.

Authority:
Fed R Civ P 42(a)

Discussion:
See *§ 18.20*

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.18 Any Party Can Oppose Consolidation.

Any party in the actions can respond in opposition to a motion to consolidate [*see, e.g.,* Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *12 (defendant in first action opposed consolidation, as did plaintiff in the second action)].

Cross Reference:

Response to motion, Ch. 26, Pretrial Motion Practice, see *§§ 26.38 -26.43*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersConsolidation of Actions

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18.19 Review Grounds for Opposing Motion.

18.19[1] Existence of Common Issues Does Not Require Consolidation. The mere existence of common issues does not require consolidation; the court must evaluate each case on its own facts with close attention to whether the anticipated benefits of a consolidated complaint outweigh potential prejudice to the parties [Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *11].

Example:

Despite common issues, five factors militated against consolidating three actions against an insurer [*Servants of the Paraclete v. Great Am. Ins. Co. (D NM 1994) 866 F Supp 1560, 1572-1573*]:

- Actions involved several separate factual issues, parties, and legal questions;
- Risk of substantial delay of trial of one action;
- Consolidation would not significantly conserve the court's resources because trying the three actions together would require a bifurcated factfinding procedure; one action is to be tried to the court; the other two actions will be tried to a jury;
- Much duplicative effort and expense has already been avoided because the court consolidated the three actions for all pre-trial matters; and
- Possible consolidation for trial of two of the actions, in which the issues and parties are more similar, in which the trial schedules are virtually identical, and which are both jury trials.

18.19[2] Consolidation Will Cause Prejudice. In deciding whether to consolidate separate actions, the court must ensure that parties are not prejudiced by consolidation [Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *12].

18.19[3] Consolidation Will Cause Jury Confusion. The likelihood of jury confusion outweighs any efficiency that might have been achieved through consolidation [Applied Materials, Inc. v. Advanced Semiconductor Materials Am., Inc. (ND Cal 1994) 1994 US Dist LEXIS 17569, at *14].

18.19[4] Consolidation Will Cause Delay. The court may decline to consolidate cases involving common questions of law or fact when the cases are at different stages of preparedness for trial and consolidation would delay the case ready for disposition [Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *14].

Example:

A defendant opposed consolidation arguing that consolidation would result in undue delay of the action against it in the light of the different stages of preparedness of the two actions. At the time consolidation was sought, the first action approached two years of litigation. The parties in the first action had conducted voluminous discovery and engaged in mediation. The case was ready for trial with the exception of expert discovery, which has been postponed due to mediation efforts. The second action was not even at issue because the complaint had neither been filed nor responded to. Consolidation realistically would delay the first action trial for at least a year based on the second action's complexities, in depth discovery and additional parties. the court agreed that on balance, the potential for delay, confusion and prejudice outweighed perceived court efficiency despite common factors between the actions [Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *11-*16].

18.19[5] Consolidation Will Cause Burden on Parties, Witnesses, and Judicial Resources. In deciding whether to consolidate cases, the court must consider whether added time will be required in trying multiple lawsuits consolidated for trial, with greater inconvenience and expense to all concerned [Zacky Farms v. FMC Corp. (ED Cal 2001) 2001 US Dist LEXIS 24255, at *14-*15].

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.20 Draft Jury Instructions to Minimize Risk of Prejudice and Confusion.

If cases are consolidated over counsel's opposition, counsel should propose jury instructions that minimize or eliminate any prejudice or confusion [*Johnson v. Celotex Corp. (2d Cir 1990) 899 F2d 1281, 1285* (risks of prejudice and confusion may be reduced by the use of cautionary instructions to the jury and verdict sheets outlining the claims of each plaintiff)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsRequests for Instructions

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18.21 CHECKLIST: Moving for Bifurcation.

☐ Determine whether there are separate claims or issues with separate sets of proof.

Authority:
Fed R Civ P 42(b)

Discussion:
See *§ 18.22*

☐ Determine whether separate trials will further convenience, avoid prejudice or be conducive to expedition and economy.

Authority:
Fed R Civ P 42(b)

Discussion:
See *§ 18.22*

☐ Determine whether separating trials will not violate a party's right to a jury trial.

Authority:
Fed R Civ P 42(b)

Discussion:
See *§ 18.31*

☐ Ascertain whether opposing counsel will stipulate to consolidation.

Authority:
Fed R Civ P 42(b)

Discussion:
See *§ 18.23*

Standard Stipulation Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.08*

☐ Prepare to request bifurcation at Case Management conference.

Authority:
Fed R Civ P 42(b)

Discussion:
See *§ 18.26*

Cross Reference:
Pretrial conferences, Ch. 17, Final Pretrial Conference, see *§§ 17.07[2]*, *17.09[2]*.

☐ If counsel will not stipulate, prepare notice of motion and motion and proposed order.

Authority:
Fed R Civ P 42(b)

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Forms:
See *§§ 18.19*, *18.20*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersSeparate Trials

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18.22 Counsel Should Weigh Factors to Determine Whether Action Is Amenable to Bifurcation.

Before moving for separate trials, counsel should evaluate the case carefully to determine whether it is a proper case for bifurcation. Motions to bifurcate will be granted on a case by case basis only when the separation will result in judicial economy and will not unduly prejudice any party [*Calmar, Inc. v. Emson Research, Inc. (CD Cal 1994) 850 F Supp 861, 865-866*].

Whether to bifurcate a trial rests with the sound discretion of the trial court [*Jinro Am. Inc. v. Secure Invs., Inc. (9th Cir 2001) 266 F3d 993, 998*]. Many courts consider bifurcation to be the exception not the rule [*see 18.04[2]*].

The court will consider the following factors when ruling on a motion for separate trials [*Calmar, Inc. v. Emson Research, Inc. (CD Cal 1994) 850 F Supp 861, 866*]:

- The complexity of the issues.
- The factual proof involved in the individual issues.
- The risk of jury confusion.
- The difference between the separated issues.
- The chance that separation will lead to economy in discovery.
- The possibility that the first trial may be dispositive of the case.

Example--Bifurcation of Manner of Death Simplified Issues:

The district court bifurcated the issue of the manner of a jail inmate's death from the other issues, including a conspiracy to violate his civil rights. The bifurcation simplified issues for the jury because the complex conspiracy issue would be eliminated if the jury found that he committed suicide. Further, evidence relevant to the conspiracy allegation could tend to obscure the more fundamental issue of how the death occurred [*Hirst v. Gertzen (9th Cir 1982) 676 F2d 1252, 1261*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersSeparate Trials

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18.23 Parties Can Stipulate to Bifurcation.

With the court's approval, the parties can stipulate to bifurcation of claims or issues under *Fed R Civ P 42(b)* [*see Marks Food Corp. v. Barbara Ann Baking Co. (9th Cir 1959) 274 F2d 934, 935*].

Cross Reference:

Discussion of preparing stipulations, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.03[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersSeparate Trials

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18.24 Court Can Order Bifurcation Sua Sponte.

A district court may separate an issue from others on its own motion and confine the introduction of evidence to that separated issue alone if the court in the exercise of reasonable discretion determines that bifurcation would save trial time or effort or make the trial of other issues unnecessary [*Richmond v. Weiner (9th Cir 1965) 353 F2d 41, 44-45* , *cert. denied, 384 US 928 (1966)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersSeparate Trials

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18.25 Any Party Can Move for Bifurcation.

Any party can move for bifurcation [*see, e.g.,* Nicoletti v. Gates (CD Cal 2002) 2002 US Dist LEXIS 13199, at *5 ; *ASM Am., Inc. v. Genus, Inc. (ND Cal 2002) 2002 US Dist LEXIS 1351, at *16* (defendant's motion to bifurcate trial denied; plaintiff's motion to sever and stay four antitrust claims and related discovery granted)].

Legal Topics:

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

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18.26 Requests for Separate Trials Will Be Considered at Pretrial Conferences.

18.26[1] Rule 16 Applies. At a pretrial conference, the court may consider an order for a separate trial pursuant to *Fed R Civ P 42(b)* with respect to a claim, counterclaim, crossclaim, or third-party claim, or with respect to any particular issue in the case [*Fed R Civ P 16(c)(2)(M)*].

18.26[2] LOCAL PRACTICE: CD Cal Requirements--Memorandum of Contentions of Fact and Law. Not later than 21 days in advance of the Final Pretrial Conference, each party must serve and file a Memorandum of Contentions of Fact and Law [*CD Cal Civ LR 16-4*]. This memorandum must contain any request for bifurcation of issues together with an explanation for the request [*CD Cal Civ LR 16-4.3*].

18.26[3] LOCAL PRACTICE: ED Cal Requirements--Status Conference and Pretrial Statement. Counsel must be prepared to discuss the appropriateness of an order for a separate trial pursuant to *Fed R Civ P 42(b)* at the status conference [*ED Cal Civ LR 240(a)(13)*]. In the pretrial statement, counsel must state whether a separate trial on any of the issues is feasible and advisable [*ED Cal Civ LR 240(a)(18)*].

18.26[4] LOCAL PRACTICE: SD Cal Requirements--Contents of Pretrial Order. The pretrial order must contain a statement that the trial of the case will or will not be bifurcated. If the trial is bifurcated, the pretrial order must state which issues will be tried first [*SD Cal Civ LR 16.1(f.6.c)*].

Warning:

Although a request for bifurcation will likely be considered in advance of when these statements or reports are due, under the local rules a court is likely to consider a request made later that this time to be untimely.

Cross Reference:

Pretrial conferences, Ch. 17, Final Pretrial Conference, see *§§ 17.07[2]*, *17.09[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.27 Move for Bifurcation As Soon As Possible.

Counsel should move for bifurcation as soon as possible [*see, e.g., Spectra-Physics Lasers, Inc. v. Uniphase Corp. (ND Cal 1992) 144 FRD 99, 101* (defendant's motion for separate trials, which involved a stay of discovery, was too late; the action had been pending for almost a year, and the factual discovery cut-off date had already passed); *but see* ACS Communications, Inc. v. Plantronics, Inc. (ND Cal 1995) 1995 US Dist LEXIS 22188, at *3-*6 (district court denied a motion to bifurcate, emphasizing that because no discovery had taken place at the time of the motion, it was difficult to ascertain the complexity of the claims and stating that while patent and antitrust claims are typically technical and complex, separating the issues at that point could cause unnecessary expenses and delay in conducting discovery)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersSeparate Trials

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18.28 Bifurcation Should Further Convenience.

A court may bifurcate any trial in furtherance of convenience [*Fed R Civ P 42(b)*; *Bates v. UPS (ND Cal 2001) 204 FRD 440, 448-449 , vacated in part, reversed in part, and remanded on other grounds,* Bates v. UPS (9th Cir 2007) 511 F3d 974 (because the issues of liability and damages are separable, it would be convenient to bifurcate)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.29 Bifurcation Should Not Prejudice Any Party.

The court may grant a motion to bifurcate only when the separation will not unduly prejudice any party [*Calmar, Inc. v. Emson Research, Inc. (CD Cal 1994) 850 F Supp 861, 865* ; *see also Bates v. UPS (ND Cal 2001) 204 FRD 440, 448] , vacated in part, reversed in part, and remanded on other grounds, Bates v. UPS, 20 Am. Disabilities Cas. (BNA) 1* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.30 Bifurcation Should Be Conducive to Expedition and Economy.

Motions to bifurcate are to be granted on a case-by-case basis, when the separation will result in judicial economy [*Calmar, Inc. v. Emson Research, Inc. (CD Cal 1994) 850 F Supp 861, 865*]. The district court has inherent authority to manage a case with economy of time and effort for itself, for counsel and for litigants [*Landis v. North Am. Co. (1936) 299 US 248, 254, 57 S Ct 163, 81 L Ed 153* ; *Pinal Creek Group v. Newmont Mining Corp. (D Ariz 2003) 218 FRD 652, 654* (defendant's motion to bifurcate liability and damages in a CERCLA action granted)].

Example:

Ordering separate trials in a civil rights action, the court stated that reducing the types and amount of evidence to be produced in each phase of trial would promote judicial economy and reduce the risk of confusion; moreover, judicial economy would be further promoted because bifurcation might eliminate the need to consider evidence of damages [*Bates v. UPS (ND Cal 2001) 204 FRD 440, 448-449] , vacated in part, reversed in part, and remanded on other grounds, 20 Am. Disabilities Cas. (BNA) 1* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.31 Right to Jury Trial Must Be Preserved.

In deciding whether to grant separate trials, the court must always preserve any federal right of trial by jury [*Fed R Civ P 42(b)*].

However, there is no *Seventh Amendment* requirement that all evidence be presented to the trier of fact at one hearing. As long as the form of trial adopted by the trial court affords the opportunity provided at common law for the consideration by the jury, there is no violation of the right to a jury trial [*see Arthur Young & Co. v. United States Dist. Court (9th Cir 1977) 549 F2d 686, 692 , cert. denied, 434 US 829 (1977)*].

Example--Claim Against Government Under Federal Tort Claims Act Can Be Tried Separately From Negligence Action Against Another Defendant:

The Federal Tort Claims Act requires claims against the United States to be tried without a jury while the *Seventh Amendment* preserves to private individuals their right of trial by jury on negligence claims against non-governmental defendants in a federal court. Thus, in actions in which the plaintiffs sued private defendants for personal injuries, the defendants could bring third-party claims against the United States rather than bringing separate actions. To preserve the parties' rights to a jury, should they desire one, the court can order separate trials under *Fed R Civ P 42(b)* [*United States v. Yellow Cab Co. (1951) 340 US 543, 555-556, 71 S Ct 399, 95 L Ed 523*].

Cross Reference:

8 Moore's Federal Practice, see *§ 42.22* (Matthew Bender 3d ed.).

The jury trial right is implicated in an action involving legal and equitable claims. There is a right to jury trial on legal claims generally, but no jury trial right on equitable claims. Bifurcation causes no constitutional problems, so long as the legal and equitable issues are distinct, *i.e.*, they do not involve common issues [*Danjaq LLC v. Sony Corp. (9th Cir 2001) 263 F3d 942, 962* ; *see Bates v. UPS (ND Cal 2001) 204 FRD 440, 448] , vacated in part, reversed in part, and remanded on other grounds, Bates v. UPS, 20 Am. Disabilities Cas. (BNA) 1* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate TrialsCivil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil ActionsGovernmentsFederal GovernmentClaims By & AgainstTortsPublic Entity LiabilityLiabilityFederal Tort Claims ActGeneral Overview

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CHAPTER 18 Consolidation and Separate Trials
IV. MOVING FOR SEPARATE TRIALS (BIFURCATION)

2-18 MB Practice Guide: Fed Pretrial Civ Proc in CA 18.32

18.32 Not All Rule 42(b) Factors Need Be Present to Bifurcate.

Only one of *Fed R Civ P 42(b)*'s requirements must be satisfied for the court to bifurcate a trial [United States v. Shell Oil, Co. (CD Cal 1992) 1992 US Dist LEXIS 3947, at * 11 ; *Pinal Creek Group v. Newmont Mining Corp. (D Ariz 2003) 218 FRD 652, 654*].

Since Rule 42(b) states these factors in the disjunctive and alternative, they need not all be present for separation; the presence of any one of them is sufficient to sustain an order for a separate trial in the exercise of an informed discretion [*In re Paris Air Crash of March 3, 1974 (CD Cal 1975) 69 FRD 310, 318-319*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersSeparate Trials

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18.33 Moving Party Has Burden of Proof.

The moving party bears the burden of establishing that separate trials are necessary to prevent prejudice or confusion and serve the ends of justice [Wechsler v. Hunt Health Sys. (SDNY 2003) 2003 US Dist LEXIS 13775, at *20 ; *see Buscemi v. Pepsico, Inc. (SDNY 1990) 736 F Supp 1267, 1271*].

Example:

Where the moving party failed to meet its burden of proving otherwise, court found that bifurcation would result in prejudice, given that two trials would inevitably cause delay in resolution of case [*Spectra-Physics Lasers, Inc. v. Uniphase Corp. (ND Cal 1992) 144 FRD 99, 101*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersSeparate TrialsEvidenceProcedural ConsiderationsBurdens of ProofAllocation

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18.34 Power to Separate Trials Includes Power to Stay Proceedings.

Implicit in the grant of discretion in *Fed R Civ P 42(b)* to grant separate trials is the power to stay proceedings, including discovery, on the deferred issues until the end of the first trial [*Ellingson Timber Co. v. Great Northern Ry. Co. (9th Cir 1970) 424 F2d 497, 499 , cert. denied, 400 US 957 (1970)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate TrialsCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & Parties

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IV. MOVING FOR SEPARATE TRIALS (BIFURCATION)

2-18 MB Practice Guide: Fed Pretrial Civ Proc in CA 18.35

18.35 Bifurcation Is Effective in Particular Types of Actions.

18.35[1] Tort Actions. In tort actions it often efficient to separate liability from damages, see for example:

- *Sanford v. Johns-Manville Sales Corp. (5th Cir 1991) 923 F2d 1142, 1145-1146* (asbestosis cases).

- *Lis v. Robert Packer Hosp. (3d Cir 1978) 579 F2d 819, 824 , cert. denied, 439 US 955 (1978)* (decision to bifurcate in medical malpractice case affirmed because no prejudice shown).

- *Bates v. UPS (ND Cal 2001) 204 FRD 440, 448-449 , vacated in part, reversed in part, and remanded on other grounds, Bates v. UPS, 20 Am. Disabilities Cas. (BNA) 1* (decision to bifurcate in civil rights action would promote judicial economy and reduce the risk of confusion).

- *Pinal Creek Group v. Newmont Mining Corp. (D Ariz 2003) 218 FRD 652, 654* (defendant's motion to bifurcate liability and damages in a CERCLA action granted).

Bifurcation of punitive damages is also favored by some courts [*Mattison v. Dallas Carrier Corp. (4th Cir 1991) 947 F2d 95, 110* (bifurcation proper where punitive damages evidence would be prejudicial to jury's consideration of liability or compensatory damages).

18.35[2] Patent Cases. Patent cases provide good illustrations of using bifurcation to promote judicial efficiency and simplify the issues, see for example:

- Bifurcation of validity from infringement [General Patent Corp. v. Hayes Microcomputer (CD Cal 1997) 1997 US Dist LEXIS 21342, at *4-*9].

- Bifurcation of willfulness from infringement [Robotic Vision Sys., Inc. v. View Eng'g, Inc. (CD Cal 1997) 1997 US Dist LEXIS 19157, at *6-*7 (defendant was confronted with the dilemma of choosing between waiving attorney-client privilege to protect itself from a willfulness finding, in which case it would risk prejudicing itself on the question of liability)].

- Bifurcation of antitrust counterclaims until after the trial of the invalidity issue [*ASM Am., Inc. v. Genus, Inc. (ND Cal 2002) 2002 US Dist LEXIS 1351, at *18-*19*].

18.35[3] Bifurcation Is Rule Rather Than Exception in Title VII Cases. Separating liability from questions of individual relief during the pretrial phase avoids unnecessary expenditure of judicial time and labor as well as attorney time and labor and expenditure of unnecessary monies in determining and reviewing and discovering the issues of damages prior to settling liability; in the absence of prejudice to the non-moving party, in Title VII employment discrimination class actions, bifurcation should be the rule rather than the exception [EEOC v. Lucky Stores, Inc. (ED Cal 1982) 1982 US Dist LEXIS 16864, at *3].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate TrialsLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General OverviewPatent LawInfringement ActionsGeneral OverviewTortsProcedureGeneral Overview

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CHAPTER 18 Consolidation and Separate Trials
V. OPPOSING MOTION FOR SEPARATE TRIALS

2-18 MB Practice Guide: Fed Pretrial Civ Proc in CA 18.36

18.36 CHECKLIST: Opposing Motion for Separate Trials.

☐ Review grounds for objecting to opponent's motion for separate trial.

Discussion:
See *§ 18.38*

☐ Check local rules for timing and case management requirements.

Discussion:
See *§ 18.26*

☐ Timely respond to bifurcation motion.

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersSeparate Trials

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18.37 Prepare to Oppose Rule 42(b) Motion at or Before Initial Case Management Conference.

Counsel should check the local rules relating to discussion of bifurcation during case management conferences [*see 18.26*].

Cross Reference:

Pretrial statements, see Ch. 17, Final Pretrial Conference, see *§ 17.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersSeparate Trials

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Unit 4 Required Conferences and Case Management
CHAPTER 18 Consolidation and Separate Trials
V. OPPOSING MOTION FOR SEPARATE TRIALS

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18.38 Review Grounds for Objecting to Bifurcation.

18.38[1] Bifurcation Will Prejudice Party. Counsel opposing bifurcation must show that it will be prejudiced by bifurcation [*see, e.g., Arnold v. UA Theatre Circuit, Inc. (ND Cal 1994) 158 FRD 439, 458-460* (granting plaintiffs' motion to bifurcate the adjudication of the issues of liability, injunctive and declaratory relief, and damages to the named plaintiffs in a civil rights action, the court emphasized that the defendant failed to allege any way in which it would be prejudiced by a bifurcated trial)].

18.38[2] Bifurcation Will Not Be Conducive to Expedition and Economy. A party opposing bifurcation can argue that separate trials will not defer costly and possibly unnecessary proceedings [*see, e.g.,* Nicoletti v. Gates (CD Cal 2002) 2002 US Dist LEXIS 13199, at *6-*7 (denying defendant's motion to bifurcate, the court stated that bifurcation will not be conducive to expedient resolution and judicial economy and would involve unnecessary costs and consumption of more time)].

When there are overlapping issues, bifurcation can result in presenting the same evidence twice, which does not serve judicial economy [Hilleby v. FMC Corp. (ND Cal 1992) 1992 US Dist LEXIS 20835, at *9 (judicial efficiency would be disserved by bifurcation where complaint and counterclaim involved same parties, same technology, same witnesses, and most of same issues)].

18.38[3] Right to Jury Trial Implications. In deciding whether to grant separate trials, the court must always preserve any federal right to trial by jury [*Fed R Civ P 42(b)*].

A constitutional concern may arise when the district court orders that some portions of the case be tried to the judge and others to a jury. Generally speaking, this is permissible because only certain issues carry the right to a jury trial. In particular, the *Seventh Amendment* preserves the right to jury trial of legal claims, but there is no right to a jury for equitable claims [*Ross v. Bernhard (1970) 396 US 531, 537-538, 90 S Ct 733, 24 L Ed2d 729*]. Difficulties may arise when the legal and equitable issues overlap and the evidence is intertwined [*Danjaq LLC v. Sony Corp. (9th Cir 2001) 263 F3d 942, 962*]. When there are issues common to both the equitable and legal claims, the legal claims must be determined prior to any final court determination of the equitable claims [*Danjaq LLC v. Sony Corp. (9th Cir 2001) 263 F3d 942, 962*].

Fed R Civ P 42(b) does not sanction switching the separated issue in a jury case from the jury to the judge unless the very stating of the separated issue shows it to be frivolous [*Marks Food Corp. v. Barbara Ann Baking Co. (9th Cir 1959) 274 F2d 934, 936*].

Cross References:

Discussion of right to jury trial, see Ch. 13, Demanding a Jury Trial, see *§ 13.04*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

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Unit 4 Required Conferences and Case Management
CHAPTER 18 Consolidation and Separate Trials
VI. FORMS
A. Consolidation

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18.39 Notice of Motion and Motion for Consolidation of Actions.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR CON-
_____ [*name*],	)	SOLIDATION OF ACTIONS
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order pursuant to *Fed R Civ P 42(a)*, consolidating the above-entitled and numbered action with the action pending in this district court entitled _____ [*identify case to be consolidated*], Docket No. _____, and for other incidental relief as may be appropriate. This motion is made on the ground that both actions present common questions of law and fact, including _____ [*specify common questions of law and/or fact, e.g.,* that both actions arise from the same contract entered into by defendant and both actions present the same question of the validity of that contract]. _____ [*address any other applicable arguments for consolidation, per discussion in 18.13*].

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 42(a)

Contents of Motion:
See *§ 18.13*

Timing:
See *§ 18.11*

Forms of Supporting Affidavit and Memorandum:

See 9 *Bender's Federal Practice Forms, Forms 42:2, 42:3*

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Unit 4 Required Conferences and Case Management
CHAPTER 18 Consolidation and Separate Trials
VI. FORMS
A. Consolidation

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18.40 Notice of Motion and Motion for Joint Trial.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR JOINT
_____ [*name*],	)	TRIAL
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order pursuant to *Fed R Civ P 42(a)*, for joint trial of the above-entitled and numbered action with the action pending in this district court entitled _____ [*identify case to be consolidated*], Docket No. _____, and for other incidental relief as may be appropriate. This motion is made on the ground that both actions present common questions of law and fact, including _____ [*specify common questions of law and/or fact, e.g.,* that both actions present the same question of the validity of the same contract entered into by the defendant].

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], the accompanying [*add, if appropriate:* Memorandum of] Points and Authorities, and the pleadings and papers on file in this action.

[*If required by local rule (e.g., ND Cal Civ LR 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 42(a)

Timing:
See *§ 18.11*

Contents of Motion:
See *§ 18.13*

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Unit 4 Required Conferences and Case Management
CHAPTER 18 Consolidation and Separate Trials
VI. FORMS
A. Consolidation

2-18 MB Practice Guide: Fed Pretrial Civ Proc in CA 18.41

18.41 Order Granting Consolidation of Actions or Joint Trial.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	ORDER GRANTING
_____ [*name*],	)	_____
Defendant	)	[CONSOLIDATION OF ACTIONS *or*
	)	JOINT TRIAL]
	)	

The motion of plaintiff for an order _____ [*specify* consolidating *or* for joint trial of] the above-entitled and numbered action with the action pending in this district court entitled _____ [*identify case to be consolidated*], Docket No. _____, came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel_____ [*name*]. On proof made to the satisfaction of the court that the motion ought, in furtherance of justice, to be granted.

IT IS ORDERED that the motion be, and it hereby is, granted and that the above-entitled and numbered action with the action pending in this district court entitled _____ [*identify case to be consolidated*], Docket No. _____ be _____ [*specify* consolidated *or* jointly tried].

[*If actions are consolidated:*]

IT IS FURTHER ORDERED that _____ [the above-entitled and numbered action *or* the action pending in this district court entitled _____ (*identify case to be consolidated*), Docket No. _____] is hereby designated the master case, and all future papers filed in these actions will show that they are consolidated. All parties to each case consolidated by this order must file all papers in each of the consolidated actions under that master docket and file copies in the other case. All papers in each consolidated case must be served on all parties to these consolidated actions.

[*If actions will be jointly tried:*]

IT IS FURTHER ORDERED that the above-entitled and numbered action *or* the action pending in this district court entitled _____ (*identify case to be consolidated*), Docket No. _____ are consolidated only for the purposes of trial, and for no other purposes.
Date: _____

_____

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
Fed R Civ P 42(a)

Court May Order Consolidation Sua Sponte:
See *§ 18.02[2]*

Factors Court Will Consider:
See *§ 18.14*

Related Form of Motion for Consolidation:
See *§ 18.39*

Related Form of Motion for Joint Trial:
See *§ 18.40*

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Unit 4 Required Conferences and Case Management
CHAPTER 18 Consolidation and Separate Trials
VI. FORMS
B. Separate Trials

2-18 MB Practice Guide: Fed Pretrial Civ Proc in CA 18.42

18.42 Notice of Motion and Motion for Separate Trials.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR SEP-
_____ [*name*],	)	ARATE TRIALS
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order pursuant to *Fed R Civ P 42(b)*, requiring separate trials of _____ [*identify claims or issues on which separate trial is sought, e.g.*, the issues of defendant's liability and damages, both compensatory and punitive], and for other incidental relief as may be appropriate.

This motion is made on the ground that on the ground that _____ [*specify grounds, e.g.*, resolution of the issue of defendant's liability may obviate the need for trying the complex and difficult issues of compensatory and punitive damages].

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 42(b)

Timing:
See *§ 18.27*

Contents of Motion:
See *§§ 18.28 -18.30*

Moving Party Has Burden of Proof:
See *§ 18.33*

Related Form of Order:
See *§ 18.43*

Additional Motion Forms:
See 9 *Bender's Federal Practice Forms, Forms 42:22- 42:28*

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CHAPTER 18 Consolidation and Separate Trials
VI. FORMS
B. Separate Trials

2-18 MB Practice Guide: Fed Pretrial Civ Proc in CA 18.43

18.43 Order Granting Separate Trials.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	ORDER GRANTING
Defendant	)	SEPARATE TRIALS
	)	
	)	

The motion of defendant for an order for separate trials of _____ [*identify claims or issues on which separate trial is sought, e.g.,* the issues of defendant's liability and damages, both compensatory and punitive], came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*]. On proof made to the satisfaction of the court that the motion ought, in furtherance of justice, to be granted.

IT IS ORDERED that the motion be, and it hereby is, granted and that the _____ [claim *or* issue] of

_____ [*specify, e.g.*, defendant's liability] be tried before the _____ [claim *or* issue] of _____ [*specify, e.g.*, damages, compensatory and punitive].
Date: _____

_____

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
Fed R Civ P 42(b)

Separate Trials Ordered Sua Sponte:
See *§ 18.24*

Form of Motion to Bifurcate:
See *§ 18.42*

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Unit 5 Provisional Remedies
CHAPTER 19 Preliminary Injunctions, TROs, and Other Provisional Remedies

2-19 MB Practice Guide: Fed Pretrial Civ Proc in CA 19.syn

§ 19.syn Synopsis to Chapter 19: Preliminary Injunctions, TROs, and Other Provisional Remedies

19.01 Scope.

19.02 Objective and Strategy.

19.02[1] Provisional Injunctive Relief.

19.02[2] Prejudgment Seizure of Property.

19.02[3] Receiverships.

19.02[4] Proceeding Against Surety Under Rule 65.1.

19.02[5] Deposit of Money or Other Things Under Rule 67.

19.03 CHECKLISTS.

19.03[1] CHECKLIST: Determining Whether to Seek Provisional Relief.

19.03[2] CHECKLIST: Seeking a Preliminary Injunction.

19.03[3] CHECKLIST: Seeking a Temporary Restraining Order.

19.04 Options and Strategies for Party Seeking Injunctive Relief.

19.04[1] Assess Potential Tactical Benefits of Injunctive Relief.

19.04[2] Determine Types of Injunctive and Other Relief Available.

19.04[2][a] Injunctions May Be Mandatory or Prohibitory.

19.04[2][b] Injunctions Are Unavailable If Jurisdictional Requisites Are Unmet.

19.04[2][c] Suit for Injunctive Relief May Be Combined With Damages Claims.

19.05 Injunctive Relief Is an Equitable Remedy.

19.05[1] Injunctive Relief Must Be Based on Equity Principles.

19.05[2] Availability of Injunction Focuses on Need to Prevent Future Irreparable Injury.

19.05[3] Types of Injunctive Relief Are Differentiated by Degree of Permanence.

19.06 Injunctions in Removed Actions.

19.06[1] State Court Injunctions and Orders Generally Remain in Effect.

19.06[2] Ex Parte Temporary Restraining Order Expires Pursuant to State Court Order and Rule 65(b).

19.06[3] Rule 65(b) Governs Dissolution or Modification of TRO.

19.07 Seeking Permanent Injunction.

19.07[1] Purpose and Nature of Permanent Injunction.

19.07[1][a] Permanent Injunction Finally Settles Dispute.

19.07[1][b] Permanent Injunction Granted at Conclusion of Trial.

19.07[2] Subject Matter Jurisdiction Required.

19.07[3] Injunction Cannot Be Enforced Against Defendant Over Whom Court Lacks Personal Jurisdiction.

19.07[4] No Special Pleading Requirements.

19.07[5] Standing for Declaratory and Injunctive Relief.

19.07[6] Court Must Balance Hardships.

19.07[7] Plaintiff Must Show Actual Success on Merits and Likelihood of Irreparable Harm.

19.08 Seeking Preliminary Injunction.

19.08[1] Preliminary Injunction Is Provisional Remedy Preserving StatusQuo.

19.08[2] Preliminary Injunction Enjoins Allegedly Unlawful Conduct Pending Outcome of Case.

19.08[3] Ninth Circuit Employs Two Alternative Tests to Determine Propriety of Preliminary Injunction.

19.08[3][a] Moving Party Must Satisfy Either Traditional or Alternative Test.

19.08[3][b] Traditional Test Weighs Irreparable Injury, Probability of Success on Merits, Balance of Harm, and Public Interest.

19.08[3][c] Alternative Test Weighs Either Combination of Probable Success and Irreparable Injury, or Serious Questions About Merits and Balance of Hardships.

19.08[3][d] Ninth Circuit Tests Represent a Continuum.

19.08[3][e] Public Interest Is Accorded Considerable Deference.

19.08[3][f] Moving Party Has Burden of Proof.

19.08[3][g] Colorable First Amendment Claim Establishes Irreparable Injury in Ninth Circuit.

19.08[3][h] Irreparable Harm Is No Longer Presumed in Trademark, Copyright, and Unfair Competition Cases Upon Sufficient Showing of Likelihood of Success.

19.08[3][i] Modified Analysis Applies to Anti-Suit Injunctions.

19.08[4] Notice to Adverse Party Required.

19.08[4][a] Preliminary Injunction Is Unavailable Without Notice to Adverse Party.

19.08[4][b] Party May Give Notice by Service of Complaint and Summons, Motion, Order to Show Cause, or Other Reasonable Means.

19.08[5] Other Papers May Be Submitted in Support of Motion.

19.08[6] LOCAL PRACTICE: CD Cal Requirements--Notice of Motion When TRO Not Sought.

19.08[7] LOCAL PRACTICE: ED Cal Requirements--Motion for Preliminary Injunction.

19.08[7][a] Notice of Motion.

19.08[7][b] Accompanying Documents.

19.08[7][c] Parties Must Provide Specified Information.

19.08[7][d] Requirements for Preliminary Injunction or Temporary Restraining Order in Actions Involving Real Property.

19.08[8] LOCAL PRACTICE: ND Cal Requirements--Motion for Preliminary Injunction.

19.08[9] Hearing on Motion for Preliminary Injunction Required Absent Waiver or Undisputed Facts.

19.08[10] Court May Order Consolidation of Hearing With Trial on Merits.

19.09 Seeking Temporary Restraining Order.

19.09[1] Temporary Restraining Order (TRO) Granted to Preserve Status Quo.

19.09[2] Notice to Adverse Parties Generally Required.

19.09[3] Requirements for Temporary Restraining Order Granted Without Notice.

19.09[3][a] Specified Facts of Irreparable Injury and Attorney Certification of Any Efforts to Give Notice Are Required.

19.09[3][b] Order Must Be Indorsed With Date and Hour of Issuance, and Filed Immediately.

19.09[3][c] If Granted, Order Must Be Filed Immediately.

19.09[3][d] Order Must Define Injury and State Why It Is Granted Without Notice.

19.09[3][e] Order Expires After 14 or Fewer Days Unless Extended.

19.09[3][f] Motion for Preliminary Injunction Given Priority; Temporary Restraining Order Dissolved If Applicant Does Not Proceed With Motion.

19.09[3][g] Ex Parte Relief Subject to Intense Judicial Scrutiny.

19.09[3][h] Ex Parte Relief Disfavored Absent Compelling Reason.

19.09[3][i] Respondent May Move for Dissolution or Modification on Two Days' or Shorter Notice; Motion Heard Expeditiously.

19.09[4] LOCAL PRACTICE: CD Cal Requirements--Temporary Restraining Order.

19.09[5] LOCAL PRACTICE: ED Cal Requirements--Temporary Restraining Order.

19.09[5][a] Actual Notice or Effort to Provide Notice Required Except in Extraordinary Circumstances.

19.09[5][b] Undue Delay of Application May Constitute Laches or Contradict Irreparable Injury Allegations.

19.09[5][c] Required Documents.

19.09[5][d] Requirements for Preliminary Injunction or Temporary Restraining Order in Actions Involving Real Property.

19.09[6] LOCAL PRACTICE: ND Cal Requirements--Temporary Restraining Order.

19.09[6][a] Ex Parte Motion for Temporary Restraining Order.

19.09[6][b] Notice to Opposition of Ex Parte Motion.

19.09[6][c] Order to Show Cause; Form of Temporary Restraining Order.

19.10 Rules for Preliminary Injunction and Temporary Restraining Order Do Not Modify Certain Federal Statutes.

19.11 Security Is Required for Restraining Order or Preliminary Injunction.

19.11[1] Applicant Must Give Security for Restraining Order or Preliminary Injunction in Appropriate Sum.

19.11[2] Court Has Discretion to Determine Amount of Security.

19.11[3] Local Rules on Requirements for Bonds and Undertakings Must Be Consulted.

19.11[4] Surety's Liability May Be Enforced on Motion.

19.12 Injunction Order.

19.12[1] Local Rules and Judges' Individual Rules Control.

19.12[2] Requirements for Order.

19.12[2][a] Order Must Be Specific, Describe Restrained Acts in Reasonable Detail, and Not Describe Acts by Reference.

19.12[2][b] Injunction May Not Be Impermissibly Vague.

19.12[2][c] Ninth Circuit Does Not Strictly Preclude Incorporation of Other Documents If Notice of Prohibited Acts Is Adequate.

19.12[3] Order Is Binding Only on Parties, Agents, and Other Specified Persons.

19.13 Rule 65 Applies to Copyright Impoundment Proceedings.

19.14 CHECKLIST: Opposing Injunctive Relief.

19.15 Options and Strategies for Opposing Injunctive Relief.

19.16 Anti-Injunction Act Limits Power of Federal Court to Enjoin State Proceedings.

19.17 Injunction Opposed on Ground of Adequate Remedy at Law.

19.18 District Court Lacks Jurisdiction to Enjoin Dissipation of Assets in Which Plaintiff Claims No Lien or Equitable Interest.

19.19 Defense of Laches.

19.19[1] Defense of Laches Requires Proof of Lack of Diligence and Prejudice.

19.19[2] Defense of Laches Is Available in Injunction Proceedings.

19.19[3] Defense of Laches Available in Some Trademark Infringement Cases.

19.19[4] LOCAL PRACTICE: ED Cal Requirements--Undue Delay of Application May Constitute Laches or Contradict Irreparable Injury Allegations.

19.20 Defense of Unclean Hands.

19.21 Raising Objections to Motion for Preliminary Injunction.

19.22 Terms of Injunction May Be Challenged on Grounds of Overbreadth and Vagueness.

19.23 Cessation of Conduct Does Not Moot Case.

19.24 Recovery on Bond for Wrongful Restraint or Enjoinment.

19.25 Motion for Dissolution or Modification of Temporary Restraining Order.

19.25[1] Respondent May Move for Dissolution or Modification on Two Days' or Shorter Notice.

19.25[2] Motion Is Heard Expeditiously.

19.25[3] At Time of Hearing on Motion to Dissolve TRO, Parties May Be Able to Present Evidence and Legal Arguments Re Preliminary Injunction.

19.26 LOCAL PRACTICE: ED Cal--Modification or Dissolution of Preliminary Injunction or Temporary Restraining Order.

19.27 District Court Has Inherent Authority to Modify Preliminary Injunction in Consideration of New Facts.

19.28 Court May Utilize Power of Contempt.

19.29 Effect on Contempt Prosecution If Injunction Reversed.

19.30 Appellate Court Reviews Grant or Denial of Permanent Injunction for Abuse of Discretion.

19.31 Interlocutory Orders Granting, Continuing, Modifying, Refusing or Dissolving Injunctions, or Refusing to Dissolve or Modify Injunctions Are Appealable.

19.32 Substance of Motion Controls Its Disposition.

19.33 Review of Grant or Denial of Motion for Preliminary Injunction.

19.33[1] Grant or Denial of Motion for Preliminary Injunction Reviewed for Abuse of Discretion.

19.33[2] When Preliminary Injunction Granted, Court of Appeals Determines Only Whether District Court Employed Appropriate Legal Standards and Correctly Interpreted Law.

19.33[3] Court Abuses Discretion When Ruling on Preliminary Injunction Is Based on Erroneous View of Law.

19.33[4] District Court's Determination of Underlying State Law, or Choice of Law Is Reviewed de Novo.

19.33[5] Merger of Preliminary Injunction Into Permanent Injunction May Render Appeal Moot.

19.33[5][a] Appeal From Grant of Preliminary Injunction Is Generally Moot When Court Enters Permanent Injunction.

19.33[5][b] If Trial Court Lacked Authority to Issue Preliminary Injunction, Appeal May Be Possible After Conversion to Permanent Injunction.

19.34 Extended TRO Granted Ex Parte May Be Appealable As Preliminary Injunction.

19.35 Effect of Appeal on Injunction Under Rule 62.

19.35[1] Interlocutory or Final Judgment in Injunction Action Not Stayed Pending Appeal.

19.35[2] District Court May Suspend, Modify, Restore, or Grant Injunction Pending Appeal.

19.35[3] Court of Appeals May Suspend, Modify, Restore, or Grant Injunction Pending Appeal.

19.36 Amount of Security Bond Reviewed for Abuse of Discretion.

19.37 CHECKLIST: Determining Available Remedies.

19.38 Prejudgment Remedies Are Those Available Under California Law.

19.39 Although State Law Determines Which Remedies Are Available, Federal Rules Govern Procedure.

19.39[1] Procedure for Prejudgment Remedy Generally Governed by Federal Law.

19.39[2] Exception; State Law Supplies Procedure for Lis Pendens.

19.40 Complaint Must Be Filed Before Seizure Is Available.

19.41 When Action Is Removed, State Court Remedies Continue.

19.42 Prejudgment Remedies Available Under California Law.

19.42[1] Writ of Attachment Is Available Under California Law.

19.42[2] Writ of Possession Is Available Under California Law.

19.42[3] Other Prejudgment Relief May Be Available Under California Law.

19.43 Agreement to Arbitrate That Provides Method and Forum for Provisional Relief Precludes Provisional Relief in District Court.

19.44 CHECKLIST: Obtaining a Writ of Attachment.

19.45 Options and Strategies for Plaintiff.

19.45[1] Determine Whether Attachment Is Available.

19.45[2] Determine Probable Validity of Claim.

19.46 Consider Use of Preliminary Injunction If Conditions for Attachment Cannot Be Met.

19.47 Compute Amount to Be Secured by Attachment.

19.48 Identify Property Subject to Attachment.

19.48[1] California Law Exempts Specific Property From Attachment.

19.48[2] All Property of Corporation, Partnership, or Unincorporated Association, Which May Be Levied, Is Subject

to Attachment.

19.48[3] Only Specified Property of Natural Person Is Subject to Attachment.

19.48[4] Special Rules Apply to Property Subject to Pending Action or Special Proceeding.

19.49 Application for Right to Attach Order.

19.49[1] Application Must Be Executed Under Oath and Contain Specified Information.

19.49[2] LOCAL PRACTICE: CD Cal Requirements--Application Must Be Made to Magistrate Judge.

19.50 Writ of Attachment May Be Obtained Ex Parte Only on Showing of Great or Irreparable Injury.

19.51 Application for Temporary Protective Order to Preserve Status Quo May Be Filed With Application for Right to Attach Order.

19.52 Contents of Notice to Defendant.

19.52[1] Defendant Must Be Notified of Time and Place of Hearing and Right to Be Present.

19.52[2] Defendant Must Be Notified of Conditions for Issuing Order.

19.52[3] Defendant Must Be Notified of Basis for Amount of Attachment.

19.52[4] Defendant Must Be Notified of Right to Oppose Attachment and of Right to Claim Property As Exempt.

19.52[5] Notice Must Contain Prescribed Statement Concerning Advice of Counsel.

19.53 Court Will Issue Right to Attach Order If Statutory Requirements Are Met.

19.54 Plaintiff Must Post Undertaking for Writ to Issue.

19.55 Contents of Writ.

19.56 Levying on Property by Service of Writ.

19.56[1] Serve Copies of Writ and Notice of Attachment on Defendant.

19.56[2] LOCAL PRACTICE: CD Cal Requirements--Seizure of Property.

19.57 Levy Creates Attachment Lien That May Last for Maximum of Eight Years.

19.58 Additional Writs of Attachment Are Available Following Notice and Hearing.

19.59 Order Granting Prejudgment Writ of Attachment Is Not Appealable.

19.60 CHECKLIST: Opposing a Writ of Attachment.

19.61 Options and Strategy for Defendant Opposing Writ of Attachment.

19.62 Specified Property Is Exempt From Attachment.

19.62[1] When Defendant Is an Entity, Property Subject to Levy Is Subject to Attachment.

19.62[2] When Defendant Is a Natural Person, Variety of Exemptions Apply.

19.63 File and Serve Notice of Opposition and/or Claim of Exemption Along With Supporting Papers Not Later Than Five Court Days Before Hearing Date.

19.64 Plaintiff May Oppose Claim of Exemption.

19.65 Undertaking May Be Substituted for Attached Property.

19.65[1] Application for Substitution of Undertaking Must Be Made by Noticed Motion.

19.65[2] All Defendants With Interest in Attached Property Must Join in Application for Undertaking.

19.65[3] Order Will Issue If Undertaking Is Sufficient.

19.66 Defendant May Apply by Noticed Motion to Quash Writ Granted Ex Parte.

19.67 Defendant May Apply by Noticed Motion for Release of Excess Attachment.

19.68 CHECKLIST: Obtaining a Writ of Possession.

19.69 Options and Strategies for Plaintiff.

19.69[1] California Law Determines Circumstances and Manner in Which Writ of Possession Is Available.

19.69[2] Plaintiff Must Show Probable Validity of Claim.

19.69[3] Personal Property Must Be Specific and Tangible.

19.70 Plaintiff Must Apply for Writ of Possession.

19.70[1] Plaintiff Must File Application to Obtain Writ of Possession.

19.70[2] LOCAL PRACTICE: CD Cal Requirements--Application Must Be Made to Magistrate Judge.

19.71 Contents of Application for Writ of Possession.

19.71[1] Application Must Show Basis of Plaintiff's Claim and That Plaintiff Is Entitled to Possession.

19.71[2] Application Must Show Wrongful Detention of Property by Defendant.

19.71[3] Application Must Describe Property and Its Location.

19.71[4] Application Must State Property Has Not Been Taken Pursuant to Statute.

19.72 Writ of Possession May Be Obtained Ex Parte Only Under Limited Circumstances.

19.73 Before Hearing, Defendant Must Be Served With Application and Notice.

19.73[1] Documents That Must Be Served on Defendant Before Hearing.

19.73[2] Contents of Notice to Defendant.

19.73[2][a] Defendant Must Be Notified of Time and Place of Hearing.

19.73[2][b] Defendant Must Be Notified of Conditions for Issuing Writ.

19.73[2][c] Defendant Must Be Notified of Right to Oppose Issuance of Writ.

19.73[2][d] Notice Must Contain Prescribed Statement Concerning Advice of Counsel.

19.74 Court Will Issue Writ If Plaintiff Establishes Probable Validity of Claim and Satisfies Undertaking Requirements.

19.74[1] Plaintiff Must Show Probable Validity of Claim.

19.74[2] Plaintiff Must Satisfy Undertaking Requirements, Unless Waived.

19.74[3] If Plaintiff Seeks Writ Requiring Entry Into Private Property, Plaintiff Must Show Probable Cause to Believe Property Is Located There.

19.75 If Writ Issues, Court May Also Issue "Turnover" Order.

19.76 Contents of Writ.

19.77 Order Granting Prejudgment Writ of Possession Is Not Appealable.

19.78 CHECKLIST: Opposing a Writ of Possession.

19.79 Options and Strategies for Defendant Opposing Writ of Possession.

19.80 Service and Contents of Documents Must Meet Statutory Requirements.

19.80[1] Defendant Must Be Served With All Required Documents.

19.80[2] Notice of Application and Hearing Must Satisfy Statutory Requirements As to Contents.

19.80[3] Plaintiff's Application or Affidavits Must Make Required Showings.

19.81 File Opposition Papers With Court and Effect Service on Plaintiff.

19.82 If Writ Was Issued Ex Parte, Defendant May Move to Quash.

19.83 Object to Plaintiff's Undertaking Within 10 Days After Levy.

19.84 File Defendant's Undertaking to Retain or Regain Possession of Property.

19.85 CHECKLIST: Determining Propriety of Receivership.

19.86 Options and Strategy for Determining Propriety of Receivership.

19.87 Determine Whether "Receivership in Fact" Already Exists.

19.88 Court's Jurisdiction to Appoint Receiver.

19.88[1] Subject Matter Jurisdiction Can Be Presumed.

19.88[1A] Federal Law Governs Appointment of Receiver in Diversity Action.

19.88[2] Seeking Equitable Relief May Implicate Appointment of Receiver.

19.88[3] Know Location of Property to Be Placed in Receivership.

19.88[3][a] Court With Jurisdiction in Rem May Appoint Receiver.

19.88[3][b] Jurisdiction in Rem Can Extend Outside District.

19.88[3][c] Jurisdiction of Legal Owner Is Sufficient to Reach Property in Any District.

19.89 Factual Basis for Receivership.

19.89[1] Receivership Is Drastic Remedy.

19.89[2] Nontraditional Factual Setting Is No Bar to Relief.

19.89[3] Match Facts of Case With Conditions Justifying Receivership.

19.89[3][a] Various Facts May Be Relevant.

19.89[3][b] Going Business May Present Special Case.

19.89[3][c] Foreclosure Proceeding May Present Special Case.

19.90 CHECKLIST: Obtaining Appointment of Receiver on Notice.

19.91 Options and Strategy for Obtaining Appointment of Receiver on Notice.

19.92 Receivership Is Obtained Through Order to Show Cause or Notice of Motion.

19.92[1] Notice Usually Is Required.

19.92[2] LOCAL PRACTICE: Drafting Order to Show Cause or Notice of Motion.

19.92[2][a] LOCAL PRACTICE: CD Cal Requirements.

19.92[2][b] LOCAL PRACTICE: ED Cal Requirements.

19.92[2][c] LOCAL PRACTICE: ND Cal Requirements.

19.92[2][d] LOCAL PRACTICE: SD Cal Requirements.

19.93 Other Parties Must Be Served With Order to Show Cause or Notice of Motion.

19.93[1] Follow Normal Motion Practice.

19.93[2] LOCAL PRACTICE: Serving Other Parties.

19.93[2][a] LOCAL PRACTICE: CD Cal Requirements.

19.93[2][b] LOCAL PRACTICE: SD Cal Requirements.

19.94 Notice Must Be Provided to Creditors.

19.94[1] Applicant Must Notify Creditors.

19.94[2] LOCAL PRACTICE: Giving Notice to Creditors.

19.94[2][a] LOCAL PRACTICE: ND Cal Requirements.

19.94[2][b] LOCAL PRACTICE: SD Cal Requirements.

19.95 Court Order Is Source of Authority for Appointment.

19.95[1] Order Is Source of Authority.

19.95[2] Special Provisions May Be Appropriate.

19.95[3] Local Rules Apply to Some Extent.

19.95[4] Requiring Receiver's Bond.

19.95[4][a] Court May Require Bond.

19.95[4][b] LOCAL PRACTICE: ED Cal Requirements.

19.95[4][c] LOCAL PRACTICE: ND Cal Requirements.

19.95[4][d] LOCAL PRACTICE: SD Cal Requirements.

19.96 Administration of Property by Receiver.

19.96[1] LOCAL PRACTICE: CD Cal Requirements--Administering Receivership Generally.

19.96[2] LOCAL PRACTICE: CD Cal Requirements--Keeping Time Records.

19.96[3] LOCAL PRACTICE: Depositing Funds.

19.96[3][a] LOCAL PRACTICE: ED Cal Requirements.

19.96[3][b] LOCAL PRACTICE: ND Cal Requirements.

19.96[3][c] LOCAL PRACTICE: SD Cal Requirements.

19.97 Reporting Duties of Receiver.

19.97[1] Reports Must Be Filed and Served Periodically.

19.97[2] LOCAL PRACTICE: Filing and Serving Reports.

19.97[2][a] LOCAL PRACTICE: CD Cal Requirements.

19.97[2][b] LOCAL PRACTICE: ED Cal Requirements.

19.97[2][c] LOCAL PRACTICE: ND Cal Requirements.

19.97[2][d] LOCAL PRACTICE: SD Cal Requirements.

19.98 Duty of Receiver to Give Prior Notice of Significant Acts.

19.98[1] Receiver Must Notify Parties and Creditors.

19.98[2] LOCAL PRACTICE: Notifying Parties and Creditors.

19.98[2][a] LOCAL PRACTICE: CD Cal Requirements.

19.98[2][b] LOCAL PRACTICE: ED Cal Requirements.

19.98[2][c] LOCAL PRACTICE: ND Cal Requirements.

19.98[2][d] LOCAL PRACTICE: SD Cal Requirements.

19.99 Power of Receiver to Employ Professionals.

19.99[1] Court Approval May Be Required.

19.99[2] LOCAL PRACTICE: Employing Attorney, Accountant, or Investigator.

19.99[2][a] LOCAL PRACTICE: ED Cal Requirements.

19.99[2][b] LOCAL PRACTICE: ND Cal Requirements.

19.99[2][c] LOCAL PRACTICE: SD Cal Requirements.

19.100 Taking Control of Property in Other District.

19.100[1] Receiver Has Jurisdiction Over Property in Other District.

19.100[2] Receiver's Jurisdiction Generally Is Subject to Condition Subsequent.

19.100[3] Jurisdiction Over Intangible Property May Not Be Subject to Condition Subsequent.

19.101 CHECKLIST: Applying Ex Parte for Temporary Receiver.

19.102 Options and Strategy for Ex Parte Application for Temporary Receiver.

19.103 Party Seeking Ex Parte Application Must Obtain Supporting Verified Declaration.

19.103[1] Good Cause Must Be Shown.

19.103[2] LOCAL PRACTICE: Showing of Good Cause.

19.103[2][a] LOCAL PRACTICE: CD Cal Requirements.

19.103[2][b] LOCAL PRACTICE: ED Cal Requirements.

19.103[2][c] LOCAL PRACTICE: ND Cal Requirements.

19.103[2][d] LOCAL PRACTICE: SD Cal Requirements.

19.104 Hearing on Continuation of Receivership Must Be Held.

19.104[1] Prompt Hearing Is Required.

19.104[2] LOCAL PRACTICE: Scheduling Prompt Hearing.

19.104[2][a] LOCAL PRACTICE: CD Cal Requirements.

19.104[2][b] LOCAL PRACTICE: ED Cal Requirements.

19.105 Order to Show Cause or Notice of Motion Must Be Utilized.

19.105[1] Parties and Creditors Are Entitled to Notice of Hearing.

19.105[2] LOCAL PRACTICE: Drafting Order to Show Cause or Notice of Motion.

19.105[2][a] LOCAL PRACTICE: CD Cal Requirements.

19.105[2][b] LOCAL PRACTICE: ED Cal Requirements.

19.105[2][c] LOCAL PRACTICE: ND Cal Requirements.

19.105[2][d] LOCAL PRACTICE: SD Cal Requirements.

19.106 Creditors of Adverse Party Must Be Notified.

19.106[1] Temporary Receiver Will Give Notice to Creditors.

19.106[2] LOCAL PRACTICE: CD Cal Requirements--Filing of List.

19.107 Ex Parte Applicant Must Give Notice of Appointment.

19.107[1] Ex Parte Applicant Will Give Notice.

19.107[2] LOCAL PRACTICE: ED Cal Requirements--Giving Notice.

19.108 CHECKLIST: Opposing Appointment of Receiver.

19.109 Options and Strategy for Opposing Appointment of Receiver.

19.110 Attack Factual Showing in Support of Appointment.

19.110[1] Show That More Harm Than Good Will Result.

19.110[2] Stress Unbalanced Outcome.

19.111 Defending Debt-Collection Suit by United States.

19.111[1] United States May Seek Appointment of Receiver.

19.111[2] Cite Any Failure to Meet Statutory Requirements.

19.111[2][a] Specific and Verified Showing Is Required.

19.111[2][b] Supporting Affidavit Is Required.

19.112 Minimize Harsh Result When Court Intends to Give Relief.

19.112[1] Suggest That Injunction Would Be Effective and Less Drastic.

19.112[2] Propose That Court Require Bond Rather Than Appoint Receiver.

19.112[3] Request Specific Limitations on Receiver's Authority and Powers.

19.112[4] Propose Custodian in Lieu of Receiver for Going Business.

19.112[5] Challenge Applicant's Candidate for Receiver.

19.112[5][a] Assert Statutory Ineligibility.

19.112[5][b] Argue That Candidate Lacks Neutrality.

19.112[5][c] Argue Special Circumstances Showing Inequity or Hardship.

19.113 Appeal From Order Appointing Receiver.

19.113[1] Interlocutory Appeal Is Allowed.

19.113[2] Standard of Review Is Abuse of Discretion.

19.113[3] Stay May Be Sought in District Court.

19.113[4] District Court May Modify Order During Pendency of Appeal.

19.114 CHECKLIST: Initial Considerations.

19.115 Options and Strategy for Creditor Considering Rule 65.1 Motion.

19.116 Identify Provision Under Which Surety Provided Security.

19.116[1] Rule 65.1 Motion Available Against Surety When Security Is Permitted or Required Under Federal Rules of Civil Procedure.

19.116[2] Rule 65.1 Motion Not Available in Bankruptcy Proceedings.

19.117 Rule 65.1 Motion Available Against Principal.

19.117[1] Creditor May Bring Rule 65.1 Motion Against Principal.

19.117[2] Rule 65.1 Motion Not Available for Surety to Proceed Against Principal.

19.118 Creditor May Bring Independent Action.

19.118[1] Creditor May Bring Independent Action in State or Federal Court.

19.118[2] District Court Has Jurisdiction Over Action on Bond Executed Under Federal Law.

19.119 CHECKLIST: Determining Surety's Liability Under Bond.

19.120 Conditions for Payment Under Bond Must Be Satisfied Before Initiating Rule 65.1 Motion.

19.121 Surety's Liability Under Injunction Bond.

19.121[1] Federal Rules Require Bond for Temporary Restraining Order or Preliminary Injunction to Issue.

19.121[2] Bond May Be Executed When Party Was Wrongfully Enjoined or Restrained.

19.121[3] Rebuttable Presumption Exists That Wrongfully Enjoined or Restrained Party Is Entitled to Execution of Bond.

19.121[4] Federal Common Law Governs Damages Recoverable.

19.121[5] Amount of Recoverable Damages.

19.121[5][a] Damages Recoverable to Compensate Wrongfully Enjoined Party for Injury Caused by Injunction.

19.121[5][b] Damages Recoverable From Surety Are Limited to Amount of Bond.

19.121[5][c] Attorney Fees Recoverable Only If Bond So Provides.

19.122 Surety's Liability Under Attachment Bond.

19.122[1] California Law Governs Attachment Undertaking.

19.122[2] Undertaking Is Condition of Writ of Attachment.

19.122[3] Amount of Damages Recoverable.

19.122[3][a] Damages Proximately Caused.

19.122[3][b] Attorney Fees.

19.122[3][c] Liability Limited to Amount of Undertaking.

19.123 Surety's Liability Under Supersedeas Bond.

19.124 CHECKLIST: Moving to Enforce Surety's Liability Under Rule 65.1.

19.125 Options and Strategy for Moving Party.

19.126 Surety's Liability May Be Enforced by Motion.

19.127 Surety Submits to Jurisdiction of Court.

19.128 Motion Must Be Timely.

19.128[1] Motion May Be Filed After Determination on Merits of Underlying Action.

19.128[2] Motion Must Be Filed Before Exoneration of Bond.

19.128[3] Excessive Delay May Be Fatal.

19.129 Advance Notice of Motion Is Required.

19.130 Attempt Resolution With Opposing Counsel.

19.131 Provide Notice to Surety by Service on Surety or by Serving Papers on Clerk.

19.131[1] Notice Must Be Provided to Surety.

19.131[2] Clerk of Court Acts As Surety's Agent.

19.131[3] LOCAL PRACTICE: Direct Notice to Surety.

19.131[3][a] LOCAL PRACTICE: CD Cal Requirements.

19.131[3][b] LOCAL PRACTICE: ED Cal Requirements.

19.131[3][c] LOCAL PRACTICE: ND Cal Requirements.

19.131[3][d] LOCAL PRACTICE: SD Cal Requirements.

19.132 Adverse Ruling May Be Appealed to Ninth Circuit.

19.133 CHECKLIST: Opposing Motion to Enforce Surety's Liability Under Rule 65.1.

19.134 Options and Strategy for Party Opposing Rule 65.1 Motion.

19.135 Rule 65.1 Procedure May Be Delayed by Injunction.

19.136 District Court Lacks Jurisdiction Over Suit on Injunction Bond Once Bond Is Exonerated.

19.137 Motion Must Be Timely.

19.138 Appeal From Determination of Liability.

19.139 CHECKLIST: Initial Considerations.

19.140 Deposit With Court Is Appropriate in Interpleader and to Stop Accrual of Interest.

19.140[1] Deposit Is Condition of Interpleader Under Federal Interpleader Act.

19.140[2] Deposit May Be Required As Condition of Proceeding With Rule Interpleader.

19.140[3] Deposit Will Stop Accrual of Interest.

19.141 Action Must Seek Judgment for Money or Property Capable of Being Deposited.

19.142 Money or Property Must Be Suitable for Delivery to Court.

19.143 All or Only Part of Disputed Money or Property May Be Deposited.

19.144 CHECKLIST: Moving for Leave to Deposit Disputed Money or Property With Court.

19.145 Options and Strategy for Moving Party.

19.146 Motion or Stipulation Is Required to Obtain Leave to Make Deposit Unless Deposit Is Allowed As of Right.

19.146[1] Noticed Motion Is Required to Obtain Leave to Make Deposit Unless Local Rules Provide Otherwise.

19.146[2] LOCAL PRACTICE: ED Cal Requirements--Deposit Allowed As of Right in Interpleader Action.

19.146[3] LOCAL PRACTICE: ED Cal Requirements--Leave of Court to Make Deposit May Be Requested by Stipulation.

19.147 Notice Is Required for Motion.

19.147[1] General Notice Rules Apply Unless Local Rules Specify Otherwise.

19.147[2] LOCAL PRACTICE: ED Cal Requirements--Seven Days' Notice Required.

19.148 Money Must Be Deposited With Treasurer or Designated Depository.

19.148[1] Money Must Be Deposited in Name of and to Credit of Court.

19.148[2] LOCAL PRACTICE: ED Cal Requirements--Depositor May Request Special Placement.

19.148[3] LOCAL PRACTICE: SD Cal Requirements--Moving Party Must Request Deposit in Other Than Passbook Savings Account.

19.149 Order Must Comply With Federal And Local Rules.

19.149[1] Order Required to Make Deposit Unless Local Rule Provides for Deposit As of Right.

19.149[2] LOCAL PRACTICE: ED Cal Requirements--Proposed Order Must Be Served on Clerk for Approval.

19.149[3] LOCAL PRACTICE: ED Cal Requirements--Order Must Specify Amount and Placement of Deposit.

19.149[4] LOCAL PRACTICE: SD Cal Requirements--Order Must Specify Amount and Placement of Deposit.

19.150 Service of Order Must Comply With Federal and Local Rules.

19.150[1] Serve Order Permitting Deposit on Clerk of Court and Other Parties.

19.150[2] LOCAL PRACTICE: ED Cal Requirements--Counsel for Depositor Has Responsibility of Personal Delivery of Order to Clerk.

19.150[3] LOCAL PRACTICE: CD Cal Requirements--Personal Service Required on Designated Clerk.

19.150[4] LOCAL PRACTICE: SD Cal Requirements--Personal Service on Clerk Required If Order Directs Deposit in Other Than Passbook Savings Account.

19.151 Adverse Ruling May Be Appealed to Ninth Circuit.

19.152 CHECKLIST: Withdrawing the Deposit.

19.153 Money Earns Interest While on Deposit.

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19.155 Order for Disbursement Must Comply With Federal and Local Rules.

19.155[1] Court Order Required to Withdraw Deposit.

19.155[2] LOCAL PRACTICE: ED Cal Requirements--Order Must Specifically Direct Clerk to Disburse Funds.

19.155[3] LOCAL PRACTICE: SD Cal Requirements--Order Must Be Entitled "Order to Disburse Funds" and Contain Other Specified Information.

19.156 Funds Unclaimed After Five Years Are Deposited With Treasury.

19.157 Order to Show Cause for Preliminary Injunction With TRO.

19.158 Motion for Temporary Restraining Order and Preliminary Injunction.

19.159 Preliminary Injunction.

19.160 Application for Right to Attach Order and Optional Request for Temporary Protective Order.

19.161 Order to Show Cause--Appointment of Receiver.

19.162 Notice of Motion and Motion for Appointment of Receiver.

19.163 Notice of Motion and Motion for Damages for Wrongful Injunction.

19.164 Notice of Motion for Leave to Make Deposit in Court Following Refusal of Tendered Payment.

19.165 Local Central District Court Attachment Forms.

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Unit 5 Provisional Remedies
CHAPTER 19 Preliminary Injunctions, TROs, and Other Provisional Remedies
I. STRATEGY

2-19 MB Practice Guide: Fed Pretrial Civ Proc in CA 19.01

19.01 Scope.

This chapter covers:

- Injunctive relief, including preliminary injunctions and temporary restraining orders (TROs) [*see 19.03 -19.36*; *Forms: 19.157 -19.159*].

- Seizure of property before judgment through writs of attachment or possession [*see 19.37 -19.84*; *Form: 19.160*].

- Appointment of receivers [*see 19.85 -19.113*; *Forms: 19.161*, *19.162*].

- Proceeding against a surety [*see 19.114 -19.138*; *Form: 19.163*].

- Deposit of money or property into court [*see 19.139 -19.156*; *Form: 19.164*].

Core Rules:
Fed R Civ P 64, *65*, *65.1*, *66*, *67*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesDeposits in CourtCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesReceivershipsGeneral Overview

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Unit 5 Provisional Remedies
CHAPTER 19 Preliminary Injunctions, TROs, and Other Provisional Remedies
I. STRATEGY

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19.02 Objective and Strategy.

19.02[1] Provisional Injunctive Relief. Counsel about to commence an action should analyze the facts to determine whether provisional injunctive relief (a temporary restraining order (TRO) or preliminary injunction) might be justified. Provisional relief can be a powerful weapon. Apart from the benefit of the TRO or injunction itself, provisional relief lends greater urgency to the case, thereby requiring the adversary to take the case seriously at the outset.

An application for a TRO combined with the motion for a preliminary injunction will give the plaintiff a very early reading as to the court's reaction to the case, which can be a great benefit or detriment. However, unless there is an urgent need for relief, or a great advantage to be gained by surprising the defendant with an ex parte application for a TRO, counsel should consider filing just a noticed motion for a preliminary injunction. Neither form of relief should be sought unless counsel thinks the court is likely to grant the requested provisional relief and that obtaining such relief is important. Losing an application for a TRO or a motion for a preliminary injunction is not a good way to start a lawsuit, and if the court denies the motion because the court finds an insufficient probability of success on the merits, the loss can dramatically affect the future course of the lawsuit. On the other hand, if the grounds for provisional relief are strong and the application for a TRO and/or motion for a preliminary injunction are successful, there is much to be gained. Thus, seeking such relief may offer great opportunity, but it also entails great risk.

In an appropriate case, combining the motion with a request for immediate, expedited discovery will heighten the urgency with which the parties, and the court, will treat the matter. Expedited discovery may take the adverse party by surprise, and yield a more complete, more accurate version of the relevant circumstances. Expedited discovery may enhance the chances that a motion for preliminary injunction will be successful.

19.02[2] Prejudgment Seizure of Property. Once an action is commenced in federal court, all provisional remedies available pursuant to the law of the state in which the district court is located, are available in the federal action [*Fed R Civ P 64(a)*]. One of the most important remedies available under California law is prejudgment seizure of property, also known as attachment. A motion for prejudgment seizure will force the adverse party to take the case seriously at the outset, and can expedite the resolution of the entire case.

19.02[3] Receiverships. A receiver is a person who takes possession of and preserves, for the party entitled to possession of it, the fund or property in litigation [*FTC v. World Wide Factors, Ltd. (9th Cir 1989) 882 F2d 344, 348*].

The opportunity to seek a neutral handling of property during the pendency of litigation may be critical, particularly when the property may be wrongfully disposed of or otherwise mishandled to the detriment of the moving party. However, the fact that the appointment of a receiver is simply an equitable remedy available wherever justified affords a wide range of possible uses as a remedy in situations not involving the management of property [*see SEC v. Hardy (9th Cir 1986) 803 F2d 1034, 1038-1039* ; *see also Fed R Civ P 66*, Committee Note of 1946].

19.02[4] Proceeding Against Surety Under Rule 65.1. Rule 65.1 provides for a simplified proceeding against a surety who has provided a bond or undertaking in a federal court. The liability of the surety can be enforced by motion; it is not necessary to commence an independent action. The surety has submitted to the jurisdiction of the court, and consented to the appointment of the clerk of the court as agent for service of process [*see Fed R Civ P 65.1*]. The motion process is less expensive and generally more expeditious than proceeding by an independent action.

19.02[5] Deposit of Money or Other Things Under Rule 67. Rule 67 governs the deposit of money or other things capable of delivery into court. The procedure is only available on notice, in any action in which all or part of the relief sought is the money or thing deposited [*see Fed R Civ P 67(a)*]. Rule 67 is not widely used in practice; indeed a court may be ill equipped or reluctant to take deposit of tangible items. The parties can make their own arrangements, through counsel, for the handling of money, pendente lite, instead of through the Rule 67 device. Often, escrow accounts or letters of credit, for example, are used. The benefit of these private arrangements is that the parties, and not the court, are in control, and the details can be fine-tuned.

Detailed Discussion/Forms:

13 Moore's Federal Practice, Ch. 64, Seizing a Person or Property (Matthew Bender 3d ed.).

13 Moore's Federal Practice, Ch. 65, Injunctions and Restraining Orders (Matthew Bender 3d ed.).

13 Moore's Federal Practice, Ch. 65.1, Proceedings Against a Surety (Matthew Bender 3d ed.).

13 Moore's Federal Practice, Ch. 66, Receivers (Matthew Bender 3d ed.).

13 Moore's Federal Practice, Ch. 67, Deposit into Court (Matthew Bender 3d ed.).

11 Bender's Federal Practice Forms, Rule 64, Seizing a Person or Property (Matthew Bender).

11 Bender's Federal Practice Forms, Rule 65, Injunctions (Matthew Bender).

11 Bender's Federal Practice Forms, Rule 65.1, Proceedings Against a Surety (Matthew Bender).

11 Bender's Federal Practice Forms, Rule 66, Receivers (Matthew Bender).

11 Bender's Federal Practice Forms, Rule 67, Deposit into Court (Matthew Bender).

Cross Reference:

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesReceivershipsGeneral Overview

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2-19 MB Practice Guide: Fed Pretrial Civ Proc in CA 19.03

19.03 CHECKLISTS.

19.03[1] CHECKLIST: Determining Whether to Seek Provisional Relief.

☐ Assess potential tactical benefits of provisional relief, including:

○ Accelerating litigation--a motion for provisional injunctive relief may result in acceleration of pretrial activity and advance the trial date.

○ Expediting court's analysis of case--the court's decision, if based on the probability of success as the merits, will give the parties the benefit (or detriment) of the court's analysis early in the litigation.

○ Accelerating settlement--a party subject to the constraints of an injunction may be pushed to settlement because of the immediate, and often prohibitive, costs of compliance.

○ Expedited discovery--the strict time constraints for litigating the injunction application often enable expedited discovery.

○ Immediacy--unlike civil suits for money damages, provisional injunctive relief is generally decided quickly, sometimes immediately.

○ Ongoing jurisdiction--the court retains jurisdiction to continue to monitor the respondent's compliance with the injunction.

○ Preventing harm--provisional injunctive relief may be critical in preventing irreversible harm.

○ Advancing legal theories in detail before discovery is risky: in cases in which some important facts remain unknown when plaintiff files the complaint--it can be counter-productive to go at on a limb before knowing what the opposing party can say in response.

○ The opposing party may have the right to appeal the injunction, which could delay the litigation.

Authority:
Fed R Civ P 65

Discussion:
See *§ 19.04[1]*

☐ Determine whether the benefits are outweighed by the potential detriments of injunctive relief, including:

○ Incurring large costs--injunction litigation is generally costly.

○ Impeding settlement--respondent may perceive denial of in-junction as vindication by the respondent and thus hinder settlement possibilities.

○ Encountering difficulty of enforcement--injunctive relief is often meaningless without effective enforcement, which may be infeasible.

○ Posting security--applicant will be required to post security, generally in the form of a bond, on issuance of the injunction.

○ Causing premature disclosure--impending irreparable injury may compel the applicant to seek injunctive relief before the case is fully investigated and analyzed.

Authority:
Fed R Civ P 65

19.03[2] CHECKLIST: Seeking a Preliminary Injunction.

☐ Determine whether preliminary injunction is necessary:

○ Evaluate need to preserve status quo between parties pending final determination on merits.

○ Decide if mandatory or prohibitory injunction would provide the most suitable

interlocutory relief.

Discussion:
See *§ 19.04[2]*

☐ Determine whether movant can satisfy the standards for preliminary injunctive relief under either of the following tests:

○ Under the traditional test, the movant must demonstrate:

☐ Irreparable injury if the relief is denied;

☐ Probability of success on the merits;

☐ The balance of potential harm favors the moving party; and

☐ The public interest favors the injunction.

Authority:
International Jensen, Inc. v. Metrosound USA Inc. (9th Cir 1993) 4 F3d 819, 822 ; *Northern Alaska Envt'l Ctr. v. Hodel (9th Cir 1986) 803 F2d 466, 471* ; *Aeroground, Inc. v. City & County of San Francisco (ND Cal 2001) 170 F Supp2d 950, 954*

Discussion:
See *§ 19.08[3][b]*

○ Under an alternative test sometimes applied by the Ninth Circuit, the movant must demonstrate:

☐ A combination of probable success on the merits and the likelihood of irreparable injury if the relief is not granted; or

☐ The existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor.

Authority:
El Pollo Loco, Inc. v. Hashim (9th Cir 2003) 316 F3d 1032, 1038 ; *International Jensen, Inc. v. Metrosound USA Inc. (9th Cir 1993) 4 F3d 819, 822*

Discussion:
See *§ 19.08[3][c]*

☐ Commence action if an action is not already pending.

Content Note:
A preliminary injunction may be sought only in connection with a pending action. If the motion for a

preliminary injunction is filed contemporaneously with the complaint, the movant should first file the complaint so that the docket number assigned can be included on the motion. This will confirm to the assigned judge that the injunctive relief is indeed being sought in the context of a pending action.

☐ Draft a notice of motion and motion or order to show cause.

- ○ The party seeking preliminary injunctive relief must provide notice to all adverse parties.
- ○ An order to show cause will permit an expedited hearing of the motion.
- ○ Consult local rules and individual judges' rules for notice requirements.

Discussion:
See *§§ 19.08[4] -[10]*

Forms:
See *§§ 19.157*, *19.158*

☐ Consider requesting expedited discovery, in order to:

- ○ Heighten the urgency with which the matter will be treated by the parties and the court.
- ○ Take the adverse party by surprise, thereby yielding a more complete and accurate version of facts.

☐ Draft supporting affidavits.

- ○ Affidavits in support of a motion for preliminary injunction should set forth the evidence demonstrating the need for injunctive relief.
- ○ Affidavits in support of a motion for preliminary injunction may serve as the sole basis for the court's ruling if the parties waive a hearing or submit the matter on the papers.
- ○ Supporting affidavits should address each of the factors for injunctive relief.

☐ Draft a supporting memorandum of law.

- ○ Generally, a memorandum of law must be submitted in support of a motion for a preliminary injunction.
- ○ Even if a memorandum of law is not required, a memorandum is invaluable, and should be submitted.

☐ Draft a proposed order if required.

- ○ Consult the local rules, and the individual judge's rules, with respect to submitting proposed orders.

☐ Submit other papers in support of the motion.

☐ Notice a hearing on a motion for preliminary injunction.

Exceptions:
If there is no dispute regarding essential facts, or if adverse party has waived its right to a hearing, hearing is not required.

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, 26.12

☐ Prepare to provide required security.

Content Note:
The movant should supply the factual predicate for the dollar amount of the security it proposes.

Authority:
Fed R Civ P 65(a), (c)

Discussion:
See *§ 19.11*

19.03[3] CHECKLIST: Seeking a Temporary Restraining Order.

☐ Determine whether temporary restraining order is necessary:

- ○ Evaluate utility of obtaining short-term device, which may not exceed 10 days' duration, to restrain a party's actions and preserve the status quo until the court holds a hearing to determine whether to issue a preliminary injunction.

- ○ Consider whether an additional 10-day extension period is necessary.

☐ Determine whether applicant can satisfy standards for TRO.

- ○ Risk of irreparable injury to movant.

Exception:
If order is to be ex parte, threatened harm must be both irreparable and immediate.

- ○ Movant's likelihood of success on merits.

- ○ Movant's lack of any other adequate remedy at law.

○ Balance of hardships weighs in movant's favor.

○ Impact on public interest.

Discussion:
See *§ 19.09[3]*

☐ Commence an action if action not already pending, because a TRO may issue only in connection with a pending action.

Prerequisite:
If the motion for a preliminary injunction and TRO is filed contemporaneously with the complaint, the movant should first file the complaint so that the docket number assigned can be included on the motion, thereby confirming to the assigned judge that the injunctive relief is indeed being sought in the context of a pending action.

☐ Provide notice, if possible, of application for TRO.

○ The party seeking a TRO must provide to the adverse party notice of the application, absent a very strong showing for the necessity of an ex parte order.

Exceptions:
If non-movant is unidentifiable or cannot be found for purpose of effecting notice, the court may allow movant to proceed ex parte. Also, a TRO may be granted ex parte if advance notice of the application would itself be likely to trigger irreparable injury.

Discussion:
See *§§ 19.09[2], [3]*

☐ Prepare supporting papers.

○ An application for a TRO typically is filed contemporaneously with a motion for a preliminary injunction. In most cases, the request for a TRO is made in the motion or order to show cause for preliminary injunctive relief.

○ The same papers typically support both the TRO and the motion for a preliminary injunction.

☐ Prepare attorney's certification if TRO is sought ex parte.

Content Note:
If a TRO is sought ex parte, the applicant's attorney must certify to the court in writing the efforts, if any, that have been made to give notice, and the reasons supporting the claim that notice should not be required.

☐ A TRO granted ex parte must:

○ Be indorsed with the date and hour of issuance.

○ Be filed immediately in the clerk's office.

○ Define the injury, and state why it is irreparable.

○ State why the order was granted without notice.

Authority:
Fed R Civ P 65(b)

Discussion:
See *§ 19.09[3]*

☐ Security is required.

Content Note:
Supply the factual predicate for the dollar amount of the proposed security.

Authority:
Fed R Civ P 65(c)

Discussion:
See *§ 19.11*

☐ A party affected by a TRO may move for dissolution or modification of the TRO on two days' notice, or such shorter notice as the court may prescribe.

Authority:
Fed R Civ P 65(b)

Discussion:
See *§ 19.25*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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Unit 5 Provisional Remedies
CHAPTER 19 Preliminary Injunctions, TROs, and Other Provisional Remedies
II. PROVISIONAL RELIEF (PRELIMINARY INJUNCTIONS AND TROS)
A. Seeking Provisional Relief

2-19 MB Practice Guide: Fed Pretrial Civ Proc in CA 19.04

19.04 Options and Strategies for Party Seeking Injunctive Relief.

19.04[1] Assess Potential Tactical Benefits of Injunctive Relief. In addition to receiving the benefit specified by court's order, a party granted injunctive relief may obtain tactical benefits, including:

- Accelerating the litigation--a motion for provisional injunctive relief may result in acceleration of pretrial activity and advance the trial date.

- Obtaining early reading of court's reaction to plaintiff's case.

  Drawback:
  By prompting the court to form an early view of the case, plaintiff may unnecessarily lock the court into an unfavorable view.

- Expedited discovery--strict time constraints for litigating the injunction application often demand expedited discovery.

- Expediting trial date--the court may consolidate the trial on the merits with the preliminary injunction hearing.

- Promoting prompt settlement--a respondent subject to the constraints of an injunction may be pushed to settlement because of the immediate, and often prohibitive, costs of compliance.

- Precipitating weak defense--the party opposing provisional injunctive relief may lack sufficient time to fully analyze the case and mount an effective defense.

- Conferring sense of urgency on parties and court--unlike civil suits for money damages, provisional injunctive relief is generally decided quickly, sometimes immediately.

- Fostering ongoing jurisdiction--the court retains jurisdiction to continue to monitor the respondent's compliance with the injunction.

- Preventing harm--provisional injunctive relief may be critical in preventing irreversible harm.

Judge's Perspective:

Because requests for preliminary relief often create a significant burden on the court, they should not be made without a true belief that the are meritorious. Preliminary relief should not be sought merely to catch the other side off balance. Avoid requests on Friday afternoon, if possible.

19.04[2] Determine Types of Injunctive and Other Relief Available.

19.04[2][a] Injunctions May Be Mandatory or Prohibitory. Whetherthe injunction sought is mandatory or prohibitory largely depends on what remedy is sought.

Examples:

An injunction ordering a party to refrain from doing some act is a prohibitory injunction, the more common type of injunction. For example, "defendant shall refrain from any conduct that may cause any change or have any effect on the engine of the impounded vehicle" [*see, e.g., Ocean Garden, Inc. v. Marktrade Co. (9th Cir 1991) 953 F2d 500, 508-509* (prohibitive preliminary injunction preventing defendant from imitating, copying, or making unauthorized use of plaintiff's trademarks or trade dress)].

An injunction ordering a party to do some act is a mandatory injunction. For example, "defendant shall take all necessary actions to prevent any change to or effect on the engine of the impounded vehicle" [*see, e.g., Stuhlbarg Int'l Sales Co. v. John D. Brush & Co. (9th Cir 2001) 240 F3d 832, 841 n8* (mandatory injunction in trademark case requiring defendant to provide Customs Service with consent to importation)].

Drawback:

Mandatory injunctions are disfavored. If a party seeks mandatory preliminary relief that goes beyond maintaining the status quo pendente lite, the court may be extremely cautious about issuing a preliminary injunction [*see Stanley v. University of S. Cal. (9th Cir 1994) 13 F3d 1313, 1319-1320*].

19.04[2][b] Injunctions Are Unavailable If Jurisdictional Requisites Are Unmet. Before an injunction may issue, the court must have personal and subject matter jurisdiction [*Hitchman Coal & Coke Co. v. Mitchell (1917) 245 US 229, 234-235, 38 S Ct 65, 62 L Ed 260*].

Cross Reference:

Personal and subject matter jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.03 -2.25, 2.31 -2.41.*

19.04[2][c] Suit for Injunctive Relief May Be Combined With Damages Claims. In some cases, an injunction may be available even though an action for damages is also proper [*El Pollo Loco, Inc. v. Hashim (9th Cir 2003) 316 F3d 1032, 1038* (court properly granted injunction to prevent irreparable harm to plaintiff franchiser's trademark in action for breach of franchise agreement)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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A. Seeking Provisional Relief

2-19 MB Practice Guide: Fed Pretrial Civ Proc in CA 19.05

19.05 Injunctive Relief Is an Equitable Remedy.

19.05[1] Injunctive Relief Must Be Based on Equity Principles. The substantive prerequisites for obtaining an equitable remedy and the general availability of injunctive relief are not altered by *Fed R Civ P 65*. Preliminary injunctive relief is only available if it is a remedy conferred by statute or one traditionally granted by English chancery courts [*Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 318-320, 119 S Ct 1961, 144 L Ed2d 319*].

19.05[2] Availability of Injunction Focuses on Need to Prevent Future Irreparable Injury. As an equitable remedy ordering a party to do some act or refrain from doing some act, an injunction targets possible future conduct. It is unrelated to punishment and reparations for past misconduct, which may be obtained by indictment or in an action for damages [*see United States v. Oregon State Medical Soc'y (1952) 343 US 326, 333, 72 S Ct 690, 96 L Ed 978*].

19.05[3] Types of Injunctive Relief Are Differentiated by Degree of Permanence. The three types of injunctive relief are [*Fed R Civ P 65*]:

- Temporary restraining order (TRO).
- Preliminary injunction.
- Permanent injunction.

Cross References:

Permanent injunction, see *19.07*; preliminary injunction, see *19.08*; temporary restraining order, see *19.09*.

Nature of injunctive relief, see 13 *Moore's Federal Practice, §§ 65.02 -65.07* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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A. Seeking Provisional Relief

2-19 MB Practice Guide: Fed Pretrial Civ Proc in CA 19.06

19.06 Injunctions in Removed Actions.

19.06[1] State Court Injunctions and Orders Generally Remain in Effect. All state-court injunctions and orders, and other state court proceedings occurring prior to removal, remain in effect, until dissolved or modified by the district court. Similarly, all bonds, undertakings, or security given by any party prior to removal of the action to federal court remain valid and effective, notwithstanding the removal [*see 28 USC § 1450*; *Granny Goose Foods, Inc. v. Brotherhood of Teamsters (1974) 415 US 423, 425, 437, 94 S Ct 1113, 39 L Ed2d 435*].

19.06[2] Ex Parte Temporary Restraining Order Expires Pursuant to State Court Order and Rule 65(b). After removal, an ex parte temporary restraining order issued by a state court prior to removal remains in force no longer than it would have done under state law. But, in no event does the order remain in force longer than Rule 65(b)'s time limitations, measured from the date of removal [*Granny Goose Foods, Inc. v. Brotherhood of Teamsters (1974) 415 US 423, 439-440, 94 S Ct 1113, 39 L Ed2d 435*].

Example:

If the state court issues a 15-day TRO on Day One and the case is removed to federal court on Day 13, the order will expire on Day 15 in federal court, just as it would have expired on Day 15 in state court. If, however, a state court issues a 15-day TRO on Day One and the case is removed to the federal court on Day Two, the restraining order will expire on Day 12, applying the ten-day time limitation of Rule 65(b), measured from the date of removal. In either case, the district court could extend the restraining order for up to an additional 10 days, for good cause shown, under Rule 65(b) [*see Granny Goose Foods, Inc. v. Brotherhood of Teamsters (1974) 415 US 423, 440 n15, 94 S Ct 1113, 39 L Ed2d 435* ; *see also Fed R Civ P 65(b)*].

19.06[3] Rule 65(b) Governs Dissolution or Modification of TRO. Once a case has been removed to federal court, its course is governed by federal law, including the Federal Rules of Civil Procedure.

Timing:

On two days' notice, or on shorter notice prescribed by the court, the party against whom a temporary restraining order has issued can move to dissolve or modify the injunction [*Fed R Civ P 65(b)(4)*].

Depending on the circumstances and the parties' readiness to present evidence and arguments, at the hearing on dissolution or modification of a TRO, the court may entertain an application for a preliminary injunction [*see Granny Goose Foods, Inc. v. Brotherhood of Teamsters (1974) 415 US 423, 441, 94 S Ct 1113, 39 L Ed2d 435*].

Cross References:

Expanded hearing on motion to dissolve or modify TRO, see *19.25*.

Discussion of removal, see *Ch. 3, Removing a State Court Case to Federal Court, § 3.03 -3.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPrior State Court OrdersCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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Kendall, Seeborg, Shartsis, Smith

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Unit 5 Provisional Remedies
CHAPTER 19 Preliminary Injunctions, TROs, and Other Provisional Remedies
II. PROVISIONAL RELIEF (PRELIMINARY INJUNCTIONS AND TROS)
A. Seeking Provisional Relief

2-19 MB Practice Guide: Fed Pretrial Civ Proc in CA 19.07

19.07 Seeking Permanent Injunction.

19.07[1] Purpose and Nature of Permanent Injunction.

19.07[1][a] Permanent Injunction Finally Settles Dispute. A permanent injunction is a means of finally settling a dispute. It may constitute part or all of the final judgment in a civil action [*see Amoco Prod. Co. v. Village of Gambell (1987) 480 US 531, 546 n12, 107 S Ct 1396, 94 L Ed2d 542*].

19.07[1][b] Permanent Injunction Granted at Conclusion of Trial. A permanent injunction is granted at the conclusion of a trial on the merits. It remains in force unless reversed or vacated by another court. It does not expire after a prescribed period of time [*see Amoco Prod. Co. v. Village of Gambell (1987) 480 US 531, 546 n12, 107 S Ct 1396, 94 L Ed2d 542*].

Distinguish:

Unlike preliminary injunctions, permanent injunctions may be issued only after an adjudication of the merits [*see Amoco Prod. Co. v. Village of Gambell (1987) 480 US 531, 546 n12, 107 S Ct 1396, 94 L Ed2d 542*].

Warning:

The court may order the trial on the merits to be advanced and consolidated with the preliminary injunction hearing [*see Fed R Civ P 65(a)(2)*].

Trap--Prayer for Injunctive Relief, Only, May Deprive Plaintiff of All Relief:

If a party seeks only injunctive and declaratory relief in the complaint, damages cannot be awarded if equitable relief becomes moot by the time of trial [*see, e.g., James Luterbach Constr. Co. v. Adamkus (7th Cir 1986) 781 F2d 599, 602* (plaintiff contractor that alleged EPA unfairly denied its bid on project neglected to apply for preliminary injunctive relief and failed to plead claim for damages in complaint)].

19.07[2] Subject Matter Jurisdiction Required. The court must have subject matter jurisdiction to grant injunctive relief [*Ocean Garden, Inc. v. Marktrade Co. (9th Cir 1991) 953 F2d 500, 503-507* (subject matter jurisdiction)]. A complaint seeking injunctive relief must allege the basis for the court's subject matter jurisdiction [*see, e.g., Lauf v. E.G. Shinner & Co. (1938) 303 US 323, 327-328, 58 S Ct 578, 82 L Ed2d 872* ("labor dispute" not adequate to invoke federal statutory jurisdiction as basis for requested injunctive relief)].

Cross Reference:

Subject matter jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), § 2.03- 2 .25.

19.07[3] Injunction Cannot Be Enforced Against Defendant Over Whom Court Lacks Personal Jurisdiction. Even if injunctive relief is granted against a defendant named in the complaint, it cannot be enforced if the defendant has not been served and has not appeared [*Hitchman Coal & Coke Co. v. Mitchell (1917) 245 US 229, 234-235, 38 S Ct 65, 62 L Ed 260* (injunction against individually named union officials not automatically effective against successors in office, even if successors named in complaint)].

Cross Reference:

Procedure under California law to obtain preliminary injunction against party who has not appeared, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, 18.11[3].*

19.07[4] No Special Pleading Requirements. No special pleading rules govern complaints that seek injunctive relief. The complaint must include a short and plain statement of the claim showing that the plaintiff is entitled to a permanent injunction [*see Fed R Civ P 8(a)*].

Cross Reference:

Requirement of short and plain statement of claim in complaint, see *Ch. 6, Drafting the Summons and Complaint, § 6.09.*

19.07[5] Standing for Declaratory and Injunctive Relief. As a predicate to declaratory and injunctive relief, a plaintiff must demonstrate:

- Having suffered or having been threatened with a "concrete and particularized" legal harm [*Lujan v. Defenders of Wildlife (1992) 504 US 555, 560, 112 S Ct 2130, 119 L Ed2d 351* ; *see also Bird v. Lewis & Clark Coll. (9th Cir 2002) 303 F3d 1015, 1019 , cert. denied, 538 US 923 (2003)*]; and

- A sufficient likelihood that it will again be wronged in a similar way [*City of Los Angeles v. Lyons (1983) 461 US 95, 111, 103 S Ct 1660, 75 L Ed2d 675* ; *see also Bird v. Lewis & Clark Coll. (9th Cir 2002) 303 F3d 1015, 1019 , cert. denied, 538 US 923 (2003)*].

Example:

In a former student's ADA discrimination suit [*see 42 USC § 12181 et seq.*] against her college, the plaintiff had standing to seek an injunction preventing the college from releasing her grades for the semester during which she allegedly suffered discrimination. But she lacked standing for a declaration that the college had discriminated against her, or for an order requiring the college to change the challenged program to prevent future discrimination against others. Because she had graduated, the plaintiff could not demonstrate a real or immediate threat that the college would again subject her to discrimination [*see Bird v. Lewis & Clark Coll. (9th Cir 2002) 303 F3d 1015, 1019-1021 , cert. denied, 538 US 923 (2003)* (also affirming denial of injunction because college made sufficient accommodations under ADA)].

19.07[6] Court Must Balance Hardships. In determining whether to grant injunctive relief, the court will balance

the hardship faced by the applicant resulting from the conduct sought to be enjoined, against the hardship the defendant would suffer if the relief were granted. Essentially, the court will grant the injunction if the hardship experienced by the applicant exceeds the hardship that would be experienced by the defendant [*see Honig v. Doe (1988) 484 US 305, 328 n10, 108 S Ct 592, 98 L Ed2d 686* (district court properly balanced disabled student's interest in free, appropriate public education against school officials' interest in maintaining a safe learning environment for all students); *Wildwest Inst. v. Bull (9th Cir 2006) 472 F3d 587, 592* (possibility of severe wildfire and loss of human life balanced against cutting of alleged "old growth" trees)].

19.07[7] Plaintiff Must Show Actual Success on Merits and Likelihood of Irreparable Harm. The standards for permanent and preliminary injunctions are essentially the same, except that a permanent injunction requires actual (rather than likely) success on the merits. A party able to show actual success on the merits and the likelihood of irreparable harm is entitled to a permanent injunction [*Brown v. California Dep't of Transp. (ND Cal 2003) 260 F Supp2d 959, 967-968*].

Example--Permanent Injunction Granted:

The California Department of Transportation (CalTrans) removed plaintiffs' anti-war signs from highway overpasses, but allowed American flags to remain tempo-rarily. Plaintiffs successfully sought a permanent injunction requiring CalTrans to enforce its permit requirements for banners on highways on a content-neutral basis, i.e., against persons who installed flags and persons who installed protest signs, alike. Plaintiffs demonstrated that the CalTrans policy violated their right to free expression under the *First Amendment*. The district court concluded that the loss of *First Amendment* freedoms, even for minimal periods of time, unquestionably constituted irreparable injury [*Brown v. California Dep't of Transp. (ND Cal 2003) 260 F Supp2d 959, 968*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsBalance of HardshipCivil ProcedureRemediesInjunctionsElementsIrreparable HarmCivil ProcedureRemediesInjunctionsElementsLikelihood of SuccessCivil ProcedureRemediesInjunctionsPermanent Injunctions

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19.08 Seeking Preliminary Injunction.

19.08[1] Preliminary Injunction Is Provisional Remedy Preserving StatusQuo. A preliminary injunction is a provisional remedy issued to prevent the irreparable loss of rights before final disposition of the litigation [*Qualcomm, Inc. v. Motorola, Inc. (SD Cal 1999) 185 FRD 285, 287-288*]. The purpose of the preliminary injunction is the preservation of the parties' relative positions (the status quo) until decided by a full trial [*see University of Texas v. Camenisch (1981) 451 US 390, 395, 101 S Ct 1830, 68 L Ed2d 175* ; *E. & J. Gallo Winery v. Andina Licores S.A. (9th Cir 2006) 446 F3d 984, 990]]* .

19.08[2] Preliminary Injunction Enjoins Allegedly Unlawful Conduct Pending Outcome of Case. In the case of the usual preliminary injunction, the plaintiff seeks to enjoin action that it claims is unlawful [*see Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 314, 119 S Ct 1961, 144 L Ed2d 319*]. A preliminary injunction is appropriate to grant intermediate relief of the same character as that which may be granted finally [*see Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 326, 119 S Ct 1961, 144 L Ed2d 319*].

19.08[3] Ninth Circuit Employs Two Alternative Tests to Determine Propriety of Preliminary Injunction.

19.08[3][a] Moving Party Must Satisfy Either Traditional or Alternative Test. To prevail on a motion for preliminary injunction, the moving party must satisfy one of two tests available in the Ninth Circuit: the traditional test, or the alternative test [*see Save Our Sonoran, Inc. v. Flowers (9th Cir 2005) 408 F3d 1113, 1120*].

19.08[3][b] Traditional Test Weighs Irreparable Injury, Probability of Success on Merits, Balance of Harm, and Public Interest. Under the traditional test for determination of a motion for preliminary injunction, the party must demonstrate [*see* Cal. Pharmacists Ass'n v. Maxwell-Jolly (9th Cir 2009) 563 F3d 847, 849 ; *International Jensen, Inc. v. Metrosound USA Inc. (9th Cir 1993) 4 F3d 819, 822*]:

- Irreparable injury if the relief is denied;

- Probability of success on the merits [*see, e.g.*, Cal. Pharmacists Ass'n v. Maxwell-Jolly (9th Cir 2009) 563 F3d 847, 849 (hospitals had shown likelihood of success on the merits that legislative enactment that reduced reimbursement rates to various healthcare providers violated Medicaid Act)].

- The balance of potential harm favors the moving party; and

- The public interest favors the injunction [*see, e.g., Earth Island Inst. v. Evans (ND Cal 2003) 256 F Supp2d 1064, 1068*].

Strategic Point:

The predicted duration of a preliminary injunction may be a factor in determining its feasibility. The duration can impact the degree of irreparable injury projected by either side [*see, e.g., Earth Island Inst. v. Evans (ND Cal 2003) 256 F Supp2d 1064, 1075* (preliminary injunction of a few months, barring use of "dolphin-safe" tuna product labels, absent adequate research of tuna-fishing practices, would prevent irreparable harm to dolphins, prevent public confusion and not tend to harm International Dolphin Conservation Program)].

19.08[3][c] Alternative Test Weighs Either Combination of Probable Success and Irreparable Injury, or Serious Questions About Merits and Balance of Hardships. Under the Ninth Circuit's alternative test for granting a preliminary injunction, the moving party can prevail by demonstrating either of the following [*see Winter v. NRDC, Inc. (2008) ___ US ___, 129 S Ct 365, 172 L Ed2d 249, 261* ; *El Pollo Loco, Inc. v. Hashim (9th Cir 2003) 316 F3d 1032, 1038* ; *Kootenai Tribe of Idaho v. Veneman (9th Cir 2002) 313 F3d 1094, 1116*]:

- A combination of probable success on the merits and the likelihood of irreparable injury if the relief is not granted; or

- The existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor.

Warning:

A party seeking preliminary injunctive relief must establish that irreparable injury is *likely* in the absence of an injunction; a *possibility* of such injury is not sufficient [*see Winter v. NRDC, Inc. (2008) ___ US ___, 129 S Ct 365, 172 L Ed2d 249, 261]* .

Examples:

Medical beneficiaries, who would be forced to go without medical care, would likely suffer irreparable harm without a preliminary injunction prohibiting the California Department of Healthcare Services from implementing state legislation imposing a ten percent reduction in payments to providers under Medi-Cal [*Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly (9th Cir 2009) 572 F3d 644, 657-658]* . Plaintiffs also demonstrated the likelihood of success on the merits under valid case law [*Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly (9th Cir 2009) 572 F3d 644, 658]* .

Plaintiffs could not supplement their amended motion for a preliminary injunction with a claim they did not raise their complaint, because "logically speaking, they could not prevail on its merits at trial" [*Tri-Valley Cares v. United States DOE (ND Cal 2008) 2008 US Dist LEXIS 60509, at *12-*13]* .

19.08[3][d] Ninth Circuit Tests Represent a Continuum. Although the Ninth Circuit's alternative tests for the grant of a preliminary injunction may appear to be two distinct tests, there is actually only one test: a continuum in

which the required showing of irreparable harm varies inversely with the probability of success [*LGS Architects, Inc. v. Concordia Homes (9th Cir 2006) 434 F3d 1150, 1155* ; *Save Our Sonoran, Inc. v. Flowers (9th Cir 2005) 408 F3d 1113, 1120*]:

- **Reasonable Likelihood of Success:** If a plaintiff demonstrates a strong likelihood of success on the merits, then only a minimal showing of harm is needed to justify the preliminary injunction. The stronger the probability of success on the merits, plaintiffs have less of a burden to demonstrate irreparable harm [*see Kootenai Tribe of Idaho v. Veneman (9th Cir 2002) 313 F3d 1094, 1124*].

- **Less Reasonable Likelihood of Success:** If only a serious question of liability is presented, then the plaintiff must show that the balance of hardships tips decidedly in its favor to justify the injunction [*see Kootenai Tribe of Idaho v. Veneman (9th Cir 2002) 313 F3d 1094, 1124*]. Even if the balance tips sharply in favor of the moving party, however, it must be shown as an irreducible minimum that there is a fair chance of success on the merits [*Levine v. Fair Political Practices Comm'n (ED Cal 2002) 222 F Supp2d 1182, 1186*].

Distinguish--Different Test Applies to Anti-Suit Injunction:

When seeking a preliminary injunction to halt foreign proceedings, the plaintiff does not have to meet the usual test of a likelihood of success on the merits of the underlying claim. Instead, the plaintiff only need show that the factors specific to an anti-suit injunction weigh in its favor. If the parties and the issues involved are the same, the foreign litigation may be enjoined when it would frustrate a policy of the forum issuing the injunction [*E. & J. Gallo Winery v. Andina Licores S.A. (9th Cir 2006) 446 F3d 984, 990-992*].

Warning:

A district court may not issue a preliminary injunction based solely on the presence of difficult jurisdictional questions, without considering whether the party seeking the injunction has demonstrated a likelihood of success on the merits [*Munaf v. Geren (2008) 553 US 674, 128 S Ct 2207, 171 L Ed2d 1, 16-17*]. The presence of difficult jurisdictional questions says nothing about the likelihood of success on the merits, other than making that success more *unlikely* due to potential impediments to even reaching the merits [*Munaf v. Geren (2008) 553 US 674, 128 S Ct 2207, 171 L Ed2d 1, 16-17*].

19.08[3][e] Public Interest Is Accorded Considerable Deference. If the public interest is involved, the district court will examine whether it favors the plaintiff [*see Sammartano v. First Judicial Dist. Court (9th Cir 2002) 303 F3d 959, 965* ; *Westlands Water Dist. v. Natural Res. Def. Council (9th Cir 1994) 43 F3d 457, 459*]. If a district court balances the hardships of the public interest against a private interest, the public interest generally receives greater weight [*see Winter v. NRDC, Inc. (2008) ___ US ___, 129 S Ct 365, 172 L Ed2d 249, 263* (even if plaintiffs had shown irreparable injury to marine mammals from Navy's training exercises, any such injury was outweighed by public interest and Navy's interest in effective, realistic training of its sailors); *FTC v. Affordable Media, LLC (9th Cir 1999) 179 F3d 1228, 1236* ; *Optinrealbig.com, LLC v. Ironport Sys. (ND Cal 2004) 323 F Supp2d 1037, 1051-1052*]. In a preliminary injunction analysis, the court will consider whether the public interest will be advanced by granting preliminary relief [*Preminger v. Principi (9th Cir 2005) 422 F3d 815, 823* ; *City of Los Angeles v. County of Kern (CD Cal 2006) 462 F Supp2d 1105, 1119-1121*]; the court may see the public interest as a separate element deserving distinct attention, rather than merely taking the public interest into consideration when balancing hardships [*see, e.g., City of Moses Lake v. United States (ED Wash 2005) 416 F Supp2d 1015, 1017-1018*].

However, the Ninth Circuit expects lower courts to protect physical harm to an individual over monetary costs to government entities [*see Harris v. Board of Supervisors (9th Cir 2004) 366 F3d 754, 766* ; *Rosado v. Alameida (SD Cal 2004) 349 F Supp2d 1340, 1348-1349*].

Strategic Point--Environmental Claims:

An equitable balancing analysis is not required when the defendant is willfully violating federal environmental laws or when the activity to be enjoined may endanger the public health [*see United States v. Bethlehem Steel Corp. (7th Cir 1995) 38 F3d 862, 867-869* ; *Oregon State Pub. Interest Research Group v. Pacific Coast Seafoods Co. (D Or 2005) 374 F Supp2d 902, 908*].

19.08[3][f] Moving Party Has Burden of Proof. The moving party carries the burden of proof on each element of either of the Ninth Circuit's alternative tests [*Levine v. Fair Political Practices Comm'n (ED Cal 2002) 222 F Supp2d 1182, 1186* ; *Environmental Council of Sacramento v. Slater (ED Cal 2000) 184 F Supp2d 1016, 1027*].

19.08[3][g] Colorable First Amendment Claim Establishes Irreparable Injury in Ninth Circuit. A serious *First Amendment* question compels a finding that the potential for irreparable injury exists, or that at the very least, the balance of hardships tips sharply in plaintiff's favor [*Sammartano v. First Judicial Dist. Court (9th Cir 2002) 303 F3d 959, 973-974* ; *see, e.g., Community House, Inc. v. City of Boise (9th Cir 2006) 468 F3d 1118, 1134* (district court should have enjoined publicly financed homeless shelter's practice of requiring residents to attend worship services to receive other services, because plaintiffs "demonstrated that the balance of hardships tips in their favor" by raising serious questions regarding *Establishment Clause* violation)]. "The loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" [*Elrod v. Burns (1976) 427 US 347, 373, 96 S Ct 2673, 49 L Ed2d 547*]. Financial burdens on speech, like outright bans, constitute irreparable injury [*Jacobsen v. USPS (9th Cir 1987) 812 F2d 1151, 1153-1154*].

19.08[3][h] Irreparable Harm Is No Longer Presumed in Trademark, Copyright, and Unfair Competition Cases Upon Sufficient Showing of Likelihood of Success. Previously, in trademark cases, the Ninth Circuit held that a plaintiff was entitled to a presumption of "irreparable injury ... from a showing of likelihood of success on the merits" [*El Pollo Loco, Inc. v. Hashim (9th Cir 2003) 316 F3d 1032, 1038* ; *GoTo.com, Inc. v. Walt Disney Co. (9th Cir. 2000) 202 F3d 1199, 1205 n. 4*]. The same rule applied in copyright and unfair competition case [*Perfect 10, Inc. v. Cybernet Ventures, Inc. (CD Cal 2002) 213 F Supp2d 1146, 1190-1191]* . However, a plaintiff is no longer granted the presumption of irreparable harm on a showing of likelihood of success on the merits [*Am. Trucking Ass'ns v. City of Los Angeles (9th Cir 2009) 559 F3d 1046, 1052-1053* ; *CytoSport, Inc. v. Vital Pharms., Inc. (ED Cal 2009) 617 F Supp2d 1051, 1065* (trademark infringement); *Volkswagen AG v. Verdier Microbus and Camper, Inc. (ND Cal 2009) 2009 US Dist LEXIS 33708, at *6-*7* (trademark infringement)]. Instead, a plaintiff seeking a preliminary injunction in a trademark, copyright, or unfair compensation case must demonstrate that irreparable injury is "likely in the absence of an injunction" [*Winter v. NRDC, Inc. (2008) ___ US ___, 129 S Ct 365, 172 L Ed2d 249, 261]* . And in each case, the court must "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief" [Winter v. NRDC, Inc. (2008) ___US ___, *129 S Ct 365, 172 L Ed2d 249, 261* ; *CytoSport, Inc. v. Vital Pharms., Inc. (ED Cal 2009) 617 F Supp2d 1051, 1065* ; *Volkswagen AG v. Verdier Microbus and Camper, Inc. (ND Cal 2009) 2009 US Dist LEXIS 33708, at *6-*7]* .

Cross Reference:

Tests to determine propriety of preliminary injunction, see *§ 19.08[3].*

19.08[3][i] Modified Analysis Applies to Anti-Suit Injunctions. An anti-suit injunction allows a court to restrain a party subject to its jurisdiction from proceeding in a foreign court. The party seeking an anti-suit injunction need not meet the usual test of a likelihood of success on the merits of the underlying claim but need only demonstrate that the factors specific to an anti-suit injunction weigh in favor of granting the injunction. Foreign litigation may been joined when the foreign litigation would [E. & J. Gallo Winery v. Andina Licores S.A. (9th Cir 2006) 446 F3d 984, 989-991]:

- Frustrate a policy of the forum issuing the injunction;

- Be vexatious or oppressive;
- Threaten the issuing court's *in rem* or *quasi in rem* jurisdiction; or
- When the foreign proceedings prejudice other equitable considerations.

19.08[4] Notice to Adverse Party Required.

19.08[4][a] Preliminary Injunction Is Unavailable Without Notice to Adverse Party. No preliminary injunction will be issued without notice to the adverse party [*Fed R Civ P 65(a)(1)*; *FTC v. Enforma Natural Prods. (9th Cir 2004) 362 F3d 1204, 1217*].

19.08[4][b] Party May Give Notice by Service of Complaint and Summons, Motion, Order to Show Cause, or Other Reasonable Means. Because *Fed R Civ P 65* does not specify a required form of notice, the party giving notice, whether by service of complaint and summons, motion, order to show cause, or otherwise, should ensure that defendant be given a fair opportunity to oppose the application and to prepare for such an opportunity [*see Granny Goose Foods, Inc. v. Brotherhood of Teamsters (1974) 415 US 423, 434 n7, 94 S Ct 1113, 39 L Ed2d 435* (order to show cause); *see also Fed R Civ P 7(b)* (motion and other papers)].

19.08[5] Other Papers May Be Submitted in Support of Motion. Papers in support of a motion for preliminary injunction may include the following:

- Discovery documents [*see, e.g., Perfect 10, Inc. v. Cybernet Ventures, Inc. (CD Cal 2002) 213 F Supp2d 1146, 1153*];
- Documentary exhibits attached to declarations [*see, e.g., Perfect 10, Inc. v. Cybernet Ventures, Inc. (CD Cal 2002) 213 F Supp2d 1146, 1153-1154*];
- Charts summarizing exhibits [*see, e.g., Perfect 10, Inc. v. Cybernet Ventures, Inc. (CD Cal 2002) 213 F Supp2d 1146, 1155-1156*].

Consider:

There is generally a reduced evidentiary standard in preliminary injunction motions [*see Perfect 10, Inc. v. Cybernet Ventures, Inc. (CD Cal 2002) 213 F Supp2d 1146, 1154, n1, n2* (declaration sufficient to establish document's authenticity)].

19.08[6] LOCAL PRACTICE: CD Cal Requirements--Notice of Motion When TRO Not Sought. In the Central District, if a TRO is not sought, an application for a preliminary injunction must be made by notice of motion and not by order to show cause [*CD Cal Civ LR 65-1*].

19.08[7] LOCAL PRACTICE: ED Cal Requirements--Motion for Preliminary Injunction.

19.08[7][a] Notice of Motion. In the Eastern District, notice of motion for preliminary injunction is given in accordance with *ED Cal Gen LR 144* (extending and shortening time) and *ED Cal Civ LR 230* (civil motion calendar and procedure) [*ED Cal Civ LR 231(d)(1)*].

Cross Reference:

Motion requirements in the Eastern District, see *Ch. 26, Pretrial Motion Practice, 26.07[2], 26.11[3][b], 26.16[5][b].*

19.08[7][b] Accompanying Documents. In the Eastern District, all motions for preliminary injunction must be

accompanied by the following [*ED Cal Civ LR 231(d)(2)*]:

- Briefs on all relevant legal issues to be presented by the motion;
- Affidavits in support of the motion, including affidavits on the question of irreparable injury; and
- A proposed order with provision for bond [*see ED Cal Gen LR 151*; *ED Cal Civ LR 230*].

19.08[7][c] Parties Must Provide Specified Information. In the Eastern District, all parties must inform the court in their briefs of the following [*ED Cal Civ LR 231(d)(3)*]:

- Whether they desire to present oral testimony at the hearing; and
- An estimate of the amount of time they anticipate will be required for the hearing.

The parties shall inform the court and all other parties immediately on learning of a change in the need for a preliminary injunction, the length of time the hearing will require, or other similar information [*ED Cal Civ LR 231(d)(3)*].

19.08[7][d] Requirements for Preliminary Injunction or Temporary Restraining Order in Actions Involving Real Property. In the Eastern District, a motion for a preliminary injunction or a temporary restraining order to limit picketing, restrain real property encroachments, or protect easements must depict by drawings, plot plans, photographs, or other appropriate means, or must describe in detail the premises involved, including, if applicable, the length and width of the frontage on a street or alley, the width of sidewalks, and the number, size, and location of entrances [*ED Cal Civ LR 231(f)*].

19.08[8] LOCAL PRACTICE: ND Cal Requirements--Motion for Preliminary Injunction. In the Northern District, motions for preliminary injunctions unaccompanied by a temporary restraining order are governed by *ND Cal Civ LR 7-2* (requirements for notice and supporting papers) [*ND Cal Civ LR 65-2*].

Cross Reference:

Motion procedures under *ND Cal Civ LR 7-2*, see *Ch. 26, Pretrial Motion Practice, 26.07[3]*, *26.16[5][c]*.

19.08[9] Hearing on Motion for Preliminary Injunction Required Absent Waiver or Undisputed Facts. The entry or continuation of an injunction requires a hearing, except if the facts are not in dispute or if the adverse party has waived its right to a hearing [*Charlton v. Estate of Charlton (9th Cir 1988) 841 F2d 988, 989* ; *see, e.g., Barahona-Gomez v. Reno (9th Cir 1999) 167 F3d 1228, 1233* (hearing held), *aff'd on rehearing, 236 F3d 1115 (9th Cir 2001)*].

The refusal to hear oral testimony at a preliminary injunction hearing is not an abuse of discretion if the parties have a full opportunity to submit written testimony and to argue the matter [*Stanley v. University of S. Cal. (9th Cir 1994) 13 F3d 1313, 1326* ; *International Molders' & Allied Workers' Local Union v. Nelson (9th Cir 1986) 799 F2d 547, 555*].

Consider:

To prevent irreparable harm, district courts have discretion to take into account otherwise inadmissible evidence when ruling on a motion for a preliminary injunction [*Flynt Distrib. Co., Inc. v. Harvey (9th Cir 1984) 734 F2d 1389, 1394* ; *Rosen Entm't Sys. v. Eiger Vision (CD Cal 2004) 343 F Supp2d 908, 912*].

19.08[10] Court May Order Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action

on the merits to be advanced and consolidated with the hearing of the application. Even if consolidation is not ordered, any evidence received on an application for a preliminary injunction that would be admissible in the trial on the merits becomes part of the record on the trial and need not be repeated at trial [*Fed R Civ P 65(a)(2)*].

Exception:

Fed R Civ P 65(a)(2) must be construed and applied in order to preserve the parties' rights to trial by jury [*Fed R Civ P 65(a)(2)*].

Cross Reference:

Detailed coverage of preliminary injunctions, see 13 *Moore's Federal Practice, §§ 65.20 -65.24* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsBalance of HardshipCivil ProcedureRemediesInjunctionsElementsIrreparable HarmCivil ProcedureRemediesInjunctionsElementsLikelihood of SuccessCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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19.09 Seeking Temporary Restraining Order.

19.09[1] Temporary Restraining Order (TRO) Granted to Preserve Status Quo. Under federal law, a TRO is appropriate only if irreparable harm appears imminent and preservation of the status quo is needed until the court can conduct a hearing to consider a preliminary injunction [*see Granny Goose Foods, Inc. v. Brotherhood of Teamsters (1974) 415 US 423, 438-439, 94 S Ct 1113, 39 L Ed2d 435* ; *Qualcomm, Inc. v. Motorola, Inc. (SD Cal 1999) 185 FRD 285, 287-288*].

Distinguish--TRO and Preliminary Injunction:

A temporary restraining order is an extraordinary remedy that differs from a preliminary injunction in the following ways:

- A TRO may be issued ex parte on a showing of the need for immediate relief, while a preliminary injunction generally will not be issued without noticed motion [*University of Hawaii Prof'l Assembly v. Cayetano (9th Cir 1999) 183 F3d 1096, 1107-1108*];

- The court must fix the duration of an ex parte TRO, although after 14 days (absent extension for good cause shown or consent of affected party), it will automatically expire, while a preliminary injunction generally remains in effect until a final adjudication on the merits [*see Fed R Civ P 65(b)*]; and

- A TRO, unlike a preliminary injunction, is not appealable [*Wilson v. United States Dist. Court (9th Cir 1998) 161 F3d 1185, 1187* (mandamus review only, no appeal as of right)].

19.09[2] Notice to Adverse Parties Generally Required. The party seeking a temporary restraining order generally must provide the adverse party with whatever notice of the application is feasible, given the emergency [*see Fed R Civ P 65(b)(2)*].

In the rare instances in which courts grant ex parte restraining orders, they limit them to preserving the status quo for so long as is necessary to hold a hearing, and no longer [*Granny Goose Foods, Inc. v. Brotherhood of Teamsters (1974) 415 US 423, 439, 94 S Ct 1113, 39 L Ed2d 435* ; *Adobe Sys., Inc. v. South Sun Prods., Inc. (SD Cal 1999) 187 FRD 636, 639*].

19.09[3] Requirements for Temporary Restraining Order Granted Without Notice.

19.09[3][a] Specified Facts of Irreparable Injury and Attorney Certification of Any Efforts to Give Notice Are Required. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if [*Fed R Civ P 65(b)(2)*; *see also Fed R Civ P 11(b)* (attorney certifies bona fides of all papers signed and submitted to court)]:

- It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition; and

- The applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required.

Judge's Perspective:

Except in cases involving clearly irreparable harm if notice is given, the chances of procuring a TRO are diminished if the judge is not confident that the applicant has been diligent in providing adequate notice of the application.

19.09[3][b] Order Must Be Indorsed With Date and Hour of Issuance, and Filed Immediately. Every temporary restraining order granted without notice must state the date and hour of issuance [*Fed R Civ P 65(b)(2)*].

19.09[3][c] If Granted, Order Must Be Filed Immediately. Every temporary restraining order granted without notice must be filed promptly in the Clerk's office and entered of record [*Fed R Civ P 65(b)(2)*].

19.09[3][d] Order Must Define Injury and State Why It Is Granted Without Notice. Every temporary restraining order granted without notice must define the injury and state why it is irreparable, and why the order was granted without requiring a noticed motion [*Fed R Civ P 65(b)(2)*].

19.09[3][e] Order Expires After 14 or Fewer Days Unless Extended. By its own terms, every temporary restraining order granted without a noticed motion must expire in 14 or fewer days, as the court provides. But, for good cause shown, the court may extend the order for a similar period, unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension must be entered of record [*Fed R Civ P 65(b)(2)*].

19.09[3][f] Motion for Preliminary Injunction Given Priority; Temporary Restraining Order Dissolved If Applicant Does Not Proceed With Motion. If a TRO is granted without a noticed motion, the hearing on a motion for a preliminary injunction should be set for the earliest possible time; it takes precedence over all matters except older matters of the same character. When the motion comes on for hearing, if the moving party does not proceed with the application for a preliminary injunction, the court will dissolve the temporary restraining order [*Fed R Civ P 65(b)(3)*].

19.09[3][g] Ex Parte Relief Subject to Intense Judicial Scrutiny. TRO applications sought ex parte require the court to serve as the absent party's advocate, triggering intense judicial scrutiny of a plaintiff's claims, the relief sought, and most importantly, its proffered justification for proceeding ex parte [*see Adobe Sys., Inc. v. South Sun Prods., Inc. (SD Cal 1999) 187 FRD 636, 639*].

Example:

In a software piracy case, the district court for the Southern District denied an ex parte application for a TRO to order defendant's computers searched for evidence of copyright infringement, holding that a bare assertion that defendant would dispose of evidence if given notice was an insufficient basis for the order; rather, plaintiffs need to show that defendants would disregard a direct court order and dispose of the evidence within the time it would take for a hearing [*Adobe Sys., Inc. v. South Sun Prods., Inc. (SD Cal 1999) 187 FRD 636, 641* ; *see First Tech. Safety Sys., Inc. v. Depinet (6th Cir 1993) 11 F3d 641, 650*].

19.09[3][h] Ex Parte Relief Disfavored Absent Compelling Reason. Ex parte injunctive relief under *Fed R Civ P 65(b)* is generally confined to two situations. First, a plaintiff may obtain ex parte relief by showing that it is impossible to give notice to the adverse party because the plaintiff does not know the party's identity or location [*see First Tech. Safety Sys., Inc v. Depinet (6th Cir 1993) 11 F3d 641, 650* ; *Adobe Sys., Inc. v. South Sun Prods., Inc. (SD Cal 1999) 187 FRD 636, 639*].

Second, a plaintiff may obtain an ex parte restraining order by showing that proceeding ex parte is the sole method of preserving a state of affairs in which the court can provide effective final relief [*see Adobe Sys., Inc. v. South Sun Prods., Inc. (SD Cal 1999) 187 FRD 636, 639-640*].

Example:

Affirmative showing (beyond mere allegations) of imminent destruction of the disputed property, its removal beyond the confines of the state, or its sale to an innocent third party, supports the conclusion that giving the defendant notice of the application for an injunction could result in an inability to provide any relief at all [*see Adobe Sys., Inc. v. South Sun Prods., Inc. (SD Cal 1999) 187 FRD 636, 639-640*].

Cross Reference:

Ex parte TROs, see 13 *Moore's Federal Practice, §§ 65.32 -65.34* (Matthew Bender 3d ed.).

19.09[3][i] Respondent May Move for Dissolution or Modification on Two Days' or Shorter Notice; Motion Heard Expeditiously. On two days' notice to the party who obtained the temporary restraining order without notice, or on shorter court-prescribed notice, the adverse party may appear and move for the TRO's dissolution or modification. In that event, the court will proceed to hear and determine the motion as promptly as justice requires. [*Fed R Civ P 65(b)(4)*].

Cross Reference:

Modification and dissolution, see *§ 19.25 -19.27*.

19.09[4] LOCAL PRACTICE: CD Cal Requirements--Temporary Restraining Order. In the Central District, a party seeking a TRO must submit an application, a proposed TRO, and a proposed order to show cause why a preliminary injunction should not issue. If the TRO is granted, the hearing on the order to show cause will be set within 10 days after the entry of the TRO unless otherwise agreed by the parties. If the TRO is denied, the court may set the hearing on the order to show cause without regard to the 28 days' notice of motion requirement of *CD Cal Civ LR 6-1* [*CD Cal Civ LR 65-1*].

Distinguish:

If a TRO is not sought, an application for a preliminary injunction is made by notice of motion and not by order to show cause [*CD Cal Civ LR 65-1*].

Cross Reference:

Notice of motion requirements under *CD Cal Civ LR 6-1*, see *Ch. 26, Pretrial Motion Practice, 26.07[1]*, *26.23[2][a]*.

19.09[5] LOCAL PRACTICE: ED Cal Requirements--Temporary Restraining Order.

19.09[5][a] Actual Notice or Effort to Provide Notice Required Except in Extraordinary Circumstances. In the Eastern District, except in the most extraordinary of circumstances, no temporary restraining order will be granted in the absence of actual notice to the affected party and/or counsel, by telephone or other means, or a sufficient showing of efforts made to provide notice. Appropriate notice would inform the affected party and/or counsel of the intention to seek a temporary restraining order, the date and time for hearing to be requested of the court, and the nature of the relief to be requested. Once a specific time and location has been set by the court, the moving party must promptly give additional notice of the time and location of the hearing [*ED Cal Civ LR 231(a)*].

19.09[5][b] Undue Delay of Application May Constitute Laches or Contradict Irreparable Injury Allegations. In the Eastern District, in considering a motion for a temporary restraining order, the court will consider whether the applicant could have sought relief by motion for preliminary injunction at an earlier date without the necessity for seeking last-minute relief by motion for temporary restraining order. Should the court find that the applicant unduly delayed in seeking injunctive relief, the court may conclude that the delay constitutes laches or contradicts the applicant's allegations of irreparable injury and may deny the motion solely on either ground [*ED Cal Civ LR 231(b)*].

19.09[5][c] Required Documents. In the Eastern District, no hearing on a temporary restraining order will normally be set unless the following documents are provided both to the court and, unless impossible under the circumstances, to the affected parties or their counsel [*ED Cal Civ LR 231(c)*]:

- A complaint;
- A motion for temporary restraining order;
- A brief on all relevant legal issues presented by the motion;
- An affidavit in support of the existence of an irreparable injury;
- An affidavit detailing the notice or efforts to effect notice to the affected parties or counsel or showing good cause why notice should not be given [*see ED Cal Gen LR 142*];
- A proposed temporary restraining order with a provision for a bond [*see ED Cal Gen LR 151*];
- A proposed order with blanks for fixing the time and date for hearing a motion for preliminary injunction, the date for the filing of responsive papers, the amount of the bond, if any, and the date and hour of issuance [*see ED Cal Gen LR 137*]; and
- When a temporary restraining order is requested ex parte, the proposed order must further notify the affected party of the right to apply to the court for modification or dissolution on two days notice or such shorter notice as the court may allow [*Fed R Civ P 65(b)*].

19.09[5][d] Requirements for Preliminary Injunction or Temporary Restraining Order in Actions Involving Real Property. In the Eastern District, a motion for a preliminary injunction or a temporary restraining order to limit picketing, restrain real property encroachments, or protect easements must depict by drawings, plot plans, photographs, or other appropriate means, or must describe in detail the premises involved, including, if applicable, the length and width of the frontage on a street or alley, the width of sidewalks, and the number, size, and location of entrances [*ED Cal Civ LR 231(f)*].

19.09[6] LOCAL PRACTICE: ND Cal Requirements--Temporary Restraining Order.

19.09[6][a] Ex Parte Motion for Temporary Restraining Order. In the Northern District, an ex parte motion for a temporary restraining order must be accompanied by [*ND Cal Civ LR 65-1(a)*; *see ND Cal Civ LR 5-5(a)(2)* (manner of service; time and methods for delivery of pleadings and papers)]:

- A copy of the complaint;
- A separate memorandum of points and authorities in support of the motion;
- The proposed temporary restraining order; and
- Such other documents in support of the motion which the party wishes the court to consider.

19.09[6][b] Notice to Opposition of Ex Parte Motion. In the Northern District, unless relieved by order of a judge for good cause shown, on or before the day of an ex parte motion for a temporary restraining order, counsel applying for the temporary restraining order must deliver notice of the motion to opposing counsel or party [*ND Cal Civ LR 65-1(b)*; *see ND Cal Civ LR 5-5(a)(2)* (manner of service; time and methods for delivery of pleadings and papers)].

19.09[6][c] Order to Show Cause; Form of Temporary Restraining Order. In the Northern District, no temporary restraining order will be issued except with an order to show cause fixing the time for hearing a motion for a preliminary injunction, which must be scheduled pursuant to *Fed R Civ P 65(b)*. Proposed orders submitted under this Rule must provide a place for the judge to fix the time within which the restraining order and all supporting pleadings and papers must be served on the adverse party of any opposing papers [*ND Cal Civ LR 65-1(c)*].

Cross Reference:

Discussion of temporary restraining orders, see 13 *Moore's Federal Practice, §§ 65.30 -65.41* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsIrreparable HarmCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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19.10 Rules for Preliminary Injunction and Temporary Restraining Order Do Not Modify Certain Federal Statutes.

The rules set forth in *Fed R Civ P 65* do not modify the following [*Fed R Civ P 65(e)*]:

- Any federal statute relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee;

- *28 USC § 2361*, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

- *28 USC § 2284*, relating to actions that must be heard and determined by a district court of three judges.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersGovernmentsCourtsRule Application & Interpretation

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19.11 Security Is Required for Restraining Order or Preliminary Injunction.

19.11[1] Applicant Must Give Security for Restraining Order or Preliminary Injunction in Appropriate Sum. The main purpose of an injunction bond is to safeguard defendants from costs and damages incurred as a result of a preliminary injunction improvidently issued [*Sionix Corp. v. Moorehead (SD Cal 2003) 299 F Supp2d 1082, 1086* ; *Washington Capitols Basketball Club v. Barry (ND Cal 1969) 304 F Supp 1193, 1203* , *aff'd, 419 F2d 472 (9th Cir 1969)*].

Exception:
No such security is required of the United States or of any United States officer or agency [*Fed R Civ P 65(c)*].

Warning:
An order granting a TRO will be reversed if the court fails to require a bond, in contravention of Rule 65(c) [*see Pioche Mines Consol., Inc. v. Dolman (9th Cir 1964) 333 F2d 257, 274*].

Distinguish:
Rule 65(c) applies only to TROs or preliminary injunctions--not to permanent injunctions [*see Fed R Civ P 65(c)*; *G.C. & K.B. Invs., Inc. v. Wilson (9th Cir 2003) 326 F3d 1096, 1108 n8*].

19.11[2] Court Has Discretion to Determine Amount of Security. District courts have wide discretion in setting the amount of a security bond [*Save Our Sonoran, Inc. v. Flowers (9th Cir 2005) 408 F3d 1113, 1125-1126* ($50,000 bond for preliminary injunction suspending development during pendency of environmental litigation not abuse of discretion); *Walczak v. EPL Prolong, Inc. (9th Cir 1999) 198 F3d 725, 733* (because court heard evidence and arguments of both parties, no abuse of discretion); *see Barahona-Gomez v. Reno (9th Cir 1999) 167 F3d 1228, 1234* , *reaff'd on rehearing, 236 F3d 1115 (9th Cir 2001)* (requirement for "nominal bond of $1,000" in immigration case was within district court's discretion)]. The bond amount may be zero if there is no evidence that the party will suffer damages from the injunction [*see Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills (9th Cir 2003) 321*

F3d 878, 882]. The district court may dispense with the filing of a bond when it concludes that there is no realistic likelihood of harm to the defendant from enjoining his or her conduct [*see Jorgensen v. Cassiday (9th Cir 2003) 320 F3d 906, 919*].

Examples:

The court set a $1,000 bond for slate-mail organizations' application seeking a preliminary injunction to enjoin enforcement of California slate-mail statutes. The court noted, on the one hand, that the only likely expenses would be the costs of the suit, and on the other hand, that plaintiffs were business people with some means at their disposal [*see Levine v. Fair Political Practices Comm'n (ED Cal 2002) 222 F Supp2d 1182, 1192*].

In a patent infringement case, the district court found that the bond amount requested by plaintiffs, $50,000, was insufficient, and the amount sought by defendant, $10 million, was excessive and based on purely speculative figures. The court found that a bond of $500,000 was appropriate [*see* 3M *Unitek Corp. v. Ormco Co. (CD Cal 2000) 96 F Supp2d 1042, 1052-1053*].

Strategic Point--Defendant:

The defendant subject to an injunction should raise the issue of need for a bond and present supporting evidence to the district court. The Ninth Circuit Court of Appeals has stated that the language of *Fed R Civ P 65(c)* does not absolve the party affected by the injunction from its obligation to present evidence that a bond is needed, so that the district court is afforded an opportunity to exercise its discretion in setting the amount of the bond [*see Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills (9th Cir 2003) 321 F3d 878, 883* (district court did not abuse discretion by not reaching bond issue because party did not request bond or present evidence that bond was needed)].

19.11[3] Local Rules on Requirements for Bonds and Undertakings Must Be Consulted. The four California districts have detailed local requirements concerning bonds and undertakings. Consult the following rules:

- **Central District:** *CD Cal Civ LR 65-2-65-10.*
- **Eastern District:** *ED Cal Gen LR 151.*
- **Northern District:** *ND Cal Civ LR 65.1-1.*
- **Southern District:** *SD Cal Civ LR 65.1.2.*

19.11[4] Surety's Liability May Be Enforced on Motion. The surety's liability may be enforced on motion without the necessity of an independent action [*Fed R Civ P 65.1*].

Alternatively, the liability may be enforced through an independent action initiated in state or federal courts [*Bass v. First Pac. Networks, Inc. (9th Cir 2000) 219 F3d 1052, 1053*].

Cross References:

Enforcement of surety's liability under Rule 65.1, see *19.114 -19.138.*

Security for injunctions or restraining orders, see 13 *Moore's Federal Practice, §§ 65.50 -65.53* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersGovernmentsFederal GovernmentClaims By & Against

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19.12 Injunction Order.

19.12[1] Local Rules and Judges' Individual Rules Control. Proposed orders must comply with local rules and individual judges' rules. In some instances the moving party must submit a proposed order together with the motion [*see, e.g., ED Cal Civ LR 231(c)*]. In other instances, submission of the proposed order should follow the court's decision on the motion. Some other districts do not welcome, or may even prohibit, submission of proposed orders altogether.

19.12[2] Requirements for Order.

19.12[2][a] Order Must Be Specific, Describe Restrained Acts in Reasonable Detail, and Not Describe Acts by Reference. Every order granting an injunction and every restraining order must include the following [*Fed R Civ P 65(d)(1)*; *see Fortyune v. American Multi-Cinema, Inc. (9th Cir 2004) 364 F3d 1075, 1086* ; *Federal Election Comm'n v. Furgatch (9th Cir 1989) 869 F2d 1256, 1262*]:

- The reasons for its issuance; and

- Specific terms describing in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.

Those against whom an injunction is issued must receive fair and precisely drawn notice of what the injunction actually prohibits [Reno Air Racing Ass'n v. McCord (9th Cir 2006) 452 F3d 1126, 1132-1134]. The specificity requirement prohibits overbreadth; an overbroad injunction is an abuse of discretion [*E. & J. Gallo Winery v. Gallo Cattle Co. (9th Cir 1992) 967 F2d 1280, 1297*].

The district court need not, however, state *how* the injunction is to be enforced [*see, e.g., Fortyune v. American Multi-Cinema, Inc. (9th Cir 2004) 364 F3d 1075, 1087*].

19.12[2][b] Injunction May Not Be Impermissibly Vague. The requirement that an injunction be specific

includes the requirement that it not be impermissibly vague [*see Fed R Civ P 65(d)*]. However, injunctions are not set aside under Rule 65(d) unless they are so vague that they have no reasonably specific meaning [*A&M Records, Inc. v. Napster, Inc. (9th Cir 2002) 284 F3d 1091, 1097* ; *E. & J. Gallo Winery v. Gallo Cattle Co. (9th Cir 1992) 967 F2d 1280, 1297* ; *United States v. Holtzman (9th Cir 1985) 762 F2d 720, 726*].

19.12[2][c] Ninth Circuit Does Not Strictly Preclude Incorporation of Other Documents If Notice of Prohibited Acts Is Adequate. The Ninth Circuit has not so strictly read *Fed R Civ P 65(d)* that it precludes any incorporation of extrinsic documents. Instead, it has interpreted the rationale behind the incorporation-by-reference language in Rule 65(d) as a safeguard to ensure adequate notice to defendants of the acts prohibited [Reno Air Racing Ass'n v. McCord (9th Cir 2006) 452 F3d 1126, 1132-1133].

19.12[3] Order Is Binding Only on Parties, Agents, and Other Specified Persons. Every order granting an injunction and every restraining order is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise [*Fed R Civ P 65(d)(2)*].

Properly substituted parties are subject to the injunction [*see Hilao v. Estate of Marcos (9th Cir 1996) 103 F3d 762, 766*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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19.13 Rule 65 Applies to Copyright Impoundment Proceedings.

In a copyright infringement action, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all articles by means of which the copies or phonorecords may be reproduced [*17 USC § 503(a)*].

Impoundment may be ordered on an ex parte basis under *Fed R Civ P 65(b)* if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief [*see Fed R Civ P 65(f)*; *Fed R Civ P 65*, Committee Note of 2001].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewComputer & Internet LawCopyright ProtectionCivil Infringement ActionsRemediesInjunctive ReliefCopyright LawCivil Infringement ActionsRemediesWrits of SeizureCopyright LawCriminal OffensesCriminal InfringementRemedies

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19.14 CHECKLIST: Opposing Injunctive Relief.

☐ Determine whether the following defenses apply:

- ○ An adequate remedy is available at law.
- ○ An anti-injunction statute applies to the case.
- ○ Laches.
- ○ Unclean hands.
- ○ The injunction is vague, overbroad, or ambiguous.

☐ Attempt to reach a stipulation with the moving party regarding injunctive relief that will have a strong and immediate adverse economic impact.

☐ Provide evidence of financial or other costs that will result if relief is granted.

☐ Show harm to innocent third parties that might flow if relief is granted (e.g., job loss).

☐ Provide solid authority as to why the plaintiff's ultimate success on the merits is questionable.

☐ Determine an appropriate bond amount and if there are grounds to recover on the bond.

☐ If order to show cause has issued, review order to ascertain time for filing opposition papers.

☐ If motion procedure used, opposing papers are due within time limits generally applicable to motions.

Authority:
28 USC § 2283; *Fed R Civ P 65*

Discussion:
See *§§ 19.16 -19.22*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityAdequate Remedy at LawCivil ProcedureEquityReliefCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral Overview

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19.15 Options and Strategies for Opposing Injunctive Relief.

A defendant should not simply ignore the pendency of a suit seeking an injunction against it, even if the application for a TRO is denied. The defendant acts at its peril and subject to the power of the court to restore the status quo by means of a mandatory injunction [*Porter v. Lee (1946) 328 US 246, 251, 66 S Ct 1096, 90 L Ed 1199*]; *Desert Citizens Against Pollution v. Bisson (9th Cir 2000) 231 F3d 1172, 1187* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsMandatory InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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19.16 Anti-Injunction Act Limits Power of Federal Court to Enjoin State Proceedings.

The Anti-Injunction Act prohibits a federal court from enjoining state court proceedings, except in the following circumstances [*see 28 USC § 2283*; *see also Brother Records, Inc. v. Jardine (9th Cir 2005) 432 F3d 939, 942-944* ; *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc. (9th Cir 2000) 204 F3d 867, 878-879*]:

- As expressly authorized by Act of Congress;
- When necessary in aid of the federal court's jurisdiction; and
- To protect or effectuate a federal court's judgment.

In general, the necessary-in-aid-of-jurisdiction exception applies to in rem proceedings in which the federal court has jurisdiction over the property and the state court proceedings might interfere with that jurisdiction. However, the exception does not authorize interference with parallel in personam state actions merely because the state courts might reach a conclusion before the district court does [*Negrete v. Allianz Life Ins. Co. (9th Cir 2008) 523 F.3d 1091, 1101* (mere fact that state court's actions might have some effect on federal proceedings did not justify injunction)].

Whether an injunction may issue under the act is a question of law reviewed de novo [*Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc. (9th Cir 2000) 204 F3d 867, 879*]. An injunction issued under one of the limited exceptions to the act will be upheld on appeal only on "a strong and unequivocal showing" that injunctive relief is necessary [*Sandpiper Village Condominium Ass'n, Inc. v. Louisiana-Pacific Corp. (9th Cir 2005) 428 F3d 831, 842*].

Cross References:

Discussion of Anti-Injunction Act, see 13 *Moore's Federal Practice, § 65.07[1]*; 17A *Moore's Federal Practice, §§ 121.02 -121.06* (Matthew Bender 3d ed.).

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsAnti-Injunction Act

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19.17 Injunction Opposed on Ground of Adequate Remedy at Law.

Availability of an adequate remedy at law may be raised as a defense to an application for provisional or permanent injunctive relief [*see Northern Cal. Power Agency v. Grace Geothermal Corp. (1984) 469 US 1306, 1306, 105 S Ct 459, 83 L Ed2d 388*].

Judge's Perspective:

The best defense is to show why monetary damages are sufficient to provide full relief if the moving party prevails.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityAdequate Remedy at LawCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsIrreparable Harm

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19.18 District Court Lacks Jurisdiction to Enjoin Dissipation of Assets in Which Plaintiff Claims No Lien or Equitable Interest.

A district court lacks the power to enjoin the defendant's dissipation of assets in which the plaintiff claims no lien or equitable interest [*Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 330-333, 119 S Ct 1961, 144 L Ed2d 319* ; *see also Dateline Exports, Inc. v. Basic Constr., Inc. (9th Cir 2002) 306 F3d 912, 913-914*]. This rule is founded on the principle that before judgment (or its equivalent), an unsecured creditor has no rights at law or in equity in the property of its debtor [*see Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 330, 119 S Ct 1961, 144 L Ed2d 319*].

Distinguish:

Cases involving bankruptcy and fraudulent conveyances, and cases in which equitable relief is sought, are exempt from the proscription against preliminary injunctions freezing assets [*In re Focus Media, Inc. (9th Cir 2004) 387 F3d 1077, 1085* , *cert. denied*, *544 US 923 (2005)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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19.19 Defense of Laches.

19.19[1] Defense of Laches Requires Proof of Lack of Diligence and Prejudice. The doctrine of laches is based on the maxim that equity aids the vigilant and not those who "slumber on their rights." The doctrine is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to the adverse party, operates as a bar in a court of equity [*see Kansas v. Colorado (1995) 514 US 673, 687, 115 S Ct 1733, 131 L Ed2d 759* ; *Beaty v. Selinger (9th Cir 2002) 306 F3d 914, 926-927*].

The defense of laches requires proof of the following [*Kansas v. Colorado (1995) 514 US 673, 687, 115 S Ct 1733, 131 L Ed2d 759* ; *Beaty v. Selinger (9th Cir 2002) 306 F3d 914, 926-927*]:

- Lack of diligence by the party against whom the defense is asserted; and
- Prejudice to the party asserting the defense.

19.19[2] Defense of Laches Is Available in Injunction Proceedings. The equitable defense of laches is available in injunction proceedings [*see, e.g., GoTo.com, Inc. v. Walt Disney Co. (9th Cir 2000) 202 F3d 1199, 1209* ; *Ocean Garden, Inc. v. Marktrade Co. (9th Cir 1991) 953 F2d 500, 508*].

19.19[3] Defense of Laches Available in Some Trademark Infringement Cases. The Ninth Circuit has allowed laches to bar trademark infringement cases, but has done so only when the trademark holder knowingly allowed the infringing mark to be used without objection for a lengthy period of time [*see, e.g., GoTo.com, Inc. v. Walt Disney Co. (9th Cir 2000) 202 F3d 1199, 1209* ; *Brookfield Communications, Inc. v. West Coast Entm't Corp. (9th Cir 1999) 174 F3d 1036, 1060-1061*].

Factors that must be weighed to determine when laches bars relief include the following [*Ocean Garden, Inc. v. Marktrade Co. (9th Cir 1991) 953 F2d 500, 508*]:

- The strength and value of the trademark rights;

- Plaintiff's diligence in enforcing its mark;
- The harm to plaintiff if relief is denied;
- Competition between plaintiff and defendant; and
- The harm suffered by defendant because of plaintiff's delay.

Example--Laches Defense Inapplicable:

In a copyright and trademark infringement case, the court found that the plaintiff had sufficient reasons for the nine months' delay between the service of the complaint and filing of the motion, including the plaintiff's need for discovery and the defendant's "stonewalling" [*see Perfect 10, Inc. v. Cybernet Ventures, Inc. (CD Cal 2002) 213 F Supp2d 1146, 1190*].

19.19[4] LOCAL PRACTICE: ED Cal Requirements--Undue Delay of Application May Constitute Laches or Contradict Irreparable Injury Allegations. In the Eastern District, in considering a motion for a temporary restraining order, the court will consider whether the applicant could have sought relief by motion for preliminary injunction at an earlier date without the necessity for seeking last-minute relief by motion for temporary restraining order. Should the court find that the applicant unduly delayed in seeking injunctive relief, the court may conclude that the delay constitutes laches or contradicts the applicant's allegations of irreparable injury and may deny the motion solely on either ground [*ED Cal Civ LR 231(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityMaximsVigilance PrincipleCivil ProcedureRemediesInjunctionsGeneral OverviewCopyright LawCivil Infringement ActionsDefensesStatutes of Limitations & LachesGovernmentsCourtsRule Application & InterpretationTrademark LawInfringement ActionsDefensesLaches

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19.20 Defense of Unclean Hands.

The equitable defense of unclean hands applies to injunction proceedings [*see, e.g., GoTo.com, Inc. v. Walt Disney Co. (9th Cir 2000) 202 F3d 1199, 1209-1210*]. The unclean hands doctrine may apply when the alleged misconduct occurs in a transaction directly related to the matter before the court and the conduct affects the equitable relationship between the litigants [*Perfect 10 Inc. v. Cybernet Ventures, Inc. (CD Cal 2002) 213 F Supp2d 1146, 1189*].

Another application of the unclean hands doctrine is to withhold an equitable remedy that would encourage illegal activity [*First Global Communications, Inc. v. Bond (WD Wash 2006) 413 F Supp2d 1150, 1155-1156*].

Example:

The operator of the website www.worldsexguide.org sued another website operator for, among other things, trademark infringement and cybersquatting. The district court denied the plaintiff's motion for a preliminary injunction based on the unclean hands doctrine. The court concluded that the issuance of a preliminary injunction would have the effect of encouraging illegal prostitution and would serve an unconscionable purpose [*First Global Communications, Inc. v. Bond (WD Wash 2006) 413 F Supp2d 1150, 1156*].

If the relative culpabilities of the parties is unclear, the court may decide that the issue of unclean hands is insufficient to justify denying injunctive relief, and better left to trial [*see, e.g., Perfect 10 Inc. v. Cybernet Ventures, Inc. (CD Cal 2002) 213 F Supp2d 1146, 1189-1190*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityMaximsClean Hands PrincipleCivil ProcedureRemediesInjunctionsGeneral OverviewComputer & Internet LawCopyright ProtectionCivil Infringement ActionsDefensesGeneral OverviewTrademark LawInfringement ActionsDefensesGeneral Overview

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19.21 Raising Objections to Motion for Preliminary Injunction.

A defendant may oppose a motion for preliminary injunction by raising any applicable objections, including evidentiary objections [*see, e.g., Perfect 10, Inc. v. Cybernet Ventures, Inc. (CD Cal 2002) 213 F Supp2d 1146, 1153-1156*].

Drawback:

Note, however, that there is generally a reduced evidentiary standard in preliminary injunction motions [*see Perfect 10, Inc. v. Cybernet Ventures, Inc. (CD Cal 2002) 213 F Supp2d 1146, 1154, n1, n2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewEvidenceProcedural ConsiderationsRule Application & Interpretation

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19.22 Terms of Injunction May Be Challenged on Grounds of Overbreadth and Vagueness.

Grounds for challenging the terms of an injunction include:

- Overbreadth [*see, e.g., E. & J. Gallo Winery v. Gallo Cattle Co. (9th Cir 1992) 967 F2d 1280, 1297-1298* (court found some terms of a permanent injunction overbroad and modified it accordingly)].

- Vagueness [*see, e.g., Federal Election Comm'n v. Furgatch (9th Cir 1989) 869 F2d 1256, 1263-1264* (court remanded case for the district court to specify precise conduct prohibited by injunction)].

Consider:

Courts will be especially attuned to correct injunctions running afoul of *First Amendment* guarantees [*see, e.g., E. & J. Gallo Winery v. Gallo Cattle Co. (9th Cir 1992) 967 F2d 1280, 1297* (discussing *First Amendment* issue but deciding against defendant)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsPrior Restraint

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19.23 Cessation of Conduct Does Not Moot Case.

Mere voluntary cessation of allegedly illegal conduct does not moot a case. If it did, the courts would be compelled to leave the defendant "free to return to his old ways" [*see FTC v. Affordable Media, LLC (9th Cir 1999) 179 F3d 1228, 1238 , citing United States v. W.T. Grant Co. (1953) 345 US 629, 632, 73 S Ct 894, 97 L Ed 1303*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityMootnessGeneral OverviewCivil ProcedureJusticiabilityMootnessVoluntary Cessation ExceptionCivil ProcedureRemediesInjunctionsGeneral Overview

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19.24 Recovery on Bond for Wrongful Restraint or Enjoinment.

A party wrongfully restrained or enjoined may seek recovery on the bond posted under *Fed R Civ P 65(c)* [*see Fed R Civ P 65(c), 65.1*].

Cross Reference:

Recovery on bond under Rule 65.1, see *§ 19.114 -19.138*. Form of notice of motion and motion for damages for wrongful injunction, see *§ 19.163*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesInjunctionsGeneral Overview

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19.25 Motion for Dissolution or Modification of Temporary Restraining Order.

19.25[1] Respondent May Move for Dissolution or Modification on Two Days' or Shorter Notice. On two days' notice to the party who obtained the temporary restraining order without notice, or on shorter court-prescribed notice, the adverse party may appear and move for dissolution or modification [*Fed R Civ P 65(b)(4)*].

Cross Reference:

For general motion procedure, see Ch. 26, Pretrial Motion Practice, see *§§ 26.12 -26.36*.

19.25[2] Motion Is Heard Expeditiously. When a party moves for dissolution or modification of a temporary restraining order, the court will proceed to hear and determine the motion as promptly as justice requires [*Fed R Civ P 65(b)(4)*].

19.25[3] At Time of Hearing on Motion to Dissolve TRO, Parties May Be Able to Present Evidence and Legal Arguments Re Preliminary Injunction. Situations may arise in which the parties, at the time of the hearing on the motion to dissolve the restraining order, find themselves in a position to present their evidence and legal arguments for or against a preliminary injunction. In such circumstances, the court can proceed with the hearing as if it were a hearing on an application for a preliminary injunction. At the hearing, as in any other hearing in which a preliminary injunction is sought, the party seeking the injunction bears the burden of demonstrating the various factors justifying preliminary injunctive relief, such as the likelihood of irreparable injury to it if an injunction is denied and its likelihood of success on the merits [*see Granny Goose Foods, Inc. v. Brotherhood of Teamsters (1974) 415 US 423, 441, 94 S Ct 1113, 39 L Ed2d 435*].

Drawback:

If one of the parties is not prepared or does not intend at the hearing on the motion to dissolve or modify the temporary restraining order to present evidence and arguments for or against a preliminary injunction, an early hearing might harm its position. In such circumstances, the appropriate procedure would be for the district court to deal with the issues raised in the motion to dissolve or modify the restraining order, but to postpone for a later hearing, still within the time limitations of *Fed R Civ P 65(b)*

, the application for a preliminary injunction [*see Granny Goose Foods, Inc. v. Brotherhood of Teamsters (1974) 415 US 423, 441, 94 S Ct 1113, 39 L Ed2d 435*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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19.26 LOCAL PRACTICE: ED Cal--Modification or Dissolution of Preliminary Injunction or Temporary Restraining Order.

In the Eastern District, if a preliminary injunction or temporary restraining order has been issued, the affected party may apply to the court for modification or dissolution of the injunction or order. This motion must normally be accompanied by a brief on all relevant legal issues to be presented in its support and affidavits supporting modification or dissolution and detailing the notice to or efforts to notify the affected party or counsel [*ED Cal Civ LR 231(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersGovernmentsCourtsRule Application & Interpretation

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19.27 District Court Has Inherent Authority to Modify Preliminary Injunction in Consideration of New Facts.

A district court has inherent authority to modify a preliminary injunction in consideration of new facts [*A&M Records, Inc. v. Napster, Inc. (9th Cir 2002) 284 F3d 1091, 1098-1099* (injunction modified pending appeal)].

Example:

In a copyright-infringement case involving the music industry, the district court first entered a preliminary injunction requiring the defendant Internet music-file-sharing service to implement a filtering system to block all of plaintiffs' (record companies and music producers) noticed copyrighted works. When the original filtering mechanism was unsuccessful, the court modified the preliminary injunction: (1) to require the defendant to remove any user file from their Internet system's file-sharing music index if it had reasonable knowledge that the file contained plaintiffs' copyrighted works; (2) to require the plaintiff record companies and music producers to give defendant notice of specific infringing files, and (3) to require defendant to continually search the index and block all files containing the particular noticed work. After monitoring defendant's compliance with the modified injunction and finding it wanting, the district court ordered defendant to disable its file-transferring service until certain conditions were met and steps taken to ensure maximum compliance, i.e., issued a shut-down order [*see A&M Records, Inc. v. Napster, Inc. (9th Cir 2002) 284 F3d 1091, 1097-1098* (deciding cross-appeals of modified injunction, and defendant's appeal of shut-down order; affirming all district court orders)].

A motion to modify or dissolve a preliminary injunction may be brought at any time before entry of final judgment [*Fed R Civ P 54(b)*; *Credit Suisse First Boston Corp. v. Grunwald (9th Cir 2005) 400 F3d 1119, 1124*].

Distinguish--Motion for Reconsideration:

A motion for reconsideration of a preliminary injunction must be filed within 28 days of entry of the order [*Fed R Civ P 59(e)*; *Credit Suisse First Boston Corp. v. Grunwald (9th Cir 2005) 400 F3d 1119, 1124* (decided under former *Fed R Civ P 56*)]. The substance of the motion governs whether a motion requesting the district court to reconsider a preliminary injunction order should be treated as a motion for reconsideration (which must be brought within 28 days) or a motion for dissolution or modification (which may be brought at any time). If the motion merely seeks to relitigate the issues underlying the original order, it is subject to the 28-day limit; if the motion is based on new circumstances arising after

the injunction was granted, it may be filed at any time before entry of a final judgment [*Credit Suisse First Boston Corp. v. Grunwald (9th Cir 2005) 400 F3d 1119, 1124* (decided under former *Fed R Civ P 56*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsGovernmentsCourtsAuthority to Adjudicate

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19.28 Court May Utilize Power of Contempt.

A court may enforce an injunction or temporary restraining order through civil or criminal contempt [*see, e.g., Granny Goose Foods, Inc. v. Brotherhood of Teamsters (1974) 415 US 423, 440-445, 94 S Ct 1113, 39 L Ed2d 435* ; *United States v. United Mine Workers (1947) 330 US 258, 293-294, 67 S Ct 677, 91 L Ed 884* ; *see also Hilao v. Estate of Marcos (9th Cir 1996) 103 F3d 762, 766-767* (violation of permanent injunctions)]. Civil contempt is remedial in nature and designed to coerce obedience and to compensate the complainant for losses sustained. Criminal contempt is designed to vindicate the court's authority [*see International Union, UMW v. Bagwell (1994) 512 US 821, 824-826, 114 S Ct 2552, 129 L Ed2d 642*].

Example:

Defendants who engaged in a Ponzi scheme that defrauded investors and failed to comply with a TRO (later incorporated into a preliminary injunction) requiring them to repatriate funds that they had placed in an offshore trust, were properly charged with civil contempt, despite their assertions that they could no longer control the proceeds of the trust [*see FTC v. Affordable Media, LLC (9th Cir 1999) 179 F3d 1228, 1239-1244*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsContemptCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal Contempt

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19.29 Effect on Contempt Prosecution If Injunction Reversed.

A prosecution of civil contempt collapses if an injunction is reversed. A prosecution of criminal contempt is not affected by a reversal of the underlying order or by the mootness of the underlying action [*see United States v. United Mine Workers (1947) 330 US 258, 294-295, 67 S Ct 677, 91 L Ed 884*].

Cross Reference:

Discussion of contempt, see Ch. 35, Contempt.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsContemptCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal Contempt

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19.30 Appellate Court Reviews Grant or Denial of Permanent Injunction for Abuse of Discretion.

The Ninth Circuit will review a denial of a permanent injunction for an abuse of discretion. It will not reverse unless the district court failed to apply the correct law or rested its decision on a clearly erroneous finding of material fact [*Bird v. Lewis & Clark Coll. (9th Cir 2002) 303 F3d 1015, 1020* , *cert. denied*, *538 US 923 (2003)* ; *Image Tech. Servs., Inc. v. Eastman Kodak Co. (9th Cir 1997) 125 F3d 1195, 1224*].

The Ninth Circuit also reviews the grant of a permanent injunction for abuse of discretion [*Union Pac. R.R. Co. v. Mower (9th Cir 2000) 219 F3d 1069, 1073* (reversing permanent injunction requiring former employee's continuing duty of confidentiality)].

The district court's ability to grant an injunction is reviewed de novo, but the district court's *exercise* of that power is reviewed for abuse of discretion [*California v. Campbell (9th Cir 1998) 138 F3d 772, 776* , *cert. denied*, *525 US 822 (1998)*]. A strong showing of abuse must be made to reverse a court's decision to grant an injunction [*United States v. W. T. Grant Co. (1953) 345 US 629, 633, 73 S Ct 894, 97 L Ed 1303* ; *United States v. Laerdal (9th Cir 1995) 73 F3d 852, 854*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewDe Novo Review

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19.31 Interlocutory Orders Granting, Continuing, Modifying, Refusing or Dissolving Injunctions, or Refusing to Dissolve or Modify Injunctions Are Appealable.

Except as otherwise provided in *28 USC § 1292(c)* and *(d)* and except when a direct review may be had in the Supreme Court, the courts of appeals have jurisdiction of appeals from interlocutory orders of the district courts granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions [*see 28 USC § 1292(a)(1)*; *see also Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc. (9th Cir 2000) 204 F3d 867, 880* (denial of preliminary injunction is one of few kinds of appealable interlocutory orders, pursuant to *28 USC § 1292(a)(1)*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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19.32 Substance of Motion Controls Its Disposition.

The substance of the motion, not its form, controls its disposition [*Andersen v. United States (9th Cir 2002) 298 F3d 804, 807* , *cert. denied*, *538 US 977 (2003)*]. If a motion couched in terms of a motion for preliminary injunction under *Fed R Civ P 65* nevertheless seeks relief not encompassed by the rule, the court of appeal will reframe the motion and evaluate the appeal accordingly [*see, e.g.,* *Andersen v. United States (9th Cir 2002) 298 F3d 804, 807* , *cert. denied*, *538 US 977 (2003)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureAppealsStandards of ReviewGeneral Overview

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19.33 Review of Grant or Denial of Motion for Preliminary Injunction.

19.33[1] Grant or Denial of Motion for Preliminary Injunction Reviewed for Abuse of Discretion. The Ninth Circuit reviews the denial of a motion for preliminary injunction to determine whether the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact [*Bernhardt v. County of Los Angeles (9th Cir 2003) 339 F3d 920, 924* (reversing denial of preliminary injunction); *Desert Citizens Against Pollution v. Bisson (9th Cir 2000) 231 F3d 1172, 1176* (reversing denial of preliminary injunction)].

19.33[2] When Preliminary Injunction Granted, Court of Appeals Determines Only Whether District Court Employed Appropriate Legal Standards and Correctly Interpreted Law. In reviewing the grant of a preliminary injunction, the Court of Appeals determines only whether the district court employed the appropriate legal standards that govern the issuance of a preliminary injunction, and whether the district court correctly apprehended the law with respect to the underlying issues in litigation. It does not, however, decide whether the application of the legal principles was or was not erroneous. Accordingly, whether or not the Court of Appeals would have arrived at a different result if it had applied the law to the facts of the case is irrelevant at this stage of the proceedings. In short, the court does not decide whether the result reached by the district judge was correct [*Harris v. Board of Supervisors (9th Cir 2004) 366 F3d 754, 760* ; *California Prolife Council Political Action Comm. v. Scully (9th Cir 1999) 164 F3d 1189, 1190*].

Example:

Under the Administrative Procedure Act, regulations are presumed to be valid and review is deferential to the promulgating agency. A district court committed legal error by failing to abide by this deferential standard when it granted a preliminary injunction barring implementation of the agency's final rule allowing resumption of the importation of Canadian cattle into the United States despite the fact that two cases of Bovine Spongiform Encepthalopathy ("mad cow disease") had been found in Canada [*Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. United States Dep't of Agric. (9th Cir 2005) 415 F3d 1078, 1093-1094*].

19.33[3] Court Abuses Discretion When Ruling on Preliminary Injunction Is Based on Erroneous View of Law. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law. The

Court of Appeals therefore reviews the legal issues underlying the preliminary injunction de novo [*see, e.g., Brookfield Communications, Inc. v. West Coast Entm't Corp. (9th Cir 1999) 174 F3d 1036, 1046* ; *Barahona-Gomez v. Reno (9th Cir 1999) 167 F3d 1228, 1234* ; *FDIC v. Garner (9th Cir 1997) 125 F3d 1272, 1276*].

19.33[4] District Court's Determination of Underlying State Law, or Choice of Law Is Reviewed de Novo. A district court's determination of the appropriate choice of law is reviewed de novo [*Sims Snowboards, Inc. v. Kelly (9th Cir 1988) 863 F2d 643, 644*].

19.33[5] Merger of Preliminary Injunction Into Permanent Injunction May Render Appeal Moot.

19.33[5][a] Appeal From Grant of Preliminary Injunction Is Generally Moot When Court Enters Permanent Injunction. Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter. In those cases, appeals are usually dismissed [*Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 314, 119 S Ct 1961, 144 L Ed2d 319*].

Usually, a plaintiff seeks a preliminary injunction against action that it claims is unlawful [*Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 314, 119 S Ct 1961, 144 L Ed2d 319*]. If the lawsuit is ultimately meritorious, that is, if the plaintiff obtains a permanent injunction although the preliminary injunction was wrongly issued (because, e.g., at that stage of the litigation the plaintiff's prospects of winning were not sufficiently clear, or the plaintiff was not suffering irreparable injury) the issuance of the preliminary injunction would be harmless error. The final injunction establishes that the defendant should not have been engaging in the conduct that was enjoined. Hence, it is reasonable to regard the preliminary injunction as merging into the final one [*Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 314-315, 119 S Ct 1961, 144 L Ed2d 319*].

19.33[5][b] If Trial Court Lacked Authority to Issue Preliminary Injunction, Appeal May Be Possible After Conversion to Permanent Injunction. If the trial court *lacked authority* to issue the preliminary injunction, it appears that the enjoined party may appeal the order granting the preliminary injunction even though the court has the authority to, and does later order, a permanent injunction to the same effect [*Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 313-317, 119 S Ct 1961, 144 L Ed2d 319*].

Example:

Plaintiffs, unsecured creditors of defendants, brought a contract claim for money damages against defendants. The trial court issued a preliminary injunction requiring plaintiffs to post a $50,000 bond and preventing defendants from disposing of their assets pending adjudication of the contract claim. The trial court eventually entered summary judgment for plaintiffs and converted the preliminary injunction to a permanent injunction. The defendants appealed from the granting of the *preliminary* injunction, challenging the trial court's authority to freeze its assets before the judgment. The Second Circuit Court of Appeals affirmed, and the Supreme Court granted certiorari. Applying the equitable rule that an unsecured creditor has no pre-judgment rights in the property of his or her debtor, the Supreme Court held that the district court lacked authority to grant the preliminary injunction. The Court determined that the issue of the preliminary injunction's propriety was not mooted by the permanent injunction--the trial court had issued the preliminary injunction not to enjoin unlawful conduct, but rather to render unlawful conduct that would otherwise be permissible, in order to protect the court's judgment. Defendants' potential claim for relief against the injunction bond preserved jurisdiction over the appeal [*Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 313-317, 119 S Ct 1961, 144 L Ed2d 319*].

Legal Topics:

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

Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewClearly Erroneous ReviewCivil ProcedureAppealsStandards of ReviewDe Novo ReviewCivil ProcedureAppealsStandards of ReviewFact & Law Issues

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19.34 Extended TRO Granted Ex Parte May Be Appealable As Preliminary Injunction.

Although an order granting or denying a temporary restraining order is generally not appealable, if the court extends a temporary restraining order granted ex parte beyond 20 days from its entry date without the consent of the enjoined party, the TRO becomes a preliminary injunction, and is immediately appealable [*Sampson v. Murray (1974) 415 US 61, 86-88, 94 S Ct 937, 39 L Ed2d 166* ; *see Fed R Civ P 65(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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19.35 Effect of Appeal on Injunction Under Rule 62.

19.35[1] Interlocutory or Final Judgment in Injunction Action Not Stayed Pending Appeal. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction is not stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. *Fed R Civ P 62(c)* governs the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal [*Fed R Civ P 62(a)*].

19.35[2] District Court May Suspend, Modify, Restore, or Grant Injunction Pending Appeal. *Fed R Civ P 62(c)* authorizes a district court to continue supervising compliance with the injunction [*see A&M Records, Inc. v. Napster, Inc. (9th Cir 2002) 284 F3d 1091, 1099*].

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal on such terms as to bond or otherwise as it considers proper for the security of the adverse party's rights [*Fed R Civ P 62(c)*; *see A&M Records, Inc. v. Napster, Inc. (9th Cir 2002) 284 F3d 1091, 1098-1099* (modifying preliminary injunction during appeal to increase efficiency of methods by which defendant music-file-sharing service blocked plaintiffs' copyrighted materials)].

If the appealed-from judgment is rendered by a district court of three judges specially constituted pursuant to a United States statute, a Rule 62(c) order can only be made by [*Fed R Civ P 62(c)*]:

- The three-judge court sitting in open court; or
- The assent of all the judges of the court evidenced by their signatures to the order.

19.35[3] Court of Appeals May Suspend, Modify, Restore, or Grant Injunction Pending Appeal. *Fed R Civ P 62* does not limit any power of an appellate court to [*Fed R Civ P 62(g)*].

- Stay proceedings during the pendency of an appeal.

- Suspend, modify, restore, or grant an injunction during the pendency of an appeal.

- Make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

Appellate courts often defer to trial courts on issues involving the "framing" of injunctions. Appellate courts will modify injunctions, however, when such action is necessary to assure that the relief will be effective [*see Image Tech. Servs., Inc. v. Eastman Kodak Co. (9th Cir 1997) 125 F3d 1195, 1224-1226* (directing modifications to ten-year injunction in antitrust suit)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionLower Court JurisdictionGovernmentsCourtsAuthority to Adjudicate

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19.36 Amount of Security Bond Reviewed for Abuse of Discretion.

Fed R Civ P 65(c) grants district courts wide discretion in setting the amount of a security bond [*Jorgensen v. Cassiday (9th Cir 2003) 320 F3d 906, 919* ; *GoTo.com, Inc. v. Walt Disney Co. (9th Cir 2000) 202 F3d 1199, 1211* ; *Walczak v. EPL Prolong, Inc. (9th Cir 1999) 198 F3d 725, 733*]. A district court's decision as to the amount of a security bond is reviewed for an abuse of discretion [*GoTo.com, Inc. v. Walt Disney Co. (9th Cir 2000) 202 F3d 1199, 1211* ; *Walczak v. EPL Prolong, Inc. (9th Cir 1999) 198 F3d 725, 733* (repeatedly rejecting requests to increase bond dramatically)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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19.37 CHECKLIST: Determining Available Remedies.

☐ Determine whether California prejudgment remedy of writ of attachment or possession is available:

○ Has the complaint been filed?

Authority:
Fed R Civ P 64

Discussion:
See *§ 19.40*

○ Does a federal statute govern seizure of property in the action?

Authority:
Fed R Civ P 64

Discussion:
See *§ 19.38*

○ Have the parties agreed to arbitration under rules that authorize provisional relief?

Authority:
China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc. (CD Cal 2001) 155 F Supp2d 1174, 1182 ; *Simula, Inc. v. Autoliv, Inc. (9th Cir 1999) 175 F3d 716, 726*

Discussion:
See *§ 19.43*

☐ Determine whether prerequisites for obtaining writ of attachment or writ of possession are satisfied.

Authority: *Fed R Civ P 64*; CCP *§ 481.010 et seq., CCP* § 511.010 et seq.

Discussion: See *§§ 19.45*, *19.46* (writ of attachment); §§ 19.69- 19 .71 (writ of possession)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.38 Prejudgment Remedies Are Those Available Under California Law.

Under Rule 64, the prejudgment remedies available to a creditor in federal district court are those prejudgment remedies available under the law of the forum state at the time the remedy is sought [*Fed R Civ P 64*]. This is true regardless of the basis for jurisdiction in federal court and regardless of whether the case was initiated in federal court or removed from state court [*28 USC § 1450*; *see Granny Goose Foods, Inc. v. Brotherhood of Teamsters (1974) 415 US 423, 434-436, 94 S Ct 1113, 39 L Ed2d 435*]. Key provisional remedies available in California are writs of attachment [*see 19.44 -19.59*] and writs of possession [*see 19.60 -19.77*].

Exception--Federal Statutes Dealing With Provisional Remedies:
If federal law governs the seizure of property in the particular action, federal law on provisional remedies applies [*Fed R Civ P 64*]. This generally involves property seized by the United States under any revenue law [*see 28 USC § 2463*], attached by the United States [*see 28 USC § 2713*], or owned by the United States [*see 40 USC § 1313*]. Property of nationally chartered banks [*12 USC § 91*], the Federal Reserve Bank [*12 USC § 632*], and the FDIC [*12 USC § 1819*] is also not subject to state-law provisional remedies.

Exception--Temporary Restraining Orders and Preliminary Injunctions:
Rule 65 governs temporary restraining orders and preliminary injunctions in federal district court [*Fed R Civ P 65*; *see 19.03 -19.36*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.39 Although State Law Determines Which Remedies Are Available, Federal Rules Govern Procedure.

19.39[1] Procedure for Prejudgment Remedy Generally Governed by Federal Law. Although the right to a prejudgment remedy is determined by state law, the procedure for obtaining the remedy is governed by the Federal Rules of Civil Procedure [*Fed R Civ P 64*].

Example:

When a federal district court issued a writ of garnishment as permitted by Florida law, the writ should have been served by the United States Marshal as provided by former *Fed R Civ P 4(c)* [*now see Fed R Civ P 4.1(a)*], and not by a Florida county sheriff as provided by the Florida Rules of Civil Procedure [*United States v St. Paul Mercury Ins. Co. (5th Cir 1966) 361 F2d 838, 839*].

19.39[2] Exception; State Law Supplies Procedure for Lis Pendens. Lis pendens is not a procedural remedy but a substantive right. State law governs how, when, and if a lis pendens is available and all procedures in connection with it [*Frederick v. Baxter Arms Corp. (1941) 39 F Supp 609, 610*].

Cross Reference:

California law on availability and procedure for lis pendens, see Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, Ch. 21, Lis Pendens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsGeneral Overview

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19.40 Complaint Must Be Filed Before Seizure Is Available.

Before a prejudgment remedy is available in federal district court, the action must be "commenced" [*Fed R Civ P 64*]. Under the Federal Rules of Civil Procedure, an action commences on the filing of the complaint [*Fed R Civ P 3*]. Therefore, even if state law permits property to be seized before the complaint is filed, this is not the case in federal district court. However, once the complaint is filed, the prejudgment remedies are available regardless of whether the defendant has been personally served [*see Carolina Power & Light Co. v. Uranex (ND Cal 1977) 451 F Supp 1044, 1048-1049* ; *Hearst v. Hearst (ND Cal 1954) 15 FRD 258, 260*].

Cross Reference:

Discussion of when action officially commences, see 1 Moore's Federal Practice, Ch. 3, Commencing an Action (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.41 When Action Is Removed, State Court Remedies Continue.

Because Rule 64 applies in federal court, it applies to actions removed from state court just as it applies to actions originally commenced in the federal district court [*Fed R Civ P 64*, 2007 Committee Note]. Any orders issued in the state court prior to removal, such as an order for attachment, continue in effect after removal [*28 USC § 1450*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPrior State Court OrdersCivil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral Overview

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19.42 Prejudgment Remedies Available Under California Law.

19.42[1] Writ of Attachment Is Available Under California Law. California law provides for a writ of attachment to have a lien recorded against real property or have the debtor's assets seized and held prior to judgment. Attachment is governed by Title 6.5 of the Code of Civil Procedure [*see CCP §§ 481.010-493.060*]. The security provided by attachment is intended to guarantee that the judgment will be collectible.

Cross Reference:

Availability of attachment, see Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, Ch. 19, Attachment.

19.42[2] Writ of Possession Is Available Under California Law. "Claim and delivery" is a remedy by which a party with a superior right to a specific item of personal property, created, most commonly, by a contractual lien, may recover possession of that specific property before judgment [*Simms v. NPCK Enters., Inc. (2003) 109 CA4th 233, 241, 134 CR2d 557*]. Under California law, pre-judgment possession of personal property is obtained by a writ of possession. Writs of possession are governed by Chapter 2 of Title 7 of the Code of Civil Procedure [*see CCP § 511.010 et seq*.].

Cross Reference:

Availability of writs of possession, see Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, Ch. 20, Claim and Delivery.

19.42[3] Other Prejudgment Relief May Be Available Under California Law. Other prejudgment relief may be available under California law depending on the specific facts of the case. For example, under California law, a court of competent jurisdiction may temporarily enjoin a bank from honoring a letter of credit, or may grant similar relief, when the party seeking that relief claims that honoring the letter of credit would facilitate a material fraud by the beneficiary on it and certain other requirements are satisfied [*see Com C § 5109(b)*]. Therefore, this remedy is available under *Fed R Civ P 64* [*Hendricks v. Bank of Am., N.A. (9th Cir 2005) 398 F3d 1165, 1176-1177*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.43 Agreement to Arbitrate That Provides Method and Forum for Provisional Relief Precludes Provisional Relief in District Court.

The district court must refrain from awarding provisional relief under *Fed R Civ P 64* if the parties have agreed to abide by arbitration rules that provide a method and forum for obtaining provisional relief [*China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc. (CD Cal 2001) 155 F Supp2d 1174, 1182* ; *see Simula, Inc. v. Autoliv, Inc. (9th Cir 1999) 175 F3d 716, 726* (inappropriate for district court to grant preliminary injunction when agreed arbitrator had authority to do so)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral Overview

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B. Obtaining a Writ of Attachment

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19.44 CHECKLIST: Obtaining a Writ of Attachment.

☐ Determine whether California statutory requirements for obtaining writ of attachment can be satisfied:

- ○ Claim must be for money.
- ○ Claim must be based on contract, express or implied.
- ○ Amount of claim must be fixed or readily ascertainable and must be not less than $500.
- ○ Claim must not be secured by interest in real property.
- ○ Claim must be commercial.

Authority:
CCP §§ 481.190, 483.010(a)

Discussion:
See *§ 19.45*

☐ Compute amount to be secured by attachment:

Authority:
CCP § 483.015

Discussion:
See *§ 19.47*

☐ Identify property to be attached.

Authority:
CCP §§ 487.010, 487.020

Discussion:
See *§ 19.48*

☐ Marshal affidavits and/or declarations to establish probable validity of claim.

Authority:
CCP §§ 484.030, 484.090(a)(2)

Discussion:
See *§ 19.45[2]*

☐ Draft Application for Right to Attach Order containing:

○ Statement showing that the attachment is sought to secure the recovery on a claim on which an attachment may be issued.

○ Statement of the amount to be secured by the attachment.

○ Statement that the attachment is not sought for a purpose other than the recovery on the claim on which the attachment is based.

○ Statement that the applicant has no information or belief that the claim is discharged or stayed in a bankruptcy proceeding.

○ Description of the property to be attached and a statement that the plaintiff is informed and believes that such property is subject to attachment.

Authority:
CCP §§ 484.020-484.040

Discussion:
See *§ 19.49*; *Ch. 26, Pretrial Motion Practice, §§ 26.11, 26.12*

Form:
See *§ 19.160*

☐ Draft application for temporary protective order.

Authority:
CCP §§ 486.010-486.110

Discussion:
See *§ 19.51*

Form: See *§ 19.160*

☐ Draft notice of hearing on application for right to attach order that satisfies statutory requirements.

Authority:
CCP § 484.050

Discussion:
See *§ 19.50*

☐ Serve papers on opposing party.

☐ Prepare order and writ of attachment.

Authority:
CCP §§ 484.090, 488.010

Discussion:
See *§ 19.53 -19.55*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesPrejudgment RemediesHearingsCivil ProcedureRemediesPrejudgment RemediesNoticesCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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B. Obtaining a Writ of Attachment

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19.45 Options and Strategies for Plaintiff.

19.45[1] Determine Whether Attachment Is Available. California state law determines the circumstances and manner in which attachment is available in a federal action brought in a California district court [*see Fed R Civ P 64*]. California law controls with respect to, among other things, the type of claims warranting attachment, bond and affidavit requirements, property exempted from attachment, and the circumstances under which property may be released from attachment [*Paul H. Aschkar & Co. v. Curtis (9th Cir 1963) 327 F2d 306, 310*].

Under California law, a writ of attachment is available only when the claim is:

- For money in an amount that is fixed or readily ascertainable and for not less than $500 [*CCP § 483.010(a)*];
- Based on contract, express or implied [*CCP § 483.010(a)*];
- Not secured by real property, with limited exceptions [*CCP § 483.010(b)*]; and
- Commercial [*CCP § 483.010(c)*].

Cross Reference:

Statutory requirements for attachment, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, 19.04[1].*

19.45[2] Determine Probable Validity of Claim. To obtain a writ of attachment, the plaintiff must establish the probable validity of its claim [*CCP § 484.090(a)(2)*]. A claim has "probable validity" when it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim [*CCP § 481.190*]. The application for the right to attach order must be supported by an affidavit (or declaration) showing that the plaintiff on the facts presented would be entitled to a judgment on the claim [*CCP § 484.030*].

Strategic Point--If Good Cause Is Shown, Additional Evidence May Be Presented at Hearing:

In deciding whether the plaintiff has established the probable validity of its claim, the court will consider all declarations and other papers in the record and, may on good cause shown, receive and consider additional oral and documentary evidence and additional points and authorities at the hearing on the motion [*CCP § 484.090(d)*; *see Homes & Land Publ'g, Ltd. v. ApartmentNet Corp. (SD Cal 2000) 100 F Supp2d 1248, 1252*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.46 Consider Use of Preliminary Injunction If Conditions for Attachment Cannot Be Met.

When the requirements for an attachment [*see 19.45*] cannot be met, consider seeking a preliminary injunction to achieve the desired result [see *Fed R Civ P 65*]. For example, the district court can require the freezing of a defendant's assets [*see FTC v. H.N. Singer, Inc. (9th Cir 1982) 668 F2d 1107, 1112* ; *Reebok Int'l, Ltd. v. Marnatech Enters., Inc. (9th Cir 1992) 970 F2d 552, 559*], or require transferees in a fraudulent conveyance proceeding to deposit sums in the court registry [*see Thomas, Head & Greisen Employees Trust v. Buster (9th Cir 1996) 95 F3d 1449, 1456-1457* (Alaska law)].

Cross Reference:

Discussion of preliminary injunctions, see *§ 19.08*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.47 Compute Amount to Be Secured by Attachment.

The amount to be secured by an attachment equals:

- The sum of the defendant's indebtedness claimed by the plaintiff and the amount allowed by the court for costs and attorney fees [*CCP § 483.015(a)*; *see CCP § 482.110* (allowance of estimated costs and attorney fees)].

- Reduced by the sum of [*CCP § 483.015(b)*]:

  - Any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable.

  - Any indebtedness of the plaintiff that the defendant has claimed in a cross-complaint or in the answer filed in the action if the defendant's claim is one upon which an attachment could be issued.

  - The value of any security interest in the property of the defendant held by the plaintiff to secure the defendant's indebtedness claimed by the plaintiff, together with the amount by which the value of the security interest has decreased due to the act of the plaintiff or a prior holder of the security interest.

Exception--Unlawful Detainer Proceedings:
A different computation for the amount to be secured applies in unlawful detainer proceedings [*see CCP §§ 483.015*, *483.020*].

Cross Reference:

Calculating amount to be secured by attachment, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, 19.04[2].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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19.48 Identify Property Subject to Attachment.

19.48[1] California Law Exempts Specific Property From Attachment. Under California law, certain property is specifically exempted from attachment including "earnings" [*see CCP § 706.011* ("earnings" defined)] and any property that is exempt from enforcement of a money judgment [*CCP § 487.020*; *see CCP § 704.010 et seq*. (property exempt from enforcement of money judgment)].

Cross Reference:

Specified exempt property, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, 19.04[3]*.

19.48[2] All Property of Corporation, Partnership, or Unincorporated Association, Which May Be Levied, Is Subject to Attachment. When the defendant is a corporation, partnership, or unincorporated association, all of its property for which a method of levy is provided [*see CCP §§ 488.300-488.485* (levy)] may be attached [*CCP § 487.010(a), (b)*].

19.48[3] Only Specified Property of Natural Person Is Subject to Attachment. California law specifies the property interests of a natural person that are subject to attachment and further limits the attachment of community property [*CCP § 487.010(c), (d)*].

Cross References:

Property of natural person exempted from attachment, see *§ 19.62*.

Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, see *§ 19.04[4][b], [c]*.

19.48[4] Special Rules Apply to Property Subject to Pending Action or Special Proceeding. Property that is the subject of a pending action or special proceeding is not subject to attachment unless it is [*CCP § 488.475*]:

- Real property;

- Growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from the sale thereof at the wellhead or minehead;

- Tangible personal property in the possession or under the control of the defendant or in the custody of a levying officer; or

- The interest of a defendant in personal property in the estate of a decedent, whether the interest arises by testate or intestate succession.

Cross Reference:

Attachment of property subject to pending action or special proceeding, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 19.04[4][e]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.49 Application for Right to Attach Order.

19.49[1] Application Must Be Executed Under Oath and Contain Specified Information. To obtain an attachment of defendant's property, plaintiff must apply for a right to attach order. The application must be executed under oath and include all of the following [*CCP § 484.020*]:

- A statement showing that the attachment is sought to secure the recovery on a claim on which an attachment may be issued.
- A statement of the amount to be secured by the attachment.
- A statement that the attachment is not sought for a purpose other than the recovery on the claim on which the attachment is based.
- A statement that the plaintiff has no information or belief that the claim is discharged or stayed in a bankruptcy proceeding.
- A description of the property to be attached under the writ of attachment and a statement that the plaintiff is informed and believes that such property is subject to attachment [*see 19.48* (property subject to attachment)].

Cross Reference:

Requirements for application, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 19.05[2].*

19.49[2] LOCAL PRACTICE: CD Cal Requirements--Application Must Be Made to Magistrate Judge. In the Central District, an application for a writ of attachment must be made to a magistrate judge, unless otherwise ordered [*CD Cal Civ LR 64-4*].

Cross Reference:

Local Central District Attachment Forms, see *§ 19.165*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentGovernmentsCourtsRule Application & Interpretation

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19.50 Writ of Attachment May Be Obtained Ex Parte Only on Showing of Great or Irreparable Injury.

To obtain a right to attach order or writ of attachment ex parte, the plaintiff must state facts by way of affidavit that it would suffer great or irreparable injury if issuance of the order were delayed until the matter could be heard on notice [*see CCP § 485.010(a)*].

Cross Reference:

Obtaining writ of attachment ex parte, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 19.09 -19.11*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.51 Application for Temporary Protective Order to Preserve Status Quo May Be Filed With Application for Right to Attach Order.

A plaintiff applying for a right to attach order may simultaneously file an application for a temporary protective order to preserve the status quo prior to the hearing [*CCP § 486.010(a)*]. The application must state what relief is requested and be supported by an affidavit showing that the plaintiff would suffer great or irreparable injury if the temporary protective order were not issued [*CCP § 486.010(a)*]. On the filing of an undertaking, the court must issue the order, which states the amount to be secured by the attachment, if it finds that [*CCP § 486.020*]:

- The claim on which the application for attachment is based is one on which an attachment may be issued.
- The plaintiff has established the probable validity of the claim.
- The order is not sought for a purpose other than the recovery on the claim on which the application for the attachment is based.
- The plaintiff will suffer great or irreparable injury if the temporary protective order is not issued.

Cross Reference:

Obtaining temporary protective order, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 19.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.52 Contents of Notice to Defendant.

19.52[1] Defendant Must Be Notified of Time and Place of Hearing and Right to Be Present. The notice of application for a right to attach order that must be given to the defendant must notify the defendant that a hearing will be held at a place and at a time, to be specified in the notice, on the plaintiff's application for a right to attach order and a writ of attachment [*CCP § 484.050(a)*]. The defendant must be notified that either the defendant or the defendant's attorney or both of them may be present at the hearing [*CCP § 484.050(h)*].

Cross Reference:

Detailed discussion of statutory notice requirements, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 19.05[4]*.

19.52[2] Defendant Must Be Notified of Conditions for Issuing Order. The defendant must be notified that the order will be issued if the court finds that [*CCP § 484.050(b)*]:

- The plaintiff's claim is probably valid and the other requirements for issuing the order are established;
- That the hearing is not for the purpose of determining whether the claim is actually valid; and
- That the determination of the actual validity of the claim will be made in subsequent proceedings and will not be affected by the decisions at the hearing on the application for the order.

19.52[3] Defendant Must Be Notified of Basis for Amount of Attachment. The defendant must be notified that the amount to be secured by the attachment is determined under *CCP §§ 482.110*, *483.010*, *483.015*, and *483.020*, and those statutes must be summarized in the notice [*CCP § 484.050(c)*]. The defendant must also be notified that if the right to attach order is issued, a writ of attachment will be issued to attach the property described in the plaintiff's application unless the court determines that such property is exempt from attachment or that its value clearly exceeds

the amount necessary to satisfy the amount to be secured by the attachment [*CCP § 484.050(d)*].

19.52[4] Defendant Must Be Notified of Right to Oppose Attachment and of Right to Claim Property As Exempt. The defendant must be notified that, to oppose the issuance of the order, the defendant must file with the court and serve on the plaintiff a notice of opposition and supporting affidavit not later than five court days before the date set for hearing [*CCP § 484.050(e)*; *see CCP § 484.060* (opposing the application)]. The defendant must also be notified of the necessity of either including a claim of exemption in the opposition papers or filing a separate claim of exemption and of the consequences of failing to do so [*CCP § 484.050(f)*, *(g)*; *see CCP § 484.070* (claim of exemption)].

Cross Reference:

Opposing attachment, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 19.14 -19.22*.

19.52[5] Notice Must Contain Prescribed Statement Concerning Advice of Counsel. The notice to the defendant must contain the following statement [*CCP § 484.050(i)*]: "You may seek the advice of an attorney as to any matter connected with the plaintiff's application. The attorney should be consulted promptly so that the attorney may assist you before the time set for hearing."

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesPrejudgment RemediesNoticesCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.53 Court Will Issue Right to Attach Order If Statutory Requirements Are Met.

If the court finds that the statutory requirements for attachment are satisfied [*see 19.45*], the court will issue the right to attach order which states the amount to be secured by the attachment [*CCP § 484.090*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.54 Plaintiff Must Post Undertaking for Writ to Issue.

Before a writ of attachment will issue, the plaintiff must file an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff in the action [*CCP § 489.210*]. Unless the court orders otherwise, the undertaking is in the amount of $10,000 [*CCP § 489.220*].

Cross Reference:

Approval of and objection to undertaking, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 19.13*.

Strategic Point--Enforcing Liability on Bond:

The defendant may attempt to recover damages for a wrongful attachment [*see CCP §§ 490.010-490.060*] by a motion to enforce liability on the plaintiff's bond [*CCP § 996.430(a)*] made at the conclusion of the plaintiff's action; no independent action is necessary [*CCP § 996.440(a)*]. The motion must be made within one year of the conclusion of the action [*CCP § 996.440(a)*].

Cross Reference:

Motion for damages for wrongful attachment, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 19.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.55 Contents of Writ.

The writ of attachment must include the following information [*CCP § 488.010*]:

- The date of issuance of the writ.
- The title of the court that issued the writ and the cause and number of the action.
- The name and address of the plaintiff and the name and last known address of the defendant.
- The amount to be secured by the attachment.
- A description of the property to be levied upon to satisfy the attachment.

Cross Reference:

Form of writ of attachment, see *Matthew Bender(R) Practice Guide, California Pretrial Civil Procedure, § 19.52*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.56 Levying on Property by Service of Writ.

19.56[1] Serve Copies of Writ and Notice of Attachment on Defendant. The levying officer, the United States Marshal or other as appointed by the court, must serve the defendant with copies of the writ and a notice of attachment [*see CCP §§ 488.060, 488.305*].

Cross Reference:

Levy procedures, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 19.23 -19.31*.

19.56[2] LOCAL PRACTICE: CD Cal Requirements--Seizure of Property. In the Central District, all writs for the seizure of property under Rule 64 must be issued, attested, signed and sealed as required for other writs issued out of the court [*CD Cal Civ LR 64-1*]. The writ must only be directed to, executed and returned by the United States Marshal or by a state or local law enforcement officer authorized by state law or a private person specially appointed by the court for the purpose of the writ. Unless otherwise relieved by the court, an attorney for the plaintiff must be available to the seizing officer at the time of the seizure [*CD Cal Civ LR 64-2*].

Cross Reference:

Local Central District Attachment Forms, see *§ 19.165*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.57 Levy Creates Attachment Lien That May Last for Maximum of Eight Years.

A levy on property under a writ of attachment creates an attachment lien on the property from the time of levy until the attachment expires [*CCP § 488.500(a)*]. Unless sooner released or discharged, the lien expires after three years from the date of issuance of the writ of attachment under which the levy was made [*CCP § 488.510(a)*]. Before the expiration of that three-year period, the plaintiff may obtain a one-year extension on motion and for good cause shown [*CCP § 488.510(b)*]. The maximum period of the lien, including any extensions, is eight years [*CCP § 488.510(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.58 Additional Writs of Attachment Are Available Following Notice and Hearing.

The plaintiff may apply for additional writs by filing an application executed under oath that contains specified information. Notice to the defendant and a hearing are required [*see CCP §§ 484.310-484.340*].

Cross Reference:

Obtaining additional writs, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 19.08*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesPrejudgment RemediesHearingsCivil ProcedureRemediesPrejudgment RemediesNoticesCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.59 Order Granting Prejudgment Writ of Attachment Is Not Appealable.

An order granting the issuance of a prejudgment writ of attachment is not an appealable collateral order [*Perpetual Am. Bank, FSB v. Terrestrial Sys. (9th Cir 1987) 811 F2d 504, 505*].

Cross References:

Discussion of appellate review of orders concerning provisional remedies, see 13 *Moore's Federal Practice, § 64.19* (Matthew Bender 3d ed.).

Discussion of the appealability of collateral orders, see 19 *Moore's Federal Practice, § 202.07*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionCollateral Order Doctrine

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C. Opposing a Writ of Attachment

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19.60 CHECKLIST: Opposing a Writ of Attachment.

☐ Determine whether plaintiff has satisfied statutory requirements for obtaining writ of attachment.

Authority:
CCP §§ 481.190, 483.010(a)

Discussion:
See *§ 19.46, 19.61*

☐ Determine whether plaintiff has attached or is seeking to attach exempt property.

Authority:
CCP §§ 487.010, 487.020

Discussion:
See *§ 19.48[1], 19.62*

☐ Determine whether to substitute undertaking for attached property.

Authority:
CCP § 489.310

Discussion:
See *§ 19.65*

☐ Draft and file notice of opposition if hearing is noticed.

Authority:
CCP §§ 484.060, 484.070

Discussion:
See *§ 19.63, 19.64*

☐ Draft and file application to terminate writ of attachment if obtained ex parte.

Authority:
CCP § 485.240

Discussion:
See *§ 19.66*

☐ Draft and file application for release of excess attachment.

Authority:
CCP § 488.720

Discussion:
See *§ 19.67*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesPrejudgment RemediesHearingsCivil ProcedureRemediesPrejudgment RemediesNoticesCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.61 Options and Strategy for Defendant Opposing Writ of Attachment.

It is the plaintiff's burden to show that the claim is one for which a writ of attachment is available. For a writ of attachment to issue, the claim must be for a fixed or readily ascertainable amount of money and must be based on a commercial contract [*CCP § 483.010*]. The plaintiff must also demonstrate that it is "more likely than not" that it will obtain a judgment against the defendant [*CCP §§ 481.190*, *484.090(a)(2)*]. If the defendant can demonstrate that the plaintiff has failed to satisfy these requirements, the writ will not issue or a writ issued ex parte will be terminated. The defendant can also oppose the amount to be secured by the attachment, obtain the release of any exempt property that has been attached [*see CCP § 487.020*], or substitute an undertaking for the attached property [*see CCP § 489.310*].

Strategic Point--Defendant:

First determine if the party seeking the writ of attachment has met the procedural statutory requirements. Then determine whether any exemptions apply. Finally, focus on the merits, because the plaintiff must establish that it is more likely than not that it will obtain a judgment. If the plaintiff is seeking the writ of attachment ex parte, also focus on refuting the contention that the plaintiff could not have brought the application on proper notice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesPrejudgment RemediesNoticesCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.62 Specified Property Is Exempt From Attachment.

19.62[1] When Defendant Is an Entity, Property Subject to Levy Is Subject to Attachment. If the defendant is a corporation, partnership, or unincorporated association, all property for which a method of levy is provided is subject to attachment [*CCP §§ 487.010(a), (b), 487.020*; *see CCP § 488.300 et seq.* (levy)].

Cross Reference:

Property subject to attachment, see *§ 19.48*.

19.62[2] When Defendant Is a Natural Person, Variety of Exemptions Apply. When the defendant is a natural person none of the following may be attached:

- Property exempt from enforcement of a money judgment [*CCP §§ 487.020(a), 704.010 et seq.*].

- Property that is necessary for the support of the defendant or the support of a member of the defendant's family who is supported in whole or in part by the defendant [*CCP § 487.020(b)*].

- The defendant's "earnings," which is the compensation payable by the defendant's employer to the defendant for personal services performed by the defendant as an employee, whether denominated as wages, salary, commission, bonus, or otherwise [*CCP §§ 487.020(c), 706.011(a)*]; this exemption applies to compensation due to a discharged employee [*Barnhill v. Robert Saunders & Co. (1981) 125 CA3d 1, 6, 177 CR 803*].

- An interest of the defendant in real property that is a leasehold estate with an unexpired term of less than one year [*CCP § 487.010(c)(1)*].

- Community property that would not be subject to enforcement of the judgment sought in the action [*CCP § 487.010(d)*].

- An account receivable or other intangible arising out of the conduct of the defendant's business with an individual value of less than $150 [*CCP § 487.010(c)(2)*].

- Money in an aggregate amount of up to $1,000 arising out of the conduct of defendant's business, located on the business premises or elsewhere [*CCP § 487.010(c)(7)*].

In the case of a defendant who is a natural person, the following types of property are specifically subject to attachment, unless otherwise exempt [*CCP § 487.010(c)*]:

- An interest in real property except leasehold estates as described above.

- Any accounts receivable and other intangibles arising out of the conduct by the defendant of a business with individual balances greater then $150.

- Equipment.

- Farm products.

- Inventory.

- Final money judgments arising out of the conduct of defendant's business.

- Any money over the exempt amount of $1,000 arising out of the conduct of defendant's business.

- Negotiable documents of title.

- Instruments.

- Securities.

- Minerals or the like (including oil and gas) to be extracted.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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19.63 File and Serve Notice of Opposition and/or Claim of Exemption Along With Supporting Papers Not Later Than Five Court Days Before Hearing Date.

If a noticed hearing is be held on the plaintiff's application for a writ of attachment, any opposition and claim of exemption papers must be filed and served not later than five court days before the hearing date [*CCP §§ 484.060(a)*, *484.070(e)*]. The notice and/or claim must state the grounds on which opposition to the issuance or to the amount of the attachment, or the claim of exemption, is based and must be accompanied by an affidavit supporting any factual issues raised and by points and authorities supporting any legal issues raised [*CCP §§ 484.060(a)*, *484.070(c)*, *(d)*]. A claim of exemption may be included in the opposition [*CCP § 484.060(b)*]. A claim of exemption must also describe the property claimed to be exempt and specify the statute section supporting the claim [*CCP § 484.070(c)*].

Cross Reference:

Form of notice, see 11 *Bender's Federal Practice Forms, Form 64:50* (Matthew Bender).

Warning--Claim of Exemption for Personal Property May Be Lost If Not Timely Made:

If the defendant fails to timely claim an exemption for personal property that is described in the plaintiff's application for a writ, or claims an exemption but fails to prove entitlement to it, then that exemption may not be claimed later unless there is a change of circumstances [*see CCP §§ 482.100*, *484.070(a)*; *see, e.g., Bank of Am. v. Salinas Nissan, Inc. (1989) 207 CA3d 260, 254 CR 748*]. However, if the defendant's personal property has been levied on following the issuance of a writ of attachment ex parte, an exemption claim as to that property must be made within 30 days after the levy [*CCP § 485.610(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.64 Plaintiff May Oppose Claim of Exemption.

The plaintiff must file and serve any opposition to a claim of exemption, along with an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised, not less than two days before the date set for the hearing. If the plaintiff fails to timely file and serve a notice of opposition, no writ of attachment may issue as to the property claimed to be exempt. If the defendant claims an exemption for all the property described in the plaintiff's application, and the plaintiff does not oppose the claim of exemption, no writ of attachment may issue and any extant temporary protective order will immediately expire [*CCP § 484.070(f)*].

Cross References:

Obtaining temporary protective order, see *§ 19.51*.

Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, see *§§ 19.12*, *19.15[4]*.

If the plaintiff does timely file and serve opposition to the claim of exemption, the burden is then on the defendant to prove that the subject property is exempt from attachment [*CCP § 484.070(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.65 Undertaking May Be Substituted for Attached Property.

19.65[1] Application for Substitution of Undertaking Must Be Made by Noticed Motion. Once a writ of attachment has issued, the defendant may apply by noticed motion to substitute an undertaking in the stead of the attached property [*CCP § 489.310(a)*]. If the defendant seeks the release of only a part of the attached property, or if the amount of the undertaking to be given is less than the amount to be secured by the attachment, the application must include a statement, executed under oath, describing the property to be released or protected from attachment [*CCP § 489.310(b)*].

19.65[2] All Defendants With Interest in Attached Property Must Join in Application for Undertaking. When the action is against more than one defendant and all the defendants do not join in the application, the application must include a statement, executed under oath, describing the character of the defendant's title to the property and the manner in which the defendant acquired title and stating whether any other defendant who has not joined in the application has an interest in the property. When two or more defendants have an interest in the same property, a joint application and undertaking must be filed to secure the release of the property [*CCP § 489.310(d)*].

19.65[3] Order Will Issue If Undertaking Is Sufficient. The court must issue the order on the condition that a sufficient undertaking is filed; the undertaking must be equal to the lesser of the value of the property attached or prevented from being attached or the amount specified by the writ to be secured by the attachment [*CCP § 489.310(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.66 Defendant May Apply by Noticed Motion to Quash Writ Granted Ex Parte.

When a writ of attachment has been granted ex parte, the defendant may apply by noticed motion for an order setting aside the right to attach order, quashing the writ of attachment, and releasing any levied-on property [*CCP § 485.240(a)*]. The notice of motion must state the grounds on which it is based and must be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised [*CCP § 485.240(b)*].

Strategic Point--Plaintiff's Lack of Great or Irreparable Injury Is Not Grounds for Setting Aside Order:

It is not grounds to set aside a right to attach order issued ex parte that the plaintiff would not have suffered great or irreparable injury if issuance of the order had been delayed until the matter could have been heard on notice [*CCP § 485.240(b)*].

Strategic Point--Although Defendant Is Moving Party, Plaintiff Has Burden of Proof:

Although the defendant is making the motion to quash the writ of attachment issued ex parte, the plaintiff still has the burden of proving that the claim is one on which an attachment may be issued and the probable validity of that claim [*Loeb and Loeb v. Beverly Glen Music, Inc. (1985) 166 CA3d 1110, 1116, 212 CR 830*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.67 Defendant May Apply by Noticed Motion for Release of Excess Attachment.

The defendant may apply by noticed motion for an order releasing the attachment of property to the extent that the value of the defendant's interest in the property clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment [*CCP § 488.720(a)*]. The notice of motion must state the grounds on which the motion is based and must be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised [*CCP § 488.720(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.68 CHECKLIST: Obtaining a Writ of Possession.

☐ Determine whether it is to plaintiff's advantage to seek writ of possession:

- ○ Is writ necessary to protect property from loss or damage?
- ○ Will possession by plaintiff encourage settlement?
- ○ Is it probable that plaintiff will prevail on the merits?
- ○ Is cost of obtaining writ, including attorney fees and undertaking, less than risk of damage or loss?

Authority:
CCP § 511.010 et seq.

Discussion:
See *§ 19.69*, *19.74[1]*

☐ Determine whether plaintiff can satisfy requirements for obtaining writ:

- ○ Can plaintiff identify specific property?

- Does plaintiff have reason to believe defendant is in possession of property?
- Does plaintiff know whereabouts of property?
- Can plaintiff show defendant's detention of property is wrongful?

Authority:
CCP § 512.010

Discussion:
See *§ 19.70*, *19.71*

☐ Determine whether to apply for writ by noticed motion or ex parte.

Authority:
CCP § 512.020

Discussion:
See *§ 19.72*

☐ Draft application for writ and supporting documents including affidavits, notice of application and hearing, order for writ of possession, and writ of possession.

Authority:
CCP §§ 512.030, *512.040*, *512.080*

Discussion:
See *§ 19.73*, *19.76*

☐ Obtain and file undertaking, unless court waives undertaking requirement.

Authority:
CCP §§ 512.050, *512.060(a)(2)*, *515.010*

Discussion:
See *§ 19.74[2]*

☐ If writ issues, give writ to levying officer to execute.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesPrejudgment RemediesNoticesCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesWritsAncillary WritsGeneral Overview

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19.69 Options and Strategies for Plaintiff.

19.69[1] California Law Determines Circumstances and Manner in Which Writ of Possession Is Available. Claim and delivery is the provisional remedy available to obtain possession of specific personal property before judgment [*see Waffer Int'l Corp. v. Khorsandi (1999) 69 CA4th 1261, 1271, 82 CR2d 241*]. The plaintiff may want pre-judgment possession of the property to protect it from loss or damage. Under Rule 64, California law determines the circumstances and manner in which a writ of possession is available so that California law controls with respect to, among other things, the type of claims warranting pre-judgment possession and the undertaking requirements [*see Fed R Civ P 64*].

Strategic Point:

For purposes of obtaining a writ of possession, the "plaintiff" is the person who files either a complaint or a cross-complaint [*CCP § 511.080*].

19.69[2] Plaintiff Must Show Probable Validity of Claim. Due to the reluctance of courts to change the position of the parties before judgment [*see CC § 3524* ("Between those who are equally in the right, or equally in the wrong, the law does not interpose"), an application for a writ of possession will be subject to careful scrutiny. In addition to the other statutory requirements for obtaining the writ, the plaintiff must show the probable validity of its claim [*CCP § 512.060(a)(1)*].

Warning:

Obtaining a writ of possession for an improper purpose will support an abuse of process action [*see, e.g., Spellens v. Spellens (1957) 49 C2d 210, 317 P2d 613*].

A plaintiff who obtains a writ of possession and then is ultimately unsuccessful, must redeliver the property to the defendant and is liable for all damages sustained by the defendant that are proximately caused by the levy of the writ of

possession, and the loss of possession of the property pursuant to levy of the writ of possession or in compliance with a turnover order [*CCP § 512.120*].

19.69[3] Personal Property Must Be Specific and Tangible. A writ of possession will issue for possession of specific personal property [*see, e.g., Edwards v. Superior Court (1991) 230 CA3d 173, 178, 281 CR 30* (champion show dog)]. Money may not be obtained through a writ of possession, unless it is marked or designed so as to make it specific as regards identification [*Hillyer v. Eggers (1917) 32 CA 764, 766, 164 P 27*]. A writ of attachment is the appropriate provisional remedy when the plaintiff has a claim for money [*Waffer Int'l Corp. v. Khorsandi (1999) 69 CA4th 1261, 1271, 82 CR2d 241*]. Stock certificates may be the subject of a writ of possession [*Englert v. IVAC Corp. (1979) 92 CA3d 178, 184, 154 CR 804*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.70 Plaintiff Must Apply for Writ of Possession.

19.70[1] Plaintiff Must File Application to Obtain Writ of Possession. The plaintiff must file an application, executed under oath, to obtain a writ of possession. The application can be filed with the complaint or at any time after the filing of the complaint [*CCP § 512.010(a), (b)*]. The requirements for the contents of the application [*see 19.71*] may be satisfied by one or more affidavits filed with the application [*CCP § 512.010(c)*].

Strategic Point--Injunctive Relief Is Also Available:

The plaintiff may apply for a temporary restraining order in addition to the writ of possession [*see CCP §§ 513.010, 513.020, 516.020*].

Cross Reference:

Applying for injunctive relief to protect plaintiff's property interest, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 20.19*.

19.70[2] LOCAL PRACTICE: CD Cal Requirements--Application Must Be Made to Magistrate Judge. In the Central District, an application for a writ of possession must be made to a magistrate judge, unless otherwise ordered [*CD Cal Civ LR 64-4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesWritsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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19.71 Contents of Application for Writ of Possession.

19.71[1] Application Must Show Basis of Plaintiff's Claim and That Plaintiff Is Entitled to Possession. The application for a writ of possession must show the basis of the plaintiff's claim and that the plaintiff is entitled to possession of the property claimed. If the basis of the plaintiff's claim is a written instrument, a copy of that instrument must be attached to the application [*CCP § 512.010(b)(1)*].

19.71[2] Application Must Show Wrongful Detention of Property by Defendant. The application must show that the property is wrongfully detained by the defendant, the manner in which the defendant came into possession of the property, and, according to the best knowledge, information, and belief of the plaintiff, the reason for the defendant's detention of the property [*CCP § 512.010(b)(1)*].

19.71[3] Application Must Describe Property and Its Location. The application must particularly describe the property, including a statement of its value [*CCP § 512.010(b)(3)*]. In addition, the application must include, according to the best knowledge, information, and belief of the plaintiff, a statement of the location of the property. If the property, or some part of it, is within a private place that may have to be entered to take possession, the application must show that there is probable cause to believe that the property is located there [*CCP § 512.010(b)(4)*].

Strategic Point--Court Can Have Jurisdiction Over Defendant's Assets Without Personal Jurisdiction Over Defendant:

If personal jurisdiction over defendant cannot be effected under *Fed R Civ P 4*, a court may obtain jurisdiction over assets belonging to defendant if those assets are located within the court's jurisdiction [*see Fed R Civ P 4(n)*].

Cross Reference:

Establishing jurisdiction over property, see Ch. 2, Determining Forum (Jurisdiction and Venue), § 2.39.

19.71[4] Application Must State Property Has Not Been Taken Pursuant to Statute. The application must contain a statement that the property has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure [*CCP § 512.010(b)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesWritsAncillary WritsGeneral Overview

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19.72 Writ of Possession May Be Obtained Ex Parte Only Under Limited Circumstances.

A hearing on noticed motion is necessary to obtain a writ of attachment unless probable cause appears that one of the following three conditions exists [*CCP § 512.020(a)*]:

- The defendant gained possession of the property by feloniously taking the property from the plaintiff; this does not apply when the defendant has fraudulently appropriated property entrusted to him or her or obtained possession by false or fraudulent representation or pretense or by embezzlement [*CCP § 512.020(b)(1)*].

- The property is a credit card [*CCP § 512.020(b)(2)*].

- The defendant acquired possession of the property in the ordinary course of trade or business for commercial purposes and the property is not necessary for the support of the defendant or his or her family; there is an immediate danger that the property will become unavailable to levy by reason of being transferred, concealed, or removed from the state or will become substantially impaired in value by acts of destruction or by failure to take care of the property in a reasonable manner; and the ex parte issuance of a writ of possession is necessary to protect the property [*CCP § 512.020(b)(3)*].

Cross References:

Obtaining writ of possession ex parte, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, 20.15*; applying for order to quash writ obtained ex parte, see *§ 20.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.73 Before Hearing, Defendant Must Be Served With Application and Notice.

19.73[1] Documents That Must Be Served on Defendant Before Hearing. Before the hearing on the application, the defendant must be served with a copy of the summons and complaint, a Notice of Application and Hearing, and a copy of the application and any supporting affidavits [*CCP § 512.030(a); see CCP § 512.030(b) (personal service on defendant who has not appeared in action)*].

Cross References:

Preparing notice of application, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 20.09*.

19.73[2] Contents of Notice to Defendant.

19.73[2][a] Defendant Must Be Notified of Time and Place of Hearing. The notice must inform the defendant that a hearing will be held at the place and time specified in the notice on the plaintiff's application for a writ of possession [*CCP § 512.040(a)*].

19.73[2][b] Defendant Must Be Notified of Conditions for Issuing Writ. The notice must inform the defendant that the writ will be issued if the court finds that the plaintiff's claim is probably valid and the other requirements for issuing the writ are established. The notice must inform the defendant that the hearing is not for the purpose of determining whether the claim is actually valid and the determination of the actual validity of the claim will be made in subsequent proceedings in the action and will not be affected by the decision at the hearing on the application for the writ [*CCP § 512.040(b)*].

19.73[2][c] Defendant Must Be Notified of Right to Oppose Issuance of Writ. The notice must inform the defendant that to oppose the issuance of the writ, he or she must file with the court either an affidavit providing evidence sufficient to defeat the plaintiff's right to issuance of the writ or an undertaking to stay the delivery of the property [*CCP § 512.040(c)*; *see CCP § 515.020* (undertaking by defendant)].

Consider:

The defendant can retain or regain possession of the property by filing an undertaking *see* [*CCP § 515.020*; *§ 19.84*].

Cross References:

Filing a defendant's undertaking, see *§ 19.84*; *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 20.25*.

Opposing a writ of possession, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, §§ 20.20 -20.26*.

19.73[2][d] Notice Must Contain Prescribed Statement Concerning Advice of Counsel. The notice to the defendant must contain the following statement: "If you believe the plaintiff may not be entitled to possession of the property claimed, you may wish to seek the advice of an attorney. Such attorney should be consulted promptly so that he may assist you before the time set for the hearing" [*CCP § 512.040(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.74 Court Will Issue Writ If Plaintiff Establishes Probable Validity of Claim and Satisfies Undertaking Requirements.

19.74[1] Plaintiff Must Show Probable Validity of Claim. For a writ of possession to issue, the court must find that the plaintiff has established the probable validity of its claim to possession of the property [*CCP § 512.060(a)(1)*]. A claim has "probable validity" when it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim [*CCP § 511.090*].

Cross Reference:

Preparing order for writ of possession and writ, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, §§ 20.07, 20.08*.

19.74[2] Plaintiff Must Satisfy Undertaking Requirements, Unless Waived. For a writ of possession to issue, the court must find that the plaintiff has satisfied the statutory undertaking requirements [*CCP § 512.060(a)(2)*; *see CCP § 515.010* (undertaking requirements)]. The undertaking must be in an amount equal to not less than twice the value of the defendant's interest in the property and may be in a greater amount [*CCP § 515.010(a)*]. The court can waive the undertaking requirements if the defendant is found to have no interest in the property [*CCP § 515.010(b)*].

Cross Reference:

Satisfying undertaking requirements to obtain writ of possession, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, § 20.13*.

19.74[3] If Plaintiff Seeks Writ Requiring Entry Into Private Property, Plaintiff Must Show Probable Cause to Believe Property Is Located There. No writ directing the levying officer to enter a private place to take possession of any property may be issued unless the plaintiff has established that there is probable cause to believe that the property is located there [*CCP § 512.060(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesWritsAncillary WritsGeneral Overview

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19.75 If Writ Issues, Court May Also Issue "Turnover" Order.

If a writ of possession is issued, the court may also issue an order directing the defendant to transfer possession of the property to the plaintiff. The order must contain a notice to the defendant that failure to turn over possession of the property to plaintiff may subject the defendant to being held in contempt of court [*CCP § 512.070*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesWritsAncillary WritsGeneral Overview

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19.76 Contents of Writ.

The writ must [*CCP § 512.080*]:

- Be directed to the levying officer within whose jurisdiction the property is located.
- Describe the specific property to be seized.
- Specify any private place that may be entered to take possession of the property or some part of it.
- Direct the levying officer to levy on the property and to retain it in custody until released or sold.
- Inform the defendant of the right to object to the plaintiff's undertaking, a copy of which shall be attached to the writ, or to obtain redelivery of the property by filing an undertaking [*see CCP § 515.020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.77 Order Granting Prejudgment Writ of Possession Is Not Appealable.

An order granting the issuance of a prejudgment writ of possession is not an appealable final order [*PMS Distrib. Co. v. Huber & Suhner, AG (9th Cir 1988) 863 F2d 639, 640*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

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19.78 CHECKLIST: Opposing a Writ of Possession.

☐ Determine whether procedural or substantive grounds exist for contesting the writ application.

○ Was defendant timely and properly served with all required papers?

Authority:
CCP § 512.030

Discussion:
See *§§ 19.73*, *19.80[1]*

○ Did notice of application meet statutory requirements?

○ Did it contain all required information?

Authority:
CCP § 512.040

Discussion:
See *§§ 19.73[2]*, *19.80[2]*

○ Was it made to proper court after complaint had been filed?

○ Was it executed under oath?

Authority:
CCP § 512.010

Discussion:
See *§ 19.70[1]*

○ Did plaintiff's application make all showings required by *CCP § 512.010(b)*?

Discussion:
See *§§ 19.71*, *19.80[3]*

○ Did plaintiff fail to establish probable validity of claim?

Authority:
CCP §§ 511.090, *512.060(a)(1)*

Discussion:
See *§§ 19.69[2]*, *19.74[1]*

○ Did plaintiff satisfy undertaking requirements?

Authority:
CCP §§ 512.060, *515.010*

Discussion:
See *§ 19.74[2]*

☐ Prepare and file opposition papers, including supporting affidavits and points and authorities.

Authority:
CCP §§ 512.050, *512.060*

Discussion:
See *§ 19.81*

☐ Determine whether to object to plaintiff's undertaking.

Authority:
CCP § 515.030

Discussion:
See *§ 19.83*

☐ Determine whether to file a defendant's undertaking to retain property or to obtain redelivery of the property.

Authority: *CCP § 515.020*

Discussion: See *§ 19.84*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesBondsObjectionsCivil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesProvisional RemediesReplevins

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19.79 Options and Strategies for Defendant Opposing Writ of Possession.

Under Rule 64, California law determines the circumstances and manner in which a writ of possession is available so that California law controls with respect to, among other things, the type of claims warranting pre-judgment possession and undertaking requirements [*see Fed R Civ P 64*]. California law imposes stringent requirements on a plaintiff seeking a writ of possession due to judicial reluctance to interfere with the status quo before judgment [*see CC § 3524*]. If the plaintiff fails to meet its burden of satisfying these statutory prerequisites, the writ should not issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.80 Service and Contents of Documents Must Meet Statutory Requirements.

19.80[1] Defendant Must Be Served With All Required Documents. Unless the plaintiff had the writ issued ex parte [*see 19.39*], before the hearing on the plaintiff's application for a writ of possession, the defendant must be served with a copy of the summons and complaint, the notice of application and hearing, and a copy of the application and any affidavit in support of the application [*CCP § 512.030(a); see CCP § 512.030(b) (personal service on defendant who has not appeared in action)*].

19.80[2] Notice of Application and Hearing Must Satisfy Statutory Requirements As to Contents. The contents of the notice of application and hearing are prescribed by statute and the burden is on the plaintiff to establish that those requirements have been satisfied [*CCP § 512.040*].

Cross Reference:

Required contents of notice of application and hearing, see *§ 19.73[2]*.

19.80[3] Plaintiff's Application or Affidavits Must Make Required Showings. The application, which must be executed under oath, or affidavits *filed with* the application, must make all the statutorily required showings [*CCP § 512.010(b), (c)*; *see 19.38* (required showings)]. If the application and any accompanying affidavits fail to make the required showings, the application is insufficient and the writ should not issue.

Consider:

The court may permit the plaintiff to file additional affidavits to correct any defects in the original application [*see CCP § 512.010(c)* (allowing for multiple affidavits)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesWritsAncillary WritsGeneral Overview

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19.81 File Opposition Papers With Court and Effect Service on Plaintiff.

The defendant should file with the court, and serve on the plaintiff, affidavits and a memorandum of points and authorities in support of arguments against the issuance of the writ [*see CCP § 512.050*].

Cross References:

Ch. 26, Pretrial Motion Practice, see *§§ 26.19 -26.21*; *Ch. 5, Formatting, Serving, and Filing Papers, §§ 5.15 et seq., 5.24 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.82 If Writ Was Issued Ex Parte, Defendant May Move to Quash.

For a writ of possession to issue ex parte, in addition to all the other requirements, the plaintiff must show that the subject property was acquired feloniously; that the subject property was a credit card; *or* that the defendant acquired possession of the property in the ordinary course of trade or business for commercial purposes, that the property is not necessary for the support of the defendant or his or her family, and other conditions are satisfied [*CCP § 512.020(b)*; *see 19.72*]. A defendant may move by noticed motion, supported by affidavits and points and authorities, to quash a writ of possession issued ex parte and for the release and redelivery of any levied-on property [*CCP § 512.020*; *see CCP § 512.050*].

Strategic Point--Defendant:

Because the prevailing defendant is entitled to any damages sustained that were proximately caused by the levy of the writ of possession and the loss of possession of the property pursuant to that levy [*CCP § 512.020*], the supporting affidavits and other documents should show the amount of those damages.

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.83 Object to Plaintiff's Undertaking Within 10 Days After Levy.

The defendant may object to the plaintiff's undertaking not later than 10 days after levy of the writ of possession [*CCP § 515.030(a)*]. The defendant must mail notice of the objection to the levying officer [*CCP § 515.030(a)*], who is directed to keep the property in a secure place for 10 days after levy [*see CCP § 514.030*]. If the court determines that the plaintiff's undertaking is insufficient and the plaintiff fails to file a sufficient undertaking within the time required, the court must vacate any temporary restraining order or preliminary injunction, vacate the writ of possession, and, if levy has occurred, order the levying officer or the plaintiff to return the property to the defendant. If the court determines that the plaintiff's undertaking is sufficient, the court must order the levying officer to deliver the property to the plaintiff [*CCP § 515.030(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.84 File Defendant's Undertaking to Retain or Regain Possession of Property.

A defendant who wants to prevent the plaintiff from taking possession of the property, or who wants to regain property that has been levied, may do so by filing an undertaking. The undertaking must be equal to the amount of the undertaking filed by the plaintiff, unless the court has waived the requirement of a plaintiff's undertaking, in which case the amount of the defendant's undertaking will be that amount stated by the court in the order issuing the writ [*CCP § 515.020(a)*; *see CCP § 515.010*]. The undertaking may be filed at any time before or after levy of the writ of possession [*CCP § 515.020(c)*].

Strategic Point--Defendant Will Be Liable for Additional Damages If Plaintiff Ultimately Prevails in Action:

Under the terms of the defendant's undertaking, if the plaintiff does ultimately recover judgment on the action, the defendant must pay all costs awarded to the plaintiff and all damages that the plaintiff sustained by reason of the loss of possession of the property, including all damages proximately caused by the plaintiff's failure to gain or retain possession [*CCP § 515.020(b)*].

If the plaintiff does not object to the defendant's undertaking for redelivery, the levying officer must deliver the property to the defendant. If the plaintiff has been given possession of the property, then the plaintiff must deliver the property to the defendant [*CCP § 512.020(d)*]. The plaintiff may object to the defendant's undertaking in the same manner as the defendant may object to the plaintiff's undertaking [*CCP § 512.020(d)*; *see 19.83*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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IV. APPOINTMENT OF RECEIVER
A. Determining Propriety of Receivership

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19.85 CHECKLIST: Determining Propriety of Receivership.

☐ Determine whether appointment of receiver is within court's equity jurisdiction in present case.

Discussion:
See *§ 19.88[2]*

☐ Determine whether court has jurisdiction with reference to location of property that is to be placed in receivership.

Discussion:
See *§ 19.88[3]*

☐ Determine whether factual basis exists for appointment of receiver.

Discussion:
See *§ 19.89*

☐ Consider positions that could be taken and arguments that could be made by adverse party.

Discussion:
See *§ 19.109*

☐ Consider incidental consequences of having receiver appointed:

○ Case cannot be dismissed except by court order.

Authority:
Fed R Civ P 41(a)(1), 66

○ Applicant has some financial risk.

☐ Applicant may have to pay premium for bond covering potential liability for harm to adverse party if court eventually determines that receivership was improper.

☐ Some expenses and portion of receiver's fee could be taxed to applicant if court eventually determines that receivership was improper. (Expenses of receivership can aggregate to very substantial amount.)

○ Expenses of receivership that adverse party would have had to incur anyway (had there been no receiver) should be charged to that party.

○ Expenses that conferred genuine benefit on adverse party also should be charged to that party.

○ Other expenses and receiver's fee should be apportioned between parties if receivership was improper; and in that case, costs of receivership that would not have arisen but for appointment should be charged to party obtaining receivership (whether or not that party acted in good faith).

Authority: *Commodity Futures Trading Comm'n v. Frankwell Bullion Ltd. (9th Cir 1996) 99 F3d 299, 306* ; *Pioche Mines Consol., Inc. v. Dolman (9th Cir 1964) 333 F2d 257, 276*

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.86 Options and Strategy for Determining Propriety of Receivership.

The basic consideration in appointing a receiver pending final disposition of a suit is the necessity of protecting, conserving, and administering property until entry of a judgment [*Gordon v. Washington (1935) 295 US 30, 37, 55 S Ct 584, 79 L Ed 1282* ; *View Crest Garden Apartments, Inc. v. United States (9th Cir 1960) 281 F2d 844, 849*]. Determining whether a receivership would be proper has two aspects:

- Is a receivership necessary in the circumstances? Some of the reasons for seeking appointment of a receiver during litigation [*see 19.89[3]*] include:
  - To conserve, preserve, protect, or administer property that is involved in the legal action--for instance, mortgaged property in a judicial foreclosure action, or trust property in an action for appointment of a successor trustee.
  - To prevent fraud or loss of the property from fraud.
  - To prevent mismanagement of the property.
  - To replace an irresponsible or insolvent assignee when claims are jeopardized in an assignment for benefit of creditors.
- Does the court have jurisdiction to appoint the receiver? This requires the coincidence of two jurisdictional conditions:
  - Jurisdiction of a person who owns (or at least claims a possessory interest in) the property to be placed in receivership [*see 19.88[3][c]*], or jurisdiction *in rem* of the property itself [*see Penn Gen. Cas. Co. v. Pennsylvania (1935) 294 US 189, 195, 198, 55 S Ct 386, 79 L Ed 850* (recognition of principle that court having jurisdiction *in rem*

has power to appoint receiver for subject property); 19.88[3][a]].

- Jurisdiction in equity [*see Gordon v. Washington (1935) 295 US 30, 38, 55 S Ct 584, 79 L Ed 1282* (federal court will not appoint receiver "where the appointment is not ancillary to some form of final relief which is appropriate for equity to give"); 19.88[2]].

Warning:

The Ninth Circuit has several lines of cases (in accord with other circuits) expressing a view that district courts have inherent power, as courts of equity, to be creative in providing ancillary relief such as the appointment of a receiver or issuance of a preliminary injunction. These cases should be understood as referring to the district court's power over the administration of a receivership, and not as permitting any novelty respecting whether a receiver should be appointed. The Supreme Court can be expected to apply a rule that the equitable powers conferred on district courts by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence [*Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 332, 119 S Ct 1961, 144 L Ed2d 319*]. While there can be cases in which the facts would strongly support some novel application of a provisional remedy [*see, e.g., Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 333-335, 119 S Ct 1961, 144 L Ed2d 319* (Ginsburg, J., dissenting)], the power to make that election belongs to Congress, not to the federal courts [*see Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 333, 119 S Ct 1961, 144 L Ed2d 319* (district court may not preliminarily enjoin debtor, to prevent disposition of property, at request of ordinary creditor having no lien on that property nor any equitable interest in it)].

Consider:

In the large majority of cases, receivers are appointed in the state courts, because the basis for jurisdiction by federal district courts is comparatively limited. Accordingly, the reported cases on equity receiverships from Ninth Circuit courts are not numerous.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsJurisdictionGeneral OverviewCivil ProcedureRemediesReceivershipsJurisdictionPartiesCivil ProcedureRemediesReceivershipsJurisdictionPropertyCivil ProcedureRemediesReceivershipsReceiversAppointments

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19.87 Determine Whether "Receivership in Fact" Already Exists.

If the district court has already appointed an auxiliary officer such as a special master, the court could have given that officer the essential duties and powers of a receiver, but without applying the legal standards and meeting all of the requirements for appointment of a receiver. Any party aggrieved by the situation may rightly ask the court to rectify that irregular appointment by, for example, following a local rule for a receiver's bond and ordering the officer to comply with local rules for administration of a receivership. If the district court declines to act, the Ninth Circuit may mandate the issuance of appropriate orders [*see FTC v. World Wide Factors, Ltd. (9th Cir 1989) 882 F2d 344, 348*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesWritsCommon Law WritsMandamus

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19.88 Court's Jurisdiction to Appoint Receiver.

19.88[1] Subject Matter Jurisdiction Can Be Presumed. Inasmuch as an application for appointment of a receiver is not a pleading but is a motion for an order in a pending action [*see Fed R Civ P 7*], it need not show the basis of the court's subject matter jurisdiction, which presumably is shown in the complaint already on file [*see Fed R Civ P 8(a)*].

19.88[1A] Federal Law Governs Appointment of Receiver in Diversity Action. Federal law governs whether to appoint a receiver in a diversity action [*Canada Life Assurance Co. v. Lapeter (9th Cir 2009) 557 F3d 1103, 1109* , *amended by (9th Cir 2009) 563 F3d 837* (matter of first impression, noting that federal courts sitting in diversity may exercise equitable powers independent of state law)].

19.88[2] Seeking Equitable Relief May Implicate Appointment of Receiver. If the complaint in the pending action seeks equitable relief, the court has power to appoint a receiver [*see Kelleam v. Maryland Cas. Co. (1941) 312 US 377, 381, 61 S Ct 595, 85 L Ed 899* ; *Gordon v. Washington (1935) 295 US 30, 37, 55 S Ct 584, 79 L Ed 1282*]. Common examples of equitable relief that could implicate appointment of a receiver would include:

- Injunctive relief.

- Declaratory relief under *CCP § 1060* [*see, e.g., McWilliams v. Hopkins (SD Cal 1926) 11 F2d 793, 795*].

- Rescission of a contract and restitution of, for example, real property conveyed, personal property transferred, or money paid [*e.g., Adelman v. CGS Scientific Corp. (ED Pa 1971) 332 F Supp 137, 147* ("The interim protection of property fraudulently acquired, and in imminent jeopardy of loss, pending rescission is one of the classic instances where the appointment of a receiver or custodian is proper.")].

- Specific performance of a contract to convey real property or transfer personal property.

- Dissolution of a partnership.

- Foreclosure of a lien on real or personal property [*see, e.g., New York Life Ins. Co. v. Watt West Inv. Corp. (ED Cal 1991) 755 F Supp 287, 288* (receiver was appointed to protect secured creditor's beneficial interest under deed of trust on commercial property)].

Example:

A mortgagee in a mortgage foreclosure suit involving commercial property that is producing income, such as an apartment building, might ask for the appointment of a receiver to take custody of that property. The receiver would be charged with collecting the income and operating the property during the foreclosure proceeding, in order to preserve the value of the property until the foreclosure sale [*see, e.g., View Crest Garden Apartments, Inc. v. United States (9th Cir 1960) 281 F2d 844, 849*].

19.88[3] Know Location of Property to Be Placed in Receivership.

19.88[3][a] Court With Jurisdiction *in Rem* May Appoint Receiver. It is elementary that whenever a court has jurisdiction *in rem,* the court has possession of the subject property. Therefore, the court may appoint a receiver for the property if that is appropriate--whether or not the court has personal jurisdiction of the owner or another person entitled to possession of the property--because that is the very essence of jurisdiction *in rem* [*see, e.g., United States v. All Assets of Statewide Auto Parts (2d Cir 1992) 971 F2d 896, 901* ; *cf. Penn Gen. Cas. Co. v. Pennsylvania (1935) 294 US 189, 195, 198, 55 S Ct 386, 79 L Ed 850* (recognition of general principle that court having jurisdiction *in rem* has power to appoint receiver for subject property)].

Example:

"Here suit is brought to foreclose a mortgage, in which the court has power to adjudicate all liens and claims against the res, ascertain their amount, order a sale of the property, confirm the sale, direct a deed of conveyance to the purchaser at the sale, and, by its writ of assistance, remove the occupant, and place the purchaser in absolute possession of the property. Not only so, but the court, moreover, may, at any time when it deems it equitable and right so to do, appoint a receiver of the property pending the suit, and thereby assume actual legal custody of the same through its officer" [*Cohen v. Solomon (D Kan 1895) 66 F 411, 413-414*].

Consider:

Usually, when a court has jurisdiction *in rem,* there is no other court that could appoint a receiver for the subject property. "The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power... . Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court; but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected" [*Farmers' Loan & Trust Co. v. Lake Street R.R. Co. (1900) 177 US 51, 61, 20 S Ct 564, 44 L Ed 667*]. This could become an important point, since another court having personal jurisdiction of the owner of the property might undertake to appoint a receiver [*see § 19.88[3][c]*].

19.88[3][b] Jurisdiction *in Rem* Can Extend Outside District. When the court appoints a receiver for property as to which the court has jurisdiction *in rem* [*see 19.88[3][a]*], and the property happens to extend beyond the boundary of the court's district, *28 USC § 754* will empower the receiver to take possession and control of the property everywhere it extends (within the United States) [*see 19.100*]. An antecedent of *28 USC § 754*, which the Supreme Court described as "extending the operation of a receivership to other districts of the same judicial circuit," was

construed as relating to "cases where the fixed property is a unit, extending into several States, like interstate railroads and pipe lines" [*Lion Bonding & Surety Co. v. Karatz (1923) 262 US 77, 87, 43 S Ct 480, 67 L Ed 871*].

19.88[3][c] Jurisdiction of Legal Owner Is Sufficient to Reach Property in Any District. When the property in question, which is to be subjected to the receivership, is located in a district other than the district where the present case is pending, the court may nevertheless appoint a receiver if the court has personal jurisdiction of the legal owner or another person entitled to possession of the property [*see United States v. Arizona Fuels Corp. (9th Cir 1984) 739 F2d 455, 460-461*]; and the receiver may take possession and control of the property [*see 28 USC § 754*; 19.100; *but see 19.88[3][a]* (appointment of receiver by court having jurisdiction *in rem*)].

Distinguish:

In a diversity-jurisdiction case, the fact that jurisdiction is based on diversity of citizenship will not affect the court's power to appoint a receiver. The power of a district court to appoint a receiver is governed by federal law, not by state law, in such a case [*National P'ship Inv. Corp. v. National Hous. Dev. Corp. (11th Cir 1998) 153 F3d 1289, 1291-1292* ; *see New York Life Ins. Co. v. Watt West Inv. Corp. (ED Cal 1991) 755 F Supp 287, 289-290*]. The *Erie* doctrine, which requires the application of state law on matters of substance [*Erie R.R. Co. v. Tompkins (1938) 304 US 64, 58 S Ct 817, 82 L Ed 1188*], would not apply to the appointment of a receiver by a federal court [*see Hanna v. Plumer (1965) 380 US 460, 471, 85 S Ct 1136, 14 L Ed2d 8*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsJurisdictionGeneral OverviewCivil ProcedureRemediesReceivershipsJurisdictionPartiesCivil ProcedureRemediesReceivershipsJurisdictionPropertyCivil ProcedureRemediesReceivershipsReceiversAppointments

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IV. APPOINTMENT OF RECEIVER
A. Determining Propriety of Receivership

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19.89 Factual Basis for Receivership.

19.89[1] Receivership Is Drastic Remedy. Appointment of a receiver is a remedy of last resort, an extraordinary step warranted only by the most compelling circumstances [*Bracco v. Lackner (ND Cal 1978) 462 F Supp 436, 456* (noting, for example, evidence of past or probable "blatant disregard of court orders")].

19.89[2] Nontraditional Factual Setting Is No Bar to Relief. Although a receivership is usually imposed to supervise a distressed business during litigation, the remedy has also been used to protect and preserve important rights of interested parties in other situations [*Bracco v. Lackner (ND Cal 1978) 462 F Supp 436, 455* (noting several such cases)].

19.89[3] Match Facts of Case With Conditions Justifying Receivership.

19.89[3][a] Various Facts May Be Relevant. Courts have recognized many factors that could be relevant when determining the appropriateness of appointing a receiver. These include [*Consolidated Rail Corp. v. Fore River Ry. Co. (1st Cir 1988) 861 F2d 322, 327*]:

- Fraudulent conduct by the adverse party [*see Burnrite Coal Briquette Co. v. Riggs (1927) 274 US 208, 212, 47 S Ct 578, 71 L Ed 1002*].
- Imminent danger that property will be lost or squandered [*see Gordon v. Washington (1935) 295 US 30, 37-39, 55 S Ct 584, 79 L Ed 1282* ; *Garden Homes, Inc. v. United States (1st Cir 1952) 200 F2d 299, 301*].
- Inadequacy of available legal remedies [*see Leighton v. One William Street Fund, Inc. (2d Cir 1965) 343 F2d 565, 568*].
- Probability that harm to the applicant if no receiver were appointed would be greater than any injury to the adverse party if the application were granted [*see Mintzer v. Arthur L. Wright & Co. (3d Cir*

1959) 263 F2d 823, 825].

- Applicant's probable success in the action and the possibility of irreparable injury to the applicant's interests in the property [*see Bookout v. First Nat'l Mortgage & Discount Co. (5th Cir 1975) 514 F2d 757, 758*].

- Impossibility or impracticability of bringing the action promptly to a final judgment [*see View Crest Garden Apartments, Inc. v. United States (9th Cir 1960) 281 F2d 844, 849*].

- Whether the interests of the applicant and others sought to be protected will in fact be well served by the receivership [*see Commodity Futures Trading Comm'n v. Comvest Trading Corp. (D Mass 1979) 481 F Supp 438, 441*].

19.89[3][b] Going Business May Present Special Case. The appointment of a receiver for a solvent going business corporation is a drastic measure that will be taken by a court of equity in the exercise of its discretion only when there is imminent danger of loss to the shareholders and there is no adequate remedy at law. Dissatisfaction with existing management and the fact that the business is a losing venture are not sufficient to warrant a receivership. Without statutory authority, a deadlocked condition of the shareholders and directors is not of itself, standing alone, sufficient ground for the appointment of a receiver. The general rule is that a receiver will not be appointed unless it appears that the appointment is necessary either to prevent fraud or to save the property from irreparable injury or threatened loss or destruction [*Macon Lumber Co. v. Bishop & Collins (6th Cir 1956) 229 F2d 305, 307*].

On the other hand, if the purposes for which a corporation was organized have become impossible of accomplishment, or it is necessary to preserve assets from irreparable loss through mismanagement by the officers or otherwise, a receiver may be appointed to administer its assets for the benefit of creditors or the shareholders. The officers of the corporation, in the management of its property, stand in a fiduciary relationship. If the corporation's funds or properties are being mismanaged and are in imminent danger of being lost to the shareholders and creditors through the collusion and fraud of the officers, a court of equity should not hesitate to assume charge and control of the property through a receiver [*Macon Lumber Co. v. Bishop & Collins (6th Cir 1956) 229 F2d 305, 307*].

Distinguish:

When the corporation is closely held, and a minority shareholder, complaining of harmful mismanagement, is seeking appointment of a receiver, a crucial issue might be whether there is a market for minority-held shares. If there is, then the court could decline to appoint a receiver, on the ground that the minority shareholder's adequate remedy is simply to sell in the market. The absence of a market should be weighed in support of appointment of a receiver [*Lyman v. Spain (DC Cir 1985) 774 F2d 495, 497-498*].

19.89[3][c] Foreclosure Proceeding May Present Special Case. A district court, in its discretion, may appoint a receiver to collect rents and profits and manage the property during the pendency of a foreclosure proceeding [*View Crest Garden Apartments, Inc. v. United States (9th Cir 1960) 281 F2d 844, 847-848*]. Factors that the court may consider include [*see United States v. Berk & Berk (DNJ 1991) 767 F Supp 593, 597* ; *New York Life Ins. Co. v. Watt West Inv. Corp. (ED Cal 1991) 755 F Supp 287, 292-293*]:

- Whether the property is inadequate security for the loan.

- Whether the mortgage contract contains a clause granting the mortgagee the right to a receiver.

- The continued default of the mortgagor.

- The probability that foreclosure will be delayed in the future.
- The unstable financial status of the mortgagor.
- If the property has rent-paying tenants: improper administration of the property that is likely to cause departure of a major tenant.
- If the property is a public-housing project:
  - The misuse of project funds by the mortgagor.
  - Furthering the policy of the National Housing Act.

Strategic Point:

It has been held that no hearing is necessary when the facts support the appointment of a receiver in a foreclosure case [*United States v. Mansion House Ctr. N. Redev. Co. (ED Mo 1976) 419 F Supp 85, 87*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDissolution & ReceivershipReceivershipsAppointment of ReceiversCivil ProcedureEquityAdequate Remedy at LawCivil ProcedureEquityIrreparable InjuryCivil ProcedureRemediesReceivershipsReceiversAppointmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral Overview

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B. Seeking Appointment of Receiver on Notice

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19.90 CHECKLIST: Obtaining Appointment of Receiver on Notice.

☐ Determine appropriate date for hearing, to be specified in order to show cause or notice of motion.

☐ Draft order to show cause or notice of motion, and have judge sign order to show cause.

- ○ **Central District:** Order to show cause.
- ○ **Eastern District:** Notice of motion.
- ○ **Northern District:** Notice of motion.
- ○ **Southern District:** Order to show cause.

Authority:
CD Cal Civ LR 66-3; *ED Cal Civ LR 232(a)(2), (d)*; *ND Cal Civ LR 66-1(c)*; *SD Cal Civ LR 66.1(a.2)*

Discussion:
See *§ 19.92*

Forms:
Order to show cause, see *19.161*; notice of motion, see *§ 19.162*

☐ Serve order to show cause or notice of motion (along with supporting papers) on other parties.

Authority:
Fed R Civ P 5(a)

Discussion:
See *§ 19.93*

☐ Pursuant to local rule, seven or 10 days before hearing date, mail notice of hearing to adverse party's creditors for which adverse party has provided list of addresses.

Authority:
ND Cal Civ LR 66-1(c); *SD Cal Civ LR 66.1(a.2)*

Discussion:
See *§ 19.94*

☐ Attend hearing and argue in support of application, according to normal motion practice.

Discussion:
Ch. 26, Pretrial Motion Practice, see *§§ 26.51 -26.53*

☐ Draft order appointing receiver, and obtain judge's signature.

Timing:
Consider bringing an already-drafted order to the hearing. Then, if the drafted order turns out to be in accord with the judge's ruling, you can submit the order for immediate issuance.

Discussion:
See *§§ 19.95 -19.99*

☐ Cause signed order to be delivered to receiver.

Timing:
While the adverse party could take an appeal from the order (within 30 days) and could obtain a stay pending appeal [*see 19.113*], this possibility is not a reason for delay in putting the order into the receiver's hands. If an appeal were taken, and the order of appointment were stayed, still the receiver should be made aware of the appointment, as a practical matter.

☐ Give any appropriate information, guidance, or instructions to receiver, for effective and proper control and management of receivership property.

Timing: Again, this can be done whether or not an appeal might be pending (unless the receiver has a preference otherwise).

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.91 Options and Strategy for Obtaining Appointment of Receiver on Notice.

Procedurally, normal motion practice will govern the application for appointment of a receiver. Substantively, the application will have to show the kind of extraordinary circumstances that courts routinely mention as being necessary for the so-called drastic remedy of receivership. Persuasive evidence in affidavits should be submitted. A memorandum of points and authorities relating the facts to a reported case that is squarely on-point, while always helpful, is especially useful in this instance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesReceivershipsReceiversAppointments

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19.92 Receivership Is Obtained Through Order to Show Cause or Notice of Motion.

19.92[1] Notice Usually Is Required. Unless notice is impractical, notice of an application for appointment of a receiver must be given to all parties [*Connecticut v. Doehr (1991) 501 US 1, 12, 111 S Ct 2105, 115 L Ed2d 1*]. Either an order to show cause or a notice of motion (depending on local practice) will be used to notify other parties [*see 19.93*] that the court will hear an application for appointment of a receiver.

Distinguish:

In practice, a receiver that is appointed for the duration of the case after a hearing on an order to show cause or a noticed motion could be called a permanent receiver or simply a receiver [*see 19.92[1]*] or might be called a temporary receiver [*see, e.g., New York Life Ins. Co. v. Watt West Inv. Corp. (ED Cal 1991) 755 F Supp 287, 288*] or a receiver *pendente lite* [*see, e.g., National Benefit Life Ins. Co. v. Shaw-Walker Co. (DC Cir 1940) 111 F2d 497, 499*]. In this chapter, "temporary receiver" means a receiver appointed on an ex parte application [*see 19.101*].

Cross Reference:

Noticed motion procedure, see *Ch. 26, Pretrial Motion Practice, § 26.16*.

19.92[2] LOCAL PRACTICE: Drafting Order to Show Cause or Notice of Motion.

19.92[2][a] LOCAL PRACTICE: CD Cal Requirements. Although no local rule explicitly governs the practice, an applicant for appointment of a receiver normally would use an order to show cause. This is implicit in a rule prescribing that concurrently with appointment of a temporary receiver on an ex parte application [*see 19.101*], the court generally must issue an order requiring the adverse party to show cause why a permanent receiver should not be appointed [*CD Cal Civ LR 66-3*; *see 19.103[2][a]*].

Exception:

The court may in its discretion prescribe a different form of notice [CD Cal Civ LR 66-4.1].

19.92[2][b] LOCAL PRACTICE: ED Cal Requirements. A receiver may be appointed on a normal noticed motion [*ED Cal Civ LR 232(a)(2)*, *(d)*, *see ED Cal Civ LR 230* (civil motion calendar and procedure)].

Distinguish:

A motion for appointment of a receiver need not be preceded by a motion for appointment of a temporary receiver [*ED Cal Civ LR 232(d)*].

19.92[2][c] LOCAL PRACTICE: ND Cal Requirements. While the local rule is confusingly worded [*see ND Cal Civ LR 66-1(c)*], apparently a normal noticed motion [*see ND Cal Civ LR 7-2* (normal motion practice: notice and supporting papers)] is used in practice.

19.92[2][d] LOCAL PRACTICE: SD Cal Requirements. A permanent receiver may be appointed after notice and hearing on an order to show cause. This order will be issued by a judge on application of the party seeking appointment of a receiver [*SD Cal Civ LR 66.1(a.2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesPrejudgment RemediesNoticesCivil ProcedureRemediesReceivershipsReceiversAppointmentsGovernmentsCourtsRule Application & Interpretation

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19.93 Other Parties Must Be Served With Order to Show Cause or Notice of Motion.

19.93[1] Follow Normal Motion Practice. The order to show cause or notice of motion must be served on other parties as in any case [*see Fed R Civ P 5(a)*].

Cross Reference:

Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.15 -5.23*.

19.93[2] LOCAL PRACTICE: Serving Other Parties.

19.93[2][a] LOCAL PRACTICE: CD Cal Requirements. A copy of the order to show cause why a permanent receiver should not be appointed must be served on the other parties to the action by the person requesting appointment of a receiver [*CD Cal Civ LR 66-4*].

Exception:

The court may in its discretion, prescribe other persons on whom the notice must be served and the time for and manner of service [CD Cal Civ LR 66-4.1].

19.93[2][b] LOCAL PRACTICE: SD Cal Requirements. The order to show cause must be served on all parties [*SD Cal Civ LR 66.1(a.2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.94 Notice Must Be Provided to Creditors.

19.94[1] Applicant Must Notify Creditors. Local rules in some districts provide that a notice of the hearing must be given to certain creditors of the adverse party, who is required to provide a list of creditors for this purpose [*see 19.94[2]*]. The concern is that other creditors' interests may be affected. As in a bankruptcy, all creditors receive notice so that they can protect their own interests.

19.94[2] LOCAL PRACTICE: Giving Notice to Creditors.

19.94[2][a] LOCAL PRACTICE: ND Cal Requirements. Within seven days of the issuance of an order to show cause, the defendant (that is, the party to whom the order is directed) must provide to the plaintiff (that is, the party seeking appointment of a receiver) a list of the defendant's creditors and their addresses. Not less than 14 days before the hearing on the order to show cause, notice of the hearing must be mailed to the listed creditors by the plaintiff [*ND Cal Civ LR 66-1(d)*].

Exception:
If a temporary receiver has been appointed ex parte [*see 19.101*], this duty to notify creditors falls to the temporary receiver instead [*ND Cal Civ LR 66-1(d)*].

Distinguish:
The rule is confusingly worded but appears to apply in all cases. In spite of the rule's singular reference to a previously issued order to show cause, which would imply an intent to limit the rule's application to cases in which a temporary receiver has been appointed ex parte, the rule plainly supposes that a temporary receiver might not have been appointed and provides, in that case, for the giving of notice by the party applying for the appointment of a receiver.

19.94[2][b] LOCAL PRACTICE: SD Cal Requirements. The defendant (that is, the party to be subjected to receivership) must provide to the plaintiff (that is, the party seeking appointment of a receiver), within seven days (after service of the order to show cause), a list of the defendant's creditors and their addresses. Not less than seven days

before the hearing, the plaintiff must mail to the listed creditors the notice of the hearing and file the proof of mailing [*SD Cal Civ LR 66.1(a.2)*].

Exception:

If a temporary receiver has been appointed ex parte [*see 19.101*], this duty to notify creditors falls to the temporary receiver instead [*SD Cal Civ LR 66.1(a.2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesPrejudgment RemediesNoticesCivil ProcedureRemediesReceivershipsReceiversAppointmentsGovernmentsCourtsRule Application & Interpretation

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19.95 Court Order Is Source of Authority for Appointment.

19.95[1] Order Is Source of Authority. The order of appointment is the source of the receiver's authority [*see Resolution Trust Corp. v. Bayside Developers (9th Cir 1995) 43 F3d 1230, 1241 n8*]. The order should specify not only what the receiver is to do but also the powers that the receiver may exercise [*see, e.g., Security Pac. Mortgage & Real Estate Servs., Inc. v. Republic of Philippines (2d Cir 1992) 962 F2d 204, 211* ("As a court-created entity, a receiver has only those powers provided for in the appointment order and may perform only those acts expressly authorized by the appointing court.")]. These matters are covered, to some extent, by local rules; otherwise, the usual practice in the drafting of appointment orders can be deduced from reported cases [*see Fed R Civ P 66* ("[T]he practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule.")]. In practice, appointment orders customarily provide that:

- The receiver is authorized forthwith to take and have complete and exclusive control, possession, and custody of the property in receivership.

- All persons, on being presented with a certified copy of the order, are directed to deliver to the receiver any and all of the property in receivership that is in their possession or under their control.

- All persons having actual knowledge or due notice of the order are enjoined from:

  - Disturbing the possession of the receiver in any way.

  - Prosecuting any actions that affect the property in receivership.

  - Transferring or otherwise disposing of, or concealing, the interest of the party (who is subjected to the receivership) in the property.

19.95[2] Special Provisions May Be Appropriate. Additionally, some appointment orders have provided that:

- The receiver must file an oath to faithfully execute the duties of a receiver as set forth in the order [*e.g., World Fuel Servs. Corp. v. Moorehead (ND Tex 2002) 229 F Supp2d 584, 591*].

- The receiver has power to exercise voting rights (or other particular ownership rights) tied to property, such as shares of stock, in receivership [*see e.g., World Fuel Servs. Corp. v. Moorehead (ND Tex 2002) 229 F Supp2d 584, 591*].

- The receiver will have no personal liability for any acts or omissions in connection with the performance of duties as receiver [*e.g., Federal Home Loan Mortgage Corp. v. Spark Tarrytown, Inc. (SDNY 1993) 829 F Supp 82, 88*]--which, although actually nothing more than a statement of the law [*see, e.g., Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno (1st Cir 1976) 547 F2d 1, 3* ("At the least, a receiver who faithfully and carefully carries out the orders of [the] appointing judge must share the judge's absolute immunity"); *accord, New Alaska Dev. Corp. v. Guetschow (9th Cir 1989) 869 F2d 1298, 1303*], may be useful as a deterrent of pointless litigation.

Strategic Point:

Not only reported cases but also local rules from another district may be cited as furnishing guidelines for particular provisions in the appointment order, in the absence of a governing (or supervening) local rule.

19.95[3] Local Rules Apply to Some Extent. Local rules in all districts provide that:

- Periodic reports to the court, with copies to the parties, are required [*see 19.97*].

- Notice must be given to parties and creditors whenever the receiver takes action as specified by local rule [*see 19.98*].

Local rules in some districts provide for:

- Requiring the receiver to furnish a bond [*see 19.95[4]*].

- General administration of the receivership [*see 19.96[1]*].

- Keeping records of time spent and services rendered [*see 19.96[2]*].

- Depositing funds in a designated account [*see 19.96[3]*].

- Employing an attorney, accountant, or investigator [*see 19.99*].

19.95[4] Requiring Receiver's Bond.

19.95[4][a] Court May Require Bond. The court's discretionary power respecting the appointment of a receiver extends to deciding whether the receiver should furnish a bond [*SEC v. Universal Fin. (9th Cir 1985) 760 F2d 1034, 1039*].

Strategic Point:

Because the cost of the receiver's bond normally will be taxed to the party subjected to the receivership [*see Commodity Futures Trading Comm'n v. Frankwell Bullion Ltd. (9th Cir 1996) 99 F3d 299, 306*], which could mean that the cost will be extracted from the property in receivership [*see § 19.85*], the proper exercise of discretion could oblige the court to weigh the considerations supporting a bond and, on the other hand, the extent to which the cost of the bond will deplete the property in receivership [*cf. SEC v. Universal Fin. (9th Cir 1985) 760 F2d 1034, 1039* (district court properly denied creditor's motion for bond to be furnished by receiver appointed in aid of judgment: "In our view, the main effect of requiring such a bond would be to deplete further the resources available to [creditors] and others with an interest in the receivership estate")].

Warning:

If the receiver is required to furnish a bond, then compliance with the requirement is a condition precedent to the receiver's having any authority to act pursuant to the order of appointment [*see, e.g., 28 USC § 754*; *ED Cal Civ LR 232(i)*; 19.95[1]].

19.95[4][b] LOCAL PRACTICE: ED Cal Requirements. The receiver must not act until a sufficient undertaking as determined by the court is filed with the clerk [*ED Cal Civ LR 232(i)*; *see ED Cal Gen LR 151* (security requirements generally)].

19.95[4][c] LOCAL PRACTICE: ND Cal Requirements. The court may require the receiver to furnish a bond in an amount that the court deems reasonable [*ND Cal Civ LR 66-1(e)*].

19.95[4][d] LOCAL PRACTICE: SD Cal Requirements. The judge may require the receiver to furnish a bond in an amount deemed reasonable [*SD Cal Civ LR 66.1(a.3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.96 Administration of Property by Receiver.

19.96[1] LOCAL PRACTICE: CD Cal Requirements--Administering Receivership Generally. Except as otherwise ordered by the court, the receiver must administer the receivership as nearly as possible in accordance with the practice in the administration of estates in bankruptcy [*CD Cal Civ LR 66-8*; *see Fed R Civ P 66* ("[T]he practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule.")].

Distinguish:

While the practice in administering a receivership is a procedural matter that can be governed by court orders and local court rules, what the receiver may and may not do in managing or operating, and generally dealing with, the property under receivership is a different matter. A receiver appointed in any cause pending in any court of the United States (except certain bankruptcy cases) must manage and operate the property in receivership according to the requirements of the valid laws of the state in which the property is situated, in the same manner as the owner or possessor would be bound to do while in possession of the property [*28 USC § 959(b)*]. The district court may not issue orders directing otherwise [*see Gillis v. California (1934) 293 US 62, 66, 55 S Ct 4, 79 L Ed 199* (identical provision in predecessor statute, former *28 USC § 124*, was construed as withholding power from district court to authorize receiver to transact business contrary to state statute by which other persons were bound); *see, e.g.,* Federal Home Loan Mortgage Corp. v. 1795 Riverside Drive Owners, Inc. (SDNY 1994) 1994 US Dist LEXIS 12510, at *2 ("While *Rule 66 of the Federal Rules of Civil Procedure* provides that procedural aspects of actions involving receivers are governed by federal procedural rules, this Court must look to principles of New York law to ascertain the substantive obligations of the receiver.")].

19.96[2] LOCAL PRACTICE: CD Cal Requirements--Keeping Time Records. The receiver, the attorney for the receiver, and other persons appointed by the court or employed by the receiver to aid the receivership, must keep an itemized record of time spent and services rendered [CD Cal Civ LR 66-8.1; *see* CD Cal Civ LR 66-8.2 (failure to maintain itemized records as required may be ground for denying reimbursement or compensation)].

19.96[3] LOCAL PRACTICE: Depositing Funds.

19.96[3][a] LOCAL PRACTICE: ED Cal Requirements. All funds received by the receiver must be deposited in a depository designated by the court, entitled "Receiver's Account" together with the name and number of the action [*ED Cal Civ LR 232(h)*]. Leave of court is granted for the making of deposits into the registry of the court by the receiver, and the receiver is not required to seek specific leave of court prior to making a deposit [*ED Cal Gen LR 150(a)*].

19.96[3][b] LOCAL PRACTICE: ND Cal Requirements. The receiver must deposit all funds in the institution selected by the court as its designated depository pursuant to *28 USC § 2041*, entitling the account with the name and number of the action. At the end of each month, the receiver must deliver to the clerk a statement of account and the canceled checks [*ND Cal Civ LR 66-4*].

19.96[3][c] LOCAL PRACTICE: SD Cal Requirements. The receiver must deposit all funds in a depository designated by a judge, entitling the account with the name and number of the action. At the end of each month, the receiver must deliver to the clerk a statement of account and the canceled checks [*SD Cal Civ LR 66.1(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesDuties & FunctionsGeneral OverviewCivil ProcedureRemediesReceiverships ReceiversDutiesCivil ProcedureRemediesReceiverships ReceiversPowersGovernmentsCourtsRule Application & Interpretation

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IV. APPOINTMENT OF RECEIVER
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19.97 Reporting Duties of Receiver.

19.97[1] Reports Must Be Filed and Served Periodically. The order appointing the receiver customarily specifies what reports the receiver must make, and when to make them, and directs that copies be served on the parties. The receiver's reporting duties are covered by local rules in all districts.

19.97[2] LOCAL PRACTICE: Filing and Serving Reports.

19.97[2][a] LOCAL PRACTICE: CD Cal Requirements. Within six months of appointment, and semi-annually thereafter, the receiver must serve and file with the court a report showing [CD Cal Civ LR 66-6.1]:

- The receipts and expenditures of the receivership.
- All acts and transactions performed in the receivership.

19.97[2][b] LOCAL PRACTICE: ED Cal Requirements. When the court directs, and at least once a year, the receiver must file and serve a report containing [*ED Cal Civ LR 232(e)(2)*]:

- A summary of the operations of the receiver.
- An inventory of all assets in receivership and their value.
- A schedule of all receipts and disbursements.
- The receiver's recommendation, with stated reasons, for continuation or termination of the receivership.
- Such other matters as the court may direct.

19.97[2][c] LOCAL PRACTICE: ND Cal Requirements. Within 30 days of appointment, a permanent receiver must serve and file with the court a verified report and petition for instructions containing [*ND Cal Civ LR 66-5*]:

- A summary of the operations of the receiver.
- An inventory of all assets in receivership and their value.
- A schedule of all receipts and disbursements.
- A list of all creditors, their addresses, and the amounts of their claims.
- The receiver's recommendation, with stated reasons, for continuation or termination of the receivership.

19.97[2][d] LOCAL PRACTICE: SD Cal Requirements. Within 30 days of appointment, a permanent receiver must serve and file with the court a verified report and petition for instructions containing [*SD Cal Civ LR 66.1(e)*]:

- A summary of the operations of the receiver.
- An inventory of all assets in receivership and their value.
- A schedule of all receipts and disbursements.
- A list of all creditors, their addresses, and the amounts of their claims.
- The receiver's recommendation, with stated reasons, for continuation or termination of the receivership.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversDutiesGovernmentsCourtsRule Application & Interpretation

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19.98 Duty of Receiver to Give Prior Notice of Significant Acts.

19.98[1] Receiver Must Notify Parties and Creditors. Local rules in all districts require the receiver to give notice to the parties before doing specified acts [*see 19.98[2]*].

19.98[2] LOCAL PRACTICE: Notifying Parties and Creditors.

19.98[2][a] LOCAL PRACTICE: CD Cal Requirements. The receiver must give notice by mail to all parties to the action and to all known creditors of the defendant (that is, the party subjected to receivership) of the time and place for hearing of [*CD Cal Civ LR 66-7*; *see CD Cal Civ LR 6-1* (notice and service requirements)]:

- Petitions for the payment of dividends to creditors.
- Petitions for the confirmation of sales of real property and personal property.
- Reports of the receiver.
- Applications for instructions concerning administration of the estate.
- Applications for discharge of the receiver.
- Applications for fees and expenses of the receiver, the attorney for the receiver, and any other person appointed to aid the receiver.

19.98[2][b] LOCAL PRACTICE: ED Cal Requirements. Unless the court otherwise orders, normal motion practice [*see ED Cal Civ LR 230*] governs all applications by the receiver [*ED Cal Civ LR 232(f)*].

19.98[2][c] LOCAL PRACTICE: ND Cal Requirements. The receiver must give all interested parties notice of the time and place of hearings of the following in accordance with normal motion practice [*ND Cal Civ LR 66-6*; *see*

ND Cal Civ LR 7-2 (normal motion practice: notice and supporting papers)]:

- Petitions for instructions.
- Petitions for the payment of dividends to creditors.
- Petitions for confirmation of sales of property.
- Reports of the receiver.
- Motions for fees of the receiver or of any attorney, accountant, or investigator, with the notice stating the services performed and the fee requested.
- Motions for discharge of the receiver.

19.98[2][d] LOCAL PRACTICE: SD Cal Requirements. The receiver must give all interested parties at least 14 days' notice of the time and place of hearings of all [*SD Cal Civ LR 66.1(f)*]:

- Petitions for the payment of dividends to creditors.
- Petitions for confirmation of sales of property.
- Reports of the receiver.
- Applications for fees of the receiver or of any attorney, accountant, or investigator, with the notice stating the services performed and the fee requested.
- Applications for discharge of the receiver.

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.99 Power of Receiver to Employ Professionals.

19.99[1] Court Approval May Be Required. Local rules in three districts require the receiver to obtain the court's approval before employing an attorney, accountant, or investigator.

Cross References:

See *§ 19.99[2]*.

19.99[2] LOCAL PRACTICE: Employing Attorney, Accountant, or Investigator.

19.99[2][a] LOCAL PRACTICE: ED Cal Requirements. The receiver may not employ an attorney, accountant, or investigator without first obtaining an order of the court authorizing the employment. The order may set forth a tentative basis for computation of compensation. The actual compensation will subsequently be fixed by the court, after hearing, on the applicant's affidavit setting forth in reasonable detail the nature of the services and the existence of any agreements concerning the amount of compensation to be paid [*ED Cal Civ LR 232(g)*].

19.99[2][b] LOCAL PRACTICE: ND Cal Requirements. The receiver may not employ an attorney, accountant, or investigator without a court order. The compensation of all such employees will be fixed by the court [*ND Cal Civ LR 66-2*].

19.99[2][c] LOCAL PRACTICE: SD Cal Requirements. The receiver may not employ an attorney, accountant, or investigator without an order of a judge. The compensation of all such employees will be fixed by the court [*SD Cal Civ LR 66.1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.100 Taking Control of Property in Other District.

19.100[1] Receiver Has Jurisdiction Over Property in Other District. A receiver appointed in any civil action or proceeding involving property (real, personal, or mixed) situated in different districts has, on giving bond, complete jurisdiction and control of the property, with the right to take possession of it [*28 USC § 754*]. Thus, when property to be taken into the receivership is located, or partly located, in another district, the receiver can take control and possession of it, and there is no necessity for appointment also in the other district.

19.100[2] Receiver's Jurisdiction Generally Is Subject to Condition Subsequent. The receiver "shall file" copies of the complaint and the order of appointment, in the district court for any other district in which receivership property is located, within 10 days after entry of the order of appointment. Failure to file the copies in another district "shall divest" the receiver of jurisdiction and control over property in that district [*28 USC § 754*].

This directive creates an election, not a duty, for the receiver. The receiver's power to assert jurisdiction and control over property in another district is not time-barred after expiration of the 10-day period. Failure to file the papers in a particular district within that period will mean that the receiver cannot be treated as having jurisdiction and control over property in that district. Yet, after expiration of the period, the receiver may still elect to assume jurisdiction and control over property in that district, by filing the papers in the district, as long as the rights of others have not been prejudiced by the delay in filing [*SEC v. Equity Serv. Corp. (3d Cir 1980) 632 F2d 1092, 1095*].

Strategic Point:

The party obtaining appointment of the receiver might prudently remind the receiver (even though receivers can be presumed to know) about this election by, for instance, sending a letter to point out that receivership property is located in another district and to ask that the receiver give notice promptly on complying with the statutory 10-day filing requirement.

19.100[3] Jurisdiction Over Intangible Property May Not Be Subject to Condition Subsequent. When the

appointing court has personal jurisdiction of the owner of intangible property (e.g., money), and that party is a resident of another district (where the property is deemed to be located), the receiver's continuing jurisdiction and control over that property does not necessarily depend on meeting the filing requirement of *28 USC § 754*. The following factors together may weigh against applying the statute preemptively so as to divest the receiver of jurisdiction [*United States v. Arizona Fuels Corp. (9th Cir 1984) 739 F2d 455, 460-461*]:

- If the party in question (owner of the property) has actual notice of the salient facts--the nature of the action, as revealed by the complaint, and appointment of the receiver--then to the extent that the filing requirement serves a notice function, the requirement has been met without filing. Proof of actual notice could be the fact that the party was served with the complaint and the order of appointment; beyond that would be the party's participation in subsequent receivership proceedings. (Moreover, the party, having actual notice, could hardly be prejudicially affected if the receiver were to make a late election to file papers in the other district.)

- As the court has personal jurisdiction of the party, the receiver could accomplish the same end by an ancillary action in the appointing court to recover the property, and the receiver's failure to have met the filing requirement of *28 USC § 754* would not divest the court of jurisdiction of such an action. Thus, there is no reason why the receiver should not be allowed instead to summarily assert jurisdiction over the property.

- Because the property is intangible and held by a party over whom the court already has jurisdiction, who has actual notice of the receivership and previously appeared in the appointing court, there is no purpose to be served in requiring the receiver to trace the property to the other district and make a statutory filing there. The functions served by a filing when property such as a parcel of land (or tangible personal property) is located in another district, or when the possessor of the property is not otherwise aware of the receivership, do not apply.

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.101 CHECKLIST: Applying Ex Parte for Temporary Receiver.

☐ Obtain affidavits and other documentary evidence of good cause to support ex parte request for appointment of temporary receiver.

Discussion:
See *§ 19.103*

☐ Determine appropriate date for hearing on whether receivership should be continued--which normally would be determined as for hearing on whether preliminary injunction should be issued following temporary restraining order.

○ **Central District:** Select next motion day following expiration of 20 days after date of temporary receiver's appointment.

○ **Eastern District:** At time of appointing temporary receiver, court will calendar hearing on continuation of receivership: take note of date.

○ **Northern District:** Following procedure for temporary restraining order, select date as though for preliminary-injunction hearing.

○ **Southern District:** Following procedure for temporary restraining order, select date as though for preliminary-injunction hearing

Authority:
CD Cal Civ LR 66-2; *ED Cal Civ LR 232(c)*; *ND Cal Civ LR 66-1(b)*; *SD Cal Civ LR 66.1(a.1)*

Discussion:
Procedure for temporary restraining order and preliminary injunction, see *§ 19.03* et seq.

☐ Prepare appropriate form of notice of hearing on whether receivership should be continued.

○ **Central District:** Order to show cause.

○ **Eastern District:** Notice of motion.

○ **Northern District:** Order to show cause.

○ **Southern District:** Order to show cause.

Authority:
CD Cal Civ LR 66-3; *ED Cal Civ LR 232(a)(2), (d)*; *ND Cal Civ LR 66-1(c)*; *SD Cal Civ LR 66.1(a.2)*

Discussion:
See *§ 19.105*

Forms:
Order to show cause, see *§ 19.161*; notice of motion, see *§ 19.162*

☐ Draft order appointing temporary receiver.

Content Note: This order should contain the same provisions concerning the receivership as will be in the subsequent order appointing a receiver (that is, continuing the receivership) for the duration of the case. The only difference in content between the two orders should be in the opening recitals, where the circumstances of issuing the order are described.

☐ Approach judge, state request for appointment of temporary receiver, submit supporting papers and drafts of orders, and make argument--following usual practice for obtaining temporary restraining order.

Discussion:
Practice for obtaining TRO, see *§ 19.09*

☐ Cause order of appointment to be delivered to temporary receiver.

☐ As required by local rule, give notice of appointment to adverse party.

Discussion:
See *§ 19.107*

☐ Respecting service of hearing notice (order to show cause or notice of motion) on other parties, and respecting other subsequent steps, proceed as when appointment of receiver is sought without antecedent appointment of temporary receiver.

Discussion: See *§ 19.90* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.102 Options and Strategy for Ex Parte Application for Temporary Receiver.

A court of equity has the power and authority to appoint a receiver on an ex parte application, and that power is properly exercised when the receivership is required by exigent circumstances [*Tennessee Pub. Co. v. Carpenter (6th Cir 1938) 100 F2d 728, 732*], such as when the giving of notice would defeat the very purpose of the receivership [*cf. Latimer v. McNeal (3d Cir 1906) 142 F 451, 452* (dictum; bankruptcy receivership)] or is impracticable because the adverse party cannot be found [*e.g., Federal Home Loan Mortgage Corp. v. Spark Tarrytown, Inc. (SDNY 1993) 813 F Supp 234, 236-237* ; *see Kattelman v. Madden (8th Cir 1937) 88 F2d 858, 863* (bankruptcy receivership)].

If the court acts improvidently in this regard, the order of appointment is not void (in the absence of a jurisdictional defect) but can be immediately attacked on appeal [*see 19.113*] as an abuse of discretion [*see Arkansas La. Gas Co. v. Kroeger (5th Cir 1962) 303 F2d 129, 134*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.103 Party Seeking Ex Parte Application Must Obtain Supporting Verified Declaration.

19.103[1] Good Cause Must Be Shown. Local rules in all districts specify that an ex parte application must show good cause for appointing a receiver before a hearing can be held on notice.

Strategic Point--Moving Party:

Generally, follow the practice for obtaining a temporary restraining order on an ex parte application [*see § 19.09*]. The court may issue a TRO if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition [*Fed R Civ P 65(b)(1)*].

19.103[2] LOCAL PRACTICE: Showing of Good Cause.

19.103[2][a] LOCAL PRACTICE: CD Cal Requirements. On good cause shown by verified pleadings or declaration, the court may in its discretion appoint a temporary receiver without notice to creditors [*CD Cal Civ LR 66-1*].

19.103[2][b] LOCAL PRACTICE: ED Cal Requirements. A temporary receiver may not be appointed without notice to the party sought to be subjected to receivership except on an appropriate showing of necessity and immediacy of potential harm [*ED Cal Civ LR 232(b)*].

19.103[2][c] LOCAL PRACTICE: ND Cal Requirements. A temporary receiver may be appointed in accordance with the requirements and limitations of *Fed R Civ P 65(b)*, without notice to the party sought to be subjected to the receivership [*ND Cal Civ LR 66-1(b)*; *see 19.103[1]*].

19.103[2][d] LOCAL PRACTICE: SD Cal Requirements. A temporary receiver may be appointed without notice to the party sought to be subjected to a receivership, in accordance with the requirements and limitations of *Fed R Civ P 65(b)* [*SD Cal Civ LR 66.1(a.1)*; *see 19.103[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.104 Hearing on Continuation of Receivership Must Be Held.

19.104[1] Prompt Hearing Is Required. As is the practice when issuing a temporary restraining order, the court appointing a temporary receiver on an ex parte application always contemplates holding a reasonably prompt hearing on whether the receivership should be continued during the progress of the litigation. The hearing is required because a fundamental rule of equity practice is that a receiver should not be appointed without a hearing [*see, e.g., Connecticut v. Doehr (1991) 501 US 1, 12, 111 S Ct 2105, 115 L Ed2d 1* ; *19.92[1]*].

19.104[2] LOCAL PRACTICE: Scheduling Prompt Hearing.

19.104[2][a] LOCAL PRACTICE: CD Cal Requirements. A temporary receiver must not be appointed for a period longer than the next motion day following the expiration of 20 days after the date of appointment [*CD Cal Civ LR 66-2*].

Cross Reference:

Motion day, see *Ch. 26, Pretrial Motion Practice, § 26.23[2][a]*.

19.104[2][b] LOCAL PRACTICE: ED Cal Requirements. On appointing a temporary receiver, the court must calendar a hearing on the continuation of the receivership [*ED Cal Civ LR 232(c)*]. The determination whether to continue the receivership must be made as set forth in *ED Cal Civ LR 232(d)*, and no weight will be given to the fact that a temporary receiver has been appointed [*ED Cal Civ LR 232(c)*].

Consider:

The referenced rule, *ED Cal Civ LR 232(d)*, provides no guidance for making the determination; it merely provides for appointment of a receiver on a noticed motion.

Legal Topics:

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

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19.105 Order to Show Cause or Notice of Motion Must Be Utilized.

19.105[1] Parties and Creditors Are Entitled to Notice of Hearing. After appointment of a temporary receiver on an ex parte application, the procedure for the applicant will be the same as when no temporary receiver has been appointed. Either an order to show cause or a notice of motion (depending on local practice) [*see 19.92*] will be used to notify other parties and affected creditors that the court will hear an application for appointment of a receiver for the duration of the case.

Distinguish:

In practice, after appointment of a temporary receiver on an ex parte application, a receiver that is appointed for the duration of the case could be called a permanent receiver or simply a receiver [*see 19.92[1]*], or might be called a receiver *pendente lite* [*see, e.g., National Benefit Life Ins. Co. v. Shaw-Walker Co. (DC Cir 1940) 111 F2d 497, 499*] or still be called a temporary receiver [*see, e.g., New York Life Ins. Co. v. Watt West Inv. Corp. (ED Cal 1991) 755 F Supp 287, 288*]. In this chapter, and in the usual practice in California, "temporary receiver" means a receiver appointed on an ex parte application.

Cross References:

Drafting of order to show cause or notice of motion, see *§ 19.92*; service of order to show cause or notice, see *§ 19.93*. Form of order to show cause, see *§ 19.161*; form of notice of motion, see *§ 19.162*.

19.105[2] LOCAL PRACTICE: Drafting Order to Show Cause or Notice of Motion.

19.105[2][a] LOCAL PRACTICE: CD Cal Requirements. Concurrently with appointment of a temporary receiver, the court generally must issue an order to show cause requiring the parties and the creditors of the defendant (that is, the party to be subjected to receivership) to show cause why a permanent receiver should not be appointed [*CD Cal Civ LR 66-3*].

Exception:

> The court may in its discretion prescribe a different form of notice and other persons on whom the notice must be served [CD Cal Civ LR 66-4.1].

19.105[2][b] LOCAL PRACTICE: ED Cal Requirements. No rule specifically applies. The common practice is to use an order to show cause.

19.105[2][c] LOCAL PRACTICE: ND Cal Requirements. Concurrently with the appointment of a temporary receiver, the judge may, on a proper showing, issue an order to show cause, requiring the parties and the creditors to show cause why a permanent receiver should not be appointed [*ND Cal Civ LR 66-1(c)*].

19.105[2][d] LOCAL PRACTICE: SD Cal Requirements. A permanent receiver may be appointed after notice and hearing on an order to show cause. This order must be issued by a judge on appointment of a temporary receiver [*SD Cal Civ LR 66.1(a.2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.106 Creditors of Adverse Party Must Be Notified.

19.106[1] Temporary Receiver Will Give Notice to Creditors. Under some local rules, one of the temporary receiver's duties will be to give notice of the up-coming hearing to creditors of the party whose property is being placed in receivership; and for this purpose, the party is required to provide a list of creditors [*see ND Cal Civ LR 66-1(d)*; *SD Cal Civ LR 66.1(a.2)*].

Cross Reference:

Giving notice to creditors, see *§ 19.94*.

19.106[2] LOCAL PRACTICE: CD Cal Requirements--Filing of List. In the Central District, the temporary receiver must file a schedule of names, addresses and amounts of claims of all known creditors of the defendant (that is, the party to be subjected to the receivership). The schedule must be filed within five days after appointment of a permanent receiver [*CD Cal Civ LR 66-5*]. Known creditors are those creditors listed as such in the records or books of account of the person or entity for which a receiver is appointed [CD Cal Civ LR 66-5.1].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Unit 5 Provisional Remedies
CHAPTER 19 Preliminary Injunctions, TROs, and Other Provisional Remedies
IV. APPOINTMENT OF RECEIVER
C. Applying Ex Parte for Temporary Receiver

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19.107 Ex Parte Applicant Must Give Notice of Appointment.

19.107[1] Ex Parte Applicant Will Give Notice. The appointment of a temporary receiver will naturally come to the attention of the adverse party because the applicant will be obliged to serve an order to show cause (or notice of motion) respecting the continuation of the receivership [*see 19.105*].

19.107[2] LOCAL PRACTICE: ED Cal Requirements--Giving Notice. If a temporary receiver has been appointed ex parte, the party seeking and securing the appointment must give notice forthwith of the temporary receiver's appointment, any terms and conditions pertaining to the appointment, and the date calendared for subsequent hearing on the question of continuance of the receivership [*ED Cal Civ LR 232(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesNoticesCivil ProcedureRemediesReceivershipsReceiversAppointmentsGovernmentsCourtsRule Application & Interpretation

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19.108 CHECKLIST: Opposing Appointment of Receiver.

☐ Attack applicant's factual showing in support of appointment.

Discussion:
See *§ 19.110*

☐ When federal government is suing to collect debt, attack any failure to meet requirements for invoking government's statutory right to seek appointment of receiver.

Authority:
28 USC §§ 3002(11), 3101, 3103

Discussion:
See *§ 19.111*

☐ If court intends to give applicant some relief, try to minimize harshness of result:

○ Suggest injunction or bond instead of receivership.

Discussion:
See *§§ 19.112[1], [2]*

○ Propose limited receivership or appointment of custodian in lieu of receiver.

Discussion:
See *§§ 19.112[3], [4]*

○ Challenge applicant's candidate for appointment.

Discussion:
See *§ 19.112[5]*

☐ Take interlocutory appeal from order of appointment.

Authority: *28 USC § 1292(a)(2)*

Discussion: See *§ 19.113*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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19.109 Options and Strategy for Opposing Appointment of Receiver.

Because the principal issue raised by an application for appointment of a receiver is whether in fact the need for that remedy can be shown, the adverse party should attempt to controvert the factual bases on which the applicant seeks the receiver's appointment [*see 19.89*]. This means presenting evidence and argument to establish any of the following (as many as possible):

- The opposing party has not engaged in fraudulent conduct.

- Any risk that property in question will be lost or squandered is nil or at least not greater than normal [*see, e.g., Meyer Jewelry Co. v. Meyer Holdings, Inc. (ED Mich 1995) 906 F Supp 428, 434* ("Meyer Holdings has not established that there is an imminent threat to its investment in Meyer Jewelry without the intervention of a receiver")].

- Available legal remedies are adequate [*see, e.g., Meyer Jewelry Co. v. Meyer Holdings, Inc. (ED Mich 1995) 906 F Supp 428, 434* ("Meyer Holdings has an adequate legal remedy for the acts of mismanagement and oppression it alleges")].

- Any harm to the applicant if no receiver were appointed would be less than the injury to the opposing party if the application were granted [*see, e.g., Meyer Jewelry Co. v. Meyer Holdings, Inc. (ED Mich 1995) 906 F Supp 428, 434*].

- The applicant's chance of success in the action is no better than even; or, if the applicant probably will succeed, nevertheless the possibility of irreparable injury to the applicant's interests in property in question (in the absence of a receiver) is remote.

- Appointment of a receiver will not enhance the prospect of bringing the action promptly to a final judgment.

- The interests of the applicant and others sought to be protected will in fact be poorly served by a

receivership.

If the federal government is suing to collect a debt and has invoked its statutory right to seek appointment of a receiver, the defendant can attack any failure to meet the statutory requirements, in addition to mounting a factual counter-attack [*see 19.111*].

If it becomes apparent that a receiver will be appointed, still the adverse party could suggest less-harsh alternatives (for example, an injunction, or furnishing a bond) or something less than the usual receivership (such as a limited receivership, or a custodian in lieu of a receiver); and it could be possible to challenge the eligibility, qualifications, or credentials of the applicant's nominee for appointment [*see 19.112*].

Finally, once a receiver has been appointed, the adverse party could consider taking an interlocutory appeal [*see 19.113*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityAdequate Remedy at LawCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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19.110 Attack Factual Showing in Support of Appointment.

19.110[1] Show That More Harm Than Good Will Result. As a practical matter, the party opposing appointment of a receiver has the burden of showing that the appointment would do more harm than good [*see, e.g., World Fuel Servs. Corp. v. Moorehead (ND Tex 2002) 229 F Supp2d 584, 590, 597*].

19.110[2] Stress Unbalanced Outcome. Although it may be clear that the court has the power to appoint a receiver and grant other preliminary relief, nevertheless, in determining the appropriate relief, the court must balance the potential harm of such relief to the parties. Preliminary relief should not be granted when it would result in a risk of substantial harm to a party. Nor should it be granted when it would greatly interfere with the operation of a party's business [*Adelman v. CGS Scientific Corp. (ED Pa 1971) 332 F Supp 137, 147)*].

Legal Topics:

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

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19.111 Defending Debt-Collection Suit by United States.

19.111[1] United States May Seek Appointment of Receiver. Receivership is authorized as a prejudgment remedy when the United States seeks to recover a judgment on a debt and to obtain, before judgment, a remedy in connection with a claim for a debt [*see 28 USC §§ 3002(11), 3101, 3103*].

A court may appoint a receiver for property in which the debtor has a substantial nonexempt interest if the application shows reasonable cause to believe that there is a substantial danger that the property will be removed from the jurisdiction of the court, lost, concealed, materially injured or damaged, or mismanaged [*28 USC § 3103(a)*].

Application for appointment of a receiver may be made "in a proceeding in conjunction with the complaint or at any time after the filing of a civil action on a claim for a debt" [*28 USC § 3101(a)(1)*; *see 28 USC § 3101(d)* (notice and hearing)].

Distinguish:

Executive Order 12988, implementing certain "Guidelines to Promote Just and Efficient Government Civil Litigation," does not apply in a receivership proceeding, insofar as it requires that a government litigation counsel, before filing a complaint initiating civil litigation, must first make a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or must confirm that the referring agency that previously handled the dispute made a reasonable effort to notify the disputants and to achieve a settlement or used its conciliation processes [*see* Exec. Order 12988 §§ 1(a), 8(b)(2) *(Feb. 5, 1996), 61 FR 4729*].

19.111[2] Cite Any Failure to Meet Statutory Requirements.

19.111[2][a] Specific and Verified Showing Is Required. The application must be made under oath [*28 USC § 3101(a)(1)*] and must:

- Set forth the factual and legal basis for appointment of a receiver [*28 USC § 3101(a)(2)*].

- State that the debtor against whom the prejudgment remedy is sought will be afforded an opportunity for a hearing [*28 USC § 3101(a)(3)(A)*].

- Set forth "with particularity" that all statutory requirements for the prejudgment remedy have been satisfied [*28 USC § 3101(a)(3)(A)*].

As ground for appointment of a receiver, the application may show reasonable cause to believe that the debtor either [*28 USC § 3101(b)(1)(A)-(D)*]:

- Is about to leave the jurisdiction of the United States with the effect of hindering, delaying, or defrauding the United States in the effort to recover a debt;

- Has assigned, disposed, removed, concealed, ill-treated, wasted, or destroyed property, or is about to do so, with the effect of hindering, delaying, or defrauding the United States;

- Has converted the debtor's property into money, securities, or evidence of debt, or is about to do so, in a manner prejudicial to the United States with the effect of hindering, delaying, or defrauding the United States; or

- Has evaded service of process by concealing himself or herself or has temporarily withdrawn from the jurisdiction of the United States with the effect of hindering, delaying, or defrauding the United States.

Alternatively, the application may show reasonable cause to believe that [*28 USC § 3101(b)(2)*]:

- The prejudgment remedy is required so as to obtain jurisdiction within the United States; and

- Appointment of a receiver will result in obtaining jurisdiction.

19.111[2][b] Supporting Affidavit Is Required. The application must include an affidavit establishing "with particularity to the court's satisfaction" facts supporting the probable validity of the claim for a debt and the right of the United States to recover what is demanded [*28 USC § 3101(c)(1)*]. The affidavit must state [*28 USC § 3101(c)(2)(A)-(C)*]:

- Specifically the amount of the debt claimed by the United States and any interest or costs attributable to the debt;

- One or more of the specific grounds for appointment of a receiver [*see 19.111[2][a]*]; and

- How the requirements for granting relief [*see 19.111[1]*] are met.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversAppointmentsGovernmentsFederal GovernmentClaims By & Against

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19.112 Minimize Harsh Result When Court Intends to Give Relief.

19.112[1] Suggest That Injunction Would Be Effective and Less Drastic. Courts have noted that a receivership is a "drastic" remedy because, among other reasons, it entails additional expenses (which can be substantial) for one or both of the parties, and it can be disruptive to a large number of persons who are not parties (such as employees of a business that is placed in receivership) [*see Federal Home Loan Mortgage Corp. v. Spark Tarrytown, Inc. (SDNY 1993) 813 F Supp 234, 235* ; *Adelman v. CGS Scientific Corp. (ED Pa 1971) 332 F Supp 137, 147*]. The party to be subjected to a receivership could offer to accept an injunction instead, on the grounds that those drastic consequences should be avoided and that the party has shown no inclination to disobey an injunction [*see Bracco v. Lackner (ND Cal 1978) 462 F Supp 436, 456*]. Perhaps also the party could proffer a surety bond as assurance of the party's intention to comply with the court's orders.

19.112[2] Propose That Court Require Bond Rather Than Appoint Receiver. If the property interest needing protection could be adequately covered by a party's furnishing a bond, that remedy normally would be preferred over the appointment of a receiver (or issuance of an injunction [*see United States v. Dominion Oil Co. (SD Cal 1917) 241 F 425, 428*].

19.112[3] Request Specific Limitations on Receiver's Authority and Powers. The case could be appropriate for a very limited receivership, with the receiver having only as much authority and only specified powers as necessary to protect whatever property interest needs protection during the litigation [*see, e.g., United States v. Honolulu Consol. Oil Co. (SD Cal 1918) 249 F 167, 171* ; *United States v. Devil's Den Consol. Oil Co. (SD Cal 1916) 236 F 973, 979*].

19.112[4] Propose Custodian in Lieu of Receiver for Going Business. When it is evident that some kind of interim relief is necessary, but appointment of a receiver could have an unintended harmful effect--for instance, indentures securing corporate bonds, and many other types of security instruments, commonly list appointment of a receiver as an event of default entitling the secured party to foreclose or pursue other relief--or otherwise might be inappropriate, the court nevertheless has power to give effective, if limited, relief. Thus, when control of a going business is the subject of the parties' dispute, the court might appoint a custodian with a mandate to act as arbitrator when the parties cannot agree on a management issue and to do nothing more than preserve the business until a trial can

be held and the court can issue a judgment [*Adelman v. CGS Scientific Corp. (ED Pa 1971) 332 F Supp 137, 148-149*].

19.112[5] Challenge Applicant's Candidate for Receiver.

19.112[5][a] Assert Statutory Ineligibility. A person holding any civil or military office or employment under the United States or employed by any justice or judge of the United States may not at the same time be appointed a receiver in any case in any court of the United States [*28 USC § 958*].

A clerk of a court or any deputy clerk may not be appointed a receiver in any case, unless there are special reasons requiring the appointment, which must be recited in the order of appointment [*28 USC § 957*].

19.112[5][b] Argue That Candidate Lacks Neutrality. The party opposing appointment of a receiver may challenge the neutrality of the person whom the applicant has nominated, if there is a ground for finding that the nominee would have a conflict of interest or otherwise would lack neutrality as between the parties. If the court decides that a receiver should be appointed, the court may reject the applicant's nominee on that ground and select a truly disinterested person [*see, e.g., World Fuel Servs. Corp. v. Moorehead (ND Tex 2002) 229 F Supp2d 584, 590, 597* (plaintiff's nominee was rejected because of having recently been affiliated with law firm that served as plaintiff's local counsel)].

19.112[5][c] Argue Special Circumstances Showing Inequity or Hardship. The court may reject the applicant's candidate, even when that candidate happens to have a statutory preference [*see, e.g., 19.112[5][a]*], if appointing that candidate would be inequitable or would cause undue hardship, and if there is an alternative candidate whose appointment would not present such a problem. For instance, the court could reject a candidate that is the real party in interest in the case and that has no office reasonably near the premises of a business being placed in receivership [*United States v. First Carolina Fund (DSC 1967) 276 F Supp 767, 769* ("under the circumstances of this case, the ends of justice would best be served by appointing a disinterested local qualified person as receiver")].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.113 Appeal From Order Appointing Receiver.

19.113[1] Interlocutory Appeal Is Allowed. Orders of the district courts in California appointing receivers can be immediately appealed. The Ninth Circuit generally has jurisdiction, but in some cases, the Federal Circuit will have exclusive jurisdiction [*see 28 USC §§ 1292(a)(2), (c)(1), 1295*].

Timing:

The notice of appeal generally must be filed within 30 days after entry of the order [*Fed R App P 4(a)(1)(A)*].

Strategic Point:

Determining whether the Ninth Circuit (or the Federal Circuit) would have jurisdiction is essential, because the notice of appeal must specify the name of the court to which the appeal is taken [*Fed R App P 3(c)(1)(C)*]. If the prospect of oral argument is an important factor, bear in mind that the Federal Circuit court sits in the District of Columbia.

Cross References:

20 Moore's Federal Practice, Ch. 303, Appeal as of Right--How Taken (Matthew Bender 3d ed.).

18 *Bender's Federal Practice Forms, Form AR3:1* (Matthew Bender).

19.113[2] Standard of Review Is Abuse of Discretion. A court of appeals will review a district court's decision to appoint a receiver for an abuse of discretion [*National P'ship Inv. Corp. v. National Hous. Dev. Corp. (11th Cir 1998) 153 F3d 1289, 1292*].

19.113[3] Stay May Be Sought in District Court. The appellant must ordinarily move first in the district court for

a stay of the order of appointment pending appeal [*Fed R App P 8(a)(1)(A)*]. Unless the district court orders otherwise, the order of appointment will not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal [*see Fed R Civ P 62(a)* ("the following [is] not stayed ... an interlocutory or final judgment in an action for an injunction or a receivership"); *cf. Ferguson v. Tabah (2d Cir 1961) 288 F2d 665, 675* (implicitly recognizing application of Rule 62 to order appointing receiver)].

Distinguish:

A supersedeas bond, which an appellant may furnish as the means of obtaining an automatic stay pending appeal except in specified cases [*see Fed R Civ P 62(d)*], would not be required [*see NLRB v. Westphal (9th Cir 1988) 859 F2d 818, 819*]. Nor would it be effective. As one of the excepted cases is an appeal from an "interlocutory or final judgment ... in a receivership action"--which may be taken as covering an order appointing a receiver [*see Ferguson v. Tabah (2d Cir 1961) 288 F2d 665, 675* (application of Rule 62 to order appointing receiver)]--a stay can be obtained only by moving the district court to stay its order [*see* Rosco, Inc. v. TIG Ins. (ND Cal 1997) 1997 US Dist LEXIS 2776, at *2 ("A judgment listed as an exception to Rule 62(d) may only be stayed by an order of a court")].

19.113[4] District Court May Modify Order During Pendency of Appeal. The district court's power to modify a preliminary injunction during the pendency of an appeal [*see Fed R Civ P 62(c)*] extends also to modifying an interlocutory order appointing a receiver [*Ferguson v. Tabah (2d Cir 1961) 288 F2d 665, 675*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureRemediesReceiverships ReceiversAppointmentsCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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V. PROCEEDING AGAINST A SURETY
A. Determining Whether to Proceed Against Surety by Rule 65.1 Motion

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19.114 CHECKLIST: Initial Considerations.

☐ Ascertain whether Rule 65.1 motion is available.

○ Was security given in bankruptcy proceeding? If so, Rule 65.1 motion is not available.

Discussion:
See *§ 19.116[2]*

○ Has surety entered into a bond, stipulation, or undertaking required or permitted by the Federal Rules of Civil Procedure?

Discussion:
See *§ 19.116[1]*

○ Determine whether Rule 65.1 summary procedure is available against principal, as well as surety.

Discussion:
See *§ 19.117*

○ Consider whether to bring independent action in state or federal court instead if:

☐ Attorney fees would be recoverable.

☐ Jury trial would be available.

☐ Jurisdiction exists in a more convenient forum or one that provides other tactical advantages.

☐ The action in which the bond was posted has been dismissed [*see American Bible Soc'y v. Blount (3d Cir 1971) 446 F2d 588, 590*].

Discussion: See *§ 19.118*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures

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19.115 Options and Strategy for Creditor Considering Rule 65.1 Motion.

The summary motion procedure of Rule 65.1 is available to enforce the liability of a surety who has provided security required or permitted under some provision of the Federal Rules of Civil Procedure. Once the applicable provision has been identified [*see 19.116[1]*], the Rule 65.1 motion may be filed once the surety's liability has been established [*see 19.120*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures

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19.116 Identify Provision Under Which Surety Provided Security.

19.116[1] Rule 65.1 Motion Available Against Surety When Security Is Permitted or Required Under Federal Rules of Civil Procedure. A Rule 65.1 motion to enforce the liability of a surety is available whenever the Federal Rules of Civil Procedure, including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, require or permit the giving of security by a party and security is given in the form of a bond or stipulation or other undertaking. Provisions for the posting of security are found throughout the Federal Rules of Civil Procedure, including:

- As condition for stay of proceedings to enforce judgment [*Fed R Civ P 62(c), (d), (h)*; *ED Cal Gen LR 151(d)*].

Cross Reference:

12 *Moore's Federal Practice, § 62.03* (Matthew Bender 3d ed.)

- Incidental to attachment and other provisional remedies for which state law requiring security applies [*Fed R Civ P 64*; *ED Cal Gen LR 151(c)*; *CCP § 481.010 et seq.*].

Cross Reference :

Attachment and other provisional remedies, see *§§ 19.37 -19.84*.

- As condition to temporary restraining order or preliminary injunction [*Fed R Civ P 65(b), (c)*].

Cross Reference:

Security as condition of injunctive relief, see *§ 19.11*.

- As security for costs required by local rule promulgated by the district court [*see Fed R Civ P 83*].

Cross Reference:

14 Moore's Federal Practice, Ch. 83, Rules by District Courts; Judge's Directives (Matthew Bender 3d ed.)

- In a derivative action, as required by state law for shareholder to maintain action [*see Corp Code § 800(c)*; *Cohen v. Beneficial Indus. Loan Corp. (1949) 337 US 541, 555-557, 69 S Ct 1221, 93 L Ed 1528*].

Cross Reference:

5 Moore's Federal Practice, Ch. 23.1, Derivative Actions by Shareholders (Matthew Bender 3d ed.).

- As security required by Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions [*Fed R Civ P 65.1*; *see* Supplemental Rules for Certain Admiralty and Maritime Claims, Rules E, F].

19.116[2] Rule 65.1 Motion Not Available in Bankruptcy Proceedings. Sureties under bonds or undertakings in bankruptcy proceedings are under the jurisdiction of the Bankruptcy Court and are governed by Bankruptcy Rules, not Rule 65.1.

Strategic Point--Moving Party:

Determine whether the proceeding against the surety may be brought as adversary proceeding under *Fed R Bankr P 9025*.

Cross Reference:

10 Collier on Bankruptcy, P 9025.01 et seq. (Matthew Bender 15th ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersGuarantorsCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures

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19.117 Rule 65.1 Motion Available Against Principal.

19.117[1] Creditor May Bring Rule 65.1 Motion Against Principal. The summary procedure of Rule 65.1 applies to a principal as well as a surety on a bond [*Squaxin Island Tribe v. State of Washington (9th Cir 1986) 781 F2d 715, 723-724* ; *Coyne-Delany v. Capital Dev. Bd. (7th Cir 1983) 717 F2d 385, 391*].

19.117[2] Rule 65.1 Motion Not Available for Surety to Proceed Against Principal. Rule 65.1 does not provide for a surety to proceed against its principal [*In re UFO Chuting of Haw., Inc. (D Haw 2002) 210 FRD 239, 243* ; *see Aerotrade, Inc. v. Republic of Haiti (SDNY 1975) 399 F Supp 618, 618*].

Example:

When personal injury plaintiffs sought payment from judgment debtor's insurer under Rule 65.1, insurer could not use Rule 65.1 procedure to assert exoneration and/or subrogation rights against judgment debtor. Those rights had to be determined in an independent action [*In re UFO Chuting of Haw., Inc. (D Haw 2002) 210 FRD 239, 243*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures

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19.118 Creditor May Bring Independent Action.

19.118[1] Creditor May Bring Independent Action in State or Federal Court. Rule 65.1 is permissive and does not preclude a creditor from bringing an independent action against a surety in state or federal court [*Bass v. First Pac. Networks, Inc. (9th Cir 2000) 219 F3d 1052, 1054*].

19.118[2] District Court Has Jurisdiction Over Action on Bond Executed Under Federal Law. The district courts have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States. There is no jurisdictional amount [*28 USC § 1352*]. Therefore, a party may bring an independent action rather than a Rule 65.1 motion [*see Buddy Sys., Inc. v. Exer-Genie, Inc. (9th Cir 1976) 545 F2d 1164, 1169*].

Example:

A Rule 65(c) injunction bond to secure a federal court injunction, was in fact a bond executed under "any law of the United States" for purposes of district court's jurisdiction over claim based on it [*Milan Express, Inc. v Averitt Express, Inc. (11th Cir 2000) 208 F3d 975, 980*].

Exception:

District courts do not have subject matter jurisdiction over matters within the exclusive jurisdiction of the Court of International Trade [*see, e.g., United States v. Universal Fruits & Vegetables Corp. (9th Cir 2004) 370 F3d 829*]. These matters involve actions by the United States to recover on import bonds given in connection with importation of merchandise from foreign countries [*see 28 USC §§ 1352, 1582(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil

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2-19 MB Practice Guide: Fed Pretrial Civ Proc in CA 19.119

19.119 CHECKLIST: Determining Surety's Liability Under Bond.

☐ Determine whether conditions for payment under the bond have been satisfied.

Discussion:
See *§ 19.120*

☐ Identify damages available under bond.

○ Injunction bond:

☐ Damages proximately caused by injunction.

☐ Attorney fees only if their payment is specifically secured by injunction bond.

Discussion:
See *§ 19.121*

○ Attachment undertaking:

☐ Damages proximately caused by attachment.

☐ Attorney fees.

☐ Amount of undertaking limits damages

Discussion:
See *§ 19.122*

○ Supersedeas bond.

Discussion: See *§ 19.123*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProceduresCivil ProcedureRemediesInjunctionsGeneral Overview

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19.120 Conditions for Payment Under Bond Must Be Satisfied Before Initiating Rule 65.1 Motion.

Before initiating the Rule 65.1 motion procedure, the conditions for payment on the bond must be satisfied and the surety's liability must have accrued. The motion will typically, therefore, be brought after resolution of the underlying action in the moving party's favor [*see, e.g., Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc. (9th Cir 1994) 16 F3d 1032, 1036*]. However, in an unusual case, a party may be entitled to proceed against the bond despite the fact that the merits of the underlying action are resolved against it [*see Grupo Mexicano De Desarrollo, S.A. v. Alliance Bond Fund, Inc. (1999) 527 US 308, 119 S Ct 1961, 144 L Ed2d 319*] or have not yet been resolved [*Qualcomm, Inc. v. Motorola, Inc. (SD Cal 1999) 185 FRD 285, 288*].

Example:

A plaintiff was entitled to recover on a bond issued in connection with a temporary restraining order (TRO) obtained by the defendant once the TRO was dissolved and the defendant failed to obtain a preliminary injunction. The denial of the motion for a preliminary injunction constituted a determination that the plaintiff had been wrongfully restrained [*Qualcomm, Inc. v. Motorola, Inc. (SD Cal 1999) 185 FRD 285, 288*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProceduresCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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19.121 Surety's Liability Under Injunction Bond.

19.121[1] Federal Rules Require Bond for Temporary Restraining Order or Preliminary Injunction to Issue. No restraining order or preliminary injunc-tion can issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained [*Fed R Civ P 65(c)*].

Cross Reference:

Requirements for restraining order or preliminary injunction, see *§ 19.03* et seq.

19.121[2] Bond May Be Executed When Party Was Wrongfully Enjoined or Restrained. A party is wrongfully enjoined or restrained within the meaning of Rule 65(c) when it turns out the party enjoined or restrained had the right all along to do what it was prohibited from doing [*Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc. (9th Cir 1994) 16 F3d 1032, 1036*].

19.121[3] Rebuttable Presumption Exists That Wrongfully Enjoined or Restrained Party Is Entitled to Execution of Bond. A rebuttable presumption exists that a wrongfully enjoined or restrained party is entitled to have the bond executed [*Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc. (9th Cir 1994) 16 F3d 1032, 1036*].

19.121[4] Federal Common Law Governs Damages Recoverable. When an injunction bond is issued under Rule 65(c), the question of what is recoverable under that bond is one of federal law [*Fireman's Fund Ins. Co. v S.E.K. Constr. Co. (10th Cir 1971) 436 F2d 1345, 1351-1352*].

19.121[5] Amount of Recoverable Damages.

19.121[5][a] Damages Recoverable to Compensate Wrongfully Enjoined Party for Injury Caused by Injunction. The wrongfully enjoined party may recover damages for injuries proximately caused by the injunction [*Matek v. Murat (9th Cir 1988) 862 F2d 720, 733-734* , abrogated on other grounds by *Holden v. Hagopian (9th Cir 1992) 978 F2d 1115* ; *see Milan Express, Inc. v. Averitt Express, Inc. (11th Cir 2001) 254 F3d 966, 981*].

19.121[5][b] Damages Recoverable From Surety Are Limited to Amount of Bond. The wrongfully enjoined party may recover *from the surety* provable damages up to the amount of the bond [*Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc. (9th Cir 1994) 16 F3d 1032, 1036*].

Distinguish:

The principal's liability may not be limited to the amount of the bond [*cf. Don Post Studios, Inc. v. Cinema Secrets, Inc. (ED Pa 2001) 148 F Supp2d 572* (bond did not limit liability of plaintiff for damages resulting from wrongful issuance of preliminary injunction); *with Minnesota Power & Light Co. v. Hockett (SD Ind 1999) 105 F Supp2d 939* (principal's liability for damages for wrongful preliminary injunction limited to amount of bond)].

19.121[5][c] Attorney Fees Recoverable Only If Bond So Provides. Under federal case law, attorney fees are not recoverable on an injunction bond [*Matek v. Murat (9th Cir 1988) 862 F2d 720, 734* , abrogated on other grounds by *Holden v. Hagopian (9th Cir 1992) 978 F2d 1115* ; *Fireman's Fund Ins. Co. v. S.E.K. Constr. Co. (10th Cir 1971) 436 F2d 1345, 1351-1352* ; *see Bass v. First Pac. Networks, Inc. (9th Cir 2000) 219 F3d 1052, 1055*]. However, Rule 65(c) grants district courts wide discretion in setting the terms and amount of the bond [*Walczak v EPL Prolong, Inc. (9th Cir 1999) 198 F3d 725, 730, 733*]. Therefore, if the district court, exercising that discretion, required the bond to secure payment of attorney fees, fees are recoverable [*see Agnew v. Alicanto, S.A. (EDNY 1989) 125 FRD 355, 359-360*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProceduresCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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19.122 Surety's Liability Under Attachment Bond.

19.122[1] California Law Governs Attachment Undertaking. The forum state's law governs the seizure of property for the purpose of securing satisfaction of the judgment, unless a federal statute applies [*Fed R Civ P 64(a)*], and determines the circumstances and manner in which attachment is available. This includes undertaking requirements [*Paul H. Aschkar & Co. v. Curtis (9th Cir 1963) 327 F2d 306, 310*].

Cross References:

Attachment as provisional remedy, see *§ 19.44* et seq.

13 *Moore's Federal Practice, §§ 64.13 -64.16* (Matthew Bender 3d ed.).

19.122[2] Undertaking Is Condition of Writ of Attachment. Before the issuance of a writ of attachment, the plaintiff must file an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff in the action [*CCP § 489.210*; *see CCP § 490.010* (wrongful attachment defined)]. An undertaking is a surety, indemnity, fiduciary, or like undertaking executed by sureties alone [*CCP § 995.190*]. The amount of the undertaking is $10,000, unless on objection to the undertaking, the court determines that the probable recovery for wrongful attachment exceeds the amount of the undertaking, in which case it must order the amount of the undertaking increased to the amount it determines to be the probable recovery for wrongful attachment if it is ultimately determined that the attachment was wrongful [*CCP § 489.220*].

19.122[3] Amount of Damages Recoverable.

19.122[3][a] Damages Proximately Caused. The liability of a plaintiff for causing a wrongful attachment includes all damages proximately caused to the defendant by the wrongful attachment [*CCP § 490.020(a)(1)*].

19.122[3][b] Attorney Fees. The liability of a plaintiff for causing a wrongful attachment includes all costs and expenses, including attorney fees, reasonably expended in defeating the attachment [*CCP § 490.020(a)(2)*].

19.122[3][c] Liability Limited to Amount of Undertaking. The liability of a plaintiff for wrongful attachment is limited by the amount of the undertaking [*CCP § 490.020(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawForum & PlaceCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProceduresCivil ProcedureRemediesProvisional RemediesAttachments

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19.123 Surety's Liability Under Supersedeas Bond.

An appellant may obtain a formal stay of the judgment pending appeal by posting a supersedeas bond [*Fed R Civ P 62(d)*]. A supersedeas bond guarantees the damages awarded in the district court when an appeal is taken from that judgment. The recovery on a supersedeas bond includes the amount of the judgment, with interest and costs [*see Martin v. Clarke (7th Cir 1939) 105 F2d 685, 687* ; *see also* former *Fed R Civ P 73(d)*], but does not include attorney fees [*Bass v. First Pac. Networks, Inc. (9th Cir 2000) 219 F3d 1052, 1053*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures

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19.124 CHECKLIST: Moving to Enforce Surety's Liability Under Rule 65.1.

☐ Review Rule 65.1 requirements.

Authority:
Fed R Civ P 65.1

Discussion:
See *§§ 19.126 -19.131*

☐ Review local rules and individual judge's rules to ascertain preconditions for filing motion.

Discussion:
Ch. 26, Pretrial Motion Practice, see *§§ 26.12 -26.36*

☐ Review terms of bond or other undertaking to ascertain any preconditions to filing motion, such as demand on surety.

☐ Ensure that timing of motion is proper.

☐ Engage opposing counsel in conference attempting resolution as required by local rule.

Authority:
CD Cal Civ LR 7-3

☐ Provide opposing counsel with documentation to substantiate claims for costs, interest, and damages.

☐ Draft motion.

☐ Provide advance notice of motion.

☐ Serve and file motion papers:

○ Serve papers on surety or on clerk of court who will mail copies to sureties if address is known.

Authority: *Fed R Civ P 65.1*

Form: *19.163* (notice of motion and motion for damages for wrongful injunction)

Warning:

A judgment against the surety will not stand if notice has not been given [*Beatrice Foods Co. v. New England Printing & Lithographing Co. (Fed Cir 1990) 930 F2d 1572, 1576-1577*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures

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19.125 Options and Strategy for Moving Party.

The Rule 65.1 motion procedure for enforcing a surety's liability should be used only if payment cannot be accomplished by agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures

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19.126 Surety's Liability May Be Enforced by Motion.

Under Rule 65.1, a surety's liability may be enforced by motion without the necessity of an independent action [*Fed R Civ P 65.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures

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19.127 Surety Submits to Jurisdiction of Court.

A surety who provides security through a bond, stipulation, or other undertaking under the Federal Rules of Civil Procedure submits to the jurisdiction of the court [*Fed R Civ P 65.1*]. This consent to jurisdiction is only in favor of the party entitled to proceed on the bond executed by the surety [*Aerotrade, Inc. v. Republic of Haiti (SDNY 1975) 399 F Supp 618, 619*].

Cross Reference:

13 *Moore's Federal Practice, § 65.1.04* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures

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19.128 Motion Must Be Timely.

19.128[1] Motion May Be Filed After Determination on Merits of Underlying Action. The surety's liability on the bond, stemming from the principal's liability in the underlying action, must be determined before the motion is filed [*see, e.g., Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc. (9th Cir 1994) 16 F3d 1032* ; *Buddy Sys., Inc. v. Exer-Genie, Inc. (9th Cir 1976) 545 F2d 1164, 1166-1167*]. Typically, a final adjudication on the merits in favor of the person for whose benefit the bond was issued is a prerequisite to the motion [*Alabama Mills v. Mitchell (D Col 1958) 159 F Supp 637, 639*].

Cross Reference:

Determining the surety's liability, see *§§ 19.119 -19.123*.

19.128[2] Motion Must Be Filed Before Exoneration of Bond. A Rule 65.1 motion must be brought before the bond is exonerated [*Buddy Sys., Inc. v. Exer-Genie, Inc. (9th Cir 1976) 545 F2d 1164, 1166-1167*].

19.128[3] Excessive Delay May Be Fatal. Although Rule 65.1 sets forth no time limit for making the motion, a California district court found that a motion to determine damages stemming from a wrongful preliminary injunction made two and one-half years after the final decree dissolving the injunction was unreasonably late [*Stoody Co. v. Mikels (SD Cal 1941) 40 F Supp 53, 53-54*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.129 Advance Notice of Motion Is Required.

No specific local rules govern advance notice of a Rule 65.1 motion. The moving party must provide the same advance notice of Rule 65.1 motion as the local rules require for any other motion [*see , e.g., ND Cal Civ LR 7-2(a)* (35 days); *SD Cal Civ LR 7.1(e.1)* (28 days)].

Cross Reference:

Notice required for motions, see Ch. 26, Pretrial Motion Practice, see *§ 26.16*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures

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19.130 Attempt Resolution With Opposing Counsel.

No specific local rules govern attempts at informal resolution prior to filing a Rule 65.1 motion. The moving party must contact opposing counsel and confer to attempt resolution as the local rules require for any other motion [*see , e.g., CD Cal Civ LR 7-3* (conference must take place before motion is filed)].

Cross Reference:

Required attempt at informal resolution, see Ch. 26, Pretrial Motion Practice, see *§ 26.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures

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19.131 Provide Notice to Surety by Service on Surety or by Serving Papers on Clerk.

19.131[1] Notice Must Be Provided to Surety. A judgment against the surety will not stand if notice has not been given [*Beatrice Foods Co. v. New England Printing & Lithographing Co. (Fed Cir 1990) 930 F2d 1572, 1576-1577*].

19.131[2] Clerk of Court Acts As Surety's Agent. A surety who provides security through a bond, stipulation, or other undertaking under the Federal Rules of Civil Procedure irrevocably appoints the court clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served [*Fed R Civ P 65.1*]. If the clerk is served, the clerk must then mail copies to the sureties if their addresses are known [*Fed R Civ P 65.1*].

19.131[3] LOCAL PRACTICE: Direct Notice to Surety.

19.131[3][a] LOCAL PRACTICE: CD Cal Requirements. In the Central District, service of the motion on personal sureties must be made pursuant to *Fed R Civ P 5(b)*; service on corporate sureties must be made as provided by *31 USC § 9306* [*CD Cal Civ LR 65-8*].

19.131[3][b] LOCAL PRACTICE: ED Cal Requirements. In the Eastern District, notwithstanding the appointment of the clerk as agent for service of process, any person seeking judgment against any surety must make a good faith effort to give actual notice to the surety of the Rule 65.1 motion or any other action by which judgment is sought against the surety [*ED Cal Gen LR 151(k)*].

19.131[3][c] LOCAL PRACTICE: ND Cal Requirements. The Northern District has no local rules provision on notice to sureties.

19.131[3][d] LOCAL PRACTICE: SD Cal Requirements. In the Southern District, service of the motion on personal sureties must be made pursuant to *Fed R Civ P 5(b)*; service on corporate sureties must be made as provided by *31 USC § 9306* [*SD Cal Civ LR 65.1.2(g.2)*].

Cross Reference:

Local rules governing filing, copies, memoranda of law, and submission of a proposed order, see Ch. 26, Pretrial Motion Practice, see *§§ 26.19[3]*, *26.20[2]*, *26.21[5]*, *26.23[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProceduresGovernmentsCourtsClerks of CourtGovernmentsCourtsRule Application & Interpretation

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19.132 Adverse Ruling May Be Appealed to Ninth Circuit.

If the district court decides against execution of the bond, the order may be appealed [*see Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc. (9th Cir 1994) 16 F3d 1032, 1033*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesBondsExecutionsCivil ProcedureAppealsAppellate JurisdictionGeneral Overview

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19.133 CHECKLIST: Opposing Motion to Enforce Surety's Liability Under Rule 65.1.

☐ Review grounds for opposing Rule 65.1 motion:

- ○ Automatic stay of bankruptcy.
- ○ Surety's liability has not been determined.
- ○ Bond has been exonerated.
- ○ Motion is untimely.

Discussion:
See *§§ 19.135 -19.137*

☐ Review grounds for challenging moving party's calculation of damages.

☐ Determine whether to appeal determination of liability.

Discussion:
See *§ 19.138*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesBondsObjectionsCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProceduresCivil ProcedureAppealsAppellate JurisdictionGeneral Overview

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19.134 Options and Strategy for Party Opposing Rule 65.1 Motion.

Before opposing the Rule 65.1 motion, counsel for the surety should determine if anything can be gained by that opposition. Entering into a negotiated payment may be more advantageous for the client if the moving party will compromise on damages.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureRemediesBondsObjectionsCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures

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19.135 Rule 65.1 Procedure May Be Delayed by Injunction.

The summary Rule 65.1 procedures to enforce a surety's liability may be delayed by an injunction. While Rule 65.1 provides a simplified *procedure* for collecting on a bond, this does not mean that such a procedure, like the more complicated procedure of a full-fledged lawsuit, cannot be stayed by a lawfully entered injunction [*Celotex Corp. v. Edwards (1995) 514 US 300, 311-312, 115 S Ct 1493, 131 L Ed2d 403*].

Cross Reference:

Discussion of injunctive relief, see *§ 19.03* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsObjectionsCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProceduresCivil ProcedureRemediesInjunctionsGeneral Overview

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19.136 District Court Lacks Jurisdiction Over Suit on Injunction Bond Once Bond Is Exonerated.

A district court cannot entertain jurisdiction over a suit on an injunction bond after the bond has been exonerated [*Buddy Sys., Inc. v. Exer-Genie, Inc. (9th Cir 1976) 545 F2d 1164, 1166* (jurisdiction under *28 USC § 1352*)]. Likewise, the district court should lack jurisdiction to entertain a Rule 65.1 motion after the bond has been exonerated.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureRemediesBondsObjectionsCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures

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19.137 Motion Must Be Timely.

Although Rule 65.1 sets forth no time limit for making the motion, a California district court found that a motion to determine damages stemming from a wrongful preliminary injunction made two-and-a-half years after the final decree dissolving the injunction was unreasonably late [*Stoody Co. v. Mikels (SD Cal 1941) 40 F Supp 53, 53-54*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureRemediesBondsSuretiesProceduresCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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19.138 Appeal From Determination of Liability.

The surety may appeal to the court of appeals from the district court's final determination of its liability on the bond [*Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc. (9th Cir 1994) 16 F3d 1032, 1033*]. The court of appeals reviews de novo a district court's decision to execute a bond [*Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc. (9th Cir 1994) 16 F3d 1032, 1033* ; *Matek v. Murat (9th Cir 1988) 862 F2d 720, 733* , *abrogated on other grounds* by, *Holden v. Hagopian (9th Cir 1992) 978 F2d 1115*]. A district court's computation of damages is reviewed under the clearly erroneous standard [*Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc. (9th Cir 1994) 16 F3d 1032, 1033*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsExecutionsCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProceduresCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsStandards of ReviewClearly Erroneous Review

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19.139 CHECKLIST: Initial Considerations.

☐ Determine whether voluntary deposit is appropriate:

○ As statutory condition of proceeding with interpleader action.

Authority:
28 USC § 1335(a)(2)

Discussion:
See *§ 19.140[1]*

○ As voluntary or court-ordered condition of proceeding with Rule interpleader.

Authority:
Fed R Civ P 22

Discussion:
See *§ 19.140[2]*

○ As tender of payment that will stop accrual of interest.

Discussion:
See *§ 19.140[3]*

☐ Determine whether action is pending that seeks, at least as part or relief sought, judgment for money or property capable of being deposited.

Discussion:
See *§ 19.141*

☐ Determine whether disputed money or property is suitable for delivery to court.

Discussion:
See *§ 19.142*

☐ Determine whether to deposit all or part of disputed money or property.

Discussion:
See *§ 19.143*

☐ Consider alternatives to deposit under Rule 67 for handling funds while action is pending, such as:

- ○ Letter of credit.
- ○ Escrow account.
- ○ Joint signature account in names of counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory InterpleadersCivil ProcedureRemediesDeposits in Court

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19.140 Deposit With Court Is Appropriate in Interpleader and to Stop Accrual of Interest.

19.140[1] Deposit Is Condition of Interpleader Under Federal Interpleader Act. Deposit with the court of the disputed money or property, or the giving of a bond, is a condition of maintaining a federal statutory interpleader action [*28 USC § 1335(a)(2)*]. Failure to deposit the entire amount in controversy is a jurisdictional defect [*see American Smelting & Refining Co. v. Naviera Andes Peruana, SA (SDNY 1959) 182 F Supp 897, 898*].

Cross Reference:

Requirements of statutory impleader, see Ch. 4, Determining Parties to the Action, see *§§ 4.56[1], 4.57[1], 4.58[1], 4.59[1][a], [2][a].*

19.140[2] Deposit May Be Required As Condition of Proceeding With Rule Interpleader. In an interpleader action under *Fed R Civ P 22*, the stakeholder is not required to deposit the disputed money or property with the court [*see Gelfgren v. Republic Nat'l Life Ins. Co. (9th Cir 1982) 680 F2d 79, 82*]. However, Rule 67 permits the deposit and allows the court to order the party in possession of property to deposit it with the court [*Fed R Civ P 67*; *see Dean Witter Reynolds, Inc. v. Fernandez (SD Fla 1979) 489 F Supp 434*].

Cross Reference:

Requirements of rule interpleader, see Ch. 4, Determining Parties to the Action, see *§§ 4.56[2], 4.57[2], 4.58[2], 4.59[1][b].*

19.140[3] Deposit Will Stop Accrual of Interest. If leave of court is obtained to deposit money or property with the court under Rule 67, and the deposit is made, that deposit will stop the accrual of interest pending a final resolution of the rights of the parties with respect to the fund [*see Cajun Elec. Power Coop., Inc. v. Riley Stoker Corp. (5th Cir 1990) 901 F2d 441, 445* ; *United States ex rel. Garrett v. Midwest Constr. Co. (5th Cir 1980) 619 F2d 349, 353*]. However, a Rule 67 deposit cannot be used to alter the contractual relationship or duties of the parties [*see LTV Corp. v. Gulf States Steel, Inc. (DC Cir 1992) 969 F2d 1050, 1063*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory InterpleadersCivil ProcedureRemediesDeposits in CourtCivil ProcedureRemediesJudgment InterestPrejudgment Interest

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19.141 Action Must Seek Judgment for Money or Property Capable of Being Deposited.

Under Rule 67, a party with leave of court may deposit money or other property with the court in an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or other thing capable of delivery [*Fed R Civ P 67(a)*].

Example:

Rule 67 did not permit deposit of funds into court when plaintiff petitioned for confirmation of arbitration award, therefore not seeking a money judgment [*Eurolines Shipping Co. v. Metal Transp. Corp. (SDNY 1980) 491 F Supp 590, 592*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureRemediesDeposits in Court

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19.142 Money or Property Must Be Suitable for Delivery to Court.

While money is the most commonly deposited thing under Rule 67, the rule allows for the deposit of any thing capable of delivery [*Fed R Civ P 67(a)*]. However, the court has the discretion to refuse to authorize the deposit of other types of property [*see John v. Sotheby's, Inc. (SDNY 1992) 141 FRD 29, 34*].

Example:

A district court refused to grant leave under Rule 67 to allow an auction house to deposit an oil painting, which was the subject of an ownership dispute, with the clerk of the court because the auction house would remain in the case even if the deposit was allowed and the painting would be better preserved if it remained with the auction house, which had facilities to store the work [*John v. Sotheby's, Inc. (SDNY 1992) 141 FRD 29, 34*].

The court also has the discretion to refuse to allow the deposit of money when the deposit would impose an unnecessary burden on the clerk and would not affect the involvement of the depositor in the litigation [*see Design Benefit Plans v. Enright (ND Ill 1996) 940 F Supp 200, 207*].

Example:

An insurance agency involved in a dispute with a former agent over unpaid commissions and breach of restrictive covenants was not permitted to deposit the disputed commissions with the clerk under Rule 67. Allowing the deposit would involve substantial sums in excess of $4 million, entail a series of ongoing deposits, and not affect the involvement of the agency in the litigation [*Design Benefit Plans v. Enright (ND Ill 1996) 940 F Supp 200, 206-207*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureRemediesDeposits in CourtGovernmentsCourtsClerks of Court

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19.143 All or Only Part of Disputed Money or Property May Be Deposited.

Rule 67 permits the deposit of "all or part of the money or thing" in dispute [*Fed R Civ P 67*].

Distinguish:
In a statutory interpleader action, the entire sum in dispute must be deposited [*28 USC § 1335(a)(2)*].

Strategic Point:

Even if the client wants to only deposit only a part of the disputed sum, the court retains the discretion to require a deposit of the full amount [*see LTV Corp. v. Gulf States Steel, Inc. (DC Cir 1992) 969 F2d 1050*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersStatutory InterpleadersCivil ProcedureRemediesDeposits in Court

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19.144 CHECKLIST: Moving for Leave to Deposit Disputed Money or Property With Court.

☐ Review Rule 67 requirements.

Authority:
Fed R Civ P 67

Discussion:
See *§§ 19.146 -19.150*

☐ Review local rules and individual judge's rules to ascertain preconditions for filing motion.

Timing:
Ensure that timing of motion is proper.

☐ Draft motion, or stipulation, and proposed order.

Discussion:
See § see *§ 19.146 -19.149*

Form:
See *§ 19.164*

☐ Obtain clerk's pre-approval of order if required by local rule.

Discussion:
See *§ 19.149[2]*

☐ Serve and file motion papers:

- ○ Notice of motion.
- ○ Supporting affidavits.
- ○ Memorandum of points and authorities.

Discussion:
See *§§ 19.146*, *19.147*

☐ Serve court order permitting deposit on clerk of court.

Discussion:
See *§ 19.150*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesDeposits in CourtGovernmentsCourtsClerks of CourtGovernmentsCourtsRule Application & Interpretation

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19.145 Options and Strategy for Moving Party.

The party contemplating a Rule 67 motion for leave to deposit disputed money or other property should consider whether a private alternative, such as a private escrow, for the handling of funds during the litigation are available and whether the other parties to the suit are amenable to making such an arrangement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewCivil ProcedureRemediesDeposits in Court

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19.146 Motion or Stipulation Is Required to Obtain Leave to Make Deposit Unless Deposit Is Allowed As of Right.

19.146[1] Noticed Motion Is Required to Obtain Leave to Make Deposit Unless Local Rules Provide Otherwise. Under Rule 67, a deposit with the court of disputed money or other property requires notice to all other parties and leave of court [*Fed R Civ P 67*]. Unless local rules permit otherwise, the application for leave must be made by written motion served on all parties to the action [*see Fed R Civ P 5(a), 7(b)(1); ED Cal Gen LR 150(a), (b)*].

19.146[2] LOCAL PRACTICE: ED Cal Requirements--Deposit Allowed As of Right in Interpleader Action. In the Eastern District, it is not necessary to seek specific leave of court before making a deposit into the registry of the court in an interpleader action. Leave of court is granted to make deposits into the registry of the court in all interpleader actions as of right [*ED Cal Gen LR 150(a)*].

19.146[3] LOCAL PRACTICE: ED Cal Requirements--Leave of Court to Make Deposit May Be Requested by Stipulation. In the Eastern District, unless the deposit is permitted as of right [*see 19.146[2]*], leave of court may be requested by stipulation of all parties who have appeared [*ED Cal Gen LR 150(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureRemediesDeposits in CourtGovernmentsCourtsRule Application & Interpretation

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19.147 Notice Is Required for Motion.

19.147[1] General Notice Rules Apply Unless Local Rules Specify Otherwise. Unless otherwise specified, the moving party must provide the same advance notice of Rule 67 motion as the local rules require for any other motion [*see, e.g., ND Cal Civ LR 7-2(a)* (35 days); *SD Cal Civ LR 7.1(e.1)* (28 days)].

Cross Reference:

Notice required for motions, see Ch. 26, Pretrial Motion Practice, see *§ 26.16*.

19.147[2] LOCAL PRACTICE: ED Cal Requirements--Seven Days' Notice Required. In the Eastern District, the motion must be set on the regular calendar of the assigned magistrate judge in Sacramento or Fresno not less than seven days from the date of filing and service [*ED Cal Gen LR 150(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesDeposits in CourtGovernmentsCourtsRule Application & Interpretation

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19.148 Money Must Be Deposited With Treasurer or Designated Depository.

19.148[1] Money Must Be Deposited in Name of and to Credit of Court. Money deposited with the clerk under Rule 67 must be deposited with the Treasurer of the United States or a designated depository, in the name of and to the credit of the court [*Fed R Civ P 67(b)*; *28 USC § 2041*]. The funds deposited must be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court [*Fed R Civ P 67(b)*].

19.148[2] LOCAL PRACTICE: ED Cal Requirements--Depositor May Request Special Placement. In the Eastern District, when no specific order is given as to the form or placement of the deposit, the deposit will be placed in an interest-bearing account at a financial institution designated by General Order of the Court as qualifying for the deposit of registry funds [*ED Cal Gen LR 150(c)*]. However, the depositor, or another party, may request that the money be placed in a particular type of account or in a particular financial institution or that other particular provisions govern the placement of the deposit [*ED Cal Gen LR 150(d)*].

19.148[3] LOCAL PRACTICE: SD Cal Requirements--Moving Party Must Request Deposit in Other Than Passbook Savings Account. In the Southern District, unless otherwise ordered by the district judge, all funds deposited in the registry in which the principal exceeds $4,999.99 will be deposited in a passbook savings account [*SD Cal Civ LR 67.1(c.1)*] and the moving party must request a deposit under other terms if desired.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewCivil ProcedureRemediesDeposits in CourtGovernmentsCourtsRule Application & Interpretation

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19.149 Order Must Comply With Federal And Local Rules.

19.149[1] Order Required to Make Deposit Unless Local Rule Provides for Deposit As of Right. Under Rule 67, a deposit with the court of disputed money or other property requires an order granting leave of court to make the deposit [*Fed R Civ P 67(a)*]. However, in the Eastern District, leave of court is granted to make deposits into the registry of the court in all interpleader actions as of right [*ED Cal Gen LR 150(a)*].

19.149[2] LOCAL PRACTICE: ED Cal Requirements--Proposed Order Must Be Served on Clerk for Approval. In the Eastern District, when service of the motion is made [*see 19.147[2]*], a copy of the proposed order must be personally delivered promptly to the Clerk or Deputy Chief Clerk for inspection [*ED Cal Gen LR 150(b)*]. A copy of the proposed order must also be personally delivered to the Clerk or Deputy Chief Clerk when the parties have stipulated to deposit [*ED Cal Gen LR 150(c)*; *see 19.146[3]*]. The Clerk will then inspect the proposed order for proper form and content and compliance with *ED Cal Gen LR 150* before signature by the court. The order must contain the words "Approved as to Form _____, Clerk, U.S. District Court" [*ED Cal Gen LR 150(e)*].

19.149[3] LOCAL PRACTICE: ED Cal Requirements--Order Must Specify Amount and Placement of Deposit. In the Eastern District, the order directing the clerk to invest the deposited funds must include [*ED Cal Gen LR 150(f)*]:

- The amount to be invested.
- The name of the approved depository.
- A designation of the type of account or instrument in which the funds must be invested.

19.149[4] LOCAL PRACTICE: SD Cal Requirements--Order Must Specify Amount and Placement of Deposit. The order directing the clerk to invest the deposited funds must include [*SD Cal Civ LR 67.1(d.2)*]:

- The amount to be invested.

- The name of the approved depository.

- A designation of the type of account or instrument in which the funds must be invested.

- Wording that directs the clerk to assess a charge for the handling of the funds in accordance with the fee schedule issued by the Director of the Administrative Office of the U.S. Courts.

- The following paragraph: "IT IS ORDERED that counsel present-ing this order personally serve a copy thereof on the clerk or the chief deputy. Absent the aforementioned service, the clerk is hereby relieved of any personal liability relative to compliance with this order."

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureRemediesDeposits in CourtGovernmentsCourtsRule Application & Interpretation

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19.150 Service of Order Must Comply With Federal and Local Rules.

19.150[1] Serve Order Permitting Deposit on Clerk of Court and Other Parties. The party making the deposit must serve the order permitting deposit on the clerk of the court, as well as all other parties [*Fed R Civ P 67*]. This assures that the clerk knows what is being deposited and what treatment has been ordered for the particular deposit [*Fed R Civ P 67*, Committee Note of 1983].

19.150[2] LOCAL PRACTICE: ED Cal Requirements--Counsel for Depositor Has Responsibility of Personal Delivery of Order to Clerk. In the Eastern District, counsel presenting the order must deliver a signed copy to the clerk or chief deputy clerk personally. Absent personal service, the clerk is relieved of any personal liability relating to compliance with the order [*ED Cal Gen LR 150(g)*].

19.150[3] LOCAL PRACTICE: CD Cal Requirements--Personal Service Required on Designated Clerk. In the Central District, for purposes of Rule 67, service on the clerk of court of an order for deposit to an interest-bearing account means personal service on the clerk, chief deputy clerk, finance director or fiscal operations officer [*CD Cal Civ LR 67-1*].

19.150[4] LOCAL PRACTICE: SD Cal Requirements--Personal Service on Clerk Required If Order Directs Deposit in Other Than Passbook Savings Account. In the Southern District, it is the responsibility of the interested party to serve the clerk or chief deputy clerk personally with any order that directs a registry deposit other than of funds into a passbook savings account. If the clerk or chief deputy clerk is not personally served with the order, it will be presumed that the court has no notice, actual or constructive, of the terms and conditions of the order [*SD Cal Civ LR 67.1(d.1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.151 Adverse Ruling May Be Appealed to Ninth Circuit.

The decision whether to allow a Rule 67 deposit, and in what amount, lies within the discretion of the district court [*LTV Corp. v. Gulf States Steel, Inc. (DC Cir 1992) 969 F2d 1050*]. If the district court decides against granting leave to make the deposit, the order may be appealed and is subject to review under an abuse of discretion standard [*see, e.g., Cajun Elec. Power Coop., Inc. v. Riley Stoker Corp. (5th Cir 1990) 901 F2d 441*]. However, the granting of a Rule 67 motion is not appealable [*see* Standard Ins. Co. v. Saklad (9th Cir 1995) 1995 US App LEXIS 24098, at *4 (unpublished opinion; generally not citable to court under 9th Cir R 36-3)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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C. Withdrawing the Deposit

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19.152 CHECKLIST: Withdrawing the Deposit.

☐ Determine whether conditions for withdrawal have been met.

☐ Determine whether other parties will stipulate to withdrawal.

Discussion:
See *§ 19.154*

☐ Draft order for disbursement.

Discussion:
See *§ 19.155*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureRemediesDeposits in Court

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19.153 Money Earns Interest While on Deposit.

The funds deposited must be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court [*Fed R Civ P 67(b)*]. The interest is paid to the prevailing party, less any amount paid to the court clerk as a registry fund fee [*see 28 USC §§ 1914, 2041*; *ED Cal Gen LR 150(i)*; *CD Cal Civ LR 67-2*; *SD Cal Civ LR 67.1(c.2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewCivil ProcedureRemediesDeposits in Court

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2-19 MB Practice Guide: Fed Pretrial Civ Proc in CA 19.154

19.154 Claimant Must Show Right to Withdraw Funds.

While the court must decide to whom a sum in the registry of the court is to be paid [*Wood v. Motorola, Inc. (D Haw 1984) 587 F Supp 531, 532* ; *Reliable Marine Boiler Repair, Inc. v. Sum of $35,000.00 (SDNY 1967) 270 F Supp 1017, 1020*], the claimant has the burden of showing that he or she has the right to withdraw the funds deposited in court [*Hansen v. United States (8th Cir 1965) 340 F2d 142, 144*]. Generally, withdrawal of registry funds will not be permitted until the dispute over the funds has been decided. In the Southern District, if the dispute is decided by entry of judgment following a court or jury trial, the order for disbursement will be issued only after the time for appeal has expired or on written stipulation of all parties approved by the court [*SD Cal Civ LR 67.1(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in Court

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Unit 5 Provisional Remedies
CHAPTER 19 Preliminary Injunctions, TROs, and Other Provisional Remedies
VI. DEPOSIT OF MONEY OR PROPERTY INTO COURT
C. Withdrawing the Deposit

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19.155 Order for Disbursement Must Comply With Federal and Local Rules.

19.155[1] Court Order Required to Withdraw Deposit. Money deposited cannot be withdrawn except by court order [*Fed R Civ P 67(b)*; *28 USC § 2042*].

19.155[2] LOCAL PRACTICE: ED Cal Requirements--Order Must Specifically Direct Clerk to Disburse Funds. In the Eastern District, an Order for Disbursement must be presented to the court before whom the action is pending for approval and signature. The order must contain specific language "directing the Clerk to disburse funds" to the parties or otherwise as specifically stated in the order [*ED Cal Gen LR 150(h)*].

19.155[3] LOCAL PRACTICE: SD Cal Requirements--Order Must Be Entitled "Order to Disburse Funds" and Contain Other Specified Information. In the Southern District, each order directing the clerk to disburse funds must be clearly entitled "Order to Disburse Funds" [*SD Cal Civ LR 67.1(a)*]. The order must also be without conditions to be met prior to the disbursement of the funds and must contain [*SD Cal Civ LR 67.1(a)*]:

- The taxpayer identification number of the party entitled to the funds.
- The mailing address of the party entitled to the funds.
- Instructions about collecting the fee if the funds have been in an interest-bearing account.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtGovernmentsCourtsRule Application & Interpretation

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C. Withdrawing the Deposit

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19.156 Funds Unclaimed After Five Years Are Deposited With Treasury.

Once the order for withdrawal issues, the money will remain on deposit for five years. Once five years have elapsed with the money remaining unclaimed, the court will cause the money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to the funds may, on petition to the court and on notice to the United States attorney and full proof of his or her right to the funds, obtain an order directing payment to him or her [*Fed R Civ P 67*; *28 USC § 2042*].

Distinguish--There Is No Escheat:

The deposit of funds unclaimed for five years in the Treasury does not work an escheat as the money is merely transferred and any claims to the money are not extinguished [*see United States v. 8.0 Acres of Land (1st Cir 1999) 197 F3d 24, 30*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtEstate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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VII. FORMS
A. Injunctive Relief

2-19 MB Practice Guide: Fed Pretrial Civ Proc in CA 19.157

19.157 Order to Show Cause for Preliminary Injunction With TRO.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	
_____ [*name*],	)	ORDER TO SHOW CAUSE
Defendant	)	AND TEMPORARY
	)	RESTRAINING ORDER
	)	

On the declaration of _____ [*name of declarant*], dated _____, submitted in support of this Order to Show Cause, _____ [*describe other documents, by title and date, submitted in support of order to show cause*], and on all of the pleadings and proceedings previously filed in this action, it is

ORDERED that defendant _____ [*name of defendant against whom injunction is sought*] show cause before this Court on _____ [*date provided by judge*] at _____ [*time of day provided*

by judge], or as soon thereafter as counsel may be heard, at the United States Courthouse located at _____ [*address of court*], Courtroom _____ [*courtroom number*], why an order should not be made, conditional on the posting by the plaintiff of an appropriate undertaking to be determined by the Court, enjoining defendant from _____ [*describe conduct to be enjoined*].

IT IS FURTHER ORDERED that pending the hearing of this motion, defendant _____ [*name of defendant*], defendant's agents, officers, representatives, or other persons having actual notice of this order are enjoined from _____ [*describe conduct to be enjoined*].

IT IS FURTHER ORDERED that service of a copy of this order and of the papers on which it is granted on _____ [*party* designation and name of party against whom relief is sought] by _____ [*specify manner of service, or leave blank space for court to supply*] on or before _____ [*date provided by judge*] shall be sufficient service.

IT IS FURTHER ORDERED that papers in opposition to the motion must be served on the moving party by _____ [*specify manner of service*] on or before _____ [*date provided by judge*].

SO ORDERED.
Dated: _____

_____ [*signature*]

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:
Fed R Civ P 65

Preliminary Injunctions and TROs:
See *§§ 19.08*, *19.09*

Related Forms of Order to Show Cause:
See 11 *Bender's Federal Practice Forms, Forms 65:60*, *65:61*, *65:130-65:132* (Matthew Bender)

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19.158 Motion for Temporary Restraining Order and Preliminary Injunction.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	
_____ [*name*],	)	COMBINED MOTION FOR TEMPORARY RE-
Defendant	)	STRAINING
	)	ORDER AND PRELIMINARY INJUNCTION
	)	(*Fed R Civ P 65(a), (b)*)

Plaintiff moves this court, pursuant to *Rule 65 of the Federal Rules of Civil Procedure*:

1. To issue a temporary restraining order _____ [*state terms of TRO sought*], pending the hearing and determination on plaintiff's request for a preliminary injunction.

2. To issue a preliminary injunction _____ [*state terms of preliminary injunction sought*], pending the final hearing and determination of this cause.

The grounds for this motion, as more fully set forth in the verified complaint and the annexed affidavits of _____ and _____ [*names of affiants*], are that: _____ [*Summarize grounds for both orders, e.g.,* 1. These portions of the order of the Commission are invalid. 2. Unless enjoined, the Commission, unless enjoined, threatens to enforce this order. 3. The order and its enforcement are causing and will cause immediate and irreparable injury to the plaintiff. 4. Unless the operation and enforcement of the order be restrained pending final disposition of the action, the injury to plaintiff in the interim will be irreparable even by final judgment for plaintiff. 5. No injury will be sustained by the defendant or by the public through issuance of a temporary injunction.]

This motion is based on the Motion papers, including this document, the Certificate of Counsel, [the attached Memorandum of Points and Authorities,] the supporting Affidavit of _____ [*name of affiant*], and the verified complaint and all other papers and records on file in this action, together with any argument and evidence that may be presented at the hearing of this motion.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

NOTES.

Authority:
Fed R Civ P 65

Preliminary Injunctions and TROs:
See *§§ 19.08*, *19.09*

Related Forms of Motion:
See 11 *Bender's Federal Practice Forms, Forms 65:10*, *65:20-65:27*, *65:100*, *65:101-65:115*, *65:120*, *65:121* (Matthew Bender)

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19.159 Preliminary Injunction.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	PRELIMINARY INJUNCTION
	)	
	)	

This cause came on to be heard on _____ [*date*] on plaintiff's motion for a preliminary injunction. At that hearing, the court considered the verified complaint, the affidavits submitted in support of the motion and in opposition to it. The court also heard [oral evidence in open court and] the argument of counsel.

After due deliberation, it appears to the court that the defendants _____ [are actually engaged in *or* have threatened to commit or combination of these] and will continue to commit the acts set forth below unless restrained by this court, to the irreparable injury of the plaintiff. The court has made and filed its findings of fact and

conclusions of law on this matter. Therefore, IT IS ORDERED that defendants, their agents, and employees, are enjoined from _____ [*specify acts restrained, e.g.,* holding further hearings closed to the press and the public in the reinstatement appeal of plaintiff].

IT IS FURTHER ORDERED that this Preliminary Injunction shall become of full force and effect at the time that the plaintiff post a Bond approved by the Clerk of this Court in the sum of $_____.

This Preliminary Injunction shall remain in full force and effect until the final judgment in this action or until further order of the Court, whichever occurs first.
Dated: _____

_____

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:
Fed R Civ P 65

Preliminary Injunctions:
See *§ 19.08*

Related Forms of Order:
See 11 *Bender's Federal Practice Forms, Forms 65:50-65:54*, *65:70*, *65:80-65:82*, *65:170*, 65:181-*65:190*, *65:243* (Matthew Bender)

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19.160 Application for Right to Attach Order and Optional Request for Temporary Protective Order.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*], Plaintiff vs. _____ [*name*], Defendant	Civil Action No. _____ APPLICATION FOR RIGHT TO ATTACH ORDER [AND REQUEST FOR TEMPORARY PROTECTIVE ORDER]

Plaintiff _____ [*name*] applies _____ [ex parte *or* after a hearing] for a right to attach order and writ of attachment [*add*, *if seeking protective order*: and a temporary protective order precluding the defendant from transferring, secreting, or otherwise disposing of any asset pending the hearing on the right to attach order].

Grounds for Relief

Defendant _____ [*name*] is _____ [*specify, e.g.,* a natural person who resides in California *or* a corporation qualified to do business in California].

Attachment is sought to secure recovery on a claim on which attachment may issue under *California Code of Civil Procedure Section 483.010*.

Attachment is not sought for a purpose other than the recovery of a claim on which the attachment is based.

Plaintiff has no information or belief that the claim is discharged or that the prosecution of the claim is stayed in a proceeding under Title 11 of the United States Code (bankruptcy).

Plaintiff's claims arise out of the conduct by the defendant of a trade, business, or profession, The claims are not based on the sale or lease of property, the furnishing of services, or the loan of money used by the defendant primarily for personal, family, or household purposes.

The facts showing the plaintiff is entitled to a judgment on the claims on which the attachment is based are set forth, with particularity, in the _____ [verified complaint *or* the attached affidavit of John Smith].

The amount to be secured by the attachment is $_____, which includes estimated costs of $_____ [*add, if appropriate*: and estimated attorney fees of $10,000].

Plaintiff is informed and believes that the following property sought to be attached is subject to attachment and a method of levy for attaching the property is provided by the California Code of Civil Procedure: _____ [*describe property, e.g.,* any property of the defendant who is not a natural person].

Plaintiff is informed and believes that the property described above is not exempt from attachment.

[*ADD, if court previously issued right to attach order*]

The Court has previously issued a Right to Attach Order on _____ [*date*].

[*ADD, if defendant is a nonresident*]

The nonresident defendant _____ [has *or* has not] filed a general appearance in this action.

[*ADD, if seeking temporary protective order*]

Plaintiff is informed and believes, on application for a Temporary Protective Order, that Plaintiff will suffer great and

irreparable injury if the order is not granted because, as is shown in the attached affidavit of _____ [*name of affiant*], _____ [*specify reason order is required, e.g.,* Defendant is in the process of concealing and transferring her assets for the express purpose of rendering herself judgment proof].

The exact terms of the protective order sought are _____ [*specify*].

[*CONTINUE*]

Plaintiff has filed an undertaking in the amount of $_____.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____
[*party's status and name*]

VERIFICATION

I declare under penalty of perjury that all of the statements made in this Application are true and correct.

I executed this declaration at _____ [*city, state*] on _____ [*date*].

_____ [*signature of Plaintiff*]

_____ [*typed name*]

NOTES.

Authority:
Fed R Civ P 64; *CCP §§ 482.030*, *484.020*; California Judicial Council Form AT-105

Requirements for application for right to attach order:
See *§ 19.49*

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CHAPTER 19 Preliminary Injunctions, TROs, and Other Provisional Remedies
VII. FORMS
C. Appointment of Receiver

2-19 MB Practice Guide: Fed Pretrial Civ Proc in CA 19.161

19.161 Order to Show Cause--Appointment of Receiver.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	ORDER TO SHOW CAUSE
	)	APPOINTMENT OF RECEIVER
	)	

To _____ [*name of party, e.g.,* Mary Jones]:

IT IS ORDERED that you appear before this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], on _____ [*date*], at _____ [*time, e.g.,* 10:00 a.m.], and then and there show cause why a receiver should not be appointed in this action for the purpose of _____ [*state role of receiver*], on the ground[s] that _____ [*state basis for appointment, e.g.,* the property is in imminent danger of being harmed or lost].

IT IS FURTHER ORDERED that service of a copy of this Order to Show Cause by _____ [*moving party, e.g.,* Plaintiff John Smith], together with all of the papers and materials filed with the Court, by hand delivery to _____ [*name of party, e.g.,* Mary Jones] or his/her/its attorney, not later than _____ [*time, e.g.,* 4:00 p.m.] on _____ [*date*], will constitute sufficient service of this order.
Dated: _____

_____

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:
Fed R Civ P 66

Drafting Order to Show Cause:
See *§§ 19.92, 19.105*

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19.162 Notice of Motion and Motion for Appointment of Receiver.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR AP-
_____ [*name*],	)	POINTMENT OF RECEIVER
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order (1) appointing a receiver in this action for the purpose of _____ [*state role of receiver*], on the ground[s] that _____ [*state basis of motion e.g.,* the property is in imminent danger of being harmed or lost]; and (2) granting such other relief as may be appropriate.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service.*]

NOTES.

Authority:
Fed R Civ P 66

Drafting Notice of Motion:
See *§§ 19.92, 19.105*

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19.163 Notice of Motion and Motion for Damages for Wrongful Injunction.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR DAM-
_____ [*name*],	)	AGES FOR WRONGFUL INJUNCTION
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for:

1. An order setting a hearing to determine the damages suffered by this defendant as a result of the preliminary injunction restraining the defendant, during the pendency of this action, from _____ [*specify subject of injunction*].

2. An order for a judgment compelling the plaintiff, and the surety on the bond filed by the plaintiff in connection with the preliminary injunction, to pay the damages determined by the Court to the defendant forthwith.

Defendant _____ [*name*] is entitled to a hearing and an order compelling the plaintiff and the plaintiff's sureties to pay the defendant the damages it suffered as a result of the injunction because:

1. On _____ [*date*], the plaintiff initiated this action seeking an injunction from this Court restraining the defendant from _____ [*specify subject of injunction*].

2. On _____ [*date*], this Court entered its preliminary injunction restraining defendant from _____ [*specify subject of injunction*] pending final judgment in this action or further order of the Court.

3. As a condition of issuing the preliminary injunction, the Court required the plaintiff to post a surety bond in the sum of $_____, to guarantee payment of any damages that defendant might suffer if the Court's ultimate decision in the action was that defendant was wrongfully enjoined. _____ [*Name of surety*] was the surety on the bond and pledged to pay the damages in question up to the full amount of the bond in the event that the defendant suffered damages as a result of the injunction and the determination by the Court that the injunction was wrongful.

4. As a result of the injunction, defendant was damaged in an amount in excess of the bond amount. As more fully explained in the Affidavit of _____ [*name of affiant*], the following damages were suffered by defendant: _____ [*set forth facts showing damages suffered by defendant*]. These damages were a direct and proximate result of the wrongful injunction in that _____ [*specify facts showing causation*].

5. On _____ [*date*], judgment in this action was rendered by this Court in favor of the defendant on the grounds that _____ [*specify grounds for decision*].

6. As more fully explained in the accompanying Memorandum of Points and Authorities, under the terms of the bond, the defendant is entitled to recover the damages described above from the plaintiff and from the surety on the plaintiff's bond. Under the provisions of *Rule 65.1 of the Federal Rules of Civil Procedure* [*add, if appropriate any governing local rules, e.g.,* and *ED Cal Gen LR 151*], this defendant is entitled to a liability determination by means of this motion and is not required to institute a separate action to recover these damages.

7. Pursuant to *Rule 65.1 of the Federal Rules of Civil Procedure*, notice of this motion has been given to the clerk of the court.

[*ADD, if notice was also provided directly to the surety*:]

Notice was also given to the surety as follows: _____.

[*CONTINUE*]

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 65.1

Surety's Liability Under Injunction Bond:
See *§ 19.121*

Motion Procedure:
See *§§ 19.124 -19.132*

Timing:
See *§ 19.137*

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19.164 Notice of Motion for Leave to Make Deposit in Court Following Refusal of Tendered Payment.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	Civil Action No. _____
Plaintiff	
vs.	NOTICE OF MOTION AND MOTION FOR LEAVE TO MAKE DEPOSIT
_____ [*name*],	
Defendant	
	Date of Hearing: _____
	Time of Hearing: _____
	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order, pursuant to *Fed R Civ P 67*, granting leave to deposit the sum of $_____ with the court and that, following the deposit, _____ [*party's status and name*] be discharged from liability as to that sum, as well as any interest that may accrue on that sum.

_____ [*Party's status and name*] contends that the deposit should be permitted because:

1. This action involves a claim _____ [*specify nature of claim and reason for deposit, e.g.,* asserted by Plaintiff John Smith on a written contract. In her answer, Defendant Mary Jones has admitted the validity of the obligation and that the sum of $125,000 is due and owing to Plaintiff. Defendant has denied that any other or additional sums are due and owing. On April 1, 2003, Defendant tendered to Plaintiff the said sum of $125,000, which Defendant contends is sufficient to pay all of Defendant's obligations on the written contract that is the subject of this suit. Plaintiff refused the tender].

2. Unless the deposit is allowed, and the _____ [*party's status and name*] is released from liability on this agreed sum, this sum may continue to generate interest under the controlling law of the State of _____. In contrast, if the deposit is allowed, _____ [*party's status and name*] may be excused from any further obligations on this sum, including interest obligations caused by the refusal of _____ [*opposing party's status and name*] to accept payment of this sum.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 67

Drafting Motion:
See *§§ 19.146 -19.150*

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VII. FORMS
F. Local District Court Forms

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19.165 Local Central District Court Attachment Forms.

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Right to Attach Order After Hearing and Order for Issuance of Writ of Attachment After Hearing (CV-4B)

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Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Notice of Attachment (CV-4C)

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Writ of Attachment After Hearing/Ex Parte (CV-4D)

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Application for Right to Attach Order, Temporary Protective Order, etc. (CV-4F)

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Order to Terminate, Modify, or Vacate Temporary Protective Order (CV-4L)

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Application and Order for Appearance and Examination (CV-4P)

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Unit 6 Class Actions
CHAPTER 20 Class Actions

2-20 MB Practice Guide: Fed Pretrial Civ Proc in CA 20.syn

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Unit 6 Class Actions
CHAPTER 20 Class Actions
I. STRATEGY

2-20 MB Practice Guide: Fed Pretrial Civ Proc in CA 20.01

20.01 Scope.

This chapter covers procedures in class actions, including:

- Determining whether the action meets the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation [*see 20.06*].
- Determining whether the action may be maintained under one of the categories of Rule 23(b) [*see 20.07*].
- Filing a class action [*see 20.08 -20.13*; *Form: 20.58*].
- Moving for class certification [*see 20.14 -20.23*; *Forms: 20.59 -20.60*].
- Providing notice of class certification and affording class members an opportunity to opt out [*see 20.24 -20.30*].
- Seeking appointment as class counsel, and seeking a fee award [*see 20.31 -20.35*].
- Seeking Rule 23(d) orders [*see 20.36 -20.38*].
- Settling or dismissing a class action [*see 20.39 -20.44*].
- Special procedures that apply in securities class actions [*see 20.45 -20.57*; *Forms: 20.61 -20.63*].

Core Rule:
Fed R Civ P 23.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass

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CHAPTER 20 Class Actions
I. STRATEGY

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20.02 Objective and Strategy.

The class action is a procedural device that allows the resolution of what might otherwise be multiple lawsuits in a single action when the claims that would be the subject of the otherwise separate suits involve similar or identical questions of law and fact. The class action both promotes judicial economy by avoiding multiple and possibly inconsistent adjudications of the same issues in different lawsuits, and allows resolution of claims when individual lawsuits would not be economically feasible because the amount at stake in each individual suit is not worth the cost of litigation. While most cases involve plaintiff classes, defendant classes are also possible under *Fed R Civ P 23*.

The class action structure imposes additional many procedural requirements that can add to the high level of complexity of class action cases. In addition to developing knowledge concerning the substantive aspects of the case, counsel must also be prepared with respect to the class action prerequisites early in the case so that the court can rule on the class certification issue "at an early practicable time." Moreover, when an action is certified as a class action, the court must become involved in and approve aspects of the litigation that would otherwise be solely in the control of the parties, including settlement and even choice of counsel. The court will take these and similar actions to assure that the parties protect the interests of absent class members.

Many different types of actions may be brought as class actions if the requirements of Rule 23 are met: for example, securities fraud or consumer fraud actions; employment discrimination and other civil rights cases; environmental litigation, RICO actions; antitrust actions, and even personal injury actions. Class actions range from matters with small individual recoveries for class members to cases in which each class member may recover substantial damages even though the number and similarity of the individual claims makes class treatment appropriate. Because many claims are aggregated, the risks in a class action are typically high for both sides.

Detailed Discussion/Forms:

5 Moore's Federal Practice, Ch. 23, Class Actions (Matthew Bender 3d ed.).

5 Bender's Federal Practice Forms, Rule 23, Class Actions (Matthew Bender).

Cross Reference:

For tips on updating case law and expanding your research with additional resources, see **How to Use**

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Legal Topics:

For related research and practice materials, see the following legal topics:
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Unit 6 Class Actions
CHAPTER 20 Class Actions
II. DETERMINING WHETHER PREREQUISITES TO CLASS ACTION CAN BE SATISFIED

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20.03 CHECKLIST: Determining Whether Prerequisites to Class Action Can Be Satisfied.

☐ Determine whether the proposed class is sufficiently definite and ascertainable so that the court can order the requested relief.

Authority:
Fed R Civ P 23(c)(1)(B)

Discussion:
See *§ 20.05*

☐ Determine whether the four requirements of Rule 23(a) can be met:

○ Numerosity: The class must be so numerous that joinder is impracticable.

○ Commonality: Some questions of fact or law must be common to the class members.

○ Typicality: The claims or defenses of the class representatives must be typical of those of the other class members.

○ Adequacy of representation: The class representatives must be able to protect the class interests fairly and adequately, meaning, among other things, that:

☐ The class representative has no conflicts of interest with the class.

☐ The class representative is not subject to unique defenses.

☐ The class representative is reasonably familiar with the issues in the case.

Authority:
Fed R Civ P 23(a)

Discussion:
See *§ 20.06*

☐ Determine whether the action may be maintained under at least one of the categories of Rule 23(b):

○ The prosecution of separate actions would create a risk of inconsistent adjudications that would establish incompatible standards of conduct for the party opposing the class.

○ The prosecution of separate actions would create a risk of adjudications with respect to individual class members that would, as a practical matter, dispose of or substantially impair the interests of the other class members (e.g., an interest in a limited fund).

○ The action seeks primarily injunctive or declaratory relief with respect to the class as a whole.

○ Questions of law or fact common to the class predominate over individual questions, and the class action procedure is superior to other methods of adjudicating the controversy.

Authority:
Fed R Civ P 23(b)

Discussion:
See *§ 20.07*

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 20 Class Actions
II. DETERMINING WHETHER PREREQUISITES TO CLASS ACTION CAN BE SATISFIED

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20.04 Options and Strategy.

The party seeking to have the case certified as a class action must establish each of the four prerequisites under *Fed R Civ P 23(a)*: numerosity, commonality, typicality, and adequacy of representation.

Additionally, the class proponent must establish that the case falls into one of the four categories for which a class action may be maintained under *Fed R Civ P 23(b)*:

- Separate actions might lead to incompatible standards of conduct for the party opposing the class;
- Separate actions might result in orders that would be dispositive of the interests of non-party class members;
- The action seeks injunctive or declaratory relief with respect to the class as a whole; or
- Common questions predominate over individual questions and a class action is superior to other available methods of adjudicating the controversy.

As an implied condition of *Fed R Civ P 23*, the class proponent must establish that a class exists and can be specifically defined, and that the proposed class representative is a member of the class. The proposed class should be carefully defined in the complaint or in the motion for certification. This is the definition the court will ordinarily consider in making its class certification decision, even though the court has discretion to redefine the class or create subclasses and certify a class based on its redefinition.

Given that the stakes of the action become much greater after a class is certified, the question as to whether a class should be certified will be highly contested in most lawsuits. In fact, in certain cases, the certification question can be the most significant dispute in the case. In the typical plaintiff class action, the class proponent will argue and present evidence that it has met each of the four prerequisites of Rule 23(a), that the action falls into one of the categories of recognizable class actions set out in Rule 23(b), and that the proposed class exists and can be clearly defined. The defendant or defendants will argue that the class proponent has failed to meet these standards.

In a federal diversity suit, *Fed R Civ P 23*, which lists the criteria for proceeding as a class action in federal court, prevails over a state law that limits the claims that may be brought as class actions [Shady Grove Orthopedic Assocs. v. Allstate Ins. Co. (2010) -- US --, 130 S Ct 1431, 176 L Ed2d 311, 317-318 (*Fed R Civ P 23* empowers a federal court to certify a class in each and every case in which the Rule's criteria are met, so that any purported limitation on that power, such as New York state law's prohibition on class actions seeking statutory penalties, necessarily conflicts with it)].

Cross Reference:

Discussion of the procedure for moving for certification, see *20.15*.

Tracking Recent Issues in Class Action Litigation:

Use Mealey's Class Action Litigation Reports to track recent issues in class action litigation:

- Legal tab> Area of Law-By Topic> Class Actions> Search News> Class Actions: Mealey's Litigation Report

  - Sample Search: To track recent issues with regard to class action litigation against pharmaceutical companies, enter the Terms and Connectors search: *pharmaceutical and date aft 2008* To save this as a recurrent search in Mealey's Class Action Litigation Report, click the Save As Alert link on the top center of the results screen complete the options on the Save LexisNexis(R) Alert dialog box.

Legal Topics:

For related research and practice materials, see the following legal topics:
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20.05 Identifiable Class Must Exist.

While *Fed R Civ P 23* does not specifically discuss the requirement of class definition, Rule 23 implicitly requires that a class exist and that the class be capable of specific and precise definition [*see Westways World Travel, Inc. v. AMR Corp. (CD Cal 2003) 218 FRD 223, 230*]. A court may never certify a vague or undefinable class because Rule 23 requires the court to state the class definition in its order certifying the class [*see Fed R Civ P 23(c)(1)(B)*]. Certification may fail if the parties seeking certification do not meet their burden of defining proper classes for the court's consideration [*see In re Paxil Litig. (CD Cal 2003) 212 FRD 539, 545*].

A class definition is sufficiently precise if it enables the court to determine who the class members are for the purposes of granting relief, and for the purposes of providing notice to the class if notice is required. Class members need not be identifiable by name and need not necessarily be identifiable at the commencement of the suit. A class definition that includes future members is not so vague as to preclude certification [*see Probe v. State Teachers' Ret. Sys. (9th Cir 1986) 780 F2d 776, 780*].

Less precision may be acceptable in actions certified under Rule 23(b)(2), which seek injunctive relief with respect to the class as a whole [*see Fed R Civ P 23(b)(2)*]. The court can enforce the relief against the defendant without necessarily identifying all the members of the plaintiff class.

Class membership should depend on objective criteria and not require determination of the merits of the litigation [*see Crosby v. Social Sec. Admin. (1st Cir 1986) 796 F2d 576, 580*]. A class definition is not proper if it makes the actual composition of the class determinable only at the conclusion of the proceedings [*see In re Paxil Litig. (CD Cal 2003) 212 FRD 539, 545*].

The court need not make its certification decision on a "take-it-or-leave-it" basis, and may alter the class definition or definitions proposed by the parties. In particular, the court may divide a proposed class into subclasses [*Fed R Civ P 23(c)(5)*]. This may be appropriate if there are groups within the proposed class that have adverse interests [*see In re Unioil Sec. Litig. (CD Cal 1985) 107 FRD 615, 622*].

Cross References:

Discussion of the court's certification decision and certification order, see *20.16*, *20.17*, *20.20*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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20.05A Standards to Be Applied in Adjudicating Rule 23 Motion for Class Certification.

The Ninth Circuit has summed up the standards to be applied by district courts in adjudicating a Rule 23 motion for class certification as follows [*Dukes v. Wal-Mart Stores, Inc. (9th Cir 2010) 603 F3d 571, 594* (Rule 23(a) requirements were shown, because large class was united by complex array of company wide practices)]:

- First, district courts must perform a rigorous analysis to ensure that the prerequisites of *Fed R Civ P 23* have been satisfied, and this analysis will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims.

- Second, district courts may not analyze any portion of the merits of a claim that do not overlap with the *Fed R Civ P 23* requirements. (A district court performs this analysis for the purpose of determining that each of the requirements has been satisfied.)

- Third, courts must keep in mind that different parts of *Fed R Civ P 23* require different inquiries. (For example, what must be satisfied for the commonality inquiry under *Fed R Civ P 23(a)(2)* is that plaintiffs establish common questions of law and fact, and answering those questions is the purpose of the merits inquiry, which can be addressed at trial and at summary judgment.)

- Fourth, district courts retain wide discretion in class certification decisions, including the ability to cut off discovery to avoid a mini trial on the merits at the certification stage.

- Fifth, different types of cases will result in diverging frequencies with which the district court will properly invoke its discretion to abrogate discovery. (For example, a district court likely would circumscribe discovery more often in a Title VII case than in a securities class action resting on a fraud on the market theory, because the statistical disputes typical to Title VII cases often encompass the basic merits inquiry and need not be proved to raise common questions and demonstrate the appropriateness of class resolution. Plaintiffs pleading fraud on the market, on the other hand, may have to establish an efficient market to even raise common questions or show predominance.)

Legal Topics:

For related research and practice materials, see the following legal topics:
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Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 6 Class Actions
CHAPTER 20 Class Actions
II. DETERMINING WHETHER PREREQUISITES TO CLASS ACTION CAN BE SATISFIED

2-20 MB Practice Guide: Fed Pretrial Civ Proc in CA 20.06

20.06 Four Requirements of Rule 23(a) Must Be Met.

20.06[1] Class Must Be So Numerous That Joinder Is Impracticable. *Fed R Civ P 23(a)* sets out four requirements and the class proponent must meet each requirement for certification. The first requirement is usually termed "numerosity." A court may certify a class only if the proposed class is so numerous that joinder of all the class members would be impracticable [*Fed R Civ P 23(a)(1)*; *see, e.g., In re Wireless Facilities, Inc. (SD Cal 2008) 2008 US Dist LEXIS 69568, at *11-*12* (numerosity satisfied when number of potential class members was "in the thousands," spread throughout United States); *Abels v. JBC Legal Group, P.C. (ND Cal 2005) 227 FRD 541, 544* (numerosity requirement satisfied when defendants admitted that they sent collection letters to at least 10,000 persons); *Chamberlan v. Ford Motor Co. (ND Cal 2004) 223 FRD 524, 525* (numerosity requirement clearly satisfied when likely that at least 150,000 California residents purchased vehicles with alleged defect)]. In assessing numerosity, the court may consider factors such as [*see Jordan v. County of Los Angeles (9th Cir 1982) 669 F2d 1311, 1319 , vacated on other grounds, 459 US 810 (1982)*]:

- Geographical diversity of class members.
- Ability of individual claimants to institute separate suits.
- Whether only injunctive or declaratory relief is sought.

The requirement that the class be so numerous that joinder is impracticable does not mean that joinder must be impossible. It means only that the court must find that the difficulty or inconvenience of joining all members of the class makes class litigation desirable. Thus, numerosity may exist even if all the class members are known and could be joined [*In re Itel Sec. Litig. (ND Cal 1981) 89 FRD 104, 111-112*].

Whether joinder is impracticable depends, of course, on the circumstances, but as a rule of thumb, joinder is usually considered practicable for classes of 20 or fewer, while classes of 40 or more usually meet the numerosity requirement [*see In re Itel Sec. Litig. (ND Cal 1981) 89 FRD 104, 111-112*]. The majority of class actions ultimately certified by the court usually involve large classes, for which numerosity is not a hurdle, although plaintiff must present

non-speculative evidence of the number of members included in the proposed class [*see Davis v. Astrue (ND Cal 2008) 2008 US Dist LEXIS 36249, at *26-*29* ("given the sheer volume of SSDI beneficiaries with mental disabilities ..., it is hard to contemplate that there are not at least forty-one people who meet the definition[,]" however, plaintiff' statistical evidence was deficient because it failed to create a general idea of size of class)].

The class proponents need not quantify the number of class members with precision. They may rely on reasonable inferences drawn from the available facts in estimating the size of the class [*Fleury v. Richemont North America, Inc. (ND Cal 2008) 2008 US Dist LEXIS 64521, at *37* (original plaintiff in class action could opine, based on his 45 years in watchmaking industry and on recent U.S. Department of Labor statistics, about number of persons who identify themselves as watch repairers in United States and what percentage of this amount were not independent watch repairers and watchmakers)]. This is particularly true when the information regarding the number of individuals is inherently within the opposing party's control [*see Westways World Travel, Inc. v. AMR Corp. (CD Cal 2003) 218 FRD 223, 234*].

Strategic Point--Plaintiff:

The failure to make an adequate showing on numerosity, even if all other requirements for certification are satisfied, will lead to denial of the motion for certification, albeit perhaps without prejudice. For example, when plaintiffs satisfied all other requirements for certification but only presented evidence of 33 possible class members, although thousands may have existed, the motion for certification was denied without prejudice [*Berry v. Baca (CD Cal 2005) 226 FRD 398, 403-404*].

Example:

In an action for injunctive relief challenging a Medicaid policy, joinder was impracticable because the class consisted of poor and elderly or disabled people who could not bring individual lawsuits without great hardship. Additionally, future class members who had not yet been affected by the policy could not yet be identified and, therefore, could not be joined [*see Sherman v. Griepentrog (D Nev 1991) 775 F Supp 1383, 1389*].

Cross Reference:

Additional discussion of "numerosity" requirement, see 5 *Moore's Federal Practice, § 23.22* (Matthew Bender 3d ed.).

20.06[2] Questions of Law or Fact Must Be Common to Class. The second *Fed R Civ P 23(a)* requirement is usually termed "commonality." A court may certify a class only if some questions of law or fact are common to the class members [*Fed R Civ P 23(a)(2)*].

This requirement has been termed "minimal," and is construed in favor of a finding of commonality. The Rule does not require that *all* questions of fact or law be common to all class members, only that *some* question of law or fact be common to all class members [Heffelfinger v. Elec. Data Sys. Corp. (CD Cal 2008) 2008 US Dist LEXIS 5296, at *56 (noting that commonality requirement is construed liberally)]. Commonality may be found in cases involving shared legal issues with divergent factual predicates, or in cases with a common core of salient facts coupled with disparate legal theories and remedies [*see Parra v. Bashas', Inc. (9th Cir 2008) 536 F3d 975, 979* (district court abused its discretion by failing to find commonality in original class definition for discriminatory pay claim; even though Hispanic employees held different positions, they all shared allegedly discriminatory pay scales); *Hanlon v. Chrysler Corp. (9th Cir 1998) 150 F3d 1011, 1019-1020*].

Example:

In a suit by prisoners alleging they were discriminated against in parole proceedings because of various physical disabilities, commonality was satisfied because the action challenged a system-wide practice or

policy that affected all the putative class members. While the class members had different types of disabilities, they all suffered similar harm from the failure to accommodate their disabilities [*see Armstrong v. Davis (9th Cir 2001) 275 F3d 849, 868 , cert. denied, 537 US 812 (2002)*].

Cross Reference:

Additional discussion of "commonality" requirement, see 5 *Moore's Federal Practice, § 23.23* (Matthew Bender 3d ed.).

In order to obtain certification of a class under Rule 23(b)(3), the class proponent must show more than commonality under Rule 23(a)(2). The class proponent must also show that the questions of law or fact common to the members of the class *predominate* over questions affecting only individual class members [*Fed R Civ P 23(b)(3)*]. For 23(b)(3) class actions, the commonality requirement is subsumed under, or superseded by, the predominance inquiry [*see Amchem Prods. Inc. v. Windsor (1997) 521 US 591, 609, 117 S Ct 2231, 138 L Ed2d 689*].

Cross Reference:

Discussion of the predominance requirement, see *§ 20.07[5][b]*.

20.06[3] Representative's Claims or Defenses Must Be Typical of Class. The third *Fed R Civ P 23(a)* requirement is usually termed "typicality." A court may certify a class only if the claims or defenses of the representative parties are typical of the claims or defenses of the class members as a whole [*Fed R Civ P 23(a)(3)*]. The typicality requirement should not be a formidable obstacle to class certification. The representative's claims are typical if they are reasonably co-extensive with those of absent class members; they need not be substantially identical with those of absent class members [*Hanlon v. Chrysler Corp. (9th Cir 1998) 150 F3d 1011, 1020*].

Warning:

Although the typicality and commonality requirements tend to merge, and the typicality requirement is not generally a great hurdle, the plaintiff does have the burden of demonstrating that the typicality requirement has been satisfied. A mere conclusory statement in the pleadings that the named plaintiffs are typical of the class is inadequate [*see, e.g., Palmer v. Stassinos (ND Cal 2006) 233 FRD 546, 550*].

The purpose of the typicality requirement is to ensure that the interests of the named representative align with the interests of the class. The test is whether the other members have the same or a similar legal injury, whether the action is based on conduct that is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct [*Hanon v. Dataproducts Corp. (9th Cir 1992) 976 F2d 497, 508*].

Differences in the amount of damages are insufficient, by themselves, to defeat class certification [*see In re Activision Sec. Litig. (ND Cal 1985) 621 F Supp 415, 428*]. Moreover, the physical, emotional, or monetary damages sustained need not be identical or even similar, provided those differences do not affect the viability of the legal theories under which they proceed [*see In re Paxil Litig. (CD Cal 2003) 218 FRD 242, 246*].

Typicality requires that the class representative have claims against all the defendants in the suit. A plaintiff may not represent class members who have claims against other defendants, even though the claims may be identical in other respects [*see La Mar v. H & B Novelty & Loan Co. (9th Cir 1973) 489 F2d 461, 466*].

Certification is inappropriate when a putative class representative is subject to unique defenses that threaten to become a focus of the litigation. A motion for class certification should not be granted if there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to that representative [*Hanon v. Dataproducts Corp. (9th Cir 1992) 976 F2d 497, 508*].

Example--Typicality Met:

Typicality was met in a suit by prisoners alleging they were discriminated against in parole proceedings because of various physical disabilities. The plaintiffs all suffered a refusal or failure to afford them accommodations as required by statute, and all were objects of discriminatory treatment on account of their disabilities. Minor differences in the nature of the specific injuries would not defeat typicality [*see Armstrong v. Davis (9th Cir 2001) 275 F3d 849, 868*].

Example--Typicality Not Met:

Typicality was not met in a products liability suit by plaintiffs who took the drug Mirapex for Parkinson's Disease and alleged that the drug caused the side effect of obsessive compulsive disorder (OCD), manifested in among other ways, compulsive gambling. In finding typicality was not satisfied, the district court noted the differences in dosages, timing of onset of the alleged OCD, and other prescription drugs taken by the three named plaintiffs. The court also found it especially difficult to find typicality with the alleged side effect of OCD which it stated was "unusually dependent on external forces" [*see Sweet v. Pfizer (CD Cal 2005) 232 FRD 360, 368-370*].

Warning:

If the named plaintiffs cannot show that they have valid claims against the defendants, they lack standing to bring the suit, and certification is improper. Moreover, the court lacks jurisdiction over the suit and must dismiss rather than allow substitution of another class member as class representative [*see Lierboe v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 350 F3d 1018, 1022-1023*].

Cross References:

Discussion of standing, see *§ 20.12[1]*.

Additional discussion of "typicality" requirement, see 5 *Moore's Federal Practice, § 23.24* (Matthew Bender 3d ed.).

20.06[4] Representative Must Fairly and Adequately Protect Class Interests.

20.06[4][a] Adequacy Has Two Components. The fourth *Fed R Civ P 23(a)* requirement is usually termed "adequacy of representation." A class may be certified only if the representative parties will fairly and adequately protect the interests of the class [*Fed R Civ P 23(a)(4)*]. To satisfy constitutional due process concerns, the court must make certain that absent class members have adequate representation before binding the absent class members to any judgment [*Hanlon v. Chrysler Corp. (9th Cir 1998) 150 F3d 1011, 1020*].

Adequacy has two components: (1) whether the class representative has any conflicts with other class members, and (2) whether the class representative will prosecute the action vigorously on behalf of the class [*Hanlon v. Chrysler Corp. (9th Cir 1998) 150 F3d 1011, 1020* ; *see Kohler v. Hyatt Corp. (CD Cal 2008) 2008 US Dist LEXIS 63392, at *17-*18* (plaintiff employees' failure to make required initial disclosures under *Fed R Civ P 26(a)(1)* and to cooperate in taking of plaintiffs' depositions cast doubt on adequacy of plaintiffs and their counsel to pursue claims asserted on behalf of putative class)].

Before the 2003 amendments to *Fed R Civ P 23*, adequacy of counsel was also considered when determining adequacy of the class representative. Rule 23 now requires that the court separately appoint counsel who will fairly and adequately represent the interests of the class [*Fed R Civ P 23(g)*], although some courts continue to consider the adequacy of the representative's chosen counsel as part of the measure of the adequacy of the class representative.

Cross References:

Discussion of appointment of class counsel, see *§ 20.33*. Discussion of appointment of the lead plaintiff and selection of class counsel in securities fraud class actions, see *20.50*, *20.51*.

20.06[4][b] Interests of Class Representative May Not Conflict With Interests of Other Class Members. A class representative will not represent absent class members adequately if the representative has significant conflicts with other class members [*see Hanlon v. Chrysler Corp. (9th Cir 1998) 150 F3d 1011, 1020*]. A conflict of interest does not render a class representative inadequate if the conflict is merely speculative or hypothetical, however [*see* International Molders' & Allied Workers' Local Union No. 164 v. *Nelson (ND Cal 1983) 102 FRD 457, 464*].

Example:

Two members of the armed forces challenged the constitutionality of a program to collect and store blood and tissue samples for future DNA analysis. These two could not properly represent a class of all service members who were compelled to participate in the program because their interests conflicted with those of class members who approved of the program and wished the policies fully enforced [*Mayfield v. Dalton (9th Cir 1997) 109 F3d 1423, 1427*].

If a class representative is closely affiliated with class counsel, this may create a conflict of interest with other class members. Significant personal or financial ties may lead the representative to sacrifice the other class members' interests for the benefit of class counsel by, for example, allowing a settlement that provides for large attorney's fees but is less favorable to the class than it could be [*see London v. Wal-Mart Stores, Inc. (11th Cir 2003) 340 F3d 1246, 1255*]. For the same reason, class counsel may not serve as class representative [*see Matassarin v. Lynch (5th Cir 1999) 174 F3d 549, 559 , cert. denied, 528 US 1116 (2000)*].

Personal qualities or motives of the proposed class representative do not determine adequacy of representation, at least not in the usual case. Thus, vindictiveness toward the defendants does not make a named plaintiff inadequate unless the "revenge" motive would lead the plaintiff to reject a suitable settlement or would otherwise lead to a conflict with the absent class members [*Kayes v. Pacific Lumber Co. (9th Cir 1995) 51 F3d 1449, 1464 , cert. denied, 516 US 914 (1995)*]. Similarly, a criminal record is irrelevant to the issue of adequate class representation when it does not implicate the representative's ability to act as a fiduciary or does not demonstrate any antagonism with class members [*In re Activision Sec. Litig. (ND Cal 1985) 621 F Supp 415, 429*].

When divergent interests are present among the class members, class certification is proper only if separate subclasses are formed and separate representatives named to represent each subclass. Class proponents may not avoid subclasses for divergent interests among class members through the strategy of appointing several class representatives with divergent interests to represent the class as a whole. Any substantial adversity between subgroups requires independent representation. Adverse subgroups may not be bound to a judgment or settlement except by consent given through representatives who understand that their role is to represent solely the members of their respective subgroups [*Amchem Prods. Inc. v. Windsor (1997) 521 US 591, 625-628, 117 S Ct 2231, 138 L Ed2d 689*].

Example:

In a class action intended to reach a global settlement of asbestos claims, named plaintiffs with diverse medical conditions were not adequate to act on behalf of a single giant class rather than on behalf of discrete subclasses. For class members who were already injured, the critical goal was generous immediate payments. This goal conflicted with that of exposure-only plaintiffs, who sought an ample, inflation-protected fund for the future [*Amchem Prods. Inc. v. Windsor (1997) 521 US 591, 625-628, 117 S Ct 2231, 138 L Ed2d 689*].

20.06[4][c] Class Member Must Be Able to Prosecute Action Vigorously. In determining adequacy, the court will consider whether the class representative will prosecute the action vigorously on behalf of the class [*see Hanlon v. Chrysler Corp. (9th Cir 1998) 150 F3d 1011, 1020*].

A class representative must show a certain amount of familiarity with the action in order to demonstrate that he or she is an adequate representative. A party who is not familiar with basic elements of the claims is not an adequate representative because he or she will be unable to exercise control over counsel's prosecution of the case [*see Burkhalter Travel Agency v. MacFarms Int'l, Inc. (ND Cal 1991) 141 FRD 144, 153-154*]. The representative must be able to exercise at least a minimal amount of control over class counsel [*see Welling v. Alexy (ND Cal 1994) 155 FRD 654, 659*].

The adequacy requirement, like typicality, may be defeated if the class representative is subject to a unique defense that threatens to become a focus of the litigation. The representative may fail to represent the class vigorously if he or she concentrates on litigating a defense unique to the representative [*see In re Activision Sec. Litig. (ND Cal 1985) 621 F Supp 415, 429*].

Some courts require the class representative to show an ability to finance the litigation, or at least to fund the costs of notice to the class [*see Rolex Employees Ret. Trust v. Mentor Graphics Corp. (D Or 1991) 136 FRD 658, 666*]. Generally, however, class counsel will advance the costs. The California Rules of Professional Conduct allow class counsel to advance the costs of litigation, and repayment may be contingent on the outcome of the case [Cal Rules Prof Conduct, Rule 4-210(A)(3); *see Moeller v. Taco Bell Corp. (ND Cal 2004) 220 FRD 604, 612* ; *In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig. (CD Cal 1988) 122 FRD 251, 257*].

The Ninth Circuit has not ruled on whether the financial status of a named plaintiff is relevant to his or her adequacy. Arguably, denying a class certification whenever plaintiff's counsel advances significant funds to plaintiffs of little or modest means would defeat the purposes that class actions were designed to achieve [*see Moeller v. Taco Bell Corp. (ND Cal 2004) 220 FRD 604, 612* , quoting *Bartelson v. Dean Witter & Co. (ED Pa 1980) 86 FRD 657, 675*].

Cross Reference:

Additional discussion of "adequacy of representation" requirement, see 5 *Moore's Federal Practice, § 23.25* (Matthew Bender 3d ed.).

Legal Topics:

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20.07 Action Must Be One of Four Types Maintainable Under Rule 23(b).

20.07[1] Court May Certify Action Under More Than One Category. An action may be certified as a class action if the numerosity, commonality, typicality, and adequacy of representation requirements of *Fed R Civ P 23(a)* are all met and, in addition, the case falls into one or more of the following categories described in *Fed R Civ P 23(b)*:

- The prosecution of separate actions would create a risk of inconsistent adjudications that would establish incompatible standards of conduct for the party opposing the class [*Fed R Civ P 23(b)(1)(A)*].

- The prosecution of separate actions would create a risk of adjudications with respect to individual class members that would, as a practical matter, dispose of or substantially impair the interests of the other absent class members [*Fed R Civ P 23(b)(1)(B)*].

- The action seeks primarily injunctive or declaratory relief with respect to the class as a whole [*Fed R Civ P 23(b)(2)*].

- Questions of law or fact common to the class members predominate over individual questions, *and* the class action vehicle is superior to other methods of adjudicating the controversy [*Fed R Civ P 23(b)(3)*].

Strategic Point--Plaintiff:
If the four *Fed R Civ P 23(a)* requirements and *Fed R Civ P 23(b)* are satisfied, the court may certify a class action whether or not a class action is a "necessity" [*Fernandez v. Department of Social & Health Servs. (ED Wash) 232 FRD 642, 646*]. Class certification is appropriate even when the requested relief could be obtained on an individual lawsuit basis [*see Zepeda v. INS (9th Cir 1983) 753 F2d 719, 729 fn1*].

Courts will often certify classes under more than one category in the same action [*see, e.g., In re Northern Dist. of Cal., Dalkon Shield IUD Prod. Liab. Litig. (9th Cir 1982) 693 F2d 847, 850 , cert. denied sub nom. A.H. Robins Co. v. Abed, 459 US 1171 (1983)*].

A principal difference between the categories concerns notice to the class and opportunity to opt out of the action. Notice and an opt-out opportunity is mandatory for "(b)(3)" class actions, and discretionary with the court for "(b)(1)" and "(b)(2)" class actions [*Fed R Civ P 23(c)(2)*].

Cross Reference:

Discussion of notice, see *§§ 20.26*, *20.27*.

20.07[2] Court May Certify Action Under Rule 23(b)(1)(A) If Separate Actions Would Create Risk of Inconsistent Adjudications That Would Establish Incompatible Standards for Party Opposing Class. An action may be maintained as a Rule 23(b)(1)(A) class action if (1) the prosecution of separate actions by or against individual members of the class (2) would create a risk of inconsistent or varying adjudications with respect to individual members of the class that (3) would establish incompatible standards of conduct for the party opposing the class [*Fed R Civ P 23(b)(1)(A)*].

Distinguish:

Both *Fed R Civ P 23(b)(1)(A)* and *(B)* address the problem of prejudice caused by the prosecution of individual actions separately rather than as a single class action. Rule 23(b)(1)(A) addresses prejudice to the party opposing the class, while Rule 23(b)(1)(B) addresses prejudice to the class members themselves.

Rule 23(b)(1)(A) applies to cases seeking injunctive or declaratory relief, not those primarily seeking damages. The phrase "incompatible standards of conduct" refers to the situation in which different results in separate actions would impair the opposing party's ability to pursue a uniform continuing course of conduct. Rule 23(b)(1)(A) certification requires more than a risk that separate judgments would oblige the opposing party to pay damages to some class members but not to others or to pay them different amounts [*Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1193 , as amended 273 F3d 1266 (2001)*]; *see, e.g., In re First Am. Corp. ERISA Litig. (CD Cal 2009) 258 FRD 610, 621-622]* .

Rule 23(b)(2) certification is not appropriate when monetary relief is predominant over injunctive relief or declaratory relief [*Dukes v. Wal-Mart Stores, Inc. (9th Cir 2010) 603 F3d 571, 617]* . To determine whether monetary relief predominates, a district court should consider, on a case-by-case basis, the objective effect of the relief sought on the litigation. Factors such as whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature--as measured by recovery per class member--raise particular due process and manageability concerns would all be relevant, though no single factor would be determinative [*Dukes v. Wal-Mart Stores, Inc. (9th Cir 2010) 603 F3d 571, 617]* .

Example--Labor Relations:

A class action might be certified under Rule 23(b)(1)(A) in cases requesting injunctive relief against an employer with respect to employment conditions, practices, or policies [*see Mitchell v. Los Angeles Unified Sch. Dist. (CD Cal 1990) 744 F Supp 938, 944 , rev'd on other grounds, 963 F2d 258 (9th Cir 1992)*].

Example--Suits Against the Government:

A class action might be certified under Rule 23(b)(1)(A) in cases seeking injunctive relief with respect to government policies, such as a challenge by a prisoner as to the adequacy of mental health care provided at a correctional institution [*see Coleman v. Wilson (ED Cal 1995) 912 F Supp 1282, 1293*].

Class members in (b)(1)(A) classes are not entitled to notice of class certification nor an opportunity to opt out.

However, the court has discretion to direct notice to the class in an appropriate case [*Fed R Civ P 23(c)(2)(A)*]. Although class members of a (b)(1)(A) class do not have the right to opt out of the class even when the court provides notice to class members, the court also has the discretion to authorize opt-out rights for class members in a "hybrid" class action in which incidental monetary damages are sought as well as injunctive relief [*see Eubanks v. Billington (DC Cir 1997) 110 F3d 87, 94-95*].

Cross Reference:

Discussion of notice and right to opt out, see *§ 20.26*.

20.07[3] Court May Certify Action Under Rule 23(b)(1)(B) If Separate Actions Would Create Risk of Adjudications That Would Be Dispositive of Interests of Non-Party Class Members.

20.07[3][a] Certification Is Proper If Separate Actions Would Inescapably Alter Rights of Other Class Members. An action may be maintained as a Rule 23(b)(1)(B) class action if the prosecution of separate actions by or against individual members of the class would create a risk of adjudications with respect to individual members of the class that would, as a practical matter, be dispositive of the interests of the non-party class members or would substantially impair their ability to protect their interests [*Fed R Civ P 23(b)(1)(B)*].

Distinguish:

Fed R Civ P 23(b)(1)(B), like (A), addresses the possibility of prejudice caused by the prosecution of individual actions separately rather than as a single class action. Rule 23(b)(1)(B) addresses prejudice to the class members themselves, while Rule 23(b)(1)(A) addresses prejudice to the party opposing the class.

Class actions are permitted under Rule 23(b)(1)(B) if separate actions will inescapably alter the substance of the rights of others having similar claims [*Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1196-1197 , as amended, 273 F3d 1266 (2001)*].

The stare decisis effect of a ruling in an earlier action is insufficient to warrant certification under Rule 23(b)(1)(B). Certification isproper only if the ruling in the first suit presents the substantial possibility of exhausting the funds available to a defendant to pay later claims, or actually binds absent members of the putative class through principles of res judicata [*see La Mar v. H&B Novelty & Loan Co. (9th Cir 1973) 489 F2d 461, 467* ; *Mateo v. M/S Kiso (ND Cal 1993) 805 F Supp 761, 773*].

Class members in (b)(1)(B) classes ordinarily are not entitled to notice of certification nor an opportunity to opt out. However, the court has discretion to direct notice to the class in an appropriate case [*Fed R Civ P 23(c)(2)(A)*].

Cross Reference:

Discussion of notice and right to opt out, see *§ 20.26*.

20.07[3][b] Certification May Be Granted on "Limited Fund" Theory. The typical *Fed R Civ P 23(b)(1)(B)* action involves a "limited fund." That is, a class action is appropriate because the class members have claims that must be satisfied out of a particular fund that is insufficient to satisfy all the claims. Examples of possible limited funds include trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit, and others [*see Ortiz v. Fibreboard Corp. (1999) 527 US 815, 834, 119 S Ct 2295, 144 L Ed2d 715*].

Certain characteristics are "presumptively necessary" to satisfy the limited fund rationale for certification under Rule 23(b)(1)(B). The plaintiff class must demonstrate that the case involves a fund (1) with a definitely ascertained limit, (2) all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, (3)

by an equitable, pro rata distribution [*see Ortiz v. Fibreboard Corp. (1999) 527 US 815, 841-842, 119 S Ct 2295, 144 L Ed2d 715* ; *Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1196-1197 , as amended, 273 F3d 1266 (2001)*].

The court may not certify an action under a limited fund rationale unless separate actions will inescapably result in the exhaustion of the limited fund before satisfying the claims of all the class members [*see Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1196-1197 , as amended, 273 F3d 1266 (2001)*]. The district court must make this determination based on adequate evidence as to the funds available to meet the claims [*In re Northern Dist. of Cal., Dalkon Shield IUD Prod. Liab. Litig. (9th Cir 1982) 693 F2d 847, 851-852*].

A settlement fund that is limited merely by the agreement of the parties is not a limited fund for purposes of Rule 23(b)(1)(B). Settling parties seeking certification under this subsection must present evidence on which the court may determine that the fund is limited independent of the parties' agreement [*see Ortiz v. Fibreboard Corp. (1999) 527 US 815, 848-849, 119 S Ct 2295, 144 L Ed2d 715*].

The Supreme Court has questioned whether a mass tort case could be certified under a limited fund theory. Instead, the drafters of the rule expected that such claims would be analyzed under *Fed R Civ P 23(b)(3)*. Assuming that a limited fund rationale could be applied, it would be essential that both (1) the fund be shown to be limited independently of the agreement of the parties, and (2) the class include all those with unsatisfied claims, with intraclass conflicts addressed by recognizing independently represented subclasses [*Ortiz v. Fibreboard Corp. (1999) 527 US 815, 864-865, 119 S Ct 2295, 144 L Ed2d 715*].

20.07[4] Court May Certify Action Under Rule 23(b)(2) If Action Seeks Injunctive or Corresponding Declaratory Relief With Respect to Class As Whole.

20.07[4][a] Rule 23(b)(2) Applies When Class-Wide Relief Is Appropriate. An action may be maintained as a Rule 23(b)(2) class action if the party opposing the class has acted or refused to act on grounds generally applicable to the class as whole, thus making it appropriate that there be final injunctive relief or corresponding declaratory relief with respect to the class as a whole [*Fed R Civ P 23(b)(2)*].

Rule 23(b)(2) was intended to facilitate civil rights actions claiming discrimination, and is appropriate with respect to classes whose members are incapable of specific enumeration. However, Rule 23(b)(2) is not limited to civil rights claims [*see Fed R Civ P 23(b)(2)*, Committee Note of 1966].

Class certification under Rule 23(b)(2) is appropriate only when the primary relief sought is injunctive or corresponding declarative relief [*see Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1195 , as amended, 273 F3d 1266 (2001)*]. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. It does not include cases in which the appropriate final relief relates exclusively or predominantly to money damages [*Fed R Civ P 23(b)(2)*, Committee Note of 1966].

Strategic Point--Plaintiff:

In an employment discrimination case, back pay is an equitable remedy that falls within the ambit of Rule 23(b)(2) relief [*Gotthardt v. AMTRAK (9th Cir 1999) 191 F3d 1148, 1153* ; *Williams v. Boeing Co. (WD Wash 2005) 225 FRD 626, 631-632*].

Claims that are not for injunctive or declaratory relief may be included as part of the action only if they are secondary to the primary relief. For example, certification is not appropriate if claims for restitution predominate over the claims seeking injunctive relief [*see In re Paxil Litig. (CD Cal 2003) 218 FRD 242, 247-248*].

Rule 23(b)(2) requires that the defendant's actions (or refusals to act) on which the suit is based be "generally applicable to the class" [*Fed R Civ P 23(b)(2)*]. This requirement is met even if the defendant's actions have taken effect or threatened only some members of the class, provided the actions have general applicability to the class [*Fed R Civ P 23(b)(2)*, Committee Note of 1966; *see Arnold v. UA Theatre Circuit, Inc. (ND Cal 1994) 158 FRD 439, 454*].

Example:

The court certified a class of wheel-chair users who were denied equal access to the defendant's movie theaters. The class's chief claims were for injunctive relief under the ADA, and claims for injunctive relief and money damages under *CC § 54.1*. The defendant's actions were generally applicable to the class because the architectural barriers affected all wheel-chair users in essentially the same way [*see Arnold v. UA Theatre Circuit, Inc. (ND Cal 1994) 158 FRD 439, 450-458*].

20.07[4][b] Claims for Damages May Be Included in Action If They Are Secondary to Primary Claims for Injunctive or Declaratory Relief. *Fed R Civ P 23(b)(2)* is not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages. The claim for monetary damages, however, is not appropriate when monetary relief is predominant over injunctive relief or declaratory relief [*Dukes v. Wal-Mart Stores, Inc. (9th Cir 2010) 603 F3d 571, 617]* . The claim for monetary damages may be a claim for punitive damages [*see Williams v. Boeing Co. (WD Wash 2005) 225 FRD 626, 632-633*].

To determine whether monetary relief predominates, a district court should consider, on a case-by-case basis, the objective effect of the relief sought on the litigation. Factors such as whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature--as measured by recovery per class member--raise particular due process and manageability concerns would all be relevant, though no single factor would be determinative [*Dukes v. Wal-Mart Stores, Inc. (9th Cir 2010) 603 F3d 571, 617]* .

Example--Certification Granted:

The district court did not err in certifying a nationwide class encompassing approximately 1.5 million women employed by defendant Wal-Mart during a specified timeframe, and encompassing claims for injunctive relief, declaratory relief, and back pay (but not compensatory damages). The district court's decision to include claims for back pay in a class certified under *Fed R Civ P 23(b)(2)* was not an abuse of its discretion, because a request for back pay is fully consistent with the certification of a *Fed R Civ P 23(b)(2)* class. Nor did the large size of the claims of itself mean that monetary claims necessarily predominated, because the predominance test used in the Ninth Circuit to determine whether claims for damages are secondary turns on the primary goal and nature of the litigation, not the possible size of the total damages award [*Dukes v. Wal-Mart Stores, Inc. (9th Cir 2010) 603 F3d 571, 619-620]* .

Example--Certification Denied:

The district court abused its discretion when it creating a separate opt out class for punitive damages that encompassed all women employed by the defendant Wal-Mart at any time after December 26, 1998, at the same time the court certified a nationwide class including the same employees and encompassing claims for injunctive relief, declaratory relief, and back pay. The district failed to analyze whether certifying punitive damages claims under *Fed R Civ P 23(b)(2)* caused monetary damages to predominate. The Ninth Circuit therefore remanded so that the district court could consider this question. The circuit court noted that the district court, if *Fed R Civ P 23(b)(2)* certification was not proper for the punitive damages claims, could consider a "hybrid" certification of *Fed R Civ P 23(b)(2)* and *23(b)(3)* classes in one action [*Dukes v. Wal-Mart Stores, Inc. (9th Cir 2010) 603 F3d 571, 620-621]* .

In a products liability action involving allegedly defective pacemakers, the plaintiffs proposed a class seeking medical monitoring relief. This class was not appropriate for certification because the relief sought was compensatory rather than injunctive. The plaintiffs sought the establishment of a reserve fund

for past and future damages, compensation for future medical treatment, plus other compensatory and punitive damages. Although the complaint also sought to require the defendant to conduct research into alternative methodologies for remedying the condition of the class members, this injunctive relief was merely incidental to the primary claim for money damages [*Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1196* , *as amended*, *273 F3d 1266 (2001)* (decided under prior law)].

Cross References:

Discussion of standards to be applied by district courts in adjudicating a Rule 23 motion for class certification, see *§ 20.05A*.

Discussion of possibility of notice and opt-out rights in a 23(b)(2) class action, see *§ 20.26*.

20.07[4][c] Manageability Is Relevant Although Analysis Is Not Explicitly Required. Although Rule 23(b)(2) does not explicitly require an analysis of manageability before certification of a class, manageability is relevant to certification [*Williams v. Boeing Co. (WD Wash 2005) 225 FRD 626, 633*]. Concerns over manageability may require carving out potential plaintiffs from the class certified and/or the creation of sub-classes [*see, e.g., Williams v. Boeing Co.(WD Wash 2005) 225 FRD 626, 637*].

20.07[5] Court May Certify Action Under Rule 23(b)(3) If Common Questions Predominate and Class Action Is Superior Method of Adjudication.

20.07[5][a] Rule 23(b)(3) Class Action Must Meet Both Predominance and Superiority Requirements. An action may be maintained as a Rule 23(b)(3) class action if both [*Fed R Civ P 23(b)(3)*]:

- The court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members.

- The court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

While Rule 23(b)(3) does not exclude from certification cases in which individual damages are high, its primary intent is to allow vindication of claims that individually would be too small to pursue [*see Amchem Prods. Inc. v. Windsor (1997) 521 US 591, 617, 117 S Ct 2231, 138 L Ed2d 689*].

Cross Reference:

Discussion of notice and opt out rights in Rule 23(b)(3) class actions, see *§ 20.27*.

20.07[5][b] Questions Common to Class Must Predominate Over Individual Questions. Under Rule 23(a)(2), questions of law or fact common to the class members must exist [*Fed R Civ P 23(a)(2)*]. For a class to be certified under Rule 23(b)(3), those questions must predominate over questions affecting only individual class members [*Fed R Civ P 23(b)(3)*].

Predominance is a pragmatic, circumstantial inquiry. Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy [*see Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1189* , *as amended*, *273 F3d 1266 (2001)*]. Accordingly, courts decide whether there are so many questions common to the plaintiffs that having class action treatment would be more efficient than having a number of separate trials [*see* Sepulveda v. Wal-Mart Stores, Inc. (CD Cal 2006) 237 FRD 229, 247-250; *Haley v. Medtronic, Inc. (CD Cal 1996) 169 FRD 643, 650* ; *see also Mevorah v. Wells Fargo Home Mortg. (In re Wells Fargo Home Mortg.) (9th Cir 2009) 571 F3d 953, 958-959* (district court abused its discretion in relying exclusively on defendant's classification of particular class of employees as exempt from federal and state overtime requirements to

exclusion of other factors relevant to predominance inquiry, since defendant's uniform exemption policy said "little about the main concern of the predominance inquiry: the balance between individual and common issues")] or when the resolution of a question common to the class would significantly advance the litigation, such as resolution of a common defense which would bar each of the plaintiff's claims [*see Romero v. Producers Dairy Foods, Inc. (ED Cal 2006) 235 FRD 474, 489-490* (citing **Moore's**)].

Securities fraud cases involving a common scheme of fraudulent conduct are often certified under Rule 23(b)(3). The predominant questions are those as to the alleged material misrepresentations or omissions that the defendants made and on which liability is based [*see, e.g., In re First Alliance Mortgage Co. (9th Cir 2006) 471 F3d 977, 990-991* (class treatment was permitted in securities fraud case in which standardized sales pitch was employed); *In re* Heritage Bond Litig. (CD Cal 2004) 2004 US Dist LEXIS 15386, at *28-*36].

Distinguish:

Denial of class certification may be appropriate when individualized reliance issues related to proof of causation predominate [*see Poulos v. Caesars World, Inc. (9th Cir 2004) 379 F3d 654, 664-666*].

Predominance may be found in product liability suits. The fact that each class member is seeking separate damages, or even that each claim arose out of a separate transaction, is not necessarily fatal to class action treatment provided the common questions predominate [*see Haley v. Medtronic, Inc. (CD Cal 1996) 169 FRD 643, 650*].

The predominance standard is difficult to meet in nationwide class actions based on state law. The differing standards of liability required by the laws of various states may preclude a finding that common questions predominate [*see Lozano v. AT&T Wireless Servs. (9th Cir 2007) 504 F3d 718, 728]* . However, variations in state law do not necessarily preclude certification if class counsel can demonstrate the commonality of substantive law applicable to all class members [*see Hanlon v. Chrysler Corp. (9th Cir 1998) 150 F3d 1011, 1023*]. The class proponent bears the burden of demonstrating a suitable and realistic plan for trial of the class claims [*Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1189* , *as amended, 273 F3d 1266 (2001)*].

Strategic Point--Proponent of Class:

Even if the common questions do not predominate over the individual questions for the entire action, so that class certification must be denied for the action as a whole, *Fed R Civ P 23* authorizes the district court, in appropriate cases, to isolate the common issues under *Fed R Civ P 23(c)(4)* and to proceed with class treatment of the isolated particular issues [*see Valentino v. Carter-Wallace, Inc. (9th Cir 1996) 97 F3d 1227, 1234*]. Whether this is or is not appropriate depends, to a large extent, on whether class treatment for the isolated, particular issues is a superior method of proceeding.

20.07[5][c] Class Action Must Be Superior to Other Available Methods of Adjudication. A class action may be certified under Rule 23(b)(3) only if the class action will be superior to other available methods for the fair and efficient adjudication of the controversy [*Fed R Civ P 23(b)(3)*]. The superiority inquiry requires a determination of whether the objectives of the class action procedure will be achieved in the particular case [*see Hanlon v. Chrysler Corp. (9th Cir 1998) 150 F3d 1011, 1023*].

The court must consider the class action procedure in comparison to "other available methods" for adjudication. For example, a few test cases, leading to settlement of the remaining claims, may achieve the same benefit as a class action without the procedural complexities and expense [*see In re Northern Dist. of Cal., Dalkon Shield IUD Prod. Liab. Litig. (9th Cir 1982) 693 F2d 847, 856* , *cert. denied sub nom. A.H. Robins Co. v. Abed, 459 US 1171 (1983)*]. On the other hand, when a class action under the Fair Labor Standards Act was certified, and pendent state law claims could be prosecuted as part of that FLSA class action, that existing alternative undercut all the Rule 23(b)(3) superiority factors and there was no reason to certify an additional class under Rule 23 [*Leuthold v. Destination Am., Inc. (ND Cal 2004)*

224 FRD 462, 469 ; *see, e.g., Edwards v. City of Long Beach (CD Cal 2006) 467 F Supp2d 986, 991-993* (certifying FLSA collective action and denying Rule 23 class action, because Rule 23 was not superior means of adjudicating plaintiff's state law claims)].

Rule 23(b)(3) provides a non-exhaustive list of factors to consider in determining superiority [*Fed R Civ P 23(b)*; *see Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc. (9th Cir 2001) 244 F3d 1152, 1163 , cert. denied, 534 US 973 (2001)*]:

- The interest of members of the class in individually controlling the prosecution or defense of separate actions.

- The extent and nature of any litigation concerning the controversy already commenced by or against members of the class.

- The desirability or undesirability of concentrating the litigation of the claims in the particular forum.

- The difficulties likely to be encountered in the management of a class action.

Consideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under Rule 23(b)(3) are those that can be adjudicated most profitably on a representative basis [*see Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1189 , as amended, 273 F3d 1266 (2001)*].

One of the purposes of the (b)(3) category is to provide a vehicle for the resolution of claims that are too small to be brought separately because the costs of litigation might overwhelm any possible recovery. Accordingly, when the damages suffered by each class member are not large, this weighs in favor of certifying a class action [*Chamberlan v. Ford Motor Co. (ND Cal 2004) 223 FRD 524, 527*].

Example:

A class action was the superior form of adjudication for a case claiming that form collection letters violated the Federal Fair Debt Collection Practices Act: many plaintiffs may not have known their rights were being violated, may not have had a monetary incentive to individually litigate, and may have been unable to hire competent counsel to protect their rights. Judicial efficiency was better served by one class action rather than thousands of individual suits [*Abels v. JBC Legal Group, P.C. (ND Cal 2005) 227 FRD 541, 547*].

By contrast, the presence of large individual damage claims suggests that the class members have a sufficient interest in controlling their own separate litigation [Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1189 , *as amended, 273 F3d 1266 (2001)*].

Manageability may be the most significant of the factors. The manageability requirement includes considerations such as the potential difficulties in notifying class members of the suit, calculation of individual damages, and distribution of damages [*see Six Mexican Workers v. Arizona Citrus Growers (9th Cir 1990) 904 F2d 1301, 1305*].

When the complexities of class action treatment outweigh the benefits of considering common issues in one trial, class action treatment is not the superior method of adjudication. If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, there may be too many individual issues for the court to manage, even though there is a common nucleus of facts concerning the defendant's conduct [*see Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d1180, 1192 , amended, 273 F3d 1266 (9th Cir 2001)*].

Superiority may not exist for a large nationwide class based on state law. The need to apply the law of many different

states will usually outweigh the advantages of a single, certified class proceeding [*see In re Paxil Litig. (CD Cal 2003) 212 FRD 539, 551*].

When a court certifies a class after a settlement has already been reached, the court need not inquire whether the case would present intractable management problems because the proposal is that there be no trial. However, other specifications of *Fed R Civ P 23* demand heightened attention in the settlement context [*see Amchem Prods. Inc. v. Windsor (1997) 521 US 591, 620, 117 S Ct 2231, 138 L Ed2d 689*].

Cross References:

Discussion of settlement classes and court approval of settlement, see *§ 20.42*.

Additional discussion of determination concerning whether common issues predominate, see 5 *Moore's Federal Practice, § 23.45* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesMaintainability

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20.08 CHECKLIST: Filing Action As Class Action.

☐ Prepare a complaint that states the claims of the named plaintiffs.

Discussion:
Ch. 6, Drafting the Summons and Complaint

Form:
See *§ 20.58*

☐ Ensure that the action is designated as a class action on the first page of the complaint.

Authority:
CD Cal Civ LR 23-1; *ND Cal Civ LR 3-4(a)(5)*; *SD Cal Civ LR 23.1(a)*

Discussion:
See *§ 20.10*

☐ In a separate section of the complaint, include "class allegations" that:

○ Define the proposed class or subclasses.

○ Allege that the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation are met.

○ Indicate the subsection or subsections of Rule 23(b) under which certification is sought, and allege that the requirements of that subsection are met.

○ For actions in the Central District of California, indicate the nature of the notice to the proposed class that is required or contemplated.

Warning:

Although pleading the proposed notice is required by the Central District local rules, and even though a plaintiff would do well to give thought to the notice that will be given to the class, even at the pleadings stage of a case, it will not make sense to plead these matters when local rules do not require it. Pleading of these matters is not required by Rules 8 and 9, and serves only to raise disputes concerning notice at the pleading stage, when such disputes are not easily resolved.

Authority:
Fed R Civ P 23(a), (b); *CD Cal Civ LR 23-2*; *SD Cal Civ LR 23.1*

Discussion:
See *§ 20.11*

Form:
See *§ 20.58*

☐ Ensure that the action meets jurisdictional requirements:

○ The named plaintiff must have constitutional standing to bring the action.

Discussion:
See *§ 20.12[1]*

○ Federal jurisdiction must be conferred by an appropriate statute, such as the federal question jurisdiction statute or the diversity jurisdiction statute.

Authority:
28 USC §§ 1331, 1332

Discussion:
Ch. 2, Determining Forum (Jurisdiction and Venue)

○ When jurisdiction is based on general diversity of citizenship:

☐ Only the citizenship of the named plaintiffs and defendants, not the remaining class members, is considered for complete diversity purposes.

☐ The amount in controversy requirement must be met by the named plaintiff without considering the claims of the unnamed class members.

☐ If a named plaintiff meets the amount in controversy requirement, the court has supplemental jurisdiction over the claims of other named and unnamed class members.

Discussion:
See *§ 20.12[2][b]*

○ When jurisdiction is based on limited diversity under the Class Action Fairness Act of 2005:

☐ Diversity of citizenship is required only between *any* member of a plaintiff class and *any* defendant.

☐ The $5 million amount in controversy requirement may be satisfied by aggregating the claims of individual class members.

Authority:
28 USC § 1332(d)(2), (6)

Discussion:
See *§ 20.12[2][c]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

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20.09 Options and Strategy.

All the filing requirements that apply in other actions must also be complied with in class actions. Preliminary considerations such as forum selection will be equally important in class actions. In addition, counsel must ensure that the requirements of *Fed R Civ P 23* can be met. Particularly, the complaint must name one or more plaintiffs who meet the requirements to serve as class representative and must set out a workable class definition. The complaint should be drafted with a settlement strategy in mind.

The defendant also has the same options in responding to the complaint as in any non-class action. The defendant may respond to the complaint by bringing any motion authorize by the Federal Rules of Civil Procedure, including any motion under Rule 12. Alternatively, the defendant may answer the complaint and assert any affirmative defenses that is has.

Cross References:

Discussion of preparation of the complaint, preparation of summons, and preparation of other documents necessary at the commencement of the action, see Ch. 6, Drafting the Summons and Complaint and Ch. 7, Service of Summons. Discussion of answer and motions to dismiss, see Ch. 8, Answers and Responsive Motions Under Rule 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsClass MembersNamed Members

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20.10 LOCAL PRACTICE: Action Must Be Designated As Class Action on First Page of Complaint.

When an action is filed as a class action, it should be labeled as such. This is specifically required by local rule as follows:

- CD Cal: The title of any pleading purporting to commence a class action must include the legend: "(Title of Pleading) Class Action" [*CD Cal Civ LR 23-1*].

- ED Cal: No specific requirement.

- ND Cal: If any complaint, counterclaim, or crossclaim is to be maintained as a class action, it must bear the legend "Class Action" on its first page below the title describing the paper as a complaint, counterclaim, or crossclaim [*ND Cal Civ LR 3-4(a)(5)*]. The action must also be designated as a class action in the appropriate block of the Civil Cover Sheet required to be submitted with the complaint, and the requested relief must be indicated [*see ND Cal Civ LR 3-2(a)*]. A copy of the form to be used may be downloaded from the court's website: www.cand.uscourts.gov.

- SD Cal: In any action sought to be maintained as a class action, the complaint or other pleading asserting a class action must bear the legend "Class Action" below the docket number [*SD Cal Civ LR 23.1(a)*].

Consider:

The same caption designating the action as a class actionshould ordinarily be used on other pleadings and motions in the action as well.

Cross References:

Discussion of format requirements for complaint generally, see *Ch. 6, Drafting the Summons and Complaint, 6.05 -6.07*. Form, see *§ 20.58*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureClass ActionsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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20.11 Complaint Should Plead Class Allegations.

20.11[1] Allegations Should Indicate That Action May Be Maintained As Class Action. In addition to those allegations otherwise required to make out the claims asserted, the complaint should describe the class and state allegations showing that the class action meets the requirements of *Fed R Civ P 23(a)* and *(b)*. Class allegations are not required by *Fed R Civ P 23*, but are required by local rules as discussed below.

Class allegations are not necessary to meet the pleading requirements set out by Rules 8 and 9, which generally require only a short and plain statement of the claims showing that the plaintiffs are entitled to relief [*see Fed R Civ P 8, 9*]. While the class allegations may be necessary to comply with the local rules and should, therefore, not be overlooked, the court's certification decision requires a rigorous analysis and should not be based merely on the pleadings [*see Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1186 , as amended 273 F3d 1266 (2001)*].

Consider:

If the class allegations are attacked as deficient under the applicable local rule, the court ordinarily should allow the pleader to amend to correct the deficiency [*see Fed R Civ P 15*].

Cross References:

Discussion of class definition and requirements of numerosity, commonality, typicality, and adequacy of representation under Rule 23(a), see *20.06*. Discussion of types of actions that may be maintained under Rule 23(b), see *20.07*. Discussion of the court's certification decision, see *§ 20.16*.

20.11[2] LOCAL PRACTICE: Class Allegations.

20.11[2][a] LOCAL PRACTICE: CD Cal Requirements. Any pleading purporting to commence a class action must contain a separate section entitled "Class Action Allegations" [*CD Cal Civ LR 23-2*]. This section must contain a reference to the portion or portions of *Fed R Civ P 23* under which the pleader contends that the suit may be maintained as a class action [*CD Cal Civ LR 23-2.1*].

The "Class Action Allegations" portion of the pleading must also contain appropriate allegations needed to justify

proceeding as a class action, including but not limited to [*CD Cal Civ LR 23-2.2*]:

- The definition of the proposed class.
- The size or approximate size of the proposed class.
- The adequacy of representation by the representatives of the class.
- The commonality of the questions of law and fact.
- The typicality of the claims or defenses of the representatives of the class.
- If proceeding under *Fed R Civ P 23(b)(3)*, allegations to support the findings of predominance and superiority.
- The nature of notice to the proposed class that is required or contemplated.

As in any case, each party must file, at least 21 days before the pretrial conference, a memorandum of contentions of fact and law setting out the party's theory of the case and other matters. [*see CD Cal Civ LR 16-4*].

Cross Reference:

Discussion of notice to class, see *§§ 20.26*, *20.27*. Northern District requirement for memorandum of contentions of fact and law, see *Ch. 17, Final Pretrial Conference, 17.09[2]*.

20.11[2][b] LOCAL PRACTICE: ND Cal Requirements. Any party seeking to maintain a case as a class action must include in the required case management statement the following additional information [*ND Cal Civ LR 16-9(b)*]:

- The specific paragraphs of *Fed R Civ P 23* under which the action is maintainable as a class action.
- A description of the class or classes in whose behalf the action is brought.
- Facts showing that the party is entitled to maintain the action under *Fed R Civ P 23(a)* and *(b)*.
- A proposed date for the court to consider whether the casemay be maintained as a class action.

20.11[2][c] LOCAL PRACTICE: SD Cal Requirements. The complaint in a class action must include a statement describing the class or classes on behalf of which the action is sought to be maintained [*SD Cal Civ LR 23.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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20.12 Class Action Must Meet Jurisdictional Requirements.

20.12[1] Named Plaintiff Must Have Constitutional Standing.

20.12[1][a] Court Must Dismiss for Lack of Standing at Beginning of Suit. The class representative must meet all the requirements of constitutional standing in order to maintain a class action. A representative who fails to establish standing may not seek relief either individually or on behalf of other members of the class [*see Doe v. Unocal Corp. (CD Cal 1999) 67 F Supp2d 1140, 1142* ; *see also Easter v. American W. Fin. (9th Cir 2004) 381 F3d 948, 962* (district court properly considered standing issues before class issues)].

Thus, if none of the named plaintiffs can establish a case or controversy with the defendants, they cannot maintain the suit. If the court finds that standing was absent at the time the suit was brought, the court must dismiss for lack of jurisdiction rather than appoint another class representative [*see Lierboe v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 350 F3d 1018, 1022-1023*].

Distinguish:

If the named plaintiff originally has a valid claim, but the claim becomes moot after certification, the court may permit substitution of a proper class representative and allow the case to proceed [*see Lierboe v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 350 F3d 1018, 1023 n6*].

The Ninth Circuit has not directly addressed whether a plaintiff having a cause of action against a single defendant has standing to maintain a class action against the single defendant as well as an unrelated group of defendants who have engaged in similar conduct [*see Cady v. Anthem Blue Cross Life & Health Ins. Co. (ND Cal 2008) 583 F Supp2d 1102, 1106]* . However, district courts within the circuit have concluded that a plaintiff may not sue any defendant against whom plaintiff has no individual claim [*see, e.g., Cady v. Anthem Blue Cross Life & Health Ins. Co. (ND Cal 2008) 583 F Supp2d 1102, 1106* (listing cases)].

20.12[1][b] Mootness of Representative's Claim After Certification Does Not Require Dismissal. If a named plaintiff's claims become moot after a class has been certified, jurisdiction is not necessarily lost. If the dispute remains alive between any of the class members and the defendant, this satisfies the constitutional case or controversy

requirement [*Sosna v. Iowa (1975) 419 US 393, 401-402, 95 S Ct 553, 42 L Ed2d 532* ; *Franks v. Bowman Transp. Co. (1976) 424 US 747, 755-757, 96 S Ct 1251, 47 L Ed2d 444*].

20.12[1][c] Mootness Before Certification Does Not Defeat Jurisdiction If Relation-Back Exception Applies. If the class representative's claims become moot and the class has not been certified, ordinarily the court loses jurisdiction and the court must dismiss the action [*see Board of Sch. Comm'rs v. Jacobs (1975) 420 US 128, 129, 95 S Ct 848, 43 L Ed2d 74*].

A "relation-back" exception applies when the claims are so inherently transitory that the trial court will not be able to rule on class certification before the named plaintiff's individual claim expires. In this situation, a later certification is considered to relate back to the time that the action was filed. Accordingly, the class claims are present in the action at the beginning of the action and an actual controversy still exists even though the named representative's claims become moot [*see County of Riverside v. McLaughlin (1991) 500 US 44, 52, 111 S Ct 1661, 114 L Ed2d 49* ; *Gerstein v. Pugh (1975) 420 US 103, 110 n11, 95 S Ct 854, 43 L Ed2d 54*].

20.12[2] Federal Jurisdiction Must Be Established.

20.12[2][a] Jurisdiction May Be Based on Diversity or Federal Question. Federal jurisdiction does not exist merely because an action is a class action. Jurisdiction must be conferred, as in any other case, by an appropriate jurisdictional statute, such as the federal question jurisdiction statute [*see 28 USC § 1331*] or the diversity jurisdiction statute [*see 28 USC § 1332*].

20.12[2][b] For General Diversity Jurisdiction, Citizenship of Class Representative Is Considered for Diversity Purposes and Class Representative Must Meet Amount in Controversy Requirement. Diversity jurisdiction requires complete diversity of citizenship between plaintiffs and defendants [*see 28 USC § 1332(a)*]. However, in class actions, only the citizenship of the named plaintiffs, not the citizenship of other, unnamed class members, need be considered [*Supreme Tribe of Ben-Hur v. Cauble (1921) 255 US 356, 365, 41 S Ct 338, 65 L Ed 673*].

Diversity jurisdiction also requires an amount in controversy that exceeds $75,000 [*28 USC § 1332(a)*]. In a class action, this requirement must be met by a named plaintiff. If a named plaintiff has a claim that meets the amount in controversy requirement, the court has supplemental jurisdiction over claims of other named and unnamed class members irrespective of the amount in controversy in those claims [*Exxon Mobil Corp. v. Allapattah Servs., Inc. (2005) 545 US 546, 549, 566-567, 125 S Ct 2611, 162 L Ed2d 502* ; *see 28 USC § 1367* (supplemental jurisdiction statute)].

Cross Reference:

Nature and scope of supplemental jurisdiction, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§§ 2.26 -2.30*.

A named plaintiff must meet the amount-in-controversy requirement without considering the "separate and distinct" claims of the other class members. The claims of the named and unnamed class members may not be aggregated to meet the amount-in-controversy requirement in most cases. Aggregation is appropriate only when the class unites to enforce a single title or right in which all class members, named and unnamed, have a "common and undivided" interest [*see Gibson v. Chrysler Corp. (9th Cir 2001) 261 F3d 927, 943-945 , cert. denied sub nom. Daimler Chrysler Corp. v. Gibson, 534 US 1104 (2002)*]. This may occur, for example, when the class asserts claims against a single indivisible res, such as an estate, piece of property, or insurance policy, which cannot be adjudicated without implicating the rights of everyone involved with the res [*see In re Ford Motor Co./Citibank (S.D.), N.A. (9th Cir 2001) 264 F3d 952, 959-960 , cert. dismissed, 537 US 1 (2002)*]. In most circumstances, there is no common and undivided interest sufficient to justify aggregation:

- Claims for disgorgement or punitive damages do not implicate a "common and undivided" interest [*see Gibson v. Chrysler Corp. (9th Cir 2001) 261 F3d 927, 943-947 , cert. denied sub nom. Daimler Chrysler Corp. v. Gibson, 534 US 1104 (2002)*].

- Claims for attorney's fees may not be attributed solely to the named plaintiff for purposes of the amount in controversy unless the statute under which they are awarded so provides. When fees are to be awarded to a "successful party" or "prevailing plaintiff," they must be awarded to the plaintiff class as a whole, so that the named plaintiff may claim only a pro rata share with respect to the amount in controversy requirement [*Gibson v. Chrysler Corp. (9th Cir 2001) 261 F3d 927, 942-943 , cert. denied sub nom. Daimler Chrysler Corp. v. Gibson, 534 US 1104 (2002)* ; *Kanter v. Warner-Lambert Co. (9th Cir 2001) 265 F3d 853, 858* ; *see CC § 1780*; *CCP § 1021.5*].

- The cost to the defendant of injunctive relief may not be attributed solely to the named plaintiff when the injunctive relief is a method of satisfying "separate and distinct" claims of the class members. For example, an action seeking an injunction to prevent the defendant from selling a defective product arose from the separate claims of the individual consumers. In this situation, considering the costs to the defendant would merely be impermissibly aggregating the separate claims to meet the amount in controversy requirement [*Kanter v. Warner-Lambert Co. (9th Cir 2001) 265 F3d 853, 859-860*].

20.12[2][c] When Amount in Controversy Exceeds $5 Million and Class Members Number 100 or More, Modified Diversity Requirements May Apply. Under the Class Action Fairness Act of 2005 [109 PL 2, 199 Stat 4 (applicable to civil actions filed on or after February 18, 2005)], a district court has original jurisdiction of certain class actions in which:

- The matter in controversy exceeds the sum or value of $5 million, exclusive of interest and costs [*28 USC § 1332(d)(2)*; *Berry v. American Express Publ'g, Corp. (CD Cal 2005) 381 F Supp2d 1118, 1123* (amount-in-controversy requirement may be satisfied either from view of aggregate value to class members or defendants)].

- Diversity of citizenship exists between *any* member of a class of plaintiffs and *any* defendant [*28 USC § 1332(d)(2)*].

- There are 100 or more members in all proposed plaintiff classes [*28 USC § 1332(d)(5)(B)*; *see Tanoh v. Dow Chemical Co. (9th Cir 2009) 561 F3d 945, 953* (seven individual state court actions, each with fewer than 100 plaintiffs, could not be considered together for purposes of 100-person minimum required to create one "mass action" eligible for removal to federal court under CAFA)].

Distinguish:

Unlike general diversity jurisdiction, the claims of individual class members are aggregated to determine whether the amount in controversy exceeds $5 million [*28 USC § 1332(d)(6)*].

These modified diversity requirements do not apply when any of the following is true:

- The action was commenced before February 18, 2005 [109 PL 2, § 9, 199 Stat 4]. For purposes of Class Action Fairness Act retroactivity, "commenced" means the date the complaint is filed, not the date the case is removed [*Bush v. Cheaptickets, Inc. (9th Cir 2005) 425 F3d 683, 689*]. For purposes of determining CAFA's effective date, an action is commenced under California law when the original complaint in the action is filed, irrespective of any relation back analysis [*Progressive W. Ins. Co. v.*

Preciado (9th Cir 2007) 479 F3d 1014, 1016-1017]. Further, an amendment to a cross-complaint in California state court (a counterclaim in federal court) does not commence an action under the CAFA as of the date of the amendment [*Progressive W. Ins. Co. v. Preciado (9th Cir 2007) 479 F3d 1014, 1015-1016*].

- The primary defendants are states, state officials, or other governmental entities against whom relief is foreclosed [*28 USC § 1332(d)(5)(A)*].

- The action solely involves a covered security [*28 USC § 1332(d)(9)(A)*].

- The action solely relates to the internal affairs or governance of a corporation or other business entity and arises under the laws of the state of incorporation or organization [*28 USC § 1332(d)(9)(B)*].

- The action solely relates to the rights, duties, and obligations relating to or created by or under any security [*28 USC § 1332(d)(9)(C)*].

Cross Reference:

Discussion of jurisdiction requirements under Class Action Fairness Act of 2005, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§ 2.24A*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureClass ActionsGeneral Overview

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20.13 Filing Tolls Statute of Limitations for Absent Class Members.

The commencement of a class action tolls the applicable statute of limitations for all putative class members until the certification question is resolved [*American Pipe & Constr. Co. v. Utah (1974) 414 US 538, 554, 94 S Ct 756, 38 L Ed2d 713]* . A putative class member who files a separate action pending a decision on class certification is entitled to the benefits of this tolling [*Phillips v. E.I Dupont de Nemours & Co. (In re Hanford Nuclear Reservation Litig.) (9th Cir 2008) 521 F.3d 1038, 1053* (filing timely class action provides defendants with notice of claim, so follow-on individual suit cannot surprise defendants)]. If certification is denied, putative class members may, within the time remaining in the limitations period, either intervene in the same action as plaintiffs [*American Pipe & Constr. Co. v. Utah (1974) 414 US 538, 554, 94 S Ct 756, 38 L Ed2d 713*] or file their own separate suits [*Crown, Cork & Seal Co. v. Parker (1983) 462 US 345, 354, 103 S Ct 2392, 76 L Ed2d 628*].

This tolling may not be extended by "stacking." That is, once certification is denied in one action, the limitations period is not further extended by filing another class action based on the same claims [*see Robbin v. Fluor Corp. (9th Cir 1987) 835 F2d 213, 214*].

When the court grants certification, the tolling of the statute of limitations ceases with respect to class members who opt out of the class. The statute begins to run again from the date the class member opts out [*see Tosti v. City of Los Angeles (9th Cir 1985) 754 F2d 1485, 1488*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersNonnamed MembersGovernmentsLegislationStatutes of LimitationsExtension & RevivalGovernmentsLegislationStatutes of LimitationsTime LimitationsCivil ProcedureClass ActionsClass Action Fairness ActGovernmentsLegislationStatutes of LimitationsTolling

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20.14 CHECKLIST: Moving for Class Certification.

☐ Request and carry out appropriate discovery on class certification issues.

Discussion:
20.16[5]; Unit 7, Discovery (Chs. 21-25).

☐ Draft and file a motion for class certification, along with supporting declarations.

Timing:
The motion should be filed early enough to allow the court to make its certification decision "at an early practicable time" [*Fed R Civ P 23(c)(1)(A)*]. The court's pretrial scheduling order will usually specify a deadline [*see Fed R Civ P 16*].

Authority:
Fed R Civ P 23(c)

Discussion:
See *§§ 20.15, 20.16*

Form:
See *§ 20.59*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ Include in the motion a request to the court to appoint counsel.

Authority:
Fed R Civ P 23(c)(1)(B)

Discussion:
See *§§ 20.21, 20.33*

☐ Keep in mind that the court must conduct a "rigorous analysis" to ensure that certification is proper:

- ○ Court may hold an evidentiary hearing.
- ○ The party seeking certification has the burden of proving that the *Fed R Civ P 23* requirements are met.
- ○ The court will scrutinize the class definition and may reframe the class or divide it into subclasses.

Discussion:
See *§ 20.16*

☐ Prepare an order for the court's signature in the event it grants certification, that:

- ○ Defines the class and the class claims, issues, or defenses.
- ○ Specifies the court's findings that the *Fed R Civ P 23(a)* prerequisites have been met.
- ○ Indicates the subsection of *Fed R Civ P 23(b)* under which the action is certified, and specifies the court's findings that the requirements of that subsection have been met.
- ○ Appoints class counsel.

Authority:
Fed R Civ P 23(c)(1)(B)

Discussion:
See *§ 20.21*

Form:
See *§ 20.60*

☐ If the court's certification decision is unfavorable, consider filing an immediate interlocutory appeal of that decision.

Timing:

Application must be made to the court of appeals within 14 days after entry of the district court order [*Fed R Civ P 23(f)*].

Authority:

Fed R Civ P 23(f)

Discussion:

See *§ 20.23*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureClass ActionsAppellate ReviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

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20.15 Proponent of Class Must Make Timely Motion for Certification.

20.15[1] Certification Process Initiated by Motion. The certification process is usually initiated by the named plaintiff's motion for certification. The motion should be filed early enough to allow the court to make its certification decision "at an early practicable time" [*Fed R Civ P 23(c)(1)(A)*] and within the time provided by the court's scheduling order [*see Fed R Civ P 16*] and by any applicable local rules.

Cross Reference:

Discussion of "early practicable time" requirement, see *§ 20.16[1].*

The motion should be accompanied by declarations showing that the *Fed R Civ P 23(a)* and *(b)* requirements have been met, along with a supporting brief or memorandum. In addition to requesting certification, the motion should request appointment of class counsel, or be accompanied by an application to serve as class counsel. If the court certifies the class, the court must also appoint class counsel [*Fed R Civ P 23(c)(1)(B)*].

If there is no real dispute as to the facts, and the only dispute concerns the application of the facts to the legal standard for certification, the parties should explore whether it is possible to submit a stipulated set of facts relevant to certification.

20.15[2] LOCAL PRACTICE: CD Cal Requirements. The proponent of the class must file a motion for certification within 90 days after service of a pleading purporting to commence a class action (other than a securities class action), unless otherwise ordered by the court [*CD Cal Civ LR 23-3*].

20.15[3] LOCAL PRACTICE: ED Cal Requirements. The proponent of the class must move for a determination on the certification issue within the time directed by the court in a *Fed R Civ P 16* scheduling order. The court may certify the action, refuse to certify and strike the class action allegations, or order postponement of the determination pending discovery or other preliminary procedures [*ED Cal Civ LR 205*; *see also ED Cal Civ LR 240*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureClass ActionsCertificationGovernmentsCourtsRule Application & Interpretation

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20.16 Court Must Decide Whether to Certify Class at Early Practicable Time.

20.16[1] Early Resolution Is Required. When a case is filed as a class action, the court must determine by order whether to certify the action as a class action "at an early practicable time" [*Fed R Civ P 23(c)(1)(A)*]. This language requires early resolution but also allows time, when necessary, to gather the information necessary to the certification decision; to resolve motions to dismiss or for summary judgment as to the individual claims; to explore designation of class counsel; or to develop a trial plan. The court should ensure that the certification decision is not unjustifiably delayed [*Fed R Civ P 23(c)(1)*, Committee Note of 2003].

A defendant may move to deny class certification, and the court may act on the motion, even though plaintiffs have not yet filed a motion to certify a class [*Vinole v. Countrywide Home Loans, Inc. (9th Cir 2009) 571 F3d 935, 941* ; *see Wright v. Schock (9th Cir 1984) 742 F2d 541, 543-544* (court may rule on dispositive motion, such as motion for summary judgment on named plaintiff's individual claims, before deciding on certification)]. The court also does not abuse its discretion by ruling before the discovery cutoff [*Vinole v. Countrywide Home Loans, Inc. (9th Cir 2009) 571 F3d 935, 942]* . Most often, however, the court will delay the dispositive motion until after the certification decision. That way, if certification is appropriate, judicial economy will be served by the resolution of the issue with respect to the whole class [*see Schwarzschild v. Tse (9th Cir 1995) 69 F3d 293, 295* , *cert. denied, 517 US 1121 (1996)*].

Strategic Point--Defendant:

A resolution on the merits before certification has no preclusive effect with respect to putative classmembers other than the named representatives. Thus, if the defendant has a strong case on the merits, the defendant may prefer to litigate the case as a class action and resolve the issues with respect to the entire class, rather than move for judgment before certification. Alternatively, individual resolution may be preferred if it is likely that no other proposed class member will seek to bring the case as a class action or if only a small proportion of the class will eventually file suit. Moreover, a judgment against the named plaintiff may deter other class members from bringing suit, thus saving the defendant the extra expense of litigating a class action.

The time for the certification decision and other related matters will usually be set in the court's Rule 16 scheduling order [*see Fed R Civ P 16*; *ED Cal Civ LR 205(1)*; *ND Cal Civ LR 16-10(b)(14)*].

Cross Reference:

Discussion of scheduling orders, see Ch. 16, Case Management Conferences, see *§§ 16.03 -16.13*.

20.16[2] Court Must Conduct Rigorous Analysis. The trial court must conduct a "rigorous analysis" to determine whether the party seeking certification has met requirements of *Fed R Civ P 23*. The court may certify the class only if the class proponent show the court that all the prerequisites of *Fed R Civ P 23(a)* and *(b)* have been satisfied [*General Tel. Co. of the Southwest v. Falcon (1982) 457 US 147, 161, 102 S Ct 2364, 72 L Ed2d 740* ; *Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1186* , *as amended, 273 F3d 1266 (2001)*].

20.16[3] Court Has Broad Discretion Within Framework of Rule 23. The trial court has broad discretion whether to certify a class, although its discretion must be exercised within the framework of *Fed R Civ P 23* [*Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1186* , *as amended,* 273 F3d 1266 (2001)].

If the requirements of Rule 23 are not met, certification is improper. However, Rule 23 provides that an action "may" be maintained as a class action if the requirements are met [*Fed R Civ P 23(b)*]. Accordingly, even when the prerequisites for certification have been satisfied, the trial court nevertheless has broad discretion in determining whether a class should be certified [*see Armstrong v. Davis (9th Cir 2001) 275 F3d 849, 872 n28*].

20.16[4] Court Will Hold Evidentiary Hearing. The court may not merely accept as true the allegations in the complaint, but must make whatever factual and legal inquiries are necessary to resolve the certification issues [*see Szabo v. Bridgeport Machs., Inc. (7th Cir 2001) 249 F3d 672, 675-677* , *cert. denied, 534 US 951 (2001)*]. Accordingly, the court may hold an evidentiary hearing to allow the parties to present proof on whether the requirements of Rule 23 have or have not been met, and to allow the parties to argue that class-wide resolution is or is not appropriate under the circumstances. However, even if the court holds an evidentiary hearing, it should not be approached as a minitrial of the individual or class substantive claims. Instead, the focus will be on the certification issues, such as predominance of common over individual questions. The judge may limit the number of witnesses, admit depositions in summary form, and permit limited expert evidence [Manual for Complex Litigation (Fourth) § 21.21 (2004)]. An extensive evidentiary showing is not required; all that is required is enough for the court to make a "reasonable judgment" on each requirement [*In re* Heritage Bond Litig. (CD Cal 2004) 2004 US Dist LEXIS 15386, at *8].

Alternatively, the court might resolve class certification issues based on the papers that have been filed, without holding an evidentiary hearing. The decision as to whether to hold an evidentiary hearing is usually left to the discretion of the court

20.16[5] Court May Allow Discovery. The district court may permit discov-ery to determine whether class certification is appropriate, may limit discovery to class certification issues, and may make appropriate orders to control the course of proceedings [*see Armstrong v. Davis (9th Cir 2001) 275 F3d 849, 872 n28* ; *see also Kamm v. California City Dev. Corp. (9th Cir 1975) 509 F2d 205, 209* (whether or not to allow discovery in class action is within court's sound discretion)].

Often, the same information is relevant to both certification and the decision on the merits. It is appropriate for the court to allow controlled discovery into these areas, provided the certification decision is not unjustifiably delayed [*see Fed R Civ P 23(c)(1)*, Committee Note of 2003].

Cross References:

Proper scope of precertification discovery, see5 *Moore's Federal Practice, § 23.85* (Matthew Bender 3d

ed.). Discussion of discovery procedures, see Unit 7, Discovery (Chs. 21-25).

20.16[6] Proponent of Class Has Burden of Proof. The party seeking class certification bears the burden of demonstrating that each of the four requirements of *Fed R Civ P 23(a)* and that the requirements for at least one of the *Fed R Civ P 23(b)* categories of class actions are met [*Zinser v. Accufix Research Inst., Inc. (9th Cir 2001) 253 F3d 1180, 1186* , *as amended, 273 F3d 1266 (2001)*].

Cross Reference:

Discussion of requirements of Rule 23(a) and (b), see *§§ 20.06*, *20.07*.

20.16[7] Court Should Not Consider Merits. A court should not make a premature determination on the merits of the action in determining whether a class action is appropriate [*Eisen v. Carlisle & Jacquelin (1974) 417 US 156, 179, 94 S Ct 2140, 40 L Ed2d 732*]. The court should not consider whether the class is likely to prevail [*see Szabo v. Bridgeport Machs., Inc. (7th Cir 2001) 249 F3d 672, 675-677*].

However, when making its certification decision a court may consider evidence that relates to the merits if that evidence also goes to the requirements of *Fed R Civ P 23(a)* or *(b)* [*Dukes v. Wal-Mart Stores, Inc. (9th Cir 2010) 603 F3d 571, 582* (while *Fed R Civ P 23* prohibits court from making any premature determinations of merits, it does not prevent court from using underlying facts to determine whether, for example, plaintiffs have demonstrated common questions of law or fact); *Hanon v. Dataproducts Corp. (9th Cir 1992) 976 F2d 497, 509*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsPrerequisitesGeneral Overview

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20.17 Court May Certify As to Particular Issues.

When appropriate, an action may be certified as a class action with respect to particular issues [*Fed R Civ P 23(c)(4)*]. The certification order must define the particular issues for which the class is certified [*see Fed R Civ P 23(c)(1)(B)*]. This type of limited certification is most often used to certify a class for determination of liability issues only, with individual damages issues to be determined separately [*see Fed R Civ P 23*, Committee Note of 1966].

If common questions do not predominate over individual questions when considering the action as a whole, so that class certification of the entire action is not warranted under *Fed R Civ P 23(b)(3)*, the district court may, in appropriate cases, isolate the common issues and proceed with class treatment limited to those particular issues [*see Valentino v. Carter-Wallace, Inc. (9th Cir 1996) 97 F3d 1227, 1234*].

Cross Reference:

Discussion of predominance requirement, see *§ 20.07[5][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesMaintainability

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20.18 Court May Create Subclasses.

When appropriate, the court may divide a proposed class into subclasses [*Fed R Civ P 23(c)(5)*; *see Bates v. UPS (ND Cal 2001) 204 FRD 440, 443] , vacated in part, reversed in part, and remanded on other grounds, Bates v. UPS (9th Cir 2007) 511 F3d 974* . When the court certifies subclasses, each subclass is treated as a separate class, and the requirements of *Fed R Civ P 23* must be applied separately to each subclass [*see Fed R Civ P 23(c)(4)*].

Example:

When a proposed class in a tort action is divided between holders of present and future claims, the class must be divided into homogenous subclasses with separate representation [*Ortiz v. Fibreboard Corp. (1999) 527 US 815, 842, 119 S Ct 2295, 144 L Ed2d 715*].

While the court has the authority to create subclasses, it is not required to do so sua sponte. Rather, the party seeking certification has the burden to submit an appropriate certification proposal to the court [*see United States Parole Comm'n v. Geraghty (1980) 445 US 388, 407-408, 100 S Ct 1202, 63 L Ed2d 479*].

A class action with too many subclasses or disparate subclasses may be too unwieldy to maintain as a class action. The difficulties of dealing with the various subclasses may undermine the benefits class certification is intended to provide [*see In re Paxil Litig. (CD Cal 2003) 212 FRD 539, 545*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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20.19 Court May Certify Settlement-Only Class.

Parties will frequently negotiate a settlement before certification, or even before the suit is filed, and request that the court certify the class and approve the settlement at the same time. The class in an action of this type, which is not intended to be litigated, is usually referred to as a "settlement class."

A court may properly certify a settlement class, but only if all of the relevant requirements of *Fed R Civ P 23* are met. The fairness inquiry required for settlements under *Fed R Civ P 23(e)* does not supersede the requirements of *Fed R Civ P 23(a)* and *(b)* [*see Amchem Prods. Inc. v. Windsor (1997) 521 US 591, 621-622, 117 S Ct 2231, 138 L Ed2d 689*].

A court need not inquire whether the case, if tried, would present intractable management problems [*see Fed R Civ P 23(b)(3)(D)*], because the proposal is that there be no trial. However, other specifications of the rule demand undiluted, even heightened, attention in the settlement context. This attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold [*see Amchem Prods. Inc. v. Windsor (1997) 521 US 591, 620, 117 S Ct 2231, 138 L Ed2d 689*].

Cross Reference:

Discussion of requirement that court approve settlements, see *§ 20.42*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsCompromises

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20.20 Court May Certify Defendant Class.

While most class actions involve claims by a class of plaintiffs, *Fed R Civ P 23* also allows the court to certify an action against a class of defendants under Rule 23(b)(1) and (b)(3) [*see Fed R Civ P 23(b)(1), (3)*; *see, e.g., Weinberger v. Jackson (ND Cal 1984) 102 FRD 839, 848-849*]. Rule 23(b)(2), which allows certification of classes seeking injunctive or declaratory relief with respect to the class as a whole, is usually held to apply only to plaintiff classes [*Fed R Civ P 23(b)(2)*; *see Tilley v. TJX Cos. (1st Cir 2003) 345 F3d 34, 39-40*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersDefendants

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20.21 Court Must Issue Written Order.

The court must determine by order whether to certify the action as a class action [*Fed R Civ P 23(c)(1)(A)*; *see also Besinga v. United States (9th Cir 1991) 923 F2d 133, 135*]. If the court certifies the class, the order must [*Fed R Civ P 23(c)(1)(B)*; *see Valentino v. Carter-Wallace, Inc. (9th Cir 1996) 97 F3d 1227, 1234*]:

- Define the class and the class claims, issues, or defenses;
- Appoint class counsel;
- Specify that all the requirements of *Fed R Civ P 23(a)* have been met; and
- Indicate the subsection(s) of *Fed R Civ P 23(b)* under which the action is proceeding.

The certification decision may not be conditional on later events or findings, although the court may amend the certification order and decertify the class if appropriate at any time before final judgment. If the court is not satisfied that the *Fed R Civ P 23* requirements are met, the court should refuse to certify until those requirements are met [*see Fed R Civ P 23(c)(1)(C)*, Committee Note of 2003].

If the court denies certification, it may order the parties to amend their pleadings to eliminate the class allegations, and then proceed with the individual claims [*see Fed R Civ P 23(d)(1)(D)*].

Cross References:

Discussion of class definition, see *20.05*. Discussion of appointment of class counsel, see *§ 20.33*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass CounselAppointmentsCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsDecertificationCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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20.22 Court May Revise Order or Decertify Class.

An order certifying a class action, or refusing to certify a class action, may be altered or amended as appropriate at any time before final judgment [*Fed R Civ P 23(c)(1)(C)*].

For example, the district court may amend the order to redefine the class [*see Armstrong v. Davis (9th Cir 2001) 275 F3d 849, 872 n28*]. Redefinition may become necessary to conform to the proof presented at trial [*see Penk v. Oregon State Bd. of Higher Educ. (9th Cir 1987) 816 F2d 458, 467 , cert. denied, 484 US 853 (1987)*].

The district court's broad discretion to determine whether a class should be certified extends to decertification. The court should revisit its certification decision throughout the legal proceedings and decertify the class if necessary [*see Armstrong v. Davis (9th Cir 2001) 275 F3d 849, 872 n28*]. The court should not decertify a class without good cause; but developments in the litigation, such as the discovery of new facts or changes in the parties or in the substantive or procedural law, may require reconsideration of the certification order [*see O'Connor v. Boeing N. Am., Inc. (CD Cal 2000) 197 FRD 404, 409-410*].

Consider:

If the court redefines a *Fed R Civ P 23(b)(3)* class so that it includes new members, additional notice and an opportunity to opt out must be afforded the new members [*see Fed R Civ P 23(c)(1)*, Committee Note of 2003].

Cross Reference:

Discussion of notice and opportunity to opt out, see *§§ 20.26*, *20.27*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsDecertificationCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out Provisions

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20.23 Court of Appeals May Permit Interlocutory Review of Certification Decision.

A decision certifying or refusing to certify a class is not a final order or appealable collateral order and, therefore, is not immediately appealable as of right. The decision may be reviewed as of right only on appeal from the final judgment [*see Coopers & Lybrand v. Livesay (1978) 437 US 463, 468, 98 S Ct 2454, 57 L Ed2d 351*].

However, a court of appeals may, in its discretion, permit an interlocutory appeal from a district court order granting or denying class certification [*Fed R Civ P 23(f)*]. Review of class certification decisions will be granted rarely. The Ninth Circuit has opined that review should be granted only when any of the following circumstances exists [*Chamberlan v. Ford Motor Co. (9th Cir 2005) 402 F3d 952, 959*]:

- A death-knell situation exists for either the plaintiff or defendant independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable.

- The certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review.

- The district court's class certification decision is manifestly erroneous and the error is significant.

However, these categories are guidelines and the court of appeals retains discretion to grant review in a case falling outside of them [*Chamberlan v. Ford Motor Co. (9th Cir 2005) 402 F3d 952, 960*].

Timing:

Application must be made to the court of appeals within 14 days after entry of the district court order [*Fed R Civ P 23(f)*]. The 14-day period is calculated under *Fed R Civ P 6*. A motion for reconsideration filed within the Rule 23(f) time limit tolls the time for making the application until the district court rules on the motion for reconsideration [*see Shin v. Cobb County Bd. of Educ (11th Cir 2001) 248 F3d 1061, 1063-1065* (decided under former version of *Fed R Civ P 23(f)*)].

Cross Reference:

Calculating time under *Fed R Civ P 6*, § 8.05[2][e].

An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders [*Fed R Civ P 23(f)*]. A stay should be sought first from the district court [*Fed R Civ P 23*, Committee Note of 1998].

The district court's decision on certification (whether on interlocutory appeal under Rule 23(f) or on review after final judgment) is reviewed for abuse of discretion [*see Barber v. Hawaii (9th Cir 1994) 42 F3d 1185, 1197*].

Consider:

A named plaintiff may appeal a denial of class certification even if the named plaintiff's own individual claims have become moot. Although the named plaintiff no longer has any interest in the substantive relief sought, the named plaintiff retains a personal stake in obtaining class certification sufficient to assure that the constitutional case or controversy requirement is satisfied [*see United States Parole Comm'n v. Geraghty (1980) 445 US 388, 403-404, 100 S Ct 1202, 63 L Ed2d 479*].

If the district court dismisses an action without deciding whether to certify (rather than denying certification), a named plaintiff whose claims have become moot has standing to appeal only when the class claims are inherently transitory so that a failure to rule may mean that a class will never be assembled [*see Wade v. Kirkland (9th Cir 1997) 118 F3d 667, 669*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsAppellate ReviewCivil ProcedureClass ActionsCertificationCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsReviewabilityTime LimitationsCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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Unit 6 Class Actions
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20.24 CHECKLIST: Providing Notice to Class Members.

☐ Consider that:

○ In actions certified under *Fed R Civ P 23(b)(1)* or *(2)* (class actions primarily for injunctive or declaratory relief, with only incidental money damages), court has discretion to determine whether it will give class members notice of certification of the action as a class action.

○ In actions certified under *Fed R Civ P 23(b)(3)* (class actions for money damages), court must provide class members with notice of class certification and with an opportunity to opt out of class action.

Authority:
Fed R Civ P 23(c)(2)

Discussion:
See *§§ 20.26*, *20.27*

☐ In Rule 23(b)(3) class actions, draft or prepare notice for court's approval that concisely and clearly states all of the following in plain, easily understood language:

○ The nature of the action.

○ The definition of the class.

○ The class claims, issues, or defenses.

○ That a class member may enter an appearance through counsel if the member so desires.

○ That the court will exclude from the class any member who requests exclusion, stating when and how and when members may elect to be excluded.

○ That a class judgment, whether favorable or unfavorable to the class, will be binding on those who have received notice, who did not request to be excluded, and whom the court finds to be members of the class.

Authority:
Fed R Civ P 23(c)(2)(B)

Discussion:
See *§ 20.27[1]*

Forms:
Illustrative forms of notice are available at the Federal Judicial Center's website: http://www.fjc.gov

☐ Provide notice to class members as directed by court, noting that:

○ Individual notice, generally by first class mail, must be provided to those class members who can be identified through reasonable effort.

○ Publication in newspapers and magazines may be ordered in addition to individual notice if that is a reasonable way to reach class members who cannot be identified through reasonable effort.

○ Other types of notice may be appropriate in some cases, such as posting in a workplace.

Authority:
Fed R Civ P 23(c)(2)(B)

Discussion:
See *§ 20.27[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsNotices

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20.25 Options and Strategy.

In class actions certified under *Fed R Civ P 23(b)(1)* or *(b)(2)* (actions primarily for injunctive or declaratory relief, with only incidental requests for money damages), the court has discretion as to whether it will order notice of the class action to the absent class members [*Fed R Civ P 23(c)(2)(A)*]. The court has no discretion, and must order notice to the class of the certification decision and the pendency of the class action in any class action certified under *Fed R Civ P 23(b)(3)* [*Fed R Civ P 23(c)(2)(B)*]. Because the costs of notice to a large class may be high, and must ordinarily be born by the plaintiffs (or the plaintiffs' attorneys), whether notice should be given and the method of giving notice are often contested by the parties.

Consider--Flexibility of Notice If Notice Is Optional:

Because notice itself is discretionary in (b)(1) and (b)(2) class actions, the court has complete flexibility as to the method and type of notice it may order [*see Fed R Civ P 23(c)(2)(A)* ("the court may direct *appropriate* notice to the class" [emphasis added])]. This flexibility recognizes that, in some instances, the cost of notice could potentially outweigh any benefit that the class could receive from the notice and, in a few instances, any benefit that the class could receive from the action on the merits. Therefore, in ordering notice in (b)(1) and (b)(2) class actions, the parties and the court should give consideration to cost effective notice mechanisms, such as posting notice on dedicated Internet web sites [*see Fed R Civ P 23*, Committee Note of 2003].

Distinguish:

Fed R Civ P 23(c) deals with notice to the class of the court's certification decision. If the action is settled, the class members must also be given notice of the settlement [*see Fed R Civ P 23(e)(1)*] and notice of other matters may also be ordered by the court [*see Fed R Civ P 23(d)(1)(B)*].

Cross References:

Discussion of notice of settlement, see *20.42[6]*. Discussion of questionnaires and other notices included in certification notice sent to class members, see *20.38[1]*. Discussion of notice of other matters, see *§ 20.38[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsNotices

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20.26 Court May Direct Notice in Rule 23(b)(1) or (2) Class Actions.

20.26[1] Notice Is Discretionary With Court. For any class certified under Rule 23(b)(1) or (2), the court "may" direct appropriate notice to the class. For these types of class actions, notice is discretionary with the court [*Fed R Civ P 23(c)(2)(A)*]. These types of class actions do not seek money damages as the primary remedy. Rule 23(b)(1) class actions are appropriate when separate litigation might impair the interests of the party opposing the class or other class members [*Fed R Civ P 23(b)(1)*], including a declaration of the competing rights of the parties as to their interests in a limited fund [*see Ortiz v. Fibreboard Corp. (1999) 527 US 815, 841-842, 119 S Ct 2295, 144 L Ed2d 715*]. Rule 23(b)(2) class actions are appropriate when a class seeks primarily injunctive or declaratory relief with respect to the class as a whole [*Fed R Civ P 23(b)(2)*] Although these types of class actions do not seek money damages as the primary remedy, these actions may also include secondary claims for damages.

Cross Reference:

Discussion of Rule 23(b)(1) and (b)(2) class actions, see *§ 20.07*.

The court's authority to order notice should be exercised with care. The court should balance the risk that the cost of notice may deter the pursuit of class relief against the benefits the class will derive from notice. Notice is most likely to be ordered in cases involving secondary claims for money damages. The more substantial the individual class members' money damages claims are, the more likely it is that the court will require notice to the individual class members [*see, e.g., Eubanks v. Billington (DC Cir 1997) 110 F3d 87, 94-96*], because the Supreme Court has held that the Due Process clause gives class members the right to notice and to opt out of a class action seeking money damages [*Phillips Petroleum, Co. v. Shutts (1985) 472 US 797, 811-812, 105 S Ct 2965, 86 L Ed2d 628*]. However, when the action seeks only injunctive relief, such as some civil rights actions, the cost of notice may be unjustifiably great [*see Fed R Civ P 23(c)(2)*, Committee Note of 2003].

The court's discretion to direct notice extends to the method of giving notice. Notice calculated to reach a significant number of class members may be sufficient to protect the interests of all class members. Informal methods may prove effective. Again, the court should consider the costs of notice in relation to the probable reach of inexpensive methods [*see Fed R Civ P 23(c)(2)*, Committee Note of 2003].

Distinguish:

For classes certified under Rule 23(b)(3), the court must order the "best notice practicable" to all class members who can be identified through reasonable effort [*Fed R Civ P 23(c)(2)(B)*].

20.26[2] Opportunity to Opt Out Is Ordinarily Not Required. Members of a Rule 23(b)(1) or (2) class action are not entitled to an opportunity to opt out, even if the court, in its discretion, has ordered that class members receive notice of the certification and pendency of the class action [*see Fed R Civ P 23(c)(2)*, Committee Note of 2003; *see, e.g., Dosier v. Miami Valley Broad. Corp. (9th Cir 1981) 656 F2d 1295, 1299*]. However, the court has discretion to allow the class members an opportunity to opt out [*see Fed R Civ P 23(d)*; *Molski v. Gleich (9th Cir 2003) 318 F3d 937, 947* , *overruled on other grounds*, *Dukes v. Wal-Mart Stores, Inc. (9th Cir 2010) 603 F3d 571, 617]* .

Consider:

Allowing the class members to opt out (and potentially pursue separate suits) may undermine the purposes of a (b)(1) or (b)(2) action. Generally speaking, (b)(1) actions are allowed in order to prevent the risk that individual suits might impair the interests of the party opposing the class or of other class members [*see Fed R Civ P 23(b)(1)*]. Similarly, (b)(2) actions seek injunctive relief with respect to the class as a whole [*see Fed R Civ P 23(b)(2)*]. Permitting individual class members to opt out of these types of classes could defeat the very purpose of class treatment in these cases [*see, e.g., Eubanks v. Billington (DC Cir 1997) 110 F3d 87, 94-96*].

Due process requires that absent class members have an opportunity to opt out only when the claims are wholly or predominately for monetary damages [*see Linney v. Cellular Alaska P'ship (9th Cir 1998) 151 F3d 1234, 1240, 1242 n6*]. When an action involves "substantial" monetary claims in addition to claims for injunctive or declaratory relief, it may be considered a "hybrid" suit, and a right to opt out may be required by due process as to the substantial monetary claims. These due process concerns may be addressed in one of three ways:

- The court could certify all of the claims of the class under Rule 23(b)(3);
- The court could bifurcate the case, certify the injunctive or declaratory relief claims under Rule 23(b)(1) or (b)(2), and certify the damages claims under Rule 23(b)(3); or
- The court could certify the claims under Rule 23(b)(1) or (2) and use its discretionary powers to order notice and an opportunity to opt out of a (b)(1) or (b)(2) class.

The Ninth Circuit ruled that, in a case involving treble statutory damages, the court had to order notice and an opportunity to opt by one of these three methods [*see Molski v. Gleich (9th Cir 2003) 318 F3d 937, 950-951* , *overruled on other grounds*, *Dukes v. Wal-Mart Stores, Inc. (9th Cir 2010) 603 F3d 571, 617]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out Provisions

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20.27 Court Must Direct Notice in Rule 23(b)(3) Class Actions.

20.27[1] Notice Is Mandatory. For any class action certified under *Fed R Civ P 23(b)(3)*, the court *must* direct the best notice practicable under the circumstances to class members, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state all the following in plain, easily understood language [*Fed R Civ P 23(c)(2)(B), (3)*]:

- The nature of the action.
- The definition of the class.
- The class claims, issues, or defenses.
- That a class member may enter an appearance through counsel if the member so desires.
- That the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded.
- That a class judgment, whether or not favorable to the class, will be binding on those who have received notice, who did not request to be excluded, and whom the court finds to be members of the class.

Notice is required not only by *Fed R Civ P 23* but by due process. In order to bind known, absent class members in a class action suit for money damages, due process requires adequate notice to the absent members of the pendency of the action and an opportunity for the members to opt out [*Phillips Petroleum Co. v. Shutts (1985) 472 US 797, 808, 812-814, 105 S Ct 2965, 86 L Ed2d 628* ; *Brown v. Ticor Title Ins. Co. (9th Cir 1992) 982 F2d 386, 392* , *cert. denied, 510 US 810 (1993)*]. Accordingly, a judgment entered before notice to the class does not bind the absent class members [*see Schwarzschild v. Tse (9th Cir 1995) 69 F3d 293, 296*].

If a class definition is altered to include new members, the court must direct notice, with an opportunity to opt out, to those new members [*see Fed R Civ P 23(c)(1)*, Committee Note of 2003].

Cross Reference:

Discussion of amendment of court's certification order, see *§ 20.22*.

Rule 23 explicitly requires plain language [*Fed R Civ P 23(c)(2)(B)*]. The notice should be drafted in such a way that the class members can readily understand their rights and options. The notice may need to be stated in one or more languages other than English [*see Mendoza v. United States (9th Cir 1980) 623 F2d 1338, 1351 , cert. denied sub nom. Sanchez v. Tuscon Unified Sch. Dist., 450 US 912 (1981)*].

Consider:

Illustrative clear-notice forms created by the Federal Judicial Center provide a helpful starting point for actions similar to those described in the forms [*see Fed R Civ P 23(c)(2)*, Committee Note of 2003]. These forms are available at the Center's website: http://www.fjc.gov.

20.27[2] Notice Must Be "Best Notice Practicable." The type of notice that the court must direct to class members is the "best notice practicable under the circumstances," including individual notice to all members who can be identified through reasonable effort [*Fed R Civ P 23(c)(2)(B)*]. This usually means sending an individual form of notice by first class mail to each class member who can be identified with reasonable effort [*see Roberts v. Heim (ND Cal 1988) 130 FRD 416, 423*].

Example:

In a case alleging antitrust and securities claims, notice was required to be mailed to 2,250,000 members whose names and addresses could be ascertained through the computerized records of the parties. The notice requirement could not be waived by the court, notwithstanding the expense involved in mailing such individual notice [*Eisen v. Carlisle & Jacquelin (1974) 417 US 156, 176, 94 S Ct 2140, 40 L Ed2d 732*].

The "best notice practicable" standard does not require that a class member actually receive notice in order to be bound by the class judgment, provided the court ordered notice that was reasonably calculated to reach the absent class members [*see Silber v. Mabon (9th Cir 1994) 18 F3d 1449, 1453-1454*]. The failure of some class members to receive notice does not render the notice inadequate when the class as a whole had adequate notice [*see Torrisi v. Tucson Elec. Power Co. (9th Cir 1993) 8 F3d 1370, 1375 , cert. denied, 512 US 1220 (1994)*].

When class members cannot be specifically identified through reasonable effort, publication in newspapers or magazines may be the best notice practicable [*see Silber v. Mabon (9th Cir 1994) 18 F3d 1449, 1455*]. In these circumstances, the court should order the notice published in those publications that class members are most likely to read, considering the geographic diversity of the class and other matters [*see Six Mexican Workers v. Arizona Citrus Growers (9th Cir 1990) 904 F2d 1301, 1304 n2*]. When publication is ordered, it is rarely, if ever, the sole method of notice ordered by the court. Courts usually authorize publication in concert with or in addition to direct notice to identifiable class members [*see Silber v. Mabon (9th Cir 1994) 18 F3d 1449, 1453*].

Publication is not the only alternative means of giving notice. Courts may also order other types of notice to supplement individual notice, including the posting of the notice at places where class members are likely to see the notice, or broadcast announcements on radio or television [*see Six Mexican Workers v. Arizona Citrus Growers (9th Cir 1990) 904 F2d 1301, 1304 n2*]. In securities class actions, courts may direct that notice be sent to the record owners of the securities (i.e., banks and securities brokers) with instructions that they forward the notice to the beneficial owners, who are the class members affected by the suit [*see Silber v. Mabon (9th Cir 1994) 18 F3d 1449, 1454 n3*].

20.27[3] Class Members Must Be Afforded Opportunity to Opt Out. The notice to class members must clearly state that the court will exclude from the class any member who requests exclusion, as well as when and how members may elect to be excluded. The notice must also state that a class judgment, whether favorable or unfavorable to the class, will be binding on class members who have received notice and who do not request to be excluded [*Fed R Civ P 23(c)(2)(B)*].

This notice requirement ensures that class members are aware of the action before the case is decided on the merits, and it allows class members to choose whether to be bound by the class judgment or whether to litigate their claims separately. The requirement prevents "one-way intervention," by which a class member would be able to make the decision to opt out or to participate only after the decision on the merits, and could therefore choose to be bound by the class resolution only when the resolution was guaranteed to be favorable to the class [*see Schwarzschild v. Tse (9th Cir 1995) 69 F3d 293, 296*].

An opportunity to opt out is required by due process; a member of a money damages *Fed R Civ P 23(b)(3)* class who is not afforded an opportunity to opt out is not bound by the class judgment [*Phillips Petroleum Co. v. Shutts (1985) 472 US 797, 808, 812-814, 105 S Ct 2965, 86 L Ed2d 628*]. The decision whether to participate or opt out is an individual one and may not be made for the class members by the class representative or the class counsel [*see Hanlon v. Chrysler Corp. (9th Cir 1998) 150 F3d 1011, 1024*].

20.27[4] Notice Must Set Deadlines for Action by Class Members. The notice must not only advise class members of their right to opt out, but must state how and when members may elect to be excluded [*Fed R Civ P 23(c)(2)(B)*]. Accordingly, the notice should include an express deadline by which class members must respond if they wish to exercise the right to opt out. When class members seek to opt out but fail to meet the deadline set by the court, the lack of timeliness may be excused under Rule 6 if the class member demonstrates excusable neglect [*Fed R Civ P 6*; *Silber v. Mabon (9th Cir 1994) 18 F3d 1449, 1455*].

Cross Reference:

Discussion of excusable neglect under Rule 6, see *Ch. 26, Pretrial Motion Practice, 26.35[3].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsDerivative ActionsNoticesCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out Provisions

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20.28 Class Proponent Ordinarily Must Bear Cost of Notice.

The plaintiff in a plaintiff class action ordinarily must bear the cost of providing notice to the class [*Eisen v. Carlisle & Jacquelin (1974) 417 US 156, 177, 94 S Ct 2140, 40 L Ed2d 732*].

However, the defendant may be required to bear some or all of the expense if the cost to the defendant is insubstantial or if the defendant would bear that expense in the ordinary course of business. For example, the defendant may be required to include notice in periodic mailings to the class members [*see Oppenheimer Fund, Inc. v. Sanders (1978) 437 US 340, 355 n22, 358-359, 98 S Ct 2380, 57 L Ed2d 253*].

Generally, class counsel will advance the costs of notice. The California Rules of Professional Conduct allow class counsel to advance the costs of litigation, and repayment may be contingent on the outcome of the case [Cal Rules Prof Conduct, Rule 4-210(A)(3); *see In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig. (CD Cal 1988) 122 FRD 251, 257*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselFeesCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsNoticesLegal EthicsClient RelationsBilling & Collection

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20.29 Interlocutory Appeal of Orders Relating to Notice May Be Available.

The court's order with respect to notice may in some cases be considered a final collateral order that is subject to interlocutory appeal [*Eisen v. Carlisle & Jacquelin (1974) 417 US 156, 179, 94 S Ct 2140, 40 L Ed2d 732*]. However, the courts of appeals may exercise jurisdiction over such an order only when there is a significant likelihood that a substantial portion of the class would not receive notice [*see Blum v. BankAtlantic Fin. Corp (11th Cir 1991) 925 F2d 1357, 1360*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsAppellate ReviewCivil ProcedureClass ActionsNoticesCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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20.30 LOCAL PRACTICE: CD Cal Requirements--Pleading.

Under a Central District of California local rule, any pleading purporting to commence a class action must contain a separate section entitled "Class Action Allegations" that must state, among other things, the nature of notice to the proposed class that is required or contemplated [*CD Cal Civ LR 23-2.2(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureClass ActionsNoticesGovernmentsCourtsRule Application & Interpretation

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CHAPTER 20 Class Actions
VI. SEEKING APPOINTMENT AS CLASS COUNSEL AND REQUESTING FEE AWARD

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20.31 CHECKLIST: Seeking Appointment As Class Counsel and Requesting Fee Award.

20.31[1] Seeking Appointment As Class Counsel.

☐ File a formal application seeking appointment with the court, either as part of the certification motion or separately.

Authority:
Fed R Civ P 23(g)(1)

Discussion:
See *§ 20.33*

☐ In the application and supporting materials, address the following factors in support of appointment:

○ The work counsel has done in identifying or investigating potential claims in the action.

○ Counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action.

○ Counsel's knowledge of the applicable law.

○ The resources counsel will commit to representing the class.

Authority:

Fed R Civ P 23(g)(1)(A)

Discussion:
See *§§ 20.33[2], [4]*

☐ The court must appoint counsel as follows:

○ If there is only one applicant, the court will appoint that applicant if it determines that the applicant is adequate to serve as counsel.

○ If there is more than one applicant, the court must appoint the applicant best able to represent the interests of the class.

○ If the court determines that none of the applicants would be satisfactory class counsel, the court may:

☐ Deny class certification;

☐ Delay certification and recommend that an application be modified;

☐ Invite new applications; or

☐ Make any other appropriate order.

Authority:
Fed R Civ P 23(c)(1)(B), (g)(2).

Discussion:
See *§ 20.33[1]*

☐ When drafting the court's certification order, ensure that it contains a provision appointing counsel for each class and subclass certified.

Authority:
Fed R Civ P 23(c)(1)(B), (g)(1)

Discussion:
See *§ 20.21*

20.31[2] Requesting Fee Award.

☐ Decide whether to request a fee award, considering:

○ Fees must be authorized by statute or by agreement of the parties.

○ Fees may be available to attorneys other than class counsel, such as:

☐ Attorneys who acted for the class before certification but were not appointed class counsel.

☐ Attorneys who represented objectors to a proposed settlement.

Authority:
Fed R Civ P 23(h)

Discussion:
See *§§ 20.35[1], [2]*

☐ To request an award of attorney's fees and nontaxable costs, file a Rule 54(d)(2) motion.

Timing:
The time for filing a motion for attorney's fees in a class action must be set by the court [*Fed R Civ P 23(h)*]. In cases involving a proposed settlement, the court should require filing in time for inclusion of information about the proposed fee award in the settlement notice that must be provided to the class as required by *Fed R Civ P 23(e)* [*see Fed R Civ P 23(h)(1)*, Committee Note of 2003].

Authority:
Fed R Civ P 23(h), 54(d)(2)

Discussion:
See *§ 20.35[1]*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, 26.12

☐ If class counsel filed the motion for attorney's fees, provide reasonable notice of the motion to class members as directed by the court; this notice may be included as part of the settlement notice.

Authority:
Fed R Civ P 23(h)(1)

Discussion:
See *§ 20.35[3]*

☐ Seek ruling on motion, noting that:

○ The court may hold a hearing.

○ The court will consider any objections filed by class members.

○ The court must carefully assess the reasonableness of the requested fees and nontaxable costs.

○ The court must find the facts and state its conclusions of law on the motion under Rule 52(a).

Authority:
Fed R Civ P 23(h)(2), (3), 52(a)

Discussion:
See *§ 20.35[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselAppointmentsCivil ProcedureClass ActionsClass CounselFees

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20.32 Options and Strategy.

The procedure for appointing class counsel is novel and was created by the 2003 amendments to Rule 23. Before then, the court scrutinized the qualifications for as part of the court's determination of adequacy of the class representative under *Fed R Civ P 23(a)(4)*. If the named plaintiff's counsel was not considered adequate, the class representative was not considered adequate either. The appointment procedure builds on that experience, but creates a new framework that separates the inquiry of who should be class representative from who should be class counsel [*see Fed R Civ P 23(g)*, Committee Note of 2003].

In most cases, the court will appoint the attorneys who filed the action as long as they are qualified to handle the case, because the court must recognize any work done to bring the case and must give consideration to the already existing attorney-client relationship between the class representatives and their attorney. However, under the appointment criteria set out in Rule 23(g), it is possible for the court to appoint counsel who have no prior relationship with the case or with the class representatives [*see Fed R Civ P 23(g)*].

The *Fed R Civ P 23(h)* provisions governing fee awards in class actions are also new, although courts have long been required to approve fee awards that are part of a settlement of a class action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselAppointmentsCivil ProcedureClass ActionsClass CounselFees

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20.33 Court Must Appoint Class Counsel.

20.33[1] Court Must Appoint Counsel at Time of Certification. When a court certifies a class, the court must also appoint class counsel unless a specific statute provides otherwise [*Fed R Civ P 23(g)(1)*]. The appointment must be made in the court's certification order [*Fed R Civ P 23(c)(1)(B)*].

An example of a statute that provides otherwise is the Private Securities Litigation Reform Act of 1995. In securities class actions governed by this statute, the court appoints a lead plaintiff, who then selects counsel, subject to the approval of the court [*see 15 USC §§ 77z-1(a)(3)(B)(v), 78u-4(a)(3)(B)(v)*].

Cross Reference:

Discussion of appointment of lead plaintiff and selection of counsel under PSLRA, see *§ 20.50*.

If the court certifies subclasses to represent divergent interests, the court must appoint class counsel for each subclass [*Fed R Civ P 23(g)(1)(A)*, Committee Note of 2003].

The class counsel may be an individual attorney, an entire firm, or even several attorneys or firms who are not otherwise affiliated. The court should be alert to the need for adequate staffing, but also to the risk of overstaffing or an ungainly counsel structure [*see Fed R Civ P 23(g)(2)*, Committee Note of 2003].

When there is only one applicant for appointment as class counsel, the court may appoint that applicant only if the court determines the applicant to be adequate. If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class [*Fed R Civ P 23(g)(2)*].

If, after review of all applicants, the court determines that none would be satisfactory class counsel, the court may deny class certification. Alternatively, it may delay certification and recommend that a class counsel application be modified, invite new applications for class counsel, or make any other appropriate order [*Fed R Civ P 23(g)(1)(C)*, Committee Note of 2003]. However, the court may not certify the class unless it also appoints class counsel [*Fed R Civ P 23(c)(1)(B)*].

The court may make any appropriate further orders in connection with the appointment of class counsel [*Fed R Civ P 23(g)(1)(E)*]. For example, the court may, if necessary, require additional notice to allow class members the opportunity to signify whether they consider the representation fair and adequate [*Fed R Civ P 23(d)(1)(B)(iii)*].

Cross Reference:

Additional discussion of Rule 23(g) appointment of counsel, see 5 *Moore's Federal Practice, § 23.120* (Matthew Bender 3d ed.).

20.33[2] Counsel Should Submit Application to Court. Those attorneys or firms that desire to be appointed class counsel should ordinarily file a formal application detailing their suitability for the position. The court usually will not appoint counsel who have not sought appointment. For counsel who filed the action, the materials submitted in support of the motion for class certification may be sufficient to justify appointment [*see Fed R Civ P 23(g)(2)*, Committee Note of 2003].

The application (or the materials submitted in support of the certification motion if the application is included in that motion) should address the factors the court must consider under *Fed R Civ P 23(g)(1)(C)(i)* [*see Fed R Civ P 23(g)(1)(C)*, *(2)*, Committee Note of 2003].

Cross Reference:

Discussion of factors, see *§ 20.33[4]*.

It may be appropriate for the court to allow a reasonable time after commencement of the action for applications to be filed. Multiple applications might be expected, for example, when more than one class action has been filed, or in which other attorneys have filed individual actions. Competition facilitates the goal of providing the best possible representation for the class [*Fed R Civ P 23(g)(2)(A)*, Committee Note of 2003].

20.33[3] Class Counsel Must Fairly and Adequately Represent Class. An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class [*Fed R Civ P 23(g)(4)*].

The primary obligation of class counsel is to the class rather than to the class representatives. Accordingly, counsel's obligations differ from the customary obligations of counsel to individual clients. The class representative does not have an unfettered right to fire class counsel, nor can the class representative command class counsel to accept or reject a settlement. Counsel must determine whether a settlement would be in the best interests of the class as a whole [*Fed R Civ P 23(g)(1)(B)*, Committee Note of 2003; *see, e.g., Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 960*].

On the other hand, control of the class action is not left completely in the control of class counsel. If counsel and the class representative disagree about a significant matter, such as whether to accept a settlement, they should submit the dispute to the court for resolution [*see Maywalt v. Parker & Parsley Petroleum Co. (2d Cir 1995) 67 F3d 1072, 1078*].

20.33[4] Court Must Consider Prescribed Factors. In appointing class counsel, the court must consider the following factors [*Fed R Civ P 23(g)(1)(A)*]:

- The work counsel has done in identifying or investigating potential claims in the action.
- Counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action.
- Counsel's knowledge of the applicable law.

- The resources counsel will commit to representing the class.

The court may also consider any other matter pertinent to counsel's ability to represent the interests of the class fairly and adequately [*Fed R Civ P 23(g)(1)(B)*]. For example, courts have traditionally considered whether counsel will vigorously protect class interests [*see Hanlon v. Chrysler Corp. (9th Cir 1998) 150 F3d 1011, 1019-1020*]. Counsel who have conflicts of interest with the class should not be appointed [*see Hanlon v. Chrysler Corp. (9th Cir 1998) 150 F3d 1011, 1020*].

The court should weigh all pertinent factors, but no single factor should necessarily be determinative. For example, the resources counsel will commit must be appropriate, but the court should not limit consideration to lawyers with the greatest resources [*Fed R Civ P 23(g)(1)(C)*, Committee Note of 2003].

The court need not limit its appointment determination to the materials submitted by applicants. The court may direct potential applicants for class counsel to provide information on any subject the court deems pertinent to the appointment [*Fed R Civ P 23(g)(1)(C)*]. For example, the court may direct applicants to inform the court concerning any fee agreement [*Fed R Civ P 23(g)(1)(C)*, Committee Note of 2003]. The court may also direct potential class counsel to propose terms for attorney's fees and nontaxable costs [*Fed R Civ P 23(g)(1)(C)*]. When the court orders the production of information that involves privileged, confidential, or work product information, a protective order may be appropriate [*Fed R Civ P 23(g)(1)(C)*, Committee Note of 2003].

20.33[5] Appointment Order May Address Fees. The order appointing class counsel may include provisions about the award of attorney's fees or nontaxable costs [*Fed R Civ P 23(g)(1)(D)*]. The court may adopt guidelines for fees and costs, or may direct class counsel to report to the court at regular intervals on what has been done, in order to facilitate the court's later determination of a reasonable fees award [*Fed R Civ P 23(g)(2)(C)*, Committee Note of 2003].

Cross Reference:

Discussion of fees award, see *§ 20.35*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselAppointmentsCivil ProcedureClass ActionsClass CounselFees

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20.34 Court May Designate Interim Counsel.

The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action [*Fed R Civ P 23(g)(3)*]. Most often, pre-certification matters will be handled by the attorneys who filed the action rather than by specially designated counsel, however [*see Fed R Civ P 23(g)(2)*, Committee Note of 2003].

Whether or not formally appointed, pre-certification counsel have a duty to act in the best interests of the class as a whole rather than the class representative [*see Fed R Civ P 23(g)(2)*, Committee Note of 2003]. Most often, of course, the interests of the class representatives and the class as a whole will align because of the typicality and adequacy of representation requirements [*see Fed R Civ P 23(a)(3), (4)*].

Cross References:

Discussion of time by which court must make its certification decision and appoint counsel, see *20.16*.
Discussion of typicality and adequacy of representation requirements, see *§§ 20.06[3], [4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass CounselAppointmentsCivil ProcedureClass ActionsPrerequisitesGeneral Overview

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20.35 Attorneys May Request Fee Award.

20.35[1] Claim for Attorney's Fees Must Be Made by Motion Under Rule 54. In an action certified as a class action, the court may award reasonable attorney's fees, including nontaxable costs, if the fees and costs are authorized by law or by an agreement of the parties. A claim for an award must be made by motion under Rule 54(d)(2) at a time set by the court [*Fed R Civ P 23(h)(1)*].

Motions under Rule 54(d)(2) must specify the judgment and the statute, rule, or other grounds entitling the party to the award. The motion also must state the amount or provide a fair estimate of the fees sought. If directed by the court, the motion must also disclose the terms of any relevant agreement with respect to fees sought in the motion [*see Fed R Civ P 54(d)(2)(B)(iii), (iv)*].

Timing:

The time for filing a motion for attorney's fees in a class action must be set by the court [*Fed R Civ P 23(h)*]. In cases involving a proposed settlement, the court should require filing in time for inclusion of information about the proposed fee award in the settlement notice that must be provided to the class as required by *Fed R Civ P 23(e)*. In those cases litigated to judgment, the court might also order prompt filing so that notice to the class under Rule 23(h) can be given [*see Fed R Civ P 23(h)(1)*, Committee Note of 2003].

Cross References:

Discussion of notice of settlement under Rule 23(e), see *20.42[6]*. Discussion of notice of fee award under Rule 23(h), see *§ 20.35[3]*.

Consider:

Rule 23(h) provides procedures for the court to follow when awarding attorney's fees pursuant to a statute or pursuant to a fee agreement or settlement agreement. Rule 23 does not create any separate basis for a fee award [*see Fed R Civ P 23(h)*, Committee Note of 2003].

20.35[2] Any Attorneys Who Provide Services in Action May File Motion. Rule 23(h) provides a framework for all awards of attorney's fees and nontaxable costs in connection with a class action, not only awards to class counsel. An award may be appropriate with respect to attorneys who acted for the class before certification but who are not appointed class counsel, or to attorneys who represented objectors to a proposed settlement, or in other situations [*Fed R Civ P 23(h)*, Committee Note of 2003].

20.35[3] Parties and Class Members Must Be Given Notice of Motion and Opportunity to Object. Notice of the motion requesting fees must be served on all parties and, for motions by for fees that are made by class counsel, directed to class members in a reasonable manner [*Fed R Civ P 23(h)(1)*; *see Fed R Civ P 5(b)*]. While the manner and time of the notice to class members is not prescribed, the notice must be sufficient to provide a basis for class members to exercise their right to object, and should be given sufficiently in advance to allow them to do so [*Fed R Civ P 23(h)(2)*, Committee Note of 2003].

A class member, or a party from whom payment is sought, may object to the motion [*Fed R Civ P 23(h)(2)*]. The court should also set the time limit for objections, and should provide sufficient time after the fee motion is on file to enable potential objectors to examine the motion. The court may even allow an objector discovery relevant to the objections, but should weigh the need for discovery against the cost and delay [*Fed R Civ P 23(h)(2)*, Committee Note of 2003].

Consider:

When a class action is settled, the court must order notice of the settlement to the class members [*Fed R Civ P 23(e)(1)*]. Notice of class counsel's fee motion should be combined with notice of the proposed settlement [*Fed R Civ P 23(h)(1)*, Committee Note of 2003].

Distinguish:

Rule 23(h) requires "reasonable" notice of the fee motion, not the "best notice that is practicable" required to advise class members that a class has been certified [*see Fed R Civ P 23(c)(2)(B)*].

Cross References:

Discussion of notice required when class is certified, see *20.26*, *20.27*. Discussion of notice of a proposed settlement, see *§ 20.42[6]*.

20.35[4] Court May Hold Hearing. The court may hold a hearing on a motion for an award of attorney's fees. The court may also refer issues related to the amount of the award to a special master or to a magistrate judge [*Fed R Civ P 23(h)(3)*, *(4)*]. *Fed R Civ P 23* does not require a formal hearing in all cases. The form and extent of a hearing depend on the circumstances [*Fed R Civ P 23(h)(3)*, Committee Note of 2003].

Fed R Civ P 54 requires that, if any party or class member requests, the court must afford an opportunity for adversary submissions with respect to the motion for an award of attorney's fees. This may take the form of declarations, affidavits, or oral testimony at the hearing. Alternatively, the court may decide the motion without oral hearing on brief written statements of reasons in support and opposition [*Fed R Civ P 54(d)(2)(C)*; *see Fed R Civ P 43(c)*, *78*].

20.35[5] Court Must Find Facts and State Conclusions of Law. The court must find the facts and state its conclusions of law on the motion for an award of attorney's fees under Rule 52(a) [*Fed R Civ P 23(h)(3)*; *see Fed R Civ P 52(a)*]. The court should set out the factors it considered and describe its reasoning in sufficient detail to allow meaningful appellate review [*see Powers v. Eichen (9th Cir 2000) 229 F3d 1249, 1256-1258*].

20.35[6] Court Must Ensure That Fee Award Is Reasonable.

20.35[6][a] Court Must Protect Interest of Absent Class Members. Any award of attorney's fees and nontaxable costs must be reasonable [*Fed R Civ P 23(h)*]. Even in the absence of objections, the court bears the responsibility to ensure that the amount and mode of payment are fair and proper, whether the fees come from a

common fund or are paid from some other source [*Fed R Civ P 23(h)*, Committee Note of 2003].

When the fees are awarded pursuant to a settlement agreement, the district court must carefully assess the reasonableness of the fee provisions and satisfy itself that the fees awarded are not unreasonably high, so as to ensure that the class members' interests were not compromised in favor of those of class counsel. That the defendant formally agrees to pay the fees independently of any monetary award or injunctive relief provided to the class in the agreement does not detract from the need to scrutinize the fee award carefully [*see Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 963-965*].

20.35[6][b] Court Must Calculate Fees by Lodestar Method When Award Is Based on Fee-Shifting Statute. Fees may be awarded under a specific statute that allows the court to award fees (i.e., a fee-shifting statute) or under a "common fund" theory [see *Fed R Civ P 23(h)*, Committee Note of 2003].

When fees are awarded under a fee-shifting statute, the court must employ the "lodestar" method of calculation. This method involves multiplying the number of hours expended on the litigation by a reasonable hourly rate, and adjusting the figure to account for other factors if circumstances warrant [*Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 965*].

In calculating an attorney's fee under a fee-shifting statute, the lodestar--the number of hours worked multiplied by the prevailing hourly rate--may be increased due to superior performance and results, but enhancements are atypical and should not duplicate the same considerations affecting the lodestar rate [Perdue v. Kenny A. ex rel. Winn (2010) -- US --, 130 S Ct 1662, 176 L Ed2d 494, 506-507 (circumstances in which superior attorney performance is not adequately taken into account in lodestar calculation are "rare" and "exceptional" and require specific evidence that lodestar fee would not have been "adequate to attract competent counsel")].

The parties may negotiate and settle the amount of statutory fees along with the merits of the case. The court must nevertheless review the settlement and may approve the fees if they meet the reasonableness standard when measured against statutory fee principles [*Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 972*].

20.35[6][c] Court May Employ Either Lodestar or Percentage Method in Common Fund Cases. Under the "common fund" doctrine, an attorney who recovers a common fund for the benefit of other persons is entitled to a reasonable attorney's fee from the fund as a whole [*Boeing Co. v. Van Gemert (1980) 444 US 472, 478, 100 S Ct 745, 62 L Ed2d 676*]. The parties settle for the total amount of the common fund, and the plaintiffs' attorneys then apply to the court for a fee award from the fund [*Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 969*].

Because the fee award will reduce the recovery by the class, the process is adversarial between the class counsel and the class. Accordingly, the court must act as fiduciary for the class [*see Vizcaino v. Microsoft Corp. (9th Cir 2002) 290 F3d 1043, 1052 , cert. denied sub nom. Vizcaino v. Waite, 537 US 1018 (2002)*].

In a common fund case, the court may employ either the lodestar or percentage method [*see Fed R Civ P 23(h)*, Committee Note of 2003; *Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 967-968*]. The lodestar method involves multiplying the number of hours expended on the litigation by a reasonable hourly rate, and adjusting the figure to account for other factors if circumstances warrant [*Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 965*]. In common fund cases in which the lodestar method is employed, the court can apply a risk multiplier to modify the award to compensate counsel for the risks involved [*Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 967-968*].

Example:

The district court properly applied a multiplier of 3.65 when counsel achieved exceptional results for the class, the litigation was long and complex, and counsel faced substantial risk. Multipliers ranging from one to four are frequently applied in common fund cases, and the multiplier used was within this range [

Vizcaino v. Microsoft Corp. (9th Cir 2002) 290 F3d 1043, 1051 , cert. denied sub nom. Vizcaino v. Waite, 537 US 1018 (2002)].

The percentage method involves an award of an appropriate percentage of the common fund. In the Ninth Circuit, 25 percent is a benchmark award [*Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 968*]. Variation from the benchmark may be appropriate in some cases. Selection of the benchmark or any other rate must be supported by findings that take into account all the circumstances of the case [*Vizcaino v. Microsoft Corp. (9th Cir 2002) 290 F3d 1043, 1048 , cert. denied sub nom. Vizcaino v. Waite, 537 US 1018 (2002)*].

In awarding a percentage fee, the court should cross-check the proposed amount of the fee with the fee that would be awarded under the lodestar method to ensure the fee award is reasonable under the circumstances [*see Vizcaino v. Microsoft Corp. (9th Cir 2002) 290 F3d 1043, 1050-1051 , cert. denied sub nom. Vizcaino v. Waite, 537 US 1018 (2002)*].

Example:

Noting that "[p]ercentage awards are not meant to be a windfall for class counsel at the expense of the class," the district court found that a 15 percent award in a securities fraud class action, which translated to $2.55 million and 1.05 million shares of stock, was unreasonable despite the fact that it fell below the benchmark of 25 percent. A lodestar cross-check revealed that that the requested fee was "too large in light of the hours devoted" and "other relevant factors." The court fixed the fee award at 11 percent of the common fund, which translated to $1,870,000 cash and 770,000 shares of stock [*In re HPL Techs., Inc. (ND Cal 2005) 366 F Supp 2d 912, 914, 925*].

A court may not consider the cost of injunctive relief as part of the common fund for purposes of applying the percentage method, except in the unusual instance in which the value to individual class members of the benefits deriving from the injunctive relief can be accurately ascertained. In other cases, courts should consider the value of injunctive relief as a relevant circumstance in determining what percentage of the common fund to award, but should not consider the value of the injunctive relief as part of the common fund itself. Alternatively, when obtaining injunctive relief is a major part of counsel's work, the court may apply the lodestar method if that would achieve a more equitable result [*Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 972-974*].

The parties may negotiate and agree to the value of a common fund as part of a settlement. Class counsel may then apply to the court later for a fee award out of the common fund. In these circumstances, the settlement agreement does not stand or fall on the amount of fees. Instead, the court must first decide the reasonableness of the settlement, including the amount of the common fund, and later decide the reasonableness of the amount of fees [*Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 972*].

20.35[6][d] Court Must Calculate Fee Awards in Coupon Settlements in Accord With Statute. Under the Class Action Fairness Act of 2005, a statutory directive exists for calculating attorney fees awards in coupon settlements arising out of class actions commenced on or after February 18, 2005 [109 PL 2, § 9, 199 Stat 4].

- **Contingent fees:** The calculation of contingent fees attributable to the award of coupons must be based on the value to class members of the coupons *redeemed* by class members [*28 USC § 1712(a)*]. On the motion of a party, the court has the discretion to receive expert testimony on the actual value to the class members of the coupons redeemed [*28 USC § 1712(d)*]. If the court requires distribution to charitable or governmental organizations of a part of the value of any unclaimed coupons, the amount of that distribution is not considered in awarding a contingent fee [*28 USC § 1712(e)*].

- **Non-contingent fees:** If fees are not contingent, then the fee award must be based on the amount of time class counsel reasonably expended working on the action. The fee must include an appropriate fee

for obtaining equitable relief, if any. The fee may be calculated using a lodestar with a multiplier [*28 USC § 1712(b)*].

- **Mixed fees:** When a settlement provides for both a coupon award and equitable relief, then the contingent portion of the fee award is to be based on the value of the coupons redeemed and the fee awarded for obtaining the equitable relief is to based on the amount of time class counsel reasonably expended working on the action [*28 USC § 1712(c)*].

20.35[6][e] Payment to Class Counsel That Results in Net Loss to Class Member Permissible Only If Nonmonetary Benefit Outweighs Loss. In a class action commenced on or after February 18, 2005 [*see* 109 PL 2, § 9, 199 Stat 4], the court may approve a proposed settlement under which any class member must pay a sum to class counsel that would result in a net loss to that member only if the court makes a written finding that the nonmonetary benefits to the class member substantially outweigh the monetary loss [*28 USC § 1713*].

Cross Reference:

Additional discussion of obtaining counsel fees, see 5 *Moore's Federal Practice, § 23.124* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureClass ActionsClass CounselFeesCivil ProcedureClass ActionsNoticesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable Fees

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20.36 CHECKLIST: Seeking Other Orders in Class Action.

☐ Consider whether various orders allowed under Rule 23(d) may be appropriate to aid in the management of the class action, such as:

- ○ Orders determining the course of proceedings, presentation of evidence, or argument.
- ○ Orders requiring additional notice to the class of, for example:
  - ☐ Any step in the action.
  - ☐ The proposed extent of the judgment.
  - ☐ The opportunity of class members to signify whether they consider the representation fair and adequate.
  - ☐ The opportunity of class members to intervene and present claims or defenses, or otherwise to come into the action.
- ○ Orders imposing conditions on the representative parties or on intervenors; for example, an order limiting communications between parties and potential class members, if necessary to prevent abuse.
- ○ An order, in the event class certification is denied or the class is decertified, striking the class

allegations from the complaint.

- Any other orders dealing with similar procedural matters.

Authority:
Fed R Civ P 23(d)

Discussion:
See *§ 20.38*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsDecertificationCivil ProcedureClass ActionsNoticesCivil ProcedurePretrial MattersConferencesPretrial Orders

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20.37 Options and Strategy.

Fed R Civ P 23(d) allows the court considerable discretion to manage the class action within the general framework of the Federal Rules. In addition to procedures and orders that are available in all actions under other rules, plaintiffs and defendants may request any type of order appropriate to facilitate the fair and efficient conduct of the class action. The parties should think through what court orders might improve the efficiency of the class action and should consider asking the court to make any such orders under Rule 23(d).

On the other hand, parties and the courts who are dealing with class actions should recall that the provisions of *Fed R Civ P 23(d)* do not supersede or diminish the need for case management orders under *Fed R Civ P 16*. Indeed, the Federal Judicial Center recommends that courts and parties in a class action case consider a number of initial case-management orders under either or both rules, including [Manual for Complex Litigation (Fourth), § 21.11]:

- Whether to hear and dispose of threshold dispositive motions, particularly motions that do not require extensive discovery, before hearing and determining the class certification motion.

- Whether to appoint interim class counsel during the period before certification.

- Whether and how to obtain information from parties and their counsel about the status of all related cases pending in state or federal courts.

- Whether and to what extent discovery is needed to decide whether to certify the proposed class.

Cross Reference:

Discussion of pretrial orders under Rule 16, see *Ch. 16, Case Management Conferences, §§ 16.20 -16.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedurePretrial

MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Orders

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CHAPTER 20 Class Actions
VII. SEEKING OTHER ORDERS IN CLASS ACTION

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20.38 Court May Make Appropriate Orders.

20.38[1] Court May Make Various Orders Under Rule 23(d). Rule 23 provides that the court may make any appropriate orders in the conduct of the class action, including orders of the following types [*Fed R Civ P 23(d)*]:

- Orders determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument.

- Orders requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given to some or all of the members of the class of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

- Orders imposing conditions on the representative parties or on intervenors.

- Orders requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly (i.e., orders striking class allegations from the complaint when class certification is denied).

- Orders dealing with similar procedural matters.

The Federal Judicial Center suggests a number of topics for post-certification management of a class action suitable for court orders, including [Manual for Complex Litigation (Fourth), §§ 21.41-21.43]:

- The extent and conditions on which the parties may or many not have post-certification discovery from unnamed class members. For example, will unnamed class members be considered "parties" for purposes of discovery, such as interrogatories? Even if unnamed class members are or are not parties, does a propounding party have to show special need to obtain discovery and, if so, what is the threshold

of need for permitting discovery? Will the threshold of need for permitting discovery depend on the type of discovery sought--such as deposing an unnamed class member, or requiring an unnamed class member to obtain counsel in order to answer written interrogatories?

- The coordination of the class action with other actions, both individual and class actions, that may be pending on the same topic in the same court or in other courts. For example, what formal and informal methods are available for this coordination? Is an injunction against another proceeding possible or advisable? Can coordinated scheduling save all parties time and expense?

- Setting special trial procedures that may assist in the management of a complex case. For example, will preliminary instructions and special verdicts make a jury trial more manageable? Can the certain common issues be tried first, while preserving all parties' rights to a full and balanced presentation of individual issues without needless duplication of effort?

Consider:

Rule 23(d) does not limit the court's authority to make orders that would be appropriate under other rules, such as orders allowing intervention [*see Fed R Civ P 24*] or orders allowing consolidation, severance, or separate trials [*see Fed R Civ P 21, 42*].

Example--Invalidation of Opt Outs:

In a class action brought by current and former employees of the Chinese Daily News, alleging, among other things, violations of the Fair Labor Standards Act, the opt out rate was 75-80 percent. The plaintiffs moved to invalidate the returned opt outs. The court noted that an average opt out rate would be between one and two percent and found that the opt outs in the case "were the product of a coercive environment that pressured employees to opt out lest they risk losing their jobs" and were not the product of independent decision-making. The court granted the motion to invalidate the opt outs submitted by class members [Wang v. Chinese Daily News, Inc. (CD Cal 2006) 236 FRD 485].

Example--Questionnaire Accompanying Notice:

In connection with the notice of the certification and pendency of a plaintiff class action and the opportunity to opt out, defendants should consider asking that the court order the plaintiffs to include a questionnaire with the notice to the class. The questionnaire can seek information concerning the individual damage claims of each class member of the plaintiff class. The information obtained can provide the parties with concrete information concerning the potential damages in the case and may provide a realistic basis for settlement negotiations [*see Schwartz v. Celestial Seasonings, Inc. (D Colo 1999) 185 FRD 313, 316*].

Cross Reference:

Discussion of *First Amendment* concerns for court orders precluding contact with class members, see *§ 20.38[3]*.

Whatever *Fed R Civ P 23(d)* orders are made, they may be altered or amended as may be desirable from time to time. Rule 23(d) is intended to give the court the authority needed to conduct the class action fairly and efficiently [*see Fed R Civ P 23(d)*, Committee Note of 1966]. A district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties. This discretion is not unlimited but is bounded by relevant provisions of the Federal Rules [*see Gulf Oil Co. v. Bernard (1981) 452 US 89, 100, 101 S Ct 2193, 68 L Ed2d 693*].

20.38[2] Court May Order Additional Notice. Other provisions of Rule 23 require notice to the class that an action has been certified under Rule 23(b)(3) [*see Fed R Civ P 23(c)(2)(B)*], that a settlement is proposed [*see Fed R*

Civ P 23(e)(1)], and that attorney's fees have been requested [*Fed R Civ P 23(h)(1)*]. Also, other provisions of Rule 23 give the court discretion to order notice when an action has been certified under Rule 23(b)(1) or (2) [*Fed R Civ P 23(c)(2)(A)*].

Rule 23(d) gives the court discretion to order other kinds of notice for the protection of the class members or for the fair conduct of the action such as, for example [*Fed R Civ P 23(d)*]:

- Notice of any other steps in the class action.
- Notice of the proposed extent of the judgment.
- Notice of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

Rule 23(d) does not require notice of any matter, but invokes the court's discretion [*Fed R Civ P 23(d)(2)*, Committee Note of 1966]. Because of the time and expense required to give notice, the court should exercise this discretion sparingly.

Rule 23(d) does not require any particular form of notice. Rather, when notice is ordered, the form and method of notice should be shaped to the particular purpose of the notice [*Fed R Civ P 23(d)(2)*, Committee Note of 1966].

20.38[3] Court May Limit Communications Between Parties and Class Members. Parties, or counsel, may need to contact class members for various reasons, such as to obtain information relevant to the certification decision. On the other hand, such communications are subject to abuse. Because of the potential problems, an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Further, any order should be carefully drawn to limit speech as little as possible, consistent with the rights of the parties under the circumstances [*see Gulf Oil Co. v. Bernard (1981) 452 US 89, 102, 101 S Ct 2193, 68 L Ed2d 693*].

Cross Reference:

Court orders authorizing or placing limits on discovery from unnamed class members, see *§ 20.38[1]*.

In fashioning an order limiting communications with class members, the court must also be sensitive to the *First Amendment* prohibition of prior restraints of speech [*see In re School Asbestos Litig. (3d Cir 1988) 842 F2d 671, 680*]. Rather than impose a prior restraint, the court may sanction misleading or coercive communications after they occur, such as by ordering curative notice at the expense of the party at fault [*see Great Rivers Coop. v. Farmland Indus. (8th Cir 1995) 59 F3d 764, 766*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsNoticesCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial Orders

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CHAPTER 20 Class Actions
VIII. SETTLING OR DISMISSING CLASS ACTION

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20.39 CHECKLIST: Settling or Dismissing Class Action.

☐ When planning a settlement or seeking dismissal, consider:

○ Plaintiff may voluntarily dismiss or parties may settle claims *before* certification without the necessity of court approval and without binding the class members other than the class representative.

Authority:
Fed R Civ P 23(c), (e)(1)

Discussion:
See *§§ 20.41, 20.44*

○ Defendant may seek *involuntary* dismissal against the plaintiffs, either before or after certification, without prior notice to the class, or a hearing at which class members might appear and object; involuntary dismissal has no binding effect on class members other than the class representative.

Authority:
Fed R Civ P 23(c), (e)(2)

Discussion:
See *§§ 20.43, 20.44*

○ Any settlement or voluntary dismissal *after* certification requires notice to class members, a hearing at which class members may appear and object, and court approval, which the court may grant only on a finding that the settlement or

dismissal is fair, reasonable, and adequate; settlement or dismissal after certification is equally binding on the class representative and on other class members, provided the class members were given notice and an opportunity to opt out, if required.

Authority:
Fed R Civ P 23(e)

Discussion:
See *§§ 20.42*, *20.44*

☐ To obtain court approval of a settlement after certification:

○ Ensure that the negotiated settlement is, in its entirety, fair, reasonable, and adequate with respect to the absent class members, considering that:

☐ The amount of recovery must be reasonable in light of the strength of the plaintiffs' case versus the risk and expense of further litigation.

☐ The settlement may be reasonable and still favor some class members at the expense of others.

☐ Any incentive payments to the class representatives must be reasonable in light of relevant factors such as the amount of time and effort the representative expended in pursuing the litigation and reasonable fear of workplace retaliation because of the representation.

☐ Settlement terms relating to attorney's fees must be reasonable, and fees must also be approved separately from the agreement.

Authority:
Fed R Civ P 23(e)

Discussion:
See *§ 20.42*

○ File a joint motion seeking approval of the settlement along with documentation disclosing all the terms of the agreement as well as a statement identifying any side agreements.

Authority:
Fed R Civ P 23(e)(3)

Discussion:
See *§§ 20.42[1]*, *[2]*

○ In the motion, request that the court direct reasonable notice to the class members, and provide a proposal for the form of notice and the method of giving notice.

Authority:
Fed R Civ P 23(e)(1)

Discussion:
See *§ 20.42[6]*

Forms:
Illustrative forms of notice are available at the Federal Judicial Center's website: http://www.fjc.gov

○ Request a hearing, at which the court will determine whether the settlement is fair, reasonable and adequate, noting that, at the hearing, the court will consider:

☐ Materials submitted by parties; and

☐ Objections made by class members.

Authority:
Fed R Civ P 23(e)(2)

Discussion:
See *§§ 20.42[4], [9]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsVoluntary Dismissals

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20.40 Options and Strategy.

Class actions are often resolved through settlement. In contrast to other types of actions, the settlement is not wholly a matter of agreement between the named parties. In order to protect the interests of absent class members, the court must take an active role in reviewing and approving all the terms of the settlement. The fact that absent class members may object to a proposed settlement negotiated between the parties, and the need for the court to consider the objections of class members and ultimately approve the settlement, creates special problems and considerations in negotiating and drafting a class action settlement. It is especially important that the parties and their counsel avoid even the suggestion that they have colluded to reach a settlement that benefits the parties and their counsel at the expense of the absent class members [*see* Manual for Complex Litigation (Fourth) § 21.61 et seq.].

The court's duty to review a settlement or voluntary dismissal of a class action arises only once the class is certified. Before certification, the action is merely an individual action between the named parties, and is treated as such for most purposes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsVoluntary Dismissals

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20.41 Parties May Voluntarily Dismiss or Settle Claims Before Certification.

Rule 23 requires court approval of a voluntary dismissal or settlement with notice to the class members, but the requirement of court approval applies only after certification of the action as a class action [*see Fed R Civ P 23(e)(1)*]. Before certification, plaintiffs may settle or dismiss their individual claims as in an individual action [*see Fed R Civ P 23(e)(1)*, Committee Note of 2003]. Similarly, the plaintiffs may amend the complaint to delete the class allegations and proceed as in an individual suit [*see Fed R Civ P 15*]. Class members other than those named as class representatives are not parties before certification and are not bound by any judgment if the action is not certified [*see Fed R Civ P 23(c)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsVoluntary Dismissals

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20.41A Each Defendant Must Notify Federal and State Officials When Proposed Settlement Is Filed With Court After Certification.

20.41A[1] Defendants Must Notify Officials Within 10 Days of Filing Proposed Settlement. Within 10 days after a proposed settlement of a class action commenced on or after February 18, 2005 [*see* 109 PL 2, § 9, 199 Stat 4] is filed in court, each participating defendant must serve state and federal officials with notice of the proposed settlement. Notice must be given to a state official of each state in which a class member resides. The required notice must include [*28 USC § 1715(b)*]:

- A copy of the complaint and any materials filed with the complaint and any amended complaints, or a notice of how to electronically access this material over the Internet.
- Notice of any scheduled judicial hearing in the class action.
- Any proposed or final notification to class members of the proposed settlement and their right to request exclusion, if any.
- Any proposed or final class action settlement.
- Any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants.
- Any final judgment or notice of dismissal.
- Any written judicial opinion relating to notice to the class members, the proposed or final settlement, any contemporaneous agreements, and any final judgment or notice of dismissal.

The notice to the state officials must also include, if feasible, the names of class members who reside in each state and the estimated proportionate share of the claims of such members to the entire settlement, or if provision of that

information is not feasible, a reasonable estimate of the number of class members residing in each state and the estimated proportionate share of the claims of such members to the entire settle-ment [*28 USC § 1715(b)(7)*].

20.41A[2] Officials to Be Notified.

20.41A[2][a] United States Attorney General Must Be Notified Unless Defendant Is Specified Federal Financial Institution. The defendant must notify the United States Attorney General unless the defendant is a federal depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of such an entity [*see 12 USC § 1813*]. A defendant that is such an entity must notify the person who has the primary federal regulatory or supervisory responsibility with respect to that defendant if any matter alleged in the class action is subject to regulation or supervision by that person [*28 USC § 1715(a)(1), (c)(1)*].

20.41A[2][b] State Official With Regulatory or Supervisory Responsibility Over Defendant Must Be Notified. The defendant must notify the person in the state who has the primary regulatory or supervisory responsibility with respect to that defendant, or who licenses or otherwise authorizes the defendant to conduct business in the state if any matter alleged in the action is subject to regulation by that person. If there is no such person, or if the matters alleged in the action are not subject to regulation or supervision of that person, then the defendant must notify the state attorney general [*28 USC § 1715(a)(2)*]. However, if the defendant is a state depository institution [*see 12 USC § 1813*], the defendant is only required to notify the state bank supervisor of the state in which it is incorporated or chartered if any matter alleged in the action is subject to regulation or supervision by that person [*28 USC § 1715(c)(2)*].

20.41A[3] Final Approval of Proposed Settlement Cannot Occur Earlier Than 90 Days After Service of Notice on State and Federal Officials. An order giving final approval of a proposed settlement may not issue earlier than 90 days after the later of the dates on which the appropriate federal and state officials are served with the required notice of the settlement [*28 USC § 1715(d)*].

20.41A[4] Class Members May Choose Not to Be Bound If Notice Not Given. A class member may refuse to comply with and may choose not to be bound by a settlement or consent decree in a class action if the class member demonstrates that the required notice to state and federal officials was not given [*28 USC § 1715(e)(1)*]. However, for this purpose, notice to either the state attorney general or to the person that has primary regulatory, supervisory, or licensing authority over the defendant is sufficient [*28 USC § 1715(e)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsAppellate ReviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsNotices

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20.42 Settlement or Voluntary Dismissal After Certification Requires Court Approval.

20.42[1] Court Must Find That Settlement or Voluntary Dismissal Is Fair, Reasonable, and Adequate. The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class [*Fed R Civ P 23(e)*]. The court may give its approval only on a finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate [*Fed R Civ P 23(e)(2)*; *see, e.g., Hanlon v. Chrysler Corp. (9th Cir 1998) 150 F3d 1011, 1026*]. The named plaintiffs may voluntarily consent to magistrate judge jurisdiction on behalf of the entire class for purposes of, among other things, approval of a settlement [*Gomez v. Vernon (9th Cir 2001) 255 F3d 1118, 1126* ; *Arnold v. Arizona Dep't of Pub. Safety (D Ariz 2005) 233 FRD 537, 540*].

Strategic Point:

The settlement review is also an opportunity to review the initial certification decision. The terms of the settlement may reveal a need to redefine the class or to create subclasses [*see Fed R Civ P 23(e)(1)(C)*, Committee Note of 2003].

20.42[2] Parties Must Disclose Terms and Identify Side Agreements. Implicit in the rule is the requirement that the parties disclose all terms of a settlement to the court so that the court may evaluate the settlement [*Fed R Civ P 23(e)(2)*, Committee Note of 2003].

Additionally, the parties seeking approval of the settlement, voluntary dismissal, or compromise must file a statement identifying any agreement made in connection with the proposed settlement, dismissal, or compromise [*Fed R Civ P 23(e)(3)*]. This requirement is aimed at related agreements that may have influenced the terms of the settlement by trading away possible advantages for the class. If there is any question that an agreement is connected to the proposed settlement, dismissal, or compromise, doubts should be resolved in favor of including the agreement on the filed statement [*Fed R Civ P 23(e)(2)*, Committee Note of 2003].

Initially, Rule 23(e) requires only a statement identifying side agreements, not disclosure of the side agreements themselves. However, the court has the discretion to direct the parties to provide a summary or copy of any side

agreement as a condition of approving a proposed settlement [*Fed R Civ P 23(e)(2)*, Committee Note of 2003].

20.42[3] Settlement Is Favored Method of Resolution. A strong judicial policy favors settlement of class actions. Settlement conserves judicial resources and avoids the costs and risks to the parties of extended litigation and trial. However, court approval is necessary in the class action context to ensure that the settlement is not the product of collusion among the negotiating parties and class counsel at the expense of the absent class members [*Churchill Village L.L.C. v. General Elec. (9th Cir 2004) 361 F3d 566, 576* , *cert. denied*, *543 US 818 (2004)* ; *see also Fed R Civ P 23(e)*, Committee Note of 2003].

20.42[4] Court Will Consider Various Factors to Determine Whether Settle-ment Is Fair. To determine whether a settlement agreement is fair, reasonable, and adequate, the court must consider a number of factors, including [*Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 959* ; *Linney v. Cellular Alaska P'ship (9th Cir 1998) 151 F3d 1234, 1242* ; *see, e.g., National Rural Telecomms. Coop. v. DIRECTV, Inc. (CD Cal 2004) 221 FRD 523, 526-529* (district court analysis of eight factors and approval of settlement as fair, just, reasonable, and adequate)]:

- The strength of the plaintiffs' case.
- The risk, expense, complexity, and likely duration of further litigation.
- The risk of maintaining class action status throughout the trial.
- The amount offered in settlement.
- The extent of discovery that is completed, and the stage of the proceedings.
- The experience and views of counsel.
- The presence of a government participant.
- The reaction of the class members to the proposed settlement.

The court must consider risk factors and the uncertainty of the outcome as well as the potential recovery. Thus, a proposed settlement may be fair and reasonable even though it amounts to only a fraction of the potential recovery in a fully litigated case [*see Linney v. Cellular Alaska P'ship (9th Cir 1998) 151 F3d 1234, 1242*].

The district court has broad discretion in evaluating the fairness of a settlement [*National Rural Telecomms. Coop. v. DIRECTV, Inc. (CD Cal 2004) 221 FRD 523, 526* (quoting **Moore's**)] A court of appeal will rarely overturn a district court's decision concerning a settlement unless the settlement agreement contains convincing indications that the outcome of the negotiations was in fact influenced by self interest rather than by the class's interest on the part of class counsel and the class representatives. The court of appeals will scrutinize the provisions relating to attorney's fees and distribution of monetary relief most closely [*Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 960*].

The settlement may not unreasonably favor some class members at the expense of others, nor is the representative entitled to a preferred position in the settlement. When there is a disparity between the awards to various class members that is not justified by the strength of their claims, the settlement may be considered unfair [*see Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 975-978* ; *cf. Rodriguez v. West Publ'g Corp. (9th Cir 2009) 563 F3d 948, 960-961* (although "incentive agreements" entered between named plaintiffs and class counsel, which required counsel to apply to court for incentive award for named plaintiffs and tied named plaintiffs' compensation to sliding scale based on amount recovered, created conflicts of interest among named plaintiffs, their counsel, and remainder of class, court was not required to reject settlement because there were two other class representatives who had no incentive agreements)].

Nevertheless, a settlement may include modest "incentive awards" payable to the class representatives. The court must determine that the incentive payment is reasonable in light of relevant factors such as the actions the representative has taken to protect the interests of the class, the degree to which the class has benefited from those actions, the amount of time and effort the representative expended in pursuing the litigation, and reasonable fear of workplace retaliation because of the representation. Class members may also be repaid for their actual litigation expenses [*see Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 976-978*].

The district court must assess the reasonableness of attorney's fees provisions included in settlement agreements with great care [*Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 963*] and must, in any event, approve the amount of any fees awarded [*see Fed R Civ P 23(h)*]. Even when the defendant formally agrees to pay the fees independently of any monetary award or injunctive relief, the class members retain an interest in the amount of fees. The court must assure itself that the fees awarded were not unreasonably high, so as to ensure that the class members' interests were not compromised in favor of those of the defendant and class counsel [*Staton v. Boeing Co. (9th Cir 2003) 327 F3d 938, 964-965*].

Cross Reference:

Discussion of award of attorney's fees, see *§ 20.35*.

20.42[5] Court Must Accept or Reject Settlement As a Whole. The settlement must be examined for overall fairness as an indivisible entity. The court does not have the authority to delete, modify, or substitute provisions. The settlement must stand or fall in its entirety [*Hanlon v. Chrysler Corp. (9th Cir 1998) 150 F3d 1011, 1026*].

Exception:

In a proposed settlement of a class action commenced on or after February 18, 2005 [see 109 PL 2, § 9, 199 Stat 4], under which class members would be awarded coupons, the court has the discretion to require that the proposed settlement agreement provide for the distribution of a part of the value of unclaimed coupons to one or more charitable or governmental organizations as agreed to by the parties [*28 USC § 1712(e)*].

20.42[6] Court Must Order Notice of Proposed Settlement and Allow Opportunity to Object.

20.42[6][a] Notice Is Mandatory for All Types of Class Actions. The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise through claim or issue preclusion [*Fed R Civ P 23(e)(1)*]. Notice is not required when the settlement takes place before certification and therefore only the named parties are bound [*Fed R Civ P 23(e)(1)(B)*, Committee Note of 2003].

Distinguish:

The court is required to direct notice of *certification* of Rule 23(b)(3) class actions, but notice of certification of *Fed R Civ P 23(b)(1)* and *(2)* class actions is discretionary with the court [*Fed R Civ P 23(c)(2)*]. The court must direct notice of a *settlement* regardless of the subsection of Rule 23(b) under which the action is certified.

Consider:

Frequently, parties will move for certification and request approval of a settlement at the same time. In those circumstances, it is appropriate to combine certification and settlement notice in order to save costs [*see Fed R Civ P 23(e)(3)*, Committee Note of 2003].

Cross References:

Discussion of notice required when class is certified, see *§§ 20.26*, *20.27*. Discussion of notice of a

proposed fee award, see *20.35[3]*. Discussion of settlement-only classes, see *§ 20.19*.

20.42[6][b] Notice Must Be Given in Reasonable Manner. Notice is satisfactory if it describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard [*Churchill Village L.L.C. v. General Elec. (9th Cir 2004) 361 F3d 566, 575 , cert. denied, 543 US 818 (2004)*]. Accordingly, the notice should state the time and place of the fairness hearing, the time and method for objecting, and enough information about the proposed settlement to enable decisions about whether to object.

Reasonable settlement notice may require individual notice in the manner required for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to file a claim to participate in the judgment, or if the court orders an opportunity to opt out of the settlement [*Fed R Civ P 23(e)(1)*, Committee Note of 2003].

Distinguish:

Fed R Civ P 23(e)(1) requires "reasonable" notice, not the "best notice practicable" such as is required to advise class members that a class has been certified under Rule 23(b)(3).

Cross References:

Illustrative clear-notice forms created by the Federal Judicial Center provide a helpful starting point for actions similar to those described in the forms [*see Fed R Civ P 23(c)(2)*, Committee Note of 2003]. These forms are available at the Center's website: http://www.fjc.gov.

Discussion of notice required when class is certified, see *§§ 20.26*, *20.27*.

20.42[7] Class Members May Object to Proposed Settlement. Any class member may object to a proposed settlement, voluntary dismissal, or compromise [*Fed R Civ P 23(e)(5)*]. An objection may be withdrawn only with the court's approval [*Fed R Civ P 23(e)(5)*].

A class member who has objected may appeal the court's approval of a settlement even if the class member was not a named party and even if the class member has not formally intervened as a party in the district court [*Devlin v. Scardelletti (2002) 536 US 1, 8, 122 S Ct 2005, 153 L Ed2d 27*].

20.42[8] Court May Allow New Opportunity to Opt Out. In an action certified under *Fed R Civ P 23(b)(3)*, the court may refuse to approve a settlement unless it affords a new opportunity to opt out to individual class members who had an earlier opportunity to request exclusion but did not do so [*Fed R Civ P 23(e)(4)*].

The decision whether to allow a second opportunity is confided to the court's discretion. The Rule limits the opportunity to members of a Rule 23(b)(3) class [*see Fed R Civ P 23(e)(3)*, Committee Note of 2003].

Cross References:

Discussion of Rule 23(b)(3) class actions, see *20.07[5]*. Discussion of opportunity to opt out, see *§ 20.27[3]*.

20.42[9] Objectors Have Limited Right to Discovery. Class members who object to a class action settlement are entitled to meaningful participation in the fairness hearing. The court has discretion to permit discovery by objectors that may assist it in determining the fairness and adequacy of the settlement. In determining whether to permit such discovery, the court must take into account the nature and amount of previous discovery, the basis for the objectors' discovery request, and the number and interests of the objectors. Discovery of evidence pertaining to settlement negotiations is appropriate only in rare circumstances [*Hemphill v. San Diego Ass'n of Realtors (SD Cal 2004) 225 FRD 616, 619-620*].

Example:

Objectors were entitled to information concerning the defendants' current financial position when a justification for the settlement was the financial inability of the defendants to pay the full anticipated judgment amount. However, they were not entitled to discovery regarding the adequacy of class counsel and the class representative, or the settlement negotiations, when, among other things, they failed to adduce evidence demonstrating the settlement was collusive [*Hemphill v. San Diego Ass'n of Realtors (SD Cal 2004) 225 FRD 616, 622-625*].

20.42[10] Court Must Hold Hearing and Make Findings. The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on a finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate [*Fed R Civ P 23(e)(2)*; *see 28 USC § 1712(e)* (coupon settlements)]. The court's findings must be set out in sufficient detail to explain to class members and the court of appeals the factors that bear on the court's decision [*Fed R Civ P 23(e)(1)*, Committee Note of 2003; *see Molski v. Gleich (9th Cir 2003) 318 F3d 937, 946*]. The court order giving final approval of a proposed settlement may not issue earlier than 90 days after the appropriate federal and state officials were served with the required notice of the settlement [*28 USC § 1715(d)*].

20.42[11] Court May Not Approve Proposed Settlement That Favors Class Members Located Near Court. The court may not approve a proposed settlement of a class action commenced on or after February 18, 2005 [*see* 109 PL 2, § 9, 199 Stat 4], that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court [*28 USC § 1714*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsVoluntary Dismissals

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CHAPTER 20 Class Actions
VIII. SETTLING OR DISMISSING CLASS ACTION

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20.43 Involuntary Dismissals Do Not Require Prior Notice to Class.

Rule 23 requires notice to all class members, a hearing at which class members may appear and object, and prior court approval for any *voluntary* dismissal of a certified class action [*see Fed R Civ P 23(e)* (as amended 2003)]. Rule 23 does not place similar restrictions on *involuntary* dismissals, whether before or after certification. Therefore, the court may make order an involuntary dismissing a class action without prior notice to the class or holding a hearing at which class members may appear and object.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsNoticesCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsHearings

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20.44 Judgment Must Indicate Who Is Bound.

When a class action is maintained under *Fed R Civ P 23(b)(1)* or *(2)*, the judgment, whether favorable or unfavorable to the class, must include and describe those whom the court finds to be members of the class [*Fed R Civ P 23(c)(3)*].

When a class action is maintained under *Fed R Civ P 23(b)(3)*, the judgment, whether favorable or unfavorable to the class, must include and specify or describe those to whom the notice provided in *Fed R Civ P 23(c)(2)* was directed, and who have not requested exclusion, and whom the court finds to be members of the class [*Fed R Civ P 23(c)(3)*].

A judgment in a properly certified class action is binding on all the class members as described in the judgment. The principles of claim and issue preclusion apply [*see Cooper v. Federal Reserve Bank of Richmond (1984) 467 US 867, 874, 104 S Ct 2794, 81 L Ed2d 718*]. However, the district court's decision may not be given preclusive effect unless the court formally certified the action and, for Rule 23(b)(3) class actions, unless notice and opportunity to opt out were provided to the class [*see Besinga v. United States (9th Cir 1991) 923 F2d 133, 135*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral Overview

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20.45 CHECKLIST: Proceedings in Securities Class Actions.

☐ Prepare and file a complaint under the Securities Act or Securities Exchange Act containing class allegations.

Authority:
15 USC §§ 77z-1, *78u-4*; *ND Cal Civ LR 3-7(a)*

Discussion:
See *§§ 20.10*, *20.11*

Form:
See *§ 20.58*

☐ Include "certification" signed by plaintiff for filing with complaint that:

- ○ States that the plaintiff reviewed and authorized the filing of the complaint;
- ○ States that the plaintiff purchased the securities for reasons other than filing a securities action;
- ○ States plaintiff's willingness to serve as representative for the proposed class;
- ○ Sets forth all of plaintiff's transactions in the securities in dispute;

○ Sets forth all other securities actions in the past three years in which plaintiff has been the class representative; and

○ States that plaintiff will not accept any payment for serving as class representative in the action being filed, except as ordered and approved by the court.

Authority:
Fed R Civ P 23; *15 USC §§ 77z-1(a)(2)(A)*, *78u-4(a)(2)(A)*; *ND Cal Civ LR 3-7(b)*

Discussion:
See *§ 20.47*

Form:
See *§ 20.61*

☐ Publish notice, such as a press release on *Business Wire*, that advises the prospective class:

○ That an action is pending that:

☐ Involves the claims described, and

☐ The purported class period during which the claims arose.

○ That not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff.

Timing:
The notice must be published not later than 20 days, or 21 days to meet ND Cal requirements, after the date the complaint is filed.

Authority:
15 USC §§ 77z-1(a)(3)(A)(i), *78u-4(a)(3)(A)(i)*; *see ND Cal Civ LR 23-1(a)* (specifying 21-day period)

Discussion:
See *§ 20.48*

☐ For class members who wish to serve as lead plaintiff of the purported class, file a motion asking to be appointed lead plaintiff.

Timing:
The motion must be filed not later than 60 days after the date on which the required notice to the class is published.

Authority:
15 USC §§ 77z-1(a)(3)(A)(i)(II), *78u-4(a)(3)(A)(i)(II)*); *ND Cal Civ LR 3-7(c)*, *23-1(a)*

Discussion:
See *§ 20.49*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ Participate in the hearing on appointment of the lead plaintiff, considering that the court must ordinarily appoint as lead plaintiff(s) the class member(s) who:

○ Has or have the largest financial interest in relief sought as compared to all applicants.

○ Meets or meet the requirements of Rule 23(a) as to typicality of claims and adequacy of representation.

○ Has or have not served as a lead plaintiff in more than five securities class actions during any three-year period.

Timing:
The court must appoint the lead plaintiff not later than 90 days after the date on which the required notice to class members is published. If a party has moved to consolidate the action with other class actions asserting substantially the same claims, the court must appoint the lead plaintiff as soon as practicable after the motion for consolidation has been decided, but not before.

Authority:
15 USC §§ 77z-1(a)(3), 78u-4(a)(3)

Discussion:
See *§ 20.50*

☐ Ask the court to approve the lead plaintiff's choice of class counsel.

Authority:
15 USC §§ 77z-1(a)(3)(B)(v), (8), 78u-4(a)(3)(B)(v), (9); *ND Cal Civ LR 3-7(d)*

Discussion:
See *§ 20.51*

☐ Move for certification and provide notice and opportunity to opt out as in other types of class actions.

Authority:
Fed R Civ P 23(c)

Discussion:
See *§§ 20.15, 20.27*

☐ If the action is settled, seek court approval of the settlement as in other types of class actions.

Authority:
Fed R Civ P 23(e)

Discussion:
See *§ 20.42*

☐ Ensure that the settlement notice contains the statements prescribed by statute, including:

○ The statement of the amount of the settlement proposed to be paid to the parties, both in the aggregate and on an average per share basis.

○ The statement of the "potential outcome" of the case that sets out all of the required details specified in the statute.

○ The statement of the attorney's fees and costs sought.

○ The identification of lawyers' representatives (who will be reasonably available to answer questions from class members concerning matters contained in the notice).

○ The reasons that the parties are proposing settlement.

○ Any other information that the court has required to be included in the notice.

Authority:
Fed R Civ P 23(e); *15 USC §§ 77z-1(a)(7), 78u-4(a)(7)*

Discussion:
See *§ 20.54*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsSecurities LawLiabilityPrivate Securities LitigationGeneral OverviewSecurities LawLiabilityPrivate Securities LitigationLead Plaintiff

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20.46 Options and Strategy.

The Private Securities Litigation Reform Act (PSLRA) [*see 15 USC §§ 77z-1*, *78u-4*] sets out procedures that must be followed, in addition to the requirements of Rule 23, in securities class actions. These provisions apply to any plaintiff class actions brought under either the Securities Act of 1933 or the Securities Exchange Act of 1934 [*see 15 USC § 77a et seq*., *78a* et seq.; *see also 17 CFR § 240.10b-5*]. Because federal law preempts state law that replicates the claims for recovery allowed under the Securities Act and Securities Exchange Act [*see 15 USC §§ 77p(b)(1)*, *78bb(f)(1)*], almost all securities fraud class actions will be controlled by the PSLRA.

The class action provisions of the PSLRA are intended to make it more likely that securities class action litigation is controlled by members of the plaintiff class and not be class counsel. Thus, the class must be provided with early notice of the pendency of the class action and must be given an opportunity to seek appointment as lead plaintiff. In addition, the PSLRA, by setting up a presumption that the applicant for lead plaintiff with the largest purported losses will be appointed lead plaintiff, encourages class members who are large institutional investors to step forward and serve as lead plaintiff because it is hoped that knowledgeable and interested class members with a substantial stake in the litigation will take a more active role in supervising class counsel than would a class member who purportedly suffered smaller losses [*see* HR Rep 104-369 (1995)]. In addition, the PSLRA seeks to limit the number of lawsuits in which so-called "professional plaintiffs" who purchase a few shares in numerous companies serve as lead plaintiff.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewSecurities LawLiabilityPrivate Securities LitigationGeneral OverviewSecurities LawLiabilityPrivate Securities LitigationLead CounselSecurities LawLiabilityPrivate Securities LitigationLead PlaintiffSecurities LawLiabilityPrivate Securities LitigationFederal Preemption

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20.47 Plaintiff Must File Certification With Complaint.

Each plaintiff named in the complaint who seeks to serve as a class representative in a securities class action must provide a sworn certification, personally signed by the plaintiff and filed with the complaint, that [*see 15 USC §§ 77z-1(a)(2)(A), 78u-4(a)(2)(A); see also ND Cal Civ LR 3-7(b)*]:

- States that the plaintiff has reviewed the complaint and authorized its filing.
- States that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action.
- States that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary.
- Sets forth all the plaintiff's transactions in the security that is the subject of the complaint during the class period specified in the complaint.
- Identifies any other securities class action filed during the 3-year period preceding the date on which the certification is signed, in which the plaintiff has sought to serve, or served, as a representative party on behalf of a class.
- States that the plaintiff will not accept any payment for serving as a representative party beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawLiabilityPrivate Securities LitigationGeneral OverviewSecurities LawLiabilityPrivate Securities LitigationLead Plaintiff

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20.48 Plaintiff Must Provide Early Notice to Class Members.

Not later than 20 days after the date the plaintiff files the complaint, the plaintiff or plaintiffs must cause to be published a notice advising members of the purported plaintiff class of [*see 15 USC §§ 77z-1(a)(3)(A)(i), 78u-4(a)(3)(A)(i)*; *see also ND Cal Civ LR 23-1(a)* (specifying 21-day period)].

- The pendency of the action, the claims asserted, and the purported class period.

- That not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff.

The notice is sufficient if it allows interested investors considering whether to seek appointment as lead plaintiff to make a rational decision whether to commit the resources necessary to represent the class [*see Wenderhold v. Cylink Corp. (ND Cal 1999) 188 FRD 577, 583*]. The notice must be published in a widely circulated national business-oriented publication or wire service [*see 15 USC §§ 77z-1(a)(3)(A)(i), 78u-4(a)(3)(A)(i)*]. A press release on *Business Wire,* which disseminates information electronically to news media, on-line services, and computer databases available to the investment community, is considered sufficient to satisfy the notice requirement [*see In re Advanced Tissue Scis. Sec. Litig. (SD Cal 1998) 184 FRD 346, 349*].

If more than one action is filed on behalf of a class asserting substantially the same claim or claims, only the plaintiff or plaintiffs in the first-filed action are required to publish notice [*see 15 USC §§ 77z-1(a)(3)(A)(ii), 78u-4(a)(3)(A)(ii)*]. In practice, however, even the plaintiff or plaintiffs who file subsequent suits generally cause the notice to be published.

This notice is in addition to the notice or notices otherwise required in class actions [*see 15 USC §§ 77z-1(a)(3)(A)(iii), 78u-4(a)(3)(A)(iii)*].

Cross References:

Discussion of notice of certification, see *§§ 20.26, 20.27*. Discussion of notice of settlement, 20.42[6]. Discussion of notice of fee award, see *§ 20.35[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsNoticesSecurities LawLiabilityPrivate Securities LitigationLead Plaintiff

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20.49 Other Class Members May Apply to Serve As Lead Plaintiff.

Not later than 60 days after the date on which the notice discussed in the preceding section is published, any member of the purported class may move the court to serve as lead plaintiff [*see 15 USC §§ 77z-1(a)(3)(A)(i)(II), 78u-4(a)(3)(A)(i)(II)*].

A Northern District of California Local Rule provides that the motion must set forth whether the party claims entitlement to the presumption that the applicant with the largest financial interest in the litigation is the "most adequate plaintiff," whether the party claims that the presumption is rebutted as to another party, and the reasons [*ND Cal Civ LR 23-1(b)*].

Cross Reference:

Discussion of presumption that applicant with largest financial interest in litigation is most adequate plaintiff, see *§ 20.50[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawLiabilityPrivate Securities LitigationLead Plaintiff

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20.50 Court Must Appoint Lead Plaintiff.

20.50[1] Court Must Appoint "Most Adequate Plaintiff" Within 90 Days. Not later than 90 days after the date on which the plaintiff publishes the required notice to class members [*see 15 USC §§ 77z-1(a)(3)(A)(i), 78u-4(a)(3)(A)(i)*], the court must appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (referred to as the "most adequate plaintiff") [*see 15 USC §§ 77z-1(a)(3)(B)(i), 78u-4(a)(3)(B)(i)*].

If more than one class action has been filed asserting substantially the same claims, and if any party has moved to consolidate the action for pretrial purposes or for trial, the court must appoint the lead plaintiff as soon as practicable after the motion for consolidation has been decided, but not before [*see 15 USC §§ 77z-1(a)(3)(B)(ii), 78u-4(a)(3)(B)(ii)*].

Timing:

The plaintiff must cause the required notice to be published not later than 20 days after the date of filing of the complaint [*see 15 USC §§ 77z-1(a)(3)(A)(i), 78u-4(a)(3)(A)(i); see also ND Cal Civ LR 23-1(a)* (specifying 21-day period)]. Accordingly, the court must appoint the lead plaintiff no later than 110 days after the complaint is filed, provided that a motion for consolidation of multiple class actions is not pending.

Cross Reference:

Additional discussion of lead plaintiff's appoint-ment, see 5 *Moore's Federal Practice, § 23.191* (Matthew Bender 3d ed.).

20.50[2] Court Must Presume That Applicant With Greatest Financial Interest Is "Most Adequate Plaintiff." The court must adopt a presumption that the most adequate plaintiff is the person or group of persons, of those who have either filed the compliant or moved to be appointed lead plaintiff, who (1) in the determination of the court, has the largest financial interest in the relief sought by the class, and (2) otherwise satisfies the Rule 23 requirements [*see 15 USC §§ 77z-1(a)(3)(B)(iii), 78u-4(a)(3)(B)(iii)*].

To make this determination, the court must first compare the financial stakes of the applicants and determine which has the most to gain from the lawsuit. It must then focus its attention on that applicant and determine, based on the information provided in the applicant's pleadings and declarations, whether that applicant satisfies the requirements of Rule 23(a), in particular those of typicality and adequacy. If the applicant meets these requirements, the applicant is entitled to the effect of the presumption. If not, the court must repeat the inquiry, considering the applicant with the next-largest financial stake [*In re Cavanaugh (9th Cir 2002) 306 F3d 726, 729-730*].

The PSLRA did not change or heighten the Rule 23(a) typicality and adequacy requirements. The court must determine whether these are met in the same manner as in other cases [*In re Cavanaugh (9th Cir 2002) 306 F3d 726, 736*].

Cross Reference:

Discussion of Rule 23(a) typicality and adequacy requirements, see *§ 20.06[3]*, *[4]*.

Distinguish:

The lead plaintiff is appointed early in the litigation, usually considerably in advance of the certification decision. The court may need to consider adequacy and typicality at the lead plaintiff selection stage, but all that is required is a preliminary showing [*see Aronson v. McKesson HBOC, Inc. (ND Cal 1999) 79 F Supp2d 1146, 1158*]. The court is still obligated to make a rigorous analysis of all the Rule 23 requirements before certifying the action as a class action, and typicality and adequacy may be reconsidered at that time.

Cross Reference:

Discussion of certification decision, see *§ 20.16*.

Once the court determines the presumptive most adequate plaintiff, it must appoint that person as lead plaintiff unless the presumption is rebutted [*In re Cavanaugh (9th Cir 2002) 306 F3d 726, 729 n2*]. The presumption may be rebutted only on proof by a member of the purported plaintiff class that the presumptive lead plaintiff either (1) will not fairly and adequately protect the interests of the class; or (2) is subject to unique defenses that render the plaintiff incapable of adequately representing the class [*see 15 USC §§ 77z-1(a)(3)(B)(iii)(II)*, *78u-4(a)(3)(B)(iii)(II)*]. The presumption is not rebutted merely because another plaintiff is a more sophisticated investor or has more investment or litigation experience [*see, e.g., Tanne v. Autobytel, Inc. (CD Cal 2005) 226 FRD 659, 672*].

The rebuttal stage of the process differs from the preceding stage in that it is adversarial--the court need not rely solely on the presumptive lead plaintiff's pleadings and declarations but will also consider any evidence presented by other plaintiffs. The court may hold an evidentiary hearing and may need to make a renewed determination of typicality and adequacy [*In re Cavanaugh (9th Cir 2002) 306 F3d 726, 739*].

The court may permit the parties to conduct discovery relating to determination of the most adequate plaintiff, but only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class [*see 15 USC §§ 77z-1(a)(3)(B)(iv)*, *78u-4(a)(3)(B)(iv)*; *see, e.g., Knisley v. Network Assocs., Inc. (ND Cal 1999) 77 F Supp2d 1111, 1115-1116*].

While there is some conflict in the district courts as to whether defendants have standing to challenge the appointment of lead plaintiff at this stage of the proceedings, the majority view is that (except in very limited circumstances) defendants do not have standing to challenge the *appointment* of lead plaintiff. Defendants may, however, raise objections to the lead plaintiff's adequacy of representation when the court hears a motion for class certification.

20.50[3] Court May Appoint Related Group of Persons As Lead Plaintiff. The Court may appoint a "member or members" of the purported plaintiff class as lead plaintiff [*see 15 USC §§ 77z-1(a)(3)(B)(i)*, *78u-4(a)(3)(B)(i)*].

Moreover, the lead plaintiff presumption may apply to a "person or group of persons" [*see 15 USC §§ 77z-1(a)(3)(B)(iii), 78u-4(a)(3)(B)(iii)*]. This statutory language has led to controversy over the extent to which a group of class members may aggregate their interests in order to have the "largest financial interest" and, therefore, be entitled to the presumption.

Generally, a large group of unrelated persons will not be allowed to serve as lead plaintiff. Congress intended the lead plaintiff to control the litigation, and a large or disconnected group cannot effectively exercise control [*see In re Network Assocs. Inc. Sec. Litig. (ND Cal 1999) 76 F Supp2d 1017, 1026-1027* ; *Yousefi v. Lockheed Martin Corp. (CD Cal 1999) 70 F Supp2d 1061, 1068*]. Moreover, this would allow law firms to compete to sign up the most class members and, by this means, become class counsel, a result Congress sought to avoid [*see Aronson v. McKesson HBOC, Inc. (ND Cal 1999) 79 F Supp2d 1146, 1153-1154*]. Accordingly, the court should appoint a group only when the group has a meaningful relationship preceding the litigation, and is united by more than the mere happenstance of having bought the same securities [*see Aronson v. McKesson HBOC, Inc. (ND Cal 1999) 79 F Supp2d 1146, 1153-1154*].

20.50[4] "Professional" Plaintiffs Restricted From Serving As Lead Plaintiff. Unless the court permits otherwise, a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than five securities class actions brought as plaintiff class actions under the Federal Rules during any three-year period [*see 15 USC §§ 77z-1(a)(3)(B)(vi), 78u-4(a)(3)(B)(vi)*].

The court may waive this restriction. Waiver may be appropriate, for example, when there are no other appropriate lead plaintiff candidates or when the candidate is a large institutional investor [*see In re Gemstar-TV Guide Int'l, Inc. Secs. Litig. (CD Cal 2002) 209 FRD 447, 453-454*].

20.50[5] Court's Decision Is Not Appealable Collateral Order. The court's order designating the lead plaintiff is not immediately appealable under the collateral order doctrine [*see Z-Seven Fund, Inc. v. Motorcar Parts & Accessories (9th Cir 2000) 231 F3d 1215, 1218-1219*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsAppellate ReviewCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersSecurities LawLiabilityPrivate Securities LitigationLead Plaintiff

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20.51 Lead Plaintiff Is Entitled to Select Class Counsel.

The lead plaintiff appointed by the court must, subject to the approval of the court, select and retain counsel to represent the class [*see 15 USC §§ 77z-1(a)(3)(B)(v), 78u-4(a)(3)(B)(v)*]. The court should ensure that selection of counsel and fee arrangements are reasonable, but should not substitute its judgment for that of the lead plaintiff [*In re Cavanaugh (9th Cir 2002) 306 F3d 726, 732* & n1 ("the district court has no authority to select for the class what it considers to be the possible lawyer or the lawyer offering the best possible fee schedule. ... Congress gave the lead plaintiff, not the court, the power to select a lawyer for the class"); *see Armour v. Network Assocs., Inc. (ND Cal 2001) 171 F Supp2d 1044, 1055-1056*].

If a plaintiff class is represented by an attorney who directly owns or otherwise has a beneficial interest in the securities that are the subject of the litigation, the court must determine whether the ownership or interest constitutes a conflict of interest sufficient to disqualify the attorney from representing the plaintiff class [*see 15 USC §§ 77z-1(a)(8), 78u-4(a)(9)*]. A Northern District of California Local Rule requires any lawyer seeking to serve as class counsel in any action governed by the PSLRA to serve and file a certificate under penalty of perjury that either [*ND Cal Civ LR 3-7(d)*]:

- Affirms that the lawyer does not directly own or otherwise have a beneficial interest in securities that are the subject of the action; or

- Sets forth with specificity the extent of any ownership or interest in the securities and explains why that ownership or interest does not constitute a conflict of interest sufficient to disqualify the attorney from representing the class.

Cross Reference:

Appointment of counsel in non-PSLRA class actions, see *§ 20.33*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass

CounselAppointmentsCivil ProcedureClass ActionsClass CounselFeesSecurities LawLiabilityPrivate Securities LitigationLead CounselSecurities LawLiabilityPrivate Securities LitigationLead Plaintiff

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20.52 Lead Plaintiff's Recovery Limited to Representative Share.

The class representative's share of any final judgment or settlement must be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. However, the representative may be awarded reasonable costs and expenses (including lost wages) directly relating to the representation of the class [*see 15 USC §§ 77z-1(a)(4), 78u-4(a)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass MembersNamed MembersSecurities LawLiabilityPrivate Securities LitigationLead Plaintiff

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20.53 Attorney's Fees Must Be Reasonable.

Total attorney's fees and expenses awarded to plaintiffs' counsel may not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class [*see 15 USC §§ 77z-1(a)(6), 78u-4(a)(6)*].

Cross Reference:

Award of fees in non-PSLRA class actions, see *§ 20.35*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass CounselFeesSecurities LawLiabilityPrivate Securities LitigationAttorney FeesSecurities LawLiabilityPrivate Securities LitigationLead Counsel

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20.54 Settlement Notice Must Contain Prescribed Statements.

Rule 23 requires that class members be given notice of any settlement [*see Fed R Civ P 23(e)(1)*]. In a securities class action, any proposed or final settlement agreement that is published or otherwise disseminated to the class must include each of the following statements, along with a cover page summarizing the information contained in the statements [*see 15 USC §§ 77z-1(a)(7), 78u-4(a)(7)*]:

- Statement of plaintiff recovery: The amount of the settlement proposed to be distributed to the parties, determined in the aggregate and on an average per share basis.

- Statement of potential outcome of case (this statement is not admissible in any federal or state judicial action or administrative proceeding, other than an action or proceeding arising out of the statement):

  - If the settling parties agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim, a statement concerning the average amount of such potential damages per share.

  - If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each securities claim, a statement from each settling party concerning the issue or issues on which the parties disagree.

- Statement of attorney's fees or costs sought: If any of the settling parties or their counsel intend to apply to the court for an award of attorney's fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make an application, the amount of fees and costs that will be sought (including the amount of fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought. This information must be clearly summarized on the cover page of any notice to a party of any proposed or final settlement agreement.

- Identification of lawyers' representatives: The name, telephone number, and address of one or more representatives of plaintiffs' counsel who will be reasonably available to answer questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to the class.

- Reasons for settlement: A brief statement explaining the reasons why the parties are proposing the settlement.

- Other information: A statement of any other information that may be required by the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsNoticesSecurities LawLiabilityPrivate Securities LitigationGeneral OverviewSecurities LawLiabilityPrivate Securities LitigationAttorney Fees

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20.55 Settlement Ordinarily May Not Be Under Seal.

The terms and provisions of any settlement agreement ordinarily may not be filed under seal, However, on motion of any party to the settlement, the court may order filing under seal for those portions of a settlement agreement as to which good cause is shown for filing under seal. Good cause exists only if publication of a term or provision of a settlement agreement would cause direct and substantial harm to any party [*15 USC §§ 77z-1(a)(5), 78u-4(a)(5)*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesGovernmentsCourtsCourt RecordsSecurities LawLiabilityPrivate Securities LitigationGeneral Overview

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20.56 LOCAL PRACTICE: ND Cal Requirements--Cover Sheet.

If a complaint or other pleading contains a claim governed by the PSLRA, the phrase "Private Securities Litigation Reform Act" must be noted in Block VI of the civil cover sheet [*ND Cal Civ LR 3-7(a)*]. A copy of the form to be used for the civil cover sheet [*see ND Cal Civ LR 3-2(a)*] may be downloaded from the court's website: www.cand.uscourts.gov.

Cross Reference:

Discussion of the civil cover sheet, see *Ch. 6, Drafting the Summons and Complaint, § 6.20*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsGovernmentsCourtsRule Application & InterpretationSecurities LawLiabilityPrivate Securities LitigationGeneral Overview

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20.57 LOCAL PRACTICE: ND Cal Requirements--Electronic Posting.

A local rule in the Northern District of California requires that certain documents, if required to be filed in an action containing a claim governed by the PSLRA, must be timely posted at a Designated Internet Site. The party or other person filing the document is responsible for timely posting [*ND Cal Civ LR 23-2(a)*].

The following types of documents must be posted [*ND Cal Civ LR 23-2(b)*]:

- Any pleading [*see Fed R Civ P 7(a)*].
- Any briefs, declarations, or affidavits filed pursuant to Rule 12, 41, or 56 [*see Fed R Civ P 12, 41, 56*].
- Any briefs, declarations, or affidavits relating to class certification.
- Any briefs, declarations, or affidavits relating to designation of a lead plaintiff.
- Any report, statement, declaration, or affidavit of an expert witness designated to testify.
- Any pretrial conference statement [*see ND Cal Civ LR 16-10*], pretrial briefs, or motions in limine.
- Any filing concerning approval of a settlement of the action.
- Any filing concerning any request for attorney's fees or costs.

However, a person is not required to post any document filed under seal with the written consent of the court. Exhibits, appendixes, or other attachments need not be posted. When briefs, declarations, or affidavits are not available in electronic form in the possession, custody, or control of the person filing the documents, or the person's counsel or agents, these documents need not be filed [*ND Cal Civ LR 23-2(b)(9)*].

A document is timely posted if, on the day the document is filed with the court, an electronic form of the filing prepared

in any commonly used word processing format, is forwarded to the Designated Internet Site by electronic transmission, e-mail, physical delivery of a diskette, or any other means acceptable to that Designated Internet Site. Electronic delivery must occur by means reasonably calculated to result in delivery by the third day following the filing. The certification of service for the filed document [*see ND Cal Civ LR 5-6*] must state that service in compliance with Rule 23-2 has been accomplished, and the Designated Internet Site must be identified by its physical and electronic addresses [*ND Cal Civ LR 23-2(c)*].

A Designated Internet Site must be accessible to the public at no cost, may charge no fee to the public or parties, and may place no restrictions on any person's ability to copy or download material posted at the site. Members of the public may request to receive e-mail notification of any posting of materials [*ND Cal Civ LR 23-2(d)*].

Links to available Designated Internet Sites may be found at http://securities.stanford.edu/sites.html.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsGovernmentsCourtsRule Application & InterpretationLegal EthicsProfessional ConductElectronic CommunicationsSecurities LawLiabilityPrivate Securities LitigationGeneral Overview

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20.58 General Form of Complaint in Class Action.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

John Smith, on behalf of himself and all others similarly situated,	)	No. _____
Plaintiffs	)	COMPLAINT
vs.	)	CLASS ACTION
Acme Widget Co.,	)	
Defendant	)	[JURY DEMANDED]

JURISDICTION

1. This court has jurisdiction over this action because _____ [*describe federal question, diversity of citizenship, or other ground for jurisdiction*].

CLASS ACTION ALLEGATIONS

2. Plaintiff _____ [*name*] brings this action on behalf of _____ [himself *or* herself] and all persons who _____ [*class definition or description, e.g.,* purchased Acme widgets in the State of California from January 1, 2000 through December 31, 2000].

3. Plaintiff is informed and believes, and on that basis alleges, that this class of persons consists of approximately _____ [*number*] persons. Joinder of all these persons would be impracticable.

4. The questions of law and fact presented in this case are common to each and every member of the class, in that _____ [*specify common issues, e.g.,* at least as to the issues of design and marketing defects in the Acme widgets purchased by each member of the class].

5. Plaintiff is a proper representative of this class of persons because, as will be more fully shown below, Plaintiff is a member of the class and the claims Plaintiff is asserting in this complaint are typical of the claims of all members of the class. Plaintiff's claims are not subject to any unique defenses nor does any interest of Plaintiff in this litigation conflict with any other member of the class.

6. Plaintiff contends that the claims set out below are proper for certification as a class action under the provisions of *Federal Rule of Civil Procedure 23* _____ [*specify either (b)(1)(A) or (b)(1)(B) or (b)(2) or (b)(3)*]. Class certification is proper because _____ [*facts meeting requirements of subsection of Rule 23(b), e.g., Rule 23(b)(3):*

a. The questions of law and fact common to the class predominate over any questions affecting individual members in that each class member claims that the same product defect was the producing cause of the injuries and losses suffered by each class member. The central issue is the product defect and its role as producing cause of injury. The injuries suffered by class members as a result of the defect are similar in nature, and vary only in their severity.

b. The class action is superior to other available methods of adjudication because there are over 4000 members in the proposed class, and repeated individual litigation of the common issues shared by all class members would reduce the amount of recovery available to each member. This is true because establishing the design and marketing defects of the product in question will be relatively costly and time-consuming when compared to proof of the nature and severity of each individual class member's resulting injury].

[*Include for (b)(3) money damages class actions*]

7. Notice of this class action may be made to each class member by ordinary mail, using customer lists obtained from Defendant.

CLAIM FOR RELIEF

[*Set forth particulars of claim or claims for relief in numbered paragraphs as in ordinary complaint*.]

REQUEST FOR RELIEF

Plaintiff demands:

A. That this court certify the action as a class action under the provision of Rule 23(b) _____, [and] appoint counsel for the class [, and order notice to class members as required by Rule 23(c)].

B. That plaintiff and each member of the class recover damages for the personal injuries that each has suffered in an amount to be determined by the evidence presented at trial, but in no event less than the jurisdictional minimum of this court.

C. That Plaintiff recover costs of suit and that Plaintiff's attorneys be awarded reasonable attorney's fees, as provided by *Fed R Civ P 23(h)*.

D. That Plaintiff and each member of the class be awarded any and all other relief that may be just and proper.
Dated: _____

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Comply with any format requirements for complaints under local rules; see Ch. 6, Drafting the Summons and Complaint*.]

NOTES.

Authority:
Fed R Civ P 23

Drafting Complaint:
See *§§ 20.10, 20.11*

Requirements for Diversity Jurisdiction:
See *§ 20.12[2]*

Description of Class:
See *§ 20.05*

Requirements of Numerosity, Commonality, Typicality, and Adequacy of Representation:
See *§ 20.06*

Rule 23(b) Categories:
See *§ 20.07*

Notice:

See *§§ 20.26, 20.27*

Costs and Attorney's Fees:
See *§ 20.35*

General Rules on Preparing Complaints:
See *Ch. 6, Drafting the Summons and Complaint, §§ 6.01 -6.17*

Preparing Summons:
See *Ch. 6, Drafting the Summons and Complaint, §§ 6.18 -6.21*

Service of Summons:
See Ch. 7, Service of Process

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20.59 Notice of Motion and Motion to Certify Class Action.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
	)	
John Smith, on behalf of himself and all others similarly situated,	)	
	)	NOTICE OF MOTION
Plaintiffs	)	AND MOTION TO
vs.	)	CERTIFY CLASS ACTION
Acme Widget Co.,	)	
Defendant	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____
	)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order under *Federal Rule of Civil Procedure 23(c)* to certify this action as a class action and to appoint counsel for the class.

_____ [*Party's status and name*] moves this court for an order that:

1. Certifies this action as a class action on behalf of Plaintiff and all other persons similarly situated, namely _____ [*state class description*], and

2. Appoints _____ [*name of attorney or firm*] as class counsel as provided by *Federal Rule of Civil Procedure 23(g)*.

[*Add for class actions being certified under Rule 23(b)(3)*]

3. Directs that an appropriate notice of the certification of this class action be given to the members of class pursuant to *Federal Rule of Civil Procedure 23(c)(2)(A)*; directs that notice be made by _____ [*indicate proposed method of notice*]; and approves the proposed form of notice attached to this motion as Exhibit A.

The grounds for this motion are as follows:

1. The proposed class, as described above, consists of _____ [*state or estimate number of members*] members, and is so numerous that joinder of all members is impracticable.

2. The issues of _____ [*describe common issues of law and fact*] are common to all members of the proposed class.

3. The _____ [claims *or* defenses] of _____ [*name of class representative*] are typical of the _____ [claims *or* defenses] of the other class members.

4. _____ [*Name of class representative*] will vigorously prosecute this action and will fairly and adequately represent the interests of the class.

[*Select one of following four alternatives as basis for class certification*]

[*Alternative One. Certification under Rule 23(b)(1)(A)*]

5. The prosecution of separate actions rather than a class action would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for _____ [*name of party opposing class*]. For example, _____ [*give example of differing judgments creating inconsistent standards of conduct, e.g.*, this suit seeks an interpretation of certain seniority provisions of a pension plan, and one employee could secure a declaration that the trustees of the defendant's pension plan must recognize the employee's years of service with defendant's predecessor and another may well conclude that

the trustees may not recognize those years of service. This would leave the defendant's pension plan subject to impossible conflicting instructions as to how to calculate seniority for class members].

[*Alternative Two. Certification under Rule 23(b)(1)(B)*]

6. The prosecution of separate actions rather than a class action would, as a practical matter, be dispositive of the interests of the other, absent class members and would, therefore, substantially impair or impede their ability to protect their interests. Specifically, _____ [*describe how interests of absent class members could be affected by individual adjudications, e.g.,* the funds sought to be divided in this suit are limited, and failure to certify the class would result in an unfair, "first-come, first-serve" basis for distribution of this limited fund, rather than a principled division among all claimants].

[*Alternative Three. Certification under Rule 23(b)(2)*]

7. _____ [*Name of party opposing class*] has acted toward all class members in a uniform manner, so that the _____ [injunctive *or* declaratory *or* injunctive and declaratory] relief requested in this action should be issued with respect to the class as a whole.

[Alternative Four. Certification under *Rule 23(b)(3)*]

8. The common questions of law and fact predominate over the questions of law or fact affecting only individual members because _____ [*explain how common questions predominate, e.g.,* this litigation involves fraud claims that are based on a uniform and unvaried presentation to each of the class members. The presentation is fraudulent and misleading as to all members or it is not. There are no individual issues of special knowledge nor any unique defenses for any class members. Only the amount of each class member's loss needs to be fixed, and even the individual amounts of loss are limited to two fixed options, depending on which of two packages the class members purchased].

9. The class action is superior to other available methods for the fair and efficient adjudication of the controversy because _____ [*explain why class action is superior, e.g.,* a single litigation will provide superior and more efficient relief for all the thousands of members of the class. Individual litigation involving relatively small amounts of money, with duplicate costs for thousands of individual investigations, repetitive formal discovery, and redundant trial preparation and trial will not be productive or efficient].

[*CONTINUE*]

10. The accompanying Application of _____ [*Name of counsel*] to Serve as Class Counsel and the Supporting Declarations show that the court has a willing and qualified candidate for appointment as class counsel in this action in that:

a. _____ [*Name of counsel*] has spent considerable time investigating and researching class claims.

b. _____ [*Name of counsel*] has considerable experience in complex litigation and with class actions.

c. _____ [*Name of counsel*] has committed and is willing to commit considerable resources to the prosecution of the action.

d. _____ [*Name of counsel*] has fully and fairly represented the interests of the class in this action to date.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying affidavits of _____ [*names of affiants*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits and exhibits to those affidavits*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 23(c)

Drafting Motion:
See *§ 20.15*

Description of Class:
See *§ 20.05*

Requirements of Numerosity, Commonality, Typicality, and Adequacy of Representation:
See *§ 20.06*

Rule 23(b) Categories:
See *§ 20.07*

Notice:
See *§§ 20.26*, *20.27*

Appointment of Counsel:
See *§ 20.33*

Timing:
See *§ 20.15[1]*

Related Form of Order:
See *§ 20.60*

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20.60 Order Certifying Plaintiff Class.

John Smith, on behalf of himself and all others similarly situated,	)	Civil Action No. _____
Plaintiffs	)	
vs.	)	
Acme Widget Co.,	)	ORDER CERTIFYING ACTION
Defendant	)	AS CLASS ACTION
	)	

On _____ [*date*], _____ [*name of moving party*] moved this Court pursuant to *Federal Rule of Civil Procedure 23(c)* for an order certifying this action as a class action. The matter was the subject of a hearing by the Court on _____ [*date*]. _____ [*Name of moving party*] appeared at the hearing through _____ [*counsel's name and firm*]. _____ [*Name of opposing party*] appeared at the hearing through _____ [*counsel's name and firm*].

Having reviewed the papers submitted, having heard the evidence presented at the hearing, and having considered the authorities cited in favor of and in opposition to the motion, the Court finds that:

1. The class consists of at least _____ [*number*] persons, so that joinder of all class members is impracticable.

2. There are questions of law and fact that are common to all members of the class, specifically _____

[*describe common issues*].

3. The claims of _____ [*name(s) of class representative(s)*] for _____ [*specify*] are typical of the claims of the other class members.

4. _____ [*Name(s) of class representative(s)*] has indicated a willingness and an ability to represent the class members and will fairly and adequately protect the interests of the class.

[*Select alternatives corresponding to relevant subsections of Rule 23(b)*]

[*Alternative One. Certification under Rule 23(b)(1)(A)*]

5. Certification is appropriate under *Federal Rule of Civil Procedure 23(b)(1)(A)* because the prosecution of separate actions would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for _____ [*name of party opposing class*]. Specifically, _____ [*describe how inconsistent adjudications would create incompatible standards of conduct*].

[*Alternative Two. Certification under Rule 23(b)(1)(B)*]

5. Certification is appropriate under *Federal Rule of Civil Procedure 23(b)(1)(B)* because the prosecution of separate actions would, as a practical matter, be dispositive of the interests of the other, absent class members and would, therefore, substantially impair or impede their ability to protect their interests. Specifically, _____ [*describe how interests of absent class members could be affected by individual adjudications*].

[*Alternative Three. Certification under Rule 23(b)(2)*]

5. Certification is appropriate under *Federal Rule of Civil Procedure 23(b)(2)* because _____ [*name of party opposing class*] has acted toward all class members in a uniform manner, so that the requested _____ [injunctive *or* declaratory *or* injunctive and declaratory] relief, if granted, should be issued with respect to the class as a whole.

[*Alternative Four. Certification under Rule 23(b)(3)*]

5. Certification is appropriate under *Federal Rule of Civil Procedure 23(b)(3)* because the questions of law and fact common to the class predominate over the questions affecting only individual members, and a class action is superior to other methods for the fair and efficient adjudication of these questions. _____ [*Explain how common questions predominate and why class action is superior means of resolution*].

[*CONTINUE*]

6. _____ [*Name of class counsel*] is has requested to be appointed and is qualified to be appointed as class counsel because:

a. _____ [He *or* She *or* They] _____ [has *or* have] prosecuted this action competently to this point;

b. _____ [He *or* She *or* They] _____ [has *or* have] expended considerable resources identifying and investigating the claims in this action;

c. _____ [He *or* She *or* They] _____ [is *or* are] experienced in handling class actions and claims of the type asserted in this action; and

d. _____ [He *or* She *or* They] _____ [has *or* have] indicated a willingness to commit the necessary resources to representing the class.

Accordingly, _____ [*name of class counsel*] will fairly and adequately represent the interests of the class. [*Add if other attorneys have also sought appointment:* _____ (*Name of class counsel*) is also the applicant best able to do so.]

Therefore,

IT IS ORDERED that:

1. The motion is GRANTED.

2. This action is certified as a class action under Federal Rule of *Civil Procedure 23(b)* _____ [(1)(A) *or* (1)(B) *or* (2) *or* (3)].

3. The action will proceed as to the following _____ [class *or* subclasses]: _____ [*define class and each subclass*].

4. The class _____ [claims *or* issues *or* defenses *or combination*] that will be decided in this action are: _____ [*define class claims, issues, or defenses*].

5. _____ [*Name of class counsel*] is appointed as class counsel to represent _____ [*specify, e.g.*, the class defined above].

[*Repeat counsel appointment for each subclass*].

6. Any judgment in this action, whether favorable or unfavorable to the class[es] described above will include and affect all members of the class[es] described.

[*Include if action certified under Rule 23(b)(3)*]

[*Alternative One. Class notice considered and ordered at time of certification*]

7. Notice to class members will take the form of the Notice attached to this Order as Exhibit A and will be provided to the class members by _____ [*specify means, e.g.*, first-class mail to the address list provided by defendants]. _____ [*Name of responsible party or parties*] shall bear the costs of this notice [*add, if appropriate:*, which may be recovered as a cost of suit if they prevail in this action].

[*Alternative Two. Class notice reserved for later hearing*]

7. The type, content, and manner of notice will be determined on _____ [*date*].
_____ [*Name of moving party*] shall make proposals for the contents and manner of notice and for the responsibility for paying for that notice. These proposals must be filed with the Court, and served on all parties, no later than _____ [*date*]. Any supporting briefs or declarations concerning the proposed form of manner of, and responsibility for paying for notice must be filed and served at the same time. All other parties in the action may make counterproposals and submit briefs and declarations on these matters. These materials must be filed with the Court, and served on all parties, no later than _____ [*date*].
Dated: _____

_____

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
Fed R Civ P 23(c)

Drafting Order:
See *§ 20.21*

Description of Class:
See *§ 20.05*

Requirements of Numerosity, Commonality, Typicality, and Adequacy of Representation:
See *§ 20.06*

Rule 23(b) Categories:
See *§ 20.07*

Notice:
See *§§ 20.26, 20.27*

Appointment of Counsel:
See *§ 20.33*

Related Form of Motion:
See *§ 20.59*

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20.61 Certification by Plaintiff in Securities Class Action.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]

_____ [*Name of plaintiff*], under penalty of perjury, certifies as follows:

1. I am the plaintiff in this action, and I make this certification as required by the Private Securities Litigation Reform Act of 1995.

2. I have reviewed the Complaint prepared by counsel in this action have authorized its filing.

3. I did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action.

4. I am willing to serve as a representative party on behalf of a class, including providing testimony at depositions and at trial, if necessary.

5. The following is a list of all my transactions in the security that is the subject of the complaint during the class period specified in the complaint: _____ [*for each transaction, list purchase or sale date, number of shares bought or sold, and price per share paid or received*].

6. During the three-year period preceding the date on which this certification is signed, I _____ [*either:* did not serve or seek to serve as representative party in any securities class action *or* served or sought to serve as a representative party in the following securities class actions: _____ (*for each action, state title of action, court or docket number, and whether party served as class representative, sought to serve, or both*)].

7. I will not accept any payment for serving as a representative party in this action beyond my pro rata share of any recovery, except as ordered or approved by the court.

8. I make this certification without waiver of any applicable privileges and without waiver of any right to challenge the necessity for, or the constitutionality of, this certification, or to object to the filing of this certification on any ground whatever.

9. The matters state in this certification are true to the best of my current knowledge, information, and belief.

CERTIFIED under the penalties of perjury, at _____ [*city and state*], on _____ [*date*].

_____ [*signature of plaintiff*]

_____ [*typed name*]

Plaintiff

NOTES.

Authority:
15 USC §§ 77z-1(a)(2)(A), 78u-4(a)(2)(A); ND Cal Civ LR 3-7(b)

Drafting Certification:
See *§ 20.47*

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20.62 Notice of Motion and Motion to Be Appointed Lead Plaintiff in Securities Class Action.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
John Smith, on behalf of himself and all others similarly situated,	)	
Plaintiffs	)	NOTICE OF MOTION AND MOTION FOR APPOINTMENT AS LEAD PLAINTIFF
vs.	)	
Acme Widget Co.,	)	
Defendant	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time*], or as soon thereafter as counsel may be heard, _____ [*name of moving party*] will move this court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for appointment as lead plaintiff in this action.

_____ [*Name of moving party*] moves this court for an order under the provisions of the Private Securities Litigation Reform Act that:

1. Appoints _____ [*name of moving party*] as lead plaintiff in this action within the meaning of *15 USC §§ 77z-1(a)(2)(A), 78u-4(a)(2)(A)*.

2. Approves Movant's selection of _____ [*name of attorney or firm*] as class counsel.

_____ [*Name of moving party*] should be appointed lead plaintiff in this action because:

1. Movant has a large and significant financial interest in the relief sought by the class in that _____ [*briefly describe moving party's financial interest, i.e., loss due to defendant's fraudulent statements*].

[*Alternative One. Movant is presumed lead plaintiff*]

2. Movant believes this interest is the largest financial interest of any of the applicants for lead plaintiff. Accordingly, Movant is entitled to the statutory presumption that Movant is the "most adequate plaintiff" and should be appointed lead plaintiff by the court.

[*Alternative Two. Movant is not presumed lead plaintiff*]

2. Movant has a large and significant financial interest in the relief sought by the class in that _____ [*briefly describe moving party's financial interest, i.e., loss due to defendant's fraudulent statements*]. While it is possible that _____ [*name of other applicant for lead plaintiff*] has a larger financial interest in the litigation than does Movant, that applicant should not be appointed lead plaintiff. Even assuming that _____ [*name of other applicant*] is entitled to the statutory presumption that it is the "most adequate plaintiff," that presumption should be rebutted because _____ [*explain, e.g.,* that applicant consists of a group of 17 unrelated individuals and institutional investors. Such a group lacks the cohesion to properly control the action and therefore cannot fairly and adequately represent the interests of the class].

[*CONTINUE*]

3. Movant also meets all of the requirements of Rule 23 to be class representative:

a. Movant's claims for damages due to the fraudulent conduct of Defendant are typical of those of the class, and

b. Movant is willing and able to vigorously prosecute this action and will fairly and adequately represent the interests of the class.

4. Pursuant to *15 USC §§ 77z-1(a)(3)(B)(v), 78u-4(a)(3)(B)(v)*, the lead plaintiff has the right to select and retain class

counsel, subject to the approval of the court. The counsel selected by Movant, _____ [*name of attorney or firm*], have extensive experience in successfully prosecuting complex securities class actions and are well qualified to represent the class. Accordingly, the court should approve Movant's choice.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for_____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service.*]

NOTES.

Authority:
15 USC §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B); ND Cal Civ LR 23-1(b)

Appointment of Lead Plaintiff:
See *§ 20.50*

Approval of Counsel:
See *§ 20.51*

Timing:
See *§ 20.49*

Related Form of Order:

See *§ 20.63*

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Unit 6 Class Actions
CHAPTER 20 Class Actions
X. FORMS

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20.63 Order Appointing Lead Plaintiff in Securities Class Action.

John Smith, on behalf of himself and all others similarly situated,	)	Civil Action No. _____
Plaintiffs	)	
vs.	)	
Acme Widget Co.,	)	ORDER APPOINTING LEAD PLAINTIFF
Defendant	)	
	)	

On _____ [*date*], _____ [*name of moving party*] moved this Court for an order appointing Movant as lead plaintiff and approving Movant's choice of counsel. The matter was the subject of a hearing by the Court on _____ [*date*]. Movant appeared at the hearing through _____ [*counsel's name and firm*]. _____ [*Name of opposing party*] appeared at the hearing through _____ [*counsel's name and firm*].

Having reviewed the papers submitted, having heard the evidence presented at the hearing, and having considered the authorities cited in favor of and in opposition to the motion, the Court finds that:

1. Movant has the largest financial interest in the litigation of any lead plaintiff applicant.

2. Movant meets the relevant requirements of Rule 23 in that Movant's claims are typical of those of the class and Movant will fairly and adequately represent the class interests.

3. _____ [*Name of attorney or firm*] has the ability, experience, and resources necessary to prosecute a securities class action.

Therefore,

IT IS ORDERED that:

1. The motion is GRANTED;

2. _____ [*Name of movant*] is appointed lead plaintiff in this action, and

3. Lead plaintiff's choice of _____ [*name of attorney or firm*] as class counsel is approved.
Dated: _____

_____

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
15 USC §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B); ND Cal Civ LR 23-1(b)

Appointment of Lead Plaintiff:
See *§ 20.50*

Approval of Counsel:
See *§ 20.51*

Related Form of Motion:
See *§ 20.62*

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Unit 6 Class Actions
CHAPTER 20 Class Actions
X. FORMS

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20.64 Local District Court Forms.

Northern District

Model Stipulation and Proposed Consolidation Order for Securities Fraud Class Actions

Click here to view image.

Cross Reference:

Automated HotDocs(R) and PDF versions of these forms may be accessed and filled in from the online version of this publication, and are also available at www.LexisOne.com/forms.

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Unit 7 Discovery
CHAPTER 21 Discovery Strategy and Planning

3-21 MB Practice Guide: Fed Pretrial Civ Proc in CA 21.syn

§ 21.syn Synopsis to Chapter 21: Discovery Strategy and Planning

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Unit 7 Discovery
CHAPTER 21 Discovery Strategy and Planning
I. STRATEGY

3-21 MB Practice Guide: Fed Pretrial Civ Proc in CA 21.01

21.01 Scope.

This chapter discusses discovery planning and strategy and document management under the Federal Rules of Civil Procedure. The chapter is organized into three main parts. Part I explains the scope of the chapter, plus the objectives and strategy of these procedures.

Part II covers the steps and considerations in implementing a discovery plan as part of a case's overall litigation plan, including:

- Planning for discovery to understand the issues and facts of the case, including establishing a plan at the outset of the case, conducting legal research, reviewing jury instructions, conducting client interviews to elicit important facts and documents, determining potential witnesses, and preparing the client for discovery [*see 21.04*].

- Reviewing relevant documents to prepare for mandatory disclosure, understanding key facts of the case, helping set client expectations, preparing for depositions, and conducting a reasonable inquiry for discovery [*see 21.04*].

- Conducting factual investigation and informal discovery, including investigating related personal injury actions, if appropriate, conducting site investigations, inspecting medical and hospital records, reviewing public records, obtaining witness information and witness statements, using investigators and consultants, if appropriate, and protecting informal discovery through the attorney-client privilege and work product doctrine [*see 21.05*].

- Preparing for formal discovery, including making mandatory initial disclosures, holding settlement conference, limiting the scope of discovery or stipulating around limits, certifying discovery responses and filing them, supplementing discovery, seeking protective orders, evaluating the discovery sequence, and evaluating the cost of discovery [*see 21.06*].

- Considering available discovery methods, including depositions, interrogatories, inspection of documents, electronically stored information, and property, physical and mental examinations, and

requests for admissions [*see 21.07*].

- Considering strategies for the order of discovery methods, including the factors to consider in deciding when and in which order to take depositions [*see 21.08*].

Part III covers the management of documents. In document-intensive litigation, the ability to locate all documents and track their origin is indispensable. Thus, a system of control and indexing that makes documents readily accessible is critical. Typical document management involves sorting, labeling, filing, and indexing documents in a manner that allows for easy retrieval. Document management typically involves some level of automation. Even for a small case, it is useful to maintain a computer-based index of pertinent documents.

The use of electronic documents has revolutionized document management, especially in large cases. Document imaging services that scan paper documents into digital images are commonly used for the purpose of automating and indexing documents in complex cases. At some firms, document imaging and management systems with comprehensive indexing and retrieval features are used in all cases. A growing number of firms use web-based sites with document management systems that make it possible for multiple users to store, index, retrieve, and electronically distribute all types of case documents with accuracy and ease.

Specifically, this part covers the following topics:

- Objectives of document management [*see 21.10[1]*].
- Methods of document management [*see 21.10[1] -[6]*].
- Reviewing and organizing key documents [*see 21.10[7]*].
- Using staff appropriately to review documents [*see 21.10[8]*].
- Organizing and managing discovery documents [*see 21.11[1] -[4]*].
- Keeping a control set of documents [*see 21.11[5]*].
- Indexing documents for retrieval and annotation [*see 21.11[6]*].
- Keeping "hot document" files, witness files, subject matter files, and exhibit files [*see 21.11[7]*].
- Recording document use [*see 21.11[8]*].
- Creating and maintaining witness files and subject matter files [*see 21.11[9] -[11]*].

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 21 Discovery Strategy and Planning
I. STRATEGY

3-21 MB Practice Guide: Fed Pretrial Civ Proc in CA 21.02

21.02 Objective and Strategy.

21.02[1] Proper Discovery Planning Can Shape Entire Case. Planning for discovery is a fundamental part of any litigation, and can have a marked impact in understanding, shaping, litigating, and resolving a case. A proper discovery plan establishes a focused, organized approach to the papers, objects, and people subject to discovery, and to the various discovery methods that will be used in the case. Discovery planning sets the road map for the entire case. It reveals the facts, evidence, and issues on which the case will turn, as well as the delivery and demeanor of potential witnesses and experts.

For both plaintiff's and defendant's counsel, the discovery planning process will help determine which discovery methods to employ, and which issues must be proved or refuted at trial. It also will show which witnesses and experts will be effective or should be attacked, and what evidence is required to prove the elements of the cause of action or defense. Further, early, thorough, and organized investigation can help determine the chances of settlement before trial, depending on the strength of the evidence.

21.02[2] Proper Document Management Helps Case Proceed Efficiently. The objective is to use the document management process to prepare for all aspects of the litigation, good and bad, from prior to commencement of formal discovery all the way through trial. Therefore, the review and coding process should focus not only on the case or defense of the reviewing party but also on the anticipated case or defense of the opposing party. In addition, the same work that goes into document review and coding at the beginning of the case should be performed as the case progresses and new documents are encountered (for instance, through the adversary's production or through third-party production).

From the outset of a case, obtaining, organizing, and managing the relevant documents facilitates understanding of the case and allows the staff working on the case to access the information in the documents when needed. Documents--whether business records, transaction documents, correspondence, investigative documents, meeting notes, calendar entries, or e-mail and other electronic documents--will provide the bulk of the important information needed to prosecute or defend the case properly.

Accordingly, it is essential to gather, maintain, store, index, and allow access to the various types of documents.

Indexing, coding, and management systems can be simple manual systems for uncomplicated cases, or intricate CD- or web-based systems with complex coding and electronic filing schemes for complex cases. Regardless of the system used, the goal is to organize the documents by some system, catalog their titles, contents, authors, and recipients, and facilitate quick access to this information, in some cases by different people at the same time. A control set of originals must be maintained, from which paper or electronic copies are made.

Strategic Point:

As the case proceeds, the documents that are most important to winning or settling the case will become clear. Those document can be maintained in a key or "hot" document folder to allow frequent access. Typically, the number of key documents decreases as the case proceeds and some issues are resolved, allowing the attorney and staff to focus their efforts on the remaining documents that will bring the case to a successful close [*see § 21.10[7]*].

Documents initially considered unimportant frequently take on significance as discovery progresses and theories change. It is important to organize documents in a manner that will facilitate easy access based on topic, author, or recipient for continuing review.

Document management also aids in tracking all relevant client documents that are subject to initial mandatory disclosure, or that may be sought by the opponent's production requests. Finally, document management will be invaluable in creating and maintaining witness files, subject matter files, and files for exhibits, if the case goes to trial.

Cross Reference:

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

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 21 Discovery Strategy and Planning
II. DEVELOPING A DISCOVERY PLAN

3-21 MB Practice Guide: Fed Pretrial Civ Proc in CA 21.03

21.03 CHECKLIST: Planning and Preparing for Discovery.

☐ Plan and prepare for discovery, including the following:

○ Identify key issues in case.

○ Conduct discovery with continuing reference to issues and facts necessary to prove or disprove them.

○ Establish discovery plan as part of litigation plan at outset of case, and update discovery plan as needed.

○ Conduct relevant legal research to determine elements of claims and defenses, fact patterns supporting liability or defense, and damages recoverable.

○ Review relevant jury instructions to focus on how courts have instructed juries in similar cases.

○ Conduct client interviews to establish basic facts of case, prepare pleadings, learn important points in controversy, determine potential witnesses, and prepare client for discovery.

○ Review relevant documents and electronically stored information in client's custody

to prepare for mandatory disclosure, develop understanding of key facts, and prepare for depositions.

○ Conduct reasonable inquiry for discovery as required by Rule 26(g).

Authority:
Fed R Civ P 11, 26(a), (f), (g)

Discussion:
See *§ 21.04*

☐ Plan and prepare for investigation and informal discovery, including the following:

○ Conduct early investigation to help plan case and preserve evidence that may degrade or disappear.

○ Gather evidence by informal means from third parties to avoid expense of discovery.

○ Investigate personal injury actions immediately, if appropriate, to preserve participants' recollections.

○ Conduct site investigations immediately, if appropriate, before scene is altered or repaired.

○ Inspect medical and hospital records, if appropriate, and obtain list of staff involved.

○ Review public and other accessible records, including government agency filings, court records, police and fire reports, accident investigations, business records, and news accounts.

○ Obtain information from unrepresented witnesses immediately to preserve recollections and obtain witness statements.

○ Use investigators and technical consultants such as fingerprint specialists and handwriting experts, if appropriate.

○ Protect results of informal discovery through attorney-client privilege.

○ Protect results of informal discovery through work product doctrine.

Authority:
Fed R Civ P 11, 26(b)(3); United States v. Zolin (1989) 491 US 554, 562, 109 S Ct 2619, 105 L Ed2d 469 ; Upjohn Co. v. United States (1981) 449 US 383, 389, 101 S Ct 677, 66 L Ed2d 584

Discussion:
See *§ 21.05*

☐ After action has commenced, begin preparations for formal discovery.

☐ If case is subject to initial disclosure requirements:

○ Await completion of Rule 26(f) conference before conducting formal discovery.

Exceptions:

Parties need not await the Rule 26(f) conference in categories of proceedings specifically exempted under *Fed R Civ P 26(a)(1)(B)*.

Parties may stipulate to discovery before the Rule 26(f) conference.

○ With other attorneys of record and all unrepresented parties that have appeared in the case, arrange a Rule 26(f) conference to occur at least 21 days before scheduling conference is held or *Fed R Civ P 16(b)* scheduling order is due.

○ In advance of Rule 26(f) conference, gather information for *Fed R Civ P 26(a)(1)* initial disclosures.

○ Participate in Rule 26(f) conference.

☐ Consider the nature and basis of the claims and defenses and the possibility for a prompt settlement or resolution of the case.

☐ Make or arrange for disclosures required by Rule 26(a)(1).

○ Make disclosures at or within 14 days after the Rule 26(f) conference.

○ For party first served or otherwise joined after Rule 26(f) conference, make disclosures within 30 days after being served or joined unless different time is set by stipulation or court order.

☐ Object to initial disclosure at conference if appropriate.

☐ Develop proposed discovery plan.

☐ Address any other matters required under local rules.

○ Submit to court written report outlining discovery plan within 14 days after conference.

Discussion:

Ch. 15, Rule 26(f) Conference and Initial Disclosure

☐ Before discovery cutoff date prescribed by court in scheduling order, conduct formal discovery.

Timing:

Within 90 days after appearance of defendant and within 120 days after complaint has been served on a defendant, court will issue scheduling order that, among other things, establishes a discovery cutoff.

- ○ Take deposition of any person, including party, without leave of court.
- ○ Serve interrogatories on another party.
- ○ Obtain documents, electronically stored information, and things from another party.
- ○ Inspect personal and real property of another party.
- ○ Seek physical and mental examinations of another party if mental or physical condition is in controversy and there is good cause for examination.
- ○ Serve requests for admissions on another party of any matter relevant to litigation.

Authority:

Fed R Civ P 30(a), (b), 34-36

Discussion:

See *§ 21.07*; Ch. 23, Methods of Discovery

☐ Consider strategy regarding order of use of discovery methods.

- ○ Ordinarily, serve interrogatories and request documents before conducting depositions.
- ○ Normally take depositions only after reviewing documents, which provide framework for understanding person's involvement in case.
- ○ Consider conducting early depositions to:
  - ☐ Alter opponent's perception of case.
  - ☐ Preserve testimony that may be lost.
  - ☐ Depose key witnesses for opposing party to learn as must as possible about case early.

☐ Depose critical witness whose testimony may favorably change balance of case.

○ Delay deposing key actors and experts until all facts are known and case is more developed.

Authority:
Fed R Civ P 30, 32-34

Discussion:
See *§ 21.08*; Ch. 23, Methods of Discovery

☐ If appropriate, stipulate around discovery limits.

Discussion:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§§ 22.03 -22.13*

☐ Certify discovery requests and responses.

☐ File discovery requests and responses if used in proceeding.

☐ Supplement or correct discovery responses, if appropriate.

☐ Seek protective orders for abusive discovery, if appropriate.

Discussion:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§§ 22.35 -22.66*

☐ Evaluate cost of discovery that will be passed along to client.

☐ In cases subject to Rule 26(a) disclosure requirements:

○ At least 90 days before trial date, or date case is set to be ready for trial, make expert witness disclosures required by Rule 26(a)(2).

Exception:
If evidence is solely to contradict or rebut evidence on same subject matter identified by another party, disclosure must be made within 30 days after other party's disclosure.

○ At least 30 days before trial date, provide to other parties and file with the court the pretrial disclosures required by Rule 26(a)(3).

○ Within 14 days after party has made Rule 26(a)(3) disclosures, serve and promptly file objections to those disclosures.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryRelevance

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Unit 7 Discovery
CHAPTER 21 Discovery Strategy and Planning
II. DEVELOPING A DISCOVERY PLAN

3-21 MB Practice Guide: Fed Pretrial Civ Proc in CA 21.04

21.04 Key Considerations for Implementing Discovery Plan.

21.04[1] Understanding Importance of Planning. Planning for discovery begins with an understanding of the issues in the case. Otherwise, it is impossible to know what information to obtain to prove a case or defense at trial. Before a complaint is filed, the plaintiff's lawyer must identify the key issues and facts in the case. The duty of prefiling investigation imposed by *Fed R Civ P 11* requires diligent inquiry before the lawsuit begins. The same duty applies to defense counsel before filing an answer or any preanswer motions.

Warning:

Improper use of discovery, or any other process, can subject the attorney to sanctions if the court determines that (1) something was done for an improper purpose, (2) claims or defenses were not warranted by existing law or a nonfrivolous argument for an extension or change in existing law, (3) allegations and other factual contentions have no evidentiary support, or (4) denials of factual contentions are not warranted [*Fed R Civ P 11(b), (c)*].

Conducting discovery with continuing reference to the issues and facts necessary to prove or disprove them serves to:

- Permit discovery to be conducted with a clear purpose, saving time and money.
- Maximize the use of discovery--limited by the press of time, the strictures of the court, or cost constraints.
- Ensure that discovery will be completed well in advance of trial.

21.04[2] Establishing Plan at Onset of Litigation. Establish a litigation plan, including a discovery plan, at the earliest possible time and update it periodically as the litigation progresses. In view of the importance of discovery, careful planning is crucial. Do not use discovery methods merely because they are available. Rather, use discovery methods for specified reasons and with clear objectives in mind. A comprehensive discovery plan serves as the final roadmap of what needs to be established or accomplished at trial.

21.04[3] Conducting Legal Research and Reviewing Relevant Jury Instructions. The first step in creating a discovery plan is to conduct legal research and review relevant jury instructions to determine:

- Elements of the claims and defenses.
- Fact patterns supporting liability or that may be used as a defense.
- Types of damages recoverable.

Strategic Point:

Because the extent of discovery undertaken is likely to hinge on the value of the case, it is helpful to research jury verdicts for similar cases in the district where the case is filed. Services that publish jury verdict information generally provide settlement information for cases that have recently settled, which can be even more useful than jury verdicts.

Once basic research has been completed, generate a list of the facts needed to prosecute or defend the action. The process of establishing required facts often begins with information in the custody or control of the client or others with whom informal access may be sought.

Cross Reference:

Discussion of informal discovery, see *§ 21.05*.

21.04[4] Conducting Client Interviews to Establish Basic Facts.

21.04[4][a] Setting Up Interview. Client interviews are a critical component of discovery planning. In most circumstances, the parties know the factual background, potential witnesses, and key documents that will be the core of the overall discovery plan.

Strategic Point:

If possible, contact the person to be interviewed in advance. Advance notice makes the interview more efficient and may eliminate the need for follow-up interviews. During that initial contact, give a summary of the nature of the action and mention the matters to be covered in the interview. To the extent possible, identify the significant disputed issues in the suit, par-ticularly the issues on which the interviewee is expected to shed some light. This will help the interviewee recall pertinent information and begin collecting the documents or evidence that otherwise would have to be located after the interview.

In addition, if meeting with someone whom the client contact knows but whom you have never met, consider having the client contact make the first communication with the interviewee and explain why the interview is necessary and appropriate. This can serve to place the interviewee at ease and make the interview more effective.

21.04[4][b] Meeting With Client to Prepare Pleadings. Whether representing a plaintiff or a defendant, developing the facts of a case normally begins with an interview with the client, the client's survivor, or, in the case of an organization, knowledgeable members of the organization. When representing the plaintiff, the interview will be a necessary prelude to preparing the complaint. When representing a defendant, the complaint should be promptly reviewed with the client to become familiar with the underlying facts and to prepare an answer or consider a preanswer

motion. During the initial meeting with the client, begin formulating a discovery plan to assure evidentiary support of the allegations in the pleadings.

21.04[4][c] Eliciting Necessary Facts Through Client Interview. Eliciting facts from the attorney's own client resembles the subsequent conduct of discovery from the adversary. It may be difficult to assemble a body of facts that are sufficiently particular and well-founded to constitute potential evidence. Even a cooperative individual's recollection may have to be prodded, and will often have to be refreshed with documents. In the course of client interviews, use any pleadings on file and all relevant documents to structure the interview.

21.04[4][d] Limiting Note-Taking by Client During Interview. There is no reason for the client or any employees to take notes or make memoranda about the substance of attorney-client interviews. At most, they need to keep track of the documents to search for after the interview. Even if the client takes notes during attorney-client meetings, the notes may be protected from discovery as work product that reflects the opinions and theories of counsel. Although the client should be careful to keep interview notes confidential, inadvertent disclosure of these notes will not necessarily waive the work product protection afforded by *Fed R Civ P 26(b)(3)* [*see FDIC v. Fidelity & Deposit Co. (SD Cal 2000) 196 FRD 375, 380*].

21.04[4][e] Establishing List of Potential Witnesses Through Initial Interviews. The initial interviewing and fact-collecting process is the first step in establishing who should be deposed, who should give written statements, and who should be subjected only to informal discovery. In the early stages of the interviewing process, counsel should learn the names of people who have firsthand knowledge of the events giving rise to the lawsuit and the location and nature of documents that bear on the issues. This information can be used to prepare a list of potential deponents, which may be refined through the use of interrogatories and document requests.

21.04[4][f] Preparing Client for Future Discovery During Initial Interview. During interviews with the client or the client's agents, begin to lay the groundwork for later preparation of those people for future discovery, including their own depositions. Tell the client about questions they may be expected to answer and documents they may be expected to produce.

21.04[5] Reviewing Relevant Documents and Electronically Stored Information in Client's Possession, Custody, or Control.

21.04[5][a] Preparing for Mandatory Initial Disclosure of Documents and Electronically Stored Information. An evaluation of the client's documents and electronically stored information is an essential part of planning for discovery. In applicable cases, even before any formal discovery demands are made, the parties are required to exchange documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment [*Fed R Civ P 26(a)(1)*; *see 21.06[1]* (discussion of initial disclosure)].

Cross Reference:

Discussion of initial disclosure under Rule 26(a), see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§§ 15.15 -15.26*.

21.04[5][b] Developing Understanding of Key Facts Underlying Case Theory. Early review of the client's documents and electronically stored information provides an opportunity to begin developing the theory of the case, which facilitates efficient use of discovery. Document review supports the development of a coherent narrative, which will later be substantiated with evidence.

Strategic Point:

A thorough review of the client's documents and electronically stored information can suggest additional theories of liability or potential defenses to develop in the course of discovery. Although the documents that are most damaging to a case can be those in the client's files, often some of the most helpful documents are also in the client's control.

21.04[5][c] Evaluating and Setting Client Expectations. A review of the client's documents and electronically stored information can provide a cross-check on the client's perspective of the case. Although the job of an advocate is to put the best light possible on the facts at hand, lawyers in the early stages of a case sometimes can be swayed by the client's accounts of the facts. Clients may overstate the strength of their position. Although the process of lowering the client's expectations is delicate, seeking explanations of apparent inconsistencies between the documentary record and the client's version of events is one way to approach this issue.

21.04[5][d] Preparing for Depositions. Review the client's files to help identify the principal actors in the events leading to the lawsuit, and thus to develop a list of potential persons to be interviewed or deposed.

Strategic Point:

Reviewing documents and electronically stored information in the possession, custody, or control of the client can help prepare the client for being deposed by an adversary. The client should never see a damaging item for the first time at a deposition.

21.04[5][e] Conducting "Reasonable Inquiry" for Discovery. The attorney or unrepresented party has a duty of "reasonable inquiry" with respect to discovery [*Fed R Civ P 26(g)*]. Breach of this duty may result in substantial sanctions.

An early review of the client's files saves time when the adverse party serves a production request under *Fed R Civ P 34*. Some lawyers, acting on the assumption that the contents of their client's files will do their case more harm than good, let the client, rather than the attorney's staff, search for responsive documents in the expectation that the job may be done less rigorously. However, Rule 26's duty of reasonable inquiry requires a diligent search when responding to a production request. The reasonable inquiry duty mandated by *Fed R Civ P 11*, which applies to signed pleadings, has been specifically extended to responses to discovery under Rule 26(g) as well. Failure to search diligently for responsive material, whether by the attorney or the client, may result in sanctions [*Henry v. Gill Indus., Inc. (9th Cir 1993) 983 F2d 943, 947* ; *Jennings v. Joshua Indep. Sch. Dist. (5th Cir 1991) 948 F2d 194, 197* ; *see also* Qualcomm Inc. v. Broadcom Corp (SD Cal 2008) 2008 US Dist LEXIS 911 , *vacated in part*, *(SD Cal 2008) 2008 US Dist LEXIS 16897* (finding discovery misconduct and sanctioning corporate counsel who failed to conduct a reasonable inquiry into the adequacy of their client's document search and production; corporate client also required to pay over $8.5 million for legal fees of opposing party and other litigation costs)].

Although there are times when counsel may not want to examine a client's relevant files, this should be a carefully considered decision. Lawyers are under a duty to maximize the client's resources and avoid wasteful expenditures, but in the practice of prudent, defensive law, it is better to prepare fully by reviewing all the files than to risk a malpractice action from the failure to do so.

Strategic Point:

Remember that "possession, custody, or control" is a fairly broad concept. Be sure to ask the client where all records relevant to the action are kept (e.g., other or satellite offices, off-site storage facilities, back-up disks or drives, and home offices). It often helps to ask the client to explain its filing system, as thinking about how and where information is kept may jog the client's memory about the very existence of

relevant material.

Legal Topics:

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

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21.05 Factual Investigation and "Informal" Discovery.

21.05[1] Value of Early Investigation. Delay in investigating a case can result in some evidence disappearing or its value or content diminishing. Recollections fade over time and documents are mislaid or destroyed. The condition of an injured or mentally disturbed party will inevitably change. Physical evidence will disappear; skid marks on a highway will be worn away by use and weather; a faulty machine will be repaired; a dangerous stairway will be replaced.

Early investigation of the facts facilitates proper planning for the case, including an outline for formal discovery. The early compilation of potential evidence helps in the preparation of factual investigation and legal research.

21.05[2] Gathering Evidence on Informal Basis. If the circumstances of the case do not require early or aggressive formal discovery, and the client's knowledge of the case has been exhausted, then counsel should gather as much evidence or information about the case as possible from independent, or third-party, sources through informal discovery methods, because:

- Formal discovery is more time-consuming and expensive than informal investigation.
- Formal discovery involves disclosure of the matters discovered to opposing counsel.
- Formal discovery often involves disclosure of theories of the case.

It is unlikely that all these benefits or objectives of informal discovery will be achieved or preserved to the time of trial. Usually, opposing counsel will at some point discover what has already been found through informal investigation. However, the temporary advantage of knowing more about the case than the adversary, and the luxury of evaluating and refining the legal and factual theories before witnesses, documents, and contentions are disclosed, can be significant.

Informal investigation of the case should commence as early as possible, in some cases within days of the events that gave rise to the controversy. Plaintiff's counsel will often begin this investigation before filing a lawsuit. Defense counsel may get a similar chance at prefiling investigation if the client notifies the attorney that a lawsuit is threatened

or expected.

21.05[3] Investigation in Personal Injury Actions. Informal investigation of the facts is particularly important in personal injury cases. The accident itself usually will have happened abruptly. The recollections of witnesses and participants will be fleeting and often colored by the trauma of the event. Even investigating officers experience better memory of a particular incident if they are asked about it shortly after their involvement. If they have investigated another 100 accidents since the accident in question, details that were not in the written report may have faded from their memories. Unlike a commercial case, which is typically based primarily on documents, the investigation of a personal injury case is more likely to require on-site inspection and more interviews with witnesses who are not connected to the parties.

Personal injury cases will often call for early investigation of one or more (and frequently all) of the following subjects:

- The accident scene.
- Other relevant physical objects, such as vehicles and equipment.
- Medical and hospital records.

The investigation should include:

- A prompt visit to the accident scene.
- A "walk-through" of the accident scene with the client.
- A critical examination at the scene of the client's and other witnesses' versions of the accident.
- Photographs of evidentiary quality, taken by a professional photographer.
- Measurements, diagrams, and surveys of the accident scene.
- Determination of the availability of witnesses who have not yet come forward at the accident scene and its vicinity.

Strategic Point:

It may help to bring the client to the scene of the accident to give a portrayal of the events that took place, and indeed discussing the case at the scene of the accident might aid in refreshing a faded recollection of accident details. In addition, depending on the issues in the case, adequate accident scene investigation may require the services of an expert, such as an accident reconstruction specialist.

21.05[4] Conducting Site Investigations. Investigating the site where the events underlying a lawsuit occurred is a critical part of early informal investigation. Faulty structures or equipment will normally be corrected or repaired within a short period after the accident. Evidence, including photographs, of the site's condition at the time of the accident should be obtained promptly. In addition, it may be necessary to conduct follow-up inspections after any subsequent repairs to learn the nature of the repair.

Consider:

Subsequent remedial measures are not admissible to prove negligence, culpable conduct, a defect in a product or its design, or a need for a warning or instruction [*Fed R Evid 407*]. But this does not detract

from the fact that learning of these measures can provide valuable insight into what went wrong before and what could have been done differently. Moreover, subsequent remedial measures are not inadmissible for other purposes, such as to show ownership or control [*Fed R Evid 407*].

If cause and origin are in issue (*e.g.,* an insurance claim for which arson or fraud is raised as a defense, or a negligence case for which the defendant's fault in causing the fire or explosion is in dispute), a determination of cause and origin must be made promptly, because physical evidence may disappear with the passage of time, and the condition of the premises may change. An inspection of this nature must be done by an expert; few lawyers are qualified to identify the cause of a fire or other physical event. Even if they were qualified, they would not be permitted to testify as an expert witness under the ethical rules forbidding an interested lawyer from being a witness.

Finding Experts Using Online Resources:

Many resources are available online for locating experts. For example, helpful resources at *lexis.com* include:

- Legal tab> Area of Law-By Topic> Federal Practice> Access Directories> Forensic Services Directory
  - Sample Search: To find a California forensic expert in a given speciality, e.g., accident reconstruction, try this SPECIALTY segment search: *specialty (accident reconstruction) and ca*.

Land does not disappear; therefore, at least in theory, land or other property involved in a case can be inspected and photographed at any time before trial. However, depending on the circumstances, buildings may be destroyed or the condition of the land altered mechanically, by the passage of time or by the effects of weather. If appropriate, promptly obtain photographs or other evidence that will show the property in its true, or original, condition.

21.05[5] Inspecting Medical and Hospital Records at the Treating Facility. Plaintiff's counsel should promptly investigate the original medical records when the plaintiff's medical treatment is in issue. Review of the original record, either before or during litigation, can be illuminating because writings that appear to be in the same ink on a copy may actually have been made in different colors on the original, thereby indicating that they were made at different times and perhaps by different people. Records often have marginal notes made after a copy has been sent to the patient or an attorney. Discharge summaries often contain damaging comments about the treatment.

A motion to preserve medical evidence may be necessary if the evidence is not routinely maintained for a long time. Some records and test results (*e.g.,* videotapes of vascular or cardiac surgery) are kept only a short time. Also, use great specificity when requesting access to or copies of medical or hospital records. Many hospitals consider certain records as "outpatient records" (*e.g.,* emergency room records) or not part of the hospital record at all (*e.g.,* pathology slides, EKG monitor tapes, billing statements, the folders in which records are kept, etc.).

Another valuable record is a list of all hospital personnel, including nurses and volunteers, involved in the patient's care or assigned to the unit where the patient was treated. Even if their names do not appear on the chart, they may be familiar with the care received or may have witnessed treatment. In summary, request and review every conceivable document or thing that might shed light on the plaintiff's treatment or condition at the treating facility.

21.05[6] Reviewing Public or Other Accessible Records.

21.05[6][a] Ascertaining Records Obtainable Without Formal Discovery. In commercial cases, a variety of public records, such as SEC or similar filings, can be obtained directly from the public entity without resort to formal

discovery procedures. This is also true of a wide variety of documents potentially relevant in other types of cases, for example:

- *Agency filings*. County, state, and federal agencies often have critical public information. For instance, the county recorder has records regarding property ownership; the Secretary of State has records regarding the structure and ownership of corporations; and the federal Patent and Trademark Office has patent and trademark filings available to the public. Agency websites and internet services specializing in public records may be used to expedite searches of public information.

- *Court records*. Court records will identify pending and past litigation involving the adverse party indicating similar lawsuits. These records can speed up investigation of the current case.

- *Police reports*. Police reports contain a near contemporaneous reconstruction of an accident or other events, the names and addresses of witnesses and, usually, a written account or accounts of the accident either as given by different witnesses or as interpreted by the police officer.

- *Fire department reports*. Fire department reports contain information similar to information found in police reports, but also usually contain a preliminary assessment of the cause and place of origin of the fire as well as the number of points of origin.

- *Transportation authority reports*. Accidents involving public carriers (buses, trains, and aircraft) will normally be investigated by a public transportation authority in addition to police departments, and the records of these investigations often are available without the use of a subpoena.

- *Weather reports*. Weather reports and records may provide significant information.

- *Certain hospital reports*. Hospital records normally are not released without the consent of the patient and thus will usually require formal discovery measures. However, some types of information available from hospitals are deemed "public" and can provide information concerning the fact, time, or duration of a patient's admission or treatment at the hospital or in its emergency ward.

- *Newspaper and television news accounts*. Newspaper accounts of pertinent events often include the names of potential witnesses, as well as firsthand or secondhand accounts of the event itself. Local television stations often possess, and allow access to, videotape of news coverage of local events.

- *Consumer reports*. Industry associations and consumer watchdog groups frequently collect reports that are not otherwise cataloged, and serve as a nationwide clipping service for companies or issues they follow.

- *Trial attorney association reports*. Local, state, and national trial attorney associations organize data about particular products or companies, in addition to specific doctors or expert witnesses.

This list is not exhaustive. The realm of publicly available information that may be helpful will depend on the nature and facts of the particular case. Freedom of Information Act requests and similar state laws (such as California's Public Records Act) may be used to obtain publicly available information.

Locating public records is valuable because the information in them is generally admissible as evidence-in-chief. Public records are admissible at trial, even if they contain opinions or conclusions, as long as the opinions or conclusions are based on a factual investigation [*Beech Aircraft Corp. v. Rainey (1988) 488 US 153, 161, 109 S Ct 439, 102 L Ed2d 445*].

21.05[6][b] Using Online Resources to Obtain Public Records. Many resources are available online for searching public records, including a wide array of resources at *lexis.com*.

Searching Court Filings:

Resources at *lexis.com* include:

- Public Records tab> Public Records> Find Filings> Civil & Criminal Court Filings and Regulatory Actions> Combined U.S. District Courts> U.S. District Courts, Civil Filings (Full Docket)
  - Search within this database for federal civil lawsuits in which a witness was named as a party.
- Legal tab> States Legal-U.S.> California> Public Records> Find Filings> Civil & Criminal Court Filings and Regulatory Actions> Combined State Civil Filings
  - Search within this database for state civil lawsuits in which a witness was named as a party.
- Public Records tab> Public Records> Find Filings> Civil & Criminal Court Filings and Regulatory Actions> Combined U.S. District Courts> U.S. District Courts, Criminal Filings (Full Docket)
  - Search within this database for federal criminal actions in which a witness was named as a party.
- Legal tab> States Legal-U.S.> California> Public Records> Find Filings> Civil & Criminal Court Filings and Regulatory Actions> Combined State Criminal Filings
  - Search within this database for state criminal actions in which a witness was named as a party.

Searching News:

Resources at *lexis.com* include:

- News & Business tab> Combined Sources> News, All (English, Full Text)
  - Sample Search: A search in the format *First Name / 3 Last Name* can find articles about a person, and using appropriate terms can find articles about events in a number of news publications.

Searching Stock Ownership Records:

Resources at *lexis.com* include:

- Legal tab> States Legal-U.S.> California> Public Records> Find Assets> Stock Information Stock Ownership

- For information on significant stock holdings, including changes of ownership of public company insiders and investors, search in this database.

21.05[7] Obtaining Information From Witnesses.

21.05[7][a] Conducting Early Witness Interviews. Consider direct interviews with anyone not represented by counsel possessing information about events in the case in advance of formal discovery. Conduct witness interviews as soon as possible. Few individuals have photographic memories or the capacity for total recall. Most people forget seemingly unimportant events, especially those that do not involve them directly, and also compress their recollection of important events. This is especially true of sudden or sensational physical events, which, after being reviewed in both recollection and conversation, are reduced to the point where the more traumatic elements of the incident are preserved and peripheral details are lost.

21.05[7][b] Determining Who to Interview. From the standpoint of case development, "witnesses" who can or should be interviewed are not limited to eyewitnesses, but include individuals or entities who have obtained secondhand or third-hand information concerning relevant events.

For instance, newspaper reporters are a good source of secondhand information. They will invariably have collected more names or facts than they included in their report of the event, and the articles submitted may have been substantially edited before publication. Newspaper reporters are usually cooperative. Reporters deal in factual information and appreciate its importance, and may even keep apprised of evolving facts in the hopes of writing a follow-up story.

Strategic Point:

It is not uncommon to request that a witness not talk to opposing counsel, or to request that if the witness decides to do so, to let you know. It is usually advisable to control access to your witness, and in normal circumstances will not be unethical to do so. Because your conversation is not privileged, it is always important to avoid the impression of coercion or unfairness, because improper tactics will invariably be revealed when the witness testifies.

21.05[7][c] Arranging Witness Interviews. The best way to conduct a witness interview will depend on a variety of considerations, including:

- The personality of the witness.
- The age of the witness.
- The physical or mental condition of the witness.
- Possible bias of the witness.
- The relationship of the witness to the parties and facts in the case.

Schedule the time and place of the interview to suit the convenience of the witness. Conduct the interview at a time, and in surroundings, where the witness can tell, and if necessary reflect on, the entire story. A neutral meeting place that is free of interruption allows for a productive interview.

21.05[7][d] Taping Witness Interviews. If the witness does not object, tape the interview. If the witness does

object, offer a copy of the tape. If the witness still objects, forego the taping but try to get an immediate written statement. Witnesses are reluctant to have interviews taped for a variety of reasons, including legitimate ones such as not feeling prepared or not wanting to be involved on the record. Never tape an interview surreptitiously. Taping an interview can have a downside; if the witness makes statements harmful to your case, they may become discoverable for unanticipated reasons.

Strategic Point:

It can be helpful to explain to the witness that part of the reason for the formality of a tape recorded interview is that it serves as a better substitute for a deposition than a mere statement. As most witnesses would rather not be deposed, anything that lessens the chance of a deposition should go a long way in securing the witness's cooperation. Of course, the witness should be informed that a tape recorded interview is no guarantee that a deposition will not be necessary later, either by the interviewing party or the opposing party.

21.05[7][e] Interviewing Difficult Witnesses. Give special consideration to a reluctant or adverse witness. The reasons for reluctance or adversity can range from a feeling of not wanting to get involved to outright antagonism (or strong sympathy for the adverse party). In some situations, the witness may already have talked to the adversary's lawyer, who may have urged or instructed the witness not to talk to anyone else. Ask at the beginning of the interview whether anyone has told the witness not to cooperate. If the other side has interfered, contact them and suggest that it would be better for both sides to cooperate, otherwise both side will have to incur the additional expense of formal discovery when informal discovery will be all that is necessary.

There is a wide range of solutions to witness reluctance or antagonism. Consider the following strategies:

- If the witness has no particular view of the case but simply does not want to be inconvenienced, appeal to the witness's sense of civic duty to provide important information. Ask the witness, for example, to imagine how he or she would feel if involved in an accident and some third party was reluctant to provide helpful information.

- It is permissible, and usually effective, to tell the witness that, if he or she is not willing to discuss the case informally, a deposition may be necessary.

- Point out that you do not wish to change the witness's story, but simply to understand it and learn what the witness has to say.

- Suggest that knowing all the facts can more likely lead to a settlement.

- Alleviate a concern that one party will have to pay damages by telling the witness that the party has insurance and will not have to pay money out of pocket.

Consider the following techniques when interviewing antagonistic witnesses:

- Critically question the witness's story on the basis of known or likely facts.

- Suggest different interpretations of ambiguous events.

- Challenge the witness's ability to know or to have seen the facts or events in question.

- Attack the witness's bias if one exists.

- Urge the witness to view the events as an impartial observer.

21.05[7][f] Obtaining Witness Statements. Generally, in accidents or similar cases, if the witness is worth interviewing and has knowledge of significant facts, it is worth obtaining a witness statement, especially if there is any chance that the witness's story might change under the pressure of the adversarial process.

Obtaining a witness statement typically raises two questions. The first is whether the statement should be prepared during the interview, or submitted later to the witness for review. Factors to consider are:

- Whether the witness's story is simple or complex.

- Whether there is any material risk that the witness will change the story (or become reluctant to review or sign the statement) in the time required to prepare the statement.

The second issue is whether the witness should be asked to sign the statement. If the statement is worth getting, it is worth having it signed. When the statement is written on the spot, it should be read to, or by, the witness, who should be asked to sign or initial each page. Any corrections made should also be initialed by the witness. If the witness, after speaking with the other side, later changes his or her story, this will obviate a claim that the statement was not read or understood and is not true.

A third, relatively unimportant, question is whether the statement should be written in the first person or the third person. In general, a short statement prepared by counsel and signed by the witness "on the spot" is best written in the first person, while a longer, more complex statement prepared by counsel is best written in the third person. When jurors hear the statement read in court, they will think that a shorter statement in the first person is more credible. They will naturally assume that a longer statement was drafted by someone other than the witness and then signed.

21.05[7][g] Searching for Witnesses. Third-party witnesses sometimes cannot be located or are not forthcoming. In these circumstances, an active search for witnesses may be necessary and could entail methods such as door-to-door inquiries, newspaper advertisements, television appeals, or posting printed material in prominent locations near the scene of an accident.

Once the identities of witnesses are determined, it may be necessary to determine their whereabouts. Internet search sites or other publicly available computerized databases, as well as private investigators, may be used to locate hard-to-find witnesses.

21.05[8] Using Investigators and Other Technical Consultants.

21.05[8][a] When Investigators and Technical Consultants Can Be Useful. Private investigators and other technical consultants (*e.g.,* fingerprint, handwriting, and questioned document experts) can be helpful in many situations, from witness searches to more complex cases involving, for example:

- Forgeries.

- Employee theft.

- Misuse of customer lists and trade secrets.

- Private, commercial, and public fraud.

- Kickbacks.
- Feigned injuries and disabilities.
- Missing persons.
- Commercial or industrial "espionage" (*e.g.,* wiretapping and other bugging).
- Explosions.
- Fires, including arson.

When hiring these experts, engage competent professionals who can be effective witnesses.

Consider:

Take the time to thoroughly check the background of the investigative professional to ascertain if he or she has the right training and experience for the task at hand. Check for industry-relevant experience (e.g., in a securities fraud case, perhaps a former investigator with the SEC or NASDAQ) and/or strong investigative qualifications (e.g., former policeman or FBI agent). Investigative services sometimes oversell their capabilities, so a thorough check of references is advised.

21.05[8][b] Ensuring Ethical Behavior of Investigators. A paramount concern is the risk that a private investigator may use improper or illegal methods of investigation. These methods include, but are not limited to:

- Entrapment.
- Illegal wiretapping.
- The use of force or coercion to obtain statements or confessions.

An engagement letter to a private investigator should state flatly that the use of any illegal or unethical means of conducting the investigation is forbidden.

A party's use of an investigator might not be discovered by the adversary and might not be made known to the court or the jury. Among other possibilities, the investigator's work may be protected by the work product privilege. However, if the purpose of the investigator's work is to generate trial evidence and if that work is successful, the manner in which the evidence was obtained will almost certainly become known. No matter how small the chance that the adversary will learn of the investigator and his or her work, the consequences of that possibility should be carefully evaluated.

21.05[8][c] Using Investigators Effectively. Counsel should carefully consider the pros and cons of using investigators to develop a case. The use of a private investigator to follow, observe, and photograph lapses on the part of a plaintiff feigning a permanent disability is common and within ethical guidelines, although some jurors may regard this practice as unfair. However, when photographs or videotapes show an allegedly disabled plaintiff engaging in vigorous physical activity (*e.g.,* playing baseball, changing a tire, or working on a ladder painting a house), the jury is more likely to be offended by the plaintiff's bogus contentions than by the intrusiveness of the investigator's surveillance.

In contrast, the use of a private detective to develop "background information" on the plaintiff in a libel case, particularly if the information sought is unrelated to the subject matter of the defamatory statement, is likely to be viewed by the jury as fundamentally unfair. Generally, most judges and jurors view "digging up dirt" about a party or

witness on subjects unrelated to the merits of the case as improper.

In sum, the use of private investigations is likely to be viewed as improper when:

- The relevance of the work strays from the merits of the case.
- The investigator's activities encroach on traditional concepts of privacy.

21.05[9] Protecting Results of "Informal" Discovery Through Attorney-Client Privilege.

21.05[9][a] Protecting Communications Regarding Legal Advice. In the informal discovery process, and indeed at all times, strive to provide as much protection as possible for all attorney-client communications. For instance, label all communications between the lawyer and client, or their agents, as confidential and privileged. This way, inadvertent disclosure is less likely. An attorney-client communication should never be disclosed to third parties or the adversary unless both lawyer and client are comfortable with the discovery by the adversary of not only the disclosed communication but also other communications within the subject matter of the disclosed communication. Some attorney-client issues that commonly arise in the informal discovery process are discussed in this section, but for a more thorough exposition of the privilege, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.

Under federal common law, the attorney-client privilege protects from formal discovery communications from a client to an attorney for the purpose of obtaining legal advice, provided the communications were intended to be confidential [*United States v. Zolin (1989) 491 US 554, 562, 109 S Ct 2619, 105 L Ed2d 469*]. These communications include client interviews, including interviews conducted in preparation of formal discovery. The burden is on the party asserting the attorney-client privilege to demonstrate its applicability [*In re Grand Jury Investigation (9th Cir 1992) 974 F2d 1068, 1070*]. The attorney-client privilege extends to initial interviews and consultations between the attorney and a prospective client, even if the attorney decides not to take the case, or the client decides not to retain the attorney [see Handgards, Inc. v. Johnson & Johnson (ND Cal 1976) 413 F Supp 926, 929].

21.05[9][b] Evaluating Attorney-Client Privilege in Corporate Setting. Corporate in-house counsel are treated in the same manner as counsel retained from the outside [*Upjohn Co. v. United States (1981) 449 US 383, 389, 101 S Ct 677, 66 L Ed2d 584*]. However, a company may not shield itself from formal discovery simply by filtering business information through staff counsel. To be entitled to the protection of the attorney-client privilege, a corporate lawyer must not only be functioning as a lawyer, but the advice given must be predominantly legal, as opposed to business, in nature [*United States v. Rowe (9th Cir 1996) 96 F3d 1294, 1297*].

Five criteria are used to determine whether communications by corporate employees to the company's lawyer are protected [*Sexton, A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 57 NYU L Rev 443 (1982)*]. These are:

- The communication would not have been made except for the rendering of legal services.
- The content of the communication relates to the subject matter of the legal services.
- The statement is made by an employee, agent, or independent contractor with a significant relationship to both the corporation and its involvement in the subject matter of the legal services.
- The statement is made in confidence.
- The privilege is asserted by either the corporation or the person who made the statement.

21.05[9][c] Understanding Limits of Attorney-Client Privilege. A client may not bring a document under the umbrella of privilege merely by turning it over to an attorney during the prediscovery phase of litigation [*Guzzino v. Felterman (WD La 1997) 174 FRD 59, 61*]. The underlying facts of an action are not protected by the attorney-client privilege [*Upjohn Co. v. United States (1981) 449 US 383, 395, 101 S Ct 677, 66 L Ed2d 584*]. The attorney-client privilege applies only to communications between the attorney and the client. It does not apply to correspondence from others that may be in the attorney's possession [*Upjohn Co. v. United States (1981) 449 US 383, 389, 101 S Ct 677, 66 L Ed2d 584*]. However, communications between a client and an agent of the attorney are privileged, provided they are intended to be confidential [*United States v. Nobles (1975) 422 US 225, 238-239, 95 S Ct 2160, 45 L Ed2d 141*].

21.05[9][d] Waiving Attorney-Client Privilege. The attorney-client privilege may be waived by the client expressly, as when a client voluntarily turns over privileged documents, or implicitly, as when the client places otherwise privileged matters in controversy *[Gomez v. Vernon (9th Cir 2001) 255 F3d 1118, 1132]* . Discussing the underlying facts of a privileged communication does not by itself waive the privilege [*see Upjohn Co. v. United States (1981) 449 US 383, 395, 101 S Ct 677, 66 L Ed2d 584*]. If it is clear that the attorney-client privilege will be waived at trial, the court should permit pretrial discovery of the privileged communication [Handgards, Inc. v. Johnson & Johnson (ND Cal 1976) 413 F Supp 926, 929] .

Cross Reference:

Discussion of the attorney-client privilege and other privileges, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.

21.05[10] Protecting Results of "Informal" Discovery Through Work Product Doctrine.

21.05[10][a] Protecting Documents and Things Prepared in Anticipation of Litigation or Trial. The work product doctrine provides that a party may not obtain discovery of documents or other tangible things prepared in anticipation of litigation or trial by or for another party or that other party's representative, unless the following conditions are met [*Fed R Civ P 26(b)(3)(A)(ii)*]:

- The party seeking discovery has substantial need of the materials in the preparation of his or her case; and

- The party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Moreover, in ordering discovery of these materials when the required showing has been made, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation [*Fed R Civ P 26(b)(3)(B)*]. The purpose of the work product doctrine is to protect an attorney's mental processes so that the attorney can analyze and prepare for the client's case without interference from an opponent [*United States v. Chevron Texaco Corp. (ND Cal 2002) 241 F Supp2d 1065, 1080-1081*]. The language of Rule 26(b)(3) attempts to strike a balance between the necessity of protecting an attorney's preparation under the adversary system and the policy of full and open discovery underlying the Federal Rules of Civil Procedure [*Loustalet v. Refco, Inc. (CD Cal 1993) 154 FRD 243, 246*].

The party asserting work product protection has the burden of establishing that the doctrine applies [*Garcia v. City of El Centro (SD Cal 2003) 214 FRD 587, 591*].

Strategic Point:

It is helpful to the protection of informal discovery to contemporaneously state on each document that it is "attorney work product" and/or "prepared in anticipation of litigation."

21.05[10][b] Scope of Work Product Doctrine. The work product doctrine applies only to requests for production of documents and tangible things [*Fed R Civ P 26(b)(3)(A)*]. Because the doctrine is intended to guard against divulging an attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product, or facts contained within work product [*Garcia v. City of El Centro (SD Cal 2003) 214 FRD 587, 591*]. Likewise, facts are not protected from disclosure just because they were gathered by an attorney [*Audiotext Communications Network v. U.S. Telecom, Inc. (D Kan 1996) 164 FRD 250, 254*]. Nevertheless, courts do afford work product protection to documents in which an attorney collates or categorizes the facts. Thus, while the facts themselves are not privileged, a chart or other compi-lation of facts may be protected as work product [*In re Grand Casinos, Secs. Litig., (D Minn 1998) 181 FRD 615, 622*].

There is no preset limitation on what constitutes a "document or tangible thing" within the meaning of the work product doctrine, provided the item was prepared in anticipation of litigation. Items that have been held within the protection include:

- Letters [*Durkin v. Shields (SD Cal 1995) 167 FRD 447, 454*].
- Interview notes [*United States v. Henke (9th Cir 2000) 222 F3d 633, 642-643*].
- Interview transcripts [*American Standard Inc. v. Bendix Corp. (WD Mo 1976) 71 FRD 443, 446*].
- Surveillance tapes [*Fletcher v. Union Pac. R.R. (SD Cal 2000) 194 FRD 666, 668*].
- Studies [*Interstate Prod. Credit Ass'n v. Fireman's Fund Ins. Co. (D Or 1989) 128 FRD 273, 281*].

21.05[10][c] Protecting Attorney's Thoughts, Mental Processes, Strategy, and Opinions. Most courts protect an attorney's thoughts, mental processes, strategy, and opinions from disclosure, regardless of the discovery method employed. In Hickman v. Taylor [*Hickman v. Taylor (1947) 329 US 495, 505, 67 S Ct 385, 91 L Ed 451*], the case from which *Fed R Civ P 26(b)(3)* is derived, the Supreme Court articulated the work product doctrine in terms that spanned the entire scope of discovery. Courts have continued to prevent parties from circumventing the work product doctrine by attempting to elicit an attorney's thought processes through depositions or interrogatories [*see, e.g., Bio-Rad Lab. v. Pharmacia, Inc. (ND Cal 1990) 130 FRD 116, 120-121*].

Strategic Point:

One step that can be taken to protect the attorney's mental processes and impressions from disclosure is to reflect their prevalence in prepared documents. For instance, if notes are taken from a witness interview, or a memorandum of the interview is drafted, it should be emphasized in the notes or memorandum that the document is not a verbatim recitation of the witness's statements but instead reflects the attorney's thoughts and impressions. The following disclaimer is an example: "This memorandum is not an attempt to make a verbatim recitation of what was said by the witness during the interview. This memorandum reflects impressions, recollections, and work product."

21.05[10][d] Protecting Tape-Recorded Conversations and Videotaped Surveillance. Tape recorded conversations and videotaped surveillance may constitute work product material in the Ninth Circuit [*Roberts v. Americable Int'l (ED Cal 1995) 883 F Supp 499, 503-504* ; *Fletcher v. Union Pac. R.R. (SD Cal 2000) 194 FRD 666, 672*]. The Ninth Circuit has consistently held that this kind of evidence is admissible in federal court proceedings if obtained in conformance with federal law, without regard to state law [United States v. Adams (9th Cir 1982) 694 F2d 200, 201-202] .

21.05[10][e] Preparing Material for Litigation or Trial. The work product doctrine applies to documents or

things prepared in anticipation of litigation or for trial [*Fed R Civ P 26(b)(3)*; *Hickman v. Taylor (1947) 329 US 495, 509-512, 67 S Ct 385, 91 L Ed 451*]. The determination of whether documents are prepared in anticipation of litigation is a factual determination [*Garcia v. City of El Centro (SD Cal 2003) 214 FRD 587, 592*]. District courts have devised various formulations to determine how concrete the prospect of litigation must be before protection will attach to a given document. In the Ninth Circuit, as in other circuits, the terms to refer to these formulations are used somewhat interchangeably. For example, some opinions speak in terms of requiring "more than a remote possibility of litigation" when the document is prepared [*e.g., Fox v. California Sierra Fin. Servs. (ND Cal 1988) 120 FRD 520, 524*]. In the *Fox* case, the court found that litigation could not have been anticipated when defendant's counsel stated in a hearing with the Department of Corporations that correspondence with state commissions "would certainly not be ... work-product and would be public documents" [*Fox v. California Sierra Fin. Servs. (ND Cal 1988) 120 FRD 520, 525*]. In the insurance litigation context, the Southern District has held that insurance claim investigations conducted in the ordinary course of business are not in anticipation of litigation. However, investigations conducted once a claim has been rejected and the parties have little hope of resolving the issues other than through litigation are in anticipation of litigation [*Garcia v. City of El Centro (SD Cal 2003) 214 FRD 587, 593-595*].

Other opinions state that there must be "an identifiable prospect of litigation" and require that specific claims must have already arisen when the document is prepared [*e.g., Bud Antle, Inc. v. Grow-Tech, Inc. (ND Cal 1990) 131 FRD 179, 182* ; *Fox v. California Sierra Fin. Servs. (ND Cal 1988) 120 FRD 520, 524*]. In the *Bud Antle* case, the court found that documents claimed to relate to anticipated patent litigation were drafted before the patent was issued, and in fact even before the defendants had even started their business [*Bud Antle, Inc. v. Grow-Tech, Inc. (ND Cal 1990) 131 FRD 179, 182*]. This is reinforced by Supreme Court precedent stating that the work product doctrine cannot be used to protect documents relating to research, tests, and experiments that are to be disclosed at the time of an application for a patent, because the documents do not constitute the results of an attorney's efforts to represent the client in a potentially adversary legal proceeding, but, instead, result from a legal duty to produce complete information as part of the application [*Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co. (1945) 324 US 806, 65 S Ct 993, 89 L Ed 1381*].

Accordingly, in the Ninth Circuit, terms referring to the standard appear to be somewhat flexible, although the facts of each case should be analyzed for the formulation sufficient to warrant protection. What is determining is whether litigation is likely or imminent [*Fox v. California Sierra Fin. Servs. (ND Cal 1988) 120 FRD 520, 524-525 , citing Burlington Industries v. Exxon Corp. (D Md 1974) 65 FRD 26, 35*].

Because work product protection extends only to documents prepared in anticipation of litigation or trial [*Fed R Civ P 26(b)(3)*], it follows that documents prepared in the regular course of a party's business are not protected by the doctrine [*Miller v. Pancucci (CD Cal 1992) 141 FRD 292, 303*]. The crucial factor in determining whether a document was prepared in the regular course of business or in anticipation of litigation is the party's purpose in preparing the document, or causing its preparation. A document prepared for an ordinary business purpose is unprotected, even if litigation was imminent [*Admiral Ins. Co. v. United States Dist. Court (9th Cir 1989) 881 F2d 1486, 1494*]. Merely placing a stamp that reads "attorney work product" on a document prepared in the ordinary course of business is not sufficient to convert it into work product [*Ledgin v. Blue Cross & Blue Shield of Kansas City (D Kan 1996) 166 FRD 496, 498-499*].

21.05[10][f] Waiving Work Product Protection. Unlike the attorney-client privilege, which is absolute and designed to protect the client's confidences, the work product doctrine is a qualified privilege designed to protect the adversary process. Therefore, not every disclosure of work product waives the doctrine [*Meoli v. American Med. Serv. of San Diego (SD Cal 2003) 287 BR 808, 815*].

Failure to assert the work product rule waives any work product immunity for the documents produced [*United States v. Nobles (1975) 422 US 225, 240, 95 S Ct 2160, 45 L Ed2d 141*]. A common issue is whether work product protection is waived by disclosing the document to a third party. If the disclosure to the third party is deliberate, the test for

determining whether the work product rule has been waived is whether, at the time of disclosure, there was a substantial danger that the documents would be disclosed to an adversary [*Samuels v. Mitchell (ND Cal 1994) 155 FRD 195, 200-201*]. However, if the disclosure to the third party is inadvertent, the court will consider the following in determining whether waiver has occurred [*FDIC v. Fidelity & Deposit Co. (SD Cal 2000) 196 FRD 375, 381 , citing Milford Power Ltd. P'ship v. New England Power Co. (D Mass 1995) 896 F Supp 53, 58*]:

- Whether the party seeking discovery of the documents was misled by the disclosure or relied on the disclosure to its detriment.
- The reasonableness of the precautions the party claiming the privilege took to prevent accidental disclosure.
- The amount of time it took the disclosing party to notice its error.
- The scope of discovery.
- The extent of the disclosure.
- The overriding interest of fairness and justice.

A party also impliedly waives work product protection if it places the substance of the documents for which the protection is claimed at issue. Similarly, if a party uses the substance of the documents in testimony, any work product protection is waived [*United States ex rel. Bagley v. TRW, Inc. (CD Cal 2003) 212 FRD 554, 556*].

Cross References:

Discussion of work product protection, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§§ 24.94 -24.102*. Discussion of disclosure of expert testimony, see *§ 21.06[1][b]*.

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 21 Discovery Strategy and Planning
II. DEVELOPING A DISCOVERY PLAN

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21.06 Preparation for Formal Discovery.

21.06[1] Making Initial Disclosures Before Participating in Formal Discovery.

21.06[1][a] Initial Disclosures. Generally, a party must make initial disclosures at or within 14 days of the discovery conference held under *Fed R Civ P 26(f)*. This general rule applies unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan [*Fed R Civ P 26(a)(1)(C)*].

Initial mandatory disclosure requires parties to exchange information regarding the following [*Fed R Civ P 26(a)(1)*]:

- Individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment.

- Documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.

- Claims and calculations of damages.

- Insurance coverage.

Consider:
In cases involving more than just a few documents, the disclosing party will typically provide a description of the docu-ments, not copies of the documents themselves. Based on the description, the other party will then seek access to desired documents through discovery [*see Fed R Civ P 26(a)(1)*, Committee Note of 1993].

Cross Reference:

Discussion of initial disclosure requirements under Rule 26(a)(1), see Ch. 15, Rule 26(f) Conference and Initial Disclosures, see *§§ 15.15 -15.26*.

21.06[1][b] Mandatory Disclosure of Expert Testimony. A party must disclose the identity of any proposed expert witness, accompanied by a written report prepared by the witness containing:

- All opinions to be expressed, and the basis for them.
- Information considered by the witness in forming the opinions.
- Exhibits to be used to summarize or support the opinions.
- The witness's qualifications, including a list of publications authored by the witness within the preceding 10 years.
- The witness's compensation.
- A listing of cases in which the witness testified as an expert at trial or deposition within the preceding four years.

These disclosures must be made at least 90 days before trial. The mandatory disclosure of expert testimony may be altered by court order or by stipulation of the parties [*Fed R Civ P 26(a)(2)(C)*].

Strategic Point:

Any opinion testimony based on "scientific, technical, or other specialized knowledge" is considered expert testimony subject to mandatory disclosure [*see Fed R Evid 701*]. Nevertheless, it can be difficult to determine whether a potential witness will be an expert witness, or a lay witness not subject to automatic disclosure. When in doubt, counsel should make the initial disclosure, or risk exclusion of the witness by the court.

Warning:

Counsel should be aware of potential work product issues when furnishing materials to an expert witness. In the Ninth Circuit, documents (and communications) provided by counsel to a testifying expert that relate to the subjects about which the expert will testify are discoverable, even when they might otherwise be considered opinion work product [*see Intermedics, Inc. v. Ventritex, Inc. (ND Cal 1991) 139 FRD 384, 391-397*].

Cross References:

Discussion of initial disclosure requirements under Rule 26(a)(2), see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§§ 15.15 -15.26*.

Discussion of the circuit split regarding the interplay of disclosure of expert testimony materials and the work product doctrine, see 6 *Moore's Federal Practice, § 26.80[1][a]* (Matthew Bender 3d ed.).

21.06[1][c] Pretrial Disclosures of Trial Evidence. A party must disclose, and file with the court, the following trial evidence, unless intended solely for impeachment:

- The name, address, and phone number of each witness.

- The designation of witnesses whose testimony is expected to be presented by way of deposition.

- An identification of each document or exhibit.

These disclosures must be made at least 30 days before trial [*Fed R Civ P 26(a)(3)(B)*].

Warning:

Evidence intended solely for impeachment is not subject to pretrial disclosure, but parties must disclose evidence that serves both impeachment and substantive purposes [*see, e.g., Klonoski v. Mahlab (1st Cir 1998) 156 F3d 255, 270*]. It can prove challenging to determine in advance of trial whether the court will consider specific evidence to be solely for impeachment. If there is any doubt, therefore, counsel should disclose the evidence, or risk that the court will not admit the undisclosed evidence at trial.

21.06[2] Holding Conference to Discuss Case and Possible Settlement Before Beginning Formal Discovery.
Except in categories of proceedings exempted from disclosure under *Fed R Civ P 26(a)*, or when authorized under the Federal Rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f) [*Fed R Civ P 26(d)(1)*].

Under Rule 26(f), the parties must confer, at least 21 days before a scheduling conference is held or a scheduling order is due under *Fed R Civ P 16(b)*, for the purpose of:

- Discussing the nature and basis of the claims and defenses.

- Discussing the possibility for a prompt settlement or resolution of the case.

- Making or arranging for the initial mandatory disclosures required by Rule 26(a).

- Discussing any issues relating to preserving discoverable information, particularly electronically stored information.

- Developing a proposed discovery plan.

The proposed discovery plan must indicate the parties' views and proposals concerning the following [*Fed R Civ P 26(f)*]:

- What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when initial disclosures were made or will be made.

- The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues.

- Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.

- Any issues relating to claims of privilege or work product protection including, if the parties agree on a procedure to assert such claims after production, whether to ask the court to include the agreement in an order.

- What changes should be made in the limitations on discovery imposed under these rules or by local

rule, and what other limitations should be imposed.

- Any other discovery orders that should be entered by the court.

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may by order require that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule require that the conference between the parties under this subdivision occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference [*Fed R Civ P 26(f)*].

21.06[3] Scope and Limits of Discovery.

21.06[3][a] Obtaining Discoverable Information. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party [*Fed R Civ P 26(b)(1)*]. The scope of discovery is broader than what is admissible at trial. Parties may discover information that appears reasonably calculated to lead to the discovery of admissible evidence [*Oppenheimer Fund, Inc. v. Sanders (1978) 437 US 340, 351-352, 98 S Ct 2380, 57 L Ed2d 253* ; *see Lewis v. ACB Bus. Servs., Inc. (6th Cir 1998) 135 F3d 389, 402-403*].

For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action [*Fed R Civ P 26(b)(1)*].

Consider:

A statute may expressly prohibit discovery of otherwise discoverable information. For example, *23 USC § 409* prohibits discovery of certain traffic safety reports compiled or collected for the purpose of identifying, evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, and *10 USC § 1102(b)* prohibits discovery of medical quality assurance records created by or for the Department of Defense. However, absent an express prohibition against disclosure, a statute barring disclosure of information will be narrowly construed [*St. Regis Paper Co. v. United States (1961) 368 US 208, 218, 82 S Ct 289, 7 L Ed2d 240* ; *see, e.g., Contratto v. Ethicon, Inc. (ND Cal 2004) 225 FRD 593, 596*]. This is in accord with recent statutory narrowing of discovery limits.

21.06[3][b] Limiting the Scope of Discovery. By order, the court may alter the limits on the number of depositions and interrogatories, or the length of depositions under *Fed R Civ P 30*. By order or local rule, the court may also limit the number of requests for admissions under *Fed R Civ P 36* [*Fed R Civ P 26(b)(2)(A)*].

With respect to electronically stored information, a party does not have to provide discovery from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought bears the burden of making that showing. If that showing is made, the court may still order discovery from those sources if the requesting party shows good cause, and may specify conditions for the discovery [Fed R Civ P 26(b)(2)(B)].

The frequency and extent of use of any discovery method may be limited by the court if it determines that [*Fed R Civ P 26(b)(2)(C)*]:

- The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.

- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

- The burden or expense of the proposed discovery outweighs its likely benefit under the circumstances.

Cross Reference:

Discussion of scope of discovery, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.

21.06[4] Stipulating Around Limitations of Discovery. Unless otherwise directed by the court, the parties may stipulate around the limitations of the various discovery rules [*Fed R Civ P 29*; *see Bobrosky v. Vickers (WD Va 1997) 170 FRD 411, 416*]. In most cases, these stipulations do not require court approval. However, if the stipulations could interfere with scheduling orders entered by the court, leave of court is required.

Cross Reference:

Discussion of stipulations regarding discovery, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.03 -22.13*.

21.06[5] Certifying Discovery Requests and Responses. Every discovery request or response must be signed by counsel, whose signature constitutes a certification of the merits of the signed document [*Fed R Civ P 26(g)(1)*]. If a certification is made in violation of *Fed R Civ P 26* without substantial justification, the court must impose an appropriate sanction on the person who made the certification, the party represented by the person who made the certification, or both [*Fed R Civ P 26(g)(3)*].

21.06[6] Discovery Responses Filed When Used in Proceeding. The following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing [*Fed R Civ P 5(d)*]:

- Depositions.

- Interrogatories.

- Requests for documents or to permit entry on land.

- Requests for admissions.

21.06[7] Supplementing Discovery Responses. Every discovery response must be supplemented or corrected whenever the party learns that the prior response was in some sense incomplete or incorrect, and that new information is not otherwise already made known to the other parties in the action [*Fed R Civ P 26(e)(1)*].

A party that without substantial justification fails to supplement discovery is not, unless the failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include informing the jury of the failure to make the disclosure [*Fed R Civ P 37(c)*].

21.06[8] Seeking Protective Orders to Prevent Abusive Discovery. The discovery rules are designed to operate with a minimum of court supervision. However, if a party's pursuit of discovery becomes overzealous, the court may issue a protective order precluding or limiting discovery to protect any person subject to abusive discovery practices [

Fed R Civ P 26(c)].

There must be a showing of good cause to justify the issuance of a protective order [*Fed R Civ P 26(c)*]. A common ground for a protective order is that the sought discovery involves privileged materials or information. The moving party has the burden of establishing good cause [*see In re Terra Int'l, Inc. (5th Cir 1998) 134 F3d 302, 306-307*]. Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party opposing disclosure. The injury must be shown with specificity. Conclusory or stereotypical assertions are insufficient to show good cause [*Gulf Oil Co. v. Bernard (1981) 452 US 89, 102 n16, 101 S Ct 2193, 68 L Ed2d 693*].

Cross Reference:

Discussion of seeking protective orders, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.35 -22.66*.

21.06[9] Determining Sequence of Discovery Procedures. Parties may conduct discovery in any sequence unless the court orders otherwise. On motion and for a party's or a witness's convenience, the court may issue an order prescribing the sequence of discovery [*Fed R Civ P 26(d)(2)*]. Typically, a party wishing to establish a particular sequence of discovery will proceed by motion for a protective order [*Fed R Civ P 26(c)(1)*]. Both parties may conduct discovery at the same time. The fact that one party is conducting discovery does not operate to delay any other party's discovery [*Fed R Civ P 26(d)*].

Each of the methods of discovery provide different strategic advantages, and selection of the proper method or combination of methods is critical to efficient litigation. For example, if the availability of a key witness is limited, depose the witness early in litigation to preserve critical testimony. Likewise, if the opposing party is known to be careless in thought or rash in expression, depose that party first, rather than after counsel has had the opportunity to craft interrogatory responses that will have the effect of diminishing the spontaneity of deposition testimony.

Interrogatories demanding precise information regarding damages may provide a fertile ground for deposition questioning. Similarly, document demands may serve as the basis for strategic interrogation during deposition.

Cross References:

Discussion of the various discovery procedures, see *§ 21.07* and Ch. 23, Methods of Discovery.
Discussion of strategy related to the sequencing of discovery, see *§ 21.08*.

21.06[10] Evaluating Potential Cost of Discovery. Consider carefully the likely cost to the client when drafting a discovery plan, including:

- Attorney's fees associated with drafting the particular discovery device, or preparing for and attending a deposition.
- Attorney's fees associated with opposing objections to the discovery, including potential motion practice.
- Stenographic fees associated with a deposition.

Although document discovery in document-intensive suits can involve enormous expenses in both fees and costs, most often the largest expense associated with discovery is preparing for and taking depositions. This is so even when the deponents are local and travel is unnecessary, because attorney time and court reporter costs are the major expenses. Accordingly, determining who to depose and planning for efficient depositions is critical to making the most of the lawyer's time and the client's money.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedurePretrial MattersConferencesGeneral Overview

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Unit 7 Discovery
CHAPTER 21 Discovery Strategy and Planning
II. DEVELOPING A DISCOVERY PLAN

3-21 MB Practice Guide: Fed Pretrial Civ Proc in CA 21.07

21.07 Consideration of Available Discovery Methods.

21.07[1] Depositions.

21.07[1][a] Depositions Help to Evaluate Witnesses and Preserve Testimony. The deposition is the most important and effective discovery tool. In addition to providing a procedure for in-depth examination of the factual underpinning of the claims and defenses, the deposition can be used to evaluate the credibility, presence, and demeanor of the witness. A witness's voice characteristics, predominant body language traits, and idiosyncratic tendencies all factor into an analysis of the likely credibility of the witness. The deposition also allows for more spontaneous responses than at trial.

Depositions are also critical to preserve necessary testimony of witnesses who may not be available for trial due to death, illness, or other causes.

21.07[1][b] Depositions Are Subject to Numeric and Timing Restrictions. A party may take the oral deposition of any party or nonparty, without leave of court, unless the person to be examined is confined in prison, or if, without the written stipulation of the parties [*see Fed R Civ P 30(a)(2)*]:

- The proposed deposition would result in more than 10 depositions being taken.
- The person to be deposed has already been deposed in the case.
- The deposition is scheduled before the time specified in *Fed R Civ P 26(d)*, unless the deposition notice properly states that the person to be examined is expected to leave the United States and will be unavailable for examination.

A deposition is limited to one day of seven hours, unless the time is extended by the court or by stipulation of the parties [*Fed R Civ P 30(d)*].

21.07[1][c] Depositions May Be Videotaped. Consider videotaping the deposition. There may be great advantage

to videotaping if there is concern that the witness may not be available at trial, because videotaped testimony is much more effective than a reading of the transcript. Any party may, by providing prior written notice to the deponent and other parties, designate that the deposition will be taken by videotape as well as stenographically [*see Fed R Civ P 30(b)(3)*].

Cross Reference:

Discussion of depositions, see Ch. 23, Methods of Discovery, *§§ 23.19 -23.75*.

21.07[2] Interrogatories.

21.07[2][a] Interrogatories May Be Propounded to Other Parties Only. Interrogatories may be used only to seek information from another party, not from nonparty witnesses [*Fed R Civ P 33*; *see* United States v. Lot 41, *Berryhill Farm Estates (10th Cir 1997) 128 F3d 1386, 1397*]. No more than 25 interrogatories may be served, including all discrete subparts, without leave of court or written stipulation [*Fed R Civ P 33(a)*].

21.07[2][b] Purposes of Interrogatories. Much of the information generally sought through interrogatories must be made in the mandatory initial disclosure without a discovery request under *Fed R Civ P 26(a)*. However, when a court order or stipulation has varied the disclosures required, interrogatories may be used for the following purposes:

- To identify persons with knowledge of relevant information.
- To discover relevant documents.
- To discover the factual basis for positions taken in the pleadings.
- To discover the basis and method of computation of claimed damages.
- To identify insurance information.

Interrogatories are relatively inexpensive, and are particularly well suited for technical and uncontroverted information. If properly prepared, written interrogatories can also be useful in holding the opposing party to particular factual claims and legal contentions at an early stage of the case and in serving as the basis for subsequent document demands, admission requests, and depositions.

Cross Reference:

Discussion of interrogatories, see Ch. 23, Methods of Discovery, *§§ 23.111 -23.133*.

21.07[3] Inspection of Documents, Electronically Stored Information, and Property.

21.07[3][a] Obtaining Disclosure and Demanding Inspection of Documents, Electronically Stored Information, and Property. A party has the right to obtain disclosure of documents, electronically stored information, and things, and to inspect premises or personal property. There are no specified limitations on the number of demands for production that can be made [*see Fed R Civ P 34*]. Consequently, the procedure provides a fruitful means of obtaining documentary insight into the issues and available proof, and a basis for deposing both parties and nonparty witnesses.

The demanding party is entitled to have disclosure and discovery of all items that are in the possession, custody, or control of the respondent and that are relevant to the issues or that may lead to the ascertainment or disclosure of relevant evidence. "Control" is defined to include items to which the respondent has a legal right of access, or a practical ability to obtain possession [*Fed R Civ P 34*; *see Fed R Civ P 26(b)(1)*].

Cross Reference:

Discussion of production of documents, electronically stored information, and things and entry on land for inspection and other purposes, see Ch. 23, Methods of Discovery, *§§ 23.135 -23.156*.

A demand for production of electronically stored information may succeed in providing access to computer-derived compilations and, if circumstances warrant, computer software and hardware, including direct access to a computer system.

Cross Reference:

Discussion of discovery of electronically stored information, see Ch. 23, Methods of Discovery, *23.157 -23.188*.

21.07[3][b] Responding to Inspection Demands. From the respondent's standpoint, care should be taken in preparing the written response to each production demand to ensure that the response is complete, accurate, and specific. Any objection to a demand must be explicitly stated. When a privilege is claimed, there must be a specific and adequate description of the withheld item, without intruding on the privileged content of the item [*Fed R Civ P 26(b)(5)(A)*].

A party objecting to only part of the request must permit inspection of the remaining parts [*Fed R Civ P 34(b)*].

Decision Point--Responding Party:

Although the responding party may bring a motion for a protective order against a demand for production [*Fed R Civ P 26(c)*], it is generally better practice to respond to the demand, stating specific reasons for the inability or refusal to produce. This places the burden on the demanding party to move to compel responses, and may often lead to an accommodation between the parties as to production without court intervention.

Cross Reference:

Discussion of production of documents, electronically stored information, and things and entry on land for inspection and other purposes, see Ch. 23, Methods of Discovery, *§§ 23.135 -23.156*.

21.07[4] Physical and Mental Examinations.

21.07[4][a] Seeking Physical and Mental Examinations. Physical or mental examinations are available only if both of the following conditions are met [*Fed R Civ P 35*; *see Schlagenhauf v. Holder (1964) 379 US 104, 118-119, 85 S Ct 234, 13 L Ed2d 152*]:

- The mental or physical condition of a party or a person in a party's custody is "in controversy"; and
- There is "good cause" for the examination.

A request for a physical or mental examination is the only discovery tool that requires a court order. The decision to grant or deny the request is within the court's discretion [*Schlagenhauf v. Holder (1964) 379 US 104, 118-119, 85 S Ct 234, 13 L Ed2d 152*].

The order may be made on notice to the person to be examined and to all parties and must specify the following [*Fed R Civ P 35(a)*]:

- The time of the examination.

- The place of the examination.
- The manner of the examination.
- The conditions of the examination.
- The scope of the examination.
- The person who will conduct the examination.

21.07[4][b] Providing the Examiner's Report to the Examined Party. If the examined party requests a copy of the examiner's report, the party requesting the examination must deliver to the examined party a copy of the detailed written report of the examiner setting out the following [*Fed R Civ P 35(b)(1), (2)*]:

- The examiner's findings, including the results of all tests.
- The examiner's diagnoses and conclusions.
- Reports of all earlier examinations of the same condition.

By requesting and obtaining a report of the examination or by taking the deposition of the examiner, the examined party waives any privilege that party may have regarding the testimony of every other person who has examined or who may thereafter examine the party regarding the same mental or physical condition [*Fed R Civ P 35(b)(4)*].

Cross Reference:

Discussion of physical and mental examinations, see Ch. 23, Methods of Discovery, *§§ 23.189 -23.216*.

21.07[5] Requests for Admission. A party may serve a written request on any other party for the admission of any matter relevant to the litigation. The recipient must respond by admitting, denying, or setting forth reasons why the request cannot be either admitted or denied [*Fed R Civ P 36(a)(4)*]. For example, a request may be submitted for an admission that:

- A particular person signed a contract with authority.
- The amount of actual damages is a certain figure.
- Attached documents are genuine.

Requests for admission are valuable early in the discovery process to limit the amount of necessary discovery. Late in the discovery process, they may sharply limit the need for trial witnesses.

At the onset of discovery, every important document for which authen-tication will be necessary should be identified, as should every important fact that is apparently not in dispute. To the extent that admissions of authenticity and facts are obtained, no further discovery on those items will be needed. Because admitted matters are conclusively established, requests for admissions can also facilitate summary judgment.

Cross Reference:

Discussion of requests for admission, see Ch. 23, Methods of Discovery, *§§ 23.217 -23.258*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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21.08 Strategies for Sequence of Discovery Methods.

21.08[1] Conventional Approach Is to Serve Interrogatories and Request Production Before Conducting Depositions. The three most commonly used methods of discovery provided for in the Federal Rules of Civil Procedure are often employed in the following sequence:

- Written interrogatories under *Fed R Civ P 33*;
- Requests for production under *Fed R Civ P 34*; and
- Depositions on oral examination under *Fed R Civ P 30*.

In this approach, the lawyer, whether representing the plaintiff or defendant, first uses interrogatories to identify individuals with knowledge and the location and description of potentially relevant material. Although the importance of interrogatories has arguably diminished in light of the initial mandatory disclosure requirements under *Fed R Civ P 26(a)*, interrogatories may also be used to begin exploring the contentions of the opposing party. Having used Rule 33 interrogatories to supplement the allegations of the pleadings and to lay the groundwork for further discovery, production of electronically stored information and documents can then be requested from the opposing party under Rule 34.

Decision Point--Propounding Party:

Although interrogatories may precede requests for production, the better practice is to initiate both these methods of discovery at the same time. The strongest reason for doing so is to compress the "pre-deposition phase" of the action. Although interrogatory answers may prompt the filing of a second set of requests for production, at least in the meantime the process of production and review has been set in motion.

In addition, counsel should consider requesting admissions under *Fed R Civ P 36*. The sometimes-ignored use of requests for admission of facts and genuineness of documents can reduce discovery costs by eliminating issues from

dispute, thereby eliminating the need to conduct discovery on those admitted facts [*see 21.07[5]*].

Once the basic facts in the case are established through these initial forms of discovery, depositions may be planned accordingly.

21.08[2] Advantages of Taking Depositions After Reviewing Documents. There are advantages to taking depositions only after having had access to the pertinent files of the adverse party and of the deponent in particular. These advantages are:

- Documents prepared by the opposing party and its agents and employees serve as an invaluable check on the deposition testimony of those individuals.

- The files provide a framework for understanding the involvement of a particular individual, and for outlining questioning of that person.

- To the extent that documents are of independent evidentiary importance, you may need to use the deposition to authenticate them, and to learn whether the author can explain away the apparent effect of what was written.

In determining the sequence in which to conduct discovery, counsel should review all available documents before taking depositions. It is worth pursuing even if review of documents will precede depositions by a matter of hours, as when a distant business has been sued in its local court for a limited sum, and counsel must make a single trip to the defendant's offices, reviewing and selecting documents one day, preparing questioning overnight, and beginning depositions the following day.

21.08[3] When to Alter Conventional Sequence of Discovery. The sequencing of discovery is a strategic decision. If it appears that an early settlement of the litigation may hinge on making the weaknesses in the opposing side's case clear to them, the use of the "conventional" approach may be less suitable. Early settlement can also can hinge on the opposing side's understanding the expense and often unpleasantness of litigation. These factors typically become prevalent once depositions begin. Consequently, early depositions can promote settlement by bringing the reality of litigation to the forefront sooner. Accordingly, counsel may wish to avoid the delays involved in the more systematic approach discussed in *21.08[1], [2]*.

A related reason for varying the sequence of discovery is the conviction that an early deposition of a critical witness may tilt the balance between the parties enough to promote early and favorable settlement without the expense of substantial additional discovery. Such a deposition is typically of a nonparty witness; good counsel should already be aware of anything their own clients can say that might radically change the perception of the case. In addition, early depositions of nonparty witnesses who may be related to or friendly with the opposing party may thwart an opposing party's attempt to shield them from the rigors of discovery or curry favor with them.

Another exception can be made for an early deposition of a nonparty witness whose knowledge of the facts bearing on some important issue will be pivotal. In addition, some issues in the case may call for a deposition for which documents are not important, even if significant in the litigation as a whole. Typically this will be a deposition of a nonparty witness that is expected to provide testimony helpful to the case.

Counsel with access to a nonparty witness who will cooperate, but who may not be available to appear at trial, might choose to take that person's deposition at once because the testimony may be favorable and may be delivered without dependence on documents. Opposing counsel's opportunity to cross-examine will be less useful than it would be after further discovery by both sides. Such a deposition will preserve the testimony of the witness for trial if the witness becomes unavailable [*see Fed R Civ P 32(a)(4)*].

21.08[4] Sequencing of Depositions Merits Special Consideration. Because depositions are often the most useful discovery method, give special consideration to when depositions are conducted. The following general factors may affect the sequence of depositions in any given case:

- *Considering the opponent's perception*. The early deposition of a key witness (before interrogatories have been answered and documents have been produced) may be desirable because the testimony may affect your opponent's perception of the case. You may decide to schedule that deposition to take place as soon as the preliminary stages of discovery are completed.

- *Preserving testimony*. The possible future unavailability of a witness whose testimony counsel wishes to preserve will lead counsel to take that witness's deposition promptly.

- *Deposing key witnesses first*. In a case in which the issues are relatively uncomplicated and the witnesses are few, depose the most important witness for the opposing party first. Because of the cost of depositions and the fact that most lawsuits settle, counsel should normally learn as much as possible in a short time about the basic issues in the case.

- *Deferring depositions until after key facts are understood*. In a complex case, counsel who is concerned that opposing counsel is more familiar with the underlying facts should defer the depositions of key actors for the adverse party until counsel is sufficiently educated about the case.

- *Deposing experts*. Counsel should typically delay the depositions of the opposing party's expert witnesses until late in the sequence. Because the experts will usually testify about opinions they have developed based on the underlying facts of the case, counsel should thoroughly understand those facts before deposing the experts.

Cross Reference:

Discussion of the use of depositions and other discovery methods, see Ch. 23, Methods of Discovery, *§§ 23.19 -23.75*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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21.09 CHECKLISTS: Managing Litigation Documents.

21.09[1] Choosing a Method of Organization. To determine how to manage litigation documents:

☐ Consider basic method of organization, which can include one of following:

○ *Manual organization*. Manual organization and hand-filing of paper documents for manual retrieval.

○ *Automated indexing*. Manual organization combined with automated indexing to retrieve paper documents.

○ *Imaging*. Electronic imaging, coding, indexing, and retrieval of electronic documents.

○ *Imaging combined with electronic file-sharing*. Electronic imaging combined with network-based or web-based access to documents for multiple users or locations.

Discussion:
See *§§ 21.10[2] -[4]*

☐ Determine method of organization. The decision to use a manual system or a more sophisticated approach will be determined by one or more of these variables:

○ *Technological resources*. Information technology resources available.

- *Budget*. Case budget may or may not warrant the use of automated organization.

- *Specific litigation*. Document-intensive cases often necessitate some level of automation.

- *Access needs*. The number of individuals in need of document access may require network- or web-based access for multiple users.

Discussion:
See *§§ 21.10[2], [6]*

☐ In document-intensive cases, consider using imaged documents. The benefits of imaged documents include the following:

- *Capacity for multiple users*. Images can be accessed simultaneously by multiple parties or offices.

- *Time savings*. There will be significant time savings, and potential cost savings as well, with regard to document handling, searching, retrieving, and distribution of litigation documents.

- *Protection of original documents*. Images cannot be damaged, regardless of how often they are used.

- *Portability*. Images are more portable and easier to access during trial than paper documents.

- *Copy quality*. Copies printed from image will be of original quality.

- *Copy ease*. There is no waiting for documents to be copied or electronically faxed.

- *Loss reduction*. There is no need to deal with lost or misfiled documents.

- *Document annotation*. Documents can be annotated as needed and even annotations can be electronically searched.

- *Quick retrieval of documents*. When imaged documents are linked to a database or coupled with indexing information, search and retrieval is instantaneous.

Discussion:
See *§ 21.10[5]*

21.09[2] Maintaining Control of Documents Throughout Litigation.

☐ Gather documents from client. Early in litigation, discuss with client documents that need to be gathered.

- Consider whether client's agents or employees possess pertinent documents.

- Consider whether electronic documents, such as e-mails, will be subject to disclosure and/or discovery.

Discussion:
See *§ 21.11[1]*

☐ Organize documents for discovery. Early in case, begin organizing documents that may be subject to:

- Mandatory initial disclosure under *Fed R Civ P 26(a)*.

- Production requests under *Fed R Civ P 34(a)*.

Authority:
Fed R Civ P 26(a), 34(a)

Discussion:
See *§§ 21.11[2] -[4]*

☐ Keep control set of documents, which will:

- Limit physical damage to documents.

- Reduce possibility of losing irreplaceable documents.

Discussion:
See *§ 21.11[5]*

☐ Organize significant documents by use of indexing system. Possible indexing methods include:

- Computer-based index consisting of document abstracts.

- Coding of image-based documents.

Discussion:
See *§ 21.11[6]*

☐ Maintain "hot document" file, which should include:

- Documents that are helpful to prove client's position.

- Documents that may be damaging to client's case.

Discussion:
See *§ 21.11[7]*

☐ Record document use. Throughout course of litigation, annotate document index for each document. Annotations can include:

- ○ Significance of document and how it has been used (investigation, deposition preparation, response to document request, etc.).
- ○ Whether document is helpful or harmful to client's case.
- ○ Whether document is privileged.
- ○ Whether document is potential exhibit.

Discussion:
See *§ 21.11[8]*

☐ Create witness files. Witness files for separate witnesses can include following documents:

- ○ Documents authored by witness.
- ○ Documents received by witness.
- ○ Documents that mention witness.

Discussion:
See *§ 21.11[9]*

☐ Create subject matter files. Subject matter files may be useful in large cases to:

- ○ Group documents based on discrete issues that need to be proved.
- ○ Review case based on subject matter of pertinent issues.

Discussion:
See *§ 21.11[10]*

☐ Create exhibit files. Throughout litigation, specific key documents can be segregated and filed as potential exhibits.

- ○ Exhibit files may include many of same documents as hot document file.

- Exhibit files provide ongoing opportunity to weigh strength of potential evidence.

Discussion:
See *§ 21.11[11]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionEvidenceDocumentary EvidenceGeneral Overview

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21.10 Objectives and Methods of Document Management.

21.10[1] Documents Must Be Organized for Accessibility. Proper document management allows counsel to keep track of and retrieve pertinent documents throughout the course of litigation. The key to document management is planned organization. Regardless of the number of documents, standardized methods of organization require:

- Indexing and/or coding of documents.
- Secure storage of documents.
- Accessibility to documents on an as-needed basis.

Management efforts do not need to be complex in every case. In many cases, document management involves nothing more than labeling tabs on file folders, placing the documents in the appropriate folders, and maintaining a master list or index of the documents.

The large number of documents involved in some cases requires management with some additional foresight, and will typically involve some level of computerized automation. In cases involving large amounts of documents, CD-imaging is often the most practical means of coding and storing documents for future use and accessibility. When paper documents are received in an office, they must be organized to be useful. Documents are labeled, sorted, filed, and indexed. Electronic documents are no different. A document imaging software system must have a comprehensive indexing system that organizes documents in a manner that makes them available when needed.

Regardless of the method of organization, the objectives are the same whatever the actual number of documents involved. What varies is the complexity of the organization or the expense of technology that must be utilized to accomplish the task. Although a sole practitioner or small firm with a limited number of large cases may be unable to justify buying imaging systems, litigation support services such as Applied Discovery may be retained for imaging needs on a case-by-case basis.

21.10[2] Methods of Document Management. Methods of document management include:

- Manual organization and filing of paper documents for manual retrieval.
- Manual organization combined with automated indexing to retrieve paper documents.
- Electronic imaging, coding, indexing, and retrieval of electronic documents, for example on CD-ROM.
- Electronic imaging combined with network-based or web-based access to documents for multiple users.

Decision Point:

The decision whether to use a manual system or more sophisticated approach is determined by one or more of these variables:

- The information technology resources available.
- The case budget.
- The time available.
- The specifics of the litigation.
- The number of people who need access to the documents.

21.10[3] Managing Documents Manually.

21.10[3][a] Examining and Evaluating Documents. The first step in the management of documents is to review relevant documents on receipt. The initial review requires counsel to consider whether the document has relevance in the litigation, whether the document is protected as privileged or confidential material, or whether it is subject to discovery.

21.10[3][b] Filing Documents. As documents are received, counsel should establish a system of organization for filing. Documents may be subdivided based on the type of document, such as the following:

- Party correspondence.
- Investigation documents.
- Transaction documents.
- Documents that tend to prove the client's position.
- Discovery-related documents.
- Privileged documents.

Separate files may then be organized in a standardized manner, such as chronologically based on the date the document was generated or received.

21.10[3][c] Creating a Master Document List. Maintenance of a master document list is essential in all cases. In its simplest form the list may be generated in table format with basic word processing software. The master document list should include basic information about each document, such as:

- Document title or type of document.
- Date of document.
- Author or source of document.
- Short description or significance of document.
- Potential uses for the document (discovery, trial exhibit, etc.).
- Document location (file name and path).

The master list provides an inventory of relevant litigation documents, as well as a means to review and access key documents quickly.

21.10[4] Managing Documents Manually and Electronically. The combined approach to document management typically involves:

- Organizing documents as they are received.
- Classifying documents for index purposes.
- Developing a computerized database for indexing.

21.10[5] Managing Documents Electronically.

21.10[5][a] Imaging Documents. "Imaging" is the creation of an electronic copy of a document. Once the electronic version is installed on a computer system, each person working on the case can display the document on a separate computer screen. Paper copies of the documents should be retained as a backup but are rarely needed, although some attorneys prefer review of paper copies. Electronic documents may be organized and manipulated quickly and efficiently.

With electronic imaging, each page is electronically scanned and saved in a discovery database or on a CD-ROM disk or similar storage device. Electronic image software is then used to access documents electronically based on coded information. The software may be modified to suit the needs of a particular case. Most software systems for organizing electronic documents also store deposition transcripts and other full-text files in fully searchable form. Legal support services that specialize in imaging technology offer various services relating to the creation and management of electronic documents.

Electronic documents in an imaging system can be stored and accessed based on various forms of organization, including:

- Full-text indexing.
- Indexing of coded information.

- Storing documents in electronic folders and sub-folders.

21.10[5][b] Searching and Indexing Within Document or Coding Document. Document imaging systems with Optical Character Recognition (OCR) provide automatic full-text searching and indexing of all documents. Once documents are scanned, the imaging software can index every word to track the location of each word and phrase within every document, dramatically reducing indexing costs, while providing extensive searching capabilities. Some OCR programs include OmniPage Pro, Adobe Capture, and Doculex, among others.

Documents can also be organized by index codes that are specifically assigned to documents. The most basic coding systems and services provide bibliographic information for coded documents, such as:

- Document page numbers.
- Packet/attachment ranges.
- Authors.
- Recipients.
- Copies.
- Date.
- Document type.

A more comprehensive database, using subjective coding, can include bibliographic information, as well as relevant data extrapolated from the document body, such as:

- Names and organizations in text.
- Key words.
- Issue-specific codes.

Decision Point:

Counsel should consider cost when choosing the level of coding. Subjective coding requires a more legalistic, analytical, and expensive review of the documents by more experienced staff. This more sophisticated coding is rarely employed because of the greater costs and because of the increasing functionality and reliability of full-text search engines that work with sophisticated search software to retrieve the desired material from documents coded in basic, bibliographic coding.

Whatever coding and indexing method is chosen must be easy to use and understand by the people who need access to the documents.

21.10[5][c] Storing Electronic Documents in Folders. Along with full-text and code-based indexing, some imaging software systems have a visual method of filing documents. In a typical law office, paper files are found by looking in a particular folder in a particular drawer in a particular file cabinet. Many document management programs electronically duplicate this filing system. A flexible folder structure eases the transition from paper filing to electronic filing and can make the use of electronic documents more successful at the onset. Document management programs include iManage, PCDocs, and WorldDocs, among others.

21.10[6] Combining Imaging Systems With Network- and Web-Based Access. As the number of documents increases in a case, the opportunity for a single lawyer to review each document lessens. Hands-on work with key documents often plays a crucial role throughout the course of litigation, and the number of people with the need for access to key documents may be substantial, depending on the size of the case.

A document imaging and retrieval system, combined with a network- or web-based database, enables multiple users to search for a document, retrieve the document to a computer screen, view the document, make notations to the electronic document, and print the document if needed. Secure sites allow firms to post documents and other data online and selectively share the information with clients, co-counsel, or other individuals. A wide variety of litigation support businesses specialize in providing services to organize and access electronic documents.

Consider:

When hiring litigation support services, determine whether the company will run conflicts checks on its staff, and whether the staff will sign confidentiality agreements.

21.10[7] Reviewing and Organizing Key Documents.

21.10[7][a] Reviewing Key Documents. An important goal of document review is to progress towards an *ever-decreasing* body of key documents. Whatever methods are used to review and organize documents, the documents should be culled throughout the litigation to eliminate documents that have little or no bearing on the action's key issues.

Counsel should gather and make accessible key documents at the onset of litigation to begin substantive case preparation and to identify potentially significant documents in such a way as to minimize the work required in a second, more thorough review. Prompt culling of a large body of documents minimizes the time and expense of a subsequent handling. However, it is generally better to reduce the universe of documents in later stages than to overlook important documents in the first step.

21.10[7][b] Organizing Key Documents. Relevant documents should be organized in the manner (*e.g.,* chronologically, by subject matter, by witness, etc.) best calculated to facilitate their overall review. It is always necessary to maintain some system of control over the entire body of documents.

Consider:

At the same time, counsel may want the ability to "parse" the documents in ways different from their fundamental, or source-related, arrangements. For instance, it is possible to assemble all significant documents seen by a particular witness or party, or all documents, from whatever source, dealing with a given subject. Under some circumstances, it might be necessary to sort the universe of relevant documents simultaneously according to several distinct criteria-- *e.g.,* all documents seen or authored by a particular witness within a given period of time.

21.10[8] Using Paralegals for Initial Document Review. An important question to consider in apportioning document review assignments to paralegals is whether each paralegal will be responsible for a particular fact area or segment of the case, or whether each paralegal should be available for whatever most needs to be done. Specialization has the obvious advantage of promoting detailed understanding. Also, clearly defined roles and responsibilities foster independent thought, initiative, and a sense of equality among team members. A disadvantage of specialization is that a specialist leaving the job can create a potentially serious gap. In a particularly complex case, specialization may result even if not initially intended, because it is not possible for each person to understand equally all aspects of the case as it develops. Different issues frequently require analysis of very different types of documents.

Consider:

One way to avoid the shortcomings of specialization is to have a central place where all attorney and paralegal work product is kept, available for use by all team members. Paralegals and attorneys should be

required to generate memoranda when they learn significant new information about pertinent documents. Electronic imaging and file-sharing software provides centralized access for multiple users and also allows users to annotate document files. Other mechanisms for sharing and documenting information can alleviate the dangers inherent in specialization. However, the pace and complexity of the case are the chief factors in determining whether to specialize. A particularly fast-moving case may require that paralegals handle one rush assignment after another, while a complex but slower-paced case may require that detailed long-term research be conducted on several fronts simultaneously.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionEvidenceDocumentary EvidenceGeneral Overview

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Unit 7 Discovery
CHAPTER 21 Discovery Strategy and Planning
III. MANAGING DOCUMENTS

3-21 MB Practice Guide: Fed Pretrial Civ Proc in CA 21.11

21.11 Managing Discovery Documents and Electronically Stored Information.

21.11[1] Reviewing Documents and Information for Initial Mandatory Disclosure. An early evaluation of the client's documents and electronically stored information is an essential component of planning for initial disclosure under *Fed R Civ P 26(a)* [*see 21.04[5][a]*]. In applicable cases, even before any formal discovery demands are made, the parties are required to exchange documents, electronically stored information, and other tangible things that [*Fed R Civ P 26(a)(1)*]:

- Are in the possession, custody, or control of the party; and
- The disclosing party may use to support its claims or defenses, unless solely for impeachment.

Cross Reference:

Discussion of initial mandatory disclosures under Rule 26(a)(1), see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§§ 15.15 -15.26*.

21.11[2] Preparing for Production of Documents and Information.

21.11[2][a] Anticipating Production Requests. While reviewing the client's files in preparation for mandatory disclosure under *Fed R Civ P 26(a)* [*see 21.04[5][a]*], counsel should begin to anticipate the opponent's production requests under *Fed R Civ P 34*. At this early stage of the process, it is generally sensible to be over-inclusive and to gather all documents and electronically stored information that may be needed throughout the discovery process, as well as throughout the course of litigation.

Parties may request production of documents and electronically stored information that are relevant to claims or defenses and that are in the possession, custody, or control of any party [*Fed R Civ P 34(a)*]. The party producing documents for inspection must produce them in one of the following manners [*Fed R Civ P 34(b)(2)(E)(i)*]:

- Produce the documents as they are kept in the usual course of business; or

- Organize and label the documents to correspond with the categories in the document request.

The party producing electronically stored information for inspection must produce it in [Fed R Civ P 34(b)]:

- The form specified in the request;
- The form in which it is ordinarily maintained;
- A form that is reasonably usable; or
- Another form as agreed or ordered by the court.

Based on the facts in the case, counsel should consider what types of documents or electronically stored information may be subject to discovery, and then inquire of the client whether the documents or information exist, in what form they exist (*e.g.,* hard copy, electronic file, e-mail, etc.), and what their production would entail.

It is critical to maintain careful records of the documents and information that have been, or will be, subject to production, and to identify, segregate, and record identifying data on documents and information that are *not* subject to production on privilege or other grounds.

Cross Reference:

Discussion of requests for production of documents, see Ch. 23, Methods of Discovery, *§§ 23.135 -23.156*.

21.11[2][b] Obtaining Documents and Information From Client's Employees and Agents. If the client's employees or agents possess documents and/or electronically stored information needed for discovery, explore whether you will encounter resistance obtaining the material. If resistance is likely, it may be useful to consult the client on how best to overcome it. Resistance is common when the needed material is considered "personal" in nature, such as desk calendars, note files, or e-mail messages. Be prepared to explain the need for the intrusion. To the extent possible, counsel should work with the client to minimize disruption, and to educate the client about the demands of litigation.

Strategic Point:

Once all of the people in a client corporation or organization who may have relevant documents and/or electronically stored information are identified, develop a memorandum that will be sent to each of them by a senior person within the client's organization, such as its general counsel. The memorandum should include a request for a response even if the particular individual has *no* documents or electronically stored information that fit the description given. Thus, if in the future a person's name arises as a potential source, the records will contain a sign-off indicating that, as of the date of the original request, that person had no material meeting the description of the request.

21.11[2][c] Considering Whether Material Is Protected From Production. When inquiring about and accumulating discovery documents and electronically stored information, consider that some material may be excepted from production based on "undue burden," confidentiality, or privilege. As with all steps in the litigation process, the client needs to know about the risk and reward of taking certain positions in discovery, including the expense of defending that position and the possibility of sanctions.

Cross Reference:

Discussion of privileges and work product protection, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.

21.11[2][d] Redaction Before Production. Because documents and electronically stored information in the client's possession, custody, or control may cover a number of topics or contain confidential or privileged material, it may be necessary to produce them in part, by masking or otherwise concealing irrelevant or privileged materials. This procedure is sometimes time-consuming, difficult to implement, and subject to criticism by opposing counsel. However, if there is no alternative, redactions must be performed carefully.

21.11[2][e] Numbering Documents for Production. Numbering documents, such as by use of a Bates stamp (there are also computer programs that electronically "stamp" documents), is often the simplest way to identify and organize them for production. The numbering system serves as a means to keep inventory of produced documents, and the production numbers can be used for purposes of indexing discovery documents. If documents are organized by request, the response to the request can make reference to document numbers, and the documents can be easily referenced and retrieved.

Cross Reference:

Discussion of responses to document requests, see *Ch. 23, Methods of Discovery, §§ 23.145 -23.156*.

21.11[3] Producing Client E-mails. E-mail offers a quick and convenient way to engage in a wide variety of business activities, including discussion and revision of policies and procedures, circulation of draft documents and meeting minutes, distribution of work assignments and schedules, and actual business transactions. Most organizations have embraced the opportunities provided by e-mail. However, the vast majority overlook that when e-mail messages contain evidence of business decisions, actions, and transactions, they become documents subject to the same legal requirements, restrictions, and standards as any record produced in any form or media.

E-mail documents that a party may use to support its claims or defenses are subject to mandatory disclosure [*see Fed R Civ P 26(a)(1)*]. Likewise, e-mail documents concerning a subject of litigation, whether in print, on someone's hard drive or network system, or on backup tapes after the messages have supposedly been deleted, are subject to discovery and must be produced on request [*Fed R Civ P 34(a)*].

Warning:

Failure to produce in a timely manner may result in severe sanctions. Also, if email files are not properly organized as business documents, the client may have to face the possibility of financing a search of unmanaged and unclassified electronic data for the purpose of production [*see, e.g., Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1051*].

Cross Reference:

Discussion of issues regarding discovery of e-mails, see 7 *Moore's Federal Practice, § 37A.33* (Matthew Bender 3d ed.).

21.11[4] Reviewing Material Produced Under Rule 34.

21.11[4][a] Determining Time and Place of Production. The requesting party must specify a reasonable time and place for production of requested documents and electronically stored information [*Fed R Civ P 34(b)*]. Typically, the parties will agree to a means of production that involves either the delivery of copies to the requesting party or the review of the material in the office of the responding party or its counsel. As a practical matter, the possibility of review at the document site arises most often when the records have been produced as maintained in the ordinary course of business.

21.11[4][b] Reviewing Documents On-Site. In a case involving an extensive body of documents that are being produced as maintained in the ordinary course of business, the document review will almost invariably take place in the offices of the opposing party or opposing counsel. Hence, the reviewers may be operating under time constraints and without complete support facilities.

Each of these factors militates against a carefully selective review at this production stage. The risk of error is too great, and sufficient time normally is not available. The appropriate course is to sweep very broadly, saving fine distinctions for a more detailed review in your own offices after selected documents are copied.

In cases involving the exchange of large numbers of documents, the parties may reach an agreement to share the cost of electronically imaging documents selected from production. Additional CD copies may then be made for nominal cost.

Cross Reference:

Discussion of document production, see Ch. 23, Methods of Discovery, *§§ 23.135 -23.156*.

21.11[5] Maintaining Control of Documents Throughout Litigation.

21.11[5][a] Keeping Control Set of Documents. Regardless of the method of document management used, counsel should maintain a master set of documents. This serves as a control when any document-related problems, questions, or issues subsequently arise. In the early stages of a case, the importance of such a control set may not be readily apparent. However, as documents are handled, redacted, copied, analyzed, used as deposition exhibits, given to experts for analysis, used in witness preparation, or used as attachments to pleadings, the importance of the control set grows.

21.11[5][b] Organizing Documents Chronologically. In many cases, it is valuable to establish a chronological set of all documents. Alternatively, a chronological *index* of documents can be assembled to present the flow of events and of the documents surrounding those events concisely. Subsequently, counsel's staff can review that index rather than spend hours grappling with volumes of documents. There should be sufficient information in the index to permit selective document requests when needed.

21.11[6] Indexing Significant Documents.

21.11[6][a] Creating Computer-Based Index System. Once document review is completed, organize pertinent documents in a meaningful yet flexible manner. The use of computer-based indexing systems in which abstracts of documents can be searched by key word methods, as well as date and author, helps manage documents in a large case. The ability to make multiple indexes for different purposes aids the ability to prepare for each deposition, as well as trial.

The most useful indexing includes:

- The document number (if applicable).
- The date of the document.
- The author of the document.
- The people to whom the document was addressed directly or by copy.
- A brief description of the document's contents.

The indexing process provides subdivisions for the entire body of documents and focuses attention on the most

important documents. Large document cases often yield remarkable quantities of transactional documentation, such as sales receipts and invoices. Unless the case revolves around issues directly linked to these transactions, once the documents are indexed they may never have to be handled again.

21.11[6][b] Coding Electronically Stored Information. When digital imaging of key documents is employed, electronically stored information may be coded in a variety of ways for indexing. Documents can then be accessed using [*see 21.10[5][b]*]:

- Full-text searching.
- Objective codes (date, author, title or number of document, etc.).
- Subjective codes (issues discussed, good and bad language, etc.).

Documents can then be retrieved in electronic form, according to any coded characteristic or combination of characteristics. If the document has been scanned with a document imaging system with Optical Character Recognition (OCR), a search can be conducted based on key words or phrases. This type of search is likely to result in the retrieval of many more documents than the coded systems, but full-text searching is critical in large cases for which familiarity with large numbers of documents and codes may be impractical.

21.11[7] Maintaining "Hot Document" File. It is unlikely that any one document will be dispositive of a complex case. Rather, a sequence of documents will establish a course of events that is either helpful or harmful. These are the types of documents to include in the "hot document" file. However, the variations in individual perceptions within your staff, and caution on the part of the reviewers, may lead to over-inclusion. Therefore, the contents of this file should be reviewed periodically to eliminate documents whose importance has been supplanted by subsequent discoveries. An "issues memorandum" based on the hot document file can help determine whether the possible proof afforded by the documents is consistent with the evidence discovered from other sources.

The hot document file is also a convenient place for preliminary research and notes about the admissibility and evidentiary issues with regard to the most important documents in the case. That research may then be a basis for motions in limine or the trial notebook. Each time the documents are handled during the discovery process, lawyers and paralegals can insert thoughts about the evidentiary issues, which may continue to change as the case proceeds.

21.11[8] Recording Document and Information Use. A complete index should identify documents and electronically stored information produced to different parties, withheld on grounds of irrelevance and/or privilege, partially withheld by redaction, considered extremely sensitive, or covered by protective orders. The index should also identify the various ways in which each document and item of electronically stored information was used, such as deposition exhibits, attachments to pleadings, and attachments to affidavits.

Furthermore, an index that tracks the uses to which opposing counsel puts various documents and items of electronically stored information may provide insight into the opponent's strategy well in advance of the trial. Large document cases tend to boil down to limited document use by the time of trial. Counsel should therefore anticipate the opponent's case by maintaining an adequate information and document-use inventory.

21.11[9] Creating Witness Files. A witness file contains in one place all of the documents:

- Authored by a particular witness.
- Received by a particular witness.
- Mentioning a particular witness.

The witness file should be a manageable instrument that can be used to prepare witnesses for deposition or trial, or to prepare for cross-examination. Consider subdividing a large witness file into subject categories, chronological periods, or other meaningful segments. Whatever choices are made for a particular witness file, the best means of organization is to put each segment in chronological order so that the witness may work through the documents in an orderly manner.

A properly prepared document index containing all of the names mentioned in any document can be a useful tool in the assembly of witness files. It may be helpful to prepare a "witness book" by placing the document copies pertaining to a particular witness in a binder. The goal of any indexing system, whether manual or computerized, is to permit this kind of flexibility.

Cross Reference:

Discussion of preparation for depositions, see Ch. 23, Methods of Discovery, *§§ 23.19 -23.35*.

21.11[10] Creating Subject Matter Files. Subject or issue files serve functions similar to witness files [*see 21.11[9]*]. Depending on the volume of subject files, it may be desirable to use abstracts or summaries of their contents in lieu of the files, as long as these abstracts or summaries contain adequate reference to the documents. As with witness files, subject files may become too cumbersome to use effectively if they are not constantly divided and subdivided to outline the issues and sub-issues that develop during discovery. In most cases, those issues will continue to evolve up to the eve of trial, long after discovery is complete. The subject files should continue to evolve along with the issues.

Subject files can be valuable in preparing to address issues of proof, educating new members of the trial team, or simply as a refresher. The periodic reevaluation of these files refines the case and understanding of all its details.

21.11[11] Maintaining Files for Potential Exhibits. If the document organizational process has worked, the documents with the greatest potential as trial or deposition exhibits will become increasingly apparent. Typically, the most important documents for use as exhibits are located in the "hot document" file.

An important consideration in the selection of exhibits is whether they are easily understood or presented. Exhibit files provide an opportunity to evaluate the strength of potential exhibits before they are used for evidentiary purposes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryElectronic DiscoveryGeneral OverviewEvidenceDocumentary EvidenceGeneral Overview

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Unit 7 Discovery
CHAPTER 22 Regulation of Discovery by Stipulation or Motion *

3-22 MB Practice Guide: Fed Pretrial Civ Proc in CA 22.syn

§ 22.syn Synopsis to Chapter 22: Regulation of Discovery by Stipulation or Motion *

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22.68 Stipulation to Extend Time for Discovery Responses.

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22.70 Format for Stipulation (SD Cal).

22.71 Notice of Motion and Motion for Accelerated, Pre-Conference Discovery.

22.72 Notice of Motion and Joint Motion to Extend Discovery Cutoff.

22.73 Notice of Motion and Motion for Protective Order for Trade Secrets.

22.74 Blanket Stipulated Protective Order.

22.75 Protective Order Changing Place of Deposition.

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CHAPTER 22 Regulation of Discovery by Stipulation or Motion *
I. STRATEGY

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22.01 Scope.

This chapter covers:

- Preparation of stipulations to modify discovery procedures [*see 22.03 -22.13*; *Forms: 22.67 -22.70*].

- Bringing and opposing motions to modify discovery procedures [*see 22.14 -22.34*; *Forms: 22.71 -22.72*].

- Bringing and opposing motions for protective orders to restrict the scope of discovery [*see 22.35 -22.66*, *Forms 22.73 -22.75*].

Core Rules:
Fed R Civ P 26(b)-(g), *29*, *30*, *31*, *33*, *34*, *36*, *37*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulations

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22.02 Objective and Strategy.

The Federal Rules of Civil Procedure provide a plethora of rules regulating the manner in which parties may obtain discovery. The rules regulate, among other things, when parties may commence discovery, the amount of time a party has to respond to discovery, the number of interrogatories a party may propound, the breadth of information a party must disclose in response to a demand, the number of depositions a party may take, and the manner in which depositions are taken. In addition to the detailed array of discovery provisions, the Rules provide two general avenues to alter the regulation of discovery to accommodate the needs of specific cases: stipulations and motions.

A discovery stipulation is an agreement between the parties to the action that certain discovery rules will not apply, or will be modified, in the action. Except in a few circumstances, a stipulation must be in writing before the federal court will enforce it [*Fed R Civ P 29*; *see Fed R Civ P 1*, 2007 Committee Note (according to the 2007 restyling of the Federal Rules, a particular rule may or may not specify that stipulations must be in writing, but the meaning of the rule is not altered by the omission)]. Although the Federal Rules do not require that stipulations be approved by the court, every district in California except the Northern District requires prior court approval [*see CD Cal Civ LR 7-1*, *ED Cal Gen LR 143(b)*, and *SD Cal Civ LR 7.2(a)*].

A party may also bring a motion to obtain relief from certain discovery rules. For example, a party might seek relief by motion when the party is unable to obtain a stipulation and cannot prepare a response to discovery within the time specified in the rule [*see Fed R Civ P 33(b)(2)*, *34(b)*, *36(a)*]. Discovery motions may also be appropriate to protect against disclosure of privileged or confidential information, to extend the discovery cutoff if the parties have not yet completed discovery, or when the rules require a court order, such as for withdrawal or amendment to an admission [*see Fed R Civ P 26(c)*, *36(b)*, *37(a)*].

Before filing such a motion, counsel should first attempt to obtain a stipulation from opposing counsel, even when leave of court is required to modify the rule. The court invariably looks more favorably on the desired modification when counsel have cooperated. In addition, the process of seeking a stipula-tion satisfies the meet-and-confer conditions for filing a motion to modify discovery procedures.

Judge's Perspective:

Courts generally require that the parties make a good faith effort to seek an adjustment of discovery

limits or the resolution of discovery disputes before bringing the matter to the court. If the record reflects no such effort, or it is appears to be a half-hearted effort, the court may deny the requested modification on that basis alone. At the same time, when the parties are able to reach agreement on discovery questions, most courts are likely to give the parties considerable leeway in managing the discovery process. Only when a proposed stipulation directly impacts on the schedule set by the court, such as an extension of a discovery cutoff that will result in the need to move a motion's hearing date, will the court possibly interfere with the parties' agreement as reflected in a proposed stipulation.

Detailed Discussion/Forms:

6 Moore's Federal Practice, Ch. 26, Duty to Disclose; General Provisions Governing Discovery (Matthew Bender 3d ed.)

6 Moore's Federal Practice, Ch. 29, Stipulations About Discovery Procedure (Matthew Bender 3d ed.)

6 Bender's Federal Practice Forms, Rule 26, Duty to Disclose; General Provisions Governing Discovery (Matthew Bender).

6 Bender's Federal Practice Forms, Rule 29, Stipulations About Discovery Procedure (Matthew Bender).

Cross Reference:

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective Orders

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II. USING STIPULATIONS TO MODIFY DISCOVERY PROCEDURES

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22.03 CHECKLISTS: Discovery Stipulations.

22.03[1] Considering Types of Discovery Stipulations Available.

☐ Consider whether timing of discovery should be altered, including:

- ○ Whether any discovery should be made prior to Rule 26(f) planning meeting.
- ○ Whether time for discovery responses should be extended.
- ○ Whether time for discovery responses should be expedited.

Authority:
Fed R Civ P 26(d), (f), 29, 30(a)(2)(A)(iii), 31(a)(2)(A)(iii), 33(b)(2), 34(b)(2), 36(a)(3)

Discussion:
See *§§ 22.11[1], [2], [8], 22.12[4]*

Form:
See *§ 22.68*

☐ Consider whether limits on amount or scope of discovery should be altered, such as:

- ○ Whether more than 25 interrogatories for each side are necessary.
- ○ Whether more than 10 depositions for each side are necessary.

- ○ Whether to conduct deposition of previously deposed witness.
- ○ Whether to modify time period allowed for taking deposition.
- ○ Whether to limit scope of deposition to particular issue(s).

Authority:
Fed R Civ P 26(c)(1)(D), 29, 30(a)(2)(A)(ii), (d)(1), 31(a)(2)(A)(ii), 33(a)(1)

Discussion:
See *§§ 22.11[3], 22.12[2], [3], [10], [11]*

Form:
See *§ 22.67*

☐ Consider whether matters regarding custody of discovery documents should be altered, such as:

- ○ Who should maintain custody of original interrogatories, requests for production of documents and requests for admissions.
- ○ Who should retain stenographic notes or transcripts of depositions.

Authority:
Fed R Civ P 30(f)(3); *CD Cal Civ LR 32-2, 33-3, 34-3, 36-3*; *ED Cal Civ LR 250.1(b)*; *ND Cal Civ LR 26-1*

Discussion:
See *§§ 22.11[4], 22.12[13]*

☐ Consider stipulating to terms regarding physical or mental examination, and ensuing report.

Authority:
Fed R Civ P 29, 35(a), (b)

Discussion:
See *§ 22.11[5]*

☐ Consider stipulating to procedural aspects of discovery, such as:

- ○ Varying subpoena procedures, such as methods of depositions and reimbursement of costs.
- ○ Location for taking deposition.
- ○ Using a commission to require the production of documents or to conduct a deposition in a foreign country.

- ○ Waiving or modifying notice and/or signature requirements for a deposition.
- ○ Taking a deposition before person other than an officer.
- ○ Recording and taking deposition by other than stenographic means.
- ○ Shifting cost of deposition.
- ○ Staging discovery such that threshold issues are explored at the outset before embarking on more expensive discovery.

Authority:
Fed R Civ P 29, *Fed R Civ P 30(b)(1)*, *(3)-(5)*, *31(a)(3)*, *(b)*, *45*

Discussion:
See *§§ 22.11[6]*, *[10]*, *22.12[1]*, *[5] -[8]*, *[12]*, *[16]*

Form:
See *§ 22.67*

☐ Determine whether to stipulate to limit use of discovery, such as:

- ○ Whether discovery in one case may be used in a subsequent case.
- ○ Whether discovery should be kept confidential.
- ○ Whether to allow use of unsigned deposition transcript.

Authority:
Elliott-McGowan Prods. v. Republic Prods., Inc. (SDNY 1956) 145 F Supp 48, 50 ; *Fed R Civ P 26(c)(1)(D)-(G)*, *29*, *30(e)*

Discussion:
See *§§ 22.11[7]*, *[9]*, *22.12[14]*

Form:
See *§ 22.74*

☐ Consider stipulating to issues regarding documents, including:

- ○ Authenticity of a document.
- ○ Who prepared, or directed preparation, of a document.

- That a document was kept in the regular course of business.
- That a document will be retained by a certain party.
- That a document will be kept available for future inspection.

Authority:
Fed R Civ P 30(f)(2); *Fed R Evid 803(6)*, *901*,

Discussion:
See *§ 22.12[9]*

☐ Consider whether it is desirable to modify rules regarding objections during deposition, such as:

- Whether reserving objections will benefit the client at trial.
- Whether each matter stipulated to is clear and recorded in the record.

Authority:
Fed R Civ P 29, *32(d)(3)(B)*

Discussion:
See *§ 22.12[15]*

22.03[2] Preparing Stipulation.

☐ Consult with opposing party to determine:

- Who should draft the stipulation.
- The issues and the terms agreed on.
- If stipulation is made during deposition, have stipulation placed on record.

Authority:
Fed R Civ P 30(b)(5); *Angell v. Shawmut Bank Conn. Nat'l Ass'n (MDNC 1994) 153 FRD 585, 590-591*

Discussion:
See *§ 22.08*

☐ Use precise language:

- Avoid ambiguous terms.

- ○ Include all terms agreed on.

Authority:
Rice v. Glad Hands, Inc. (5th Cir 1985) 750 F2d 434, 438

Discussion:
See *§ 22.08*

☐ Evaluate need for court order:

- ○ If extension of time interferes with discovery cutoff.
- ○ If extension of time interferes with hearing or trial.

Authority:
Fed R Civ P 29

Discussion:
See *§ 22.09*

☐ Review local rules to determine whether prior court order is required.

Authority:
CD Cal Civ LR 7-1; *ED Cal Gen LR 143(b)*; *ND Cal Civ LR 7-11*, *16-2(e)*; *SD Cal Civ LR 7.2(a)*

Discussion:
See *§ 22.09[3]*

☐ Review local rules to determine whether filing required.

Authority:
CD Cal Civ LR 7-1; *ED Cal Gen LR 144(a)*; *ND Cal Civ LR 7-12*; *SD Cal Civ LR 7.2(a)*

Discussion:
See *§ 22.07[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulations

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22.04 Options and Strategy.

Whether propounding or responding to discovery demands, parties frequently find it desirable, and sometimes necessary to alter the limitations provided in the discovery rules. For the propounding party, it may be necessary, for example, to expedite discovery, such as when discoverable material or witnesses may become unavailable before the lapse of the usual time limits. For the responding party, it may be necessary to extend the time that discovery is due, or limit the scope of discoverable materials, particularly when discovery demands are voluminous.

When faced with a situation where discovery rules would impair the ability to adequately prepare a case, the first option is to consider contacting opposing counsel to seek a stipulation to alter the discovery terms. Before contacting opposing counsel, consider how opposing counsel might similarly benefit from the sought modification. For example, there may be a third-party witness who is scheduled to leave the country prior to the Rule 26(f) planning meeting, before which no party may obtain discovery from any source [*Fed R Civ P 26(d), (f)*]. Because opposing counsel would likely benefit from the opportunity to obtain expedited discovery prior to the Rule 26(f) planning meeting, opposing counsel may stipulate to this modification. Similarly, if both parties have confidential documents that will be produced in the case, opposing counsel will likely be more willing to stipulate to a protective order preserving the documents' confidentiality.

When faced with a request from opposing counsel seeking a modification of the discovery rules, keep in mind that, even if the requested stipulation is sought only to accommodate opposing counsel's schedule, a time may come when you would benefit from a similar exercise of professional courtesy from opposing counsel. Refusal to stipulate to a reasonable modification may come back to haunt you. Moreover, courts expect counsel to agree to stipulations extending deadlines or modifying schedules, for instance, unless a party is being recalcitrant or if time is pressing.

Judge's Perspective:

In determining what position to take with respect to seeking or opposing a stipulation regarding discovery, keep in mind how that position will appear if agreement is not reached and the matter is referred to the court for resolution. Generally, courts do not look favorably on refusals to stipulate that are seemingly "knee-jerk" in nature and disassociated from any actual prejudice or inconvenience to the opposing party. At the same time, if a pattern emerges whereby a party regularly seeks delay or other relief from pre-set discovery limits, then a court is less likely to view a refusal to stipulate by the other party as being an unreasonable reaction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulations

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22.05 When to Use Discovery Stipulations.

Unless the court directs otherwise, parties may [*Fed R Civ P 29*]:

- Provide that depositions may be taken before any person, at any time or place, on any notice, and in any manner.

- Modify other procedures governing or limitations placed on discovery, unless the stipulation would interfere with a court-specified discovery cutoff date or scheduled hearing or trial.

Legal Topics:

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

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22.06 Discovery Stipulations Distinct From Disclosure Stipulations.

Fed R Civ P 29 governs only stipulations relating to discovery, and not stipulations relating to mandatory disclosure under *Fed R Civ P 26(a)*.

Cross Reference:

Discussion of stipulations relating to mandatory disclosure, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§§ 15.15 -15.17*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulations

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22.07 Requirements for Use of Discovery Stipulations.

22.07[1] Stipulation Generally Must Be in Writing. To modify discovery by agreement of the parties, you generally must prepare a formal written stipulation signed by all interested parties [*see Fed R Civ P 29*; *Tropix, Inc. v. Lyon & Lyon (D Mass 1996) 169 FRD 3, 3-4*].

22.07[2] Examples of Informal Writings Not Enforced by Court.

22.07[2][a] Confirming Letter Inadequate. A letter to opposing counsel that confirmed an oral agreement to limit the length of time to take depositions was not enforced by the court, because the agreement was not in the form of a stipulation [*Pescia v. Auburn Ford-Lincoln Mercury (MD Ala 1977) 177 FRD 509, 510*].

22.07[2][b] Oral Agreement Inadequate. An oral agreement between opposing counsel is not sufficient to extend time to respond to discovery [*Tropix, Inc. v. Lyon & Lyon (D Mass 1996) 169 FRD 3, 3-4*].

22.07[2][c] Unilateral Understanding Inadequate. A unilateral understanding is insufficient to create an enforceable stipulation. For example, a party who mistakenly believes that discovery is suspended pending response to a settlement offer is not justified in ignoring discovery deadlines or unilaterally granting extensions of time, even if the intention is to save time and expense [*Rogerson v. Xidex Corp. (D Mass 1986) 110 FRD 412, 413*].

22.07[3] Exceptions to Writing Requirement.

22.07[3][a] Oral Representation in Open Court. Courts may enforce oral stipulations made in open court [*Rice v. Glad Hands, Inc. (5th Cir 1985) 750 F2d 434, 437-438*].

22.07[3][b] Stipulations on Record During Deposition. An oral agreement made on the record at a deposition constitutes an enforceable stipulation [*Racine Educ. Ass'n v. Racine Unified Sch. Dist. (ED Wis 1979) 82 FRD 461, 462-463* ; *see also Fed R Civ P 30(b)(5)(C)* (requiring deposition officer to "set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters")].

22.07[3][c] Estoppel Doctrine May Prevent Unfair Advantage. Courts may enforce an oral discovery

agreement, just as with certain other contracts that otherwise must be in writing, if the failure to do so allows one party to take unfair advantage of another [*Oliver v. City of Shattuck (10th Cir 1946) 157 F2d 150, 153*].

22.07[4] Filing Stipulations Not Required by Federal Rules. The Federal Rules do not require that stipulations be filed with the court [*Fed R Civ P 5(d)(1), 29*]. Nevertheless, most local rules require that stipulations be filed [*see 22.07[5][a] -[d]*]. Filing a stipulation can alert the court to a change in scheduling, and becomes part of the court record.

22.07[5] LOCAL PRACTICE: Requirements for Stipulation.

22.07[5][a] LOCAL PRACTICE: CD Cal Requirements. Stipulations in writing must be filed in the proceeding and approved by the judge, except as authorized by statute or the Federal Rules of Civil Procedure. The Central District explicitly recognizes the enforceability of stipulations made in open court and those made on the record at a deposition [*CD Cal Civ LR 7-1*].

Many judges in the Central District have standing orders that address stipulations, either generally or as it pertains to certain types of stipulations. Some judges require that good cause for every stipulation be set forth in a separately filed declaration. Refer to the standing orders of the judges to be certain that no special requirements exist. The court may reject nonconforming stipulations.

22.07[5][b] LOCAL PRACTICE: ED Cal Requirements. The local rules for the Eastern District explicitly state that stipulations must be in writing and signed by all counsel or parties in propria persona. Exceptions to this rule include stipulations recorded in the transcript during the course of a deposition, those made in open court and noted by the courtroom deputy clerk in the minutes or by the court reporter in the notes, or those recited in a pretrial or other court order. Only when it is necessary to prevent manifest injustice will the court recognize stipulations not in conformity with these requirements [*ED Cal Gen LR 143(a)*]. In addition, stipulations must be filed [*see ED Cal Gen LR 144(a)*].

22.07[5][c] LOCAL PRACTICE: ND Cal Requirements. Every stipulation that requests judicial action must be in writing signed by all affected parties or their counsel. The local rules do not include a filing requirement [*ND Cal Civ LR 7-12*].

22.07[5][d] LOCAL PRACTICE: SD Cal Requirements. While the Southern District does not explicitly require that stipulations be filed, the local rules do state that stipulations are not binding unless approved by the court, or unless otherwise provided [*SD Cal Civ LR 7.2(a)*]. The stipulation must generally be filed in order to be approved.

22.07[6] Check Standing Orders of Judges. Because some judges, particularly in the Central District, have standing orders pertaining to stipulations, you should refer to any such standing orders prior to preparing a stipulation to make sure it conforms to the particular judge's requirements. Nonconforming stipulations may be rejected.

Legal Topics:

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

* The authors acknowledge the contribution of Teresa L. Zuber, a member of the California Bar, in preparing this chapter.

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CHAPTER 22 Regulation of Discovery by Stipulation or Motion *
II. USING STIPULATIONS TO MODIFY DISCOVERY PROCEDURES

3-22 MB Practice Guide: Fed Pretrial Civ Proc in CA 22.08

22.08 Consider Effects of Stipulation.

22.08[1] Stipulations Govern Only Litigation at Hand. If opposing parties are involved in more than one lawsuit against each other, a discovery stipulation applies only to the litigation for which the stipulation is prepared, unless the parties express an intent to be bound in other suits [*Melton v. McCormick (WDNY 1982) 94 FRD 344, 346*].

Cross Reference:

6 *Moore's Federal Practice, § 29.06[2]* (Matthew Bender 3d ed.).

22.08[2] Avoid Ambiguous Terms. Courts fully enforce the unambiguous terms expressed in the stipulation. When terms are ambiguous, the court examines the surrounding circumstances to determine the intent of the parties in entering the stipulation [*see Rice v. Glad Hands, Inc. (5th Cir 1985) 750 F2d 434, 438*].

Warning:

Inclusion of ambiguous terms can lead to additional time and expense for the court to resolve the intended meaning of the stipulation.

Cross Reference:

6 *Moore's Federal Practice, § 29.06[1], [4]* (Matthew Bender 3d ed.).

22.08[3] Expressly Include All Desired Terms. A stipulation binds parties only to the terms expressly included in the stipulation [*see Angell v. Shawmut Bank Conn. Nat'l Ass'n (MDNC 1994) 153 FRD 585, 590-591*]. Make sure the stipulation includes all terms by which the parties intend to be bound.

Cross Reference:

6 *Moore's Federal Practice, § 29.06[4]* (Matthew Bender 3d ed.).

Legal Topics:

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Civil ProcedureDiscoveryMethodsStipulations

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22.09 Prior Judicial Approval Required for Some Stipulations.

22.09[1] General Rule: No Approval Required. The Federal Rules generally do not require court approval for discovery stipulations [*Fed R Civ P 29*].

22.09[2] Exception: Stipulation Interferes With Court-Imposed Deadlines. Prior court approval is required for stipulations that extend time for responses to interrogatories, requests for production of documents, and requests for admission when the stipulated response date would interfere with dates for discovery cutoff, hearing of a motion, or trial [*Fed R Civ P 29(b)*].

Some judges in the Northern District make an exception to this exception, and allow parties to stipulate to extend the date for filing motions beyond the discovery cutoff and to conduct some discovery beyond the formal cutoff date. Check with the particular judge and the pretrial order to determine whether prior court approval is required.

22.09[3] LOCAL PRACTICE: Required Judicial Approval.

22.09[3][a] LOCAL PRACTICE: CD Cal Requirements. Stipulations are not effective in the Central District unless first approved by the judge, except as authorized by statute or the Federal Rules of Civil Procedure [*CD Cal Civ LR 7-1*].

A separate order must be electronically filed with any stipulation, requiring an order of the court. The pertinent elements requested in the stipulation must be set forth in the order [CD Cal Civ LR 52-4.1].

22.09[3][b] LOCAL PRACTICE: ED Cal Requirements. Stipulations generally are not effective in the Eastern District unless first approved by the court, except as otherwise provided in the local or federal rules [*ED Cal Gen LR 143(b)*].

However, an initial extension of time for no more than 28 days to respond to interrogatories, requests for admissions, or requests for production of documents may be filed without court approval if the stipulation is signed on behalf of all parties who have appeared in the action and are affected by the stipulation. The court must approve all other stipulations

that extend time. The court does not recognize any open extensions of time by stipulation [*ED Cal Gen LR 144(a)*].

Timing:

Try to obtain a stipulation from opposing counsel as soon as possible after you determine that you need an extension. Requests for court-approved extensions brought on the date a response is due are disfavored [*see ED Cal Gen LR 144(d)*].

Consider:

If opposing counsel seeks a reasonable request for an extension of time, the court likely will look at you with disfavor if you refuse it.

As with other stipulations, those that seek an order shortening time must be approved by the judge or magistrate judge on whose calendar the matter is to be heard before such stipulations will be given effect. Any proposed order shortening time must include blanks for the court to designate a time and date for the hearing [*ED Cal Gen LR 144(e)*].

With the written stipulation, you must submit the proposed order to the court. You need not, however, submit a separate document to contain the proposed order. The proposed order may consist of an endorsement on the stipulation with the words, "IT IS SO ORDERED," with spaces designated for the date and signature of the judge or magistrate judge [*ED Cal Gen LR 143(b)*].

22.09[3][c] LOCAL PRACTICE: ND Cal Requirements. Stipulations in the Northern District are generally effective without prior court approval, though local rules do permit the parties to submit the stipulation for approval [*ND Cal Civ LR 7-12*]. Any stipulation that would vary the date of a Case Management Conference is not effective, however, unless approved by the assigned judge before the date set for the conference [*ND Cal Civ LR 16-2(e)*].

When preparing a proposed form of order to submit with the stipulation, the local rules recommend that the order include an endorsement on the stipulation of the words, "PURSUANT TO STIPULATION, IT IS SO ORDERED," with spaces designated for the date and the signature of the judge [*ND Cal Civ LR 7-12*].

22.09[3][d] LOCAL PRACTICE: SD Cal Requirements. Stipulations are only binding on the court when approved by the judge [*SD Cal Civ LR 7.2(a)*].

When preparing the stipulation and order, you must include the heading "ORDER" at the close of the stipulation portion. Below this heading, you must include the "sum and substance" of the matters stipulated. If the stipulation provides for an extension of time, you must include the reason for the change of date, otherwise the stipulation may be rejected by the court. The document must close with blank lines for the date and the judge's signature, below which must appear the words "Judge of the District Court" [*SD Cal Civ LR 7.2(b)*].

If you cannot fit the order on the same page as the stipulation, the order page to be signed must contain a header or footer identifying the document name, case title and name of requesting party [*SD Cal Civ LR 7.2(c)*].

Cross Reference:

Form, see *§ 22.70*.

Legal Topics:

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

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22.10 Judicial Rejection of Stipulations.

22.10[1] Courts Have Authority to Reject Stipulations. Courts have the authority to reject stipulations, and parties may not enter stipulations if "the court orders otherwise" [*Fed R Civ P 29*].

22.10[2] Rejection Based on Change in Circumstances. The court may relieve a party from an improvident stipulation if enforcement of the stipulation would contravene the policy favoring full disclosure and interfere with the ability to dispose of a case on the merits [*see, e.g., In re Westinghouse Elec. Corp. (10th Cir 1978) 570 F2d 899, 902-903*].

Example--Changed Circumstances:

A stipulation that precluded additional questioning of a deponent was not enforced when important documents were produced after the parties' agreement, and enforcement of the stipulation would have closed the door to the development of potentially critical facts [*In re Westinghouse Elec. Corp. (10th Cir 1978) 570 F2d 899, 902-903*].

22.10[3] Rejection to Prevent Injustice. A court may relieve a party from an improvident stipulation to prevent injustice, such as, when the stipulation was entered into under a mistake of law [*Marshall v. Emersons Ltd. (4th Cir 1979) 593 F2d 565, 568-569*].

Cross Reference:

6 *Moore's Federal Practice, § 29.07* (Matthew Bender 3d ed.).

Legal Topics:

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

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22.11 Using Stipulations for General Discovery Matters.

22.11[1] Parties May Stipulate to Permit Discovery Before Rule 26(f) Planning Meeting.

22.11[1][a] General Rule: No Discovery Before Rule 26(f) Meeting. Normally, except in certain circumstances, parties may not seek discovery until after they have conferred as required under Rule 26(f) [*Fed R Civ P 26(d)*, *(f)*].

Cross Reference:

Discussion of the requirements of the discovery planning meeting required under *Fed R Civ P 26(f)*, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§§ 15.03 -15.14*.

22.11[1][b] Availability of Stipulation. Parties may agree by written stipulation to permit discovery prior to the *Fed R Civ P 26(f)* discovery planning meeting [*Fed R Civ P 26(d)*].

22.11[2] Parties May Stipulate to Alter Time for Response to Discovery Request. The parties may stipulate to increase or decrease the time required to respond to discovery requests, including the 30-day period normally required to respond to requests for production, interrogatories, and requests for admission [*Fed R Civ P 29*, *33(b)(2)*, *34(b)(2)(A)*, *36(a)(3)*]. Courts recognize that discovery responses are rarely completed within the 30-day period and expect that this type of modification be accommodated by stipulation [*see Jayne H. Lee, Inc. v. Flagstaff Indus. Corp. (D Md 1997) 173 FRD 651, 653-654*].

Warning:

Particularly in the Northern District, make sure that any extension of time does not interfere with any dates set by the court for completion of discovery, the hearing of a motion, the Case Management Conference or trial. If the extension would interfere with any of those dates, court approval is required [*Fed R Civ P 29*; *ND Cal Civ LR 16-2(e)*]. The interference with court dates is of special concern to practice in the Northern District, because prior court approval is required in any event for stipulations in the Central District, Eastern District and Southern District [*CD Cal Civ LR 7-1*; *ED Cal Gen LR 143(b)*; *SD Cal Civ LR 7.2(a)*].

Cross References:

Form, see *22.68*. Discussion of prior court approval under local rules, see *§§ 22.09[3][a] -[d]*.

22.11[3] Parties May Stipulate to Exceed Permitted Number of Interrogatories. Parties may stipulate to allow more than 25 interrogatories for each party, the maximum number allowed under the Federal Rules [*Fed R Civ P 29*, *33(a)(1)*].

22.11[4] LOCAL PRACTICE: Stipulation Regarding Custody of Discovery Documents.

22.11[4][a] LOCAL PRACTICE: CD Cal Requirements. The party propounding interrogatories, requests for production of documents, and requests for admission holds the originals pending actual use or court-ordered production [*CD Cal Civ LR 33-3*, *34-3*, *36-3*]. Local rules include no provision for stipulation to alter the custodian for these types of discovery.

In contrast, with respect to depositions, the original transcript of the deposition is to be kept by the attorney who noticed the deposition, unless otherwise stipulated by the parties on the record at the deposition [*CD Cal Civ LR 32-2*].

22.11[4][b] LOCAL PRACTICE: ND Cal Requirements. In the Northern District, the party propounding interrogatories, requests for production of documents or requests for admission must retain the original of the discovery request and the original response [*ND Cal Civ LR 26-1*]. Parties are encouraged, however, to stipulate to sharing diskettes or other computer-readable copies of discovery requests and responses to save costs and facilitate expeditious pretrial discovery [*ND Cal Civ LR 26-1* (commentary)].

Cross Reference:

Discussion regarding the appropriate custodians of specific types of discovery documents, see Ch. 23, Methods of Discovery, *§§ 23.135 -23.148*.

22.11[5] Stipulation Concerning Conduct of Physical or Mental Examinations. Parties may stipulate to alter the requirements for taking a physical or mental examination otherwise required by *Fed R Civ P 35* [*Fed R Civ P 29*, *35(a)*].

If the stipulation pertains only to the taking of the exam itself, Rule 35(b)'s requirements regarding the examiner's report will still apply [*Fed R Civ P 35(b)*]. Parties wishing to alter these requirements must include terms expressly altering the requirements in the stipulation [*see Fed R Civ P 35(b)*].

Cross Reference:

Discussion regarding requirements for taking physical or mental examinations, see Ch. 23, Methods of Discovery, *§§ 23.189 -23.216*.

22.11[6] Parties May Stipulate to Vary Subpoena Procedures. Parties may stipulate to alter the terms of a subpoena for discovery of a non-party witness [*Fed R Civ P 29*, *45*]. Stipulations may modify, for example, methods of taking a deposition [*see Westmoreland v. CBS, Inc. (DC Cir 1985) 770 F2d 1168, 1175*], and reimbursement of costs [*see Angell v. Shawmut Bank Conn. Nat'l Ass'n (MDNC 1994) 153 FRD 585, 589-590*].

Cross Reference:

Discussion regarding discovery on non-party discovery, see Ch. 23, Methods of Discovery, *§§ 23.259 -23.285*.

22.11[7] Parties May Stipulate to Limit Discovery in Future Litigation. At least one court has enforced stipulations limiting discovery in future litigation [*see Elliott-McGowan Prods. v. Republic Prods., Inc. (SDNY 1956)*

145 F Supp 48, 50]. Because of the potential impact on the client in future litigation, be sure the client understands and consents to such terms.

22.11[8] Parties May Stipulate to Expedite Discovery. When both parties recognize a need to expedite discovery, they should draft a stipulation setting forth the scope, method, and timing of discovery. The stipulation should be designed to maximize the efficiency of the discovery process, minimize discovery disputes, and facilitate preparation for the hearing or trial. The stipulation may include:

- Specification of the number of depositions to be taken [*Fed R Civ P 26(f)*, *29*, *30(a)*].
- Disclosure of the identity of each intended deponent [*Fed R Civ P 26(a)*].
- Use of inexpensive discovery procedures, such as telephone depositions [*Fed R Civ P 30(b)(4)*].

If the parties agree to expedited discovery, the stipulation should be incorporated into the written report required by Rule 26(f) [*see Fed R Civ P 26(f)*].

Cross References:

Discussion regarding the written report required by Rule 26(f), see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§ 15.14*. Discussion of oral depositions, see Ch. 23, Methods of Discovery, *§§ 23.19 -23.75*.

22.11[9] Parties May Stipulate to Preserve Confidentiality. Parties may enter stipulations to limit the dissemination of sensitive, proprietary, or confidential information. For example, parties may stipulate that discovery be limited to certain matters, that discovery be conducted with no one present except persons designated by the court, that a deposition be sealed and opened only by court order, and that secret or confidential matters not be revealed, or be revealed only in certain designated ways [*Fed R Civ P 26(c)(1)(D)-(G)*, *29*].

Cross Reference:

Discussion regarding protective orders to maintain confidential information, see *§ 22.45*.

22.11[10] Parties May Stipulate to Obtain Discovery Abroad. Parties may stipulate to the terms of obtaining discovery abroad, as long as those terms do not violate the law of the country in which the discovery is sought. For example, parties have stipulated to use commissions to require the production of documents located in foreign countries as provided in the Hague Evidence Convention [*see Compagnie Francaise d'Assurance v. Phillips Petroleum Co. (SDNY 1984) 105 FRD 16, 22-23*].

Cross Reference:

Discussion regarding obtaining discovery abroad, see Ch. 23, Methods of Discovery, *§ 23.45*.

22.11[11] Stipulations Regarding Discovery for Use in Foreign Courts. Parties may stipulate to matters relating to obtaining and using domestic discovery for use in foreign proceedings. For example, parties have stipulated to stay discovery pending appeal of a subpoena issued under *28 USC § 1782*, the statute which permits discovery of individuals in the United States for use in a foreign or international tribunal [*In re Gianoli Aldunate (2d Cir 1993) 3 F3d 54, 57* , *cert. denied sub nom. Fonden v. Aldunate, 510 US 965 (1993)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulations

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22.12 Parties May Stipulate to Modify Deposition Procedures.

22.12[1] Parties May Stipulate to Modify Procedural Aspects of Depositions. Parties may stipulate to modify procedural aspects of both oral and written depositions. Unless otherwise directed by the court, parties may stipulate that depositions be taken [*Fed R Civ P 29(a)*]:

- Before any person.
- At any time or place.
- On any notice.
- In any manner.

Cross Reference:

Discussion regarding procedural rules for taking oral and written depositions, see Ch. 23, Methods of Discovery, *§§ 23.19 -23.110*.

22.12[2] Parties May Stipulate to Exceed Limit on Number of Depositions. Parties may stipulate to take more than ten depositions, the maximum number of depositions permitted for both oral and written depositions under the Federal Rules [*Fed R Civ P 29*, *30(a)(2)(A)(i)*, *31(a)(2)(A)(i)*]. Absent a stipulation, parties must seek leave of court to take additional depositions [*Fed R Civ P 30(a)(2)(A)*, *31(a)(2)(A)*].

Cross References:

Further discussion of the number of depositions a party may take, see Ch. 23, Methods of Discovery, *§ 23.21[2]*.

22.12[3] Parties May Stipulate to Take Deposition of Previously Deposed Witness. If a party determines it is necessary to depose a witness whose deposition has already been taken, the party must obtain a written stipulation with

the other parties to avoid the need to obtain leave of court [*Fed R Civ P 30(a)(2)(A)(ii)*, *31(a)(2)(A)(ii)*].

Cross Reference:

Further discussion on deposing previously deposed witnesses, see Ch. 23, Methods of Discovery, *§ 23.25*.

22.12[4] Parties May Stipulate to Take Early Deposition.

22.12[4][a] General Rule Against Depositions Before Rule 26(f) Planning Meeting. Absent a stipulation or court order, depositions may not be taken prior to the time the parties have met and conferred as required by *Fed R Civ P 26(f)* [*Fed R Civ P 26(d)*].

Cross Reference:

Discussion of Rule 26(f), see Ch. 15, Rule 26(f) Conference and Initial Disclosures, see *§§ 15.03*, *15.04*.

22.12[4][b] Parties May Stipulate to Early Deposition. Parties may stipulate to take a deposition before the *Fed R Civ P 26(f)* meeting [*Fed R Civ P 26(d)(1)*, *30(a)(2)(A)(iii)*, *31(a)(2)(A)(iii)*].

22.12[5] Parties May Stipulate to Waive or Modify Notice Requirements. Parties may stipulate to alter or waive notice requirements for oral or written depositions [*Fed R Civ P 29(a)*, *30(b)(1)*, *31(a)(3)*].

Cross Reference:

Discussion of notice requirements for depositions, see Ch. 23, Methods of Discovery, *§§ 23.27 -23.33*.

22.12[6] Stipulations May Allow Deposition Before Person Other Than Officer. A deposition taken in the United States ordinarily must be taken before an officer authorized to administer oaths or appointed by the court [*Fed R Civ P 28*, *30(b)(5)*, *31(b)*]. The parties may stipulate to have the deposition taken "before any person" [*Fed R Civ P 29(a)*].

Cross References:

Discussion regarding the qualifications of an officer and who may take depositions, see *Ch. 23, Methods of Discovery, 23.43*, *23.44*. Discussion regarding qualifications of persons taking depositions outside the United States, see Ch. 23, Methods of Discovery, *§ 23.45*.

22.12[7] Parties May Stipulate to Record and Take Deposition by Other Than Stenographic Means.

22.12[7][a] Modes of Recording. Unless otherwise ordered by the court, the rules provide that depositions may be recorded by sound, sound-and-visual, or by stenographic means, in addition to other methods designated by any party [*Fed R Civ P 30(b)(3)*]. The parties, however, may stipulate that a deposition be taken by telephone or other remote electronic means [*Fed R Civ P 29(a)*, *30(b)(4)*].

22.12[7][b] Factors Affecting Choice of Recording Method. For cases in which the dollar value of the case is low, or where it would be burdensome for a witness to appear at a deposition for reasons such as distance or physical disabilities, parties may decide that telephonic or other electronic methods, such as instant messaging, would be appropriate. A stipulation would be required under these circumstances [*Fed R Civ P 30(b)(4)*]. When the demeanor of the witness is important, sound-and-visual recording would be valuable. No stipulation is required for this type of recording, as it is provided for in the rules [*Fed R Civ P 30(b)(3)*].

Cross Reference:

Discussion regarding the manner of recording depositions, see Ch. 23, Methods of Discovery, *§§ 23.34*,

23.46, *23.63*.

22.12[8] Parties May Stipulate to Shift Cost of Deposition. Normally, the party taking the deposition pays for the cost of the recording of the deposition [*see Fed R Civ P 30(b)(3)(B)*]. The parties may, however, stipulate to shift or share those costs [*Fed R Civ P 29*].

In the Southern District, the party taking the deposition assumes the transcription costs, unless, upon the parties' agreement, the court orders a waiver of transcription or a different apportionment of cost [*SD Cal Civ LR 30.1*].

22.12[9] Parties May Stipulate to Matters Regarding Documents. If documents are used as exhibits or produced for identification, the parties may stipulate to foundational issues, such as [*see Fed R Civ P 30(f)*; *Fed R Evid 803(6)*, *901*, *1003*]:

- That a document is authentic.
- That a document was prepared by or under the direction of a witness.
- That a document was kept in the regular course of business of a witness.
- That, following the deposition, a document will be retained by a certain party.
- That a document will be kept available for future inspection.

Cross Reference:

Discussion of the procedures for authentication of documents, see Ch. 23, Methods of Discovery, *§ 23.184*.

22.12[10] Parties May Stipulate to Limit Scope of Examination. Parties may stipulate to limit the scope of the examination [*see Fed R Civ P 29* (parties may stipulate to take deposition "in any manner"); *see also Fed R Civ P 26(c)(1)(D)* (party may seek protective order to limit scope of examination)].

Example:

When personal jurisdiction is at issue, the parties may stipulate to limit the scope of a deposition to matters relating to personal jurisdiction without prejudice to the taking of another deposition of the defendant on the merits of the case [*see Fed R Civ P 29*].

22.12[11] Parties May Stipulate to Modify Duration of Deposition. While the rules limit the duration of a deposition to one day of seven hours, parties may stipulate to extend this time [*Fed R Civ P 30(d)(1)*]. In addition, parties may stipulate to divide the seven-hour period over more than one day [*see Fed R Civ P 30(d)(1)*].

In the Eastern District, if counsel knows early on that he or she will need more than one day of seven hours to depose a particular witness, counsel should address the matter in the Joint Status Report and at the status conference. If counsel learns later that more time is needed, counsel should first try to obtain a stipulation with opposing counsel before filing a motion dealing with discovery matters [*see ED Cal Civ LR 240(a)(8)*, *(b)*; *ED Cal Civ LR 251(b)*].

Cross References:

Discussion regarding the duration of depositions, see Ch. 23, Methods of Discovery, *§ 23.21*.

22.12[12] Parties May Stipulate to Waive Formalities. Parties may stipulate to waive formalities regarding a deposition, such as notice and signature [*Fed R Civ P 29*, *30*, *31*].

22.12[13] Parties May Stipulate to Alter Requirements for Retention of Deposition Notes.

22.12[13][a] General Rule Regarding Custody of Deposition. Under the Federal Rules, the deposition officer retains the stenographic notes or the copy of the recording of a deposition. The parties may, however, stipulate otherwise [*Fed R Civ P 30(f)(3)*].

22.12[13][b] LOCAL PRACTICE: CD Cal Requirements. The Central District requires that the attorney noticing the deposition maintain control of the original deposition until final disposition of the case or until called on to lodge the original deposition with the court, unless otherwise stipulated to on the record at the deposition [*CD Cal Civ LR 32-2*].

22.12[13][c] LOCAL PRACTICE: ED Cal Requirements. The Eastern District requires that "[c]ounsel noticing a deposition is responsible to obtain the original deposition transcript or audio or video tape recording from the deposition reporter ... and to retain it under conditions suitable to protect it from loss, destruction or tampering" until it is filed with the clerk or until one year after final disposition of the case, whichever is earlier [*ED Cal Civ LR 250.1(b)*]. Although the local rules do not address stipulations, presumably, the parties may stipulate for other custody and retention arrangements under *Fed R Civ P 30(f)(3)*.

Cross Reference:

Discussion of the custody of deposition documents, see Ch. 23, Methods of Discovery, *§§ 23.62*, *23.63*.

22.12[14] Parties May Stipulate to Use of Unsigned Transcript. Prior to completion of a deposition, a deponent or party may request to review the transcript or recording within 30 days of being notified that the transcript or recording is available. If the deponent wishes to change any testimony, the deponent must sign a statement reciting the changes and the reasons for making them [*Fed R Civ P 30(e)*]. The parties may stipulate to allow the use of the unsigned transcript without prejudice to the deponent's right to correct and sign the statement regarding changes at a later time [*see Fed R Civ P 29*]. For example, if the deposition testimony contains information relevant to a fact material to a pending hearing, the parties may stipulate to allow use of the deposition testimony at the hearing rather than file a motion to continue the hearing until after the 30 days has lapsed [*see Fed R Civ P 29*].

Cross Reference:

Discussion regarding review of deposition testimony, see Ch. 23, Methods of Discovery, *§ 23.61*.

22.12[15] Parties May Stipulate to Modify Rules on Waiving and Reserving Objections.

22.12[15][a] General Rules. A party present at a deposition need not object to the competency of a witness or to the competency, relevancy or materiality of testimony, unless the ground of the objection could be obviated or removed if raised at the deposition [*Fed R Civ P 32(d)(3)(A)*]. In the latter case, however, a party who fails to raise the objection at the deposition waives the objection completely. In particular, objections pertaining to the manner of taking the deposition, the form of the questions or answers, the oath or affirmation, the conduct of parties, and other errors that might be obviated, removed, or cured, are waived unless raised at the deposition [*Fed R Civ P 32(d)(3)(B)*].

The parties may, however, stipulate to alter these rules [*Fed R Civ P 29(a)*]. These stipulations are typically done on the record just prior to the questioning of the witness.

22.12[15][b] Reserving Objections Except As to Form. Frequently, counsel who participate in a deposition stipulate that all objections are reserved, except those "as to form."

Warning:

Though a stipulation reserving objections except as to form resembles *Fed R Civ P 32(d)(3)*, it is not the

same. A question that might be correct as to form may nonetheless be objectionable for being asserted without a proper foundation. If this stipulation is in place, opposing counsel may refrain from objecting to the question at the deposition, but later raise the objection of lack of foundation at trial. The response to the deposition question may thereby be excluded at trial. Under Rule 32(d)(3), this objection would have been waived if not raised at the deposition, because counsel taking the deposition could have cured the defect by laying the proper foundation at the deposition. Absent the stipulation, the response would therefore be admissible at trial. Counsel taking the deposition should consider the risks of entering this type of stipulation before agreeing to it.

22.12[15][c] Reserving All Objections. Counsel may stipulate to reserve all objections, including those as to form [*Los Angeles Trust & Deed Mortg. Exch. v. SEC (9th Cir 1959) 264 F2d 199, 212, 213*].

Warning:

Consider the potential for substantial parts of the deposition to be excluded at trial pursuant to a stipulation reserving all objections. In addition, objections are an important tool for ensuring that your client understands the questions he or she is answering and for controlling an opposing party's improper questions.

22.12[15][d] Agreeing to Blanket Stipulations. In some areas local practitioners develop a set of stipulations (usually concerning how long the court reporter will have to complete the transcript, how long the deponent will have to review the transcript, and who will maintain the original transcript) to which they commonly stipulate. These sets of stipulations may be commonly referred to as the "usual stipulations." Nevertheless, to avoid disputes, counsel should always insist that the exact stipulations be articulated on the record to avoid any uncertainty and to ensure against stipulating to undesirable terms.

22.12[16] Parties May Stipulate to Matters Pertaining to Taking Depositions Abroad. As parties may stipulate to take the deposition "at any place," parties may stipulate to take a deposition in a foreign country [*Fed R Civ P 29(a)*; *In re Anschuetz & Co. (5th Cir 1987) 754 F2d 602, 609 , vacated on other grounds sub nom. Anschuetz & Co. v. Mississippi River Bridge Auth., 483 US 1002 (1987)*]. However, the terms of the stipulation should not contravene any laws of the country in which the deposition is taken [*Popular Imps., Inc. v. Wong's Int'l Trading, Inc. (EDNY 1996) 166 FRD 276, 280 n5*]. Some countries, such as Japan and Switzerland, have strict laws severely limiting or precluding depositions.

If the deposition is of a non-party witness, parties otherwise inclined to stipulate to the terms of the deposition, must consider the provisions of the Hague Convention, if the deponent resides within the jurisdiction of one of the signatory countries [*see Graco v. Kremlin, Inc. (ND Ill 1984) 101 FRD 503, 519-520*].

Stipulations have been used for the following procedures:

- To invoke a foreign commission to take depositions abroad [*In re Bankers Trust Co. (3d Cir 1984) 752 F2d 874, 878* ; *but see In re Bankers Trust Co. (3d Cir 1985) 775 F2d 545, 547-549* (rejecting terms of stipulation to allow use of previous deposition where lower court had ordered second deposition must be taken by commission)].

- To agree on procedures for taking depositions in foreign countries, including procedures that circumvent the requirements of *Fed R Civ P 28(b)* regarding who may take the deposition [*Popular Imps., Inc. v. Wong's Int'l Trading, Inc. (EDNY 1996) 166 FRD 276, 280*].

- To decide where deposition will be taken [*Pillar Corp. v. Enercon Indus. Corp. (ED Wisc 1988) 694 F Supp 1353, 1363*].

Cross References:

Discussion of the procedures for taking depositions abroad, see Ch. 23, Methods of Discovery, *§§ 23.45*, *23.79*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMethodsWritten Depositions

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22.13 Deposition Stipulations Must Be Placed on Record.

The deposition officer must state on the record any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or stipulations concerning other pertinent matters [*Fed R Civ P 30(b)(5)(C)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulations

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22.14 CHECKLISTS: Bringing a Noticed Motion to Modify Discovery Procedures.

22.14[1] Preparing Motion.

☐ Determine whether proposed modification would interfere with court-imposed deadlines.

Authority:
Fed R Civ P 29; *ND Cal Civ LR 26-2*

Discussion:
See *§ 22.09[2]*

☐ Consult with opposing party to attempt to resolve differences.

Authority:
Fed R Civ P 26(c), *37(a)(3)(B)*, *(d)*

Discussion:
See *§ 22.17[3]*

☐ Consider whether joint motion is appropriate.

Discussion:
See *§ 22.17[4]*

☐ Carefully review district court rules and any standing orders issued by the assigned judge for any local prerequisites to bringing discovery motion (e.g., meet and confer requirements).

Authority:
CD Cal Civ LR 37-2; *ED Cal Civ LR 251*; *ND Cal Civ LR 26-2*; *SD Cal Civ LR 26.1*

Discussion:
See *§ 22.17[5]*

☐ Determine whether to seek order assessing costs of discovery motion on opposing party.

Authority:
Fed R Civ P 26(c), *(g)*, *30(d)(3)(C)*, *30(g)*, *36(a)*, *37(a)(5)*, *(c)(2)*, *(d)*, *(f)*

Discussion:
See *§ 22.33*

☐ Prepare notice of motion and supporting documents.

Authority:
Fed R Civ P 7(b), *37(a)*; but see *ED Cal Civ LR 251(f)*

Discussion:
See *§ 22.17*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

22.14[2] Preparing Opposition to Motion.

☐ Review local rules to determine whether joint stipulation must be prepared and whether supplemental briefing is allowed.

Authority:
CD Cal Civ LR 37-2, *37-2.3*; *ED Cal Civ LR 251(b)*, *(c)*

Discussion:
See *§ 22.17[4]*

☐ Determine extent of issues to raise in opposition to preserve them on appeal.

Authority:
Diapulse Corp. of Am. v. Curtis Publ'g Co. (2d Cir 1967) 374 F2d 442, 445

Discussion:
See *§ 22.18[2]*

☐ Determine whether to request protective order if motion seeks to compel discovery.

Authority:
Fed R Civ P 37(a)(5)(B)

Discussion:

See *§ 22.31[2]*

☐ Determine whether to seek order assessing cost of opposing motion on moving party.

Authority:
Fed R Civ P 26(c), (g), 30(d)(3)(C), 30(g), 36(a), 37(a)(5), (c)(2), (d), (f)

Discussion:
See *§ 22.33*

☐ Prepare opposition and supporting documents.

Authority:
Fed R Civ P 7(b), 37(a)

Discussion:
See *§ 22.18*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

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22.15 Options and Strategy.

If a party cannot obtain a modification to the discovery rules by stipulation, the party may move the court to order such modification. A party should generally resort to motion practice to regulate discovery only when opposing counsel refuses to stipulate to the sought modification or when required by the rules. Some modifications may only be made pursuant to court order, however.

Example:

A stipulation is insufficient to modify discovery when the proposed modification would interfere with discovery cutoffs, hearing, or trial dates [*see, e.g., Fed R Civ P 29*; *but see ND Cal Civ LR 26-2*].

Determine at the outset whether informal procedures are available, through the judge, to deal with discovery disputes without *Fed R Civ P 37* motion practice. Use of the informal procedures is preferable for anything but the most egregious offenses. In fact, it is generally unrealistic to expect a formal Rule 37 motion will yield a result justifying the cost and time, unless the adversary's conduct is inexcusable, or a true obstacle to trial preparation.

A party served with an interrogatory or document request that it considers ambiguous or unclear should contact the propounding attorney for clarification, rather than simply objecting. Similarly, a party served with an interrogatory or document request that it considers overly broad, partially irrelevant, or unduly burdensome should contact the propounding attorney in an attempt to reach an agreement reducing the scope of the request. Any agreement clarifying a discovery request should be reduced to writing. Furthermore, if there is a meaningful chance that the response to an interrogatory might be used at trial, the clarification should be set forth in a revised interrogatory.

If an informal request for clarification is rejected, the responding party should note that fact in its responses, set forth in good faith its understanding of the unclear terms, and then, on the basis of that understanding, provide answers. Similarly, if an informal request to narrow the scope of a document request is rejected, the responding party should note that fact, identify the scope of a request that it would consider appropriate, and then provide the documents responsive to that narrowed request.

Before filing a motion to modify discovery, make sure that the requested modification is reasonable under the circumstances. Courts are empowered to impose attorneys' fees on the moving party when the motion is not justified [

see, e.g., Fed R Civ P 26(c)(1)(H), 37(a)(5)(B)]. Similarly, when opposing counsel seeks a modification of a discovery procedure, consider that courts disfavor unreasonable refusals to accommodate requests, and that opposing a reasonable request could result in the imposition of attorneys' fees for the cost of bringing the motion [*see, e.g., Fed R Civ P 26(c), 37(a)(5)(A)*].

Also consider whether the sought modification is sufficiently important to warrant the time and expense of litigating the issue. For example, if an extension of time is sought to complete discovery responses, the time used to prepare the discovery papers may well be better spent preparing the responses themselves. The non-moving party should also consider whether the time and expense of opposing the motion is worth the cost to the client. Both parties should consider whether the dispute may be perceived by the court as trivial, and if so, it is necessary to seek judicial resolution nonetheless.

When preparing an opposition to a discovery motion, the issues of delay and expense are always present. The purpose of the federal rules is to "secure the just, speedy, and inexpensive determination of every action and proceeding" [*Fed R Civ P 1*]. Every discovery motion involves delay in the discovery process and expenses to the parties to some extent, and in this respect, runs counter to two of the purposes of the federal rules. These issues should be raised in the opposition along with the specific refutations pertaining to the issues raised in the particular motion.

Finally, the party seeking limits on discovery bears the burden of showing why discovery should be disallowed [*Cable & Computer Tech., Inc. v. Lockheed Sanders, Inc. (CD Cal 1997) 175 FRD 646, 650*]. This party may be the moving party, such as when the motion seeks a protective order, or the non-moving party, such as when the motion seeks to compel discovery.

Judge's Perspective:

Litigants should not lose sight of the history of discovery disputes already brought to the court's attention. For example, if repeated discovery motions have been made, the moving party will want to take into account the court's prior rulings and opponent's attitude to each party's respective discovery positions before bringing another motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

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22.16 When to Use Motions to Regulate Discovery.

Circumstances in which a party can use pretrial motion practice to modify discovery procedures include the following:

- To alter the number of depositions and interrogatories, the length of depositions, the number of requests for admission, or the frequency or extent of use of the discovery methods set forth in the federal or local rules [*see Fed R Civ P 26(b)(2)*].

- To expand discovery to matters beyond relevance to the parties' claims or defenses to any matter relevant to the subject matter involved in the lawsuit [*see Fed R Civ P 26(b)(1)*].

- To determine whether material sought is privileged or should otherwise be protected from disclosure [*see Fed R Civ P 26(c)*].

- To obtain discovery from a recalcitrant party or witness [*see Fed R Civ P 37*].

- When the Federal Rules or local district rules require a party to obtain a court order [*see, e.g., Fed R Civ P 36(b)* (requiring motion to permit party to withdraw or amend admission served in response to request for admission)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective Orders

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22.17 Bringing Discovery Motions.

22.17[1] General Rules for Discovery Motions. Although *Fed R Civ P 7(b)*, the Federal Rule of Civil Procedure generally addressing motions, does not distinguish between discovery motions and other types of motions, the Federal Rules addressing discovery (Rules 26- 37) impose additional procedural requirements for certain types of discovery motions, such as motions to compel and motions for protective orders [*see, e.g., Fed R Civ P 26(c)* (requiring good-faith attempt to resolve dispute before bringing motion for protective order); *see also Fed R Civ P 37* (requirements for motions to compel and motions for discovery sanctions)]. In addition, local district court rules and individual judge's rules may impose additional or different procedural requirements for discovery motions [*see, e.g., ED Cal Civ LR 251(f)* (general notice requirement for motions does not apply to discovery motions)].

Judge's Perspective:

Individual judges are particularly likely to have standing orders on how to bring discovery motions. Some judges have a three-stage approach: one method for emergencies, a second method for accelerated timing, and a third method consistent with a general motion calendar. Other judges may require a letter brief regarding the discovery issue before agreeing to hear the motion. Therefore, it is imperative to review standing orders, as well as local rules, for any particular court.

Cross Reference:

Discussion of the general procedure for bringing noticed pretrial motions, see Ch. 26, Pretrial Motion Practice, *§§ 26.12 -26.36*.

22.17[2] Motion Must Be Filed in Appropriate Court. Discovery motions are typically brought in the court where the action is pending [*see Fed R Civ P 26(c), 37(a)(1)*].

Exceptions:

A *Fed R Civ P 37(a)* motion to compel discovery from a nonparty must be brought in the court in the district where the discovery would be taken [*Fed R Civ P 37(a)(2)*].

A Rule 26(c) motion for protective order relating to a deposition must be brought in the court in the

district where the deposition is to be taken [*Fed R Civ P 26(c)*], although there are circumstances in which the court in the district where the action is pending has jurisdiction [*see Platypus Wear v. K.D. Co. (SD Cal 1995) 905 F Supp 808, 810* ; *see also Fed R Civ P 30(d)(3)(A)* (when examination is being conducted in bad faith, court where action is pending or court where deposition is being taken may order examination terminated)].

22.17[3] Certification Regarding Good-Faith Attempt to Confer Is Mandatory. The Federal Rules require that discovery motions for protective orders, motions to compel and motions for sanctions be accompanied by a certification that the moving party has in good faith conferred or attempted to confer with the opposing party [*Fed R Civ P 26(c)*, *37(a)(1)*, *(d)(1)(B)*]. Some jurisdictions require that the parties confer in person under certain circumstances [*see CD Cal Civ LR 37-1*; *SD Cal Civ LR 26.1(a)*]. Review local rules and individual judge's standing orders to determine whether to follow additional meet and confer requirements.

Cross Reference:

Discussion of meet and confer requirements for each of the district courts in California, see Ch. 25, Motions to Compel and Discovery Sanctions, *§ 25.05*.

22.17[4] Joint Motion Is Possible. Adverse parties may join together to bring a discovery motion, or may stipulate regarding discovery [*see, e.g., Owner-Operator Indep. Driver's Ass'n v. Swift Transp. Co. (D Ariz 2003) 288 F Supp2d 1033, 1040* (joint motion to vacate discovery deadlines pending scheduling conference); Maxwell v. Angel-Etts of Cal. (CD Cal 2001) 2001 US Dist LEXIS 25418, at *7 (joint motion to extend discovery motion deadline)].

Strategic Point:

If the discovery cutoff date set in the court's scheduling order appears impracticable, the parties may submit a joint motion to extend the cutoff, or more commonly, the parties may prepare a proposed stipulation to the cutoff date, with a signature line for the court. If the parties agree on the matter, a stipulation is an easier and more efficient means of obtaining the relief, and may be preferred by the court. The parties should call the court clerk to determine whether the court requires a motion or whether a stipulation is adequate.

Cross Reference:

Form of joint motion to extend the discovery cutoff, see *§ 22.72*.

22.17[5] LOCAL PRACTICE: Requirements for Bringing Discovery Motions.

22.17[5][a] LOCAL PRACTICE: CD Cal Requirements. No motion on a discovery matter may be filed in the Central District unless the parties have first conferred to resolve the issue [*CD Cal Civ LR 37-1*].

If unable to resolve their differences, the parties must prepare a joint stipulation setting forth the issues in dispute and each party's contentions, and points and authorities [*CD Cal Civ LR 37-2*]. Note that a joint stipulation can be time-consuming to prepare, so make sure to leave enough time for all parties to make their contributions and review the document.

After the joint stipulation is filed each party may file a supplemental memorandum of law, of no more than five pages, not later than 14 days before the hearing on the motion [*CD Cal Civ LR 37-2.3*].

If the non-moving party refuses to cooperate in preparing the joint stipulation, the moving party must file an affidavit

establishing the failure to cooperate for the court to consider the motion [*CD Cal Civ LR 37-2.4*]. Failure to cooperate may result in the imposition of sanctions [*CD Cal Civ LR 37-4*].

Cross Reference:

Discussion regarding additional requirements in the Central District, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.05[1]*, *[2]*.

22.17[5][b] LOCAL PRACTICE: ED Cal Requirements. Notice provisions normally applicable to civil motion practice [*see ED Cal Civ LR 230*] do not apply to motions and hearings on discovery matters [*ED Cal Civ LR 251(f)*].

Except for discovery motions brought due to a total failure to respond to discovery or for discovery sanctions, all discovery motions, including those to modify discovery limitations for protective orders may be initiated by the filing of a notice of motion and motion, scheduling the hearing at least 21 days from the filing date. No other documents need be filed at that time [*ED Cal Civ LR 251(a)*].

If, after satisfying the meet and confer requirements, the parties cannot resolve their differences, they must prepare a joint statement re discovery disagreement [*ED Cal Civ LR 251(b)*, *(c)*]. If opposing counsel refuses to cooperate in preparation of this document, counsel for the moving party may file and serve an affidavit so stating, along with that party's contentions with regard to the issues [*ED Cal Civ LR 251(d)*].

Cross Reference:

Discussion of additional requirements in the Eastern District, see Ch. 25, Motions to Compel and Discovery Sanctions, *§ 25.05[3]*.

22.17[5][c] LOCAL PRACTICE: ND Cal Requirements. In the Northern District, the court will not entertain a request or motion to resolve a discovery dispute unless the parties have met and conferred in an attempt to resolve the disputed issues. If a dispute arises during a discovery event, the parties must attempt to resolve the matter without judicial intervention, but if this fails, counsel may contact the chambers of the assigned judge to ask if the judge is available to address the problem through a telephone conference [*ND Cal Civ LR 37-1*; *see Fed R Civ P 37*]. The Northern District prescribes the format and contents of a motion to compel further responses to a discovery request [*see ND Cal Civ LR 37-2*].

The Northern District clarifies that discovery requests calling for responses after the discovery cutoff are not enforceable except by order of the court for good cause shown. Motions to compel may not be filed more than seven days after the discovery cutoff for either fact or expert discovery, respectively [*ND Cal Civ LR 26-2*]. However, parties may stipulate to extend the date for filing motions and to conduct some discovery after the cutoff. Court approval may be required for such stipulations to be enforceable, depending on the particular judge's practice and the directives of the governing pretrial order.

Cross Reference:

Discussion of additional requirements in the Northern District, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.05[4]*, *25.10[3]*.

22.17[5][d] LOCAL PRACTICE: SD Cal Requirements. The court will not entertain any discovery related motions unless the parties have first met and conferred concerning all disputed issues [*SD Cal Civ LR 26.1(a)*]. If the non-moving party refuses or fails to meet and confer, the judge may order payment of reasonable expenses, including attorneys' fees [*SD Cal Civ LR 26.1(a)*]. The moving party must file with the motion a certificate of compliance with the requirements of Local Rule 26.1(a) [*SD Cal Civ LR 26.1(b)*].

The magistrate judge assigned to the case handles discovery motions. The magistrate may waive all or part of Local

Rule 7.1(f), the local rule which designates the required documents to be filed with a motion [*SD Cal Civ LR 26.1(e)*]. As discovery motions may be resolved on an informal basis, call the magistrate judge's law clerk to learn the appropriate procedure.

Cross Reference:

Discussion of additional requirements in the Southern District, see Ch. 25, Motions to Compel and Discovery Sanctions, *§ 25.05[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

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22.18 Opposing Motions to Modify Discovery.

The procedure for preparing an opposition to a discovery motion generally follows the procedure for opposing other motions [*see Fed R Civ P 7(b), 37(a)*]. These procedures may be varied by local rules, as described in *22.17[5]*. Not opposing the motion means that the court is likely to grant it, and the court may look unfavorably on the parties' failure to stipulate to the matter at issue in the motion. If for some reason a party cannot stipulate but decides not to oppose the motion, it may consider filing a notice of non-opposition explaining why it could not stipulate.

Cross References:

Discussion of local rules governing discovery motions, see *§ 22.17*. Discussion of the general procedure to follow for opposing pretrial motions, see Ch. 26, Pretrial Motion Practice, *§§ 26.37 -26.43*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

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22.19 Courts May Limit Frequency or Extent of Discovery on Party's Motion.

22.19[1] Motion Procedure Is Available to Party Responding to Discovery Request. The recipient of discovery demands may bring a motion to limit the frequency or extent of use of discovery [*Fed R Civ P 26(b)(2)*].

22.19[2] Party Who Seeks Limit on Discovery Bears Burden of Showing Why Discovery Should Be Disallowed. The party who opposes discovery bears the burden of showing why the discovery should not be allowed, and the burden of clarifying, explaining, and supporting the objection [*Cable & Computer Tech., Inc. v. Lockheed Sanders, Inc. (CD Cal 1997) 175 FRD 646, 650*].

22.19[3] Party May Move to Limit Discovery That Is Unreasonably Cumulative, Duplicative or Inconvenient.

22.19[3][a] Party May Seek to Remove Obligation to Respond. A party may move the court to limit discovery that is unreasonably cumulative, duplicative or inconvenient [*Fed R Civ P 26(b)(2)(C)(i)*]. Once the court determines that the discovery is unreasonably cumulative or duplicative, the court must order relief [*Fed R Civ P 26(b)(2)(C)*].

22.19[3][b] Party May Seek to Shift Cost of Responding. Instead of removing the obligation to respond to cumulative, duplicative or inconvenient discovery demands, a responding party may seek to shift the cost of responding to the discovery demands, particularly when the discovery sought is not readily accessible [*OpenTV v. Liberate Techs. (ND Cal 2003) 219 FRD 474, 475-476*].

22.19[3][c] Opposing Party May Defeat Motion by Establishing Reasonableness of Discovery Demand. A court generally will not limit discovery simply because it is somewhat cumulative and duplicative; it must be unreasonably so [*Fed R Civ P 26(b)(1)*]. An opposing party may defeat a motion filed on these grounds by establishing that the cumulative and duplicative discovery is reasonable [*see Travelers Rental Co. v. Ford Motor Co. (MDNC 1989) 116 FRD 140, 145-146*].

Example:

Although depositions of automobile manufacturer executives would be somewhat duplicative of depositions taken of lower level employees, the court denied the manufacturer's motion to quash or

modify the deposition. The court noted that the rental car company established that the executives may have information about motive that is more probative than the motives understood by lower level employees [*Travelers Rental Co. v. Ford Motor Co. (MDNC 1989) 116 FRD 140, 145-146*].

Cross Reference:

Limits on cumulative, duplicative or inconvenient discovery demands, see *6 Moore's Federal Practice, § 26.60[2]* (Matthew Bender 3d ed.).

22.19[4] Courts Must Limit Discovery When Information Is Available From Another More Convenient, Less Burdensome, or Less Expensive Source. If material sought can be obtained from another more convenient, less burdensome, or less expensive source, the party or person from whom discovery is sought may bring a motion to require the propounding party to obtain the information from the alternative source [*Fed R Civ P 26(b)(2)(C)(i)*].

Cross Reference:

Limits based on availability from other sources, see *6 Moore's Federal Practice, § 26.60[3]* (Matthew Bender 3d ed.).

22.19[5] Courts Must Limit Discovery If Propounding Party Has Had Ample Opportunity to Obtain Information Sought.

22.19[5][a] Party or Court May Move to Limit Extent or Use of Discovery If Propounding Party Has Had Ample Opportunity to Obtain Information Sought. A court, on motion of a party or its own motion after reasonable notice, must limit the extent or use of discovery if the party seeking discovery has already had ample opportunity in the action to obtain the information sought [*Fed R Civ P 26(b)(2)(C)(ii)*].

Warning:

Be sure to propound discovery within a reasonable time after learning of the existence of evidence to avoid being barred from seeking the discovery later.

Cross Reference:

Limitations on discovery for delay, see 6 *Moore's Federal Practice, § 26.60[4]* (Matthew Bender 3d ed.).

22.19[5][b] Opposing Party May Defeat Motion by Establishing Lack of Ample Opportunity. A propounding party may establish the lack of ample opportunity to obtain the sought discovery to defeat a motion filed on this ground [*Fed R Civ P 26(b)(2)(C)(ii)*].

22.19[6] Court Must Limit Discovery When Burden Outweighs Likely Benefit. A party may move to limit the extent or use of discovery when the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues and the importance of the proposed discovery in resolving the issues [*Fed R Civ P 26(b)(2)(C)(iii)*].

In making its determination, the court may not base its decision solely on the financial resources of the respective parties. The focus is whether the cost of discovery outweighs the benefit [*see Munoz-Santana v. United States (9th Cir 1984) 742 F2d 561, 563-564*]. Nevertheless, a discussion of the parties' resources is relevant to the cost-benefit analysis, and may be included in the briefing on such a motion [*Fed R Civ P 26(b)(2)(C)(iii)*].

Cross Reference:

Additional discussion of limitations on discovery for unduly burdensome demands, see 6 *Moore's*

Federal Practice, § 26.60[5] (Matthew Bender 3d ed.).

22.19[7] Court May Limit Discovery of Electronically Stored Information That Is Not Reasonably Accessible. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought bears the burden of making that showing. If that showing is made, the court may still order discovery from those sources if the requesting party shows good cause, and may specify conditions for the discovery. In making a good cause determination, the court will consider the generally applicable limitations on discovery imposed by Rule 26(b)(2)(C) [Fed R Civ P 26(b)(2)(B)].

Cross Reference:

Generally applicable limitations on discovery imposed by Rule 26(b)(2)(C), *§§ 22.19[3] -22.19[6]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

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22.20 Party May Bring Motion to Widen Discovery Scope.

22.20[1] Usual Scope of Discovery Is Party's Claims and Defenses. In general, parties may obtain discovery of unprivileged matters that are relevant to any party's claims or defenses [*Fed R Civ P 26(b)(1)*].

22.20[2] Party May Move to Expand Scope of Discovery to Matters Relevant to Subject Matter of Action on Showing of Good Cause. A party may, for good cause, make a motion to expand the scope of discovery to any unprivileged matters relevant to the subject matter of the action [*Fed R Civ P 26(b)(1)*].

Allegations establishing good cause should be more than conclusory statements and more than merely stating that the requested discovery is likely to lead to the discovery of admissible evidence. The court may extend the expanded scope to all discovery in the action, or may limit the expansion to specific discovery requests.

Judge's Perspective:

Be alert in arguing either for or against expansion of the scope of discovery to matters relevant to the subject matter on a showing of good cause, that Rule 26 was amended in 2000 to add the "good cause" requirement to such an expansion. Accordingly, case authority predating that amendment and addressing the proper scope of Rule 26 discovery may no longer be persuasive on this particular issue.

22.20[3] Opposing Party May Defeat Motion by Showing Moving Party Failed to Justify Need for Expansion Considering Particular Case. At least one court has held that the party seeking expansion must establish that the expanded discovery is justified by the needs of the particular case [Collins v. J.C. Penney Life Ins. Co. (SD Cal 2003) 2003 US Dist LEXIS 8455, at *3]. Accordingly, a party opposing expansion should focus on the lack of connection between the information sought through expanded discovery and the needs of the particular case.

Cross Reference:

Discussion of the scope of discovery, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryRelevance

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22.21 Courts May Increase Amount of Discovery Beyond General Limits.

22.21[1] Party May Move to Increase Number of Allowable Depositions. The rules generally allow each side, including plaintiffs, defendants and third-party defendants, to take 10 depositions. A party may, however, obtain a court order to increase the number of allowable depositions [*Fed R Civ P 30(a)(2)(A)(i)*, *31(a)(2)(A)(i)*].

Though the Federal Rules do not set out a standard to determine whether additional depositions should be allowed, at least one California federal district court applied the standards of *Fed R Civ P 26(b)(2)* to determine whether to allow additional depositions. Those standards include whether (1) the additional discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome or less expensive; (2) the party seeking additional discovery has ample opportunity to obtain the information sought; or (3) the burden or expense of the proposed additional discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the party's resources, and the importance of the proposed discovery in resolving the issues [Andamiro U.S.A. v. Konami Amusement of Am., Inc. (CD Cal 2001) 2001 US Dist LEXIS 11168, at *5].

22.21[2] Party May Move to Increase Number of Allowable Interrogatories. Under the Federal Rules, each party may propound up to 25 interrogatories. A party may, however, move the court to allow additional interrogatories absent a written stipulation [*Fed R Civ P 33(a)(1)*].

22.21[3] Opposing Party May Defeat Motion by Showing Increased Discovery Is Inconsistent With Limitations Provided in Rule 26(b). A party opposing an increase in the number of allowable depositions or interrogatories should focus on the purposes of the limits imposed by the rules, which are to control the costs and delays associated with discovery [*see Fed R Civ P 1*]. The limitations provided in *Fed R Civ P 26(b)*, regarding the extent or use of discovery, provide a standard by which to establish why the additional discovery should not be allowed [*see* National Union Fire Ins. Co. v. Hicks, Muse, Tate & Furst (SDNY 2002) 2002 US Dist LEXIS 14537, at *6-*7].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

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22.22 Party May Move to Require Discovery Papers Be Filed.

Depositions, interrogatories, requests for documents or to permit entry on land and requests for admission are not to be filed unless ordered by the court [*Fed R Civ P 5(d)(1)*]. A party may bring a motion that these documents be filed [*Fed R Civ P 5(d)(1)*; *see also SD Cal Civ LR 33.1(c)*, 34.1(c)], although this practice is not common except in cases where there is suspicion that discovery items have been tampered with.

Strategic Point:

A party may want to move to file discovery papers along with a motion, or as part of the record on appeal. For example, a party might need to show that the opposing party admitted a particular fact in interrogatory responses.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

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22.23 Court May Order Discovery Prior to Rule 26(f) Planning Meeting on Party's Motion.

22.23[1] Party May Move to Alter General Rule Prohibiting Discovery Prior to Rule 26(f) Planning Meeting. Normally, a party may not seek discovery from any source prior to the *Fed R Civ P 26(f)* planning meeting absent an agreement between the parties or a court order [*Fed R Civ P 26(d)*]. If unable to secure a stipulation to expedite discovery, a party may thereafter move the court to order that certain discovery be expedited.

22.23[2] Party Must Establish Good Cause to Expedite Discovery.

22.23[2][a] Good Cause Based on Administration of Justice. A party moving for expedited discovery must show good cause. Good cause may be shown when the need for expedited discovery, considering the administration of justice, outweighs the prejudice to the responding party [*see Semitool, Inc. v. Tokyo Electron Am., Inc. (ND Cal 2002) 208 FRD 273, 276*].

Examples:

A court found good cause to expedite inspection of certain narrowly identified documents and technology, when the plaintiff established it had spent a year attempting to negotiate with the defendant to inspect the device at issue, and when the inspection would enable the plaintiff to amend its claims early in the litigation. Allowing expedited discovery would facilitate a more complete case management conference, and permit fuller disclosure [*Semitool, Inc. v. Tokyo Electron Am., Inc. (ND Cal 2002) 208 FRD 273, 276-277*]. On the other hand, good cause did not exist for the same plaintiff to obtain expedited inspection of the same or similar device from third parties. The court noted that inspection from those parties would not likely facilitate the definition of plaintiffs' claims prior to the case management conference, and that expedited discovery could disrupt defendant's business relations with its customers [*Semitool, Inc. v. Tokyo Electron Am., Inc. (ND Cal 2002) 208 FRD 273, 277-278*].

22.23[2][b] Good Cause Based on Preliminary Injunction Standard. It is possible that good cause may also be established based on the standard for issuing a preliminary injunction, though this standard has not been applied in a California federal court to date. This standard examines (1) irreparable injury in the absence of expedited discovery, (2) probability of success on the merits, (3) some connection between expedited discovery and avoidance of irreparable

injury, and (4) whether irreparable injury to the moving party in absence of expedited discovery is greater than harm to non-moving party in allowing expedited discovery [*Yokohama Tire Corp. v. Dealers Tire Supply, Inc. (D Ariz 2001) 202 FRD 612, 614*].

22.23[3] Party Opposing Expedited Discovery May Defeat Motion by Refuting Good Cause and Showing Harm Caused by Expediting Process. In opposing a motion for expedited discovery, a showing that expediting discovery will not appreciably benefit the administration of the case and may cause harm to a party may convince the court not to order discovery be expedited [*see Semitool, Inc. v. Tokyo Electron Am., Inc. (ND Cal 2002) 208 FRD 273, 277-278*].

Cross Reference:

Form of motion for expedited discovery, see *§ 22.71*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

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22.24 Courts May Set Timing or Sequence of Discovery.

22.24[1] Party May Move to Restrict Timing or Sequence of Discovery for Convenience and Interests of Justice. Normally, a party may employ any method of discovery in any desired sequence, and the fact that one party is conducting discovery does not serve to delay another party's discovery [*Fed R Civ P 26(d)(2)*]. A party may make a motion, however, to restrict the sequence or timing of discovery "for the parties' and witnesses' convenience and in the interests of justice" [*Fed R Civ P 26(d)(2)*].

Example:

When the target of discovery asserts a qualified privilege, such as the journalist's privilege, the court may order that the party seeking discovery first exhaust other sources of information before pursuing the holder of a qualified privilege [*see Shoen v. Shoen (9th Cir 1993) 5 F3d 1289, 1301-1302* (Kleinfeld, J., concurring), *appeal after remand, 48 F3d 412 (1995)*].

22.24[2] Court May Balance Hardship in Determining Whether to Restrict Timing or Sequence of Discovery. A court may determine whether to grant a motion to restrict the timing or sequence of discovery based on a balancing of hardships [*see Rebel Oil Co. v. Atlantic Richfield Co. (D Nev 1990) 133 FRD 41, 45*]. Parties on both sides of a such a motion should include an explanation as to the hardship it may endure in the event the motion is not decided in its favor.

Example:

In an antitrust action, the court considered the burden on defendant in allowing discovery on all issues relevant to an antitrust action, compared to the burden on plaintiff in restricting discovery. The court recognized that plaintiff must establish certain issues, such as market definition and barriers to market entry to prove the case. The court therefore balanced the hardships and restricted discovery to those threshold issues until such time as the plaintiff could make an adequate showing of market definition and barriers to market entry [*Rebel Oil Co. v. Atlantic Richfield Co. (D Nev 1990) 133 FRD 41, 45*].

Strategic Point--Defendant:

Restricting the sequence of discovery can be particularly useful for a defendant when the plaintiff's liability case is likely to be defeated on summary judgment and the discovery into damages would be very burdensome. Preventing damages discovery until after the summary judgment motion is decided can save a significant amount of time and money for all parties.

22.24[3] LOCAL PRACTICE: SD Cal Requirements. The Southern District conducts Early Neutral Evaluation conferences in some cases [*see SD Cal Civ LR 16.1(c)*].

Cross Reference:

Discussion of the Early Neutral Evaluation process in the Southern District, see Ch. 32, Court Annexed ADR, *§ 32.69*.

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For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

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22.25 Court May Alter Time to Respond to Written Discovery Demands on Party's Motion.

22.25[1] Party May Move to Shorten or Extend Time for Response. If a party has been refused a request to stipulate to shorten or extend the time to respond to discovery demands, the party may move the court to modify the 30-day deadline for response [*Fed R Civ P 33(b)(2)*, *34(b)(2)(A)*, *36(a)(3)*]. If an extension of time to conduct discovery is desired that extends beyond the discovery cutoff, a hearing on a motion, or trial, a party must make a motion to extend the date, even if all parties stipulate to the extension [*Fed R Civ P 29(b)*].

Strategic Point--Shortening Time for Response:

When considering whether to seek an order shortening time for a discovery response, be sure to have propounded the discovery demand as soon as practi-cable after learning of the need for the information. A court may be disinclined to shorten the time for discovery responses when the discovery demand was not propounded sufficiently early [*see* Worldwide Forest Prods., Inc. v. Winston Holding Co. (ND Miss 1997) 1997 US Dist LEXIS 23368, at *4].

22.25[2] Opposing Party May Defeat Motion by Showing Ample Opportunity of the Moving Party. If the moving party seeks to shorten time for a response, the opposing party may defeat the motion by establishing that the moving party had ample opportunity to propound the discovery earlier [*DePew v. Hanover Ins. Co. (ED Tenn 1976) 76 FRD 8, 9*]. By analogy, if the moving party seeks to extend time to respond, the opposing party may defeat the motion by establishing that the moving party had ample opportunity to respond, either by showing previously allowed extensions, or by showing the limited amount of discovery sought. A court may also consider the extent of resources available to the moving party to prepare the responses prior to the existing or proposed deadline [*cf. Fed R Civ P 26(b)(2)(C)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil

ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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22.26 Court May Extend Discovery Cutoff Date on Party's Motion.

22.26[1] Party Must Show Good Cause to Extend Discovery Cutoff. If discovery needs to be taken after the discovery cutoff date, the party seeking additional discovery needs to file a motion to extend the cutoff date. The motion must establish good cause, unless the extension is otherwise authorized by local rule or order of the magistrate judge. [*Fed R Civ P 16(b)(4)*; *Johnson v. Mammoth Recreations, Inc. (9th Cir 1992) 975 F2d 604, 608)*]. Good cause is established by showing diligence in seeking the discovery [*In re Imperial Credit Indus. Secs. Litig. (CD Cal 2003) 252 F Supp2d 1005, 1017*].

22.26[2] LOCAL PRACTICE: Extending Discovery Cutoff Dates.

22.26[2][a] LOCAL PRACTICE: CD Requirements. Motions to modify the discovery cutoff date contained in a scheduling order must be made to the judicial officer who issued the order [*CD Cal Civ LR 16-14*]. Accordingly, if the district judge imposes a discovery cutoff, the motion to extend the cutoff must be made to that judge, not the assigned magistrate judge.

22.26[2][b] LOCAL PRACTICE: ND Requirements. In the Northern District, if the discovery request was propounded prior to the cutoff date, but calls for a response or deposition after the discovery cutoff, the request is unenforceable unless the party obtains a court order instructing the responding party to respond. Such a motion will only be granted for good cause [*ND Cal Civ LR 26-2*]. The parties may stipulate to allow the post-cutoff discovery, though some judges require court approval of the stipulation. Be sure to check with the presiding judge to determine whether approval is required.

Cross References:

Form of motion to extend discovery cutoff, see Form 22.68.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil

ProcedurePretrial MattersConferencesCase Management

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22.27 Court May Order Physical or Mental Examination, and Preparation of Resulting Report, on Party's Motion.

A party may move for a court order directing a physical or mental examination of an opposing party when the physical or mental condition of the opposing party is in controversy [*Fed R Civ P 35(a)*]. The court has discretion to "specify the time, place, manner, conditions, and scope of the examination" [*see Fed R Civ P 35(a)(2)(B)*], including the discretionary authority to permit the presence of a recording device at the examination [*T.B. v. Chico Unified School Dist. (ED Cal 2009) 2009 US Dist LEXIS 32653, at *4-*10* (defense expert could videotape independent mental examination of eight-year-old autistic child and child's parent would be required to attend to assist examiner)]. The examined party may request a report prepared by the examiner. If this report is not forthcoming, the examined party may move for an order for such relief as is just, including an order that the examiner's testimony be excluded at trial [*Fed R Civ P 35(b)(5)*].

Cross Reference:

Discussion of the process of obtaining physical and mental examinations, see Ch. 23, Methods of Discovery, *§§ 23.189 -23.216*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations

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22.28 Party May Move to Withdraw or Amend Admission.

If a party believes that an admission made pursuant to a request for admission is incorrect or incomplete, the party may move to withdraw or amend it [*Fed R Civ P 36(b)*]. The rules include no provision allowing modification of an admission by stipulation.

Cross Reference:

Discussion regarding modification of responses to requests for admission, see Ch. 23, Methods of Discovery, *§§ 23.249 -23.253*.

Legal Topics:

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

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22.29 Court May Order Deposition Be Taken of Person Confined in Prison.

If a witness is confined in prison, a party may take the deposition of that witness only after the party obtains leave of court to do so [*Fed R Civ P 30(a)(2)(B)*].

Cross Reference:

Discussion of taking depositions of inmates, see *§ 23.25[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral Depositions

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22.30 Court May Order Deposition Be Taken Before Action or Pending Appeal.

If a person determines it necessary to take a deposition of an individual before an action has been filed, the person may file a verified petition in the district of the residence of the expected adverse party seeking to perpetuate the testimony [*Fed R Civ P 27(a)*]. Similarly, if a case is on appeal, a party may petition the district court in which the judgment was rendered to order the perpetuation of testimony for use in the event of further proceedings in the district court [*Fed R Civ P 27(b)*].

Cross Reference:

Discussion of perpetuation of testimony, see Ch. 23, Methods of Discovery, *§§ 23.03 -23.18*.

Legal Topics:

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

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22.31 Court May Compel Discovery on Party's Motion.

22.31[1] Party May Move to Compel Discovery. A party who has promulgated discovery may file a motion to compel responses when the recipient of the discovery fails to respond [*Fed R Civ P 37(a)(3)(B)*]. Similarly, a motion to compel may also be filed when the discovery answer or response is evasive or incomplete [*Fed R Civ P 37(a)(3)-(4)*].

Cross Reference:

Discussion of the procedure for filing motions to compel discovery responses, see Ch. 25, Motions to Compel and Discovery Sanctions, *§ 25.03 -25.12*.

22.31[2] Party Opposing Motion to Compel May Seek Protective Order. If a court denies a motion to compel, the court may enter a protective order limiting the allowable discovery [*Fed R Civ P 37(a)(5)(B)*]. In opposing a motion to compel, consider including an argument supporting the need for a protective order.

Cross References:

§§ 22.32, *22.35- 22.66*. Discussion of opposing a motion to compel, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.13 -25.27*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryMotions to Compel

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22.32 Court May Limit Discovery Through Protective Orders on Party's Motion.

A recipient of a discovery demand may move for a protective order to bar or place limits or restrictions on the discovery request [*Fed R Civ P 26(c)*].

Cross Reference:

Discussion of protective orders, see *§§ 22.35 -22.66*.

Legal Topics:

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

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22.33 Court May Order Payment of Motion Expenses.

As part of a ruling on a discovery motion, the court must assess attorneys' fees against the party opposing the motion or the party bringing the motion, unless the court finds that the unsuccessful party's position was substantially justified or that other circumstances make an award of expenses unjust [*Fed R Civ P 37(a)(5)*; *but see ND Cal Civ LR 7-8*, *37-3* (motion for sanctions must be in separate motion)]. The court may assess fees associated with each of the following motions:

- Motions for protective orders [*Fed R Civ P 26(c)*].
- Motions to terminate or limit deposition [*Fed R Civ P 30(d)(3)*].
- Motions for expenses due to a party's failure to appear at, or serve a subpoena for, a deposition the same party noticed [*Fed R Civ P 30(g)*].
- Motions to determine the sufficiency of responses or objections to requests for admission [*Fed R Civ P 36(a)(6)*, *37(c)(2)*].
- Motions to establish that discovery certification was signed in violation of the rules [*Fed R Civ P 26(g)*].
- Motions to establish opposing party's failure to participate in the framing of a discovery plan [*Fed R Civ P 37(f)*].
- Motions to compel disclosure or discovery, including answering written or oral depositions, responding to interrogatories or request for inspection [*Fed R Civ P 37(a)(5)*, *(d)(3)*].

Cross References:

Discussion of expenses associated with discovery motions, see *Ch. 25, Motions to Compel and Discovery Sanctions, §§ 25.16 -25.27*. Discussion regarding failure to admit matters pursuant to request for admissions, see Ch. 23, Methods of Discovery, *§§ 23.254 -23.258*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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22.34 Court May Order Discovery Sanctions.

A party may move for additional sanctions, such as fact, issue, and claim sanctions [*see Fed R Civ P 37(d)(3)*], against another party for:

- Failure to comply with an order that a party provide or permit discovery, including answering written or oral depositions, answering interrogatories, or responding to request for inspection [*Fed R Civ P 37(a), (b)*].

- Failure to comply with an order that a party submit to a mental or physical examination [*Fed R Civ P 35(a), 37(b)*].

- Failure to comply with pretrial orders and protective orders [*Fed R Civ P 16(b), (c) , 26(c), (f), 37(b)(2)*].

- Failure to supplement disclosure or amend prior discovery responses [*Fed R Civ P 26(e), 37(c)*].

- Failure to appear at a deposition after proper notice [*Fed R Civ P 37(d)*].

- Failure to serve answers or objections to interrogatories after proper service, or failure to serve a written response after proper service of the request [*Fed R Civ P 37(d)*].

Cross References:

Discussion of grounds for sanctions, see Ch. 25, Motions to Compel and Discovery Sanctions. Discussion of requirements to amend discovery responses, Ch. 23, Methods of Discovery. Discussion regarding supplementation of disclosure responses, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§ 15.26*.

Legal Topics:

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

Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconduct

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IV. USING PROTECTIVE ORDERS TO LIMIT DISCOVERY
A. Determining Uses of Protective Orders

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22.35 CHECKLIST: Evaluating Grounds for Protective Order.

☐ On receipt of discovery requests, determine whether grounds for a protective order exist, including whether the request results in unnecessary:

- ○ Annoyance.
- ○ Embarrassment.
- ○ Oppression.
- ○ Undue burden or expense.

Authority:
Fed R Civ P 26(c)

Discussion:
See *§ 22.37*

☐ If grounds for a protective order exist, determine type of relief sought, including, but not limited to the following:

- ○ Possible block on discovery if:
  - ☐ Requested material is irrelevant and unlikely to lead to relevant evidence.

☐ Requested material is privileged.

☐ Discovery would interfere with constitutional rights.

☐ Deposition is sought of corporate officer or employee without personal knowledge of relevant issues.

☐ Opposing party seeks deposition of counsel.

☐ Discovery seeks immigration status of employee plaintiff.

Authority:
Fed R Civ P 26(c)(1); *Phillips v. GMC (9th Cir 2002) 307 F3d 1206, 1211-1212* ; *Caterpillar, Inc. v. Friedmann (D Or 1995) 164 FRD 76, 78*

Discussion:
See *§ 22.39*

○ Imposition of specified terms and conditions of discovery, such as:

☐ Limitation on number of days or hours deposition may last;

☐ Sequencing discovery so that certain discovery be had prior to other discovery;

☐ Requiring accelerated completion of discovery;

☐ Designating place for discovery;

☐ Requiring opposing party to pay discovery expenses.

Authority:
Fed R Civ P 26(c)(1)(B), 30(b)(1), 30(d)(1); *Hendrick v. Avis Rent A Car Sys., Inc. (WDNY 1996) 916 F Supp 256, 260* ; *Transamerica Computer Co. v. IBM Corp. (9th Cir 1978) 573 F2d 646, 652* ; Berry v. Baca (CD Cal 2002) 2002 US Dist LEXIS 15698, at *10, *12

Discussion:
See *§§ 22.40[1] -[3], [7], [8]*

Form:
See *§ 22.75*

○ Stay of discovery if:

☐ Pending motion would obviate need for discovery.

☐ Discovery would interfere with parallel criminal or civil proceeding.

☐ No prejudice to opposing party would result from stay.

Authority:
15 USC §§ 77z-1(b)(1), 78u-4(b)(3); B.R.S. Land Investors v. United States (9th Cir 1979) 596 F2d 353, 356 ; United States ex rel. Sequoia Orange Co. v. Baird Neece Packing (9th Cir 1998) 151 F3d 1139, 1144

Discussion:
See *§§ 22.40[4] -[6]*

○ Prescribe particular method of discovery, such as:

☐ Requiring interrogatories be used instead of questioning during deposition.

☐ Requiring deposition on written questions in lieu of an oral deposition.

☐ Require deposition be taken telephonically.

Authority:
Fed R Civ P 26(c)(1)(C), 31(a); McCormick- Morgan, Inc. v. Teledyne Indus. (ND Cal 1991) 134 FRD 275, 288 , rev'd on other grounds, 765 F Supp 611 (1991) ; Rehau, Inc. v. Colortech, Inc. (WD Mich 1993) 145 FRD 444, 446-447

Discussion:
See *§ 22.41*

○ Limitation on scope of discovery.

Authority:
Fed R Civ P 26(c)(1)(D)

Discussion:
See *§ 22.42*

○ Exclude a particular person from attending a deposition, when, for example:

☐ Presence of person would intimidate deponent.

☐ Person would harass deponent.

☐ Deponent's privacy would be compromised.

☐ Person creates a security risk.

☐ Trade secrets would be exposed.

Authority:
Fed R Civ P 26(c)(1)(E); *In re Terra Int'l, Inc. (5th Cir 1998) 134 F3d 302, 306-307*

Discussion:
See *§ 22.43*

○ Sealing discovery materials if:

☐ Specific prejudice or harm will result if discovery remains public.

☐ Compelling reasons justify curtailing access to court documents.

Authority:
Fed R Civ P 26(c)(1)(F); *Verizon Cal., Inc. v. Ronald A. Katz Tech. Licensing, L.P. (CD Cal 2003) 214 FRD 583, 585 n9* ; *Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1135*

Discussion:
See *§ 22.44*

○ Limitation on discovery of trade secrets or other confidential information, considering:

☐ The extent the sought material is kept secret or confidential.

☐ Whether a public interest is involved.

☐ Specific prejudice or harm that would result from disclosure of sought information.

☐ Relevance and necessity of sought information to issue in the case.

☐ Whether harm can be alleviated by limiting disclosure to opposing counsel and/or experts.

☐ Whether harm can be alleviated by limiting opposing counsel's practice for specified period of time.

☐ Whether harm can be alleviated by prohibiting copying of documents and requiring return of documents following termination of lawsuit.

☐ Whether opposing party should post a bond to protect against damages from disclosure.

☐ Whether a log should be kept of each person who accesses information.

☐ Whether all persons who view materials should sign confidentiality agreement.

Authority:

Fed R Civ P 26(c)(1)(G); *Andrew Corp. v. Rossi (ND Ill 1998) 180 FRD 338, 341* ; *Brown & Williamson Tobacco Corp. v. FTC (6th Cir 1983) 710 F2d 1165, 1179-1180* ; *Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1130* ; *Directv, Inc. v. Trone (CD Cal 2002) 209 FRD 455, 459-460* ; *Chan v. Intuit, Inc. (ND Cal 2003) 218 FRD 659, 661*

Discussion:

See *§ 22.45*

Form:

See *§ 22.73*

○ Simultaneously file sealed documents with court to prevent opposing party from obtaining unfair advantage in litigation.

Authority:

Fed R Civ P 26(c)(1)(H) San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1098 n1

Discussion:

See *§ 22.46*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

* The authors acknowledge the contribution of Teresa L. Zuber, a member of the California Bar, in preparing this chapter.

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22.36 Options and Strategy.

On receipt of discovery requests, a party should determine whether good cause exists to relieve it from complying with the requests, or some part of them, because of "annoyance, embarrassment, oppression, or undue burden or expense" [*see Fed R Civ P 26(c)(1)*]. When such good cause exists, the responding party should consider seeking a protective order.

If a discovery request seeks information that is beyond the scope of discovery, is privileged, or constitutes trade secret or other confidential information, the responding party may seek a protective order barring or limiting the requested discovery in some manner [*see Fed R Civ P 26(c)(1)(A)-(H)*]. For example, when the requested discovery is extensive, but clearly relevant to the claims or defenses, a blanket protective order limiting the individuals who may have access to the materials may be appropriate.

It may also be appropriate to obtain a protective order to require that a particular method of discovery be used over the one selected by the propounding party [*see Fed R Civ P 26(c)(1)(C)*]. For example, if the attorney for the propounding party is a percipient witness to certain issues in the case and has been noticed for an oral deposition, the propounding party may seek a protective order to require the discovery be obtained either by interrogatories or deposition by written questions.

Protective orders also may be obtained to specify the location, time or sequence that discovery may be had [*see Fed R Civ P 26(c)(1)(B)*]. For example, if a deponent is unable to attend a deposition at the location specified by the propounding party because of physical health constraints, a party may seek a protective order to conduct the deposition at a location feasible for the deponent.

Should the responding party identify another means to more effectively protect the responding party's interest than those identified in Rule 26(c), a protective order may still be obtained to include the unique means of protection [*see Fed R Civ P 26(c)*]. If recourse to the court becomes necessary, select the type of protection that would appear to the court to be the least burdensome on the litigation process while sufficiently protecting the client's needs for protection. For instance, it is much less expensive simply to object to the discovery requests and place the burden of moving to compel on the requesting party. The requesting party may decide that some requests are not worth the cost of motion practice

and may drop these requests, or the parties may be able to negotiate narrower requests.

Strategic Point:

Parties will often serve objections first and then attempt to resolve limitations to discovery requests with the propounding party during the meet and confer process that precedes a motion to compel. The decision whether to preempt the motion to compel by a motion for a protective order is a strategic one. Parties may wish to file motions for a protective order--instead of responding to the request and then awaiting a motion to compel--to move the case along and control the schedule. Also, by filing a motion for a protective order, the responding party gets to frame the issues and has the last word in the reply brief. In contrast, if the responding party simply objects and waits for a motion to compel, the requesting party will have the first and last word. However, if the responding party simply objects, it may be able to negotiate an advantageous arrangement with the requesting party and avoid motion practice, or the requesting party may decide to move to compel on only a few requests. So, more often than not, the best strategy may be to object and try to resolve differences during the meet and confer process.

Warning:

Filing a motion for a protective order does not substitute for filing a written response to a discovery request. In the absence of a response, the missing objections might be deemed waived. However, if the protective order is entered with respect to *all* of the requests, the party will not have to respond [*see Flaherty v. Seroussi (NDNY 2002) 209 FRD 300, 304*].

Judge's Perspective:

The term "protective order" is now generally used both with reference to a specific request to relieve a party of the need to respond to a discovery request, as well as the more general order usually entered by the court, on the stipulation of the parties, early in the litigation to govern the use of information produced in discovery. In almost all cases of any size and complexity in federal court, a protective order will be entered that sets forth how documents and deposition transcripts are to be treated, to whom access is to be provided, how disputes regarding those issues are to be resolved, and the manner of submitting such materials to the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue Burdens

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22.37 Several Types of Relief Are Available Through Protective Orders.

A party or witness who wishes to protect against disclosure or discovery because of annoyance, embarrassment, oppression, or undue burden or expense may seek a protective order, either through stipulation or by motion, to restrict the discovery in the following ways [*Fed R Civ P 26(c)(1)*]:

- To preclude certain discovery entirely.
- To provide that disclosure or discovery be provided only on specified terms and conditions.
- To conduct discovery by a method other than that selected by the party seeking discovery.
- To exclude certain matters from being inquired into.
- To limit the scope of the disclosure or discovery to certain matters.
- To designate the persons who may be present at a deposition.
- To seal discovery, and provide the terms regarding who may view it and when it may be viewed.
- To preclude entirely, or prescribe the terms for, discovery of trade secrets or other confidential research, development or commercial information.
- To require parties to simultaneously file specified documents or information enclosed in sealed envelopes.

This list of available relief is not exclusive. A court may issue any order to protect against annoyance, embarrassment, oppression or undue burden or expense [*Fed R Civ P 26(c)(1)*; *Phillips v. GMC (9th Cir 2002) 307 F3d 1206, 1211-1212*].

Example:

A railroad employee was injured on the job and sued the railroad under the Federal Employer's Liability Act. A protective order was appropriate to prevent the railroad from requiring the employee to submit to an extra-judicial physical examination, and to prevent it from disciplining the employee for refusing to submit to such an examination. The railroad's attempt to require the employee to submit to such an examination constituted discovery subject to the court's authority and an effort to circumvent the discovery rules [*Partida v. Union Pac. R.R. Co. (CD Cal 2004) 221 FRD 623, 629-630*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue Burdens

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22.38 Court May Impose Other Conditions on Discovery.

Even if a motion for protective order is denied in whole or in part, the court may order that a party or other person provide or permit discovery "on just terms" [*Fed R Civ P 26(c)(2)*].

Legal Topics:

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

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22.39 Protective Order May Block Discovery.

22.39[1] Court May Order That No Disclosure or Discovery Be Had. A court may order that disclosure or discovery not be had at all [*Fed R Civ P 26(c)(1)(A)*]. In considering whether to block discovery the court may consider whether the particular discovery sought is irrelevant and not likely to lead to discovery of admissible evidence, whether the sought discovery is privileged and whether the sought discovery would interfere with constitutional or statutory rights [*see Phillips v. GMC (9th Cir 2002) 307 F3d 1206, 1211-1212* ; Killion v. Franklin Reg'l Sch. Dist. (WD Pa 2000) 2000 US Dist LEXIS 12687, at *3-*4].

22.39[2] Complete Blocking of Discovery Is Rare. Courts seldom order that discovery not be taken at all. Instead, discovery normally is expected to go forward, with the parties asserting their objections to particular matters during the course of discovery [*see* EEOC v. Caesars Entertainment, Inc. (D Nev 2006) 237 FRD 428, 432; *Kaiser v. Mutual Life Ins. Co. of New York (SD Ind 1994) 161 FRD 378, 380*].

22.39[3] Court May Block Depositions of Corporate Officers and Employees.

22.39[3][a] Court May Block Deposition of High-Level Corporate Officers. Courts may grant a protective order denying a deposition when the noticed deposition is of a high-level or "apex" corporate officer who can establish a lack of any relevant knowledge [*Kyle Eng'g Co. v. Kleppe (9th Cir 1979) 600 F2d 226, 231-232* ; *see Salter v. Upjohn Co. (5th Cir 1979) 593 F2d 649, 651*]. However, if the defendant has personal knowledge of relevant events, "apex" status will not preclude the deposition [*Blankenship v. Hearst Corp. (9th Cir 1975) 519 F2d 418, 429*].

Example:

If a deponent is a high-level corporate officer who certifies that he or she has no personal knowledge of the facts, the court may grant a protective order requiring the deposing party to seek discovery first through less intrusive methods, usually by deposing lower-level employees who are more likely to have direct knowledge [*see, e.g., Naftchi v. New York Univ. Med. Ctr. (SDNY 1977) 172 FRD 130, 132*].

22.39[3][b] Court May Block Deposition of Subordinate Employees. A party may obtain a protective order to

block discovery from subordinate employees when it is more appropriate to seek discovery from the employee's supervisor who had direct responsibility for the matter in question [*see Kidd v. Taos Ski Valley, Inc. (10th Cir 1996) 88 F3d 848, 853-854*].

22.39[4] Court May Block Deposition of Adverse Counsel.

22.39[4][a] Party Seeking Deposition of Adverse Counsel Bears Burden of Showing Good Cause. Ordinarily, the burden of establishing good cause for a protective order is on the party seeking the protective order [*see, e.g., Methode Elecs., Inc. v. Finisar Corp. (ND Cal 2001) 205 FRD 552, 554*]. However, when a party seeks to take a deposition of opposing counsel, the burden shifts to the party seeking the deposition to establish that counsel has information that is [*Shelton v. American Motors Corp. (8th Cir 1986) 805 F2d 1323, 1327* ; *American Cas. Co. v. Krieger (SD Cal 1995) 160 FRD 582, 588-589*]:

- Not otherwise obtainable;
- Non-privileged;
- Relevant; and
- Crucial to the preparation of the case.

When the party seeking the deposition cannot satisfy this burden, a protective order should block the deposition of opposing counsel [*Caterpillar, Inc. v. Friedemann (D Or 1995) 164 FRD 76, 78*]. If a party does satisfy this burden, a limited protective order may still issue to limit the duration and scope of the questioning [*American Cas. Co. v. Krieger (SD Cal 1995) 160 FRD 582, 591*].

22.39[4][b] No Block Where Exception to Privilege Applies. If an exception to the attorney client privilege applies, such as when an attorney was retained in furtherance of a crime or fraud, the privilege does not apply and discovery may be obtained from the attorney [*see United States v. Hodge & Zweig (9th Cir 1977) 548 F2d 1347, 1355*].

Cross Reference:

Exceptions to attorney-client privilege, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§ 24.39*.

22.39[4][c] No Block When Privilege Is Waived. If the client waives the privilege, expressly or impliedly, such as by asserting ineffective assistance of counsel in a habeas proceeding, the court will not issue a protective order to prevent disclosure of those matters relevant to the matter for which the client waived the privilege [*see, e.g., Bittaker v. Woodford (9th Cir 2003) 331 F3d 715, 716*]. Nevertheless, the court may, and in some cases must, limit the use of the otherwise privileged communications for any purpose other than the litigated matter before the court [*see Bittaker v. Woodford (9th Cir 2003) 331 F3d 715, 717, 728*].

Cross Reference:

Waiver of attorney-client privilege, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§ 24.40*.

Legal Topics:

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

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22.40 Protective Order May Specify Terms and Conditions for Discovery.

22.40[1] Court May Restrict Number of Hours or Days Deposition May Last. The Federal Rules generally provide that a deposition is limited to one day of seven hours [*Fed R Civ P 30(d)(1)*]. The court, however, must allow additional time if needed for a fair examination of the deponent or if the deposition is impeded or delayed [*Fed R Civ P 30(d)(1)*]. A party may obtain a protective order, however, to limit the number of days a deposition may last [*see Fed R Civ P 26(c)(1)(B)*].

Cross Reference:

Discussion of the time allowable for taking a deposition, see Ch. 23, Methods of Discovery, *§ 23.21*.

22.40[2] Court May Set Sequence of Discovery. A party may obtain a protective order to designate the sequence of discovery [*Fed R Civ P 26(c)(1)(B)*]. For example, a protective order may be obtained to delay discovery of prior statements by witnesses until after the witnesses who made the statements are deposed in order to obtain unrefreshed recollections on deposition [*see Hendrick v. Avis Rent A Car Sys., Inc. (WDNY 1996) 916 F Supp 256, 260*]. Conversely, the court may order production of materials, such as tapes, prior to a deposition to allow the deponent to review them before the deposition [*see Roberts v. Americable Int'l (ED Cal 1995) 883 F Supp 499, 505*].

Cross Reference:

Discussion of use of protective orders to set the timing or sequence of discovery, see 6 *Moore's Federal Practice, § 26.105[3][a]* (Matthew Bender 3d ed.).

22.40[3] Court May Order Accelerated Completion of Discovery. Under *Fed R Civ P 26(c)(1)(B)*, a court may set deadlines for completion of discovery. For example, a court may order accelerated completion of discovery, and further order that privileged documents inadvertently submitted on accelerated time schedule do not operate to waive privilege [*see Transamerica Computer Co. v. IBM Corp. (9th Cir 1978) 573 F2d 646, 652*].

22.40[4] Court May Order Stay of Discovery Pending Outcome of Dispositive Motion.

22.40[4][a] Court May Stay Discovery Pending Dispositive Motion. A court may stay discovery pending the disposition of a motion or other determination, particularly when discovery on one issue would obviate the need for discovery on other issues [*see e.g., B.R.S. Land Investors v. United States (9th Cir 1979) 596 F2d 353, 356*]. Dispositive motions that would obviate the need for discovery may include

- Motions to dismiss [*see, e.g., B.R.S. Land Investors (9th Cir 1979) 596 F2d 353, 356*].
- Motions for summary judgment [*see, e.g.,* Landry v. Air Line Pilots Ass'n Int'l AFL-CIO (5th Cir 1990) 901 F2d 404, 436].
- Motions to determine governmental immunity [*see, e.g., Anderson v. Creighton (1987) 483 US 635, 646 n6, 107 S Ct 3034, 97 L Ed2d 523*].

22.40[4][b] Court Considers Various Factors in Determining Motion to Stay. The factors a court considers to determine whether to stay discovery pending the outcome of a motion include [*Skellup Indus. Ltd. v. City of Los Angeles (CD Cal 1995) 163 FRD 598, 601*]:

- The type of motion and whether it is a challenge as a matter of law or to the sufficiency of the allegations.
- The nature and complexity of the action.
- Whether counterclaims or crossclaims have been interposed.
- Whether some or all defendants have joined in the request to stay discovery.
- The expected extent of discovery in light of the number of parties.
- Any other relevant circumstances.

22.40[4][c] Court Balances Harm of Stay Versus Benefit of Discovery. In determining whether to grant a motion to stay pending a dispositive motion, the court balances the harm from imposing a stay on discovery against the benefit of discovery [*see GTE Wireless, Inc. v. Qualcomm, Inc. (SD Cal 2000) 192 FRD 284, 289*]. One court has applied the following two considerations in performing this balance [*Pacific Lumber Co. v. National Union Fire Ins. Co. (ND Cal 2003) 220 FRD 349, 351-352*]:

- A pending motion must be dispositive of the entire case, or at least dispositive on the issue at which discovery is directed.
- The pending dispositive motion can be decided absent additional discovery.

The court must determine both these conditions are present before it may issue a protective order to stay discovery [*Pacific Lumber Co. v. National Union Fire Ins. Co. (ND Cal 2003) 220 FRD 349, 351-352*].

22.40[5] Court May Order Stay of Discovery Pending Outcome of Parallel Criminal or Civil Proceeding. A court may stay discovery pending the outcome of a parallel criminal or civil proceeding, if the discovery is likely to interfere with the parallel criminal or civil investigation [*United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp. (9th Cir 1998) 151 F3d 1139, 1144*]. In making its determination whether to issue a stay, the court balances the harm from a stay against the need for discovery based on the following considerations [*FSLIC v. Molinaro (9th Cir 1989) 889 F2d 899, 902-903*]:

- The extent to which the defendant's *Fifth Amendment* rights are implicated.

- The interests of the plaintiff in proceeding expeditiously with the litigation or any particular aspect of it.

- The potential prejudice to plaintiff of delay.

- The burden of any particular aspect of the proceeding may impose on defendant.

- The convenience of the court in the management of its cases and the efficient use of judicial resources.

- The interests of persons not party to the litigation.

- The interest of the public in the pending civil and criminal litigation.

Cross Reference:

Discussion of stays pending the outcome of motions and parallel proceedings, see 6 *Moore's Federal Practice, § 26.105[3][c]* (Matthew Bender 3d ed.).

22.40[6] Court Order Required to Conduct Discovery Following Automatic Stay of Discovery Pending Ruling on Motion to Dismiss in Securities Fraud Class Actions. In securities fraud class action lawsuits brought pursuant to *15 USC § 77z-1* or *78u-4*, all discovery and other proceedings are stayed pending the disposition of any motion to dismiss, unless the court finds on the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party [*15 USC §§ 77z-1(b)(1)*, *78u-4(b)(3)(B)*].

22.40[7] Court May Designate Place for Discovery. A party may designate any place for a deposition, subject to the court's power to grant a protective order [*see Fed R Civ P 26(c)(1)(B)*, *30(b)(1)*]. When the deponent seeks a protective order, the court generally will recognize the presumption that the deposition should take place at the deponent's residence or place of business or employment absent special circumstances, and order that the deposition be taken at or near the deponent's residence or business [Berry v. Baca (CD Cal 2002) 2002 US Dist LEXIS 15698, at *10]. Special circumstances, however, may rebut this presumption when the deponent's residence or place of business is abroad [*see, e.g.*, Dean Foods Co. v. Eastman Chem. Co. (ND Cal 2001) 2001 US Dist LEXIS 25447, at *20-*25].

Cross References:

Form, see *§ 22.75*.

6 *Moore's Federal Practice, § 26.105[3][b]* (Matthew Bender 3d ed.).

22.40[8] Court May Order Payment of Expenses of Discovery. As a condition of obtaining discovery under *Fed R Civ P 26(c)(1)(B)* the court may order that a party seeking discovery pay the expenses of obtaining the discovery [*Penk v. Oregon State Bd. of Higher Educ. (9th Cir 1987) 816 F2d 458, 468*].

Example:

One court gave the deposing party the option either of paying the travel and hotel expenses to have the deposition taken at that party's choice of location or holding the deposition in the vicinity of the deponent's residence, which was in Missouri [Berry v. Baca (CD Cal 2002) 2002 US Dist LEXIS 15698, at *12].

Legal Topics:

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

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22.41 Protective Order May Prescribe Discovery Method.

22.41[1] Court May Order That Certain Method of Discovery Be Used. A party typically selects the method of obtaining discovery. However, the court may order discovery by a "method other than the one selected by the party seeking discovery" [*Fed R Civ P 26(c)(1)(C)*].

22.41[2] Court May Order That Discovery Questions Be Propounded by Interrogatories, Not Deposition. During the course of a deposition, a deposing party may ask questions that seek the bases of the opposing party's contentions. In a complicated case, a court may issue a protective order that such questions may only be answered in response to properly prepared interrogatories, rather than in a deposition [*McCormick-Morgan, Inc. v. Teledyne Indus. (ND Cal 1991) 134 FRD 275, 288 , rev'd on other grounds, 765 F Supp 611 (1991)*].

Strategic Point--Propounding Party:

If the opposing party seeks a protective order on this basis, the party seeking discovery may convince the court to control the danger of receiving elusive lawyer-crafted responses by limiting the responding parties' presentation of evidence at trial to those matters included in the response to the interrogatories [*McCormick-Morgan, Inc. v. Teledyne Indus. (ND Cal 1991) 134 FRD 275, 287 , rev'd on other grounds, 765 F Supp 611 (1991)*].

22.41[3] Court May Order That Deposition Proceed on Written Questions. A party may move to convert a noticed oral deposition to a written deposition [*Fed R Civ P 26(c)(1)(C), 31(a)*]. In determining such a motion, the court must exercise its discretion in a manner that does justice to both parties [*Wheeler v. West Indies S.S. Co. (SDNY 1951) 11 FRD 396, 397*]. Courts consider various circumstances in deciding such motions, including:

- Whether the nature of the questioning requires a physical presence, such as the need for authentication of documents [*see United States v. $160,066.98 from Bank of Am. (SD Cal 2001) 202 FRD 624, 630-631*].

- The extent of need for follow-up questions, which are not possible with written questions prepared in advance [*see United States v. $160,066.98 from Bank of Am. (SD Cal 2001) 202 FRD 624, 630-631*].

- The likelihood of *Fifth Amendment* objections, for which written deposition would be more appropriate [*see Gatoil, Inc. v. Forest Hill State Bank (D Md 1985) 104 FRD 580, 582*].

- Whether the deponent is opposing counsel, in which case a written deposition may be adequate [*see In re Arthur Treacher's Franchisee Litig. (ED Pa 1981) 92 FRD 429, 439*].

- The need for privacy of deponents, such as nonparty blood donors in actions concerning the transmission of AIDS through blood transfusions, where written depositions would be preferable [*see Borzillieri v. American Nat'l Red Cross (WDNY 1991) 139 FRD 284, 289*].

The written format is generally disfavored, because of the lack of cross-examination, the inability to evaluate the deponent's credibility, and the ability of counsel to assist with providing carefully tailored answers [*United States v. Local 1804-1, Int'l Longshoremen's Ass'n (SDNY 1990) 753 F Supp 1158, 1163-1164*]. When the issues to be addressed are narrow and straightforward, and the hardships of taking an oral deposition are substantial, a court is more likely to order a written deposition [*see Mill-Run Tours, Inc. v. Khashoggi (SDNY 1989) 124 FRD 547, 550*].

Cross Reference:

Discussion of the uses of oral and written depositions, see Ch. 23, Methods of Discovery, *§§ 23.20*, *23.77*.

22.41[4] Court May Order That Deposition Be Taken Telephonically or Videotaped. On a showing of legitimate need, for example, when an oral deposition would present hardship, but follow-up questions are necessary, a court may consider ordering the deposition be taken telephonically [*see Rehau, Inc. v. Colortech, Inc. (WD Mich 1993) 145 FRD 444, 446-447*]. However, when a physical presence is necessary, such as when authentication of documents will be required, or assessment of credibility is critical, the court will likely deny this alternative [*see United States v. $160,066.98 from Bank of Am. (SD Cal 2001) 202 FRD 624, 629-630*]. When follow-up questions and demeanor are critical, the court may order that the deposition be videotaped [*Fed R Civ P 26(c)(1)(C), 30(b)(3)(A)*].

Cross Reference:

Discussion of telephonic depositions and videotaped depositions, see Ch. 23, Methods of Discovery, *§§ 23.02*, *23.31*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryProtective Orders

* The authors acknowledge the contribution of Teresa L. Zuber, a member of the California Bar, in preparing this chapter.

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Unit 7 Discovery
CHAPTER 22 Regulation of Discovery by Stipulation or Motion *
IV. USING PROTECTIVE ORDERS TO LIMIT DISCOVERY
A. Determining Uses of Protective Orders

3-22 MB Practice Guide: Fed Pretrial Civ Proc in CA 22.42

22.42 Protective Order May Limit Scope of Discovery.

A party may seek an order that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters [*Fed R Civ P 26(c)(1)(D)*]. The scope of discovery may be limited for various reasons, such as:

- To exclude inquiry into privileged matters [*Cobb v. Danzig (SD Cal 1999) 190 FRD 564, 566-567*].

- To exclude discovery on an issue that has already been established through stipulation [*see* Rivera v. Nibco, Inc. (9th Cir 2004) 364 F3d 1057, 1072].

- To prevent intimidation [*Rivera v. Nibco, Inc. (9th Cir 2004) 364 F3d 1057, 1074*].

- To protect the financial privacy of a witness [*see, e.g., Rogers v. United States Navy (SD Cal 2004) 223 FRD 533, 535-536*].

- To protect other constitutionally-based privacy rights of third parties [*see, e.g., Keith H. v. Long Beach Unified Sch. Dist. (CD Cal 2005) 228 FRD 652, 657-659*].

Example--Preventing Intimidation:
Plaintiffs filed an action alleging unlawful termination from employment. Defendant sought to obtain discovery of the immigration status of plaintiffs, contending that Defendant's damages would be reduced on a showing that some of the plaintiffs were foreign nationals without authorization to work. The court entered a protective order barring defendant from using the discovery process to determine plaintiffs' immigration status to prevent plaintiffs and potential future plaintiffs from being intimidated against bringing such actions [*Rivera v. Nibco, Inc. (9th Cir 2004) 364 F3d 1057, 1064-1065, 1074*].

Cross Reference:
Discussion of the permissible scope of discovery, see Ch. 24, Restrictions on Scope and Extent of

Discovery: Privileges and Work Product Protection.

Legal Topics:

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

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22.43 Protective Order May Restrict Attendance at Deposition.

22.43[1] Protective Order Required to Exclude Persons From Deposition. Deposition witnesses are not subject to sequestration merely at a party's request. To exclude someone from a deposition, the party seeking exclusion must obtain a protective order on a showing of good cause [*Fed R Civ P 26(c)(1)(E)*; *In re Terra Int'l, Inc. (5th Cir 1998) 134 F3d 302, 306-307*].

22.43[2] Order Must Be Supported by Particular and Specific Showing of Facts. A party cannot establish the good cause showing required to obtain a protective order to exclude attendance at a deposition based on "stereotyped or conclusory statements." The motion must be supported by a "particular and specific showing of facts" to establish the need to exclude the presence of the subject person [*In re Terra Int'l, Inc. (5th Cir 1998) 134 F3d 302, 306-307*].

22.43[3] Examples of Orders Granted. Protective orders have been issued excluding persons, including parties, from attending depositions in order to:

- Avoid intimidating the deponent in a case involving an alleged child abuse victim [*see, e.g., Bucher v. Richardson Hosp. Auth. (ND Tex 1994) 160 FRD 88, 95*].

- Avoid harassment at the deposition [*see, e.g., Galella v. Onassis (2d Cir 1973) 487 F2d 986, 997*].

- Protect privacy interests, particularly involving allegations of sexual abuse [*see, e.g., Gottlieb v. County of Orange (SDNY 1993) 151 FRD 258, 260*].

- Protect prison safety when a prisoner's attendance at deposition poses a security risk [*see, e.g., James v. Roberts (SD Ohio 1995) 163 FRD 260, 262*].

- Protect trade secrets [*see, e.g., Metal Foil Prods. Mfg. Co. v. Reynolds Metals Co. (ED Va 1970) 55 FRD 491, 493-494*].

Cross Reference:

Additional discussion regarding exclusion of persons at depositions, see 6 *Moore's Federal Practice, § 26.105[6]* (Matthew Bender 3d ed).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective Orders

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22.44 Court May Order Discovery Records Be Sealed.

22.44[1] Party May Move to Seal Depositions and Other Discovery Materials. Rule 26(c)(1)(F) allows the court to order that a deposition, after being sealed, be opened only by court order [*Fed R Civ P 26(c)(1)(F)*]. Although the Federal Rules expressly mention only depositions, a party may also seek a protective order sealing other types of discovery [*see, e.g., Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us, Inc. (9th Cir 1995) 62 F3d 1217, 1218*].

22.44[2] LOCAL PRACTICE: Sealing of Documents.

22.44[2][a] LOCAL PRACTICE: CD Cal Requirements. In the Central District, except when authorized by statute or rule, a document cannot be filed under seal except with prior court approval. When approval is required, a written application and proposed order must be presented to the judge with the document to be sealed. Detailed format and submission requirements are specified [*CD Cal Civ LR 79-5.1*]. A sealed record cannot be disclosed except on written order of the court [*CD Cal Civ LR 79-5.2*]. To seek disclosure of sealed records, a written application setting forth with particularity the need for specific information must be made to the court [*CD Cal Civ LR 79-5.3*].

22.44[2][b] LOCAL PRACTICE: ED Cal Requirements. In the Eastern District, documents may be sealed only on written order of the court [*ED Cal Gen LR 141(a)*]. A motion to seal must be made even if federal law requires or permits the sealing of the document. The motion must state the statutory or other authorization for sealing, the requested duration, and any other relevant information [*ED Cal Gen LR 141(b)*]. The motion to file a document under seal, along with a proposed order, should be filed electronically unless the attorney believes both a public and nonpublic order should issue in which case the nonpublic version of the order may be filed in paper. Likewise, if the attorney may serve a nonpublic version of the motion in paper format if he or she believes the motion should not be made public [*ED Cal Gen LR 141(d)*].

A document filed under seal should not be filed electronically. Instead, the attorney must electronically file a "Notice of Filing Sealed Document" designated as accompanying the relevant document. Within 24 hours after electronically filing that notice, counsel must manually file and, if required or appropriate, serve the sealed document in paper format, paper

copies of the Notice of Filing Sealed Document, a paper copy of the notice of electronic filing and proof of service [*ED Cal Gen LR 141(c)*].

Cross Reference:

Eastern District requirements for electronic filing, see *§ 5.31[2]*.

22.44[2][c] LOCAL PRACTICE: ND Cal Requirements. In the Northern District, a sealing order is required to allow the filing of documents under seal; a stipulation or a blanket protective order that allows a party to designate documents as sealable is insufficient. A sealing order will issue only if it is established that the document, or a part of it, is privileged or protectable as a trade secret or otherwise entitled to protection under the law [*ND Cal Civ LR 79-5(a)*].

To obtain a court order authorizing the sealing of a document, or portions thereof, an administrative motion to file under seal must be filed and served [*see ND Cal Civ LR 7-11*], along with an accompanying declaration establishing that the document, or a portion of it, is sealable, and the document must be lodged with the court clerk [*ND Cal Civ LR 79-5(a)-(c)*].

Pending consideration of a revision to *ND Cal Civ LR 79-5*, the following procedures apply, effective May 10, 2010, to the filing of sealed documents in civil cases [ND Cal Gen Order 62]:

- Motions to file documents under seal must be made electronically.

- In order to move to electronically file (e-file) either an entire document under seal pursuant to *ND Cal Civ LR 79-5(b)*, or a portion of a document under seal pursuant to *ND Cal Civ LR 79-5(c)*:

  - E-file an Administrative Motion to File Under Seal [see *ND Cal Civ LR 7-11*];

  - E-file under seal and serve manually one or more Declarations (instructions on how to e-file under seal are available on the ECF website under FAQs at https://ecf.cand.uscourts.gov/cand/index.html);

  - E-file the Proposed Order (filed unsealed) and e-mail the Proposed Order to the Judge's proposed order e-mail address; and

  - Serve manually, but do not e-file, the documents to be filed under seal.

- Lodge with the clerk for delivery to the judge's chambers a copy of the entire filing including the documents to be filed under seal, contained in an 81/2-inch by 11-inch sealed envelope or other suitable sealed container, with a cover sheet affixed to the envelope or container, setting out the information required by *ND Cal Civ LR 3-4(a)* and *(b)*, prominently displaying the notation: "DOCUMENT SUBMITTED UNDER SEAL AND CHAMBERS COPY" no later than noon on the business day following the day that the administrative motion is filed electronically.

If the motion to file under seal is denied in part or in full, neither the document nor any proposed redacted version may be e-filed under seal. If the motion is denied in full, the submitting party may retain the document and not make it part of the record in the case, or, within 4 days, e-file the document unsealed. If the motion is denied in part and granted in part, the party may within 4 days resubmit the document in a manner that conforms to the Court's order and this rule [ND Cal Gen Order 62].

If a motion to file under seal is granted in part or full, the requesting party will e-file the document under seal according to the procedures outlined in the FAQs on the ECF website at https://ecf.cand.uscourts.gov/cand/index.html [ND Cal Gen Order 62].

Unless otherwise ordered by the court, any document filed under seal must be kept from public inspection, including inspection by attorneys and parties to the action, during the pendency of the case. The chambers copy of sealed documents will be disposed of in accordance with the assigned Judge's discretion. Ordinarily these copies will be recycled, not shredded, unless special arrangements are made [ND Cal Gen Order 62].

Any document filed under seal in a civil case will be open to public inspection without further action by the court 10 years from the date the case is closed. However, a party that submitted documents that were placed under seal may, on showing good cause at the conclusion of the case, seek an order that would continue the seal until a specific date beyond 10 years. However, nothing in this rule is intended to affect the normal records destruction policy of the United States Courts [ND Cal Gen Order 62].

22.44[2][d] LOCAL PRACTICE: SD Cal Requirements. In the Southern District, documents to be filed under seal must be accompanied by an order sealing them. If the order is also to be filed under seal, it must so state [*SD Cal Civ LR 79.2(b)*]. Documents filed under seal are returned to the submitting party on entry of final judgment or termination of the appeal unless otherwise ordered by the court [*SD Cal Civ LR 79.2(c)*].

22.44[3] Party Must Establish Specific Harm or Prejudice to Overcome Presumption of Public Access to Discovery. Absent a court order to the contrary, the fruits of pretrial discovery are presumed public [*San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1103*]. To overcome this presumption, the party seeking a protective order bears the burden of establishing specific prejudice or harm that will result if no protective order is granted [*Verizon Cal., Inc. v. Ronald A. Katz Tech. Licensing, L.P. (CD Cal 2003) 214 FRD 583, 585 n9*]. A particularized showing of "good cause" is required to keep documents attached to non-dispositive motions under seal; a party seeking to maintain the secrecy of documents attached to dispositive motions must show that "compelling reasons" support secrecy [Kamakana v. City and County of Honolulu (9th Cir 2006) 447 F3d 1172, 1180].

22.44[4] Presumption of Public Access to Court Documents.

22.44[4][a] Public Access to Court Documents May Be Overridden by Compelling Reasons. The Ninth Circuit recognizes a strong presumption in favor of access to court records [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1135*]. This presumption may only be overcome by a showing of sufficiently compelling reasons, considering the public interest in understanding the judicial process and whether disclosure could result in improper use of the material. The court issuing such a protective order must articulate the factual basis for the ruling without relying on hypothesis or conjecture [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1135*]. The "compelling reasons" standard applies to most judicial records [*see Pintos v. Pac. Creditors Ass'n (9th Cir 2009) 565 F3d 1106, 1115]* .

22.44[4][b] Exception to Presumption of Public Access for Nondispositive Motion. A different standard applies to "private materials unearthed during discovery," because those documents are not part of the judicial record [*Pintos v. Pac. Creditors Ass'n (9th Cir 2009) 565 F3d 1106, 1115]* . In these circumstances, Rule 26(c) governs [*see Fed R Civ P 26(c)*; *Pintos v. Pac. Creditors Ass'n (9th Cir 2009) 565 F3d 1106, 1115]* . The relevant standard for Rule 26(c) is whether "'good cause' exists to protect th[e] information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality" [*Phillips ex rel. Estates of Byrd v. Gen. Motors Corp. (9th Cir 2002) 307 F3d 1206, 1213]* . This "good cause" standard presents a lower burden for the party wishing to seal documents than the "compelling reasons" standard [*Pintos v. Pac. Creditors Ass'n (9th Cir 2009) 565 F3d 1106, 1115* ; *see Kamakana v. City and County of Honolulu (9th Cir 2006) 447 F3d 1172, 1180* ("[d]ifferent interests are at stake with the right of access than with Rule 26(c)")].

The "good cause" standard is not limited to discovery. "Good cause" is also the proper standard when a party seeks access to previously sealed discovery attached to a nondispositive motion [*Phillips ex rel. Estates of Byrd v. Gen. Motors Corp. (9th Cir 2002) 307 F3d 1206, 1213* ("when a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public's right of access is rebutted")].

Distinguish:

The presumption of access remains, however, for documents filed under seal in support of a dispositive motion [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1136* ; *see, e.g., California ex rel. Lockyer v. Safeway, Inc. (CD Cal 2005) 355 F Supp2d 1111, 1114* (motion for summary judgment)]. A party seeking to maintain documents under seal filed in support of a dispositive motion must therefore provide compelling reasons to do so, not merely good cause, as is normally required to obtain a protective order [Kamakana v. City and County of Honolulu (9th Cir 2006) 447 F3d 1172, 1180; *ATM Express, Inc. v. ATM Express, Inc. (SD Cal 2008) 2008 US Dist LEXIS 94923, at *3]* .

Judge's Perspective:

The key difference in these cases is that a lesser degree of secrecy is required for materials attached to nondispositive proceedings because much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying claim for relief. In other words, the public has a heightened interest in the merits of the case and a lesser need for access to pretrial procedural matters [*see Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1135*].

Cross Reference:

Additional discussion of sealing discovery materials, see 6 *Moore's Federal Practice, § 26.105[7]* (Matthew Bender 3d ed).

Legal Topics:

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

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22.45 Court May Limit Disclosure of Trade Secrets or Other Confidential Information.

22.45[1] Court May Order Confidential Information Not Be Revealed or Revealed Only in Designated Way. A court may issue a protective order when a party seeks information constituting a trade secret, or other confidential research, development, or commercial information [*Fed R Civ P 26(c)(1)(G)*]. The court may order that the sought materials not be revealed or be revealed only in a designated way [*Fed R Civ P 26(c)(1)(G)*].

22.45[2] Moving Party Must Show Good Cause for Protection of Confidential Information.

22.45[2][a] Moving Party Must Show That Information Sought Is Confidential. To establish that confidential information merits protection, the party seeking protection must show [*see Ruckelshaus v. Monsanto Co. (1984) 467 US 986, 1002, 104 S Ct 2862, 81 L Ed2d 815*]:

- That the information is not known outside the business;
- That the secret or other confidential information has not been disclosed to someone without obligation to maintain confidentiality; and
- That the information is not publicly available.

A court also may consider [*see Andrew Corp. v. Rossi (ND Ill 1998) 180 FRD 338, 341*]:

- The extent to which the information is known to employees and others involved in the business.
- Measures taken to guard the information's secrecy.
- The value of the information to the business or its competitors.
- The amount of time, money and effort expended in development of the information.

- The ease or difficulty of duplicating or properly acquiring the information.

22.45[2][b] Mere Harm to Reputation Not Sufficient Basis to Provide Protection From Discovery. Although a party may consider some material secret because release may be embarrassing to, or may harm the reputation of, that party, a court may be disinclined to issue a protective order on this basis alone, particularly when a matter of public interest is involved [In re Lifescan Consumer Litig. (ND Cal 1999) 1999 US Dist LEXIS 9894, at *7 ; *Brown & Williamson Tobacco Corp. v. FTC (6th Cir 1983) 710 F2d 1165, 1179-1180*].

22.45[2][c] Moving Party Must Also Show Specific Prejudice or Harm Will Result in Absence of Protective Order. For each particular document a party seeks to protect, that party must show not only that the material contains confidential information, but also that revealing the information contained in each document will cause specific prejudice or harm if no protective order is granted [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1130*].

The allegations of harm must be substantiated with specific demonstrations of fact, preferably by affidavits and concrete examples, rather than conclusory allegations [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1130*].

Cross References:

Form of motion for protective order for trade secrets, see *§ 22.73*.

6 *Moore's Federal Practice, § 26.105[8][a]* (Matthew Bender 3d ed.).

22.45[3] Following Good Cause Showing to Protect Trade Secrets, Burden Shifts to Party Seeking Discovery.

22.45[3][a] Party Seeking Discovery Bears Burden of Showing Relevance and Necessity. If the party seeking the protective order establishes good cause based on confidential material and harm from disclosure, the burden shifts to the party seeking discovery to establish that disclosure is relevant and necessary [*Directv, Inc. v. Trone (CD Cal 2002) 209 FRD 455, 459-460*]. Relevance and necessity must be supported by specifics, not merely conclusory allegations [*Directv, Inc. v. Trone (CD Cal 2002) 209 FRD 455, 460*].

22.45[3][b] Necessity May Include Public Interest Consideration. The concept of "necessity" can include furtherance of the public interest, as well as furtherance of establishing a party's claims or defenses. For example, a court may consider the fact that public disclosure of specific information would be beneficial to consumers [*see, e.g., Gelb v. AT&T (SDNY 1993) 813 F Supp 1022, 1035*].

22.45[4] Methods for Limiting Disclosure of Trade Secrets and Confidential Information. When determining the type of protection to afford a party's confidential information, the court will balance the risk of inadvertent disclosure of trade secrets and the risk of impairing the litigation process [*Chan v. Intuit, Inc. (ND Cal 2003) 218 FRD 659, 661*]. If the party seeking a protective order is unable to obtain complete protection for confidential information, that party might argue for any of the following types of limited protection:

- Limiting access to counsel [*see Davidson Pipe Co. v. Laventhol & Horwath (SDNY 1988) 120 FRD 455, 465*].

- Limiting access to counsel and party's expert witnesses [*see Dynamic Microprocessor Assocs. v. EKD Comp. Sales (EDNY 1996) 919 F Supp 101, 106*].

- Limiting access to counsel and restricting counsel's ability to represent the same type of entity for a

specified period of time [*see Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc. (7th Cir 1986) 784 F2d 1325, 1345-1346*].

- Limiting access to opposing party's expert witnesses and requiring opposing party to return confidential documents at the close of the litigation [*see Miles v. Boeing Co. (ED Pa 1994) 154 FRD 112, 115*].

- Limiting access to an independent consultant [*see* Brown Bag Software v. Symantec Corp. (9th Cir 1992) 960 F2d 1465, 1471].

- Limiting access only to outside counsel [*see Chan v. Intuit, Inc. (ND Cal 2003) 218 FRD 659, 661-662*].

- Limiting use of confidential information to the particular lawsuit [*see Dove v. Atlantic Capital Corp. (2d Cir 1992) 963 F2d 15, 19*].

- Prohibiting copying of confidential documents [*see Citicorp v. Interbank Card Ass'n (SDNY 1980) 87 FRD 43, 48*].

- Requiring a bond to protect against the risk of disclosure [*see In re Remington Arms Co. (8th Cir 1991) 952 F2d 1029, 1033*].

- Maintaining a log of all persons who examine the confidential records, and the times and dates of their inspections [*see Dynamic Microprocessor Assocs. v. EKD Comp. Sales (EDNY 1996) 919 F Supp 101, 106*].

- Designating an attorney as custodian of all confidential records [*see In re Remington Arms Co. (8th Cir 1991) 952 F2d 1029, 1033*].

- Requiring everyone who sees the confidential information to sign a confidentiality agreement [*see In re Remington Arms Co. (8th Cir 1991) 952 F2d 1029, 1033*].

22.45[5] Court May Restrict Which Counsel May View Protected Material Based on Risk of Inadvertent Disclosure. If litigation counsel for the party seeking discovery also participates in the client's competitive decision-making, such as advising on prosecution of patent applications, the court may order the attorney authorized to view the protected information to refrain from participating in competitive decision-making for a period of time to prevent inadvertent disclosure [*Chan v. Intuit, Inc. (ND Cal 2003) 218 FRD 659, 661-662*]. This determination is made without regard to whether the attorney who will view the discovery is in-house or outside counsel [*Brown Bag Software v. Symantec Corp. (9th Cir 1992) 960 F2d 1465, 1470*].

If the party seeking protection cannot establish that litigation counsel is involved in competitive decision-making, the court will not bar litigation counsel for the opposing party from viewing confidential information under the terms of the protective order [Nazomi Communications, Inc. v. Arm Holdings PLC (ND Cal 2002) 2002 US Dist LEXIS 21400, at *8].

Cross Reference:

6 *Moore's Federal Practice, § 26.105[8][b]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryProtective OrdersTrade Secrets LawCivil ActionsProtection OrdersTrade Secrets LawCivil ActionsSealed Records

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22.46 Court May Order Parties to Simultaneously File Information Under Seal.

A protective order may require that parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court [*Fed R Civ P 26(c)(1)(H)*].

The simultaneous exchange may prevent one party from acquiring an unfair advantage over the other by ensuring that neither party is privy to the other's information first [*see Friction Div. Prods. V. E.I. DuPont de Nemours & Co. (D Del 1987) 658 F Supp 998, 1003 , aff'd, 883 F2d 1027 (1989)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryProtective OrdersTrade Secrets LawCivil ActionsSealed Records

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22.47 CHECKLIST: Preparing Motion for Protective Order.

☐ Use federal pretrial motion procedure to prepare motion geared to particular discovery event.

Authority:
Fed R Civ P 6(c), 7(b)(1), 26(c)

Discussion:
See *§ 22.53[1]*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ Make sure motion is timely filed.

○ Motion on written discovery should be filed before responses due.

○ Motion on deposition must be filed prior to the scheduled date for deposition.

Authority:
Berry v. Baca (CD Cal 2002) 2002 US Dist LEXIS 15698, at *8-*9 ; *Pioche Mines Consol., Inc. v. Dolman (9th Cir 1964) 333 F2d 257, 269*

Discussion:
See *§ 22.53[2]*

☐ File motion in either:

- ○ Court in which the action is pending.
- ○ District where the deposition is to be taken.

Authority:
Fed R Civ P 26(c)

Discussion:
See *§ 22.53[3]*

☐ Confer or attempt to confer.

Authority:
Fed R Civ P 26(c)

Discussion:
See *§ 22.53[4]*

☐ State grounds for protective order:

- ○ Establish good cause by identifying specific harm or prejudice in absence of protective order.
- ○ Show that danger of harm or prejudice outweighs need for discovery.
- ○ Identify type of protection needed.

Authority:
Fed R Civ P 26(c); *McCoy v. Southwest Airlines Co. (CD Cal 2002) 211 FRD 381, 386*

Discussion:
See *§§ 22.37 -22.46*, *22.54*

Form:
See *§ 22.73*

☐ Prepare affidavits by knowledgeable persons to establish good cause.

Authority:
Brittain v. Stroh Brewery Co. (MDNC 1991) 136 FRD 408, 412-413

Discussion:
See *§ 22.54[3][b]*

☐ Attach certification that movant conferred or attempted to confer to resolve dispute.

Authority:
Fed R Civ P 26(c)

Discussion:
See *§ 22.53[4]*

Form:
See *§ 22.73*

☐ Serve and file motion for protective order in accordance with federal motion practice, local rules and individual judge's rules.

Authority:
Fed R Civ P 5, *77*

Discussion:
Ch. 5, Formatting, Serving and Filing Papers, see *§§ 5.18*, *5.26*

☐ Include proposed order with motion.

Discussion:
See *§ 22.53[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureDiscoveryProtective Orders

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IV. USING PROTECTIVE ORDERS TO LIMIT DISCOVERY
B. Obtaining a Protective Order

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22.48 Options and Strategy.

If the responding party determines that a protective order is warranted, the responding party should consider the available methods to protect against these abuses.

If the discovery request requires a written response, the party has two options:

- **Objection:** First, the responding party may object to the discovery request in the written opposition. The propounding party must then decide whether to pursue the discovery through meet and confer efforts with the responding party and, if determined to obtain responses, proceed with a motion to compel. At the meet and confer stage, the responding party has the opportunity to seek a stipulated protective order to limit the discovery. If no stipulation is entered, the propounding party must file a motion to compel, and the responding party may request a protective order in opposition to the motion to compel [*Fed R Civ P 37(a)(5)(B)*].

- **Protective Order:** The second option for the responding party is to meet and confer to obtain a stipulated protective order, and if none is achieved, to file a motion for protective order prior to the time discovery responses are due.

While it normally makes sense economically for the responding party to wait for the propounding party to bring a motion to compel on objectionable discovery, particularly when it is unclear that the propounding party intends to compel responses, there are instances where the responding party would benefit from bringing a motion for protective order first. Bringing a motion for protective order puts the responding party in a more aggressive position, and lets the court know that the responding party takes the objections seriously and has confidence in the legal support for the objections. Bringing such a motion may also allow the responding party to have the last word on the issue in a reply. Also, if the objectionable discovery is voluminous, and a blanket protective order is desired, it may be less time-consuming to prepare a motion for protective order than to prepare numerous and repetitive objections.

If the discovery request is a notice of taking deposition, the party opposing the deposition does not have the option of raising the objection first in written discovery responses. The party opposing a deposition should seek a protective

order, either through stipulation or court order, prior to the deposition date if the party believes the deposition should not be allowed or should be limited in some respect. After the commencement of the deposition, a protective order may only be issued upon a showing either that the deposition is being taken in bad faith or in a manner that "unreasonably" annoys, embarrasses, or oppresses the deponent or party [*Fed R Civ P 30(d)(3)(A)*].

Legal Topics:

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

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22.49 Parties May Move for Protective Order Pertaining to Discovery or Disclosure.

Parties may obtain protective orders for:

- Mandatory disclosure required under *Fed R Civ P 26(a)* [*Fed R Civ P 26(a)(1)*].

- Any type of discovery request, including oral or written depositions, interrogatories, requests for admission, requests for production or inspection, and requests for physical or mental examination [*Fed R Civ P 26(c), 30(d)(3)*].

Cross References:

Discussion of matters subject to disclosure, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, §§ 15.15- 15 .26. Discussion of matters subject to discovery requests, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§§ 24.03 -24.11*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryProtective Orders

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22.50 Subpoenaed Nonparties May Seek Protective Order.

Rule 26(c) provides that protective orders may be sought by a "party or any person from whom discovery is sought" [*Fed R Civ P 26(c)(1)*]. Subpoenaed nonparties may therefore obtain protection from a subpoena under this rule, and under *Fed R Civ P 45*, regarding subpoenas [*Fed R Civ P 26(c)*, *45(c)(3)*; *see also Compaq Computer Corp. v. Packard Bell Elecs., Inc. (ND Cal 1995) 163 FRD 329, 335*].

Cross Reference:

Discussion regarding restrictions on subpoenas, see Ch. 23, Methods of Discovery, *§ 23.261*.

Legal Topics:

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

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22.51 Third Parties Must Intervene to Assert Rights Under Protective Order.

22.51[1] Third Parties Generally Bound by Terms of Protective Order. A protective order generally binds nonparties as well as parties, even when the nonparty is not named in the protective order [*see Quinter v. Volkswagen of Am. (3d Cir 1982) 676 F2d 969, 972*].

22.51[2] Protective Orders Not Binding Against Grand Jury Subpoenas. The Ninth Circuit, recognizing a split in authority in the circuit courts, has adopted a *per se* rule that grand jury subpoenas take precedence over protective orders [*In re Grand Jury Subpoena Served On Meserve, Mumper & Hughes (9th Cir 1995) 62 F3d 1222, 1226*]. Accordingly, a protective order will not shield discovery from review by grand jury other than for material produced in divorce, malpractice, and other cases where a privilege is shared by both parties.

Judge's Perspective:

Practically speaking, a litigant is unlikely to be able to shield civil discovery from grand jury review. Although the recipient of a grand jury subpoena retains the right to move to quash on grounds of privilege, overbreadth, lack of particularity, and lack of relevance, the standard is highly deferential to a finding that the subpoena is reasonable [*see Fed R Crim P 17(c)(2)*]. Particularly as to relevance, the scope is much broader than for a civil subpoena. Accordingly, a motion to quash is unlikely to succeed where discovery materials from a civil action subject to a protective order are at issue.

22.51[3] Third Parties Must Participate Directly to Protect Information. A party seeking a protective order usually may not assert the rights of third parties to protect the third parties' proprietary or confidential business information [*Burton Mech. Contractors, Inc. v. Foreman (ND Ind 1992) 148 FRD 230, 234*]. The affected third party must intervene in the lawsuit to protect the information that is in the possession of a litigant [*Blum v. Schlegel (WDNY 1993) 150 FRD 38, 38-39*]. However, in securities actions, a party may seek to block third-party subpoenas until motions to dismiss have been denied [*Powers v. Eichen (SD Cal 1997) 961 F Supp 233, 236*]

Warning:

Avoid delay in intervening to seek protection against disclosure matters pertaining to third parties. Motions to intervene to gain access to documents subject to a protective order must be timely. The Ninth Circuit determines timeliness based on (1) the state of the proceeding at which the applicant seeks to intervene; (2) the prejudice to other parties, and (3) the reason for and length of delay in seeking intervention [*see Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us, Inc. (9th Cir 1995) 62 F3d 1217, 1219*].

Cross Reference:

Ch. 14, Intervention.

Discussion of who may assert third party rights in protective orders, see 6 *Moore's Federal Practice, § 26.101[2][b]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedureDiscoveryProtective Orders

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22.52 Methods for Obtaining Protective Order.

22.52[1] Parties May Stipulate to Protective Order. In many cases, parties may stipulate to a protective order, particularly when the party seeking discovery wishes to avoid delays, uncertainties and costs associated with pursuing a motion to compel or opposing a motion for protective order [*see San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1098 n1*]. Even if attempts to stipulate a protective order are unsuccessful, the process of attempting to secure one satisfies the meet and confer requirements requisite to filing a motion for protective order [*see Fed R Civ P 26(c)*].

Strategic Point:

Stipulating to a protective order has the great advantage that the parties draft the order and therefore can ensure that provisions important to them are included. However, a stipulation cannot be used to skirt the requirement that, as appropriate, either a particularized showing of "good cause" or showing of compelling reasons be made for keeping documents under seal [*see, e.g.,* Kamakana v. City and County of Honolulu (9th Cir 2006) 447 F3d 1172].

Cross References:

Discussion of procedures for preparing a discovery stipulation, see *§ 22.07*.

Form of stipulated protective order, see *§ 22.74*.

Additional discussion of stipulated protective orders, see 6 *Moore's Federal Practice, § 26.104[2]* (Matthew Bender 3d ed.).

22.52[2] Party May Request a Protective Order in Opposition to a Motion to Compel. When the parties are unable to stipulate to a protective order, the party from whom written discovery is sought may object to the discovery request and request a protective order in opposition to a motion to compel if one is filed [*Fed R Civ P 37(a)(5)(B)*].

This option is not available to the same extent when the discovery method is by deposition, because no written objections are involved [*Nelson v. Capital One Bank (ND Cal 2001) 206 FRD 499, 500 n1*].

Cross References:

Discussion of objections to specific types of discovery requests, see Ch. 23, Methods of Discovery. Discussion of opposing a motion to compel, see *Ch. 25, Motions to Compel and Discovery Sanctions, §§ 25.13 -25.15*. Discussion regarding obtaining a protective order covering a deposition, see *§ 22.43*.

22.52[3] Party May Bring Motion for Protective Order. If the parties refuse to stipulate to a protective order, the party from whom discovery was sought may bring a motion for protective order, and must follow the procedures required for noticed motions [*Fed R Civ P 6(c), 7(b)(1), 26(c)*].

Cross References:

Discussion of procedures for bringing motion for protective order, see *§ 22.53*. General discussion of preparing a noticed motion, see Ch. 26, Pretrial Motion Practice, *§§ 26.12 -26.36*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders

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22.53 Procedures for Bringing Motion for Protective Order.

22.53[1] Motion for Protective Order Must Follow Noticed Motion Procedure. A party filing a motion for protective order must generally follow the procedures for preparing a noticed motion [*see Fed R Civ P 6(c), 7(b)(1), 26(c)*]. District courts have additional local requirements, as do individual judges as reflected in their standing orders.

Cross References:

Discussion of preparing noticed motions, see *Ch. 26, Pretrial Motion Practice, §§ 26.12 -26.36*. Local district court requirements for preparing noticed motions, see Ch. 26, Pretrial Motion Practice, *§§ 26.18 -26.22*.

22.53[2] Motion for Protective Order Must Be Timely.

22.53[2][a] Timeliness Required. Although *Fed R Civ P 26(c)* includes no time limit for filing a motion for a protective order, courts require that the motion be timely or reasonable [*see* Berry v. Baca (CD Cal 2002) 2002 US Dist LEXIS 15698, at *8-*9].

Timing:

A motion for protective order is timely if it is made prior to the date set for producing the discovery [*see* Berry v. Baca (CD Cal 2002) 2002 US Dist LEXIS 15698, at *9 ; *see also* Seminara v. City of Long Beach (9th Cir 1995) 1995 US App LEXIS 29729, at *13 (unpublished opinion; generally not citable to court under 9th Cir R 36-3)].

Cross Reference:

6 *Moore's Federal Practice, § 26.102[2]* (Matthew Bender 3d ed.).

22.53[2][b] Court May Excuse Untimely Motion for Good Cause. A court may consider an untimely motion for protective order for good cause [Berry v. Baca (CD Cal 2002) 2002 US Dist LEXIS 15698, at *9]. Good cause to

excuse untimely motions has been found when:

- There was no opportunity to move for a protective order [*Brittain v. Stroh Brewery Co. (MDNC 1991) 136 FRD 408, 414*].

- The party sought in good faith to negotiate a consent protective order [*Nestle Foods Corp. v. Aetna Cas. & Sur. Co. (DNJ 1990) 129 FRD 483, 487*].

22.53[2][c] Protective Order Covering an Oral Deposition Must Be Filed Before Deposition Begins. When a party seeks a protective order to block or narrow the scope of a deposition, the motion must be filed before the deposition begins. The party seeking the protective order must obtain a protective order from the court prior to the date set for deposition, or at a minimum, obtain an order postponing the date of the deposition pending disposition of the motion [*Pioche Mines Consol., Inc. v. Dolman (9th Cir 1964) 333 F2d 257, 269* (construing former Fed R Civ P rule regarding protective orders for depositions)].

Warning:

The mere filing of the motion is insufficient to relieve the deponent from the obligation to appear at the deposition [*see BCI Communication Sys. Inc. v. Bell Atlanticom Sys., Inc. (ND Ala 1986) 112 FRD 154, 159*].

Once a deposition has started, the deponent may obtain a protective order only on a showing that the deposition is being conducted in bad faith or in a manner as to unreasonably annoy, embarrass, or oppress the deponent or a party [*Fed R Civ P 30(d)(3)*].

Cross Reference:

Discussion regarding discontinuing a deposition after its commencement, see Ch. 23, Methods of Discovery, *§§ 23.47 -23.59*.

22.53[2][d] LOCAL PRACTICE: ND Cal Requirements. In the Northern District, if a dispute arises during a discovery event, the parties must attempt to resolve the matter without judicial intervention, but if this fails, counsel may contact the chambers of the assigned judge to ask if the judge is available to address the problem through a telephone conference [*ND Cal Civ LR 37-1(b)*].

22.53[3] Motion Must Be Filed in the Proper District.

22.53[3][a] Requirement Under Federal Rules. A motion for protective order may be filed in either [*Fed R Civ P 26(c)(1)*]:

- The court in which the action is pending; or

- On matters relating to a deposition, the district where the deposition is to be taken.

22.53[3][b] Court May Transfer Motion to Judge in District Where Action Is Pending. The Seventh Circuit Court of Appeals has suggested that the judge in the district where the deposition is to be taken should transfer the motion to the judge handling the case on the merits [*see In re Orthopedic Bone Screw Prods. Liab. Litig. (7th Cir 1996) 79 F3d 46, 48*].

In contrast, the Northern District of Georgia concluded that the court in the district where the deposition is to be taken should defer to the court where the action is pending only if the trial judge has some background information needed to rule on the motion. Otherwise, the court reasoned, the nonparty deponents will be unable to avoid the burden and

expense of traveling to litigate the merits of the discovery dispute [*Lampshire v. Procter & Gamble Co. (ND Ga 1982) 94 FRD 58, 59*].

The Ninth Circuit has yet to address this issue. In a different context, however, the Ninth Circuit recognized that two courts may be involved in determining issues relating to protective orders [*see Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1132-1133*].

22.53[4] LOCAL PRACTICE: Parties Must Meet and Confer to Resolve Dispute.

22.53[4][a] LOCAL PRACTICE: CD Cal Requirements. Prior to the filing of a motion for protective order, counsel for the parties in the Cental District must confer in a good-faith effort to eliminate the necessity for hearing the motion or to eliminate as many of their discovery disputes as possible. Counsel for the moving party must arrange the conference. If both counsel are located within the same county of the Central District, the conference must take place in person at the office of the moving party's counsel, unless the parties agree to meet at a different location. If both counsel are not located within the same county of the Central District, the conference may take place telephonically. Unless relieved by written order of the Court after showing good cause, counsel for the opposing party must confer with counsel for the moving party within ten days after the moving party serves a letter requesting the conference. The moving party's letter must identify each issue and/or discovery request in dispute, state briefly with respect to each issue/request the moving party's position (and provide any legal authority that the moving party believes is dispositive of the dispute as to that issue/request), and specify the terms of the discovery order to be sought [*CD Cal Civ LR 37-1*]. Counsel unable to settle their differences must formulate a written stipulation, which must be filed and served with the notice of motion for a protective order [*CD Cal Civ LR 37-2*; *see CD Cal Civ LR 37-2.1-2.4* (stipulation requirements)].

Cross Reference:

Discussion of discovery stipulations, see *§§ 22.03 -22.13*.

22.53[4][b] LOCAL PRACTICE: ED Cal Requirements. In the Eastern District, a motion for a protective order will not be heard by the court unless (1) the parties have conferred and attempted to resolve their differences, and (2) the parties have stated their differences and the bases of the differences in a Joint Statement re Discovery Disagreement. The attorneys for all interested parties must confer in advance of the filing of the motion or in advance of the hearing of the motion in a good-faith effort to resolve their differences. Counsel for the moving party or prospective moving party must arrange the conference, which must be held at a time and place and in a manner mutually convenient to counsel [*ED Cal Civ LR 251(b)*]. If the moving party is still dissatisfied after the conference of counsel, that party must draft, with the participation of the other interested parties, and file the Joint Statement re Discovery Disagreement [*ED Cal Civ LR 251(c)*].

Cross Reference:

Discussion of discovery stipulations, see *§§ 22.03 -22.13*.

22.53[4][c] LOCAL PRACTICE: ND Cal Requirements. In the Northern District, the court will not consider a motion for a protective order unless the attorneys have previously conferred under Rule 37 in an attempt to resolve all disputed issues. If the attorney for the moving party seeks to arrange such a conference and opposing counsel refuses or fails to confer, the judge may impose an appropriate sanction, which may include an order requiring payment of all reasonable expenses, including attorney's fees, caused by the refusal or failure to confer [*ND Cal Civ LR 37-1*].

22.53[4][d] LOCAL PRACTICE: SD Cal Requirements. In the Southern District, the court will not consider any motion for a protective order unless the attorneys have previously met and conferred concerning all disputed issues. If counsel for the moving party seeks to arrange such a conference and counsel for the party against whom the motion will be made willfully refuses or fails to meet and confer, the court may order a payment of reasonable expenses, including attorney's fees, pursuant to Rule 37. If counsel have offices in the same county, they must meet in person. If

counsel have offices in different counties, they must confer by telephone. The parties may not satisfy the meet and confer requirement by exchanging written correspondence [*SD Cal Civ LR 26.1(a)*]. At the time of filing any motion to compel, counsel for the moving party must serve and file a certificate of compliance with this local rule [*SD Cal Civ LR 26.1(b)*].

22.53[5] Submit Proposed Order With Motion. Along with the motion, the moving party should submit a proposed order. Otherwise, the court may issue a standard order than does not contain specific provisions that may be important to the moving party [*see, e.g., CD Cal Civ LR 79-5.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryProtective Orders

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22.54 Party Seeking Protective Order Must Satisfy Requirements for Burden of Proof.

22.54[1] Good Cause Must Be Shown Before Court May Issue Protective Order. A court may only grant a protective order on a showing of good cause [*Fed R Civ P 26(c)(1)*]. The limitation on discovery must be supported by a "strong showing" for limitation and a "particular and specific need for the protective order" [*Methode Elecs., Inc. v. Finisar Corp. (ND Cal 2001) 205 FRD 552, 554*].

22.54[2] Person Seeking Protective Order Generally Has Burden of Establishing Good Cause. The party seeking a protective order generally has the burden of demonstrating good cause for each particular document or matter for which protection is sought [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1130*].

22.54[3] Establishing Good Cause for Protective Order.

22.54[3][a] Good Cause Generally Requires Showing of Specific Prejudice or Harm in Absence of Protective Order. Although the particulars of what constitutes good cause varies according to the type of protection sought, a party must in general make a showing of specific prejudice or harm that would result if no protective order is granted [*McCoy v. Southwest Airlines Co. (CD Cal 2002) 211 FRD 381, 386*].

Broad allegations of prejudice or harm are insufficient; the motion must be supported by specific examples or articulated reasoning [*Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 476*].

Cross Reference:

Discussion of some of the particular applications of good cause analysis, see *§§ 22.43[2]*, *22.44[3]*, *22.45[2]*.

22.54[3][b] Moving Party Should Use Affidavits to Show Good Cause. Normally, the moving party articulates the facts in support of its request for a protective order by affidavits from knowledgeable persons [*see Brittain v. Stroh Brewery Co. (MDNC 1991) 136 FRD 408, 412-413*]. If the specific facts alleged in the affidavit contain confidential information or trade secrets, the court may review the affidavit *in camera* [*see Brittain v. Stroh Brewery Co. (MDNC*

1991) 136 FRD 408, 412-413].

Cross Reference:

Discussion of good cause requirement, see 6 *Moore's Federal Practice, § 26.104[1]* (Matthew Bender 3d ed).

22.54[4] After Good Cause Shown, Court Must Balance Hardship Against Need for Discovery. Once a party seeking a protective order establishes good cause, the court must then balance the hardship to the party seeking the protective order against public and private interests to decide whether a protective order is necessary [*see Phillips v. GMC (9th Cir 2002) 307 F3d 1206, 1211*].

Example:

In a matter involving trade secrets, the court must balance the danger of inadvertent disclosure against the danger that a protective order will interfere with the opposing party's ability to prosecute its claims [*see Brown Bag Software v. Symantec Corp. (9th Cir 1992) 960 F2d 1465, 1470*].

In addition, the court must balance the public interest in obtaining access to the discovery materials against the litigant's interest in withholding the materials from discovery [*see, e.g., In re Eli Lilly & Co., Prozac Prods. Liab. Litig. (SD Ind 1992) 142 FRD 454, 458*].

Legal Topics:

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

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22.55 CHECKLIST: Opposing Motion for Protective Order.

☐ Use federal pretrial motion procedure to oppose motion.

Authority:
Fed R Civ P 6(c), 7(b)(1), 26(c)

Discussion:
See *§ 22.57[1]*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ Refute showing of good cause by:

○ Establishing minimal risk of harm.

○ Establishing minimal harm.

○ Establishing lack of cognizable prejudice.

Authority:
Pacific Lumber Co. v. National Union Fire Ins. Co. (ND Cal 2003) 220 FRD 349, 351-352 ; Nazomi Communications, Inc. v. Arm Holdings PLC (ND Cal 2002) 2002 US

Dist LEXIS 21400, at *8, *11

Discussion:
See *§ 22.57[2]*

☐ Show relevance and need for discovery outweigh potential harm to party seeking protection.

Discussion:
See *§ 22.57[3]*

☐ Serve and file opposition to motion for protective order in accordance with federal motion practice, local rules and individual judge's rules.

Authority:
Fed R Civ P 5, 77

Discussion:
Ch. 5, Formatting, Serving and Filing Papers, see *§§ 5.15 -5.23*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryProtective Orders

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22.56 Options and Strategies.

During meet and confer efforts, the propounding party may determine that the responding party's proposed limitations on discovery are too extreme. If the responding party files a motion for protective order, the propounding party should emphasize to the court the extreme nature of the moving party's requested limitations, and the difficulties the limitations will impose on the propounding party's ability to litigate its case. The propounding party, in opposing the motion, should establish that the requested discovery is relevant and necessary to the issues in the case, and that the bases for "good cause" are insufficient [*see* Nazomi Communications, Inc. v. Arm Holdings PLC (ND Cal 2002) 2002 US Dist LEXIS 21400, at *8, *11].

To the extent the moving party has legitimate bases to establish good cause, the propounding party should establish that the need for the discovery outweighs the purported harm. The propounding party should show that the purported harm is either minimal or not cognizable under the law, and/or that the risk that the purported harm may occur is slight [*see Pacific Lumber Co. v. National Union Fire Ins. Co. (ND Cal 2003) 220 FRD 349, 351-354*]. The propounding party may further strengthen its argument by describing any restrictions it offered to the moving party, the manner in which the proposed restrictions would have alleviated the asserted harm, and that the moving party rejected them.

If the opposing party is concerned that the court will grant the motion, the opposing party may consider submitting an alternative proposed protective order containing provisions that are less onerous than those proposed by the moving party.

Legal Topics:

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

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22.57 Requirements for Opposing Motion for Protective Order.

22.57[1] Party Opposing Motion Must Use Noticed Motion Procedure. Parties opposing a motion for protective order must generally follow the procedures for opposing a noticed motion [*see Fed R Civ P 6(c), 7(b)(1), 26(c)*]. District courts have additional local requirements and individual judge's standing orders to follow in opposing discovery motions.

Cross Reference:

Discussion of opposing noticed motions, see Ch. 26, Pretrial Motion Practice, *§§ 26.37 -26.43*.

22.57[2] Party Opposing Protective Order Should Refute Good Cause. The party opposing a protective order will prevail if the court is not convinced that good cause exists. Accordingly, opposition to the protective order, whether in a reply to a motion to compel or in opposition to a motion for protective order, should focus on the unlikelihood of potential harm or prejudice, and on the minimal nature of any harm or prejudice that might occur. The minimal nature of *either* of these factors will likely defeat a request for protective order.

Example--Minimal Risk:

In a patent infringement case, a party sought a protective order to bar opposing counsel, who accessed its confidential information, from prosecuting patents related to the particular technology at issue, or from negotiating licenses with the parties to the action. The bar would last varying terms from one to five years after the termination of the litigation. The court held that, since opposing counsel were only litigation counsel, as opposed to competitive decision-makers, the risk of inadvertent disclosure was too slight to warrant the proposed bars [Nazomi Communications, Inc. v. Arm Holdings PLC (ND Cal 2002) 2002 US Dist LEXIS 21400, at *8, *11].

Example--Minimal Harm:

In a property damages suit, a logging company sought a protective order to stay discovery, arguing in part that a pending disposition of a summary judgment motion could narrow the scope of discovery. In denying the motion, the court noted that much of the discovery would still be relevant to remaining

issues not subject to the summary judgment motion [*Pacific Lumber Co v. National Union Fire Ins. Co. (ND Cal 2003) 220 FRD 349, 351-352*].

Example--Lack of Cognizable Prejudice:

A logging company claimed it would suffer prejudice from allowing the depositions from the defendant insurance company, because a previous settlement agreement in another case required the insurance company not to engage in discovery that may cause harm to the insured, the logging company. The court rejected this argument, noting that the lumber company had brought suit against the insurer, and therefore could not claim prejudice due to discovery of the information about the insured [*Pacific Lumber Co v. National Union Fire Ins. Co. (ND Cal 2003) 220 FRD 349, 353-354*].

22.57[3] Party Opposing Protective Order May Defeat or Limit Order on Showing of Relevance and Necessity of Requested Information. The party seeking discovery may still defeat, or at least limit the reach of a protective order, by showing that the relevance and necessity of the information outweigh the opposing party's interest in restricting discovery [*see, e.g., Cobb v. Danzig (SD Cal 1999) 190 FRD 564, 566-567*].

Example--Limited Discovery Allowed:

A former employee had her security clearance revoked and sued her former employer for discrimination based on the employer's decision to undertake an investigation of her security clearance status. The defendant sought a protective order barring depositions of naval intelligence officers, claiming that the court lacked jurisdiction to review revocation of security clearance and that the deponent lacked information relevant to the claim. The court acknowledged its lack of jurisdiction to review the decision to revoke security clearance, but allowed the depositions to go forward, limited to the issue regarding the initial decision to investigate whether the security clearance should be revoked [*Cobb v. Danzig (SD Cal 1999) 190 FRD 564, 566-567*].

22.57[4] Nonparty May Oppose Protective Order on Public Interest Grounds. In the absence of a court order, the fruits of pretrial discovery are presumptively public [*San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1103*]. Accordingly, nonparties may intervene in an action to refute a showing of good cause when the case involves a matter of public interest [*see San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1100*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryProtective Orders

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22.58 Prevailing Party on Motion May Recover Expenses.

If the motion for protective order is denied, the court may award to the prevailing party any expenses incurred by it in relation to opposing the motion, including attorney's fees. However, the court will not award expenses if it finds that filing the motion was substantially justified or that other circumstances make an award of expenses unjust [*Fed R Civ P 26(c), 37(a)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryProtective Orders

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22.59 CHECKLISTS: Modifying or Vacating Protective Order.

22.59[1] Preparing Motion to Modify or Vacate Protective Order.

☐ If you are nonparty to action in which protective order was entered, prepare timely motion to intervene.

Authority:
Fed R Civ P 24(b)(1)(B); *San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1100* ; *Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us, Inc. (9th Cir 1995) 62 F3d 1217, 1221*

Discussion:
See *§§ 22.51*, *22.64*. Discussion regarding the procedure to follow to intervene in another lawsuit, see Ch. 14, Intervention

☐ If you are party to protective order, establish:

○ Sufficient need for information.

○ Need for discovery outweighs potential harm to party seeking continued protection.

Authority:
Intel Corp. v. Via Techs., Inc. (ND Cal 2000) 198 FRD 525, 528-529

Discussion:
See *§ 22.65[1]*

☐ If you are collateral litigant seeking to avoid duplicative discovery, establish to court that issued the protective order that:

- ○ Protected material was not subjected to good cause analysis.
- ○ Protected material is relevant to collateral litigation.
- ○ Protected material is generally discoverable.
- ○ Relevance of protected discovery outweighs reliance interests of protected party.

Authority:
Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1131-1133

Discussion:
See *§ 22.65[2]*

☐ If, as collateral litigant, you obtain modification of protective order from issuing court, establish to collateral court that:

- ○ Specific discovery sought is relevant to specific issues.
- ○ Specific material sought is discoverable.

Authority:
Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1132-1133

Discussion:
See *§ 22.65[2][e]*

☐ If you are nonparty seeking access in a matter of public interest, show

- ○ Protective order was issued without showing of good cause.
- ○ Importance to public health or safety.
- ○ Importance to other matters of public interest.

Authority:
San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1103

Discussion:
See *§ 22.65[3]*

☐ If you are nonparty seeking access in a matter of public interest to matters filed under seal in court in a non-dispositive motion, show compelling reasons why material should be released.

Authority:
Phillips v. GMC (9th Cir 2002) 307 F3d 1206, 1213

Discussion:
See *§ 22.65[3][c]*

☐ If nonparty is a grand jury seeking protected material, protective order is not enforceable to bar production of material sought in grand jury subpoena.

Authority:
In re Grand Jury Subpoena Served On Meserve, Mumper & Hughes (9th Cir 1995) 62 F3d 1222, 1227

Discussion:
See *§ 22.65[4]*

22.59[2] Opposing Modification of Protective Order.

☐ Establish good cause for specific materials sought to be discovered, particularly in case involving blanket protective order or stipulated protective order.

Authority:
Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 475 ; Kamakana v. City & County of Honolulu (D Haw 2002) 2002 US Dist LEXIS 26921, at *12-*13

Discussion:
See *§ 22.66[1], [4][a]*

☐ Establish reliance on existence of protective order, such as:

○ Existence of protective order induced protected party into providing discovery.

○ Existence of protective order induced settlement of action.

○ Existence of protective order induced party to testify as to matters for which *Fifth Amendment* would have been invoked.

Authority:
Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 475-476

Discussion:
See *§ 22.66[2]*

☐ If sought discovery was filed in court under seal, show compelling reasons why sealed matters should not be revealed.

Authority:

Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1136

Discussion:

See *§ 22.66[3]*

Legal Topics:

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

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22.60 Options and Strategy.

A protective order may be modified under appropriate circumstances [*see Verizon Cal., Inc. v. Ronald A. Katz Tech. Licensing, L.P. (CD Cal 2003) 214 FRD 583, 585-586*]. For example:

- A party to the litigation in which the protective order was issued may determine that information that had previously been blocked from discovery has become relevant and necessary to the litigation and that therefore the protective order must be modified to obtain the information.

- A party to collateral litigation may need access to material subject to the protective order.

- A nonparty may seek access to protected material when that material contains information that bears on a matter of public interest.

If a collateral litigant or other nonparty seeks to modify a protective order, the first step is to intervene in the lawsuit in which the protective order was issued [*see San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1100*]. This may be done following the termination of the lawsuit. The motion to intervene must be timely filed, so the intervening party should seek intervention within a reasonable time after learning of the need for the protected material.

The burden of establishing good cause for protection remains with the party opposing disclosure [*see Verizon Cal., Inc. v. Ronald A. Katz Tech. Licensing, L.P. (CD Cal 2003) 214 FRD 583, 585*]. While the type of showing that must be made by the party seeking modification varies depending on the status of that party, the party seeking modification generally must establish the need for the material, and that the need outweighs any potential harm to the party seeking to maintain protection.

The party opposing modification should show not only good cause for continued protection, but also that the existence of the protective order induced the protected party to act in some manner in reliance on the order. When the protective order at issue is a blanket protective order, or is a stipulated protective order, the protected party may need to establish good cause for the first time in opposing the motion for protective order.

Judge's Perspective:

The parties should keep in mind that the protected aspect of discovery materials may be an evolving concept. The assumption should not be made that information deemed protected from disclosure at one point in the litigation will invariably maintain that status throughout the life of the case. For example, sensitive business information may become outdated by product development or disclosure. Accordingly, parties seeking access to protected information should consider whether circumstances have altered the basis on which protection was originally afforded. Conversely, parties who wish to maintain that protection should be alert to preserving the characteristics of the information on which the protective order was based, such as keeping in place practices to restrict dissemination of the material.

Legal Topics:

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

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22.61 Protective Order May Be Modified or Vacated.

The district court retains the power to modify or vacate a protective order after it has been entered [*Verizon Cal., Inc. v. Ronald A. Katz Tech. Licensing, L.P. (CD Cal 2003) 214 FRD 583, 585-586*]. Modification may be sought even after the underlying suit has terminated [*see Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1128*].

Legal Topics:

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

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22.62 Modification May Not Impose New Obligations on Parties to Protective Order After Underlying Action Terminated.

Once the underlying action has ended, a court may not impose any new, affirmative requirements on the parties relating to discovery [*see Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1133 , citing Public Citizen v. Liggett Group, Inc. (1st Cir 1988) 858 F2d 775, 781 , cert. denied, 488 US 1030 (1989)*].

Legal Topics:

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

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22.63 Both Parties and Nonparties May Seek Modification.

A party or other person may seek to modify or vacate a protective order by noticed motion [*see Intel Corp. v. VIA Techs., Inc. (ND Cal 2000) 198 FRD 525, 528* ; *Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1128-1129*].

Legal Topics:

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

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22.64 Nonparty Must Intervene to Modify Protective Order.

22.64[1] Nonparty Must Intervene in Lawsuit to Challenge Order. Nonparties may challenge protective orders to obtain access to information or judicial proceedings by seeking permissive intervention [*Fed R Civ P 24(b)(1)(B)*; *San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1100*].

Cross Reference:

Discussion of permissive intervention in another lawsuit, see Ch. 14, Intervention, *§§ 14.08*, *14.09*.

22.64[2] Party May Intervene After Action Terminated. Courts may grant motions to intervene to modify protective orders after the underlying action has ended [*see Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1128-1129*].

22.64[3] Motion to Intervene Must Be Timely. The Ninth Circuit requires that motions to intervene to modify protective orders must be timely [*Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us, Inc. (9th Cir 1995) 62 F3d 1217, 1221*].

Timing:

To assess whether the motion to intervene is timely, the court considers the following three factors [*Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us, Inc. (9th Cir 1995) 62 F3d 1217, 1219*]:

- The stage of the proceeding at which an applicant seeks to intervene.
- The prejudice to other parties.
- The reason for and length of delay.

A court will be more willing to grant the motion when the third party was unlikely to have had any way of knowing at the time the protective order was entered what effect the order would have on its interests. Conversely, if a third party knew of the protective order and understood its impact on its interests, the court is less likely to grant the motion to intervene [*see Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us, Inc. (9th Cir 1995) 62 F3d 1217, 1220*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedureDiscoveryProtective Orders

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22.65 Making Showing Necessary to Modify Protective Order.

22.65[1] Showing Required for Party to Protective Order Seeking Modification.

22.65[1][a] Party to Protective Order Who Seeks Modification Must Show Sufficient Need for Information. A party to an existing protective order who seeks to modify the order must show that the party needs the protected material, and that its ability to litigate its case will be prejudiced without access to it [*Intel Corp. v. Via Techs., Inc. (ND Cal 2000) 198 FRD 525, 528-529*].

22.65[1][b] Party Must Show Need for Discovery Outweighs Potential Harm to Party Seeking Continued Protection. After a party establishes a need for the protected information, the court then balances the need for the discovery against any harm to the party seeking continued protection [*Biovail Laboratories, Inc. v. Anchen Pharmaceuticals, Inc. (CD Cal 2006) 463 F Supp2d 1073, 1084* ; *Intel Corp. v. Via Techs., Inc. (ND Cal 2000) 198 FRD 525, 528*]. To the extent the party opposing modification contends that it relied on the protective order, the party seeking modification must establish that the need for the discovery outweighs the reliance interest.

Cross References:

Discussion of reliance interest by the party opposing modification, see *§ 22.66[2].*

Additional discussion of the standards that apply to a party seeking modification, see 6 *Moore's Federal Practice, § 26.106[3]* (Matthew Bender 3d ed).

22.65[2] Showing Required for Collateral Litigant.

22.65[2][a] Collateral Litigant Must Show Relevance. A collateral litigant who intervenes to modify a protective order issued in another case to avoid duplicative discovery must show that the protected discovery is relevant to the collateral proceedings [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1132*]. The court determines relevance based on the "degree of overlap in facts, parties, and issues between the suit covered by the protective order and the collateral proceedings" [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122,*

1132].

Cross Reference:

Intervention by nonparty to modify protective order, see *§ 22.64*

22.65[2][b] Collateral Litigant Must Show Discoverability. A collateral litigant must also show that the protected material is generally discoverable [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1132*]. For instance, if the protected material contains privileged matters, those materials are not discoverable by the collateral litigant [*see Fed R Civ P 26(b)(1)*].

22.65[2][c] Collateral Litigant May Discover Materials That Should Not Have Been Placed Under Seal. In some cases, a blanket protective order may have been issued forbidding all parties to a case from disclosing any information obtained in discovery, particularly in a document intensive case where review for confidential materials would be especially onerous. In such a case, good cause for the protective order was never established for each specific document subject to the order. When a collateral litigant seeks modification of this type of protective order, the court must allow the collateral litigant access to all relevant and discoverable materials except for those for which the party seeking protection shows good cause to remain subject to a protective order [*see Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1131*]

22.65[2][d] Issuing Court Balances Threshold Relevance and Reliance. Initially, the court that issued the protective order determines whether the protected materials are relevant to the collateral litigant's lawsuit [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1132-1133*].

On this initial determination of relevance, the issuing court balances the interest in avoiding duplicative discovery against the protected party's reliance on the protective order [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1133*]. To the extent the party opposing modification relied on the confidentiality afforded by a protective order, the party seeking modification may agree to abide by the same restrictions on maintaining confidentiality as those governing the original parties to the order [*see Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 475*].

22.65[2][e] Collateral Court Determines Whether Collateral Litigant Will Obtain Materials. Once a collateral litigant obtains a modification of a protective order from the issuing court, the collateral court must then determine whether the specific protected material is relevant and discoverable by the litigants in the collateral proceeding [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1132-1133*].

Judge's Perspective:

As a practical matter, the issue is likely to be resolved by the issuing court, which will take into account the collateral litigant's need for the material before ordering a modification to permit access. Accordingly, on obtaining the modification, the collateral litigant should meet and confer with the responding party to determine if disclosure can be obtained without the need for further motion practice before the collateral court. If the responding party refuses, the collateral litigant should stress to the collateral court that, explicitly or implicitly, the issuing court took into account the collateral litigant's need for the material in agreeing to modify the protective order.

22.65[3] Showing Required for Modification by Nonparty in Matter of Public Interest.

22.65[3][a] Nonparty Should Address Lack of Good Cause for Protecting Pretrial Discovery. The Ninth Circuit recognizes a presumption of access to pretrial discovery and court documents absent a court order to the contrary. A party seeking a protective order that overrides this presumption of access typically must show good cause [*see Fed R Civ P 26(c)*; *San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1103*].

A nonparty seeking to modify a protective order to gain access to pretrial discovery or court documents should address in its moving papers how the protective order was issued without a showing of good cause as to the particular materials sought [*see San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1103*].

22.65[3][b] Court Considers Various Factors to Determine Whether Good Cause Is Present in a Matter of Public Interest. In determining whether good cause exists to shield discovery from nonparties seeking information in the public interest, courts may consider the following factors [Kamakana v. City & County of Honolulu (D Haw 2002) 2002 US Dist LEXIS 26921, at *9 n3].

- Whether disclosure will violate any privacy interests.
- Whether the information is being sought for a legitimate purpose or for an improper purpose.
- Whether disclosure of the information will cause a party embarrassment.
- Whether confidentiality is being sought over information important to public health and safety.
- Whether the sharing of information among litigants will promote fairness and efficiency.
- Whether a party benefiting from the order of confidentiality is a public entity or official.
- Whether the case involves issues important to the public.

22.65[3][c] Nonparty Must Show Compelling Reason for Modification If Sought Documents Were Filed in Court Under Seal in Non-Dispositive Motion. Although nonparties generally enjoy a presumption of access to pretrial discovery and court documents, this presumption is rebutted when good cause was previously established for issuing the protective order. If the sought documents were filed in court under seal in a non-dispositive motion, the nonparty seeking modification must establish compelling reasons why the document should be released [*Phillips v. GMC (9th Cir 2002) 307 F3d 1206, 1213*].

Distinguish:

When a nonparty seeks protected materials that had been filed in court in support of a *dispositive* motion, the nonparty is entitled to access those protected documents absent compelling reasons to disallow access [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1136*].

22.65[3][d] Waiver Possible If Confidential Material Is Revealed in Court. Although the Ninth Circuit has not yet ruled on the issue of whether protection for confidential material is waived when presented as evidence in open court, the Third Circuit has held that such presentation does defeat the strictures of the protective order [*see Littlejohn v. BIC Corp. (3d Cir 1988) 851 F2d 673, 678-680*]. In light of the strong presumption in favor of public access, it is likely that the Ninth Circuit would follow the Third Circuit.

Strategic Point:

To preserve the protections afforded by the protective order, the party seeking protection should object to the admission into evidence of the protected materials and request that such materials only be admitted under seal.

Judge's Perspective:

Do not assume that a protective order will automatically apply at trial. Most protective orders issued on a

blanket basis at the commencement of litigation do not purport to cover the treatment of confidential materials at trial. That issue is generally left for discussion at the pretrial conference or through motions in limine. In general, federal courts are extremely resistant to holding civil trial proceedings "under seal."

Cross Reference:

Nonparty challenges to gain access to matters of public interest, see 6 *Moore's Federal Practice, § 26.106[3][b]* (Matthew Bender 3d ed.).

22.65[4] Showing Required for Nonparty Governmental Entity Seeking Access to Material Subject to Protective Order for Law Enforcement Purposes. The Ninth Circuit has adopted a *per se* rule that grand jury subpoenas take precedence over any protective orders issued under *Fed R Civ P 26(c)* [*In re Grand Jury Subpoena Served On Meserve, Mumper & Hughes (9th Cir 1995) 62 F3d 1222, 1227*]. The government need only present the grand jury subpoena to access the protected material identified in the grand jury subpoena.

Legal Topics:

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

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22.66 Considerations for Opposing Modification.

22.66[1] Party Opposing Modification Must Show Good Cause. Because the Ninth Circuit strongly favors access to discovery materials, the party opposing modification generally bears the burden of showing good cause to continue the protection afforded by the protective order [*Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 475*].

Consider:

If the protective order was originally obtained on a showing of good cause, the party opposing modification generally will have already met this burden [*see Intel Corp. v. Via Techs., Inc. (ND Cal 2000) 198 FRD 525, 528*].

Once the party seeking modification meets its burden of showing good cause, the burden then shifts to the party seeking modification to establish a sufficient need for the information that outweighs the risk of injury to the party opposing modification [*see Intel Corp. v. Via Techs., Inc. (ND Cal 2000) 198 FRD 525, 528*].

22.66[2] Party Opposing Modification Should Show Reliance on Protective Order. A party opposing a motion to modify a protective order should also show that the terms of the protective order induced its reliance on the order in litigating the case [*Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 476*]. The extent to which a court will defer to the reliance interests of the party opposing modification depends on the extent to which the order induced that party to consent to allow discovery or to settle a case [*Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 475*].

Example:

When potential criminal conduct is implicated, a protective order that induces a party into testifying without invoking the *Fifth Amendment* would create a particularly strong reliance interest [*see Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 475*].

22.66[3] Party Opposing Modification Must Show Compelling Reasons to Prevent Nonparty From

Accessing Sealed Documents Filed in Support of Dispositive Motion. A party seeking to maintain confidentiality of documents under seal filed in support of a dispositive motion must provide compelling reasons to do so [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1136*].

22.66[4] Party Opposing Modification of Stipulated or Blanket Protective Order Has Heavier Burden.

22.66[4][a] Party Opposing Modification of Stipulated or Blanket Protective Order Must Establish Good Cause. When a blanket protective order is issued, a party seeking modification of the protective order may establish that good cause was never established as to a particular document for which access is sought [*San Jose Mercury News, Inc. v. United States Dist. Court (9th Cir 1999) 187 F3d 1096, 1103*]. Similarly, when a stipulated protective order is entered, a party seeking modification can show that good cause was never established at all [*see Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 476*].

In these situa tions, the party seeking protection must establish good cause as to each document for which access is sought [*see* Kamakana v. City & County of Honolulu (D Haw 2002) 2002 US Dist LEXIS 26921, at *12-*13].

22.66[4][b] Party Opposing Modification of Stipulated or Blanket Protective Order Has Greater Burden of Establishing Reliance. Because blanket protective orders are by their nature over inclusive, courts consider the reliance interests associated with this type of protective order to be minimal [*see Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 476*]. Similarly, in the case of stipulated protective orders, because the protected party makes no showing of good cause to secure the order, one court has held that the party seeking protection did not have a reliance interest at all [Kamakana v. City & County of Honolulu (D Haw 2002) 2002 US Dist LEXIS 26921, at *10, *12].

A party opposing modification of a stipulated blanket protective order must therefore identify specific acts, beyond granting discovery and settling the case, or specific harm that would result from the reliance on the existence of the stipulated blanket protective order [*see Beckman Indus., Inc. v. International Ins. Co. (9th Cir 1992) 966 F2d 470, 476*].

Legal Topics:

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

* The authors acknowledge the contribution of Teresa L. Zuber, a member of the California Bar, in preparing this chapter.

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Unit 7 Discovery
CHAPTER 22 Regulation of Discovery by Stipulation or Motion *
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3-22 MB Practice Guide: Fed Pretrial Civ Proc in CA 22.67

22.67 Discovery Stipulation.

Discovery Stipulation.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff vs.	)	Civil Action No. _____
_____ [*name*],	)	STIPULATION RE _____
Defendant	)	
	)	
	)	

The parties whose counsel sign this stipulation do, by this document, stipulate that:

[*Example One. Allowing more than ten depositions by each side*]

notwithstanding that the parties have each taken ten depositions in this case, the additional oral deposition of _____ [*specify name of deponent*] may be conducted. The parties stipulate that the testimony of this witness is relevant to the claims and defenses in this case in that this witness _____ [*specify facts explaining the witnesses likely knowledge and how that knowledge bears on the claims and defenses*].

[*Example Two. Waiving signature requirement and allowing copies to be used as exhibits.*]

_____ [*name of deponent*], whose deposition is currently scheduled for _____ [*date*] at _____ [*time*], need not sign the transcript of _____ [his *or* her] deposition, and the signature of _____ [his *or* her] counsel to this Stipulation expressly waives the witness' rights in this regard.

It is further stipulated that the originals of the paper exhibits that may be offered in evidence at the examination in connection with this deposition be retained in the hands of counsel. Copies of these exhibits will be supplied to the deposition officer and all other parties by counsel for the party offering the exhibit. Counsel for the party offering the exhibit will have the original available for comparison with the copies. If no objection is made on the record to the quality or accuracy of the copies, the copy lodged with the deposition officer may be used as an original for all purposes.

For _____ [*name of first party*]:

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys for _____ [*party name*]

For _____ [*name of second party*]:

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys for _____ [*party name*]

[*Continue with signature block for each party to stipulation*]

[*Optional provision: Add if approval of court desired or required by local rule*]

IT IS SO ORDERED:
Dated: _____

_____

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:
Fed R Civ P 10(a), 11(a), (b), 29, 30(a)(2)(A)(i), 31(a)(2)(A)(i)

Format Requirements:
See *§§ 22.07, 22.08*

Drafting Stipulation for Additional Deposition:
See *§ 22.12[2]*

Legal Topics:

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

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3-22 MB Practice Guide: Fed Pretrial Civ Proc in CA 22.68

22.68 Stipulation to Extend Time for Discovery Responses.

Stipulation to Extend Time for Discovery Responses.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff vs.	)	Civil Action No. _____
_____ [*name*],	)	STIPULATION TO EXTEND TIME FOR DISCOV-
Defendant	)	ERY RESPONSES
	)	
	)	

The parties whose counsel sign this document stipulate as follows for the purposes of this proceeding:

1. Defendant, whose responses to Plaintiff's Third Set of Request for Production of Documents is currently due on _____ [*date*], shall have an additional week, until _____ [*date*] to serve on the

undersigned counsel for Plaintiff the responses to this discovery demand.

2. Plaintiff, whose responses to Defendant's Third Set of Request for Production of Documents is currently due on _____ [*date*], shall have an additional week, until _____ [*date*] to serve on the undersigned counsel for Defendant the responses to this discovery demand.

[*Optional provision: Add if extension of time interferes with time set for completion of discovery, for hearing of a motion or for trial*]

3. The additional time is necessary because _____ [*specify reasons why responses could not be made sooner*]. Although the proposed due date for the discovery responses are scheduled for after the _____ [discovery cutoff *or* hearing date *or* trial date], the probative value of the discovery responses is of such import to the issues in this case, because _____ [*specify facts that will be determined by responses to discovery demand that bear on the issues to be determined in the case*].

[*Continue with signature block for each party to stipulation*]

[*Optional provision: Add if approval of court desired or required by local rule*]:

IT IS SO ORDERED:
Dated: _____

_____

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:
Fed R Civ P 29, 34

Drafting Stipulation to Extend Time for Discovery Response:
See *§ 22.11[2]*

Legal Topics:

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

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[Reserved].

22.69[Reserved].

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Unit 7 Discovery
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22.70 Format for Stipulation (SD Cal).

Format for Stipulation (SD Cal).

[*Set forth stipulation*.]

ORDER

_____ [*Set forth sum and substance of stipulation, e.g.*, Plaintiff John Smith and Defendant Mary Jones have stipulated to extend the date for service of Plaintiff's Responses to Defendant's First Set of Interrogatories until June 15, 2004. The extension is necessary because Plaintiff was out of the country at the time Defendant's Interrogatories were served and did not return until four weeks after service of the interrogatories was made. Plaintiff has thereby been unavailable to provide complete responses within the time specified in Rule 33(b)(3).]

WHEREFORE, IT IS ORDERED that Plaintiff's Responses to Defendant's First Set of Interrogatories is due June 15, 2004.
Dated: _____

_____ [*signature*]

UNITED STATES DISTRICT JUDGE

[*If the order is not on the same page as the stipulation, include a header or footer identifying the document name, case title and name of requesting party*.]

NOTES.

Authority:
SD Cal Civ LR 7.2(b), (c)

Format Requirements:
See *§ 22.09[3][d]*

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 22 Regulation of Discovery by Stipulation or Motion *
V. FORMS

3-22 MB Practice Guide: Fed Pretrial Civ Proc in CA 22.71

22.71 Notice of Motion and Motion for Accelerated, Pre-Conference Discovery.

Notice of Motion and Motion for Accelerated, Pre-Conference Discovery.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff vs.	)	MOTION FOR ACCELERATED DISCOVERY
_____ [*name*],	)	(*Fed R Civ P 26(d)*)
Defendant	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____
	)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an Order permitting discovery in advance of the Rule 26(f) discovery conference, and in particular permitting _____ [*name of the moving party*] to _____ [*specify early discovery sought*].

Grounds for Relief

1. The central issues in this action involve alleged defects in the material supplied by _____ [*name of opposing party*]. _____ [*Name of moving party*] is unaware of anyone else who is currently in possession of this material other than _____ [*name of opposing party*].

2. The affidavit of _____ [*name of affiant*] shows that _____ [*name of opposing party*] is rapidly disposing of the material that is central to the issues in this case. If _____ [*name of opposing party*] is not compelled to preserve it, and produce a reasonably sized sample for inspection and testing, _____ [*name of moving party*] will be severely compromised in its ability to _____ [prosecute *or* defend] this action.

3. The pretrial conference in this case is scheduled for _____ [*date*], which is _____ [*period of time*] from the filing of this action and _____ [*period of time*] from the filing of this motion.

4. Given the unusual facts and circumstances set out in the supporting affidavits, _____ [*name of moving party*] cannot afford to wait for the Rule 26(f) conference, the full 30 days for _____ [*name of opposing party*] to respond to a request for production, and then whatever additional time it takes _____ [*name of opposing party*] to actually produce a reasonably sized sample of the material in question.

Pre-Motion Attempts to Resolve Dispute

5. Prior to bringing this motion, counsel for _____ [*name of moving party*] conferred with counsel for _____ [*name of opposing party*], in an attempt to secure voluntary production of the material in question immediately, without the need for a motion and a court order.

6. Even though _____ [*name of moving party*] pointed out that producing the material now rather than weeks from now would result in no prejudice to _____ [*name of opposing party*], _____ [*name of opposing party*] refused to agree to voluntary production. The affidavit of counsel shows that counsel for _____ [*name of opposing party*] argued that it made its decision to replace the material in question based on its pre-lawsuit examination and testing of that material. _____ [*Name of opposing party*] also claims that the mere existence of this lawsuit should not deprive it of its ability to replace the material in question.

Record on Motion

This motion is based on this document, the Court's Order Shortening Time for service of this Motion dated _____ [*date*], the supporting affidavits of _____ [*name*] and of counsel, and Certificate of Service showing service of these motion papers in compliance with the directions in the Court's Order Shortening Time. The motion is also based on all of the pleadings and papers already on file in this action, and on

whatever evidence and argument may be presented at a hearing on this motion.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 7(b), 26(d)

Additional Moving Papers Required Under Local Rules:
See *§§ 22.17[5][a]* (Central District-Joint Stipulation); 22.17[5][b] (Eastern District-Joint Statement re Discovery Disagreement); 22.17[5][d] (Southern District-Certificate of Compliance)

Bringing Discovery Motions:
See *§§ 22.14 -22.17*

Drafting Argument for Accelerated Early Discovery:
See *§ 22.23*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

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Unit 7 Discovery
CHAPTER 22 Regulation of Discovery by Stipulation or Motion *
V. FORMS

3-22 MB Practice Guide: Fed Pretrial Civ Proc in CA 22.72

22.72 Notice of Motion and Joint Motion to Extend Discovery Cutoff.

Notice of Motion and Joint Motion to Extend Discovery Cutoff.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff vs.	)	MOTION TO EXTEND TIME FOR DISCOVERY
_____ [*name*],	)	(*Fed R Civ P 16(b), 26(d)*)
Defendant	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____
	)	

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*], joined by _____ [

party's status and name], will jointly move this Court to amend its Scheduling Order of _____ [*date*] to extend the period within which to complete discovery from _____ [*date*] until _____ [*date*].

Grounds for Relief

1. The Court's Scheduling Order of _____ [*date*] calls for all discovery to be completed on _____ [*date*].

2. Through circumstances unforeseen at the time, and complicated by the fact that _____ [*name of moving party*] is a resident of _____ [*city, state*] who is not always able to schedule discovery, particularly depositions, as easily as would a local resident, the parties each have failed to complete _____ [*specify uncompleted items of discovery, e.g.,* the depositions of each other's experts]. The facts and circumstances that led to the unavoidable delays are set forth in detail in the supporting affidavits of counsel filed with this joint motion.

3. The brief extension in the discovery cutoff sought will delay the report of the parties as to witnesses to be called at trial (in person and by deposition), but only by _____ [*number*] of days. The parties agree that this information my be included, instead, in the final pretrial report to be filed on _____ [*date*]. This report, and the final pretrial conference scheduled for _____ [*date*], should not be delayed by the brief extension of the discovery cutoff sought by this motion.

4. As the fact of the joint nature of this motions shows, the parties and their counsel have worked diligently and harmoniously in an attempt to get this matter promptly prepared for trial. The brief extension sought was unavoidable and will not delay the court's schedule for this action in any significant degree.

Record on Motion

This motion is based on this document, the joinder of _____ [*name of remaining party*] shown below, the supporting affidavits of counsel filed with this motion, and the pleadings and papers already on file in this action.
Dated: _____

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

JOINDER IN MOTION

By the signature of _____ [his *or* her] counsel below, _____ [*name of remaining party*] joins in this motion, waives formal service of the motion, and requests the court to grant the relief sought by this motion.
Dated: _____

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

PROPOSED ORDER

The joint motion of the parties for an extension of the discovery cutoff to _____ [*date*] is GRANTED. The Scheduling Order of _____ [*date*] is amended to show the new discovery cutoff date, and the Witness Report currently scheduled for filing on _____ [*date*] may be included in the Joint Pre-Trial Conference report due on _____ [*date*].

The final Pre-Trial Conference date and Trial Date as set in this Scheduling Order are maintained.
Dated: _____

_____

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:
Fed R Civ P 16(b), *26(d)*; *CD Cal Civ LR 16-14*; *ND Cal Civ LR 26-2*

Drafting Argument to Extend Discovery Cutoff:
See *§ 22.26*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureDiscoveryGeneral Overview

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3-22 MB Practice Guide: Fed Pretrial Civ Proc in CA 22.73

22.73 Notice of Motion and Motion for Protective Order for Trade Secrets.

Notice of Motion and Motion for Motion for Protective Order for Trade Secrets.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff vs.	)	NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER
_____ [*name*],	)	
Defendant	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter

as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for a protective order that _____ [*name of moving party*] not be required to disclose any secret processes, developments, or research in connection with the manufacture of _____ [*product name or description*] during the depositions of _____, _____, _____ [*names of witnesses*], officers and employees of _____ [*name of moving party*], whose depositions have been noticed by _____ [*name of opposing party*].

Grounds for Relief

1. This is a dispute involving _____ [*nature of dispute, e.g.,* copyright violations concerning computer programs copied by Defendant from Plaintiff].

2. The witnesses whose depositions have been noticed can and should be allowed to testify to _____ [*undisputed subjects of testimony, e.g.,* the identity of the programs in question, Plaintiff's copyright in the programs, and Plaintiff's losses caused by the violation those copyrights.

3. However, _____ [*name of opposing party*] is a direct business competitor of _____ [*name of moving party*]. Information as to _____ [*disputed subjects of testimony, e.g.,* how the programs were created and marketed] has only marginal relevance to the claims and defenses established by the pleadings.

4. Disclosure of this information to a direct business rival would work an unreasonable hardship on _____ [*name of moving party*], and provide an unfair competitive advantage to _____ [*name of opposing party*] in creating competitive products based on _____ [*name of moving party*]'s trade secret information. On the other hand, denial of discovery of clear and indisputable trade secrets would barely affect the preparation of _____ [*name of opposing party*] for trial on the claims and defenses in dispute.

5. _____ [*Name of moving party*] has maintained the confidentiality of this information by prohibiting all employees with knowledge of the trade secret information from communicating this information to individuals outside the business. The trade secrets have not been disclosed to anyone without an obligation to maintain confidentiality, and the trade secret information is not publicly available.

6. _____ [*Name of opposing party*]'s intention to inquire into these trade secret matters is clear from the notices of depositions. The notices were served pursuant to *Rule 30(b)(6) of the Federal Rules of Civil Procedure* and have, in each instance, expressly asked that the witness selected by _____ [*name of opposing party*] be prepared to testify as to these matters. The notices are attached as Exhibits "_____" and "_____" to the Affidavit of _____ [*name of affiant*] in Support of Motion for Protective Order.

Certificate of Pre-Motion Conference

7. By signing the motion, counsel for _____ [*name of moving party*] certifies that, prior to making this motion, counsel for the parties conferred in an attempt to resolve this matter without the intervention of the Court.

8. Counsel for the parties conferred by telephone, and as the Affidavit of _____ [*name of affiant*] shows, counsel for _____ [*name of opposing party*] stated that there were no circumstances under

which _____ [*name of opposing party*] would voluntarily limit discovery as to _____ [*subjects that involve trade secrets*]. Furthermore, counsel refused to stipulate to a protective order that would keep this information strictly with counsel and shielded from the client. Counsel for _____ [*name of opposing party*] stated that _____ [*name of officer or employee of opposing party*], _____ [*title of officer or employee of opposing party*] of _____ [*name of opposing party*], would be personally present at all of the noticed depositions and would not voluntarily exclude himself from the deposition or shield himself from this information.

[*If permitted under local rules, incorporate request for sanctions in motion papers. In Northern District, sanctions must be requested in separate motion under ND Cal Civ LR 7-8, 37-3* .]

Sanctions

9. The intransigence of counsel for _____ [*name of opposing party*], or _____ [*name of opposing counsel*], in refusing to stipulate to standard protections for trade secret matters, such as the requested stipulation that all such matters be disclosed solely to counsel and shielded from clients, is without any legitimate justification.

10. The only conceivable justification for this position is an attempt to abuse the discovery processes of the court to obtain an improper business advantage and, perhaps, by that manner, an improper advantage in this litigation.

11. The Affidavit of _____ [*name of affiant*] sets out the expenses incurred by _____ [*name of moving party*] in bringing this motion to Court, including the reasonable attorney's fees incurred. Sanctions in the minimum amount of $ _____ should be awarded in this matter as authorized by *Rules 26(c)* and *37(a)(4) of the Federal Rules of Civil Procedure*.

[*CONTINUE*]

Record on Motion

This motion is based on this document [on the attached Memorandum of Points and Authorities], the Supporting Affidavits of _____ and _____ [*names of affiants*], on the Court's Order Shortening Time for service of this motion, and on the Certificate of Service of the motion papers pursuant to that Order Shortening Time. _____ [*Name of moving party*] will also rely on any and all pleadings and papers already on file in this action.
Dated: _____

_____

[*firm name*]

By: _____

[*signature*]

_____

[*typed name*]

Attorneys for _____

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 7(b), 26(c)

Additional Moving Papers Required Under Local Rules:
See *§§ 22.17[5][a]* (Central District-Joint Stipulation); 22.17[5][b] (Eastern District-Joint Statement re Discovery Disagreement); 22.17[5][d] (Southern District-Certificate of Compliance)

Moving for Protective Order:
See *§§ 22.47 -22.54*

Timing:
See *§ 22.53[2]*

Meet and Confer Requirements Under Local Rules:
See *§ 22.53[4]*

Drafting Argument for Protective Order for Trade Secrets:
See *§ 22.45[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureDiscoveryProtective OrdersTrade Secrets LawCivil ActionsProtection Orders

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3-22 MB Practice Guide: Fed Pretrial Civ Proc in CA 22.74

22.74 Blanket Stipulated Protective Order.

Blanket Stipulated Protective Order.

_____ [*name*],	)	
Plaintiff vs.	)	Civil Action No. _____
_____ [*name*],	)	STIPULATED PROTECTIVE ORDER
Defendant	)	
	)	
	)	

The parties, by the signatures of their counsel on this document, stipulate to the following Protective Order in this action:

1. All papers, records, and other recorded data ("documents") that are voluntarily exchanged, disclosed pursuant to Rule 26(a), or produced in response to a discovery request subject to a designation of confidentiality and a claim privilege, and all deposition testimony or other forms of discovery responses that are given in this action under a designation of confidentiality or a claim of privilege must be treated as confidential by all other parties to this litigation and used only for the purposes of this litigation. The affected documents, deposition testimony, and responses to discovery must not be disclosed to persons other than parties to the litigation, counsel for parties, and expert witnesses employed by the counsel for the parties, unless and until the Court makes a written order to the contrary.

2. All documents, deposition testimony, or other discovery responses produced or disclosed under a designation of confidentiality or a claim of privilege that are, for any reason, filed with the Court must be filed in a sealed envelope, marked "confidential," and not made public pending further order of the Court.

SO STIPULATED:

For _____ [*name of first party*]:

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys for _____ [*party name*]

For _____ [*name of second party*]:

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys for _____ [*party name*]

[*Continue with signature block for each party to stipulation*]

[*Optional provision: Add if approval of court desired or required by local rule*]:

IT IS SO ORDERED:
Dated: _____

_____

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:
See *Fed R Civ P 26(c), 29*

Format Requirements:
See *§§ 22.07, 22.08*

Drafting Stipulated Blanket Protective Order:
See *§ 22.52[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective Orders

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Unit 7 Discovery
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V. FORMS

3-22 MB Practice Guide: Fed Pretrial Civ Proc in CA 22.75

22.75 Protective Order Changing Place of Deposition.

Protective Order Changing Place of Deposition.

_____ [*name*],	)	
Plaintiff vs.	)	Civil Action No. _____
_____ [*name*],	)	PROTECTIVE ORDER RE DEPOSITION
Defendant	)	(*Fed R Civ P 26(c)*)
	)	
	)	

On _____ [*date*], _____ [*name of moving party*] brought on a motion for protective order seeking to change the place of taking of the deposition of _____ [*name of witness*]. Having considered the papers submitted in connection with the motion, the authorities cited by the parties, and the argument of counsel,

IT IS ORDERED THAT:

1. The motion for protective order is GRANTED.

2. The deposition of _____ [*name of witness*] will not be held in _____ [*city, state*], but in _____ [*city, state*] at _____ [*address or description of location, e.g.*, a suitable room at the headquarters of Plaintiff John Smith], unless some other place in _____ [*city, state*] that is mutually agreeable to the parties;

3. The parties will set a mutually agreeable date and time for this deposition, which may not be later than _____ [*date*], at _____ [*time, e.g.,* 9:00 a.m.];

[4. Sanctions _____ (are *or* are not) awarded in connection with this Order. (*Optional Provision: Add if sanctions are awarded*) Sanctions in the amount of $ _____ shall be paid to _____ (*name of moving party*) by _____ (*name of opposing party, name of attorney for opposing party, or both*), jointly and severally].

5. All relief not expressly granted is denied.

IT IS SO ORDERED.

Dated: _____

[*Alternative One. Order issued by district judge*]

_____

UNITED STATES DISTRICT JUDGE

[*Alternative Two. Order issued by magistrate judge*]

_____

UNITED STATES MAGISTRATE JUDGE

NOTES.

Authority:
Fed R Civ P 7(b)(2), 26(c), 30(b)(1); Berry v. Baca (CD Cal 2002) 2002 US Dist LEXIS 15698, at *10

Drafting Protective Order Changing Place of Deposition:
See *§ 22.40[7]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective Orders

* The authors acknowledge the contribution of Teresa L. Zuber, a member of the California Bar, in preparing this chapter.

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.syn

§ 23.syn Synopsis to Chapter 23: Methods of Discovery

23.01 Scope.

23.02 Objective and Strategy.

23.02[1] Perpetuation of Testimony.

23.02[2] Oral Depositions.

23.02[3] Written Depositions.

23.02[4] Interrogatories.

23.02[5] Requests for Production and Inspection.

23.02[6] Discovery of Electronically Stored Information.

23.02[7] Physical and Mental Examinations.

23.02[8] Requests for Admission.

23.02[9] Nonparty Discovery: Subpoena.

23.03 CHECKLIST: Petitioning for Perpetuation of Testimony.

23.04 Options and Strategy for Petitioner.

23.04[1] Decide Whether Pre-Action Perpetuation of Testimony Is Necessary to Prevent Loss of Evidence.

23.04[2] Determine What Information Will Be Sought.

23.04[3] Consider Bringing Action to Perpetuate Testimony.

23.04[4] Consider Stipulations or Declaratory Relief.

23.04[4][a] Stipulations.

23.04[4][b] Declaratory Relief.

23.04[5] Using Perpetuated Evidence.

23.05 Pre-Action Perpetuation of Testimony May Be Available Under Rule 27.

23.05[1] Matters Must Be Cognizable in United States Court.

23.05[2] Action Must Be Anticipated.

23.05[3] Federal Jurisdiction Must Exist in Anticipated Action.

23.05[4] Anticipated Action Must Be Civil.

23.05[5] Perpetuation of Testimony Must Prevent Failure or Delay of Justice.

23.05[6] Trial Court Will Exercise Its Discretion.

23.06 Perpetuation Is Not Appropriate for Obtaining Unknown Information.

23.07 Required Contents of Petition.

23.07[1] Name of Petitioner.

23.07[2] Expectation of Action.

23.07[3] Description of Subject Matter.

23.07[4] Facts of Testimony.

23.07[5] Reasons for Perpetuation.

23.07[6] Names of Adverse Parties.

23.07[7] Names of Persons to Be Examined.

23.07[8] Request for Order.

23.07[9] Verification.

23.08 Required Notice and Filing.

23.08[1] File in District of Opponent's Residence.

23.08[2] File in Any District If All Expected Adverse Parties Are Aliens.

23.08[3] Notice Must Be Served on Each Expected Adverse Party.

23.08[4] Notice Must Contain Required Statements.

23.08[5] Notice Must Be Served 21 Days Before Hearing.

23.08[6] Notice Must Be Served as Required by Rule 4.

23.09 Petitioner Must Establish Three Elements.

23.09[1] Petitioner Must Show Anticipation of Litigation.

23.09[2] Petitioner Must Describe Testimony Sought.

23.09[3] Petitioner Must Show Risk of Losing Evidence.

23.09[3][a] Significant Risk Required.

23.09[3][b] Factors Indicating Urgency.

23.10 Petitioner May Request Production of Documents, Electronically Stored Information, and Things, Entry on Land, and Physical and Mental Examinations.

23.10[1] Pre-Action Discovery May Be Available.

23.10[2] Deposition Is Not Required.

23.11 Order Must Contain Specific Findings.

23.12 Depositions Will Be Taken in Accordance With Federal Rules of Civil Procedure.

23.13 CHECKLIST: Opposing Petition to Perpetuate Testimony.

23.14 Options and Strategy for Opponent.

23.15 Grounds for Objecting to Petition for Perpetuation of Testimony.

23.16 Opposition Papers Must Be Filed.

23.17 Other Potential Adverse Parties May File Response.

23.18 Sanctions May Be Available.

23.19 CHECKLIST: Planning Oral Depositions.

23.20 Options and Strategy for Party Seeking Discovery.

23.21 Depositions Are Subject to Numeric and Timing Restrictions.

23.21[1] Depositions Cannot Be Taken Before Parties' Initial Meeting Except by Stipulation or With Leave of Court.

23.21[2] Number of Depositions Is Limited to 10 for Each Side.

23.21[3] Duration of Each Deposition Is Limited.

23.21[3][a] Duration Is One Day of Seven Hours Unless Otherwise Stipulated or Ordered.

23.21[3][b] Court Must Allow Additional Time for Fair Examination.

23.21[3][c] Circumstances That Might Require Additional Time.

23.21[3][d] Persons Responsible for Impediment or Delay May Be Subject to Sanctions.

23.21[3][e] Court May Order Shorter Duration in Particular Case.

23.22 Any Person May Be Deposed.

23.22[1] Generally Any Person, Including Any Party, May Be Deposed.

23.22[2] Deposition Notice May Specify Certain Individuals to Testify on Behalf of Corporation.

23.22[2][a] Deposition Notice May Specify Officers, Directors, or Managing Agents to Appear on Behalf of Corporation.

23.22[2][b] Who Is a "Managing Agent."

23.22[3] Depositions of Counsel Are Allowed in Limited Circumstances.

23.22[4] Expert Whose Opinions May Be Presented at Trial May Be Deposed.

23.23 Leave of Court Generally Is Not Required.

23.24 No Party Has Priority in Setting Depositions.

23.25 Circumstances When Leave of Court Is Required.

23.25[1] Leave Required When Deponent Is Incarcerated.

23.25[2] Leave Required for More Than 10 Depositions.

23.25[3] Leave Required If Person Already Deposed.

23.25[4] Leave May Be Required for Deposition Before Discovery Plan Agreement.

23.26 Court Will Limit Excessive or Unreasonable Discovery.

23.27 CHECKLIST: Giving Notice of Oral Deposition.

23.28 Options and Strategy for Party Noticing Deposition.

23.29 Written Notice Is Required.

23.29[1] Give Reasonable Notice in Writing to All Parties.

23.29[2] Specify Time and Place of Deposition.

23.29[3] State Name and Address of Deponent, If Known.

23.29[4] Designate Materials to Be Produced Pursuant to Subpoena Duces Tecum.

23.29[5] State Method for Recording Testimony.

23.29[6] LOCAL PRACTICE: ND Cal Requirements--Consult With Counsel or Pro Se Party Deponent About Scheduling Prior to Giving Notice.

23.30 Notice May Name Corporation, Partnership, Association, or Agency As Deponent.

23.30[1] Notice Must Describe Matters on Which Examination Is Requested.

23.30[2] Entity Must Designate Individual(s) Who Will Testify on Its Behalf.

23.30[3] Deposition of Specific Individual May Be Noticed.

23.31 Telephone or Video Conference Deposition May Be Allowed by Stipulation or Court Order.

23.32 Notice to Party Deponent May Be Accompanied by Request for Production.

23.33 Notice Must Be Served on Parties.

23.33[1] Serve on All Parties.

23.33[2] Do Not File Notice.

23.33[3] Serve Nonparty Deponent With Subpoena to Compel Attendance and/or Production.

23.34 Cost of Recording and Transcription Generally Borne by Deposing Party.

23.34[1] Party Taking Deposition Bears Cost of Recording.

23.34[2] LOCAL PRACTICE: SD Cal Requirements--Court May Order Waiver of Transcription or Apportionment of Cost.

23.34[3] Any Party May Notice Additional Method of Recording.

23.35 Parties May Stipulate to Modification of Deposition Procedures.

23.36 CHECKLIST: Responding to Notice of Deposition.

23.37 Options and Strategy for Challenging the Notice by the Opposing Party or Deponent.

23.37[1] Possible Objections.

23.37[2] Preparing the Deponent.

23.38 Objections to Errors or Irregularities in Notice Must Be Promptly Served on Party Giving Notice.

23.39 Objections to Deposition Officer Must Be Made As Soon As Disqualification Becomes Known or Could Be Discovered.

23.40 Motion to Quash Deposition Notice or Subpoena Must Be Made Promptly.

23.41 Motion for Protective Order Requires Showing of Good Cause.

23.41[1] May Be Made by Party or Deponent.

23.41[2] Good-Faith Attempt to Resolve Dispute Is Required.

23.41[3] Relief Available.

23.41[4] Court May Order Discovery on Specified Terms and Conditions.

23.41[5] Court May Award Expenses.

23.42 CHECKLIST: Conducting an Oral Deposition.

23.43 Deposition Officer Must Be Authorized to Administer Oaths or Be Appointed by the Court.

23.44 Deposition Officer Cannot Have Relationship to Parties or Counsel or Financial Interest in Action.

23.45 Deposition May Utilized in International Discovery.

23.45[1] Several Methods for Appointment of Officer and Taking Foreign Deposition.

23.45[2] Presiding Officer Is Determined by Law of Foreign Nation.

23.45[3] Court Issues Commission or Letter of Request for Deposition on Application of Party Seeking Discovery.

23.45[4] Presiding Officer Must Be Designated by Name or Title.

23.45[5] Caption Must Meet Requirements of Applicable Treaty or Convention.

23.45[6] Counsel Must Consult Foreign Law to Ascertain Permissible Deposition Procedures.

23.45[7] Procedure Used for Deposition in Foreign Country Does Not Affect Admissibility of Evidence.

23.45[8] Deposition May Be Taken in United States Pursuant to Foreign Request or Letters Rogatory.

23.46 Conduct of Deposition Must Comply With Federal Rules and Local Rules.

23.46[1] Officer Must Make Statement on the Record to Begin.

23.46[2] Officer Must Administer Oath and Record Testimony.

23.46[3] Requirements for Nonstenographic Recording.

23.46[3][a] Officer Must Identify Deposition at the Beginning of Each Unit of Tape or Other Recording Medium.

23.46[3][b] Recording Techniques Cannot Distort Appearance or Demeanor of Participants.

23.46[4] Examination and Cross-Examination Proceed As at Trial.

23.46[4][a] Federal Rules of Evidence Apply, With Two Exceptions.

23.46[4][b] Adverse Party May Access Materials Used to Refresh Deponent's Memory.

23.46[4][c] Deponent and Deponent's Counsel May Not Confer During Questioning.

23.46[5] Other Parties May Transmit Written Questions.

23.46[6] Examination Proceeds Subject to Objections Noted in the Record.

23.46[7] Officer Must Indicate End of Deposition on Record and Set Forth Stipulations Made by Counsel.

23.46[8] LOCAL PRACTICE: Numbering Exhibits.

23.46[8][a] LOCAL PRACTICE: CD Cal Requirements.

23.46[8][b] LOCAL PRACTICE: ED Cal Requirements.

23.46[8][c] LOCAL PRACTICE: ND Cal Requirements.

23.46[8][d] LOCAL PRACTICE: SD Cal Requirements.

23.46[9] Any Party May Arrange for Transcription or Additional Method of Recording.

23.47 CHECKLIST: Objecting to the Conduct of an Oral Deposition.

23.48 Objections to Qualifications of Deposition Officer Are Waived If Not Timely.

23.49 Objections to Competency of Witness or Testimony Generally Are Not Waived.

23.50 Objection to Errors or Irregularities During Deposition Must Be Seasonably Made or Are Waived.

23.51 Objections to Questioning Must Be Concise and Non-Argumentative.

23.52 Instructing Witness Not to Answer Is Permitted in Limited Cases.

23.52[1] Witness May Be Instructed Not to Answer Only in Certain Circumstances.

23.52[2] Question Beyond Scope Described in Notice to Deponent Entity Not Grounds for Instruction.

23.53 Party or Deponent May Move for Protective Order During Deposition.

23.53[1] Party or Deponent May Demand That Deposition Be Suspended to Seek Order.

23.53[2] Grounds for Order.

23.53[3] Court May Terminate Deposition or Limit Examination.

23.53[4] Terminated Deposition May Be Resumed Only on Court Order.

23.53[5] Court May Award Expenses.

23.54 Party May Move for Award of Expenses When Noticing Party Fails to Attend Deposition.

23.55 Party May Move for Award of Expenses When Witness Does Not Attend Because of Noticing Party's Failure to Serve Subpoena.

23.56 CHECKLIST: Compelling Attendance, Testimony, or Production.

23.57 Motion for Sanctions Available When Party Deponent Fails to Appear.

23.58 Failure of Nonparty Deponent to Comply With Subpoena Is Contempt.

23.59 Party May Move to Compel Deponent to Answer Question or Produce Materials.

23.60 CHECKLIST: Obtaining Copies of and Reviewing Transcript.

23.60[1] Deponent's Checklist.

23.60[2] Noticing Party's Checklist.

23.60[3] Opposing Party's Checklist.

23.61 Deponent May Request Review of Transcript.

23.61[1] Review Must Be Requested Before Completion of Deposition.

23.61[2] Deponent Has 30 Days to Review Transcript.

23.61[3] Deponent Must Provide Statement of Changes and Reasons for Changes.

23.61[4] Deposition Officer Must Indicate Review Was Requested and Append Changes.

23.61[5] Failure to Follow Procedure May Lead to Striking of Changes.

23.62 Certification and Delivery of Deposition Must Comply With Federal and Local Rules.

23.62[1] Officer Must Prepare Certificate to Accompany Deposition.

23.62[2] LOCAL PRACTICE: ND Cal Requirements--Pages of a Deposition Must Be Numbered Sequentially.

23.62[3] Items Produced During Examination Must Be Annexed to Deposition on Request.

23.62[4] Officer Must Deliver Deposition to Attorney Who Arranged for Transcript or Recording.

23.62[5] Attorney Must Store Deposition.

23.62[6] LOCAL PRACTICE: Requirements for Delivery and Storage of Transcript.

23.62[6][a] LOCAL PRACTICE: CD Cal Requirements.

23.62[6][b] LOCAL PRACTICE: ED Cal Requirements.

23.62[6][c] LOCAL PRACTICE: ND Cal Requirements.

23.62[6][d] LOCAL PRACTICE: SD Cal Requirements.

23.63 Deposition Officer Retains Stenographic Notes or Copy of Recording.

23.64 Persons Who May Obtain Copy of Transcript or Recording.

23.64[1] Any Party or Deponent May Obtain Copy From Deposition Officer.

23.64[2] Nonparty May Obtain Copy If Filed Without Protective Order.

23.65 Deposition Is Not Filed With Court.

23.65[1] Discovery Documents Generally Are Not Filed Until Used.

23.65[2] LOCAL PRACTICE: Filing of Depositions.

23.65[2][a] LOCAL PRACTICE: CD Cal Requirements.

23.65[2][b] LOCAL PRACTICE: ED Cal Requirements.

23.65[2][c] LOCAL PRACTICE: ND Cal Requirements.

23.65[2][d] LOCAL PRACTICE: SD Cal Requirements.

23.66 Motion to Suppress Must Be Made Promptly or Errors and Irregularities in Preparation of Deposition Are Waived.

23.67 CHECKLIST: Using or Preventing the Use of a Deposition.

23.67[1] Checklist for Party Intending to Use Deposition.

23.67[2] Checklist for Party Seeking to Prevent Use of Deposition.

23.68 Deposition May Be Used at Trial to Extent Admissible.

23.69 Purposes for Which a Deposition May Be Used.

23.69[1] Any Party May Use Deposition for Impeachment of Deponent As a Witness.

23.69[2] Adverse Party May Use Deposition of Party for Any Purpose.

23.69[3] Any Party May Use Deposition for Any Purpose When Witness Is Unavailable.

23.69[3][a] When Witness Is Dead.

23.69[3][b] When Witness Is More Than 100 Miles From Place of Trial.

23.69[3][c] When Witness Cannot Attend or Testify for Specific Reasons.

23.69[3][d] Party Has Been Unable to Procure Attendance of Witness by Subpoena.

23.69[3][e] Exceptional Circumstances Exist.

23.69[4] Objections to Admissibility of Deposition.

23.70 Circumstances When Deposition May Not Be Used.

23.70[1] Against Party Who Was Unable to Obtain Counsel for Deposition Taken Early and Without Leave of Court.

23.70[2] Against Party Who Received Less Than 11 Days' Notice and Moved for Protective Order.

23.71 Form of Presentation.

23.71[1] Party Must Provide Transcript.

23.71[2] LOCAL PRACTICE: SD Cal Requirements--Party Using Deposition Must Provide Extra Copy to Judge.

23.71[3] On Request of Party in Jury Case, Nonstenographic Deposition Testimony Must Be Presented.

23.71[4] LOCAL PRACTICE: CD Cal Requirements--Specific Requirements for Marking and Lodging Depositions With Court.

23.72 Objections May Be Made As to Admissibility As If Witness Were Present.

23.73 Additional Parts of Deposition May Be Introduced to Be Considered With Part Previously Introduced.

23.74 Substitution of Parties Does Not Affect Right to Use Depositions.

23.75 Depositions May Be Used in Subsequent Action.

23.76 CHECKLIST: Planning Depositions Upon Written Questions.

23.77 Options and Strategy for Party Seeking Discovery.

23.78 Written Deposition May Be Cost-Effective Means to Obtain Discovery.

23.79 Written Deposition May Be Used for Discovery in Foreign Countries.

23.80 Written Deposition May Allow Identity of Deponent to Be Kept Confidential.

23.81 Written Depositions Have Inherent Limitations.

23.82 Written Depositions Are Subject to Numeric and Timing Restrictions.

23.82[1] Depositions Cannot Be Taken Before Parties' Initial Meeting Except by Stipulation or Leave of Court.

23.82[2] Number of Depositions Is Limited to 10 for Each Side.

23.83 Persons or Entities May Be Deposed.

23.83[1] Any Person, Including Any Party, May Be Deposed.

23.83[2] Corporations or Other Business Organizations May Be Deposed.

23.83[3] Associations or Agencies May Be Deposed.

23.83[4] Written Depositions May Be Used for Deposing Attorney.

23.84 Leave of Court Generally Is Not Required.

23.85 Circumstances When Leave of Court Is Required.

23.85[1] Leave Required When Deponent Is Incarcerated.

23.85[2] Leave Required for More Than 10 Depositions.

23.85[3] Leave Required If Person Already Deposed.

23.85[4] Leave Required for Deposition Before Discovery Plan.

23.86 Court Will Limit Excessive or Unreasonable Discovery.

23.87 CHECKLIST: Giving Notice of Deposition Upon Written Questions.

23.88 Options and Strategy for Party Noticing Deposition.

23.89 Written Notice Is Required.

23.89[1] Identify Deponent.

23.89[1][a] State Name and Address of Deponent.

23.89[1][b] Describe Deponent If Name Not Known.

23.89[1][c] Notice May Name Entity As Deponent.

23.89[2] Identify Deposition Officer.

23.89[3] State Time and Place of Deposition.

23.90 Notice Must Be Served on Parties.

23.90[1] Serve Questions With Notice.

23.90[2] Serve Notice and Questions on All Parties.

23.90[3] Serve 33 Days Before Date of Deposition.

23.90[4] Serve Nonparty Deponent With Subpoena to Compel Attendance and/or Production.

23.90[5] Do Not File Notice.

23.91 CHECKLIST: Responding to Notice of Deposition Upon Written Questions.

23.92 Options and Strategy for Opposing Party or Deponent.

23.93 Objections to Errors or Irregularities in Notice of Deposition Must Be Promptly Served on Party Giving Notice.

23.94 Objections to Deposition Officer Must Be Made Promptly to Avoid Waiver.

23.95 Objections to Form Must Be Timely Served in Writing.

23.96 Entity Named As Deponent Must Designate Individual to Testify.

23.97 Party or Deponent May Move for Protective Order.

23.97[1] Court May Preclude or Limit Discovery on Showing of Good Cause.

23.97[2] Court May Order That Discovery Be Taken by Another Method.

23.97[3] Good-Faith Attempt to Resolve Is Required.

23.98 CHECKLIST: Propounding Cross, Redirect, and Recross Questions.

23.99 Parties May Serve Cross Questions Within 14 Days of Notice.

23.100 Noticing Party May Serve Redirect Questions Within Seven Days of Cross Questions.

23.101 Party May Serve Recross Questions Within Seven Days of Redirect Questions.

23.102 Court May Enlarge or Shorten Time for Serving Questions.

23.103 CHECKLIST: Procedure for Taking Deposition Upon Written Questions.

23.103[1] Noticing Party's Checklist.

23.103[2] Deponent's Checklist.

23.103[3] Opposing Party's Checklist.

23.104 Noticing Party Must Deliver Notice and Questions Served to Deposition Officer.

23.105 Deposition Officer Must Take Testimony of Deponent.

23.106 Deponent May Request Review of Completed Deposition.

23.107 Officer Must Certify and Deliver Deposition.

23.108 Deposition Is Not Filed With Court.

23.109 Noticing Attorney Must Safely Store Deposition Transcript.

23.110 Motion to Suppress Must Be Made Promptly or Errors Are Waived.

23.111 CHECKLIST: Propounding Interrogatories.

23.111[1] Making Preliminary Determinations Regarding Interrogatories.

23.111[2] Drafting and Serving Interrogatories.

23.112 Options and Strategies for Propounding Party.

23.112[1] Use Identification Interrogatories to Gather Specific Types of Information.

23.112[2] Use Contention Interrogatories to Inquire Into Opinion or Contention.

23.112[3] Consider Advantages of Using Interrogatories.

23.112[4] Consider Disadvantages of Using Interrogatories.

23.113 Review Mandatory Disclosure Requirements.

23.114 Subject Matter of Interrogatories.

23.114[1] Interrogatories May Inquire About Relevant Matters.

23.114[2] Interrogatories Must Be Reasonably Calculated to Lead to Discovery of Admissible Evidence.

23.114[3] Interrogatory May Relate to Party's Contention.

23.114[3][a] Contention Interrogatories Are Not Automatically Objectionable.

23.114[3][b] Court May Postpone Response.

23.114[4] Interrogatories Seeking Legal Conclusions Are Impermissible.

23.115 Number of Interrogatories Is Limited.

23.115[1] Twenty-Five Interrogatories Allowed.

23.115[2] Avoid Subparts.

23.115[3] Obtain Court Permission or Stipulation to Exceed Limit.

23.115[4] LOCAL PRACTICE: ND Cal Requirements--Motion for Leave to Propound More Interrogatories Must State Proposed Interrogatories.

23.115[5] LOCAL PRACTICE: ED Cal Requirements--Request Additional Interrogatories in Joint Status Report by Stipulation.

23.115[6] LOCAL PRACTICE: SD Cal Requirements--Motion for Leave to Propound More Interrogatories Must State Proposed Interrogatories and Good Cause.

23.116 Drafting Interrogatories.

23.116[1] Interrogatories Should Be Clear and Definite.

23.116[2] Large Amounts of Information Can Be Treated As Single Interrogatory.

23.116[3] LOCAL PRACTICE: CD Cal Requirements--Number Interrogatories Sequentially.

23.116[4] LOCAL PRACTICE: ED Cal Requirements--Leave Space for Answer After Interrogatory.

23.116[5] Attorney's Signature Is Required.

23.117 Interrogatories May Be Served After Rule 26(f) Conference.

23.117[1] Parties Must Meet and Confer.

23.117[2] Court May Postpone Answers to Contention Interrogatories.

23.117[3] Interrogatories May Be Served Before or After Other Types of Discovery.

23.117[4] Interrogatories Must Be Served 30 Days Before Discovery Deadline.

23.117[5] Be Aware of Mandatory Disclosure Deadline.

23.117[6] LOCAL PRACTICE: ND Cal Requirements--Untimely Discovery Requests Are Unenforceable.

23.118 Serve All Parties.

23.119 Do Not File Interrogatories.

23.119[1] File Only When Used in Proceeding.

23.119[2] LOCAL PRACTICE: CD Cal Requirements--Propounding Party Keeps Original of Interrogatories.

23.119[3] LOCAL PRACTICE: ED Cal Requirements--File Only Relevant Portion of Interrogatories.

23.119[4] LOCAL PRACTICE: ND Cal Requirements--Propounding Party Is Custodian of Interrogatories and Responses.

23.120 Motion to Compel Is Available When Party Fails to Respond.

23.121 CHECKLIST: Responding to Interrogatories.

23.121[1] Making Preliminary Determinations Concerning Answers.

23.121[2] Drafting and Serving Responses to Interrogatories.

23.122 Options and Strategy for Responding Party.

23.123 Who May Respond.

23.123[1] Interrogatories Directed to Individual Must Be Answered, Signed, and Verified by That Person.

23.123[2] Interrogatories Directed to Organization Must Be Answered, Signed, and Verified by Officer or Agent.

23.123[3] Organization Must Designate Agent; Attorney May Be Agent.

23.123[4] Interrogatories Directed to Government Agency Must Be Answered, Signed, and Verified by Officer or Agent.

23.123[5] Attorney for Party Must Certify Responses.

23.124 Responding Party Must Answer or Object.

23.125 Responding Party Has Duty to Furnish All Available Information.

23.125[1] Answer to the Extent Possible.

23.125[2] Information Under Responding Party's Control.

23.125[3] Business Entity Must Provide Information Known to Officers and Employees.

23.126 Business Records May Be Provided in Lieu of Answer.

23.126[1] Specify Records and Provide Opportunity for Inspection.

23.126[2] Make Specification Detailed.

23.126[3] Burden of Deriving Answer Must Be Same for Both Parties.

23.126[4] Responding Party May Be Required to Provide Index.

23.126[5] Court May Require That Interrogating Party Reimburse Respondent's Expenses.

23.126[6] Claim of Privilege May Be Restricted.

23.127 Thirty-Day Period for Response.

23.127[1] Extra Three Days for Service by Mail or Other Alternative Delivery.

23.127[2] Obtain Agreement of Parties or Court Order to Alter Timing.

23.127[3] Several Methods of Serving Response Are Available.

23.127[4] Timing of Response for Removed Actions.

23.127[5] Failure to Make Timely Response Sanctionable.

23.128 Restrictions on Filing Interrogatory Responses.

23.129 Formatting Responses.

23.129[1] Draft Full and Separate Responses for Each Interrogatory.

23.129[2] LOCAL PRACTICE: Response Must Immediately Follow Interrogatory.

23.129[2][a] LOCAL PRACTICE: CD Cal, ND Cal, and SD Cal Requirements--Set Forth Each Question Before Answer.

23.129[2][b] LOCAL PRACTICE: ED Cal Requirements--Answer in Space Provided.

23.129[3] Respondent and Attorney Must Sign.

23.130 Objecting to Interrogatories.

23.130[1] Rule 26 Is Primary Source of Objections.

23.130[2] State Precise Grounds for Objection.

23.130[2][a] General Grounds Are Insufficient.

23.130[2][b] LOCAL PRACTICE: ED Cal Requirements--State Reasons.

23.130[3] Respondent May Object in Part.

23.130[4] Objector Has Burden of Proof.

23.130[5] Format Requirement: Objection Must Immediately Follow Interrogatory.

23.130[5][a] LOCAL PRACTICE: CD Cal, ND Cal, and SD Cal--Set Forth Each Question Before Objection.

23.130[5][b] LOCAL PRACTICE: ED Cal--Object in Space Provided.

23.130[6] Make Timely Objection.

23.130[7] Avoid Waiver of Objection.

23.130[7][a] General Rule: Failure to Timely Object Waives Objection.

23.130[7][b] Excuse for "Good Cause" Shown.

23.131 Attorney Must Sign Objections.

23.132 Relief May Be Available by Obtaining Protective Order.

23.133 Effect of Answers.

23.133[1] Use at Trial.

23.133[2] Objections to Introduction of Answers.

23.134 Respondent Must Supplement and Amend Answers.

23.135 CHECKLIST: Planning to Obtain Documents, Electronically Stored Information, and Tangible Items Through Production or Inspection.

23.136 Options and Strategies Related to Planning for Production or Inspection.

23.136[1] Choosing Best Method of Obtaining Production or Inspection.

23.136[1][a] Sequence of Discovery Methods.

23.136[1][b] Alternate Sources to Help Identify Items.

23.136[1][c] Use of Subpoena for Items Not in Possession, Custody, or Control of Party.

23.136[2] Preventing Destruction of Documents.

23.137 Types of Documents, Electronically Stored Information, and Tangible Items That Party May Request.

23.137[1] Party May Request Production of Documents for Inspection and Copying.

23.137[2] Party May Request Production of Tangible Items for Inspection, Sampling, Testing and Copying.

23.137[3] Party May Request Permission to Enter Land for Inspection, Sampling, and Copying Tangible Items.

23.137[4] Electronically Stored Information Is Discoverable Material.

23.138 Requested Documents, Electronically Stored Information, and Items Must Be Discoverable.

23.138[1] Parties Are Generally Entitled to Request Material Relevant to Claim or Defense of Parties.

23.138[1][a] Party May Request Production of All Items Within Scope of Discovery.

23.138[1][b] Scope of Discovery Is Broad.

23.138[1][c] Requested Document, Electronically Stored Information, or Item Need Not Be Admissible If It Leads to Admissible Evidence.

23.138[2] Parties May Not Request Privileged or Work Product Material.

23.139 Persons Subject to Rule 34 Discovery.

23.139[1] Rule Applies to Parties to Civil Action.

23.139[2] Party Is Actual Claimant or Defendant in Civil Suit.

23.139[3] Only Representative Party in Class Action Litigation Is Deemed Party for Discovery Purposes.

23.140 Limits on Number of Rule 34 Requests.

23.141 Other Discovery Procedures for Production of Documents, Electronically Stored Information, and Tangible Items.

23.141[1] Parties Must Produce Certain Documents, Electronically Stored Information, and Tangible Items As Part of Mandatory Initial Disclosures.

23.141[2] Party May Include Request for Production in Notice of Deposition.

23.141[3] Party May Serve Subpoena on Nonparty to Obtain Documents, Electronically Stored Information, and Tangible Items.

23.141[3][a] Subpoena Facilitates Discovery From Nonparties.

23.141[3][b] Subpoena Procedures Must Be Followed for Production or Inspection From Nonparty.

23.141[3][c] Nonparty Subpoena for Production or Inspection Is Subject to Court's Discovery Deadlines.

23.141[3][d] Subpoena May Be Used to Compel Testimony.

23.141[3][e] Subpoena Procedure Must Protect Nonparty Against Significant Expense.

23.141[3][f] Factors Court May Consider in Shifting Payment of Subpoena Discovery Expense.

23.141[4] Serving Subpoena on Parties.

23.142 CHECKLIST: Requesting Production or Inspection.

23.143 Options and Strategies for Requesting Party.

23.143[1] Consider Early Requests for Production or Inspection.

23.143[2] Consider Motion to Shorten Time to Respond to Requests for Production or Inspection.

23.144 Time Restrictions on Requests for Production or Inspection.

23.144[1] Request Is Premature If Made Prior to Filing of Complaint.

23.144[2] Request Is Premature If Made Prior to Discovery Conference.

23.144[3] Request Is Premature If Made Prior to Initial Disclosure.

23.144[4] Request May Not Be Made Later Than 30 Days Prior to Discovery Deadline.

23.144[5] Request Must Set Reasonable Time for Inspection.

23.144[6] LOCAL PRACTICE: ND Cal--Request Must Allow Time for Response Before Discovery Cutoff.

23.144[7] LOCAL PRACTICE: ED Cal--Relief From Discovery Termination Date Requires Strong Showing.

23.145 Contents and Format of Request for Production or Inspection.

23.145[1] Written Request Must Specify Items Individually or by Category.

23.145[2] Request Must Specify Items With Reasonable Particularity.

23.145[2A] Request May Specify Form of Production of Electronically Stored Information.

23.145[3] Request Must Specify a Reasonable Place and Manner of Inspection.

23.145[4] Request Must Specify a Reasonable Time for Inspection.

23.145[5] LOCAL PRACTICE: CD Cal Requirements--Requirements for Numbering Requests.

23.146 Certification Is Required on Request.

23.147 Service of Request Is Required on All Parties.

23.148 LOCAL PRACTICE: Requests for Production or Inspection Generally Should Not Be Filed.

23.148[1] LOCAL PRACTICE: CD Cal Requirements.

23.148[2] LOCAL PRACTICE: ED Cal Requirements.

23.148[3] LOCAL PRACTICE: ND Cal Requirements.

23.148[4] LOCAL PRACTICE: SD Cal Requirements.

23.149 CHECKLISTS: Responding to Request for Production or Inspection.

23.149[1] Checklist for Service of Response.

23.149[2] Checklist for Response.

23.150 Options and Strategies for Responding Party.

23.150[1] Exercise Response Option Within Time Constraint.

23.150[2] Determine How to Respond to Each Request.

23.151 Time Limit for Written Response.

23.151[1] Time Limit Is Generally 30 Days.

23.151[2] Time Limit May Be Altered by Court Order or by Agreement.

23.151[3] Formal Response Necessary to Preclude Waiver.

23.152 Contents and Format of Response to Request for Production or Inspection.

23.152[1] Response Must Be in Writing and Specify Items Individually or by Category.

23.152[2] Response Should Conform to Designation of Items and Categories in Request.

23.152[2A] Response Must State Form of Production of Electronically Stored Information If No Form Was Specified in Request or If Responding Party Objects to Form Specified.

23.152[3] Responding Party Must Clearly Specify Reasons for Each Objection.

23.152[4] Responding Party Must Comply With Unobjectionable Parts of Request.

23.152[5] Certification of Response.

23.152[6] LOCAL PRACTICE: Format of Response.

23.152[6][a] LOCAL PRACTICE: CD Cal Requirements.

23.152[6][b] LOCAL PRACTICE: ED Cal Requirements.

23.152[6][c] LOCAL PRACTICE: ND Cal Requirements.

23.152[6][d] LOCAL PRACTICE: SD Cal Requirements.

23.152[7] Supplementation of Responses.

23.153 Grounds for Refusal to Produce or Allow Inspection.

23.153[1] Privilege.

23.153[1][a] Requirements of Privilege Claim.

23.153[1][b] Methods of Establishing Privilege Claim.

23.153[2] Work Product.

23.153[3] Lack of Relevance to Claim or Defense of Party.

23.153[4] Lack of Possession, Custody, or Control.

23.153[4][a] Party Must Produce Only Items in Its Possession, Custody, or Control.

23.153[4][b] Nature of Possession, Custody, or Control.

23.153[4A] Electronically Stored Information Is Not Readily Accessible.

23.153[5] Other Objections.

23.154 Service of Response Required on All Parties.

23.155 Motion for Protective Order.

23.156 Production of Documents, Electronically Stored Information, or Tangible Items by Responding Party.

23.156[1] Place of Production.

23.156[2] Manner of Production.

23.156[3] Inspection and Copying of Produced Material.

23.156[3][a] Access to Produced Material.

23.156[3][b] Court May Direct Manner of Production.

23.156[4] Testing of Produced Tangible Items.

23.156[5] Responsibility for Expenses of Production and Inspection of Documents, Electronically Stored Information, and Tangible Items.

23.156[5][a] Presumed Responsibility for Expenses.

23.156[5][b] Discretion of Court to Shift Costs.

23.157 CHECKLIST: Making Requests for Electronically Stored Information.

23.158 Electronically Stored Information Is Discoverable.

23.158[1] Electronically Stored Information Is Subject to Discovery.

23.158[2] Types of Electronically Stored Information That Are Subject to Discovery.

23.158[3] "Deleted" Electronically Stored Information Is Discoverable.

23.158[4] Discovery of Electronically Stored Information Relied on by Experts.

23.158[4][a] Data Relied on by Testifying Expert Must Be Disclosed.

23.158[4][b] Data Relied on by Non-Testifying Expert Is Discoverable Only Under Exceptional Circumstances.

23.158[5] Production in Specific Format May Be Requested.

23.158[6] Request Electronically Stored Information in Electronic Format.

23.159 Pre-Service Discovery May Be Available Under Limited Circumstances to Discover Identity of Doe Defendant Who Committed Tortious Acts On-Line Anonymously or Pseudonymously.

23.160 Address Discovery of Electronically Stored Information Early in Litigation.

23.160[1] Rule 26(a)(1) Requires Disclosure of Electronically Stored Information.

23.160[2] Pretrial Conferences May Be Used to Narrow Scope of Relevant Records.

23.161 Parties Have Duty to Preserve Evidence.

23.161[1] Knowledge of Litigation or Imminent Litigation Triggers Preservation Duty.

23.161[2] Zubulake Guidelines for Preservation of Electronic Evidence.

23.161[2][a] Zubulake Cases Provide Detailed Guidance on Preservation Duties.

23.161[2][b] Directives to Parties Under Zubulake IV.

23.161[2][c] Directives to Attorneys Under Zubulake V.

23.161[3] Obtain Stipulation or Order for Preservation of Evidence.

23.161[4] Sanctions May Be Imposed for Failure to Preserve Evidence.

23.161[4][a] Sanctions May Be Imposed for Violation of Preservation Order.

23.161[4][b] Court Has Inherent Authority to Impose Sanctions for Destruction of Evidence.

23.162 Use Discovery Methods to Gather Evidence in Form of Electronically Stored Information.

23.162[1] Use Interrogatories to Identify Sources of Electronically Stored Information and Persons With Knowledge of Storage Policies and Procedures.

23.162[2] Depose Person With Knowledge of Electronic Information Systems and Storage.

23.162[3] Demand Inspection of Electronic Information System.

23.162[3][a] Rule 34(a) Provides for Inspection of Electronic Information Systems.

23.162[3][b] Requesting Party Must Demonstrate Need and Likelihood of Finding Relevant Matter.

23.162[3][c] Attempt Agreement on Confidentiality Protocol.

23.162[4] Request Production of Electronically Stored Information.

23.162[4][a] Make Rule 34 Request for Production to Obtain Electronically Stored Information.

23.162[4][b] Responding Party Must Produce All Responsive Information Within Its Possession, Custody, or Control.

23.162[5] Make Supplemental Requests for After-Acquired or Discovered Information.

23.163 Move to Compel Discovery If Responding Party Fails to Comply With Discovery Request.

23.164 CHECKLIST: Responding to Requests for Electronically Stored Information

23.165 Request for Production Includes Electronically Stored Information.

23.166 Responding Party Has Duty to Perform Diligent Search.

23.167 Routine Procedures That Would Destroy Relevant Records Must Be Suspended.

23.168 Responding to Request for Production.

23.168[1] Produce Information in Form Specified in Request or Form in Which It Is Ordinarily Maintained or Form That Is Reasonably Usable.

23.168[2] Responding Party Has Duty to Create Compilations If Raw Data Exists.

23.168[3] Interrogatories May Be Answered by Making Records Available.

23.168[4] Respond or Object in Timely Manner.

23.168[4][a] Failure to Object Within Time Required Waives Any Objections.

23.168[4][b] Objection Must Identify Specific Item As to Which It Is Made and Specify Reason for Objection.

23.168[4][c] Response Must State Form of Production If Other Than That Stated in Request.

23.168[5] Determine Whether to Retain Expert to Protect Against Manipulation of Data by Requesting Party.

23.169 Requested Matter Must Be Relevant to Claim or Defense.

23.169[1] Wide-Ranging Discovery Is Allowed Under Liberal Interpretation of Rule 26(b).

23.169[2] "Fishing Expeditions" Are Not Allowed.

23.169[3] Burden Is on Responding Party to Show Lack of Relevance.

23.170 Requested Matter Must Not Be Privileged.

23.171 Determine Whether Burden or Expense Exceeds Right to Evidence.

23.171[1] Party Must Produce Evidence Unless Production Is Unduly Burdensome or Expensive.

23.171[2] Evaluate Burden and Expense of Production Under Rule 26(b)(2)(C) Factors.

23.171[2][a] Burden of Producing Electronically Stored Information Can Be Substantial.

23.171[2][b] Rule 26(b) Balancing Factors Determine Extent of Discovery of Electronically Stored Information.

23.171[2][c] Limitation on Discovery Can Be Obtained If Likely Benefit Is Outweighed by Burden or Expense.

23.171[2][d] Assess Whether Request for Discovery Is Too Broad.

23.172 Responding to Request for Search of Back-Up System or Archive.

23.172[1] Search of Back-Up System or Archive May Be Difficult and Costly.

23.172[2] Proportionality Test Applies to Search of Back-Up Systems and Archives.

23.173 Protective Order Is Available If Burden or Expense of Production Is Too Great.

23.173[1] Burden of Searching Records and Translating Data Into Readable Form Is Necessary and Foreseeable.

23.173[2] Prepare Proffer Outlining Costs and Burdens.

23.173[3] Attempt to Resolve Dispute With Requesting Party.

23.173[4] Protective Order Is Available If Dispute Cannot Be Resolved Between Parties.

23.174 Apply for Order Shifting Costs If Production Requires Significant or Special Costs.

23.174[1] Court Has Inherent Authority to Allocate Discovery Costs.

23.174[2] Cost-Shifting Is Appropriate When Data Is Inaccessible.

23.174[3] Responding Party Bears Cost of Review and Production Following Conversion to Accessible Form.

23.175 Third-Party Response to Subpoena Issued Under Rule 45.

23.175[1] Produce Information in Form Specified in Subpoena, Form Ordinarily Maintained, or Reasonably Usable Form.

23.175[2] Identify Documents Withheld Based on Privilege Sufficiently to Enable Requesting Party to Contest Claim.

23.175[3] Electronic Communications Privacy Act of 1986 Protects Customer Information Possessed by Provider of Electronic Communication Service.

23.175[4] Seek Protective Order to Prevent, or Impose Sanctions for, Imposition of Undue Burden or Expense.

23.175[5] Discovery Order Is Normally Not Immediately Appealable.

23.176 CHECKLIST: Protecting Confidentiality and Privilege.

23.177 Privileged Matter Is Protected From Discovery.

23.178 Reasonable Expectation of Confidentiality May Exist in Electronically Stored Information.

23.178[1] Electronically Stored Information May Contain Privileged or Confidential Information.

23.178[2] Totality of Circumstances Is Considered in Determining Whether Inadvertent Disclosure Waives Privilege.

23.178[3] Employee Has No Reasonable Expectation of Privacy in E-mails Sent Over Employer's Computer System.

23.178[4] Attorney-Client Privilege Applies to Communication by E-mail.

23.179 Work Product Doctrine Can Apply to Computerized Litigation Support System.

23.179[1] Work Product Doctrine Protects Work Prepared Because of Litigation.

23.179[2] Attorney Involvement Determines Level of Protection for Computerized Litigation Support System.

23.179[3] When Requesting Party Has Targeted Computerized Litigation Support System for Discovery, Determine Whether Material Is Available From Another Source.

23.180 Stipulated Protective Order May Be Used to Protect Confidential and Privileged Information.

23.181 Move for Protective Order If Requesting Party Will Not Stipulate.

23.181[1] Attempt Must Be Made to Resolve Dispute Before Moving for Protective Order.

23.181[2] Court Has Broad Discretion to Fashion Appropriate Order.

23.182 CHECKLIST: Admitting Electronically Stored Information at Trial.

23.183 Electronically Stored Information Is Writing Subject to Federal Rules of Evidence.

23.184 Authenticity Is Governed by Fed R Evid 901.

23.184[1] Proponent Must Produce Evidence Sufficient to Support Finding That Matter in Question Is What Proponent Claims It to Be.

23.184[2] Website Printouts Must Be Authenticated.

23.184[3] Printouts of Electronically Stored Information Must Be Authenticated.

23.184[4] E-mail Must Be Authenticated.

23.185 Questions of Accuracy Go to Weight, Not Admissibility.

23.186 Electronically Stored Information Will Be Excludable as Hearsay Unless an Exception Applies.

23.186[1] Electronically Stored Information Is Subject to Exclusion as Hearsay.

23.186[1][a] Electronically Stored Information May Be Statement Subject to Exclusion as Hearsay.

23.186[1][b] Nonassertive Printout Is Not Hearsay.

23.186[1][c] Admission by Party-Opponent Is Not Hearsay.

23.186[2] Hearsay Electronically Stored Information Is Admissible If an Exception Applies.

23.186[2][a] Federal Rules of Evidence Provide Exceptions That Allow Admission of Hearsay.

23.186[2][b] Electronically Stored Information Is Admissible Under Business Records Exception to Hearsay Rule If Proper Foundational Requirements Are Established.

23.186[2][c] Catch-All Exception for Statements With Circumstantial Guarantees of Trustworthiness.

23.187 Court May Require Disclosure of Digital Material That Will Be Shown to Jury.

23.188 Application of Best Evidence Rule to Printouts of Electronically Stored Information.

23.189 CHECKLIST: Initial Considerations.

23.190 Options and Strategy for Party Considering Examination.

23.191 Any Party May Seek Examination.

23.192 Party or Person in Custody or Control of Party May Be Examined.

23.192[1] Any Party Is Subject to Examination.

23.192[2] Person in Custody or Control of Party Is Subject to Examination.

23.192[3] Nonparty Is Not Subject to Examination.

23.193 Examination Must Be Conducted by Qualified Examiner.

23.193[1] Examiner Must Be Suitably Licensed or Certified.

23.193[2] Designation of Examiner by Moving Party Generally Conclusive.

23.194 CHECKLIST: Agreeing or Stipulating to Physical or Mental Examination.

23.195 Options and Strategy for Agreeing or Stipulating to Examination.

23.196 Parties May Agree to Mental or Physical Examination.

23.197 Examination Pursuant to Agreement Is Subject to Rule 35 Restrictions, Unless Agreement Explicitly Provides Otherwise.

23.198 CHECKLIST: Moving for Physical or Mental Examination of Party.

23.199 Options and Strategy for Moving Party.

23.200 Request and Examination Must Be Timed Properly.

23.200[1] Examinations Must Await Preliminary Discovery Conference.

23.200[2] Examinations Must Be Sought Before Close of Discovery.

23.200[3] Examination May Be Available Prior to Commencement of Action to Preserve Evidence.

23.201 Requisites of Motion Practice Must Be Followed.

23.202 Physical or Mental Condition Must Be Shown to Be "in Controversy."

23.202[1] Burden Is on Moving Party.

23.202[2] Party to Be Examined Must Have Placed Condition "in Controversy."

23.202[3] Showing That Physical Condition Is in Controversy.

23.202[4] Showing That Mental Condition Is in Controversy.

23.202[4][a] Making Claim of "Garden-Variety" Emotional Distress or Mental Anguish Does Not Place Mental Condition "in Controversy."

23.202[4][b] Making Claim of Ongoing Mental Injury Places Mental Condition "in Controversy."

23.202[4][c] Party to Be Examined May Concede That Mental Condition Is "in Controversy."

23.203 Establishing "Good Cause" for Examination.

23.203[1] Burden Is on Moving Party.

23.203[2] "Good Cause" Requires Demonstration of Necessity to Discover Specific Relevant Facts Through Examination.

23.203[3] Moving Party's Ability to Obtain Information From Other Source May Obviate Need for Examination.

23.203[4] Prior Examination May Obviate Need for Second Examination.

23.203[5] Court May Balance Privacy Interest of Party Against Need for Examination.

23.204 Setting and Limiting Conditions of Examination.

23.204[1] Conditions Should Be Specified in Motion.

23.204[2] Attendance of Third Parties, Including Counsel, Generally Disfavored.

23.204[3] Recording Examination Not Necessary.

23.205 CHECKLIST: Sanctioning Noncompliance With Court Order for Examination.

23.206 Examining Party Can Move for Sanctions If Party Fails to Comply With Examination Order.

23.207 Party May Escape Sanctions by Showing Inability to Produce Examinee.

23.208 Various Types of Sanctions Are Available, Including Attorney's Fees.

23.209 Failure to Comply May Not Be Punished by Contempt.

23.210 CHECKLIST: Opposing Request or Motion for Examination.

23.211 Options and Strategies for Opposition.

23.211[1] Determine Whether Opposition Would Be Beneficial.

23.211[2] Attempt Negotiation Toward Stipulated Examination.

23.211[3] Focus on Scope of Examination.

23.211[4] Consider Seeking Protective Order.

23.211[5] Prepare Client for Examination.

23.211[6] Interview Client After Examination.

23.211[7] Consider Options for Obtaining Examination Report.

23.212 CHECKLIST: Obtaining Examination Reports.

23.213 Obtaining Report on Request of Examined Party.

23.213[1] Examination Ordered After Motion.

23.213[2] Stipulated Examination May Curtail Right to Report.

23.214 Compelling Production of Report.

23.214[1] Examined Party May Move Court to Compel Production.

23.214[2] Excluding Evidence for Failure to Produce Report.

23.215 Determining Effect of Request for and Delivery of Report.

23.215[1] Request of Examined Party Includes All Results of Earlier Examinations of Same Condition.

23.215[2] Delivery of Report by Examining Party Entitles Party to Results of Any Other Examination of Same Condition.

23.215[3] Request of Examined Party Waives Any Privilege of Party As to Other Examinations of Same Condition.

23.216 Obtaining Report Under Other Discovery Provisions Not Precluded.

23.217 CHECKLIST: Requesting Admissions.

23.218 Determine Whether Matter Under Consideration Is Subject to Requests for Admission.

23.218[1] Requests Must Concern Matters Relating to Facts.

23.218[2] Requests May Relate to Ultimate Facts.

23.218[3] Requests May Relate to Application of Law to Facts.

23.218[4] Requests May Relate to Genuineness of Documents.

23.218[5] Requested Matter Must Be Relevant and Not Privileged.

23.218[6] Requested Matter Must Not Be Pure Legal Conclusion Unrelated to Facts of Case.

23.219 Propound Requests to Each Party Against Whom Admission Will Be Used.

23.220 Determine Timing of Requests.

23.220[1] Service of Requests Generally Must Await Discovery Conference.

23.220[2] Earlier Service of Requests May Be Based on Parties' Stipulation or Leave of Court.

23.220[3] Discovery Cutoff Date Applies to Requests for Admission.

23.221 Comply With Local Rules Limiting Number of Requests.

23.221[1] Check Judge's Standing Orders.

23.221[2] LOCAL PRACTICE: ND Cal Requirements.

23.221[3] LOCAL PRACTICE: SD Cal Requirements.

23.222 Draft Requests Carefully.

23.222[1] Requests Must Be Clear and Precise.

23.222[2] State Each Request Separately.

23.222[3] LOCAL PRACTICE: CD Cal Requirements.

23.222[4] Frame Requests As Statements Not Questions.

23.222[5] Attach Relevant Documents.

23.223 Request Must Be Signed on Behalf of Propounding Party.

23.224 Serve Requests.

23.224[1] Signed Request Must Be Served on Responding Party.

23.224[2] LOCAL PRACTICE: Retain Original.

23.224[2][a] LOCAL PRACTICE: CD Cal Requirements.

23.224[2][b] LOCAL PRACTICE: ND Cal Requirements.

23.224[3] Serve Copies of Requests on All Other Parties.

23.225 Do Not File Request.

23.225[1] Requests Should Not Be Filed Until Used in Case.

23.225[2] LOCAL PRACTICE: Filing Requirements.

23.225[2][a] LOCAL PRACTICE: CD Cal Requirements.

23.225[2][b] LOCAL PRACTICE: ED Cal Requirements.

23.226 CHECKLIST: Responding to Requests for Admission.

23.227 Responding Party Has Duty of Inquiry.

23.228 Review Grounds for Objecting.

23.228[1] Improper Format of Request.

23.228[2] Untimely Request.

23.228[3] Excessive Number of Requests.

23.228[4] Undue Burden.

23.228[5] Improper Scope of Request.

23.228[6] Irrelevance.

23.228[7] Privilege.

23.228[8] Failure to Provide Document.

23.229 Respondent's Options.

23.229[1] Answer.

23.229[2] Object.

23.229[3] Ask to Extend Time.

23.229[4] Seek Protective Order.

23.230 Failure to Respond Is Deemed Admission.

23.231 Response Must Be Served Within 30 Days.

23.232 Exceptions to 30-Day Period to Respond.

23.232[1] Court Order.

23.232[2] Parties' Written Stipulation.

23.233 Responding Party May Move for Relief From Failure to Make Timely Response.

23.234 Responses Must Be in Writing.

23.235 LOCAL PRACTICE: Quote Requests in Response.

23.235[1] LOCAL PRACTICE: CD Cal Requirements.

23.235[2] LOCAL PRACTICE: ED Cal Requirements.

23.235[3] LOCAL PRACTICE: ND Cal Requirements.

23.235[4] LOCAL PRACTICE: SD Cal Requirements.

23.236 Drafting Response.

23.236[1] State Admission.

23.236[1][a] Unqualified Admission.

23.236[1][b] Admission With Qualification.

23.236[2] State Denial.

23.236[2][a] Complete Denial.

23.236[2][b] Partial Denial.

23.236[3] Assert Lack of Information.

23.236[4] Assert Objections.

23.236[4][a] State Objections to Avoid Waiver.

23.236[4][b] State Reasons for Objection.

23.236[4][c] Avoid Improper Objections.

23.237 Response Must Be Signed on Behalf of Responding Party.

23.238 Verification Is Not Required.

23.239 Serve Responses.

23.239[1] Serve Original Response on Propounding Party.

23.239[2] Serve Copies of Response on All Other Parties.

23.240 Propounding Party Should Not File Response.

23.240[1] Responses Are Not Filed Until Used in Case.

23.240[2] Retain Original Response.

23.240[3] LOCAL PRACTICE: Filing and Retention Requirements.

23.240[3][a] LOCAL PRACTICE: CD Cal Requirements.

23.240[3][b] LOCAL PRACTICE: ED Cal Requirements.

23.240[3][c] LOCAL PRACTICE: ND Cal Requirements.

23.240[3][d] LOCAL PRACTICE: SD Cal Requirements.

23.241 Respondent Must Supplement Responses.

23.242 Sanctions May Be Available for Inadequate Response.

23.243 CHECKLIST: Moving to Determine Sufficiency of Responses.

23.243[1] Propounding Party's Checklist.

23.243[2] Responding Party's Checklist.

23.244 Requesting Party May Move to Determine Sufficiency of Responses.

23.245 Unless Objection Is Justified, Court Will Order Answer.

23.246 If Answer Is Insufficient, Court May Order Matter Admitted or Answer Amended.

23.247 Court May Order Parties to Confer.

23.248 Expenses May Be Awarded.

23.249 CHECKLIST: Withdrawing or Amending Admissions.

23.249[1] Responding Party's Checklist.

23.249[2] Propounding Party's Checklist.

23.250 Withdrawal or Amendment Must Advance Decision on Merits and Not Prejudice Requesting Party.

23.251 Stricter Standard for Withdrawal Applies After Entry of Final Pretrial Order.

23.252 Moving Party's Burden on Motion.

23.253 Propounding Party's Burden on Motion.

23.254 CHECKLIST: Recovering Expenses of Proving Matters Not Admitted.

23.254[1] Propounding Party's Checklist.

23.254[2] Responding Party's Checklist.

23.255 Move for Order Requesting Reasonable Expenses.

23.256 File Motion As Soon As Possible.

23.257 Show How Expenses Were Incurred.

23.258 Expenses Will Be Awarded Unless Failure to Admit Was Justifiable.

23.259 CHECKLIST: Determining Whether Use of Subpoena Is Appropriate.

23.260 CHECKLISTS: Drafting Subpoenas for Nonparty Discovery.

23.260[1] Subpoena to Compel Testimony.

23.260[2] CHECKLIST: Subpoena to Compel Production.

23.260[3] CHECKLIST: Subpoena to Compel Permission to Inspect Premises.

23.261 Options and Strategy.

23.261[1] Informal Discovery Available From Nonparties.

23.261[2] Prior to Drafting, Verify That Subpoena May Be Served.

23.261[3] Consider Issuing More Than One Subpoena.

23.261[4] Party May Not Issue Subpoena Absent Pending Litigation.

23.261[5] Party Must Issue Subpoena Before Discovery Cutoff.

23.261[6] Consult Local Rules When Issuing Subpoena.

23.262 Essential Components of Subpoena to Compel Testimony.

23.262[1] Subpoena Must Issue From Proper Court.

23.262[2] Indicate Title of Action, Name of Court in Which Action Is Pending, and Civil Action Number.

23.262[3] Command Witness to Attend and Give Testimony.

23.262[4] Advise Corporate Witnesses of Subject Matter and Duty to Designate Witness.

23.262[5] Indicate Time and Place for Deposition, Hearing, or Trial, and Method of Recording Deposition Testimony.

23.262[6] Include Text of Federal Rule of Civil Procedure 45(c) and (d).

23.262[7] Include Proper Signature.

23.262[8] Provide Reasonable Time to Comply.

23.262[9] Appropriate Witness and Mileage Fees Must Accompany Subpoena to Compel Testimony.

23.262[10] Subpoena Must Not Be Unduly Burdensome.

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23.263 Essential Components of Subpoena to Compel Production.

23.263[1] Subpoena Must Issue From Proper Court.

23.263[2] State Title of Action, Name of Court in Which Action Is Pending, and Civil Action Number.

23.263[3] Command Production of Documents, Electronically Stored Information, and Things.

23.263[4] Designate Time and Place for Production.

23.263[5] Include Text of Federal Rule of Civil Procedure 45(c) and (d).

23.263[6] Include Proper Signature.

23.263[7] Provide Reasonable Time for Compliance.

23.263[8] Subpoena Must Not Be Unduly Burdensome.

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23.264[2] State Title of Action, Name of Court in Which Action Is Pending, and Civil Action Number.

23.264[3] Command Permission to Inspect Premises.

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23.264[5] Include Text of Federal Rule of Civil Procedure 45(c) and (d).

23.264[6] Include Proper Signature.

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
I. STRATEGY

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.01

23.01 Scope.

This chapter discusses the various methods of discovery under the Federal Rules of Civil Procedure:

- **Pre-action perpetuation of testimony** under *Fed R Civ P 27*, including:
  - Determining whether Rule 27 is available to prevent loss of evidence before an action is filed [*see 23.03 -23.06*, *23.09*].
  - Petitioning a federal district court for an order to perpetuate evidence [*see 23.07*; *Forms: 23.286*, *23.288*].
  - Giving notice to potentially adverse parties [*see 23.08*; *Form: 23.287*].
  - Opposing a Rule 27 petition to perpetuate testimony [*see 23.13 -23.18*].
- **Depositions on oral examination** under *Fed R Civ P 30*, including:
  - Determining the individuals or entities to be deposed [*see 23.19 -23.22*].
  - Moving for leave of court to take a deposition, if required [*see 23.23 -23.66*; *Form: 23.290*].
  - Giving notice of an oral deposition [*see 23.27 -23.33*; *Form: 23.289*], including naming a corporation or other entity as deponent [*see 23.30*].
  - Stipulating to or moving for an order allowing the taking of a deposition by

telephone or other remote electronic means [*see 23.31*; *Form: 23.292*].

- Responding to a notice of deposition [*see 23.36 -23.41*], including objecting to errors or irregularities in the notice or to the qualifications of the deposition officer [*see 23.38*, *23.39*; *Form: 23.289*], moving to quash the deposition notice or subpoena [*see 23.40*], and moving for a protective order to prevent or limit the deposition [*see 23.41*].

- Conducting an oral deposition [*see 23.42 -23.46*], including the qualifications of the deposition officer [*see 23.43*], and the procedure to be followed [*see 23.46*].

- Objecting to the conduct of an oral deposition [*see 23.47 -23.55*], including moving for a protective order during a deposition in progress [*see 23.53*; *Form: 23.293*].

- Moving for an award of expenses when the party noticing the deposition fails to attend [*see 23.54*] or when the witness does not attend because of the noticing party's failure to serve a subpoena [*see 23.55*].

- Compelling a deponent to attend the deposition or to answer a question and/or produce materials [*see 23.56 -23.59*].

- Obtaining copies of and reviewing the transcript [*see 23.60 -23.66*], including review of the transcript by the deponent [*see 23.61*], the procedures for delivery and storage of the transcript [*see 23.62*, *23.63*], local rules concerning the filing of depositions with the court [*see 23.65*], and motions to suppress [*see 23.66*].

- Using or preventing the use of a deposition [*see 23.67 -23.75*], including purposes for which a deposition may be used [*see 23.69*], circumstances when a deposition may not be used [*see 23.70*], and the form of presentation of a deposition to the court [*see 23.71*].

- **Depositions by written questions** under *Fed R Civ P 31*, including:

  - Determining whether a deposition upon written questions is an appropriate method of discovery in a particular case [*see 23.77 -23.82*].

  - Identifying the individuals or entities to be deposed [*see 23.83*].

  - Moving for leave of court to take a deposition upon written questions, if required [*see 23.84 -23.86*; *Form: 23.295*].

  - Giving notice of a deposition upon written questions [*see 23.87 -23.90*; *Form: 23.294*].

  - Responding to a notice of deposition upon written questions [*see 23.91 -23.97*], including objecting to errors or irregularities in the notice [*see 23.93*; *Form: 23.296*],

objecting to the qualifications of the deposition officer [*see 23.94*; *Form: 23.296*], objecting to the form of written questions [*see 23.95*; *Form: 23.296*], designating an individual to testify on behalf of an entity named as deponent [*see 23.96*], and moving for a protective order to preclude or limit discovery, including requiring the discovery to be taken by another method [*see 23.97*; *Form: 23.297*].

- Propounding cross, redirect, and recross questions [*see 23.98 -23.102*].

- The procedure for taking a deposition upon written questions, including delivering the notice and questions to the deposition officer who will conduct the deposition [*see 23.103 -23.105*], review of the completed deposition by the deponent [*see 23.106*], certification and delivery of the deposition by the deposition officer [*see 23.107*, *23.108*], and motions to suppress [*see 23.110*].

- **Interrogatories** under *Fed R Civ P 33*, including:

  - Objectives and strategy for interrogatories [*see 23.02[4]*].

  - Options and strategies for the party propounding the interrogatories [*see 23.112*].

  - Subject matter of interrogatories [*see 23.114*].

  - Drafting interrogatories [*see 23.116*].

  - Time requirements for propounding [*see 23.117*] and responding to interrogatories [*see 23.127*].

  - Service of interrogatories [*see 23.118*].

  - Responses and objections to interrogatories [*see 23.121 -23.134*].

  - Obtaining a protective order in regard to interrogatories [*see 23.132*].

  - Duty to supplement or amend answers [*see 23.134*].

  - Motions to compel responses to interrogatories [*see 23.120*].

  - Form of interrogatories [*see 23.298*].

  - Form of motion and order for leave to propound excess interrogatories [*see 23.299*, *23.300*].

  - Form for answers and objections [*see 23.301*].

- **Requests for production and inspection** under *Fed R Civ P 34*, including:

  - Objectives and strategy related to the production and inspection of documents, electronically stored information, and other tangible items [*see 23.02[5]*].

  - Planning request for production or inspection [*see 23.135*, *23.136*].

  - Types of documents, electronically stored information, and tangible items that are subject to request for production or inspection [*see 23.137*, *23.138*].

  - Persons covered by Rule 34 [*see 23.139*].

  - Procedures for requesting production or inspection [*see 23.140 -23.148*].

  - Contents and format of request for production or inspection [*see 23.145*; *Forms: 23.302*, *23.303*].

  - Procedure for responding to request for production or inspection [*see 23.149 -23.156*].

  - Contents and format of response to request for production or inspection [*see 23.152*; *Form: 23.304*].

  - Motion for protective order by responding party [*see 23.155*; *Form: 23.305*].

  - Objections by responding party to requests for production [*see 23.153*].

  - Method of production by responding party [*see 23.156*].

- **Discovery of electronically stored information** including:

  - Requesting electronically stored information [*see 23.157 -23.163*].

  - Responding to a request for electronically stored information [*see 23.164 -23.175*].

  - Protecting confidentiality and privilege [*see 23.176 -23.181*].

  - Admitting electronically stored information at trial [*see 23.182 -23.188*].

- **Physical and mental examinations** under *Fed R Civ P 35*, including:

  - Determining whether to conduct an examination of a party [*see 23.189 -23.193*].

- Agreeing or stipulating to an examination [*see 23.194 -23.197*].
- Moving for a court-ordered physical or mental examination [*see 23.198 -23.204*].
- Compelling compliance with a court order for examination [*see 23.205 -23.209*].
- Opposing a request or motion for examination [*see 23.210*, *23.211*].
- Obtaining and using examination reports [*see 23.212 -23.216*].

- **Requests for admission** under *Fed R Civ P 36*, including:
  - Purpose and effect of requests for admission [*see 23.02[8]*].
  - Propounding requests for admission [*see 23.217 -23.225*; *Forms: 23.312*, *23.313*].
  - Responding to requests for admission, including asserting objections [*see 23.226 -23.242*; *Form: 23.314*].
  - Moving to determine the sufficiency of responses [*see 23.243 -23.248*; *Form: 23.315*].
  - Withdrawing or amending admissions [see *23.249 -23.253*; *Form: 23.316*].
  - Recovering expenses of proving matters not admitted [see *23.254 -23.258*].

- **Nonparty discovery** under *Fed R Civ P 45*, including:
  - Drafting subpoenas [*see 23.259 -23.265*; *Forms: 23.317 -23.319*].
  - Serving subpoenas [*see 23.266 -23.273*].
  - Responding to subpoenas [*see 23.274 -23.282*; *Form: 23.320*].

Core Rules:
Fed R Civ P 27(a), *30*, *31*, *33*, *34*, *35*, *36*, *45*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryProtective Orders

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
I. STRATEGY

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23.02 Objective and Strategy.

23.02[1] Perpetuation of Testimony. In rare circumstances, a person may be faced with a situation in which he or she may be potentially a party in a federal action, and vital evidence may be lost or destroyed before the action is filed. Illustrative fact patterns involve elderly or ailing witnesses who may die before the action is commenced, ships that may sail off to foreign ports, and property that may be repaired or demolished. *Fed R Civ P 27* provides a possible avenue of relief in these situations, for both potential plaintiffs and defendants.

Rule 27 is designed to preserve specific testimony that could be lost before a civil action commences. Pre-action acquisition and preservation of testimony is called "perpetuation of testimony."

Rule 27 has stringent requirements that are not liberally construed. For this reason counsel should carefully review its provisions and consider the following issues:

- Whether persons who can be deposed can be identified and located.
- Will the testimony or physical evidence be otherwise lost or destroyed.
- Can the content of the testimony to be perpetuated be specified.
- Will the anticipated action be filed in federal court.
- Can other potentially adverse parties be identified.

Although perpetuation of testimony is accomplished through depositions, a discovery method, perpetuation is not a discovery tool. Rule 27 may not be used to find new evidence. You must know what information you are seeking when you decide to petition for perpetuation.

Cross Reference:

Discussion of perpetuation of testimony, see *§ 23.03* et seq.

Detailed Discussion/Forms:

7 Moore's Federal Practice, Ch. 27, Depositions to Perpetuate Testimony (Matthew Bender 3d ed.).

6 Bender's Federal Practice Forms, Rule 27, Depositions to Perpetuate Testimony (Matthew Bender).

23.02[2] Oral Depositions. Oral depositions are the most effective and significant tool available to obtain important information and to assess the strength, credibility, and effectiveness of a witness. Deposition testimony is available to impeach testimony given by the witness at trial or in response to a summary judgment motion, or may provide a basis for a summary judgment motion. Oral depositions are also critical to obtain the testimony of witnesses who live beyond the subpoena range of the court or who otherwise cannot be compelled to testify at trial, as well as to preserve testimony if the witness becomes unavailable for any reason.

Advantages of oral depositions include:

- They can be set on reasonable notice.
- They can be videotaped or audio taped.
- They permit the questioner to learn what the witness may say at trial.
- They provide an opportunity to evaluate the credibility of key witnesses.
- They allow a broad range of questions, and are much more likely to uncover useful information than are interrogatories.
- They may provide inconsistent statements that can be used to impeach trial testimony.
- They may be used to require the witness to bring documents.
- They preserve testimony, if the witness is later unavailable.
- They afford an opportunity to observe opposing counsel.
- They may provide a basis for a later motion for summary judgment.
- The deposition process may encourage the opponent to pursue settlement, either to avoid the deposition entirely or in relation to a witness's poor deposition performance.
- They may lead to discovery of other important witnesses or documents.
- They may uncover potential weaknesses in your own case early enough to modify your strategy.
- They may provide an opportunity for opposing counsel to observe your effectiveness.
- They may provide a means of controlling the course of the litigation.

Disadvantages of oral depositions include:

- They can be expensive, compared to other forms of discovery.
- They are time consuming.
- They may provide an opportunity for opposing counsel to understand your strategy and identify weaknesses in your case or your effectiveness.

Planning is important to maximize the value of a deposition. Because depositions may be extensively relied on in showing the existence of a disputed fact on a summary judgment motion, and potentially at trial, the deposition must show the deponent's personal knowledge of the matter about which the deponent is testifying. Similarly, counsel must ensure that documents on which a claim or defense relies are properly authenticated by the appropriate witness.

Cross Reference:

Discussion of oral depositions, see *§ 23.19* et seq.

Detailed Discussion/Forms:

7 Moore's Federal Practice, Ch. 30, Depositions by Oral Examination (Matthew Bender 3d ed.).

6 Bender's Federal Practice Forms, Rule 30, Depositions by Oral Examination (Matthew Bender).

23.02[3] Written Depositions. A deposition by written questions is a device to obtain testimony from either a party or nonparty witness, without the expense of an oral deposition. In a deposition by written questions, all questions, including cross, redirect, and recross questions, are prepared in advance and served on all the parties [*see Fed R Civ P 31(a)(3)-(5)*]. The questions are delivered to a deposition officer, who then propounds the questions to the deponent and records the deponent's responses [*see Fed R Civ P 31(b)*]. The procedures for oral deposition, such as compelling the attendance of a nonparty through the use of a subpoena, generally apply [*see Fed R Civ P 31(a)(1), (b)*].

Although depositions by written questions can be efficient and cost-effective, particularly if substantial travel expense would otherwise be involved, they are used far less frequently than oral depositions because of their inherent limitations, such as the lack of spontaneity, the inability to observe the witness' demeanor, and the possibility that the witness will be coached before testifying.

A deposition by written questions may nonetheless be an appropriate discovery method when the deponent is a witness, such as a custodian of records, whose credibility is not at issue, or a nonparty whose testimony is predictable or not controversial in light of the documentary record.

Cross Reference:

Discussion of depositions by written questions, see *§ 23.76* et seq.

Detailed Discussion/Forms:

7 Moore's Federal Practice, Ch. 31, Depositions by Written Questions (Matthew Bender 3d ed.).

6 Bender's Federal Practice Forms, Rule 31, Depositions by Written Questions (Matthew Bender).

23.02[4] Interrogatories. Interrogatories are a discovery device consisting of written questions propounded by one party to another [*see Fed R Civ P 33(a)*]. The scope of issues that interrogatories may cover is coextensive with that of other forms of discovery. That is, interrogatories may relate to any matter, not privileged, relevant to the claims and defenses of any party [*see Fed R Civ P 26(b)(1)*; *see also 23.114*].

Like other forms of discovery, the purpose of interrogatories is to develop the facts and theories of the case and obtain

evidence for use in summary judgment motions, in limine motions, and trial. Skillful use of interrogatories can narrow the issues at trial in an inexpensive fashion and thereby reduce the possibility of surprise. They provide an opportunity for each party to determine the basis for the other party's claim or defense, and to delineate the facts and issues in dispute.

Much of the information that was previously sought by interrogatories must now be disclosed by the parties at the outset of the litigation without a formal discovery request under the mandatory disclosure requirements [*see Fed R Civ P 26(a)*; *see also 23.113*]. Interrogatories may be used in conjunction with other forms of discovery to obtain initial information on which to base additional requests for discovery, for example, to request production of documents and depose people mentioned in the answers. Interrogatories also may be used to augment information already known, such as facts obtained by deposition or in the initial required disclosures.

Interrogatories also may be used to inquire into a party's contentions and opinions [*see Fed R Civ P 33(a)(2)*; *see also 23.114[3]*].

While interrogatories are useful to gather information on which to build a case or defense, the answers themselves can serve an evidentiary function. During trial, the answers may be used to the extent permitted by the rules of evidence [*see Fed R Civ P 33(c)*]. Moreover, if the opposing party did not provide certain responsive information in answering a well-crafted interrogatory, the propounding party may be able to use the interrogatory and response to prevent the opposing party from using that information at trial.

Cross Reference:

Discussion of interrogatories, see *§ 23.111* et seq.

Detailed Discussion/Forms:

7 Moore's Federal Practice, Ch. 33, Interrogatories to Parties (Matthew Bender 3d ed.).

6 Bender's Federal Practice Forms, Rule 33, Interrogatories to Parties (Matthew Bender)**.**

23.02[5] Requests for Production and Inspection. The production of documents, electronically stored information, and other tangible items is an important device for collecting discovery information and preserving documentary and physical evidence for use at trial.

Advantages of requests for production and inspection include:

- Requests allow a party to obtain documents and electronically stored information not provided in the initial disclosures.

- Discovery of documents and electronically stored information can effectively lead to the discovery of other relevant materials and witnesses, and provide the critical exhibits for trial, a clearer understanding of the facts of the case, and sometimes support for new claims or counterclaims.

- Parties may make an unlimited number of requests under federal rules, although the assigned judge may limit the number on a case-by-case basis; the types of documents and electronically stored information that can be sought are usually broad, including emails, word processing files and data compilations, and, in limited circumstances, the responding party's computer system.

- By accessing and inspecting land, premises, and physical objects, parties can gather information, or physical evidence for use later at trial.

- Parties may use production and inspection requests in conjunction with depositions.

- Documents, electronically stored information, and tangible items can provide an effective substitute for witnesses who are unavailable or possess faulty memory due to the passage of time.

- Evidence created contemporaneously with the events at issue may be obtained without being influenced by counsel preparation, as are interrogatories and depositions.

Disadvantages of requests for production include:

- This form of discovery can be expensive, and the requesting party may be required to pay part of the expenses of production.

- Parties may request production or inspection only from parties (not third parties) with possession, custody, or control of the items or premises.

- Examination and analysis of large amounts of irrelevant information may be necessary.

- Propounding a large number of requests may encourage the responding party to serve the propounding party with its own lengthy list of requests. Responding to requests can be very expensive and disruptive to a client, especially if the requests seek electronically stored information.

- Rule 34 requests often generate objections, discovery motion practice, and consequent delays in the proceedings.

- Rule 34 requests will often seek broad categories of documents and electronically stored information related generally to the dispute at issue, and thus may reveal less about case needs and strategy than interrogatories or depositions, which frequently require more specific questions.

Regardless of any perceived advantage or disadvantage, requests for production or inspection will often offer the most important, if not the only, means of acquiring from the opposing side the physical, documentary, and electronically stored evidence necessary to litigate a case. Documents and information produced through the Rule 34 process will often be crucial in shaping the rest of discovery (e.g., they often drive deposition questioning) and presentation at trial. Rule 34 requests are thus frequently crucial to the success or failure of the litigation, and the pursuit of complete production through motions practice or otherwise may be worth the time and effort.

Parties participating in Rule 34 discovery should consider the following:

- A requesting party may seek not only items that are relevant to claims or defenses of any party, but also, on a showing of "good cause," materials that are inadmissible in evidence at trial, if the material could reasonably lead to the discovery of admissible evidence [*see Fed R Civ P 26(b)(1)*].

- It often makes sense to serve requests at the beginning of discovery, before taking depositions. Otherwise, the requesting party may obtain pertinent documents and information after having already taken the deposition of the witness with knowledge about them. If the requesting party is not knowledgeable about the types of documents and electronically stored information maintained by a party that is not an individual, it may decide first to take a deposition of the other party's custodian of records concerning what documents and information systems it maintains.

- In reviewing documents and electronically stored information for production, counsel must withhold

attorney-client privileged and work product material. Disclosure of such material might be held to constitute a waiver of the privilege. A responding party claiming privilege must provide a specific and adequate description of the privileged item, without revealing its privileged content [*see 23.153[1]*].

- Emails and other electronically stored information can be a rich source of information. Requests for production should cover these types of documents, and the responding party should produce the documents in electronic format when appropriate [*see 23.02[6]*].

Cross Reference:

Discussion of requests for production and inspection, see *§ 23.135* et seq.

Detailed Discussion/Forms:

7 Moore's Federal Practice, Ch. 34, Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes (Matthew Bender 3d ed.)

7 Moore's Federal Practice, Ch. 37A, Discovery of Electronically Stored Information (Matthew Bender 3d ed.)

9 Moore's Federal Practice, Ch. 45, Subpoena (Matthew Bender 3d ed.).

8 Bender's Federal Practice Forms, Rule 34, Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes (Matthew Bender).

9 Bender's Federal Practice Forms, Rule 45, Subpoena (Matthew Bender).

23.02[6] Discovery of Electronically Stored Information. The types of evi-dence contained in electronically stored information include such things as e-mail, files, documents, and back-up tapes, including the "hidden text" and "embedded data" such as logs, time/date stamps, and metadata that will not appear on a printout or be visible when viewing a document on screen. This electronically stored information is subject to discovery and governed by the Federal Rules of Civil Procedure just as paper documents. However, due to the volume of data stored on computers, the expense involved in searching and retrieving the data, and the privileged and/or confidential nature of some of the stored material, discovery requests must be drafted carefully to avoid imposing an unnecessary burden and expense on the responding party and the imposition of a protective order.

Cross Reference:

Discussion of discovery of electronically stored information, see *§ 23.157* et seq.

Detailed Discussion:

7 Moore's Federal Practice, Ch. 37A, Discovery of Electroncially Stored Information (Matthew Bender 3d ed.).

23.02[7] Physical and Mental Examinations. Obtaining a medical examination of an opposing party is a powerful discovery tool. It affords the party calling for the examination an opportunity to obtain an unbiased view of the opposing party's alleged physical and/or mental injuries. *Fed R Civ P 35* provides the procedure for these examinations.

Counsel should plan carefully before using this discovery method, considering the cost of examinations as well as potential objections based on invasion of privacy. Issues to be considered in determining whether to seek this type of evidence include:

- The need for the particular evidence that is likely to be produced.

- The scope of the examination and the procedures to be performed.
- The timing of the examination.
- What type of medical professional can best perform the examination.
- What other means are available to obtain the information.
- Objections that opposing counsel will raise.

Fed R Civ P 35 permits a party to compel a physical or mental examination of another party when the party's physical or mental condition is "in controversy" in the action [*Fed R Civ P 35(a)*]. When a party alleges some physical or mental condition, the alleging party has an obvious advantage as to proof of that condition. The rule is therefore designed to level the playing field by permitting other parties to have similar access to the necessary proof (or lack of proof) of the condition [*Ragge v. MCA/Universal Studios (CD Cal 1995) 165 FRD 605, 608*].

From a strategic perspective, the *ability* of the party to conduct an examination should be distinguished from the *desirability* of doing so. Consider, for example, the effect of *Fed R Civ P 35(b)(1)*, which provides that an examined party is entitled to receive a copy of the examiner's report [*see 23.213*]. The party seeking the examination must recognize the possibility that the examination may yield a report confirming, at least in part, the adversary's claim of injury or impairment [*see, e.g., Grajales-Romero v. American Airlines, Inc. (1st Cir 1999) 194 F3d 288, 298-299* (defendant's examiner concluded that plaintiff suffered condition alleged)]. Moreover, an examination at the behest of one party that supports the claims of the adverse party has a particularly profound probative effect.

To further complicate the prospective movant's decision, if the examination is ordered and the examined party exercises the right to demand the examiner's report, the party that moved for the examination then becomes entitled to all medical reports obtained by the examined party as to the same condition [*Fed R Civ P 35(b)(4)*; *see 23.215*].

These considerations are so fact-intensive that no generalized advice can be offered. Whether to demand and, if necessary, move for a physical or mental examination requires careful thought. Similarly, the examined party's decision, whether to demand a copy of the examiner's report, with the attendant obligation to supply all such reports, can be a perilous one.

Cross Reference:

Discussion of physical and mental examinations, see *§ 23.189* et seq.

Detailed Discussion/Forms:

7 Moore's Federal Practice, Ch. 35, Physical and Mental Examinations (Matthew Bender 3d ed.).

8 Bender's Federal Practice Forms, Rule 35, Physical and Mental Examinations (Matthew Bender).

23.02[8] Requests for Admission. Requests for admission [*Fed R Civ P 36*] are used to establish statements or opinions of fact or the application of law to fact, including the genuineness of documents, about which there is no real dispute [*Fed R Civ P 36(a)*]. Admissions also facilitate proof with respect to issues that cannot be eliminated from the case [*Fed R Civ P 36*, Committee Note of 1970]. By eliminating some issues and facilitating proof on other issues, requests for admission can expedite the trial and save litigants time and money [*see Asea, Inc. v. Southern Pac. Transp. Co. (9th Cir 1981) 669 F2d 1242, 1245* ; *see also* Collins v. JC Penney Life Ins. Co. (SD Cal 2003) 2003 US Dist LEXIS 8455, at *7 (admissions "eliminate issues for trial by establishing facts without requiring actual proof")].

Matters admitted in accordance with *Fed R Civ P 36*, whether expressly admitted or admitted by default, are conclusively established for pur-poses of the pending action unless the court, on motion, permits the withdrawal or amendment of the admission [*Fed R Civ P 36(b)*]. Matters that are deemed admitted do not require further proof [*see 999 v. C.I.T. Corp. (9th Cir 1985) 776 F2d 866, 869*].

An admission established under Rule 36 may be offered into evidence at the trial of the action, but it is subject to all pertinent objections to admissibility that may be interposed at trial. Thus, for example, a hearsay objection may be available if the admission is offered against a party other than the one who made the admission [*see Walsh v. McCain Foods Ltd. (7th Cir 1996) 81 F3d 722, 726* ; *see also Fed R Evid 801(d)(2)*]. An admission made under Rule 36 is for the purpose of the pending action only [*Fed R Civ P 36(a)(1)*], and it may not be used as an admission for any other purpose or in any other proceeding [*Fed R Civ P 36(b)*; *see In re Pizante (9th Cir 1995) 186 BR 484, 489*].

Admissions, even deemed admissions resulting from a failure to respond to requests, may be sufficient independent grounds for summary judgment against the responding party [*see, e.g., Wright v. Paul Revere Life Ins. Co. (CD Cal 2003) 291 F Supp2d 1104, 1111* ; *Cereghino v. Boeing Co. (D Or 1994) 873 F Supp 398, 403* ; *see Fed R Civ P 56*].

Evidence that is contrary to an admission is not admissible [*999 v. C.I.T. Corp. (9th Cir 1985) 776 F2d 866, 869*], unless it is offered by a party other than the responding party. An admission that has not been amended or withdrawn cannot be rebutted by contrary testimony, nor can it be ignored by the court even if the party against whom it is to operate offers evidence that appears to be more credible [*AAA v. AAA Legal Clinic (5th Cir 1991) 930 F2d 1117, 1120*]. However, a matter deemed admitted does not bind the propounding party, who is free to introduce evidence contrary to the admitted matter [*Brook Village North Assocs., v. General Elec. Co. (1st Cir 1982) 686 F2d 66, 75* ; *Champlin v. Oklahoma Furniture Mfg. Co. (10th Cir 1963) 324 F2d 74, 76*].

One reason to propound requests for admission is that if the responding party fails to admit the genuineness of a document or the truth of a matter as requested pursuant to *Fed R Civ P 36*, the propounding party may move for an order requiring the responding party to pay the reasonable expenses, including reasonable attorney's fees, of proving the genuineness of the document or the truth of the matter at trial [*Fed R Civ P 37(c)(2)*].

Requests for admission are not designed to elicit or discover facts but rather to eliminate issues not in dispute. Consider, therefore, whether you are trying to elicit facts, discover the existence of facts, or obtain documents. Other discovery tools such as interrogatories, depositions, and requests for production may be more useful than requests for admission [*see Safeco Ins. Co. of Am. v. Rawstron (CD Cal 1998) 181 FRD 441, 445* ; *see also Fed R Civ P 26-35*].

Cross Reference:

Discussion of requests for admission, see *§ 23.217* et seq.

Detailed Discussion/Forms:

7 Moore's Federal Practice 3d, Ch. 36, Requests for Admission (Matthew Bender 3d ed.)

8 Bender's Federal Practice Forms, Rule 36, Requests for Admission.

23.02[9] Nonparty Discovery: Subpoena. Subpoenas are the vehicle by which discovery is obtained against nonparties. Subpoenas are required for all discovery devices employed against nonparties, whether discovery is sought in the form of an oral deposition, the production of documents, electronically stored information, and things, or permission to inspect premises. A subpoena to compel testimony is also referred to as a "subpoena ad testificandum," and a subpoena to compel production or to inspect premises is also referred to as a "subpoena duces tecum."

Discovery under *Fed R Civ P 45* essentially serves to make the discovery available from *parties* pursuant to *Fed R Civ P 26*, *30*, and *34* accessible from *nonparties* as well [*see United States ex rel. Schwartz v. TRW, Inc. (CD Cal 2002)*

211 FRD 388, 392]. It is therefore important to review these rules in conjunction with seeking or responding to nonparty discovery pursuant to *Fed R Civ P 45*.

Not all discovery devices available against parties are available against nonparties. Interrogatories and requests for admission may not be employed against nonparties [*Fed R Civ P 33*, *36*; *see also Lehman v. Kornblau (EDNY 2001) 206 FRD 345, 346*]. Further, physical and mental examinations are available against nonparties only when the nonparty's physical or mental condition is at issue, and the nonparty is "in the custody or under the legal control of a party" [*Fed R Civ P 35(a)*]. Proper drafting and service of subpoenas, therefore, are crucial to ensuring the acquisition of information in the possession, custody, or control of a nonparty.

Parties must timely respond to subpoenas and must carefully follow the applicable rules. Failure to do so may result in a waiver of any objection or privilege claim regarding the subpoena [*see McCoy v. Southwest Airlines Co. (CD Cal 2002) 211 FRD 381, 385*]. If a nonparty does not comply with a subpoena, it may be necessary to compel compliance through a motion to compel, or to seek sanctions.

Cross Reference:

Discussion of nonparty discovery, see *§ 23.259* et seq.

Detailed Discussion/Forms:

9 Moore's Federal Practice, Ch. 45, Subpoena (Matthew Bender 3d ed.).

Cross References:

For chapters addressing other aspects of discovery and related topics, see:

- Ch. 15, Rule 26(f) Conference and Initial Disclosures
- Ch. 21, Discovery Strategy and Planning.
- Ch. 22, Regulation of Discovery by Stipulation or Motion.
- Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.
- Ch. 25, Motions to Compel and Discovery Sanctions.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.03 CHECKLIST: Petitioning for Perpetuation of Testimony.

☐ Determine whether action is anticipated in federal court but unable to be brought now.

Authority:
Fed R Civ P 27(a)(1)

Discussion:
See *§ 23.05*

☐ Determine whether vital evidence in anticipated action may be lost or destroyed.

Authority:
Fed R Civ P 27(a)(1)

Discussion:
See *§ 23.09[3]*

☐ Identify potential adverse parties in anticipated action.

Authority:
Fed R Civ P 27(a)(1)

Discussion:
See *§ 23.07[6]*

☐ Identify particular testimony, documents, or things to be sought.

Authority:
Fed R Civ P 27(a)(1)

Discussion:
See *§ 23.09[2]*

☐ Identify persons whose depositions will be sought.

Authority:
Fed R Civ P 27(a)(1)

Discussion:
See *§ 23.07[7]*

☐ Ascertain basis of federal jurisdiction of anticipated action.

Authority:
Fed R Civ P 27(a)(1)

Discussion:
See *§ 23.05[3]*

☐ Consider alternative procedures.

Authority:
Fed R Civ P 27(c)

Discussion:
See *§§ 23.04[4], [5]*

☐ Draft petition entitled "IN THE MATTER OF _____ [*name of petitioner*], PETITION FOR PERPETUATION OF TESTIMONY." Include the following:

○ Statement that civil action is anticipated in federal court to which petitioner is potentially a party.

○ Reason why action cannot be brought at this time.

○ Names and addresses of potential adverse parties.

○ Description of the subject matter of the anticipated action and the petitioner's interest in the action.

○ Names and addresses of persons to be examined.

- ○ Content of the expected testimony, or documents, or investigation.
- ○ Allegation that testimony will be lost or destroyed if not perpetuated at this time.
- ○ Request for order authorizing petitioner to take the depositions of the persons named in the petition.
- ○ Verification.

Authority:
Fed R Civ P 27(a)(1)

Discussion:
See *§ 23.07*

Form:
See *§ 23.286*

☐ Draft notice to be served on all adverse parties. Include:

- ○ Statement that petitioner will apply to the court for the order requested in the petition.
- ○ Time and place of hearing.

Authority:
Fed R Civ P 27(a)(2)

Discussion:
See *§§ 23.08[4] -[6]*

Form:
See *§ 23.287*

☐ File petition in U.S. district court.

- ○ File in the district court in the district of the residence of any expected adverse party.
- ○ File in any district if all expected adverse parties are aliens.

Authority:
Fed R Civ P 27(a)(1); *28 USC § 1391(d)*

Discussion:
See *§§ 23.08[1], [2]*

☐ Schedule hearing.

☐ Serve notice at least 21 days before the hearing date, as provided by Rule 4.

○ Serve notice on all expected adverse parties named in the petition.

○ Include copy of petition.

Authority:
Fed R Civ P 4, 27(a)(2)

Discussion:
See *§§ 23.08[5], [6]*

☐ Draft proposed order.

Authority:
Fed R Civ P 27(a)(3)

Discussion:
See *§ 23.11*

Form:
See *§ 23.288*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsPerpetuation of Testimony

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23.04 Options and Strategy for Petitioner.

23.04[1] Decide Whether Pre-Action Perpetuation of Testimony Is Necessary to Prevent Loss of Evidence. Assuming a determination that the client is a potential party in an anticipated action in federal court, before seeking to invoke the provisions of *Fed R Civ P 27* counsel must identify what particular testimony or physical evidence may be lost or destroyed before the action can be filed. Note that Rule 27 properly applies only when it is necessary to prevent testimony from being lost [*Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra (4th Cir 1999) 198 F3d 473, 484 , cert. denied sub nom. Pacific Eternity S.A. v. Deiulemar Compagnia di Navigazione S.P.A., 529 US 1109 (2000)*].

23.04[2] Determine What Information Will Be Sought. Counsel must identify what particular evidence is to be perpetuated and who can provide this evidence. Note that *Fed R Civ P 27* is not a substitute for broad discovery [*see Penn Mut. Life Ins. Co. v. United States (DC Cir 1995) 68 F3d 1371, 1376*], nor is it designed as a means of ascertaining facts for drafting a complaint [*see In re Storck (D Mass 1998) 179 FRD 57, 58*]. A petitioner must know the substance of the evidence it seeks before it can invoke Rule 27 perpetuation [*see Nevada v. O'Leary (9th Cir 1995) 63 F3d 932, 936* (petitioner could not satisfy Rule 27 because it could not "set forth the substance of the testimony")].

Strategic Point:

Material sought must be material and admissible [*see Martin v. Reynolds Metals Corp. (9th Cir 1961) 297 F2d 49, 55* ; *In re Chester County Elec., Inc. (ED Pa 2002) 208 FRD 545, 549*].

23.04[3] Consider Bringing Action to Perpetuate Testimony. Counsel may bring an independent action for the sole purpose of perpetuating testimony [*Fed R Civ P 27(c)*; *see Nevada v. O'Leary (9th Cir 1995) 63 F3d 932, 937*], rather than using the petition procedure. The action must be brought in a manner satisfying venue and service of process requirements of the expected action in which perpetuated testimony will be used [*Shore v. Acands, Inc. (5th Cir 1981) 644 F2d 386, 389*].

Plaintiff must make a similar showing to that required by petitioning under Rule 27(a) [*Nissei Sangyo Am. Ltd. v. United States (7th Cir 1994) 31 F3d 435, 440*]:

- That the records or testimony sought are competent and material to the matter in controversy;
- The information sought cannot be obtained in ordinary discovery because the plaintiff is not yet in a position to initiate such an action; and
- The testimony or records may be lost if the plaintiff cannot obtain them at the present time.

Drawback:

A potential drawback to bringing an action under Rule 27(c), rather than a petition under Rule 27(a), is the need to satisfy all the requirements for bringing an original action generally, (filing a complaint, satisfying venue and jurisdiction requirements) at the time of filing.

Cross Reference:

Discussion of procedural requirements and required showing, see 6 *Moore's Federal Practice, §§ 27.51, 27.52* (Matthew Bender 3d ed.)].

23.04[4] Consider Stipulations or Declaratory Relief.

23.04[4][a] Stipulations. As an alternative to petitioning to preserve testimony under *Fed R Civ P 27(a)*, the potential parties to the litigation can stipulate to discovery before the action is filed. Accordingly, the parties can avoid the stringent requirements of Rule 27 by stipulating to a variety of discovery methods without having to show that the testimony will be lost [*see In re Sinclair Oil Corp. (D Wyo 1995) 881 F Supp 535, 536*]. However, counsel must not appear to be circumventing Rule 27 [*see Collins v. Polk (MD La 1987) 115 FRD 326, 328* (court impounded depositions that it believed were taken in circumvention of Rule 27 and ordered that they not be used by any party in case)].

Consider:

There is a strong argument that the parties cannot expand Rule 27 by stipulation. The jurisdictional footing of Rule 27 is its tie to an anticipated filing of a case within the jurisdiction of the district court. That tie is expressed in terms of necessity, not convenience. Because subject matter jurisdiction cannot be conferred by agreement, the better view is that agreement of the parties to perpetuate in the absence of a contemplated action that cannot presently be filed is alone insufficient. That is not to say that an unopposed petition to perpetuate cannot proceed, provided the elements are properly asserted. Also, even if it is ultimately determined that Rule 27 cannot be expanded by stipulation, testimony taken under oath pursuant to such a stipulation may nonetheless qualify for admission at trial under an exception or exemption to the hearsay rule, pursuant to the Federal Rules of Evidence.

Cross References:

Discussion of discovery stipulations, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.03 -22.13*.

Discussion of use of other methods to avoid strict requirements of Rule 27, see 6 *Moore's Federal Practice, § 27.04* (Matthew Bender 3d ed.).

23.04[4][b] Declaratory Relief. A party can bring an action for declaratory relief in anticipation of being sued or when it would not otherwise be possible to file suit [*see Fed R Civ P 57*; *State Farm Fire & Cas. v. Taylor (MDNC 1988) 118 FRD 426, 429*].

Drawback:

A potential defendant to a claim that can meet the standards for a declaratory relief action can seek declaratory relief to facilitate discovery without waiting for the potential plaintiff to file a claim and without filing a *Fed R Civ P 27* petition. However, in many cases a declaratory relief action may not be a better alternative to a Rule 27 petition if the petitioner's only purpose is to preserve testimony, because the requirements of a Rule 27 petition are less difficult to meet.

Cross References:

Discussion of use of other methods to avoid strict requirements of Rule 27, see 6 *Moore's Federal Practice, § 27.04* (Matthew Bender 3d ed.).

23.04[5] Using Perpetuated Evidence. If a deposition to perpetuate testimony is taken under Rule 27, it may be used in any action involving the same subject matter subsequently brought in a federal district court, in accordance with *Fed R Civ P 32(a)* [*Fed R Civ P 27(a)(4)*].

The deposition should be filed with the court [*see In re Amenia (SDNY 2001) 200 FRD 200, 204*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony

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23.05 Pre-Action Perpetuation of Testimony May Be Available Under Rule 27.

23.05[1] Matters Must Be Cognizable in United States Court. A person who desires to perpetuate testimony regarding any matter cognizable in any United States court may file a verified petition in a federal district court [*Fed R Civ P 27(a)(1)*]. A petitioner does not have to demonstrate a cognizable action with absolute certainty [*see Penn Mut. Life Ins. Co. v. United States (DC Cir 1995) 68 F3d 1371, 1374*].

Even anticipated actions that are contingent and uncertain can be cognizable for the purposes of Rule 27 jurisdiction [*Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra (4th Cir 1999) 198 F3d 473, 484-485 , cert. denied sub nom. Pacific Eternity S.A. v. Deiulemar Compagnia di Navigazione S.P.A., 529 US 1109 (2000)*].

Example--Claim Cognizable:

Granting a petitioner's request to take Rule 27(a) depositions, the court stated that it was satisfied that a records deposition may prevent a delay of justice as contemplated by Rule 27 when [In re Groth (D Kan 2002) 2002 US Dist LEXIS 982, at *1-*3]:

- Petitioner was an insured who recently had his monthly disability benefits terminated.
- Petitioner had been advised that he would receive a written decision regarding permanent termination.
- After learning of the decision, petitioner attempted to obtain a copy of his claim file from the insurer.
- Although petitioner allegedly had provided authorization to produce the file, the insurer stated it would only produce the file in response to a subpoena with petitioner's written authorization.
- Accordingly, petitioner sought to depose the insurer's records custodian to compel the insurer to produce the file.

Rule 27 does not define "court of the United States." "Court of the United States" is defined in the United States Code to include the following courts [*28 USC § 451*]:

- The United States Supreme Court;
- The Circuit Courts of Appeals;
- The federal district courts;
- Bankruptcy courts;
- The Court of International Trade; and
- Any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

Cross Reference:

Discussion of matters for which pre-action perpetuation may be utilized, see 6 *Moore's Federal Practice, § 27.10* (Matthew Bender 3d ed.).

23.05[2] Action Must Be Anticipated. Petitioner must show that he or she expects to be a party in an anticipated action in federal court [*Fed R Civ P 27(a)*; *see, e.g., In re Amenia (SDNY 2001) 200 FRD 200, 202*].

23.05[3] Federal Jurisdiction Must Exist in Anticipated Action. There need not be an independent basis in federal jurisdiction in a proceeding to perpetuate under *Fed R Civ P 27*, but it must be shown that in the contemplated action, for which the testimony is being perpetuated, federal jurisdiction would exist and thus is a matter that may be cognizable in the federal courts [*Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra (4th Cir 1999) 198 F3d 473, 484 , cert. denied sub nom. Pacific Eternity S.A. v. Deiulemar Compagnia di Navigazione S.P.A., 529 US 1109 (2000)*].

23.05[4] Anticipated Action Must Be Civil. Pre-action perpetuation of testimony is limited to civil cases [*In re Eisenberg (5th Cir 1981) 654 F2d 1107, 1113*].

23.05[5] Perpetuation of Testimony Must Prevent Failure or Delay of Justice. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it will permit the deposition to be taken [*Fed R Civ P 27(a)(3)*; *Calderon v. United States Dist. Court (9th Cir 1998) 144 F3d 618, 621-622*].

Strategic Point--No Other Potential Witness:

To show that Rule 27 perpetuation of testimony may prevent a failure or delay of justice, a petitioner must demonstrate a need for the testimony or evidence that cannot easily be accommodated by other potential witnesses [*Penn Mut. Life Ins. Co. v. United States (DC Cir 1995) 68 F3d 1371, 1375*].

23.05[6] Trial Court Will Exercise Its Discretion. What circumstances show a possible failure or delay of justice sufficient to call for the issuance of an order is a matter for the sound discretion of the district court [*Mosseller v. United States (2d Cir 1946) 158 F2d 380, 382*]. The right to this relief depends on the situation of the petitioner, and the petitioner's power to bring his or her rights to an immediate investigation [Pacific Tech. Corp. v. Ehrenwald (SDNY 2000) 2000 US Dist LEXIS 15797, at *4].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.06 Perpetuation Is Not Appropriate for Obtaining Unknown Information.

Rule 27 is not appropriate when the petitioner seeks discovery of unknown information that the petitioner hopes will assist it in the future when the petitioner applies for judicial relief [*Nevada v. O'Leary (9th Cir 1995) 63 F3d 932, 933*].

Warning:

Petitioner may not engage in a "fishing expedition" [*19th St. Baptist Church v. St. Peters Episcopal Church (ED Pa 2000) 190 FRD 345, 347*].

Examples:

It appeared that the petitioner was using *Fed R Civ P 27* as a fishing expedition to prepare for filing when there was no showing that the information sought could not be acquired through due diligence. The petitioner failed to show that justice would be impaired if the testimony were not preserved. Instead petitioner asked the court to allow pre-action discovery because he "lack[s] the power of the Court to establish certain facts necessary to make a complete administrative claim" [*In re Solorio (D Utah 2000) 192 FRD 709, 709-710*].

Petitioner's showing was insufficient under *Fed R Civ P 27(a)* when it did not aver that any records were in imminent danger of destruction, or that any proposed deponent was seriously ill or likely to leave the country [*In re Chester County Elec., Inc. (ED Pa 2002) 208 FRD 545, 547-548*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsPerpetuation of Testimony

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23.07 Required Contents of Petition.

23.07[1] Name of Petitioner. The petition must be entitled in the name of the petitioner [*Fed R Civ P 27(a)(1)*].

23.07[2] Expectation of Action. The petition must contain a statement that the petitioner expects to be a party to an action cognizable in a United States court but is presently unable to bring the action or cause it to be brought [*Fed R Civ P 27(a)(1)(A)*].

23.07[3] Description of Subject Matter. The petition must contain a statement describing the subject matter of the expected action and the petitioner's interest in that subject matter [*Fed R Civ P 27(a)(1)(B)*].

23.07[4] Facts of Testimony. The petition must contain a statement describing the facts the petitioner desires to establish by the proposed testimony [*Fed R Civ P 27(a)(1)(C)*].

23.07[5] Reasons for Perpetuation. The petition must contain a statement setting forth the petitioner's reasons for desiring to perpetuate the testimony [*Fed R Civ P 27(a)(1)(C)*].

23.07[6] Names of Adverse Parties. The petition must contain a statement detailing the names of the adverse parties or a description of the persons the petitioner expects will be adverse parties and their known addresses [*Fed R Civ P 27(a)(1)(D)*].

23.07[7] Names of Persons to Be Examined. The petition must contain a statement disclosing the names and addresses of the persons to be examined and the substance of the testimony the petitioner expects to elicit from each [*Fed R Civ P 27(a)(1)(E)*].

23.07[8] Request for Order. The petition must contain a request for an order authorizing the petitioner to take the depositions of the persons to be examined as named in the petition, for the purpose of perpetuating their testimony [*Fed R Civ P 27(a)(1)*].

23.07[9] Verification. The petition must contain a verification [*Fed R Civ P 27(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
II. PERPETUATION OF TESTIMONY
A. Petitioning for Perpetuation of Testimony

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.08

23.08 Required Notice and Filing.

23.08[1] File in District of Opponent's Residence. The petition must be filed in the federal district court in the district of the residence of any expected adverse party [*Fed R Civ P 27(a)(1)*].

23.08[2] File in Any District If All Expected Adverse Parties Are Aliens. If all the expected adverse parties in the anticipated litigation are aliens, the petitioner may file the petition in any district under the federal venue statute [*see 28 USC § 1391(d)*].

23.08[3] Notice Must Be Served on Each Expected Adverse Party. After filing the petition, the petitioner must serve a notice on each person named in the petition as an expected adverse party, together with a copy of the petition [*Fed R Civ P 27(a)(2)*].

Example--Failure to Serve Notice of Deposition Violates Rule 27:

In assisting the Tokyo District Prosecutor's Office in a criminal investigation of the murder of a Japanese citizen in the United States, the federal district court appointed two commissioners to facilitate the gathering of evidence (the Federal Rules of Civil Procedure applied to this investigation). The commissioners supervised the taking of witness depositions and the production of documentary and physical evidence. The Japanese citizens who were later indicted for murder successfully argued that the collection of evidence violated, inter alia, *Fed R Civ P 27(a)* because no notice was given to them as expected adverse parties [*Okubo v. Reynolds (9th Cir 1994) 16 F3d 1016, 1020*].

Warning:

Notice must be given to the anticipated adverse party in accordance with Rule 27(a)(2). This notice is a condition precedent; when the petitioner fails to comply, the petition will be denied [*see In re Solorio (D Utah 2000) 192 FRD 709*].

23.08[4] Notice Must Contain Required Statements. The notice must state that the petitioner will apply to the court, at a time and place named in the notice, for the order described in the petition [*Fed R Civ P 27(a)(2)*].

Cross Reference:

Discussion of notice and service, see 6 *Moore's Federal Practice, § 27.11[3]* (Matthew Bender 3d ed.).

23.08[5] Notice Must Be Served 21 Days Before Hearing. The petitioner must serve the notice at least 21 days before the date of the hearing, within or without the district or state [*Fed R Civ P 27(a)(2)*].

Warning--Notice May Not Be Shortened:

Fed R Civ P 27(a)(2) does not authorize dispensation of the notice requirement, even if the potential deponent might die during that period, before the deposition can be ordered and taken [*see In re Petition of Jacobs (ND Ind 1986) 110 FRD 422, 424*].

23.08[6] Notice Must Be Served as Required by Rule 4. The notice must be served in the manner provided in *Fed R Civ P 4* [*Fed R Civ P 27(a)(2)*].

Cross Reference:

Ch. 7, Service of Summons.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.09 Petitioner Must Establish Three Elements.

23.09[1] Petitioner Must Show Anticipation of Litigation. The petitioner must show he or she is acting in anticipation of litigation in federal court that cannot presently be brought [*Calderon v. United States Dist. Court (9th Cir 1998) 144 F3d 618, 621-622* ; *Tennison v. Henry (ND Cal 2001) 203 FRD 435, 440*].

23.09[2] Petitioner Must Describe Testimony Sought. The petitioner must adequately explain the substance of the testimony he or she seeks to obtain [*Calderon v. United States Dist. Court (9th Cir 1998) 144 F3d 618, 621-622* ; *Tennison v. Henry (ND Cal 2001) 203 FRD 435, 440*].

The testimony to be perpetuated must be relevant, not simply cumulative, and likely to provide material distinctly useful to a finder of fact [*In re Bay City Middlegrounds Landfill Site (6th Cir 1999) 171 F3d 1044, 1047*].

Example:

Rejecting the opponent's argument that the petitioner sought to use *Fed R Civ P 27* as a discovery device to uncover new evidence, the court found that the district court had some basis to conclude that the petitioner, in requesting perpetuation of evidence relating to the condition of a ship and its engine parts, largely knew the substance of the information it sought to preserve through Rule 27, when the Coast Guard had reported several engine-related defects on the ship [*Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra (4th Cir 1999) 198 F3d 473, 486 , cert. denied sub nom. Pacific Eternity S.A. v. Deiulemar Compagnia di Navigazione S.P.A., 529 US 1109 (2000)*].

23.09[3] Petitioner Must Show Risk of Losing Evidence.

23.09[3][a] Significant Risk Required. The petitioner must show that there is a significant risk the evidence described in the petition will be lost if it is not perpetuated [*Calderon v. United States Dist. Court (9th Cir 1998) 144 F3d 618, 621-622*].

A showing that the petitioner is presently unable to bring the expected action or cause it to be brought may be sufficient

showing of the danger of the loss of evidence by delay [*Tennison v. Henry (ND Cal 2001) 203 FRD 435, 440*].

Cross Reference:

Discussion of risk that testimony will be lost, see 6 *Moore's Federal Practice, § 27.13[4]* (Matthew Bender 3d ed.).

23.09[3][b] Factors Indicating Urgency. Although the passage of time may under some circumstances be sufficient to establish the need to perpetuate testimony, courts are most likely to permit perpetuation under *Fed R Civ P 27(a)* when some special consideration makes the need to perpetuate testimony particularly urgent. Among the factors that courts have found to be persuasive in justifying the need to perpetuate testimony are the following [*Tennison v. Henry (ND Cal 2001) 203 FRD 435, 441*]:

- Advanced age or infirmity of witness [*see, e.g., Penn Mut. Life Ins. Co. v. United States (DC Cir 1995) 68 F3d 1371, 1375* (permitting deposition under Rule 27(a) on basis that witness was 80 years old and, therefore, that there was significant risk that testimony would be lost)].

- Possibility that the witness will not be willing to testify if discovery is delayed [*see, e.g., Calderon v. United States Dist. Court (9th Cir 1998) 144 F3d 618* (permitting perpetuation on unexhausted claim when facts showed that witness might not be willing to cooperate in future)].

- Uniqueness of the information at issue [*see In re Bay City Middlegrounds Landfill Site (6th Cir 1999) 171 F3d 1044, 1047* (material sought under Rule 27(a) need only be "distinctly useful" to finder of fact, but if material were absolutely unique and relevant to potential suit, it would clearly meet standard of Rule 27(a))].

Example--Elderly Witness:

A petition for perpetuation of testimony was granted when a crucial witness in the anticipated CERCLA litigation was 77 years old and reportedly in ill health. The court noted his expected testimony would be highly valuable and that while "a male person age seventy-seven has a statistical life expectancy of 8.6 years, there is no assurance that any one individual will live for that time, or remain able to testify, especially an individual with an adverse medical history, as shown in this case" [*In re Amenia (SDNY 2001) 200 FRD 200, 203*].

Warning:

Although age may be a relevant factor in showing that testimony must be perpetuated to avoid loss, conclusory remarks in the petitioner's brief may be inadequate to show that evidence is likely to be lost [*Ash v. Cort (3d Cir 1975) 512 F2d 909, 912* (from petitioner's brief: "There exists a substantial risk that testimonial evidence will become unavailable if discovery is further postponed. It is probable that the officers and directors having first hand knowledge are over fifty years of age. They are all senior officers of a large industrial corporation. One director has already died. Memories may fade ... .")].

Strategic Point:

Affidavits or declarations supporting statements of risk of loss should be attached to the petition: for example with respect to a very ill deponent, an affidavit from the person's doctor.

Legal Topics:

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

Civil ProcedureDiscoveryMethodsPerpetuation of Testimony

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23.10 Petitioner May Request Production of Documents, Electronically Stored Information, and Things, Entry on Land, and Physical and Mental Examinations.

23.10[1] Pre-Action Discovery May Be Available. As part of its authority to grant a petition to perpetuate testimony before an action is initiated, a district court may make orders of the character provided for by Rules 34 and 35 [*Fed R Civ P 27(a)(3)*]. *Fed R Civ P 34* governs production of documents, electronically stored information, and things and entry on land as part of discovery in a civil action. *Fed R Civ P 35* governs physical and mental examinations of persons as part of discovery in a civil action.

Example--Inspection of Ship Properly Ordered:

The charterer of a ship expected to be a party to an action in a United States court to compel arbitration under the charter agreement, seek security, or enforce an arbitration award against the ship's owners. The charterer petitioned to perpetuate evidence of the ship's then-existing condition because the ship's owner intended to install new cylinder heads to the main engine. The district court properly ordered inspection and perpetuation of evidence of the ship's condition under *Fed R Civ P 27* in light of the "extraordinary circumstances" presented [*Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra (4th Cir 1999) 198 F3d 473, 479-480 , cert. denied sub nom. Pacific Eternity S.A. v. Deiulemar Compagnia di Navigazione S.P.A., 529 US 1109 (2000)*].

Cross References:

Discussion of production of documents, electronically stored information, and things, see *§§ 23.135 -23.156*. Discussion of physical and mental examinations, see *§§ 23.189 -23.216*.

Discussion of document production, see 6 *Moore's Federal Practice, § 27.12* (Matthew Bender 3d ed.).

23.10[2] Deposition Is Not Required. A party may proceed under *Fed R Civ P 27* for an order for production of documents, electronically stored information, and things or entry onto land under *Fed R Civ P 34* without taking a deposition [*Martin v. Reynolds Metals Corp. (9th Cir 1961) 297 F2d 49, 55*].

Example:

Noting that respondent was in possession of the only copy of an important public document that was missing from the government's files, and should respondent lose or destroy the document prior to any litigation petitioner could be severely prejudiced, the court granted the petition to the extent of requiring respondent to produce the document in question and a witness to testify that it contained the complete file wrapper; however, petitioner was not entitled to depose the witness concerning anything beyond the facts necessary to establish the authenticity and completeness of the document [Pacific Tech. Corp. v. Ehrenwald (SDNY 2000) 2000 US Dist LEXIS 15797, at *6-*8].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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23.11 Order Must Contain Specific Findings.

If after the hearing the court is satisfied that the perpetuation of testimony may prevent a failure or delay of justice, the court must make an order as follows [*Fed R Civ P 27(a)(3)*]:

- Designating or describing the persons whose depositions may be taken.

- Specifying the subject matter of the examination [*see Martin v. Reynolds Metals Corp. (9th Cir 1961) 297 F2d 49, 55* (court may not delegate obligation to specify subject matter of deposition)].

- Specifying whether the depositions will be taken on oral examination or written interrogatories.

- When requested, orders for production of documents or things, or entry on land; or orders for physical or mental examination.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.12 Depositions Will Be Taken in Accordance With Federal Rules of Civil Procedure.

Depositions for perpetuating testimony will taken in accordance with the Federal Rules of Civil Procedure [*Fed R Civ P 27(a)(3)*].

Cross Reference:

Discussion of general rules governing depositions, see *§§ 23.19 -23.110*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of Testimony

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23.13 CHECKLIST: Opposing Petition to Perpetuate Testimony.

☐ Consider objections based on petitioner's failure to include required elements in petition.

Authority:
Fed R Civ P 27(a)(1)

Discussion:
See *§ 23.07*

☐ Consider objections based on petitioner's failure to serve and file the petition as required.

Authority:
Fed R Civ P 27(a)(1)

Discussion:
See *§ 23.08*

☐ Consider objections based on petitioner's failure to show that unique evidence will be lost or destroyed.

Authority:
Fed R Civ P 27(a)(1)

Discussion:
See *§ 23.09[3]*

☐ Consider objections based on petitioner's lack of specificity as to evidence sought (a "fishing expedition").

Authority:
Fed R Civ P 27(a)(1)

Discussion:
See *§ 23.06*

☐ Draft opposing papers.

☐ Serve opposing papers on petitioner and all named potential adverse parties; file with the court.

Authority:
Fed R Civ P 27(a)(2)

Discussion:
See *§ 23.16*

☐ Consider requesting sanctions.

Authority:
Fed R Civ P 27(a)(1)

Discussion:
See *§ 23.18*

Legal Topics:

For related research and practice materials, see the following legal topics:
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B. Opposing Petition to Perpetuate Testimony

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23.14 Options and Strategy for Opponent.

Because Rule 27 provides strict requirements, counsel who receives notice of a petition to perpetuate testimony should review the notice and petition carefully to make sure that they meet those requirements, taking into account the checklist above [*see 23.13*]. If possible, point out alternative sources of the information requested to show that it is not unique.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony

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23.15 Grounds for Objecting to Petition for Perpetuation of Testimony.

Among the most common objections to Rule 27 petitions are [*see Fed R Civ P 27(a)*]:

- Petitioner has not shown that he or she is presently unable to bring an action or to cause an action to be brought.
- Petitioner has not shown that a risk of loss of testimony exists.
- Petitioner seeks to engage in a fishing expedition.
- No basis for federal jurisdiction exists in anticipated action.
- Petitioner has not set forth the substance of the testimony sought.
- Notice was not served on all potentially adverse parties.
- Notice was served less than 20 days before the hearing date.

Cross References:

Contents of petition, see *§ 23.07*; notice requirements, see *§ 23.08*; elements of proof, see *§ 23.09*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony

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23.16 Opposition Papers Must Be Filed.

Counsel must file the opposition papers and serve the response on the petitioner and all named potential adverse parties [*see, e.g., In re Amenia (SDNY 2001) 200 FRD 200, 201*].

Timing:

Fed R Civ P 27 does not discuss when the opposition papers must be filed. Therefore, unless a local rule applies, there does not appear to be any firm deadline for oppositions. If the petition is considered a "motion," local rules for the Eastern District and Southern District regarding motions provide that an opposition to a motion is due 14 days before the hearing [*ED Cal Civ LR 230(c)*; *SD Cal Civ LR 7.1(e.2)*]. Northern District and Central District local rules provide that an opposition to a motion is due 21 days before the hearing [*ND Cal Civ LR 7-3(a)*; *CD Cal Civ LR 7-9*]. However, there is also an equally reasonable argument that a Rule 27 petition is not a "motion," in which case none of these rules applies.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony

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23.17 Other Potential Adverse Parties May File Response.

Any potential adverse party may file a response in support of or in opposition to the petition [*see, e.g., In re Amenia (SDNY 2001) 200 FRD 200, 201* (response in support of petition)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.18 Sanctions May Be Available.

Sanctions under *Fed R Civ P 26(g)* are not available in a *Fed R Civ P 27(a)* proceeding [*In re Chester County Elec., Inc. (ED Pa 2002) 208 FRD 545, 548-549*].

However, truly frivolous or offending motions under Rule 27(a) can be sanctioned under other rules, or under the court's inherent authority [*see, e.g., 18 USC § 401* (contempt power); *28 USC § 1927* (punishing attorneys who vexatiously multiply proceedings); *see generally Chambers v. NASCO, Inc. (1991) 501 US 32, 45, 111 S Ct 2123, 115 L Ed2d 27* ; *In re Amenia (SDNY 2001) 200 FRD 200, 201*].

Cross References:

Ch. 34, Other Sanction Provisions; Ch. 35, Contempt.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMisconduct

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III. ORAL DEPOSITIONS
A. Planning Oral Depositions: Initial Considerations

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23.19 CHECKLIST: Planning Oral Depositions.

☐ Determine who will be deposed:

- ○ Party or nonparty.
- ○ Individuals.
- ○ Named individual(s) to testify on behalf of corporation or other entity.
- ○ Entity that will designate individual(s) to testify.

Authority:
Fed R Civ P 30(a)(1)

Discussion:
See *§ 23.22[1]*

☐ If seeking deposition testimony from corporation through individual named employees, determine whether deponent(s) can testify on behalf of corporation, because of status as:

- ○ Officer(s).

- Director(s).
- Managing agent(s).

Authority:
Fed R Civ P 30(a)(1); *Sugarhill Records, Ltd. v. Motown Record Corp. (SDNY 1985) 105 FRD 166, 169*

Discussion:
See *§ 23.22[2]*

☐ If proposed deponent is opposing counsel, determine whether circumstances exist for deposition:

- No other means exist to obtain the information than to depose opposing counsel;
- The information sought is relevant and nonprivileged; and
- The information is crucial to the preparation of the case.

Authority:
Shelton v. American Motors Corp. (8th Cir 1986) 805 F2d 1323, 1327

Discussion:
See *§ 23.22[3]*

☐ Determine whether leave of court is required to take any deposition because deponent is incarcerated.

Authority:
Fed R Civ P 30(a)(2)(B)

Discussion:
See *§ 23.25[1]*

☐ Determine if opposing counsel will stipulate to allowing deposition when any of the following circumstances exist, which otherwise require leave of court:

- Proposed deposition would result in more than 10 depositions by party seeking discovery;

Warning:

Many judges will not allow parties to stipulate to additional depositions or other discovery without prior court approval.

- Person to be examined has already been deposed in the case; or
- Party seeking discovery wants to take deposition before parties have agreed to a discovery plan.

Exception:
Leave of court is not required to take a deposition before the parties have agreed to a discovery plan if the notice of deposition contains a certification, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

Authority:
Fed R Civ P 30(a)(2)(A)(iii)

Discussion:
See *§§ 23.25[2] -[4]*

☐ If leave of court is required, draft motion for leave, in accordance with standard motion procedure and local rule requirements, indicating that:

○ The discovery sought is not unreasonably cumulative or duplicative, or is not obtainable from some other source that is more convenient, less burdensome, or less expensive;

○ The party seeking discovery has not had ample opportunity by discovery in the action to obtain the information sought; or

○ The burden or expense of the proposed discovery does not outweigh its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Authority:
Fed R Civ P 26(b)(2), 30(a)(2)

Discussion:
See *§§ 23.23 -23.26*

Form:
See *§ 23.290* (notice of motion for leave to take deposition)

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*

☐ Consider videotaping deposition.

Authority:
Fed R Civ P 30(b)(3)

Discussion:
See *§ 23.20*

Legal Topics:

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

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23.20 Options and Strategy for Party Seeking Discovery.

Because the number of depositions is limited [*see Fed R Civ P 30(a)(2)(A)(i)*], each party must determine the most important depositions for its case. Each party should also use other forms of discovery, such as interrogatories, to elicit the information sought or to identify specific individuals to be deposed.

The party seeking discovery from a corporation or other entity should consider whether to require the entity to designate individuals to testify on its behalf [*see Fed R Civ P 30(b)(6)*], or to notice the depositions of specific individuals within the entity. If the party names a corporation or other entity as deponent, so that the entity must designate the person or persons to testify on its behalf, the examination is considered to be one deposition for purposes of the deposition limit [*see Fed R Civ P 30(b)(6)*]. Although the selection of the individuals to testify is then in the entity's control, rather than in the control of the party seeking discovery, remedies are available if the entity fails to designate and produce for deposition "the most knowledgeable person" on the subjects identified.

Strategic Point--Preparation Is Key:

Always ask yourself prior to starting a deposition. "What is the goal of this deposition?" "What information and/or trial testimony do I need to obtain from this witness?" Develop a strategy for every deposition that will be taken. Preparation is important because of the limit of 10 depositions [*see Fed R Civ P 30(a)(2)(A)(i)*] and because subsequent depositions of the same person require leave of court [*see Fed R Civ P 30(a)(2)(A)(ii)*]. Also the seven-hour duration limit [*see Fed R Civ P 30(d)(1)*] requires that counsel be organized. If the potential deponent is a party to the action, the deposing party should consider using other discovery methods prior to the deposition to gather information that will enable counsel to define clearly the issues to be emphasized at the oral examination.

Strategic Point--Consider Videotaping the Deposition:

A videotaped deposition can be a very powerful tool for preserving not just the testimony, but also the appearance and credibility of the deponent. A videotape can also keep opposing counsel on his or her

best behavior; failing that, it demonstrates the behavior for the judge if the behavior is extreme enough to lead to a motion for a protective order. A videotape is very useful in assessing potential juror reactions to the other side's witnesses (e.g., in mock trials or focus-group exercises).

A videotape is also more powerful at trial than reading from a deposition transcript, especially when used for impeachment purposes. A cold stenographic transcript reports only words spoken at the deposition. It misses all the nonverbal communication inherent in facial expressions, the inflection and intonation of the voice, gestures, body language, and long pauses between questions and answers. Nonverbal communication may express a message to those present at the deposition that does not appear on the written transcript.

Consider regularly including in your deposition notice the statement that you reserve the right to take the deposition by videotaping it. Without that notice you will be unable to videotape the deposition [*see Fed R Civ P 30(b)(3)*]. By including it, you will keep your options open and can choose whether or not you want to videotape. Videotaping depositions is a common occurrence, particularly in large commercial litigation.

Drawback--Disadvantages of Videotaping Depositions:

Although there are many benefits to videotaping depositions, drawbacks can include (1) the cost of making, copying, and laying the foundation for the videotape, (2) constraining the questioner's behavior, and (3) videotaping can make the deposition more formal and less conversational, causing witnesses to be less talkative.

Cross References:

Discussion of limitations on depositions, see *§ 23.21[2]*. Discussion of naming a corporation or other entity as deponent, see *§ 23.22*.

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
III. ORAL DEPOSITIONS
A. Planning Oral Depositions: Initial Considerations

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.21

23.21 Depositions Are Subject to Numeric and Timing Restrictions.

23.21[1] Depositions Cannot Be Taken Before Parties' Initial Meeting Except by Stipulation or With Leave of Court. A stipulation or leave of court is required to take a deposition before the parties' initial meeting to develop a discovery plan [*Fed R Civ P 30(a)(2)(A)(iii)*; *Fed R Civ P 26(d)*, *(f)*].

Exception:

Leave of court is not required if the notice of deposition contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time [*Fed R Civ P 30(a)(2)(A)(iii)*].

Cross References:

Discussion of circumstances when leave of court is required to take a deposition, see *§ 23.25*. Discussion of the parties' meeting to develop a discovery plan, see Ch. 21, Discovery Strategy and Planning.

23.21[2] Number of Depositions Is Limited to 10 for Each Side. Unless the court grants leave to take additional depositions, only 10 depositions, whether oral or written, may be taken by the plaintiffs, or by the defendants, or by third-party defendants [*Fed R Civ P 30(a)(2)(A)(i)*]. In considering a request for leave to take more than 10 depositions, the court must examine the request and consider the asserted need for additional discovery in light of the stated principles of *Fed R Civ P 26(b)(2)* [Andamiro U.S.A. v. Konami Amusement of Am., Inc. (CD Cal 2001) 2001 US Dist LEXIS 11168, at *5].

The Central District has stated that it is not at all clear that the 10-deposition limitation set forth in Rule 30(a)(2)(A) applies to multidistrict litigation, which, by its definition, involves hundreds of cases and parties. Generally, litigation of that nature and scope requires substantial discovery, including the taking of more than 10 depositions [In re Air Crash at Taipei (CD Cal 2003) 2003 US Dist LEXIS 23220, at *4]. Accordingly, the 10-deposition limit may not apply if more than one case is involved.

Example--Leave Granted to Exceed 10-Deposition Limit:

In one case, the court granted leave for plaintiff to take four expert witness depositions beyond the 10-deposition limit because [Andamiro U.S.A. v. Konami Amusement of Am., Inc. (CD Cal 2001) 2001 US Dist LEXIS 11168, at *6-*7]:

- Witnesses' opinions could not be discovered from other sources, so the discovery sought was not duplicative or unreasonably cumulative;
- Expense of depositions would be borne by the party taking them; and
- Information was crucial, so the benefit of discovery vastly outweighed the burden or expense to the opposing party.

Strategic Point--Party Noticing Deposition of Entity:

If the party seeking discovery notices the deposition of an entity, the deposition counts as only one deposition against the 10-per-side limit, even though the entity may designate several witnesses to testify on its behalf [*see Fed R Civ P 30(b)(6)*]. However, each designee may be examined for seven hours [*Fed R Civ P 30(d)*, Committee Note of 2000].

Consider:

In appropriate cases, it may be useful to raise at the *Fed R Civ P 26* conference and the subsequent scheduling conference with the court whether the number, duration, and other limits should be modified in the particular case to avoid the necessity of a motion.

Cross Reference:

Discussion of notice to entity and entity's designation of witnesses, see *§ 23.29*.

23.21[3] Duration of Each Deposition Is Limited.

23.21[3][a] Duration Is One Day of Seven Hours Unless Otherwise Stipulated or Ordered. Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours [*Fed R Civ P 30(d)(1)*].

It is expected that in most instances the parties and the witness will make reasonable accommodations to avoid the need for resort to the court [*Fed R Civ P 30(d)*, Committee Note of 2000].

The limitation is phrased in terms of a single day, on the assumption that ordinarily a single day would be preferable to a deposition extending over multiple days; if alternative arrangements would better suit the parties, they may agree to them in most cases, or a party may seek modification by the court [*Fed R Civ P 30(d)*, Committee Note of 2000].

This limitation contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition [*Fed R Civ P 30(d)*, Committee Note of 2000].

23.21[3][b] Court Must Allow Additional Time for Fair Examination. The court must allow additional time, consistent with the principles stated in *Fed R Civ P 26(b)(2)*, if [*Fed R Civ P 30(d)(1)*]:

- Additional time is needed for a fair examination of the deponent; or
- The deponent or another person, or other circumstance, impedes or delays the examination.

Example:

An "other circumstance" that impedes or delays the examination might include a power outage, a health emergency, or other event [*Fed R Civ P 30(d)*, Committee Note of 2000].

23.21[3][c] Circumstances That Might Require Additional Time. Various circumstances, such as the following, may justify extending the time for a deposition [*Fed R Civ P 30(d)*, Committee Note of 2000]:

- An interpreter is needed to communicate with the witness.
- The examination covers events occurring over a long period of time.
- The witness failed to review and become familiar with numerous or lengthy documents made available to the witness in advance, prior to the deposition.
- The examination reveals that documents were requested but not produced.
- Each party in a multiparty case needs to examine the witness.
- The lawyer for the witness wants to examine the witness.
- Additional time is needed to explore the theories on which an expert witness relies.
- The deponent or opposing counsel has delayed the examination by improper, lengthy, or inappropriate objections.
- The witness has been very slow in responding to questions or has delayed proceedings by consultations with counsel.

23.21[3][d] Persons Responsible for Impediment or Delay May Be Subject to Sanctions. If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose on the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result of the impediment, delay, or conduct [*Fed R Civ P 30(d)(2)*].

The "persons responsible" may include the deponent, any party, or any other person involved in the deposition [*Fed R Civ P 30(d)*, Committee Note of 2000].

Cross Reference:

Discussion of sanctions, see Ch. 25, Motions to Compel and Discovery Sanctions.

23.21[3][e] Court May Order Shorter Duration in Particular Case. The court may limit the length of a deposition to less than one day of seven hours under its general power to limit discovery, either on its own initiative or pursuant to a motion for a protective order [*Fed R Civ P 26(b)(2)*].

Examples:

The court may order [*Fed R Civ P 30(d)*, Committee Note of 2000]:

- Shorter depositions for all depositions in a particular case;
- A shorter deposition for a specific witness in a particular case; or

- A particular deposition to be taken for limited periods on several days.

Cross Reference:

Discussion of motion for protective order, see *§ 23.41*.

Legal Topics:

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

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23.22 Any Person May Be Deposed.

23.22[1] Generally Any Person, Including Any Party, May Be Deposed. A party may take the testimony of any person, including a party, by deposition on oral examination [*Fed R Civ P 30(a)(1)*]. Leave of court is required, however, if the person has already been deposed in the action [*Fed R Civ P 30(a)(2)(A)(ii)*].

Exceptions:

Absent extraordinary circumstances, high-ranking government officials generally cannot be deposed if other persons can provide the information sought [*see Kyle Eng'g Co. v. Kleppe (9th Cir 1979) 600 F2d 226, 231* ; *Coleman v. Schwarzenegger (ND Cal 2008) 2008 US Dist LEXIS 70224, at *26-*28* (disallowing depositions of governor and his chief of staff in case challenging prison conditions because they had no information that could not be obtained by other means)]. Similarly, a high-ranking corporate officer may obtain a protective order to preclude being deposed about matters of which he or she has no personal knowledge, even if the corporation has such knowledge [*see Thomas v. IBM (10th Cir 1995) 48 F3d 478, 483* ; *Lewelling v. Farmers Ins. of Columbus, Inc. (6th Cir 1989) 879 F2d 212, 218*].

Cross Reference:

Discussion of protective orders, see *§ 23.41*.

23.22[2] Deposition Notice May Specify Certain Individuals to Testify on Behalf of Corporation.

23.22[2][a] Deposition Notice May Specify Officers, Directors, or Managing Agents to Appear on Behalf of Corporation. Only an officer, director, or managing agent may be noticed to appear for deposition on behalf of a corporation. In certain instances, the corporation can designate a deponent who is not an officer, director, or managing agent [*see Sugarhill Records, Ltd. v. Motown Record Corp. (SDNY 1985) 105 FRD 166, 169*]. Note that a party may also notice the deposition of a specific named person within an organization [*see Fed R Civ P 30(b)(6)*].

Cross Reference:

Discussion of corporate deponents, see 7 *Moore's Federal Practice, § 30.03[2]* (Matthew Bender 3d ed.).

23.22[2][b] Who Is a "Managing Agent." Whether an individual will be deemed a managing agent of a corporate party depends on several factors [*Sugarhill Records, Ltd. v. Motown Record Corp. (SDNY 1985) 105 FRD 166, 170*]:

- Whether the individual is invested with general powers allowing him or her to exercise judgment and discretion in corporate matters;
- The general responsibilities of the individual respecting the matters involved in the litigation;
- Whether the individual can be relied on to give testimony, at the employer's request, in response to the demands of the examining party;
- Whether any person or persons are employed by the corporate employer in positions of higher authority than the individual designated in the area concerning the information sought; and
- Whether the individual can be expected to identify or represent the interests of the corporation.

Example--Deponent Considered Managing Agent:
An airline captain was considered a managing agent of airline because he (1) was vested with the authority of the corporation, (2) had complete control of the aircraft, (3) had the most relevant first-hand knowledge regarding the cause of the accident at issue, and (4) was in the position of highest authority to testify about it [In re Air Crash at Taipei, Taiwan (CD Cal 2002) 2002 US Dist LEXIS 466, at *5].

Example--Deponent Not Considered Managing Agent:
A managing director of corporate party's subsidiary was not considered managing agent of corporate holding company in litigation involving the holding company's trademarks because (1) he did not have any power or responsibilities with respect to the trademarks, and (2) other actual employees of the holding company were in charge of those issues [Mattel, Inc. v. MCA Records, Inc. (CD Cal 1998) 1998 US Dist LEXIS 7561, at *2-*6].

23.22[3] Depositions of Counsel Are Allowed in Limited Circumstances. Depositions of counsel, although not prohibited, are generally disfavored because of the potential for abuse and issues of work product and privilege [*see Shelton v. American Motors Corp. (8th Cir 1986) 805 F2d 1323, 1327* ; *Massachusetts Mut. Life Ins. Co. v. Cerf (ND Cal 1998) 177 FRD 472, 478-479* ; *American Cas. Co. v. Krieger (SD Cal 1995) 160 FRD 582, 588*].

Depositions of opposing counsel should be limited to those circumstances when the party seeking to take the deposition has shown that [*Shelton v. American Motors Corp. (8th Cir 1986) 805 F2d 1323, 1327*]:

- No other means exist to obtain the information than to depose opposing counsel;
- The information sought is relevant and nonprivileged; and
- The information is crucial to the preparation of the case.

Example:
The plaintiff insurer in a declaratory relief action was allowed to depose opposing counsel who had represented the defendants in an underlying state court action against its insured. The state court action resulted in a default judgment against the insured and an assignment of the insured's rights against the insurer. Insurer was entitled to depose counsel concerning the facts and circumstances surrounding the entry of default and assignment, subject to a partial protective order limiting the scope of questioning and

duration of the deposition [*American Cas. Co. v. Krieger (SD Cal 1995) 160 FRD 582, 591-592*].

23.22[4] Expert Whose Opinions May Be Presented at Trial May Be Deposed. A party may depose any person who has been identified as an expert to present testimony at trial [*Fed R Civ P 26(b)(4)(A)*]. A report from the expert is required under *Fed R Civ P 26(a)(2)(B)*, and the deposition cannot be conducted until after the report is provided [*Fed R Civ P 26(b)(4)(A)*]. Unless manifest injustice would result, the court will require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to the discovery [*Fed R Civ P 26(b)(4)(C)*]. To apply the manifest injustice exception, the court must find that the party seeking to depose the expert is either indigent or that requiring payment of the deposition fee would create an undue hardship [*Harris v. San Jose Mercury News, Inc. (ND Cal 2006) 235 FRD 471, 473* ; *Edin v. The Paul Revere Life Ins. Co. (D Ariz 1999) 188 FRD 543, 547*]. When a plaintiff would face undue hardship if required to pay the fees for deposing defense experts, the court may order the defendant to absorb the cost in the appropriate circumstances [*see, e.g., Harris v. San Jose Mercury News, Inc. (ND Cal 2006) 235 FRD 471, 473-474*].

Absent an agreement to do so, there is no requirement that the expert's fees must be paid in advance of the deposition [*Harris v. Costco Wholesale Corp. (SD Cal 2005) 226 FRD 675, 676-677*].

Strategic Point:

If allowed by the judge's procedural standing order, counsel concerned about the deposing party's payment of the expert's fees may wish to contact the court at the time of the deposition for guidance or an immediate ruling. Following the deposition, application may be made to the court for payment if payment is not timely [*see Harris v. Costco Wholesale Corp. (SD Cal 2005) 226 FRD 675, 677*].

Judge's Perspective:

One view is that it is wise to decline deposing your opponent's experts, on the theory that all pertinent information is in the Rule 26 expert report. Under this theory, a deposition simply gives the expert time to correct any weaknesses in the presentation. The opposing view is that failing to depose might lead to a new theory or opinion that surprises you at trial. Although the rules call for exclusion of any expert opinion not included in the Rule 26 report [*see Fed R Civ P 26(b)(4)(A)*], not all judges strictly adhere to that provision of Rule 26. Unless you know the judge's practice in this regard, failing to depose can be risky.

Distinguish--Experts Who Will Not Testify:

Facts known or opinions held by the opponent's *non-testifying* experts are discoverable "on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means" [*Fed R Civ P 26(b)(4)(B)(ii)*]. The requesting party must pay the responding party a fair portion of the fees and expenses reasonably incurred by the responding party in obtaining facts and opinions from the non-testifying expert to comply with the request [*Fed R Civ P 26(b)(4)(C)*].

Cross References:

Discussion of scope of discovery from experts, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection. Discussion of disclosure of expert testimony, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§§ 15.27 -15.34*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.23 Leave of Court Generally Is Not Required.

Leave of court generally is not required to take a deposition on oral examination [*Fed R Civ P 30(a)(1)*].

Cross Reference:

Discussion of when leave of court is required, see 7 *Moore's Federal Practice, § 30.05[1]* (Matthew Bender 3d ed.).

Legal Topics:

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23.24 No Party Has Priority in Setting Depositions.

Although discovery by all parties ordinarily proceeds concurrently (the rules do not give priority to any party or side), sometimes one or more parties should be allowed to proceed first. For example, if a party needs discovery to respond to an early summary judgment motion, that party may be given priority. Some judges establish periods in which particular parties have exclusive or preferential rights to take depositions, and, in multiple litigation, those judges direct that discovery be conducted in some cases before others. Sometimes judges order "common" discovery to proceed in a specified sequence, without similarly limiting "individual" discovery in the various cases.

One purpose of a discovery plan is to establish an orderly procedure and to avoid indiscriminate noticing of depositions, which may result in inconvenience, harassment, and inefficiency. Depositions should be scheduled to accomplish the objectives of the discovery plan while minimizing travel and other expense, and reasonably accommodating parties, counsel, and witnesses. A plan might set specific dates for specific witnesses or set aside specified time periods during which designated parties are given either exclusive or preferential rights to schedule depositions, subject to exceptions for emergencies.

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23.25 Circumstances When Leave of Court Is Required.

23.25[1] Leave Required When Deponent Is Incarcerated. A party must obtain leave of court when the person to be deposed is confined in prison [*Fed R Civ P 30(a)(2)(B)*].

23.25[2] Leave Required for More Than 10 Depositions. A party must obtain leave of court if, without the written stipulation of all parties, a proposed deposition would result in more than 10 depositions being taken by either side [*Fed R Civ P 30(a)(2)(A)(i)*].

23.25[3] Leave Required If Person Already Deposed. A party must obtain leave of court if, without the written stipulation of the parties, the person to be examined has already been deposed in the case [*Fed R Civ P 30(a)(2)(A)(ii)*].

23.25[4] Leave May Be Required for Deposition Before Discovery Plan Agreement. A party must obtain leave of court if, without the written stipulation of the parties, the party seeks to take a deposition before the parties have agreed to a discovery plan [*see Fed R Civ P 26(d), (f)*], unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time [*Fed R Civ P 30(a)(2)(A)(iii)*].

Cross References:

Discussion of discovery plan required by *Fed R Civ P 26(f)*, see Ch. 22, Regulation of Discovery by Stipulation or Motion. Form of notice of motion to obtain leave of court, see *§ 23.290*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.26 Court Will Limit Excessive or Unreasonable Discovery.

Discovery must be limited if the court determines that [*Fed R Civ P 26(b)(2)(C)*]:

- The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive (this ground is often asserted in mass tort or class actions when depositions from related cases already exist);

- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

- The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Cross Reference:

Discussion of general limits on discovery, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.27 CHECKLIST: Giving Notice of Oral Deposition.

☐ Determine time and place for deposition:

○ Reasonable notice is required.

○ Thirty days' notice is required if notice of deposition to party is accompanied by request for production.

Authority:
Fed R Civ P 30(b)(2)

Discussion:
See *§ 23.29[1]*

○ Deposition of nonparty must be within 100 miles of place where deponent resides, is employed, or regularly transacts business.

Authority:
Fed R Civ P 30(a)(1), 45(c)(3)(A)(ii)

Discussion:
See *§ 23.29[2]*

☐ If seeking to take deposition by telephone or other remote electronic means:

- ○ Obtain stipulation of opposing counsel; or
- ○ If unable to obtain stipulation, move for court order.

Authority:
Fed R Civ P 30(b)(4)

Discussion:
See *§ 23.31*

Form:
See *§ 23.292* (notice of motion to take deposition by telephone or other electronic means)

☐ Prepare notice of taking oral deposition:

- ○ Specify time and place of deposition.
- ○ State name and address of deponent, if known, or state general description sufficient to identify person or particular class or group to which person belongs.
- ○ Designate materials to be produced pursuant to subpoena duces tecum, if any.
- ○ State method for recording testimony.

Authority:
Fed R Civ P 30(b)(1)-(4)

Discussion:
See *§ 23.29*

Form:
See *§ 23.289* (notice of deposition)

- ○ If entity is named as deponent, describe with reasonable particularity the matters on which examination is requested.

Authority:
Fed R Civ P 30(b)(6)

Discussion:
See *§ 23.30[1]*

☐ Serve notice on all parties.

Authority:
Fed R Civ P 30(b)(1)

Discussion:
See *§ 23.33*

☐ If documents are requested of party deponent, serve party with accompanying request for production of documents and things at the taking of the deposition.

Authority:
Fed R Civ P 30(b)(2)

Discussion:
See *§ 23.32*

☐ If documents are requested of nonparty deponent, serve nonparty with subpoena to compel attendance, testimony, and production of documents.

Authority:
Fed R Civ P 30(a)(1)

Discussion:
See *§ 23.33[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.28 Options and Strategy for Party Noticing Deposition.

Although only "reasonable notice" is required for a deposition [*Fed R Civ P 30(b)(1)*], the party seeking discovery should consult with opposing counsel about scheduling prior to giving notice, if possible, to avoid objections to the time and place that may cause unnecessary delay. The party giving notice should also take care to comply with the specific requirements for the written notice and for any request for production or subpoena served with the notice [*see Fed R Civ P 34, 45*].

Cross Reference:

Form of notice of deposition, see *§ 23.289*.

Legal Topics:

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23.29 Written Notice Is Required.

23.29[1] Give Reasonable Notice in Writing to All Parties. A party desiring to take the deposition of any person on oral examination must give reasonable notice in writing to every other party to the action [*Fed R Civ P 30(b)(1)*].

Warning--Notice of Deposition Accompanied by Request for Production:

Although only "reasonable" notice of an oral deposition is required, if the notice to a party is accompanied by a request for production of documents at the deposition, 30 days' notice is required [*see Fed R Civ P 34(b)*].

Cross Reference:

Discussion of the requirements for a request for production, see *§§ 23.135 -23.156*.

23.29[2] Specify Time and Place of Deposition. A notice of oral deposition must state the time and place for taking the deposition [*Fed R Civ P 30(b)(1)*].

Subject to the court's power to grant a protective order, the deposition of a party may be noticed in an appropriate location the deposing party designates [*United States v. $160,066.98 from Bank of Am. (SD Cal 2001) 202 FRD 624, 627* ; Berry v. Baca (CD Cal 2002) 2002 US Dist LEXIS 15698, at *10].

Examples:

- Foreign nationals filed claims in forfeiture action to recover money from business conducted in the United States. Plaintiff United States was entitled to depose claimants in the United States, rather than in their country of residence, because claimants were considered parties to the action for purposes of resolving discovery disputes *United States v. $160,066.98 from Bank of Am. (SD Cal 2001) 202 FRD*

624, 627].

- Plaintiff who claimed to reside in Missouri sued prison officials in California for over-detaining him at the Los Angeles jail. Officials were entitled to depose him in Missouri; they were not required to pay his travel costs to California [Berry v. Baca (CD Cal 2002) 2002 US Dist LEXIS 15698, at *10-*11].

Warning--Location of Deposition of Nonparty:

The attendance of a nonparty deponent at a deposition must be compelled by subpoena [*Fed R Civ P 30(a)(1)*]. The location of the deposition is therefore limited by the court's subpoena power. The deposition must take place within 100 miles of the place where the nonparty deponent resides, is employed, or regularly transacts business in person [*see Fed R Civ P 45(c)(3)(A)(ii)*].

Cross Reference:

Discussion of the use of subpoenas to obtain discovery from nonparties, see *§§ 23.259 -23.285*.

23.29[3] State Name and Address of Deponent, If Known. A notice of deposition must state the name and address of each person to be examined, if known [*Fed R Civ P 30(b)(1)*].

If the name of the person to be deposed is not known, the notice must state a general description sufficient to identify the person or the particular class or group to which the person belongs [*Fed R Civ P 30(b)(1)*].

23.29[4] Designate Materials to Be Produced Pursuant to Subpoena Duces Tecum. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena must be attached to, or included in, the notice of deposition [*Fed R Civ P 30(b)(2)*].

Cross Reference:

Discussion of subpoenas duces tecum, see *§§ 23.259 -23.285*.

23.29[5] State Method for Recording Testimony. The party taking the deposition must state in the notice the method by which the testimony will be recorded [*Fed R Civ P 30(b)(3)(A)*].

Unless the court orders otherwise, the testimony may be recorded by sound, sound-and-visual (e.g., videotape), or stenographic means [*Fed R Civ P 30(b)(3)(A)*].

23.29[6] LOCAL PRACTICE: ND Cal Requirements--Consult With Counsel or Pro Se Party Deponent About Scheduling Prior to Giving Notice. In the Northern District, before noticing a deposition of a party or a witness affiliated with a party, the noticing party must confer about the deposition scheduling with opposing counsel or, if the party is pro se, the party. A party noticing a deposition of a witness who is not a party or affiliated with a party must also meet and confer about scheduling but may do so after serving the nonparty witness with a subpoena [*ND Cal Civ LR 30-1*].

Legal Topics:

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23.30 Notice May Name Corporation, Partnership, Association, or Agency As Deponent.

23.30[1] Notice Must Describe Matters on Which Examination Is Requested. A party may, in the notice of deposition and in a subpoena, name as the deponent a public or private corporation, partnership, association, governmental agency, or other entity, and describe with reasonable particularity the matters on which examination is requested [*Fed R Civ P 30(b)(6)*].

Warning--Counsel for Entity:

The "reasonable particularity" requirement does not limit the scope of the questioning to the matters described in the notice; counsel cannot instruct the individual testifying on behalf of the entity not to answer merely because a question is beyond that scope [*Detoy v. City & County of San Francisco (ND Cal 2000) 196 FRD 362, 366-367*].

Cross Reference:

Discussion of circumstances when a deponent may be instructed not to answer, see *§ 23.52*.

23.30[2] Entity Must Designate Individual(s) Who Will Testify on Its Behalf. An entity named as a deponent must designate one or more officers, directors, or managing agents, or other persons most knowledgeable to testify on its behalf on the subjects identified in the notice [*Fed R Civ P 30(b)(6)*]. For each person so designated, the organization may set forth the matters on which the person will testify [*Fed R Civ P 30(b)(6)*].

The persons designated by an entity must testify as to matters known or reasonably available to the organization [*Fed R Civ P 30(b)(6)*].

Strategic Point--Deponent Entity:

The entity must seek a protective order if it is unable to designate one or more individuals to testify on its

behalf with respect to the matters described in the notice of deposition. Failure to make a designation or seek a protective order may result in the imposition of sanctions [*see Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc. (9th Cir 1995) 67 F3d 766, 770-771 , cert. denied, 519 US 815 (1996)*].

Cross References:

Discussion of protective orders, see *§ 23.41*. Discussion of discovery sanctions, see Ch. 25, Motions to Compel and Discovery Sanctions.

23.30[3] Deposition of Specific Individual May Be Noticed. The rules on organization depositions do not preclude a party from noticing the deposition of a specific named officer, director, or managing agent within an organization [*see Fed R Civ P 30(b)(6)*].

Cross Reference:

Discussion of individuals who can be noticed as deponents on behalf of a corporation, see *§ 23.22[2]*.

Legal Topics:

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

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23.31 Telephone or Video Conference Deposition May Be Allowed by Stipulation or Court Order.

The parties may stipulate in writing or the court may, on motion, order that a deposition be taken by telephone or other remote electronic means [*Fed R Civ P 30(b)(4)*]. Telephone and video depositions are commonly used in cases involving multiple parties, with counsel and witnesses located in disparate locations, often relating to the authentication of documents and other formal, noncontentious matters.

A deposition taken by telephone or other remote electronic means is deemed to be taken in the district and at the place where the deponent is to answer questions [*Fed R Civ P 30(b)(4)*].

Although some courts have stated that telephone depositions should be liberally permitted [*see Jahr v. IU Int'l Corp. (WDNC 1986) 109 FRD 429, 430* ; *Rehau, Inc. v. Colortech, Inc (WD Mich 1993) 145 FRD 444, 446*], other courts appear reluctant to order telephone depositions [*see, e.g., United States v. $160,066.98 from Bank of Am. (SD Cal 2001) 202 FRD 624, 629* (in refusing to order a deposition by telephone from Pakistan to San Diego, court emphasized that circumstances of case required in-person depositions)].

Strategic Point:

Counsel defending a deposition will usually be comfortable stipulating to a telephone or other electronic deposition. However, counsel taking a deposition should consider the ramifications before doing so, because (1) it is hard to monitor discussions between the witness and the witness's counsel, and (2) it is hard to develop a conversational rhythm in telephonic or electronic depositions.

Judge's Perspective:

In general, courts will approve video and telephone depositions if the parties stipulate to them. Video depositions are usually preferable to telephone depositions, because you can see the body language and demeanor of the deponent, and whether the deponent is being coached.

Cross References:

Form of notice of motion to take deposition by telephone or other remote electronic means, see *§ 23.292*.

Depositions by telephone and video conferencing, see 7 *Moore's Federal Practice, § 30.24* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulations

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23.32 Notice to Party Deponent May Be Accompanied by Request for Production.

The notice to a party deponent may be accompanied by a request for the production of documents, electronically stored information, and tangible things at the taking of the deposition [*Fed R Civ P 30(b)(2)*; *see* Fed R Civ P 34(a), Committee Note of 2006].

The request for the production must be made in accordance with the procedure specified in *Fed R Civ P 34* [*Fed R Civ P 30(b)(2)*].

Warning--30-Days' Notice Required:

Although only "reasonable" notice of an oral deposition is required, if the deponent is a party and the notice is accompanied by a request for production at the deposition, 30 days' notice is required [*see Fed R Civ P 34(b)(2)(A)*].

Cross References:

Discussion of requests for the production of documents and things, see *§§ 23.135 -23.156*.

Discussion of production of documents at deposition, see 7 *Moore's Federal Practice, § 30.22* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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23.33 Notice Must Be Served on Parties.

23.33[1] Serve on All Parties. The notice of deposition must be served on all parties [*Fed R Civ P 30(b)(1)*; *see Fed R Civ P 5* (service of papers)].

Although only "reasonable" notice of a deposition is required [*Fed R Civ P 30(b)(1)*], if a party receives less than 14 days' notice and promptly files a motion for a protective order requesting that the deposition not be held or be held at a different time or place, and the deposition is taken while the motion is pending, the deposition cannot be used against that party [*Fed R Civ P 32(a)(5)(A)*].

Cross References:

Discussion of service of papers, see Ch. 5, Formatting, Serving, and Filing Papers, *§§ 5.15 -5.23*.
Discussion of use of depositions, see *§§ 23.68 -23.70*.

23.33[2] Do Not File Notice. The notice of deposition is not filed with the court [*see Fed R Civ P 5(d)(1)* (discovery requests not filed until used or filing ordered by court)].

23.33[3] Serve Nonparty Deponent With Subpoena to Compel Attendance and/or Production. A notice of deposition is sufficient to compel the attendance and testimony of a party deponent [*see Fed R Civ P 37(d)(1)(A)(i)*].

A subpoena is required to compel attendance and testimony or production of documents by a nonparty deponent [*Fed R Civ P 30(a)(1)*; *see Fed R Civ P 45(a)*].

Warning:

An employee of a corporation who is not an officer, director, or managing agent of the corporation is a nonparty witness, even if the corporation is a party to the proceeding.

Cross Reference:

Discussion of the procedure for issuance and service of a subpoena, see *§§ 23.259 -23.285*.

Legal Topics:

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

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23.34 Cost of Recording and Transcription Generally Borne by Deposing Party.

23.34[1] Party Taking Deposition Bears Cost of Recording. The party taking the deposition bears the cost of the recording [*Fed R Civ P 30(b)(3)*].

23.34[2] LOCAL PRACTICE: SD Cal Requirements--Court May Order Waiver of Transcription or Apportionment of Cost. In the Southern District, the deposing party must assume the cost of the record or transcription unless, upon motion or the parties' agreement, the court orders a waiver of transcription or a different apportionment of cost [*SD Cal Civ LR 30.1(a)*].

23.34[3] Any Party May Notice Additional Method of Recording. With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition [*Fed R Civ P 30(b)(3)(B)*]. Also, any party may arrange for a transcription to be made from the recording of a deposition [*Fed R Civ P 30(b)(3)(A)*].

The additional record or transcript must be made at that party's expense unless the court otherwise orders [*Fed R Civ P 30(b)(3)(B)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.35 Parties May Stipulate to Modification of Deposition Procedures.

Unless otherwise directed by the court, the parties may by written stipulation provide that depositions may be taken [*Fed R Civ P 29*]:

- Before any person;
- At any time or place;
- On any notice; and
- In any manner.

The parties may also stipulate that when so taken, depositions may be used like other depositions [*Fed R Civ P 29(a)*].

Cross Reference:

Discussion of requirements for stipulations, including local practice, see Ch. 22, Regulation of Discovery by Stipulation or Motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulations

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23.36 CHECKLIST: Responding to Notice of Deposition.

☐ Review notice of deposition and accompanying documents to determine whether there are:

○ Errors or irregularities in notice.

Authority:
Fed R Civ P 32(d)(1)

Discussion:
See *§ 23.38*

○ Lack of qualifications of deposition officer.

Authority:
Fed R Civ P 32(d)(2)

Discussion:
See *§ 23.39*

○ Grounds for motion to quash or motion for protective order based on discovery sought or manner in which deposition will be conducted.

Authority:
Fed R Civ P 26(c)

Discussion:
See *§§ 23.40*, *23.41*

☐ Serve written objections promptly on party giving notice of deposition.

Authority:
Fed R Civ P 32(d)

Discussion:
See *§§ 23.38*, *23.39*

Form:
See *§ 23.291* (objections to errors or irregularities in notice of deposition or to deposition officer)

☐ Prepare and file motion to quash notice of deposition or subpoena, if appropriate, in accordance with standard motion procedure.

Authority:
Fed R Civ P 26(b)(2)

Discussion:
See *§ 23.40*

Standard Procedure Checklists:
Ch. 26, Pretrial Motion Practice, see *§ 26.37*

☐ Prepare and file motion for protective order, if appropriate, in accordance with standard motion procedure.

Grounds:

- Annoyance;
- Embarrassment;
- Oppression; or
- Undue burden or expense.

Prerequisite:
The party seeking a protective order must certify that he or she has in good faith conferred or attempted to confer with other affected parties to resolve the dispute without court action.

Authority:
Fed R Civ P 26(c)

Discussion:
See *§ 23.41*

Standard Procedure Checklist:

Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.47*

☐ If notice names an entity as deponent, provide party giving notice with designation of one or more individuals who will testify on entity's behalf and the matters on which each person will testify.

Authority:
Fed R Civ P 30(b)(6)

Discussion:
See *§ 23.30[2]*

☐ Determine whether to have the deponent's testimony recorded by a method other than the method specified by the party taking the deposition and give notice to the deponent and other parties of the additional method of recording, if any.

Authority:
Fed R Civ P 30(b)(3)(B)

Discussion:
See *§ 23.32[3]*

Legal Topics:

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

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23.37 Options and Strategy for Challenging the Notice by the Opposing Party or Deponent.

23.37[1] Possible Objections. A party or deponent served with a notice of deposition may oppose the deposition because:

- The noticing party failed to comply with the requirements for noticing a deposition [*Fed R Civ P 32(d)(1)*; *see 23.38*];
- The deposition officer identified in the notice is unqualified [*Fed R Civ P 32(d)(2)*; *see 23.39*];
- The discovery sought or the manner in which the deposition will be conducted fails to comply with procedural requirements [*Fed R Civ P 26(c)*; *see 23.41*].

Serving the noticing party with objections will preserve objections that would otherwise be waived, but will not prevent the deposition from going forward. The party or deponent opposing discovery must therefore determine whether his or her objections to the proposed deposition give rise to grounds for a motion to quash the notice [*see 23.40*] or a motion for a protective order to prevent or limit the deposition [*see 23.41*].

23.37[2] Preparing the Deponent. The deponent should be prepared for the deposition in the same way he or she would be prepared for trial. The deponent should be warned not to assume the informal setting of the deposition means the situation is less serious than examination at trial. Additionally, the deponent should dress formally, especially if the deposition will be videotaped.

Be sure to cover at least the following issues with the deponent before the deposition:

- An overview of the topics to be covered.
- The strategies the questioner will use, and strategies for defending the deposition.

- That the deponent should not volunteer nonresponsive information in response to questions, and should confine testimony to what the deponent actually knows and recalls. The deponent should not guess or speculate.

- The concept of refreshing recollection. If after being refreshed with a document the deponent has no independent recollections, the deponent should say so, and clarify that his or her recollection is not refreshed. The deponent should not unthinkingly adopt, as the deponent's own recollection, language contained in documents shown to the deponent, unless the deponent's memory is actually refreshed.

- That the deponent should avoid making conversational banter with the questioner.

- The purposes of objections, and how the deponent should respond to them.

- The manner for responding to questions calling for privileged information (e.g., attorney-client communications, and attorney work product).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective Orders

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23.38 Objections to Errors or Irregularities in Notice Must Be Promptly Served on Party Giving Notice.

All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served on the party giving notice [*Fed R Civ P 32(d)(1)*].

Cross Reference:

Form of objections, see *§ 23.291*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.39 Objections to Deposition Officer Must Be Made As Soon As Disqualification Becomes Known or Could Be Discovered.

Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made [*Fed R Civ P 32(d)(2)*]:

- Before the taking of the deposition begins; or
- As soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

Cross References:

Discussion of qualifications of deposition officer, see *§ 23.43*. Form of objections, see *§ 23.291*.

Legal Topics:

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

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23.40 Motion to Quash Deposition Notice or Subpoena Must Be Made Promptly.

The court may quash a deposition notice or subpoena under its general power to limit discovery [*see Fed R Civ P 26(b)(2), (c)*]. However, a motion to quash, or a motion for a protective order to prohibit a deposition, generally is not granted except in extraordinary circumstances [*Thomas v. IBM (10th Cir 1995) 48 F3d 478, 483*].

Examples:

- Subpoena for the deposition of a state judge was quashed because the information sought was protected from discovery by judicial privilege [*Phelan v. Thompson (D NH 1994) 161 FRD 7, 7-8*].

- Motion for protective order preventing deposition of corporate officer was granted because officer testified by affidavit that he lacked personal knowledge of the facts at issue [*Thomas v. IBM (10th Cir 1995) 48 F3d 478, 483*].

Cross References:

Discussion of motion for protective order, see *§ 23.41*. Detailed discussion of motions for protective orders, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.35 -22.66*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedurePretrial MattersSubpoenas

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23.41 Motion for Protective Order Requires Showing of Good Cause.

23.41[1] May Be Made by Party or Deponent. On motion by a party or by the deponent, the court in which the action is pending or, alternatively, the court in the district where the deposition is to be taken, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense [*Fed R Civ P 26(c)*]. The moving party must show good cause for the order [*Fed R Civ P 26(c)*].

23.41[2] Good-Faith Attempt to Resolve Dispute Is Required. A motion for a protective order must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action [*Fed R Civ P 26(c)*].

Cross Reference:

Discussion of informal resolution requirements, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§ 22.17[3]*.

23.41[3] Relief Available. The protective order limiting a deposition may include one or more of the following orders [*Fed R Civ P 26(c)*]:

- That the deposition not be taken;
- That the deposition may be taken only on specified terms and conditions, including a designation of the time or place;
- That the discovery may be had only by another method of discovery;
- That certain matters not be inquired into, or that the scope of questioning be limited to certain matters;

- That the deposition be taken with no one present except persons designated by the court;
- That the deposition transcript be sealed and thereafter be opened only by order of the court;
- That a trade secret or other confidential research, development, or commercial information may not be revealed or may be revealed only in a designated way; and
- That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

23.41[4] Court May Order Discovery on Specified Terms and Conditions. If the motion for a protective order is denied in whole or in part, the court may order that any party or deponent identified in the notice provide or permit discovery on such terms and conditions as are just [*Fed R Civ P 26(c)*].

23.41[5] Court May Award Expenses. The court may award expenses to the prevailing party for costs incurred in relation to the motion for a protective order [*Fed R Civ P 26(c)*; *see Fed R Civ P 37(a)(4)*; *but see ND Cal Civ LR 7-8*, *37-3* (separate sanctions motion required in Northern District)].

Cross Reference:

Discussion of award of expenses, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§ 22.58*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective Orders

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23.42 CHECKLIST: Conducting an Oral Deposition.

☐ Make appropriate arrangements for taking deposition:

○ Place and manner of recording arranged for time specified in notice.

Authority:
Fed R Civ P 30(b)(1), (3)

Discussion:
See *§§ 23.29[2], [5]*

○ Stipulation or court order obtained to allow deposition to be taken by telephone or other remote electronic means.

Authority:
Fed R Civ P 30(b)(4)

Discussion:
See *§ 23.31*

○ Qualified deposition officer engaged.

Authority:
Fed R Civ P 28(a)

Discussion:
See *§ 23.43*

☐ Conduct deposition in accordance with *Fed R Civ P 30*:

○ Deposition officer must make statement on record including:

☐ The officer's name and business address;

☐ The date, time, and place of the deposition;

☐ The name of the deponent;

☐ The administration of the oath or affirmation to the deponent; and

☐ An identification of all persons present.

Authority:
Fed R Civ P 30(b)(5)

Discussion:
See *§ 23.46[1]*

○ Officer must administer oath and record the questions, objections, comments, and testimony.

Authority:
Fed R Civ P 30(c)

Discussion:
See *§ 23.46[2]*

○ If deposition is recorded by non-stenographic means, such as videotape, officer must, in addition to above requirements, identify deposition at beginning of each unit of tape or other recording medium.

Authority:
Fed R Civ P 30(b)(5)(B)

Discussion:
See *§ 23.46[3][a]*

☐ Proceed with examination and cross-examination of deponent as at trial.

Authority:
Fed R Civ P 30(c)

Discussion:
See *§ 23.46[4]*

☐ Continue with examination to conclusion, subject to objections noted in the record.

Authority:
Fed R Civ P 30(c)

Discussion:
See *§ 23.46[6]*

☐ Suspend the taking of testimony and adjourn deposition if one of the following occurs:

○ Deponent fails to answer any question or produce materials, and noticing party wishes to file motion to compel before proceeding.

Authority:
Fed R Civ P 37(a)(3)(B)

Discussion:
See *§ 23.59*

○ Party or deponent demands suspension to seek protective order.

Authority:
Fed R Civ P 30(d)(3)

Discussion:
See *§ 23.53[1]*

☐ Conclude deposition by deposition officer:

○ Officer states on record that deposition is complete.

○ Officer sets forth stipulations of parties.

Authority:
Fed R Civ P 30(b)(5)(C)

Discussion:
See *§ 23.46[7]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.43 Deposition Officer Must Be Authorized to Administer Oaths or Be Appointed by the Court.

Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions must be taken before [*Fed R Civ P 28(a)*]:

- An officer authorized to administer oaths by the laws of the United States or of the place where the examination is held; or

- A person appointed by the court in which the action is pending.

A person appointed by the court in which the action is pending has power to administer oaths and to take testimony [*Fed R Civ P 28(a)*].

The term "officer," as used in *Fed R Civ P 30*, *31* and *32*, governing the taking of depositions, includes a person appointed by the court or designated by the parties' stipulation [*Fed R Civ P 28(a)*; *see Fed R Civ P 29* (stipulations regarding discovery procedure)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.44 Deposition Officer Cannot Have Relationship to Parties or Counsel or Financial Interest in Action.

No deposition can be taken before a person who is [*Fed R Civ P 28(c)*]:

- A relative, employee, attorney, or counsel of any of the parties;
- A relative or employee of any attorney or counsel of any of the parties; or
- Financially interested in the action.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.45

23.45 Deposition May Utilized in International Discovery.

23.45[1] Several Methods for Appointment of Officer and Taking Foreign Deposition. Subject to the foreign country's laws, depositions may be taken in a foreign country [*Fed R Civ P 28(b)*]:

- Pursuant to any applicable treaty or convention;
- Pursuant to a letter of request (whether or not captioned a letter rogatory);
- On notice before a person authorized to administer oaths in the place where the examination is held, either by the law of that place or by the law of the United States; or
- Before a person commissioned by the court.

A person commissioned by the court has the power by virtue of the commission to administer any necessary oath and to take testimony [*Fed R Civ P 28(b)*].

Cross Reference:

Detailed discussion of foreign depositions, see 6 *Moore's Federal Practice, §§ 28.10* -28.18 (Matthew Bender 3d ed.).

23.45[2] Presiding Officer Is Determined by Law of Foreign Nation. The person before whom a deposition may be taken in a foreign nation depends on the law of that nation. If the witness is willing, the foreign nation may permit a deposition to be taken by U.S. counsel before a U.S. consular officer. If the foreign nation requires testimony to be taken by local judicial authority, U.S. counsel may be unable to participate and may have to provide written interrogatories attached to a letter rogatory to the foreign judicial authority [*see* U.S. State Dept. Circular, Obtaining Evidence Abroad (available at travel.state.gov/obtaining_evidence.html)].

23.45[3] Court Issues Commission or Letter of Request for Deposition on Application of Party Seeking Discovery. A commission or a letter of request must be issued on application and notice and on terms that are just and appropriate [*Fed R Civ P 28(b)(3)*]. In proper cases, *both* a commission and a letter of request may be issued [*Fed R Civ P 28(b)(3)*].

23.45[4] Presiding Officer Must Be Designated by Name or Title. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title [*Fed R Civ P 28(b)*].

A letter of request may be addressed "To the Appropriate Authority in [name of country]" [*Fed R Civ P 28(b)*].

23.45[5] Caption Must Meet Requirements of Applicable Treaty or Convention. A letter of request, or any other device used pursuant to any applicable treaty or convention, must be captioned in the form prescribed by that treaty or convention [*Fed R Civ P 28(b)(3)*].

23.45[6] Counsel Must Consult Foreign Law to Ascertain Permissible Deposition Procedures. Although *Fed R Civ P 28(b)* provides that the letter to a foreign judicial authority may include any terms and directions that are just and appropriate, the extent to which those terms or directions will be allowed depends on the foreign jurisdiction where discovery is sought. Thus, for example, methods of conducting a deposition, such as telephone participation or videotaping, may not be authorized. Similarly, a deposition may have to be taken by written questions, instead of on oral examination, in the foreign nation where discovery is sought. Counsel should verify that the discovery and manner of discovery sought will be allowed under the laws of the foreign nation and draft the request in accordance with those laws.

For State Department guidelines on foreign discovery, see U.S. State Dept. Circular, Obtaining Evidence Abroad available at (travel.state.gov/obtaining_evidence.html); U.S. State Dept. Circular, Preparation of Letters Rogatory (available at travel.state.gov/letters_rogatory.html).

Cross Reference:

Discussion of foreign depositions, see 6 *Moore's Federal Practice, §§ 28.10* -28.18 (Matthew Bender 3d ed.).

23.45[7] Procedure Used for Deposition in Foreign Country Does Not Affect Admissibility of Evidence. Evidence obtained in response to a letter of request need not be excluded merely [*Fed R Civ P 28(b)*]:

- Because it is not a verbatim transcript;
- Because the testimony was not taken under oath; or
- Because of any similar departure from the requirements for depositions taken within the United States under the Federal Rules.

23.45[8] Deposition May Be Taken in United States Pursuant to Foreign Request or Letters Rogatory. A United States district court can order a person to give testimony or a statement or to produce documents or other things for use in a foreign proceeding pursuant to a letter of request or letter rogatory issued by a foreign or international tribunal or on application of an interested party [*28 USC § 1782(a)*].

Consider:

Federal courts are authorized, *but not required*, to provide judicial assistance to foreign or international tribunals, or interested parties under *28 USC § 1782*. District court compliance with a § 1782 request is not mandatory [*see, e.g., Four Pillars Enters. Co. v. Avery Dennison Corp. (9th Cir 2002) 308 F3d 1075, 1078-1079*].

The proceeding for which discovery is sought in the foreign country must be in reasonable contemplation, but need not be imminent or pending [*Intel Corp. v. Advanced Micro Devices, Inc. (2004) 542 US 241, 258-259, 124 S Ct 2466, 159 L Ed2d 355*].

Before ordering discovery to proceed under § 1782, the district court judge is not required to determine whether the information sought would be discoverable under the law governing the foreign proceeding [*Intel Corp. v. Advanced Micro Devices, Inc. (2004) 542 US 241 259-263, 124 S Ct 2466, 159 L Ed2d 355* (resolving circuit split on issue)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsInternational LawDispute ResolutionEvidenceGeneral OverviewInternational LawDispute ResolutionEvidenceAssistanceInternational LawDispute ResolutionEvidenceHague Convention on Taking Evidence AbroadInternational LawDispute ResolutionEvidenceWitnesses

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Unit 7 Discovery
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23.46 Conduct of Deposition Must Comply With Federal Rules and Local Rules.

23.46[1] Officer Must Make Statement on the Record to Begin. Unless otherwise agreed by the parties, a deposition must be conducted before a qualified deposition officer and must begin with a statement on the record by the officer that includes [*Fed R Civ P 30(b)(5)(A)*]:

- The officer's name and business address;
- The date, time, and place of the deposition;
- The name of the deponent;
- The administration of the oath or affirmation to the deponent; and
- An identification of all persons present.

Strategic Point--Presence of Additional Persons May Be Grounds for Protective Order:

If a party or counsel has brought numerous people to the deposition, such as several officers of a corporate party, nonparty family members of an individual, or staff, a party or the deponent may be able to move for a protective order to limit the persons present. An objection ordinarily should be made only if the additional parties are disruptive, or themselves are witnesses [*see Fed R Civ P 26(c)(1)(E), Fed R Civ P 30(d)(3)*].

Cross References:

Discussion of motion for protective order during deposition, see *§ 23.53*. Form of motion for protective order during deposition in progress, see *§ 23.293*.

23.46[2] Officer Must Administer Oath and Record Testimony. The officer before whom the deposition is to be taken must put the witness on oath or affirmation [*Fed R Civ P 30(c)(1)*].

The officer must personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness [*Fed R Civ P 30(c)(1)*].

The testimony must be taken stenographically or recorded by sound or sound-and-visual means, unless the court orders otherwise [*Fed R Civ P 30(b)(3)(A)*].

Strategic Point--Deponent's Counsel:

You may learn a great deal about the case from the opposing party's deposition of your client. The opposing party's questioning may take the client in some directions you had not anticipated and uncover facts the client did not provide to you and for which you had not probed. For the first time, you are hearing your client address pieces of the story under oath, and issues and facts may surface that did not appear when the client was telling the story to you in your office. The line of questioning may also offer some clues as to opposing counsel's theory of the case and information opposing counsel has, sometimes that you have yet to discover.

23.46[3] Requirements for Nonstenographic Recording.

23.46[3][a] Officer Must Identify Deposition at the Beginning of Each Unit of Tape or Other Recording Medium. If the deposition is recorded other than stenographically, the officer must repeat his or her name and business address, the date, time, and place of the deposition, and the name of the deponent at the beginning of each unit of recorded tape or other recording medium [*Fed R Civ P 30(b)(5)(B)*].

23.46[3][b] Recording Techniques Cannot Distort Appearance or Demeanor of Participants. The appearance or demeanor of deponents or attorneys cannot be distorted through camera or sound-recording techniques [*Fed R Civ P 30(b)(5)(B)*].

23.46[4] Examination and Cross-Examination Proceed As at Trial.

23.46[4][a] Federal Rules of Evidence Apply, With Two Exceptions. Examination and cross-examination may proceed as permitted at trial under the provisions of the Federal Rules of Evidence, except *Fed R Evid 103* (rulings on evidence) and *Fed R Evid 615* (exclusion of witnesses on request of party) [*Fed R Civ P 30(c)(1)*].

Strategic Point--Presence of Other Witnesses or Persons May Be Grounds for Protective Order:

Although the exclusion of witnesses is not mandatory upon request of a party, a party may be able to move for a protective order to limit the persons present [*see Fed R Civ P 26(c)(1)(E), Fed R Civ P 30(d)(3)*].

Cross References:

Discussion of motion for protective order during deposition, see *§ 23.53*. Form of motion for protective order during deposition in progress, see *§ 23.293*.

23.46[4][b] Adverse Party May Access Materials Used to Refresh Deponent's Memory. Because the Federal Rules of Evidence generally apply to depositions, *Fed R Evid 612* allows an adverse party access to materials used to refresh a deponent's memory [*United States ex rel. Bagley v. TRW, Inc. (CD Cal 2003) 212 FRD 554, 565*].

Under *Fed R Evid 612*, if a witness uses a writing to refresh his or her memory either while testifying or before testifying, if the court in its discretion determines it necessary, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce into evidence those portions of the writing that relate to the testimony of the witness [*Fed R Evid 612*].

Cross Reference:

Discussion of application of Federal Rules of Evidence to depositions, see 7 *Moore's Federal Practice, § 30.42[1][b]* (Matthew Bender 3d ed.).

23.46[4][c] Deponent and Deponent's Counsel May Not Confer During Questioning. Because examination and cross-examination proceed as at trial [*Fed R Civ P 30(c)*], a questioning attorney is entitled to have the witness, and the witness alone, answer questions. When there is a question pending, the deponent arguably may not confer with his or her attorney, except to assert a privilege [*Hall v. Clifton Precision (ED Pa 1993) 150 FRD 525, 528-529* ; *but see In re Stratosphere Corp. Sec. Litig. (D Nev 1998) 182 FRD 614, 621-622* (rejecting *Hall* on this point)].

Courts differ as to whether the deponent and counsel may confer during recesses. While some courts prohibit private conferences during recesses [*Honeywell Int'l, Inc. v. Universal Avionics Sys. Corp. (D Del 2003) 289 F Supp2d 493, 499* ; *Hall v. Clifton Precision (ED Pa 1993) 150 FRD 525, 528-529*], other courts, including California federal and state courts, reason that such conferences are allowed, as they are during recesses at trial, as long as the attorney for the deponent does not demand a break in the questions or demand a conference between questions and answers [*see Christian v. Mattel, Inc. (9th Cir 2002) 286 F3d 1118, 1125* ; *In re Stratosphere Corp. Sec. Litig. (D Nev 1998) 182 FRD 614, 621-622*].

Cross Reference:

Discussion of attorney-deponent conferences during depositions, see 7 *Moore's Federal Practice, § 30.42[2]* (Matthew Bender 3d ed.).

23.46[5] Other Parties May Transmit Written Questions. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition [*Fed R Civ P 30(c)(3)*]. The party taking the deposition must transmit the written questions to the officer, who must propound them to the witness and record the answers verbatim [*Fed R Civ P 30(c)(3)*]. This procedure is not commonly used, but may be useful if the expense of travelling to a distant deposition is prohibitive, and the questions are non-controversial and relatively unimportant.

23.46[6] Examination Proceeds Subject to Objections Noted in the Record. The officer must note on the record of the deposition all objections made at the time of the examination to [*Fed R Civ P 30(c)(2)*]:

- The qualifications of the officer taking the deposition;
- The manner of taking the deposition;
- The evidence presented;
- The conduct of any party; or
- Any other aspect of the proceedings.

The examination must proceed, with the testimony being taken subject to the objections [*Fed R Civ P 30(c)(2)*].

Exception:

The taking of a deposition must be suspended, on demand of the objecting party or the deponent, for the time necessary to make a motion for a protective order [*Fed R Civ P 30(d)(3)(A)*].

Judge's Perspective:

Many courts will now take telephone calls in order to rule on such issues without the need to suspend the deposition.

Cross Reference:

Discussion of motion for protective order during deposition, see *§ 23.53*.

23.46[7] Officer Must Indicate End of Deposition on Record and Set Forth Stipulations Made by Counsel. At the end of the deposition, the officer must state on the record that the deposition is complete and must set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters [*Fed R Civ P 30(b)(5)(C)*].

23.46[8] LOCAL PRACTICE: Numbering Exhibits.

23.46[8][a] LOCAL PRACTICE: CD Cal Requirements. In the Central District, documents introduced in discovery must be numbered as follows:

- Documents introduced in discovery must be numbered sequentially. Only one exhibit number can be assigned to any given document. Exhibits must be numbered without regard to the identity of the party introducing the exhibits [*CD Cal Civ LR 26-3.1*].

- If possible, each new exhibit must be given the next available number. If it is not possible to do so (as, for example, when multiple depositions are conducted on the same day), then the parties must break the sequence and use higher numbers to avoid duplication [*CD Cal Civ LR 26-3.1*].

- Any exhibit that is an exact duplicate of an exhibit previously numbered must bear the same exhibit number regardless of which party is using the exhibit. Any version of any exhibit that is not an exact duplicate must be marked and treated as a different exhibit bearing a different exhibit number [*CD Cal Civ LR 26-3.2*].

- If, through inadvertence, the same exhibit has been marked with different exhibit numbers, the parties must assign the lowest such exhibit number to the exhibit and conform all deposition transcripts and exhibits to reflect the lowest number. The superseded number must not be reused by the parties [*CD Cal Civ LR 26-3.3*].

  Example:

  If the same exhibit has been marked as 52 in the deposition of A and 125 in the depositions of B, C and/or D, the exhibit marked 125 must be renumbered 52 and the depositions of B, C and D must be conformed to the renumbered exhibit. Thereafter, number 125 cannot be used [*CD Cal Civ LR 26-3.3*].

- If it is necessary to identify sub-parts of a document that has been marked as an exhibit, then the sub-parts must be designated by the number of the exhibit followed by a number designation [*CD Cal Civ LR 26-3.4*].

  Example:

  If a three-page contract is marked as Exhibit No. 12, the pages of the contract may be

marked as Exhibits 12-1, 12-2, and 12-3; the entire document must be referred to as Exhibit 12 [*CD Cal Civ LR 26-3.4*].

- In addition to exhibit numbers, documents may bear other numbers or letters used by the parties for internal control purposes [*CD Cal Civ LR 26-3.5*].

23.46[8][b] LOCAL PRACTICE: ED Cal Requirements. Local court rules in the Eastern District do not require particular numbering of documents identified as exhibits during depositions.

23.46[8][c] LOCAL PRACTICE: ND Cal Requirements. In the Northern District, documents identified as exhibits during the course of depositions and at trial must be numbered and organized as follows [*ND Cal Civ LR 30-2(b)*]:

- At the outset of the case, counsel must meet and confer regarding the sequential numbering system that will be used for exhibits throughout the litigation, including trial.

- If the pages of an exhibit are not numbered internally and it is necessary to identify pages of an exhibit, then each page must receive a page number designation preceded by the exhibit number (e.g., Exhibit 100-2, 100-3, 100-4).

- To the extent practicable, any exhibit that is an exact duplicate of an exhibit previously numbered must bear the same exhibit number regardless of which party is using the exhibit. Any version of any exhibit that is not an exact duplicate must be marked and treated as a different exhibit, bearing a different exhibit number.

- In addition to exhibit numbers, documents may bear other numbers or letters used by the parties for internal control purposes.

23.46[8][d] LOCAL PRACTICE: SD Cal Requirements. Local court rules in the Southern District do not require particular numbering of documents identified as exhibits during depositions.

23.46[9] Any Party May Arrange for Transcription or Additional Method of Recording. Any party may arrange for a transcription to be made from the recording of a deposition [*Fed R Civ P 30(b)(3)(A)*].

With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition [*Fed R Civ P 30(b)(3)(B)*]. The additional record or transcript must be made at that party's expense unless the court otherwise orders [*Fed R Civ P 30(b)(3)(B)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulations

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23.47 CHECKLIST: Objecting to the Conduct of an Oral Deposition.

☐ Attend deposition as noticed.

☐ If party giving notice fails to attend and proceed with the deposition, file and serve motion for award of expenses, in accordance with standard motion procedure.

Authority:
Fed R Civ P 30(g)(1)

Discussion:
See *§ 23.54*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*

☐ If deponent fails to attend because of noticing party's failure to serve the deponent with a subpoena, file and serve motion for award of expenses, in accordance with standard motion procedure.

Authority:
Fed R Civ P 30(g)(2)

Discussion:
See *§ 23.55*

Standard Procedure Checklist:

Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*

☐ State objections concisely and in non-argumentative and non-suggestive manner.

Authority:
Fed R Civ P 30(c)(2)

Discussion:
See *§ 23.51*

☐ Make any objections during deposition:

○ Qualifications of deposition officer.

Timing:
Objection is waived unless made as soon as disqualification becomes known or could be discovered with reasonable diligence.

Authority:
Fed R Civ P 32(d)(2)

Discussion:
See *§ 23.48*

○ Competency of witness or testimony.

Timing:
Objection to competency or witness or competency, relevancy, or materiality of testimony is waived only if the ground of objection might have been obviated or removed if presented during deposition.

Authority:
Fed R Civ P 32(d)(3)(A)

Discussion:
See *§ 23.49*

○ Errors or irregularities during the deposition in the following matters:

☐ The manner of taking the deposition;

☐ The form of the questions or answers;

☐ The oath or affirmation;

☐ The conduct of the parties; or

☐ Errors of any kind that might be obviated, removed, or cured if promptly presented.

Timing:

Objections to errors or irregularities during the deposition must be timely or are waived.

Authority:
Fed R Civ P 32(d)(3)(B)

Discussion:
See *§ 23.50*

☐ Instruct witness not to answer only when necessary to:

- ○ Preserve a privilege;
- ○ Enforce a limitation directed by the court; or
- ○ Present a motion to terminate or limit examination.

Authority:
Fed R Civ P 30(c)(2)

Discussion:
See *§ 23.52*

☐ Determine if deposition is being conducted in manner that would justify protective order. If so, demand that deposition be suspended for time necessary to move for order.

Grounds:

- Examination is being conducted in bad faith; or
- Examination is being conducted in such manner as unreasonably to annoy, embarrass, or oppress deponent or party.

Authority:
Fed R Civ P 30(d)(3)(A)

Discussion:
See *§ 23.53*

Form:
See *§ 23.293*

☐ If deponent wants to review transcript before it is final, request for review must be made before deposition is concluded.

Authority:
Fed R Civ P 30(e)

Discussion:
See *§ 23.61*

Legal Topics:

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

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23.48 Objections to Qualifications of Deposition Officer Are Waived If Not Timely.

Objections based on the qualifications of the deposition officer are waived unless made [*Fed R Civ P 32(d)(2)*]:

- Before the taking of the deposition begins; or
- As soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

Cross Reference:

Discussion of qualifications of deposition officer, see *§ 23.43*.

Legal Topics:

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

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23.49 Objections to Competency of Witness or Testimony Generally Are Not Waived.

Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one that might have been obviated or removed if presented at that time [*Fed R Civ P 32(d)(3)(A)*]. These types of objections should be made as early as possible, if the witness is suffering from a temporary incapacity, such as a speech or memory problem caused by medication. In other cases, it would be difficult to waive competency.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.50 Objection to Errors or Irregularities During Deposition Must Be Seasonably Made or Are Waived.

Errors and irregularities occurring at the oral examination in the following matters are waived unless seasonable objection to them is made at the taking of the deposition [*Fed R Civ P 32(d)(3)(B)*]:

- The manner of taking the deposition;
- The form of the questions or answers;
- The oath or affirmation;
- The conduct of the parties; and
- Errors of any kind that might be obviated, removed, or cured if promptly presented.

Legal Topics:

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

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23.51 Objections to Questioning Must Be Concise and Non-Argumentative.

Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner [*Fed R Civ P 30(d)(1)*].

If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose on the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result of the impediment, delay, or conduct [*Fed R Civ P 30(d)(2)*].

Cross References:

Discussion of discovery sanctions, see Ch. 25, Motions to Compel and Discovery Sanctions.

Discussion of raising objections and attorney conduct during depositions, see 7 *Moore's Federal Practice, § 30.43* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.52 Instructing Witness Not to Answer Is Permitted in Limited Cases.

23.52[1] Witness May Be Instructed Not to Answer Only in Certain Circumstances. A person may instruct a deponent not to answer only when necessary to [*Fed R Civ P 30(c)(2)*]:

- Preserve a privilege;
- Enforce a limitation directed by the court; or
- Present a motion to terminate or limit the examination [*see Fed R Civ P 30(d)(3)*].

Warning:

Instructing a witness not to answer without justification can result in a motion to compel and sanctions awarded against the party objecting to the questioning [*see Fed R Civ P 37(a)(4)(A)*; *but see ND Cal Civ LR 7-8*, *37-3* (separate sanctions motion required in Northern District)].

Cross Reference:

Discussion of instructing witness not to answer, see 7 *Moore's Federal Practice, § 30.43[2]* (Matthew Bender 3d ed.).

23.52[2] Question Beyond Scope Described in Notice to Deponent Entity Not Grounds for Instruction. When an entity has designated an individual to testify on its behalf, pursuant to *Fed R Civ P 30(b)(6)*, as to matters described in a notice of deposition, the scope of the questioning is not limited to the matters described in the notice. Counsel for the entity cannot instruct the individual testifying on behalf of the entity not to answer merely because a question is beyond that scope [*Detoy v. City & County of San Francisco (ND Cal 2000) 196 FRD 362, 366-367*].

Strategic Point--Party Objecting to Question Beyond Scope of Notice:

If desired, counsel may object and note on the record that the answers to questions beyond the scope of the designation are not intended as the answers of the entity and do not bind the entity [*Detoy v. City & County of San Francisco (ND Cal 2000) 196 FRD 362, 367*]. Counsel may also seek a protective order if the questioner pursues topics outside the scope of the notice [*Paparelli v. Prudential Ins. Co. (D Mass 1985) 108 FRD 727, 730*].

Legal Topics:

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

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23.53 Party or Deponent May Move for Protective Order During Deposition.

23.53[1] Party or Deponent May Demand That Deposition Be Suspended to Seek Order. At any time during a deposition, a party or the deponent may move for a protective order in the court in which the action is pending or the court in the district where the deposition is being taken [*Fed R Civ P 30(d)(3)(A)*].

On demand of the objecting party or deponent, the deposition must be suspended for the time necessary to make a motion for an order [*Fed R Civ P 30(d)(3)(A)*].

Strategic Point:

Inquire at the Rule 16 conference if the court is willing to take "on the spot" telephone calls to resolve such issues.

Cross Reference:

Form of notice of motion for protective order during deposition in progress, see *§ 23.293*.

23.53[2] Grounds for Order. The moving party must show that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party [*Fed R Civ P 30(d)(3)(A)*].

A party seeking to limit discovery must make a strong showing for limitation, and a particular and specific need for the protective order [*Methode Elecs., Inc. v. Finisar Corp. (ND Cal 2001) 205 FRD 552, 554*].

23.53[3] Court May Terminate Deposition or Limit Examination. On consideration of the motion for protective order, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition [*Fed R Civ P 30(d)(3)(B)*; *see Fed R Civ P 26(c)*].

23.53[4] Terminated Deposition May Be Resumed Only on Court Order. If the court's order terminates the examination, the examination may be resumed only on the order of the court in which the action is pending [*Fed R Civ P 30(d)(3)(B)*].

23.53[5] Court May Award Expenses. The court may make an award of expenses to the prevailing party incurred in relation to the motion for a protective order in accordance with *Fed R Civ P 37(a)(5)* [*Fed R Civ P 30(d)(3)(C)*; *but see ND Cal Civ LR 7-8*, *37-3* (separate sanctions motion required in Northern District)].

Example--Award Against Moving Party:

Plaintiff was not justified in adjourning a deposition and seeking protective order to bar one of defendants' attorneys from deposition because of inappropriate comment he made about the deponent, plaintiff's designee. Plaintiff had obtained that remedy voluntarily when the attorney offered to remove himself from the deposition to allow other defense counsel to go forward. Motion for a protective order was denied and monetary sanction was awarded against plaintiff [Federal Deposit Ins. Corp. v. Fidelity & Deposit Co. (SD Cal 2000) 2000 US Dist LEXIS 11955, at *13-*14].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective Orders

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23.54 Party May Move for Award of Expenses When Noticing Party Fails to Attend Deposition.

If the noticing party fails to attend and proceed with the deposition, the other parties and attorneys attending pursuant to the notice may, on motion, recover the reasonable expenses incurred in attending, including reasonable attorney's fees [*see Fed R Civ P 30(g)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.55 Party May Move for Award of Expenses When Witness Does Not Attend Because of Noticing Party's Failure to Serve Subpoena.

If a party noticing the deposition of a nonparty witness fails to serve a subpoena on the witness and the witness because of that failure does not attend, the other parties and attorneys attending pursuant to the notice may, on motion, recover the reasonable expenses incurred in attending, including reasonable attorney's fees [*Fed R Civ P 30(g)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconduct

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
III. ORAL DEPOSITIONS
F. Compelling Attendance, Testimony, or Production at Deposition

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.56

23.56 CHECKLIST: Compelling Attendance, Testimony, or Production.

☐ Determine appropriate remedy if deponent fails to provide discovery in accordance with notice of deposition:

○ If party deponent fails to appear for properly noticed deposition, file motion for sanctions.

Authority:
Fed R Civ P 37(d)

Discussion:
See *§ 23.57*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*

○ If nonparty deponent fails to appear for deposition after being properly subpoenaed, initiate contempt proceeding.

Authority:
Fed R Civ P 45(e)

Discussion:
See *§ 23.58*

○ If deponent fails to answer question during deposition or answers evasively, move to compel answer.

Authority:
Fed R Civ P 37(a)(3)(B), (4)

Discussion:
See *§ 23.59*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*; Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.03*

○ If deponent that is a corporation or other entity fails to designate an individual to testify on its behalf, move to compel designation.

Authority:
Fed R Civ P 37(a)(3)(B)(iii)

Discussion:
See *§ 23.59*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*; Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.03*

☐ Determine appropriate remedy if deponent fails to answer after being directed to do so by court:

○ If nonparty deponent fails to comply with order to answer, initiate contempt proceeding.

Authority:
Fed R Civ P 37(b)(1), 45(e)

Discussion:
See *§ 23.58*

○ If party deponent fails to comply with order to answer, move for imposition of discovery sanctions and/or punishment for contempt.

Authority:
Fed R Civ P 37(b)(1), (2)

Discussion:
See *§ 23.57*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation and Motion, see *§ 22.14*; Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconductCivil

ProcedureDiscoveryMotions to CompelCivil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsContemptGeneral Overview

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23.57 Motion for Sanctions Available When Party Deponent Fails to Appear.

A proper notice of deposition is sufficient to require a deponent who is a party, or party representative, to appear and testify [*see Fed R Civ P 30(a)*]. The attendance of a party or party representative need not be compelled by subpoena [*see Fed R Civ P 30(a)*].

If a party deponent fails to appear for a properly noticed deposition, the court may, on motion, award sanctions against the party failing to appear without a prior court order compelling the appearance [*see Fed R Civ P 37(d)(1)(A)(i)*].

Example:

Sanctions were properly awarded against a party who failed to appear by repeatedly canceling the appearance at the last minute [*Henry v. Gill Indus., Inc. (9th Cir 1993) 983 F2d 943, 947*].

Distinguish--Deponent Appears, but Refuses to Answer Questions:

If a deponent appears, but refuses to testify or to answer particular questions, or answers evasively, the remedy is a motion to compel the answer [*Estrada v. Rowland (9th Cir 1995) 69 F3d 405, 406* ; *see Fed R Civ P 37(a)*].

Cross References:

Discussion of motion to compel an answer, see *§ 23.59* and Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.03 -25.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconduct

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23.58 Failure of Nonparty Deponent to Comply With Subpoena Is Contempt.

A nonparty deponent must be subpoenaed to compel his or her appearance at a deposition [*see Fed R Civ P 30(a), 45*]. If a nonparty deponent fails to appear after being subpoenaed, the remedy for failure to comply with the subpoena is contempt [*Fed R Civ P 45(e)*].

Distinguish--Deponent Appears, but Refuses to Answer Questions:

If a nonparty deponent appears, but refuses to testify or to answer particular questions, or answers evasively, the remedy is a motion to compel the answer [*see Fed R Civ P 37(a)*].

Cross References:

Discussion of the use of subpoenas to obtain discovery from nonparties, see *§§ 23.259 -23.285*.
Discussion of contempt sanction for failure to respond to subpoena, see *§ 23.285*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconductCivil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsContemptGeneral Overview

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23.59 Party May Move to Compel Deponent to Answer Question or Produce Materials.

A party may move to compel if a deponent, either party or nonparty, fails to answer a question or answers evasively [*Fed R Civ P 37(a)(3)(B)*, *Fed R Civ P 37(a)(4)*]. The proponent of the question may complete or adjourn the examination before applying for the order compelling an answer [*Fed R Civ P 37(a)(3)(C)*].

A party may also move to compel a designation if a corporation or other entity fails to designate an individual to testify on its behalf under *Fed R Civ P 30(b)(6)* [*Fed R Civ P 37(a)(3)(B)(ii)*].

A nonparty deponent who fails to answer after being directed to do so by the court is subject to punishment for contempt [*Fed R Civ P 37(b)(1)*, *45(e)*].

A party deponent who fails to comply with an order to answer is subject to additional discovery sanctions as well as punishment for contempt [*see Fed R Civ P 37(b)*].

Cross References:

Discussion of discovery motions see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.34*. Discussion of motions to compel, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.03 -25.12*. Discussion of the imposition of sanctions, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.28 -25.42*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to Compel

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G. Obtaining Copies of and Reviewing Transcript

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23.60 CHECKLIST: Obtaining Copies of and Reviewing Transcript.

23.60[1] Deponent's Checklist.

☐ Review transcript when notified by deposition officer that it is available.

Prerequisite:
The deponent or a party must request review before the completion of the deposition.

Timing:
The deponent has 30 days after being notified by the deposition officer that the transcript or recording is available in which to review the transcript or recording.

Authority:
Fed R Civ P 30(e)

Discussion:
See *§§ 23.61[1], [2]*

☐ Make changes and sign statement:

- ○ Reciting any changes in form or substance; and
- ○ Giving the reasons for making the changes.

Authority:
Fed R Civ P 30(e)

Discussion:
See *§ 23.61[3]*

23.60[2] Noticing Party's Checklist.

☐ Store deposition received from deposition officer to protect it against loss, destruction, tampering, or deterioration, in accordance with local requirements, if any.

Authority:
Fed R Civ P 30(f)(1); *ED Cal Civ LR 250.1(b)*; *CD Cal Civ LR 32-2*

Discussion:
See *§§ 23.62[5]*, *[6]*

☐ Do not file deposition until used in proceeding or court orders filing.

Authority:
Fed R Civ P 5(d); *ED Cal Civ LR 250.1(a)*; *CD Cal Civ LR 32-1*

Discussion:
See *§ 23.65*

☐ If deposition is to be used in proceeding or court orders filing, give notice of filing to all other parties.

Authority:
Fed R Civ P 30(f)(4)

Discussion:
See *§ 23.65[1]*

23.60[3] Opposing Party's Checklist.

☐ Obtain copy of transcript or other recording of deposition from deposition officer on payment of reasonable charge.

Authority:
Fed R Civ P 30(f)(3)

Discussion:
See *§ 23.64[1]*

☐ File motion to suppress all or part of deposition if objecting to errors or irregularities in manner in which:

- ○ Testimony is transcribed; or
- ○ Deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or

otherwise dealt with by deposition officer.

Timing:

Errors and irregularities are waived unless motion to suppress is made with reasonable promptness after defect is, or with due diligence might have been, ascertained.

Authority:

Fed R Civ P 32(d)(4)

Discussion:

See *§ 23.66*

Standard Procedure Checklist:

Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.61 Deponent May Request Review of Transcript.

23.61[1] Review Must Be Requested Before Completion of Deposition. The deponent may review and make changes to the transcript of a deposition only if the deponent or a party has requested that review before completion of the deposition [*Fed R Civ P 30(e)(1)*].

23.61[2] Deponent Has 30 Days to Review Transcript. If requested by the deponent or a party before completion of the deposition, the deponent has 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording [*Fed R Civ P 30(e)(1)(A)*]. The 30-day correction period begins on notification of availability, not possession of the transcript of the recording by the deponent [*see Hambleton Bros. Lumber Co. v. Balkin Enters. (9th Cir 2005) 397 F3d 1217, 1224*].

23.61[3] Deponent Must Provide Statement of Changes and Reasons for Changes. The deponent must sign a statement reciting any changes in form or substance and giving the reasons for making the changes [*Fed R Civ P 30(e)(1)(B)*]. While corrections may be made in form or substance, changes must be corrective and not contradictory [*Hambleton Bros. Lumber Co. v. Balkin Enters. (9th Cir 2005) 397 F3d 1217, 1225-1226*].

Example:

Changes should not be offered solely to create a material factual dispute in a tactical attempt to evade an unfavorable summary judgment. Changes offered for this purpose will be evaluated under the "sham" affidavit rule [*Hambleton Bros. Lumber Co. v. Balkin Enters. (9th Cir 2005) 397 F3d 1217, 1225-1226*].

Warning:

Only the deponent himself or herself, not deponent's counsel, can change the deponent's testimony [*see* Adams v. Allied Sec. Holdings (CD Cal 2006) 236 FRD 651, 652].

Cross Reference:

Discussion of review of transcript by deponent, see 7 *Moore's Federal Practice, § 30.60* (Matthew Bender 3d ed.).

23.61[4] Deposition Officer Must Indicate Review Was Requested and Append Changes. The deposition officer must indicate in the certificate accompanying the deposition whether any review was requested [*Fed R Civ P 30(e)(2)*]. If review was requested, the officer must append any changes made by the deponent during the 30-day review period [*Fed R Civ P 30(e)(2)*].

23.61[5] Failure to Follow Procedure May Lead to Striking of Changes. If the procedural dictates of *Fed R Civ P 30(e)* are not followed, the district court may exercise its discretion to strike any changes [*see, e.g., Hambleton Bros. Lumber Co. v. Balkin Enters. (9th Cir 2005) 397 F3d 1217, 1226* ; Adams v. Allied Sec. Holdings (CD Cal 2006) 236 FRD 651, 652].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.62 Certification and Delivery of Deposition Must Comply With Federal and Local Rules.

23.62[1] Officer Must Prepare Certificate to Accompany Deposition. The deposition officer must certify that [*Fed R Civ P 30(f)(1)*]:

- The witness was duly sworn by the officer; and
- The deposition is a true record of the testimony given by the witness.

The certificate must be in writing and accompany the record of the deposition [*Fed R Civ P 30(f)(1)*].

23.62[2] LOCAL PRACTICE: ND Cal Requirements--Pages of a Deposition Must Be Numbered Sequentially. In the Northern District, the pages of a deposition of a single witness, even if taken at different times, must be numbered sequentially [*ND Cal Civ LR 30-2(a)*].

23.62[3] Items Produced During Examination Must Be Annexed to Deposition on Request. Documents and things produced for inspection during the examination of a witness must, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party [*Fed R Civ P 30(f)(2)(A)*].

Exception:
If the person producing the materials desires to retain them, the person may [*Fed R Civ P 30(f)(2)(A)*]:

- Offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals; or
- Offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed

to the deposition.

Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case [*Fed R Civ P 30(f)(2)(B)*].

23.62[4] Officer Must Deliver Deposition to Attorney Who Arranged for Transcript or Recording. Unless otherwise ordered by the court, the officer must [*Fed R Civ P 30(f)(1)*]:

- Securely seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]"; and
- Promptly send the deposition to the attorney who arranged for the transcript or recording.

23.62[5] Attorney Must Store Deposition. The attorney to whom the deposition is sent must store it under conditions that will protect it against loss, destruction, tampering, or deterioration [*Fed R Civ P 30(f)(1)*].

23.62[6] LOCAL PRACTICE: Requirements for Delivery and Storage of Transcript.

23.62[6][a] LOCAL PRACTICE: CD Cal Requirements. The Central District has the following local requirements concerning the custody of the original deposition transcript [*CD Cal Civ LR 32-2*]:

- The original transcript of a deposition must, unless otherwise stipulated to on the record at the deposition, after signing and correction, or waiver of the same [*see Fed R Civ P 30(e)*], be sent to the attorney noticing the deposition.
- The attorney must keep the original deposition under his or her control until final disposition of the case or until called upon to lodge the original deposition with the court pursuant to *CD Cal Civ LR 32-1*.
- A copy of a deposition signed and certified as required in *Fed R Civ P 30(e)*, *(f)* may be used in lieu of an original.

Cross Reference:

Discussion of Central District requirements for lodging deposition with court pursuant to *CD Cal Civ LR 32-1*, see *§ 23.71[4]*.

23.62[6][b] LOCAL PRACTICE: ED Cal Requirements. The Eastern District has the following local requirements [*ED Cal Civ LR 250.1(b)*]:

- Counsel noticing a deposition must obtain the original deposition transcript or audio or videotape record from the deposition reporter [*see Fed R Civ P 30(f)*].
- Counsel must retain the transcript or recording under conditions suitable to protect it from loss, destruction, or tampering until the earlier of:
  - The date it is filed with the clerk in accordance with *ED Cal Civ LR 250.1(a)* and *ED Cal Gen LR 133(j)*; or
  - One year after the judgment has become final or other final disposition of the action.

- Before that date, for good cause, any party or intervenor may move the court for an order prohibiting the destruction of a transcript or record or otherwise directing the custody and maintenance of the transcript or record.

Cross Reference:

Discussion of Eastern District requirements for filing depositions under *ED Cal Civ LR 250.1(a)*, see *§ 23.65[2][b]*.

23.62[6][c] LOCAL PRACTICE: ND Cal Requirements. The Northern District has no specific local requirements concerning the delivery and storage of deposition transcripts.

23.62[6][d] LOCAL PRACTICE: SD Cal Requirements. The Southern District has no specific local requirements concerning the delivery and storage of deposition transcripts.

Legal Topics:

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23.63 Deposition Officer Retains Stenographic Notes or Copy of Recording.

Unless otherwise ordered by the court or agreed by the parties, the deposition officer must retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method [*Fed R Civ P 30(f)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.64 Persons Who May Obtain Copy of Transcript or Recording.

23.64[1] Any Party or Deponent May Obtain Copy From Deposition Officer. The deposition officer must furnish a copy of the transcript or other recording of the deposition to any party or to the deponent, on payment of reasonable charges by the person requesting the copy [*Fed R Civ P 30(f)(3)*].

23.64[2] Nonparty May Obtain Copy If Filed Without Protective Order. If a deposition is filed with the court, a nonparty may obtain a copy unless the deposition was filed subject to a protective order preventing public disclosure [*see Fed R Civ P 26(c)(1)(F)* (order for sealing deposition)].

Cross Reference:

Discussion of filing depositions with the court, see *§ 23.65*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.65 Deposition Is Not Filed With Court.

23.65[1] Discovery Documents Generally Are Not Filed Until Used. Discovery requests and responses, including depositions, generally are not filed with the court until they are used in the proceeding or the court orders filing [*Fed R Civ P 5(d)(1)*].

When a deposition is filed with the court, the party taking the deposition must give prompt notice of its filing to all other parties [*Fed R Civ P 30(f)(4)*].

23.65[2] LOCAL PRACTICE: Filing of Depositions.

23.65[2][a] LOCAL PRACTICE: CD Cal Requirements. In the Central District, depositions are not filed unless, at a trial or motion, the court orders a lodged deposition to be filed, or directs a party to prepare extracts from a deposition to be filed [*CD Cal Civ LR 32-1*].

Cross Reference:

Discussion of Central District requirements for preparation of depositions lodged with the court, see *§ 23.71[4]*.

23.65[2][b] LOCAL PRACTICE: ED Cal Requirements. In the Eastern District, depositions and their related subpoenas, notices, proofs of service, and other documents must not be filed with the clerk until there is a proceeding in which the document or proof of service is at issue [*ED Cal Civ LR 250.1(a)*]:

Depositions are not to be filed through the Case Management/Electronic Case Files (CM/ECF) docketing and filing system. Before or on the filing of a document making reference to a deposition, the attorney must ensure that a courtesy hard copy of the original of the entire deposition so relied on has been submitted to the clerk for use in chambers. Alternatively, an electronic copy in lieu of the courtesy paper copy may be submitted by e-mail to the judge or magistrate judge and concurrently e-mailed, or otherwise transmitted, to all other parties. Neither the hard copy nor electronic copy of the entire deposition will become part of the official record absent a court order. Parts of the

deposition intended to become part of the record must be submitted as exhibits in support of a motion or otherwise [*ED Cal Gen LR 133(j)*; *see ED Cal Civ LR 250.1(a)*].

23.65[2][c] LOCAL PRACTICE: ND Cal Requirements. The local rules for the Northern District do not include specific provisions concerning the filing of depositions.

23.65[2][d] LOCAL PRACTICE: SD Cal Requirements. The local rules for the Southern District do not include specific provisions concerning the filing of depositions.

Legal Topics:

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23.66 Motion to Suppress Must Be Made Promptly or Errors and Irregularities in Preparation of Deposition Are Waived.

Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under *Fed R Civ P 30* are waived unless a motion to suppress the deposition or some part of it is made with reasonable promptness after the defect is, or with due diligence might have been, ascertained [*Fed R Civ P 32(d)(4)*].

Example:

Party who did not move to suppress deposition, listed in pretrial order as exhibit opposing party intended to use, waived any objection to use based on deponent's failure to sign deposition [*In re Ashley (9th Cir 1990) 903 F2d 599, 603*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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H. Using or Preventing Use of Deposition

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23.67 CHECKLIST: Using or Preventing the Use of a Deposition.

23.67[1] Checklist for Party Intending to Use Deposition.

☐ Determine parts of deposition to be used at trial, in accordance with the Federal Rules of Evidence, for any of the following purposes:

○ Impeachment of deponent as a witness.

Authority:
Fed R Civ P 32(a)(2)

Discussion:
See *§ 23.69[1]*

○ Against adverse party for any purpose.

Authority:
Fed R Civ P 32(a)(3)

Discussion:
See *§ 23.69[2]*

○ Upon court finding that witness is unavailable.

Authority:
Fed R Civ P 32(a)(4)

Discussion:
See *§ 23.69[3]*

☐ If the deposition is in nonstenographic form, arrange for transcript of portions to be offered.

Authority:
Fed R Civ P 32(c)

Discussion:
See *§ 23.71[1]*

☐ Comply with local requirements for marking of transcript and lodging or filing deposition with court.

Authority:
CD Cal Civ LR 32-1; *SD Cal Civ LR 30.1(b)*

Discussion:
See *§§ 23.71[2], [4]*

☐ Provide nonstenographic form of deposition, if available, if requested by party in jury case.

Authority:
Fed R Civ P 32(c)

Discussion:
See *§ 23.71[3]*

23.67[2] Checklist for Party Seeking to Prevent Use of Deposition.

☐ File motion to suppress all or part of deposition if objecting to errors or irregularities in manner in which:

○ Testimony is transcribed; or

○ Deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by deposition officer.

Timing:
Errors and irregularities are waived unless motion to suppress is made with reasonable promptness after defect is, or with due diligence might have been, ascertained.

Authority:
Fed R Civ P 32(d)(4)

Discussion:
See *§ 23.66*

Standard Procedure Checklist:

Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*

☐ File motion to suppress deposition that cannot be used against party because:

○ Deposition was taken before parties' initial discovery meeting without leave of court, and party was unable, through exercise of diligence, to obtain counsel to represent it at the taking of the deposition.

Authority:
Fed R Civ P 32(a)(5)(B)

Discussion:
See *§ 23.70[1]*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*

○ Party received less than 14 days' notice of deposition and filed motion for protective order. Deposition was held while motion for protective order was pending.

Authority:
Fed R Civ P 32(a)(5)(A)

Discussion:
See *§ 23.70[2]*

☐ Determine grounds for objection to use of deposition to be raised at trial or hearing:

○ Party did not have reasonable notice of deposition and was not present at taking of the deposition.

Authority:
Fed R Civ P 32(a)

Discussion:
See *§ 23.68*

○ Deposition or part of deposition to be offered is inadmissible.

Authority:
Fed R Civ P 32(a), (b)

Discussion:
See *§§ 23.68, 23.72*

○ Party offering part of deposition should be required to introduce other parts which in fairness ought to be considered.

Authority:
Fed R Civ P 32(a)(6)

Discussion:

See *§ 23.73*

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.68 Deposition May Be Used at Trial to Extent Admissible.

At the trial or at the hearing of a motion or an interlocutory proceeding, any part or all of a deposition may be used against any party [*Fed R Civ P 32(a)*]:

- Who was present or represented at the taking of the deposition; or
- Who had reasonable notice of the taking of the deposition.

Cross Reference:

Discussion of use of depositions at trial, see 7 Moore's Federal Practice, Ch. 32, Using Depositions in Court Proceedings (Matthew Bender 3d ed.).

A deposition may be used to the extent that it is admissible under the rules of evidence, applied as though the witness were then present and testifying, in accordance with the provisions of *Fed R Civ P 32(a)* [*Fed R Civ P 32(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
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23.69 Purposes for Which a Deposition May Be Used.

23.69[1] Any Party May Use Deposition for Impeachment of Deponent As a Witness. Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence [*Fed R Civ P 32(a)(2)*].

23.69[2] Adverse Party May Use Deposition of Party for Any Purpose. An adverse party may use for any purpose the deposition of a party or the deposition of anyone who at the time of taking the deposition was [*Fed R Civ P 32(a)(3)*]:

- An officer;
- A director;
- A managing agent; or
- A person designated under *Fed R Civ P 30(b)(6)* or *31(a)* to testify on behalf of a public or private corporation, partnership, association, or governmental agency that is a party.

23.69[3] Any Party May Use Deposition for Any Purpose When Witness Is Unavailable.

23.69[3][a] When Witness Is Dead. The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is dead [*Fed R Civ P 32(a)(4)(A)*].

23.69[3][b] When Witness Is More Than 100 Miles From Place of Trial. The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that [*Fed R Civ P 32(a)(4)(B)*]:

- The witness is at a greater distance than 100 miles from the place of trial or hearing; or

- The witness is out of the United States.

Exception:

The deposition may not be used if it appears that the absence of the witness was procured by the party offering the deposition [*Fed R Civ P 32(a)(4)(B)*].

23.69[3][c] When Witness Cannot Attend or Testify for Specific Reasons. The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is unable to attend or testify because of [*Fed R Civ P 32(a)(4)(C)*]:

- Age;
- Illness;
- Infirmity; or
- Imprisonment.

23.69[3][d] Party Has Been Unable to Procure Attendance of Witness by Subpoena. The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the party offering the deposition has been unable to procure the attendance of the witness by subpoena [*Fed R Civ P 32(a)(4)(D)*].

23.69[3][e] Exceptional Circumstances Exist. The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used [*Fed R Civ P 32(a)(4)(E)*].

23.69[4] Objections to Admissibility of Deposition. A variety of objections to the admissibility of a deposition may be made, including objections to (1) the deposition notice, (2) the qualifications of the officer, and (3) the method of taking the deposition [*Fed R Civ P 32(d)*]. All of these objections can have an impact on the purposes for which a deposition may be used.

Cross Reference:

Discussion of objections to admissibility of depositions, see *§§ 23.37*, *23.38*, *23.49*, *23.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureTrialsDepositionsEvidenceHearsayExceptionsFormer Testimony of Unavailable DeclarantsEvidenceHearsayUnavailabilityGeneral OverviewEvidenceTestimonyCredibilityImpeachmentPrior Inconsistent Statements

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23.70 Circumstances When Deposition May Not Be Used.

23.70[1] Against Party Who Was Unable to Obtain Counsel for Deposition Taken Early and Without Leave of Court. A deposition taken pursuant to a notice under *Fed R Civ P 30(a)(2)(A)(iii)*, before the parties' initial discovery meeting and without leave of court, may not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition [*Fed R Civ P 32(a)(5)(B)*].

23.70[2] Against Party Who Received Less Than 11 Days' Notice and Moved for Protective Order. A deposition may not be used against a party who received less than 14 days' notice of a deposition if [*Fed R Civ P 32(a)(5)(A)*]:

- On receiving the notice, the party filed a motion for a protective order under *Fed R Civ P 26(c)(1)(B)*, requesting that the deposition not be held or be held at a different time or place; and
- The motion for a protective order is pending at the time the deposition is held.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureTrialsDepositions

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23.71 Form of Presentation.

23.71[1] Party Must Provide Transcript. Except as otherwise directed by the court, a party offering deposition testimony pursuant to *Fed R Civ P 32* may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party must also provide the court with a transcript of the portions so offered [*Fed R Civ P 32(c)*].

23.71[2] LOCAL PRACTICE: SD Cal Requirements--Party Using Deposition Must Provide Extra Copy to Judge. In the Southern District, whenever a deposition or any part of a deposition is to be read in court, counsel using the deposition must furnish a copy to the judge, in addition to the original filed with the court [*SD Cal Civ LR 30.1(b)*].

Cross Reference:

Discussion of filing depositions, see *§ 23.65*.

23.71[3] On Request of Party in Jury Case, Nonstenographic Deposition Testimony Must Be Presented. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes must be presented in nonstenographic form, if available, unless the court for good cause orders otherwise [*Fed R Civ P 32(c)*].

23.71[4] LOCAL PRACTICE: CD Cal Requirements--Specific Requirements for Marking and Lodging Depositions With Court. In the Central District, depositions to be used at trial or on a motion must be prepared and lodged with the court in accordance with the following requirements [*CD Cal Civ LR 32-1*]:

- Deposition transcripts to be used at trial or on a motion must be marked as provided in *CD Cal Civ LR 16-2.7* (preparation of depositions prior to final pretrial conference).

- The requirement for marking depositions does not apply to depositions intended to be used at trial solely for impeachment.

- The original deposition must be lodged with the clerk on or before the first day of a trial or at least

10 days before a motion unless required to be filed under *CD Cal Civ LR 16-11* (filing of depositions when court orders waiver of local pretrial procedures).

- All original depositions not lodged must be brought to court for any trial by the attorney having custody of them.

- Any party may by notice require an original deposition to be lodged for a motion proceeding.

Warning:

If a party submits "deposition fragments" in support of a motion and fails to lodge the original deposition with the court as required by *CD Cal Civ LR 32-1*, the partial deposition transcripts will not be considered by the court in ruling on the motion [*see, e.g., United States v. Novelli (CD Cal 2005) 381 F Supp2d 1125, 1130*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureTrialsDepositions

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23.72 Objections May Be Made As to Admissibility As If Witness Were Present.

Subject to the provisions of *Fed R Civ P 28(b)* (admissibility of deposition taken in foreign country) and *Fed R Civ P 32(d)(3)* (objections as to taking of deposition), objection may be made at the trial or hearing to receiving in evidence any deposition or part of a deposition for any reason that would require the exclusion of the evidence if the witness were then present and testifying [*Fed R Civ P 32(b)*].

Cross References:

Discussion of admissibility of depositions taken in foreign countries, see *§ 23.45*. Discussion of objections to the taking of depositions, see *§§ 23.48 -23.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureTrialsDepositions

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23.73 Additional Parts of Deposition May Be Introduced to Be Considered With Part Previously Introduced.

If only part of a deposition is offered in evidence by a party [*Fed R Civ P 32(a)(6)*]:

- An adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced; and

- Any party may introduce any other parts

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureTrialsDepositionsEvidenceDocumentary EvidenceCompleteness

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23.74 Substitution of Parties Does Not Affect Right to Use Depositions.

Substitution of parties pursuant to *Fed R Civ P 25* does not affect the right to use depositions previously taken [*Fed R Civ P 32(a)(7)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureTrialsDepositions

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23.75 Depositions May Be Used in Subsequent Action.

When an action has been brought in any court of the United States or of any state and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken for the subsequent action [*Fed R Civ P 32(a)(8)*; *see Acme Printing Ink Co. v. Menard, Inc. (ED Wis 1992) 812 F Supp 1498, 1522-1523* (Rule 32 requires that prior and present lawsuits involve same subject matter and same parties or representatives or successors in interest)].

A deposition previously taken may also be used as permitted by the Federal Rules of Evidence [*Fed R Civ P 32(a)(8)*]. Evidence rules particularly relevant to depositions include:

- *Fed Rules Evid 613*, prior statements of witnesses.
- *Fed Rules Evid 801(d)*, statements that are not hearsay.
- *Fed Rules Evid 804(b)*, hearsay exceptions.
- *Fed Rules Evid 806*, attacking and supporting credibility of declarant.
- *Fed Rules Evid 1007*, testimony or written admission of a party.

It is not necessary that the prior action be dismissed before depositions taken for use in the prior action can be used in the subsequent action. Before amendment in 1980, Rule 32(a)(4) contained this requirement, but the advisory committee stated that the requirement "was doubtless an oversight," and courts have ignored it [*see Fed R Civ P 32*, Committee Note of 1980]. Whether to admit a deposition from a prior lawsuit is a decision left to the court's discretion. As the Ninth Circuit has observed, "Depositions can save the time, effort and money of litigants, and help expedite trials. Because the underlying objective is efficiency at trial without jeopardizing accurate fact finding, the district court is usually in the best position to decide whether a prior deposition should be admitted" [*Hub v. Sun Valley Co. (9th Cir 1982) 682 F2d 776, 777-778* (court of appeals affirmed district court decision that deposition in prior action was not

admissible because of lack of showing of similarity of issues)].

Testimony taken at a previous trial may be treated as the equivalent, at least, of a deposition [*see Castilleja v. Southern Pac. Co. (5th Cir 1971) 445 F2d 183, 186* (testimony of witness at former trial admitted on basis that under liberal application of *Fed R Civ P 43(a)* testimony from former trial should be considered equivalent of deposition)]. In any event, prior trial testimony is usable under the exceptions to the hearsay rule set forth in Article VII of the Federal Rules of Evidence. It seems clear that a deposition taken during the pendency of an action in the federal court, whether or not it was introduced in evidence at the first trial of the action, may be used at the retrial of the case [*Arrow-Hart, Inc. v. Philip Carey Co. (6th Cir 1977) 552 F2d 711, 713* (depositions of witnesses allowed at retrial)].

Cross Reference:

Discussion of depositions from other actions, see 7 *Moore's Federal Practice, § 32.63* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.76 CHECKLIST: Planning Depositions Upon Written Questions.

☐ Determine if deposition upon written questions is necessary or desirable under circumstances of case, such as:

- ○ Written deposition would be less expensive and/or burdensome.
- ○ Written deposition will be required for discovery in foreign country.
- ○ Identity of deponent must be kept confidential.

Authority:
Fed R Civ P 31

Discussion:
See *§§ 23.78 -23.80*

☐ Determine if advantages of deposition upon written questions are outweighed, under circumstances of case, by inherent limitations of the discovery method, including:

- ○ Lack of extensive or probing follow-up questioning.
- ○ Inability to observe demeanor of witness.

○ Potential coaching of witness by counsel prior to deposition.

Authority:
Mill-Run Tours, Inc. v. Khashoggi (SDNY 1989) 124 FRD 547, 549

Discussion:
See *§ 23.81*

☐ Determine who will be deposed by written questions:

○ Individuals.

○ Entity that will designate individual(s) to testify.

Authority:
Fed R Civ P 31(a)(1)

Discussion:
See *§§ 23.83[1] -[3]*

☐ If proposed deponent is opposing counsel, determine whether circumstances exist for deposition:

○ No other means exist to obtain the information than to depose opposing counsel;

○ The information sought is relevant and nonprivileged; and

○ The information is crucial to the preparation of the case.

Authority:
Shelton v. American Motors Corp. (8th Cir 1986) 805 F2d 1323, 1327

Discussion:
See *§ 23.83[4]*

☐ Determine whether leave of court is required to take deposition because deponent is incarcerated.

Authority:
Fed R Civ P 31(a)(2)(B)

Discussion:
See *§ 23.85[1]*

☐ Determine if opposing counsel will stipulate to allowing deposition when any of the following circumstances exist, which otherwise require leave of court:

○ Proposed deposition would result in more than 10 depositions by party seeking discovery;

○ Person to be examined has already been deposed in the case; or

○ Party seeking discovery wants to take deposition before parties have agreed to a discovery plan.

Authority:
Fed R Civ P 31(a)(2)(A)

Discussion:
See *§§ 23.85[2] -[4]*

☐ If leave of court is required, draft motion for leave, in accordance with standard motion procedure and local rule requirements, indicating that:

○ The discovery sought is not unreasonably cumulative or duplicative, or is not obtainable from some other source that is more convenient, less burdensome, or less expensive;

○ The party seeking discovery has not had ample opportunity by discovery in the action to obtain the information sought; or

○ The burden or expense of the proposed discovery does not outweigh its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Authority:
Fed R Civ P 26(b)(2), 31(a)(2)

Discussion:
See *§ 23.86*

Form:
See *§ 23.295*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*

☐ Consider videotaping or other nonstenographic method of recording deposition.

Authority:
Fed R Civ P 30(c), 31(b)

Discussion:
See *§ 23.77*

Legal Topics:

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

Civil ProcedureDiscoveryMethodsWritten Depositions

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23.77 Options and Strategy for Party Seeking Discovery.

The party seeking discovery should consider whether the information sought in a deposition upon written questions can be more effectively obtained through a different discovery device. In particular, if the deponent is a party, interrogatories may be a more efficient way of obtaining the same information. However, interrogatories may be propounded only on other parties, and the number of questions is limited [*Fed R Civ P 33(a)(1)*].

The cost-saving or other benefits of a deposition upon written questions should also be weighed against the inherent limitations of the discovery device. If it is important to evaluate the witness' demeanor and credibility, a deposition by oral examination may be more appropriate, particularly if an opposing party is likely to seek a protective order to require that discovery be taken by oral examination [*see Fed R Civ P 26(c)(3)*].

If proceeding with a deposition upon written questions, counsel may also consider having the questions and answers recorded by videotape or other nonstenographic method of recording.

Cross Reference:

Discussion of comparing written depositions with oral depositions and interrogatories, 7 Moore's Federal Practice, *§ 31.02* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsWritten Depositions

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23.78 Written Deposition May Be Cost-Effective Means to Obtain Discovery.

Depositions upon written questions are less expensive and burdensome than oral depositions because they require the presence of only the deposition officer and the deponent, and the questions to be propounded are submitted in advance. Depositions upon written questions may be particularly useful to:

- Obtain the testimony of nonparty witnesses without incurring travel expenses.
- Obtain the testimony of witnesses in a foreign country that does not permit oral depositions.
- Complete the examination of a witness whose oral deposition has been adjourned or ordered resumed.
- Obtain the testimony of a nonparty whose testimony is not controversial, and/or predictable, in light of the documentary record.
- Obtain the testimony of a custodian of records whose credibility is not at issue.
- Determine if a subsequent oral deposition of a particular witness is necessary.

  Warning:

  Counsel taking a written deposition of a witness may be precluded from taking an oral deposition of that witness [*see Fed R Civ P 30(a)(2)(A)(i), 31(a)(2)(A)(i)* (limits on number of oral and written depositions that may be taken)].

- Obtain specific information from large numbers of persons, such as members of a class.

Legal Topics:

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

Civil ProcedureDiscoveryMethodsWritten Depositions

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23.79 Written Deposition May Be Used for Discovery in Foreign Countries.

If discovery is sought in a foreign nation, the court may order the deposition to be taken by written instead of oral questions [*see, e.g., DBMS Consultants v. Computer Assocs. Int'l (D Mass 1990) 131 FRD 367, 370* (deposition on written questions to be taken in Australia); *but see United States v. $160,066.98 from Bank of Am. (SD Cal 2001) 202 FRD 624, 629-631* (court rejected request for written deposition in Pakistan)]. Prior to drafting a request for discovery, counsel should verify that the discovery and manner of discovery sought will be allowed under the laws of the foreign nation.

For State Department guidelines on foreign discovery, see U.S. State Dept. Circular, Obtaining Evidence Abroad, travel.state.gov/obtaining_evidence.html; U.S. State Dept. Circular, Preparation of Letters Rogatory, travel.state.gov/letters_rogatory.html

Cross Reference:

Discussion of taking depositions in foreign countries, see *§ 23.45*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsWritten DepositionsInternational LawDispute ResolutionEvidenceGeneral OverviewInternational LawDispute ResolutionEvidenceAssistanceInternational LawDispute ResolutionEvidenceHague Convention on Taking Evidence AbroadInternational LawDispute ResolutionEvidenceWitnesses

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23.80 Written Deposition May Allow Identity of Deponent to Be Kept Confidential.

The identity of the individual from whom discovery is obtained generally is disclosed. For example, answers to interrogatories must be signed by the person making them [*Fed R Civ P 33(b)(5)*], and the parties are entitled to be present and participate in the examination of the deponent in an oral deposition [*Fed R Civ P 30(c)*]. However, a deposition upon written questions can be used to obtain discovery from a deponent whose identity must be kept confidential [*Borzillieri v. American Nat'l Red Cross (WDNY 1991) 139 FRD 284, 288-289*].

Example--Deponent's Identity Kept Confidential:
A blood donor, whose identity was to be kept confidential in case involving the transmission of AIDS by blood transfusion, could be deposed anonymously by deposition upon written questions [*Borzillieri v. American Nat'l Red Cross (WDNY 1991) 139 FRD 284, 288-289*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.81 Written Depositions Have Inherent Limitations.

Although written depositions may be an appropriate method of discovery in certain situations, they are used far less frequently than oral depositions because of their inherent limitations. The particular disadvantages to posing written questions include [*see Mill-Run Tours, Inc. v. Khashoggi (SDNY 1989) 124 FRD 547, 549*]:

- The written question format does not permit extensive or probing follow-up questioning.
- The demeanor of the witness cannot be observed.
- All questions are served in advance, so the witness' answers may be coached by counsel prior to the deposition.

Example--Written Deposition Inadequate Under Circumstances:

Plaintiff demonstrated that a written deposition in Pakistan would be inadequate when: (1) the very existence of the deponent was in question, (2) plaintiff needed to secure a signature exemplar from the deponent in the presence of its expert witness, (3) counsel needed to evaluate the deponent's demeanor, and (4) the testimony to be elicited did not appear to lend itself to advance formulation of follow-up [*United States v. $160,066.98 from Bank of Am. (SD Cal 2001) 202 FRD 624, 629-631*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.82 Written Depositions Are Subject to Numeric and Timing Restrictions.

23.82[1] Depositions Cannot Be Taken Before Parties' Initial Meeting Except by Stipulation or Leave of Court. A stipulation or leave of court is required to take a deposition before the parties' initial meeting to develop a discovery plan [*Fed R Civ P 31(a)(2)(A)(iii)*; *see Fed R Civ P 26(d), (f)*].

Cross Reference:

Discussion of developing a discovery plan, see Ch. 21, Discovery Strategy and Planning, *§§ 21.03 -21.08*.

23.82[2] Number of Depositions Is Limited to 10 for Each Side. Unless the parties stipulate otherwise or the court grants leave to take additional depositions, only 10 depositions, whether oral or written, may be taken by the plaintiffs, or by the defendants, or by third-party defendants [*Fed R Civ P 31(a)(2)(A)(i)*].

Cross References:

Form of notice of motion for leave to take deposition, see *§ 23.295*.

Stipulations generally, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.03 -22.13*.

Strategic Point--Party Noticing Deposition of Entity:

If the party seeking discovery notices the deposition of an entity, the deposition counts as only one deposition against the 10-per-side limit, even though the entity may designate several witnesses to testify on its behalf [*see Fed R Civ P 30(b)(6)*].

Cross Reference:

Notice to entity and entity's designation of witnesses, see *§ 23.89[1][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.83 Persons or Entities May Be Deposed.

23.83[1] Any Person, Including Any Party, May Be Deposed. A party may take the testimony of any person, including a party, by deposition upon written questions [*Fed R Civ P 31(a)(1)*].

23.83[2] Corporations or Other Business Organizations May Be Deposed. A deposition upon written questions may be taken of a public or private corporation in accordance with the provisions of Rule 30(b)(6) [*Fed R Civ P 31(a)(4)*].

Cross Reference:

Who may testify on behalf of corporation, see *§ 23.22[2]*.

23.83[3] Associations or Agencies May Be Deposed. A deposition upon written questions may be taken of an association or a governmental agency in accordance with the provisions of Rule 30(b)(6) [*Fed R Civ P 31(a)(4)*].

23.83[4] Written Depositions May Be Used for Deposing Attorney. The rules do not prohibit taking the deposition of an opposing party's attorney [*American Cas. Co. v. Krieger (SD Cal 1995) 160 FRD 582, 585*]; however, this procedure is rare and the party seeking the deposition must show propriety and need [*Shelton v. American Motors Corp. (8th Cir 1986) 805 F2d 1323, 1327*]. Some courts have permitted deposition of opposing counsel by written questions [*see, e.g., Vargas v. Peltz (SD Fla 1995) 901 F Supp 1572, 1576*].

Cross Reference:

Counsel may be deposed as fact witness, see 7 *Moore's Federal Practice, § 31.03[2]* (Matthew Bender 3d ed.).

Legal Topics:

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

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23.84 Leave of Court Generally Is Not Required.

Leave of court generally is not required to take a deposition upon written questions [*Fed R Civ P 31(a)(1)*].

Legal Topics:

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

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A. Planning Depositions Upon Written Questions: Initial Considerations

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23.85 Circumstances When Leave of Court Is Required.

23.85[1] Leave Required When Deponent Is Incarcerated. A party must obtain leave of court when the person to be deposed is confined in prison [*Fed R Civ P 31(a)(2)(B)*].

Cross Reference:

Form of notice of motion to obtain leave of court, see *§ 23.295*.

23.85[2] Leave Required for More Than 10 Depositions. A party must obtain leave of court if, without the written stipulation of the parties, a proposed deposition would result in more than 10 depositions being taken by either side [*Fed R Civ P 31(a)(2)(A)(i)*].

Cross Reference:

Form of notice of motion to obtain leave of court, see *§ 23.295*.

23.85[3] Leave Required If Person Already Deposed. A party must obtain leave of court if, without the written stipulation of the parties, the person to be examined has already been deposed in the case [*Fed R Civ P 31(a)(2)(B)*].

Cross Reference:

Form of notice of motion to obtain leave of court, see *§ 23.295*.

23.85[4] Leave Required for Deposition Before Discovery Plan. A party must obtain leave of court if, without the written stipulation of the parties, the party seeks to take a deposition before the parties have agreed to a discovery plan [*Fed R Civ P 31(a)(2)(A)(iii)*; *see Fed R Civ P 26(d), (f)*].

Cross References:

Discussion of stipulations generally, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.03 -22.13*. Form of notice of motion to obtain leave of court, see *§ 23.295*.

Legal Topics:

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

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23.86 Court Will Limit Excessive or Unreasonable Discovery.

As with other forms of discovery, *Fed R Civ P 26(c)* applies to written depositions [*Fed R Civ P 31(a)(2)*]. Accordingly, discovery by written depositions will be limited if the court determines that [*Fed R Civ P 26(b)(2)*]:

- The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

- The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Cross Reference:

Discussion of limits on discovery, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryProtective Orders

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23.87 CHECKLIST: Giving Notice of Deposition Upon Written Questions.

☐ Determine time and place for deposition:

○ Time of deposition must be at least 33 days after service of notice, unless stipulation of parties or order of court provides otherwise, to allow time for service of cross, redirect, and recross questions.

Authority:
Fed R Civ P 31(a)(5)

Discussion:
See *§ 23.90[3]*

○ If request for production is served with notice of deposition, 30 days' notice is required.

Authority:
Fed R Civ P 34(b)(2)(A)

Discussion:
See *§ 23.90*

○ Deposition of nonparty must be within 100 miles of place where deponent resides, is employed, or regularly transacts business.

Authority:
Fed R Civ P 30(a)(1), 45(c)(3)(A)(ii)

Discussion:
See *§ 23.89[3]*

☐ Prepare notice of taking deposition upon written questions:

○ State name and address of deponent, if known, or state general description sufficient to identify person or particular class or group to which person belongs.

○ State name or descriptive title and address of deposition officer.

○ Specify time and place of deposition.

○ If entity is named as deponent, describe with reasonable particularity the matters on which examination is requested.

Authority:
Fed R Civ P 30(b)(6), 31(a)(4)

Discussion:
See *§ 23.89*

Form:
See *§ 23.294*

☐ Prepare questions to be propounded to deponent.

Authority:
Fed R Civ P 31(a)(3)

Discussion:
See *§ 23.90[1]*

☐ Serve notice and questions on all parties.

Authority:
Fed R Civ P 31(a)(3)

Discussion:
See *§ 23.90[2]*

☐ Serve party deponent with accompanying request for production of documents, electronically stored information, and things at the taking of the deposition, if appropriate.

Authority:

Fed R Civ P 34

Discussion:
See *§ 23.90*

☐ Serve nonparty deponent with subpoena to compel attendance and testimony, and, if desired, production.

Authority:
Fed R Civ P 31(a)(1)

Discussion:
See *§ 23.90[4]*

Legal Topics:

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

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23.88 Options and Strategy for Party Noticing Deposition.

A notice of deposition upon written questions must take into account the time required for the exchange of cross, redirect, and recross questions [*Fed R Civ P 31(a)(5)*]. If there is a need to obtain the discovery more quickly, the party noticing the deposition should consider a motion requesting the court to shorten the time for serving questions [*Fed R Civ P 31(a)(5)*].

If a request for production or subpoena will be served with the notice of deposition, the party giving notice should comply with the requirements for the request or subpoena to avoid any delay in the deposition [*see Fed R Civ P 34, 45*].

Cross References:

Form of notice of deposition upon written questions, see *§ 23.294*. Requirements for request for production, see *§§ 23.135 -23.156*. Requirements for subpoena, see *§§ 23.259 -23.285*. Moving to shorten time, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§ 22.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.89

23.89 Written Notice Is Required.

23.89[1] Identify Deponent.

23.89[1][a] State Name and Address of Deponent. A notice of deposition upon written questions must state the name and address of the person who is to answer the questions, if known [*Fed R Civ P 31(a)(3)*].

23.89[1][b] Describe Deponent If Name Not Known. If the name of the person who is to answer the questions is not known, the notice of deposition must contain a general description sufficient to identify the person or the particular class or group to which the person belongs [*Fed R Civ P 31(a)(3)*].

23.89[1][c] Notice May Name Entity As Deponent. A notice of deposition upon written questions may name a public or private corporation or a partnership or association or governmental agency as deponent in accordance with the provisions of *Fed R Civ P 30(b)(6)* [*Fed R Civ P 31(a)(4)*]. The entity is then required to designate one or more individuals to testify on its behalf [*see Fed R Civ P 30(b)(6)*].

Cross Reference:

Discussion of naming an entity as deponent under Rule 30, see *§ 23.30*.

23.89[2] Identify Deposition Officer. A notice of deposition upon written questions must state the name or descriptive title and address of the officer before whom the deposition is to be taken [*Fed R Civ P 31(a)(3)*].

23.89[3] State Time and Place of Deposition. Although not explicitly required by *Fed R Civ P 31*, the notice of deposition upon written questions should state the time and place of the deposition. Alternatively, the notice may state that the time and place will be determined by the deposition officer.

Warning--Location of Deposition of Nonparty:

The attendance of a nonparty deponent at a written deposition may be compelled by subpoena [*Fed R Civ P 31(a)(1)*]. The location of the deposition is therefore limited by the court's subpoena power. The

deposition must take place within 100 miles of the place where the nonparty deponent resides, is employed, or regularly transacts business in person [*see Fed R Civ P 45(c)(3)(A)(ii)*].

Cross Reference:

Use of subpoena to compel attendance, see *§§ 23.259 -23.285*.

Legal Topics:

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

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23.90 Notice Must Be Served on Parties.

23.90[1] Serve Questions With Notice. The party desiring to take a deposition upon written questions must serve the questions along with the notice of deposition [*Fed R Civ P 31(a)(3)*].

23.90[2] Serve Notice and Questions on All Parties. The notice of deposition and written questions must be served on every other party to the action [*Fed R Civ P 31(a)(3)*].

23.90[3] Serve 33 Days Before Date of Deposition. Rule 31 does not state a specific time for service of the notice of deposition. However, the notice of deposition and written questions should normally be served at least 33 days before the date of the deposition, unless a stipulation by the parties or an order of the court provides otherwise, to allow the required time for service of cross, redirect, and recross questions [*see Fed R Civ P 31(a)(5)*].

Timing:

Although Rule 31(a)(5) does not mandate a specific period, a 28-day period can be calculated from the specified 14 days to serve cross questions, seven days to serve redirect questions, and seven days to serve recross questions [*Fed R Civ P 31(a)(5)*]. However, if any of these is served by mail, the time to serve recross questions would be greater than 28 days. Further, each party has five additional days after applicable questions are served to object to form. Thus, the recommended time is at least 33 days.

Warning--Notice of Deposition Accompanied by Request for Production:

If the notice of deposition upon written questions of a party deponent is accompanied by a request for production of documents at the deposition, 30 days notice is required [*see Fed R Civ P 34(b)*].

Cross References:

Discussion of service of cross, redirect, and recross questions, see *§§ 23.98 -23.102*. Discussion of the requirements for a request for production, see *§§ 23.135 -23.156*.

23.90[4] Serve Nonparty Deponent With Subpoena to Compel Attendance and/or Production. A notice of deposition is sufficient to compel the attendance and testimony of a party deponent [*see Fed R Civ P 37(d)*].

A subpoena is required to compel attendance and testimony or production of documents by a nonparty deponent [*Fed R Civ P 31(a)(1)*; *see Fed R Civ P 45(a)*].

Cross References:

Procedure for issuance and service of a subpoena, see *23.259 -23.285*. Compelling attendance at deposition, see *§§ 23.56 -23.59*.

23.90[5] Do Not File Notice. The notice of deposition is not filed with the court [*see Fed R Civ P 5(d)(1)* (discovery requests not filed until used or filing ordered by court)].

Legal Topics:

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

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23.91 CHECKLIST: Responding to Notice of Deposition Upon Written Questions.

☐ Review notice of deposition upon written questions and accompanying documents to determine basis, if any, for opposing discovery or method of discovery:

○ Objection to errors or irregularities in notice.

Authority:
Fed R Civ P 32(d)(1)

Discussion:
See *§ 23.93*

○ Objection to qualifications of deposition officer, if known.

Authority:
Fed R Civ P 32(d)(2)

Discussion:
See *§ 23.94*

○ Objection to form of written question(s).

Authority:
Fed R Civ P 32(d)(3)(C)

Discussion:
See *§ 23.95*

○ Grounds for motion for protective order based on discovery sought or manner in which deposition will be conducted.

Authority:
Fed R Civ P 26(c)

Discussion:
See *§ 23.97*

☐ Serve written objections on party giving notice of deposition.

Authority:
Fed R Civ P 32(d)

Discussion:
See *§§ 23.93 -23.95*

Form:
See *§ 23.296*

☐ Prepare and file motion for protective order, if appropriate, in accordance with standard motion procedure, to preclude or limit discovery or to require that discovery be taken by method other than deposition upon written questions.

Grounds:

- Annoyance;
- Embarrassment;
- Oppression; or
- Undue burden or expense.

Prerequisite:
The party seeking a protective order must certify that he or she has in good faith conferred or attempted to confer with other affected parties to resolve the dispute without court action.

Authority:
Fed R Civ P 26(c)

Discussion:
See *§ 23.97*

Form:
See *§ 23.297* (notice of motion for protective order that discovery be taken by other means)

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*

☐ If notice names an entity as deponent, provide party giving notice with designation of one or more individuals who will testify on entity's behalf and the matters on which each person will testify.

Authority:
Fed R Civ P 30(b)(6)

Discussion:
See *§ 23.96*

Legal Topics:

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

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23.92 Options and Strategy for Opposing Party or Deponent.

A party or deponent served with a notice of deposition upon written questions may object to the deposition because of:

- The noticing party's failure to comply with the requirements for notice [*Fed R Civ P 32(d)(1)*; *see 23.93*];
- Objections to the qualifications of a deposition officer identified in the notice [*Fed R Civ P 32(d)(2)*; *see 23.94*];
- Objections to the form of written questions [*Fed R Civ P 32(d)(3)(C)*; *see 23.95*]; or
- Objections to the substance of the discovery sought or the manner in which the discovery will be conducted [*Fed R Civ P 26(c)*; *see 23.97*].

Serving the noticing party with objections will preserve objections that would otherwise be waived, but will not prevent the deposition from going forward. The party or deponent opposing discovery should consider whether a motion for a protective order is required to prevent or limit the deposition or to required that the discovery be taken by another means [*Fed R Civ P 26(c)*; *see 23.97*].

If the party served with a notice of deposition upon written questions has no objections, the party should consider whether to serve cross questions to be propounded to the deponent [*Fed R Civ P 31(a)(5)*; *see 23.99*].

If the deponent served with a notice of deposition upon written questions is an entity, the deponent should designate an individual or individuals to testify on its behalf [*Fed R Civ P 30(b)(6)*, *31(a)(3)*; *see 23.96*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.93 Objections to Errors or Irregularities in Notice of Deposition Must Be Promptly Served on Party Giving Notice.

All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served on the party giving notice [*Fed R Civ P 32(d)(1)*].

Cross Reference:

Form of objections, see *§ 23.296*.

Legal Topics:

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

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23.94 Objections to Deposition Officer Must Be Made Promptly to Avoid Waiver.

Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made [*Fed R Civ P 32(d)(2)*]:

- Before the taking of the deposition begins; or
- As soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

Cross References:

Qualifications of deposition officer, see *§ 23.43*. Form of objections, see *§ 23.296*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.95 Objections to Form Must Be Timely Served in Writing.

Objections to the form of written questions are waived unless served in writing on the party propounding them [*Fed R Civ P 32(d)(3)(C)*]:

- Within the time allowed for serving the succeeding cross or other questions; and
- Within five days after service of the last questions authorized.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.96 Entity Named As Deponent Must Designate Individual to Testify.

If the notice of deposition names a public or private corporation or a partnership or association or governmental agency as deponent [*see Fed R Civ P 31(a)(4)*], the entity must designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf [*Fed R Civ P 30(b)(6)*].

Cross Reference:

Discussion of deponent entity's designation of individual to testify, see *§ 23.30*.

Legal Topics:

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

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23.97 Party or Deponent May Move for Protective Order.

23.97[1] Court May Preclude or Limit Discovery on Showing of Good Cause. On motion by a party or by the deponent, the court in which the action is pending or alternatively, the court in the district where the deposition is to be taken, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense [*Fed R Civ P 26(c)*]. The moving party must show good cause for the order [*Fed R Civ P 26(c)*].

Cross Reference:

Discussion of motions for protective orders, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.35 -22.66*.

23.97[2] Court May Order That Discovery Be Taken by Another Method. If a party or the deponent opposes the taking of a deposition upon written questions, instead of by another method, the party or deponent may move for a protective order requiring that discovery be taken by oral examination or another method [*see Fed R Civ P 26(c)(3)*].

Cross Reference:

Form of notice of motion for protective order that discovery be taken by other means, see *§ 23.297*.

23.97[3] Good-Faith Attempt to Resolve Is Required. A motion for a protective order must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action [*Fed R Civ P 26(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryProtective Orders

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IV. WRITTEN DEPOSITIONS
D. Propounding Cross, Redirect, and Recross Questions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.98

23.98 CHECKLIST: Propounding Cross, Redirect, and Recross Questions.

☐ If served with notice of deposition and written questions:

- ○ Draft cross questions.
- ○ Serve cross questions on all other parties.

Timing:

Cross questions must be served within 14 days after the notice of deposition and written questions are served, unless court, on motion, shortens or enlarges time.

Authority:
Fed R Civ P 31(a)(5)

Discussion:
See *§§ 23.99*, *23.102*

☐ If served with cross questions to be propounded to deponent:

- ○ Draft redirect questions, if any, to be propounded to deponent.
- ○ Serve redirect questions on all other parties.

Timing:

Redirect questions must be served within seven days after the cross questions are served, unless court, on motion, shortens or enlarges time.

Authority:

Fed R Civ P 31(a)(5)

Discussion:

See *§§ 23.100*, *23.102*

☐ If served with redirect questions to be propounded to deponent:

○ Draft recross questions, if any, to be propounded to deponent.

○ Serve recross questions on all other parties.

Timing:

Recross questions must be served within seven days after the redirect questions are served, unless court, on motion, shortens or enlarges time.

Authority:

Fed R Civ P 31(a)(5)

Discussion:

See *§§ 23.101*, *23.102*

Legal Topics:

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

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23.99 Parties May Serve Cross Questions Within 14 Days of Notice.

Within 14 days after the notice and written questions are served, a party may serve cross questions on all other parties [*Fed R Civ P 31(a)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.100 Noticing Party May Serve Redirect Questions Within Seven Days of Cross Questions.

Within seven days after being served with cross questions, a party may serve redirect questions on all other parties [*Fed R Civ P 31(a)(5)*].

Legal Topics:

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.101

23.101 Party May Serve Recross Questions Within Seven Days of Redirect Questions.

Within seven days after being served with redirect questions, a party may serve recross questions on all other parties [*Fed R Civ P 31(a)(5)*].

Legal Topics:

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

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23.102 Court May Enlarge or Shorten Time for Serving Questions.

The court may, for cause shown, enlarge or shorten the time for serving cross, redirect, and recross questions [*Fed R Civ P 31(a)(5)*].

Cross Reference:

Discussion of motions to shorten or enlarge time during discovery, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§ 22.25*.

Legal Topics:

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

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IV. WRITTEN DEPOSITIONS
E. Procedure for Taking Deposition Upon Written Questions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.103

23.103 CHECKLIST: Procedure for Taking Deposition Upon Written Questions.

23.103[1] Noticing Party's Checklist.

☐ Deliver notice of deposition and all questions to deposition officer.

Authority:
Fed R Civ P 31(b)

Discussion:
See *§ 23.104*

☐ Store deposition received from deposition officer to protect it against loss, destruction, tampering, or deterioration, in accordance with local requirements, if any.

Authority:
Fed R Civ P 30(f)(1), *31(b)*; *ED Cal Civ LR 250.1(b)*; *CD Cal Civ LR 32-2*

Discussion:
See *§§ 23.62[5]*, *[6]*

☐ Do not file deposition with court or clerk until used in proceeding or court orders filing.

Authority:
Fed R Civ P 5(d); *ED Cal Civ LR 250.1(a)*; *CD Cal Civ LR 32-1*

Discussion:
See *§ 23.108*

☐ If deposition is to be used in proceeding or court orders filing, give notice of filing to all other parties.

Authority:
Fed R Civ P 31(c)

Discussion:
See *§ 23.108*

23.103[2] Deponent's Checklist.

☐ Review transcript when notified by deposition officer that it is available.

Prerequisite:
The deponent or a party must request review before the completion of the deposition.

Timing:
The deponent has 30 days after being notified by the deposition officer that the transcript or recording is available in which to review the transcript or recording.

Authority:
Fed R Civ P 30(e), 31(b)

Discussion:
See *§ 23.106*

☐ Sign statement:

○ Reciting any changes in form or substance; and

○ Giving the reasons for making the changes.

Authority:
Fed R Civ P 30(e), 31(b)

Discussion:
See *§ 23.61[3]*

23.103[3] Opposing Party's Checklist.

☐ Obtain copy of transcript or other recording of deposition from deposition officer upon payment of charge.

Authority:
Fed R Civ P 30(f)(3), 31(b)

Discussion:

See *§ 23.64*

☐ File motion to suppress all or part of deposition if objecting to errors or irregularities in manner in which:

○ Testimony is transcribed; or

○ Deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by deposition officer.

Timing:

Errors and irregularities are waived unless motion to suppress is made with reasonable promptness after defect is, or with due diligence might have been, ascertained.

Authority:

Fed R Civ P 32(d)(4)

Discussion:

See *§ 23.109*

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
IV. WRITTEN DEPOSITIONS
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.104

23.104 Noticing Party Must Deliver Notice and Questions Served to Deposition Officer.

The party taking the deposition upon written questions must deliver a copy of the notice and copies of all questions served to the deposition officer designated in the notice [*Fed R Civ P 31(b)*].

Legal Topics:

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

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23.105 Deposition Officer Must Take Testimony of Deponent.

The deposition officer must promptly, in the manner provided for oral depositions [*see Fed R Civ P 30(c)*], take the testimony of the witness in response to the questions [*Fed R Civ P 31(b)*].

Cross Reference:

Discussion of procedure for taking testimony, see *§ 23.46*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.106 Deponent May Request Review of Completed Deposition.

The deponent may review and make changes to the transcript of a deposition upon written questions if the deponent or a party has requested that review before completion of the deposition [*Fed R Civ P 30(e), 31(b)*].

Cross Reference:

Discussion of procedure for deponent's review of and changes to deposition transcript, see *§ 23.61*.

Legal Topics:

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

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23.107 Officer Must Certify and Deliver Deposition.

The officer must promptly, in the manner provided for oral depositions [*see Fed R Civ P 30(e), (f)*], prepare, certify, and file or mail the deposition, attaching to it the copy of the notice and the questions received by the officer [*Fed R Civ P 31(b)*].

Cross Reference:

Discussion of procedure for certification and delivery of deposition transcript, see *§ 23.62*.

Legal Topics:

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

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23.108 Deposition Is Not Filed With Court.

Discovery requests and responses, including depositions, generally are not filed with the court until they are used in the proceeding or the court orders filing [*Fed R Civ P 5(d)(1)*].

When a deposition upon written questions is filed with the court, the party taking the deposition must give prompt notice of its filing to all other parties [*Fed R Civ P 31(c)*].

Cross Reference:

Local rules concerning the filing of depositions with the court, see *§ 23.65[2]*.

Legal Topics:

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

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.109

23.109 Noticing Attorney Must Safely Store Deposition Transcript.

The attorney who noticed the deposition must store the deposition transcript to protect it against loss, destruction, tampering, or deterioration [*Fed R Civ P 30(f)(1), 31(b)*].

Cross References:

Storage of deposition transcript, including local rule requirements, see *§§ 23.62[5], [6].*

Legal Topics:

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

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.110

23.110 Motion to Suppress Must Be Made Promptly or Errors Are Waived.

Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under *Fed R Civ P 30* and *31* are waived, unless a motion to suppress the deposition or some part of it is made promptly after the defect is known or with reasonable diligence could have been known [*Fed R Civ P 32(d)(4)*].

Example:

Party who did not move to suppress deposition, listed in pretrial order as exhibit opposing party intended to use, waived any objection to use based on deponent's failure to sign deposition [*In re Ashley (9th Cir 1990) 903 F2d 599, 603*].

Legal Topics:

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

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V. INTERROGATORIES
A. Propounding Interrogatories

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23.111 CHECKLIST: Propounding Interrogatories.

23.111[1] Making Preliminary Determinations Regarding Interrogatories.

☐ Determine when to serve interrogatories:

○ Serve interrogatories any time after parties have conferred for discovery purposes, as required by Rule 26(f).

○ If interrogatories need to be served before Rule 26(f) conference, either:

☐ Obtain written stipulation from other parties.

☐ Obtain court order.

○ In all cases, serve interrogatories early enough before discovery cutoff date set by court to allow responding party 30-day response period.

Authority:
Fed R Civ P 26(d), 33(a), (b)(2)

Discussion:
See *§ 23.117*

☐ Review other types of discovery and evaluate the use of interrogatories as part of overall discovery plan.

Authority:
Fed R Civ P 26-36

Discussion:
Ch. 21, Discovery Strategy and Planning, see *§§ 21.03 -21.08*

☐ Weigh impact of mandatory disclosures.

Authority:
Fed R Civ P 26(a)

Discussion:
Ch. 15, Rule 26(f) Conference and Initial Disclosures, see *§§ 15.15 -15.26*

☐ Consider the following issues:

- ○ Usefulness: Is interrogatory precisely calculated to elicit information useful to propounding party?
- ○ Clarity: Language should be clear and precise.
  - ☐ Consider including separate list of definitions at beginning of set of interrogatories.
  - ☐ Consider including separate instructions at beginning of set of interrogatories.
- ○ Breadth: Is interrogatory appropriate in its scope?
- ○ Burden on responding party: Is interrogatory defensible as to its scope and degree of burden in context of motion to compel under Rule 37?
- ○ Avoid objections: Review list of possible grounds for objection [*see 23.130[1]*] and frame interrogatories to minimize potential for objection.

☐ Make use of both types of interrogatories as appropriate:

- ○ Use identification interrogatories to ask for factual information.
- ○ Use contention interrogatories to inquire into opinions and contentions that relate to fact or the application of law to fact, to determine opposing party's theory of case.

Authority:
Fed R Civ P 33(a)(2), (c)

Discussion:
See *§§ 23.112[1] -[3]*

☐ Consider permissible subject matter of interrogatories:

○ Parties may seek matter relevant to claims and defenses of parties to action.

○ For good cause, court may order discovery of any matter relevant to subject matter of action. Any matter reasonably calculated to lead to discovery of admissible evidence is relevant.

○ Interrogatory may relate to party's contention.

○ Interrogatory may not seek legal conclusions or statements of law.

○ Interrogatory may not seek privileged matter.

Authority:
Fed R Civ P 26(a)(1), 33(c)

Discussion:
See *§ 23.114*

☐ Determine which parties to question by interrogatories:

○ Determine whether interrogatories are a useful discovery device in this situation; consider depositions or requests for admissions.

○ If responding party is public or private corporation or partnership or governmental agency, do not direct interrogatories to particular person.

Authority:
Fed R Civ P 33(a)

Discussion:
See *§ 23.118*

☐ Determine how many interrogatories you need to propound:

○ Do not exceed 25-interrogatory limit, counting all discrete subparts, without court permission or stipulation of other parties.

○ If more than 25 interrogatories are needed try to obtain written stipulation to additional interrogatories from responding party.

○ If other parties will not stipulate to additional interrogatories, move for court order to serve additional interrogatories. Check local rules.

Authority:
Fed R Civ P 29, *33(a)*; *ND Cal Civ LR 33-3*; *SD Cal Civ LR 33.1(a)*; *ED Cal Civ LR 251*

Discussion:
See *§ 23.115*

Forms:
See *§§ 23.299*, *23.300*

23.111[2] Drafting and Serving Interrogatories.

☐ Draft interrogatories clearly and narrowly:

- ○ Make sure subparts relate directly to subject matter of main interrogatory.
- ○ Number interrogatories sequentially, when required [*CD Cal Civ LR 33-1*].
- ○ Leave space for answer after interrogatory, when required [*ED Cal Civ LR 250.2(a)*].

Authority:
Fed R Civ P 33(a); *CD Cal Civ LR 33-1*; *ED Cal Civ LR 250.2(a)*

Discussion:
See *§§ 23.115[2]*; *23.116[3]*, *[4]*

Form:
See *§ 23.298*

☐ Sign interrogatories before serving on responding party:

- ○ Interrogatories must be signed by attorney for propounding party if propounding party is represented by counsel.
- ○ Interrogatories must be signed by propounding party if proceeding pro se.

Authority:
Fed R Civ P 26(g)(1)

Discussion:
See *§ 23.116[5]*

☐ Serve interrogatories:

- ○ On responding party.
- ○ On all other parties to action.

○ If responding party is business or other entity, serve on business or entity generally, and not on particular officer or employee.

Authority:
Fed R Civ P 5(a), 33(a)

Discussion:
See *§ 23.118*

☐ Do not file interrogatories or responses unless and until they are to be used in proceeding or court orders filing. Check local rules.

Authority:
Fed R Civ P 5(d); *ND Cal Civ LR 26-1*; *ED Cal Civ LR 250.2(c)*; *CD Cal Civ LR 33-3*

Discussion:
See *§ 23.119*

☐ Calendar response date.

Authority:
Fed R Civ P 33(b)

Discussion:
See *§ 23.127*

☐ If respondent fails to serve timely answers, or answers are incomplete, consider motion to compel.

○ Check local rules for meet and confer requirements.

Authority:
Fed R Civ P 37(a)

Discussion:
Ch. 25, Motions to Compel and Discovery Sanctions, see *§§ 25.03 -25.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.112

23.112 Options and Strategies for Propounding Party.

23.112[1] Use Identification Interrogatories to Gather Specific Types of Information. Use identification interrogatories, asking for factual information, at the beginning of the case to [*see Fed R Civ P 26(b)(1)*]:

- Obtain identifying and general background information about the responding party.

  Consider:
  Often this information may be publicly available or contained in documents, so it might not be useful to seek it by interrogatory.

- Identify and locate witnesses for deposition and to develop deposition questions.

  Strategic Point--Propounding Party:

  Asking for the identity of all people with knowledge on a particular subject can also be a means of precluding witnesses from testifying on that subject at trial, if the responding party did not name those witnesses in response to the interrogatory.

- Obtain factual detail pertaining to an opposing party's allegations and defenses. If the opposing party fails to list responsive information, it may be precluded at trial from seeking to admit or argue that evidence. Conversely, if a party responds with specific responsive information, the propounding party can seek to admit the response as evidence at trial.

- Identify relevant documents for document requests.

  Strategic Point--Propounding Party:

By asking for the identification of all documents pertaining to a specific subject matter, the propounding party may be in a position later to prevent the responding party from using responsive documents that the responding party failed to identify.

- Identify conversations or other communications concerning specified subjects, especially if these communications were not memorialized in any documents.

Timing:

Identification interrogatories may be propounded at any stage of the discovery period and may be divided into separate sets at separate times so long as the overall limit on the number of permitted interrogatories is not exceeded. Identification interrogatories may be particularly useful at the outset of the case to obtain basic factual information regarding claims and defenses. A number should be kept in reserve to propound for follow-up information arising out of depositions and document production.

23.112[2] Use Contention Interrogatories to Inquire Into Opinion or Contention. Contention interrogatories are used to inquire into an opinion or contention that relates to fact or the application of law to fact, including asking a party to [*see Fed R Civ P 33(a)(2)*]:

- State what it contends or whether it is making a certain contention.
- State the facts underlying a contention.
- Articulate the legal or theoretical reason for a contention.

Contention interrogatories can help to pin the opposing party to particular positions and thus narrow the areas of dispute, and to obtain admissions for summary judgment motions and trial.

Timing:

Contention interrogatories generally should be propounded at or near the close of discovery, when the responding party better understands the disputed issues. Otherwise, the propounding party is likely to be met with the objection that the interrogatory is premature and that discovery is continuing. Nevertheless, contention interrogatories may be useful early in the case to understand what evidence the opposing party has and what theories it is pursuing. Parties might include a reservation in answers to early contention interrogatories that their factual investigation and discovery are incomplete. Thus, in most cases one cannot rely on an opponent's early answers to contention interrogatories. Responding parties, however, have a duty to supplement the answers later, and changes in a party's answers can create opportunities to exploit at trial a party's inconsistent statements.

Cross Reference:

Discussion of use of contention interrogatories, see *§ 23.114[3]*. Identification interrogatories may be propounded at any stage of the discovery period and may be divided into separate sets at separate times so long as the overall limit on the number of permitted interrogatories is not exceeded. Identification interrogatories may be particularly useful at the outset of the case to obtain basic factual information regarding claims and defenses. A number should be kept in reserve to propound for follow-up information arising out of depositions and document production.

23.112[3] Consider Advantages of Using Interrogatories. Advantages of using interrogatories compared to other discovery methods can include the following:

- Interrogatories are more convenient than depositions.

- Interrogatories are less expensive than depositions.

- Interrogatories may be carefully crafted over time and can anticipate and attempt to avoid objections.

- Interrogatories require a party to provide all information available to that party, compared to deposition questions, which only require the deponent to provide information of which he or she has knowledge.

- The responding party has an obligation to supplement interrogatory answers if it later learns that the initial answers were incomplete or incorrect, which is not the case for deposition answers [*see Fed R Civ P 30(e)* (deponent has 30 days after notification that transcript is available to make changes or corrections)].

Cross Reference:

Discussion of purposes of interrogatories, see 7 *Moore's Federal Practice, § 33.03* (Matthew Bender 3d ed.).

23.112[4] Consider Disadvantages of Using Interrogatories. Disadvantages of using interrogatories compared to other discovery methods can include the following:

- Interrogatories are limited to parties only, in contrast to depositions, which may be used to obtain discovery from nonparties [*see Fed R Civ P 30(a)(1), 31(a)(1), 33(a)*].

- Interrogatories are often prone to prompt and extensive boilerplate objections that may require burdensome motion practice to overcome.

- Interrogatories do not provide subjective information, such as the demeanor of the responding party, in contrast to depositions, where the witness is present.

- Interrogatory responses are the product of the opposing attorney, normally carefully crafted to minimize usefulness.

- Interrogatories do not allow for follow up questions as do depositions upon oral examination, which permit the attorney to ask follow-up questions based on the answers to previous questions or to repeat questions if the party being deposed attempts to evade answering or gives incomplete answers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.113

23.113 Review Mandatory Disclosure Requirements.

Except in categories of exempt cases, or to the extent otherwise stipulated or directed by court order, parties must share certain specific types of information at specific pretrial stages *without* a discovery request:

- **Preliminary disclosures:** Parties must disclose basic information regarding individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses; documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses; claims and calculations of damages; and insurance coverage [*see Fed R Civ P 26(a)(1)*].

- **Expert witness disclosures:** Information about and from retained expert witnesses is to be shared later into the pretrial period [*see Fed R Civ P 26(a)(2)*].

- **Pretrial disclosures:** Information about evidence that the parties contemplate using at trial is to be shared near the end of the pretrial period [*see Fed R Civ P 26(a)(3)*].

Cross References:

Scope of mandatory disclosure, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§§ 15.15 -15.26*.

See also 6 *Moore's Federal Practice, §§ 26.20 -26.28* (Matthew Bender 3d ed.).

Parties may use traditional discovery methods, including interrogatories, to obtain further information regarding any matters subject to mandatory disclosure [*Fed R Civ P 26*, Committee Note of 2007].

Consider:

Mandatory disclosure obligations under Rule 26 have lessened the need for identification interrogatories regarding basic information on claims and defenses. Accordingly, interrogatories may be more useful to follow up on specific factual information on a "surgical" basis and to lock in on adversary's contentions

towards the conclusion of the discovery period.

On the other hand, a party usually discloses information that it thinks is required to be disclosed given its perspective and theory of the case. Interrogatories are still useful to obtain information that might not be relevant from the producing party's perspective, but which the propounding party considers highly relevant. Also, mandatory disclosures do not provide the mechanism for obtaining admissions that can be used as evidence in summary judgment motions and at trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral Overview

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.114

23.114 Subject Matter of Interrogatories.

23.114[1] Interrogatories May Inquire About Relevant Matters. Interrogatories may inquire about any matters, not privileged, relating to any claim or defense, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and locations of persons having knowledge of any discoverable matter [*Fed R Civ P 26(b)(1), 33(c)*].

23.114[2] Interrogatories Must Be Reasonably Calculated to Lead to Discovery of Admissible Evidence. To survive objection, interrogatories need not necessarily seek admissible evidence, but they must be reasonably calculated to lead to the discovery of admissible evidence [*Fed R Civ P 26(b)(1)*; *see, e.g., Kowalski v. Stewart (D Ariz 2004) 220 FRD 599, 600-601*]. Accordingly, interrogatories are not limited to matters that may be admitted in evidence, and discovery is not controlled by rules of evidence [*see Sherman Park Cmty. Ass'n Co. v. Wauwatosa Realty (ED Wis 1980) 486 F Supp 838, 845* (in class action for discriminatory real estate practices, interrogatories permitted even though they requested information about geographical areas outside of area at issue and events before dates at issue)].

Cross References:

Discovery leading to admissible evidence, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§§ 24.03 -24.11*.

Limitations on scope of interrogatories, see 7 Moore's Federal Practice, *§ 33.62*. (Matthew Bender 3d ed.).

23.114[3] Interrogatory May Relate to Party's Contention.

23.114[3][a] Contention Interrogatories Are Not Automatically Objectionable. An interrogatory is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact [*Fed R Civ P 33(a)(2)*]. In fact, the general view is that contention interrogatories are a perfectly permissible form of discovery, to which a response is required. Furthermore, contention interrogatories are considered in the same manner as any other interrogatory, placing the burden on the party opposing discovery rather

than shifting the burden to the proponent of contention interrogatories [*see Cable & Computer Tech., Inc. v. Lockheed Sanders Inc. (CD Cal 1997) 175 FRD 646, 652*].

Contention interrogatories may not simply track the allegations in the opposing party's pleadings, paragraph by paragraph, asking for all facts in support of the party's contentions in each paragraph. These types of contention interrogatories have been found to be a serious form of discovery abuse because they can be used to impose great burdens on the opposing party, and almost always are counterproductive [*In re Convergent Techs. Sec. Litig. (ND Cal 1985) 108 FRD 328, 337*].

Thus, contention interrogatories must be specific, intelligible, and narrowly tailored for the case. The propriety of a contention interrogatory is judged in terms of its scope and the overall context of the case at the time it is asked [*see Roberts v. Heim (ND Cal 1989) 130 FRD 424, 427* ; *see, e.g., Mancini v. Ins. Corp. (SD Cal 2009) 2009 US Dist LEXIS 51321, at *9* (court modified each interrogatory to seek "material or principal facts" instead of "all facts")].

Cross Reference:

Discussion of contention interrogatories, see 7 *Moore's Federal Practice, § 33.78* (Matthew Bender 3d ed.).

23.114[3][b] Court May Postpone Response. Although contention interrogatories are not objectionable, the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time [*Fed R Civ P 33(a)(2)*].

Nevertheless, even early in the proceedings, the respondent will be required to provide information available at that time. Then the respondent may later amend the answer with leave of court or supplement it, as it has an obligation to do under *Fed R Civ P 26(e)* [*see Cable & Computer Tech., Inc. v. Lockheed Sanders, Inc. (CD Cal 1997) 175 FRD 646, 652*].

23.114[4] Interrogatories Seeking Legal Conclusions Are Impermissible. Interrogatories may not pose questions when the answers would involve a statement of pure law [*Fed R Civ P 33(c)*, Committee Note of 1970].

Interrogatories involving pure law are those that call for "legal issues unrelated to the facts of the case" [*Fed R Civ P 33(b)*, Committee Note of 1970].

Cross Reference:

Discussion of interrogatories seeking legal conclusions, see 7 *Moore's Federal Practice, § 33.79* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.115

23.115 Number of Interrogatories Is Limited.

23.115[1] Twenty-Five Interrogatories Allowed. Rule 33 limits the number of interrogatories that may be served by one party on another to 25, including all discrete subparts [*Fed R Civ P 33(a)(1)*]. By order, the court may alter the limits on the number of interrogatories [*Fed R Civ P 26(b)(2)*]. For cases involving multiple parties, the propounding party may serve up to 25 interrogatories on each party.

Unless otherwise ordered for good cause shown, every interrogatory served that causes the responding party to undertake the burden of preparing and serving objections is counted against the 25-interrogatory limit. Thus, for example, interrogatories objected to, but not answered, count against the limit [*Walker v. Lakewood Condo. Owners Ass'n (CD Cal 1999) 186 FRD 584, 587*].

Warning:

The propounding party may not circumvent the numerical limit by unilaterally "withdrawing" interrogatories after the responding party has prepared and served a written response. Nor may the propounding party "sidestep" the numerical limit by characterizing subsequently served supernumerary interrogatories as a "revised set of interrogatories" [*Walker v. Lakewood Condo. Owners Ass'n (CD Cal 1999) 186 FRD 584, 588*].

Strategic Point--Propounding Party:

Because the number of interrogatories permitted is restricted [*see Fed R Civ P 33(a)*], interrogatories should be carefully drafted to request only information not readily available from other sources. For example, parties are required by rule to disclose, without awaiting a discovery request, names of witnesses, copies or descriptions of documents, electronically stored information, and tangible things supporting claims or defenses, computations of damages, and insurance agreements [*see Fed R Civ P 26(a)(1)*], and detailed information concerning experts who may be used at trial to present evidence [*see*

Fed R Civ P 26(a)(2)]. Interrogatories should not be wasted in seeking information that will otherwise automatically be disclosed.

Cross Reference:

Discussion of number of interrogatories, see 7 *Moore's Federal Practice, § 33.30* (Matthew Bender 3d ed.).

23.115[2] Avoid Subparts. The limit on the number of interrogatories a party may serve includes "all discrete subparts" [*Fed R Civ P 33(a)(1)*]. In other words, a party cannot avoid the numerical limits by asking questions about distinct subjects, but numbering the questions as subparts [*Collaboration Props. v. Polycom, Inc. (ND Cal 2004) 224 FRD 473, 475* (quoting **Moore's**)]. Conversely, subparts need not be separately numbered to count as multiple interrogatories. [*Fed R Civ P 33(a)*, Committee Note of 1993].

The best test of whether subsequent questions, within a single interrogatory, are subsumed and related, is to examine whether the first question is primary and subsequent questions are secondary to the primary question. Or, can the subsequent question stand alone? Is it independent of the first question? Genuine subparts should not be counted as separate interrogatories. However, discrete or separate questions should be counted as separate interrogatories, notwithstanding they are joined by a conjunctive word and may be related [*Kendall v. GES Exposition Servs. (D Nev 1997) 174 FRD 684, 685-686*].

Example--Unnumbered Subparts May Count As Discrete Subparts:

Interrogatory asking responding party to state facts, identify witnesses, or identify documents supporting denial of each request for admission, pursuant to *Fed R Civ P 36*, contained in set of 50 requests for admissions should be construed as containing discrete subpart for each request for admission, unless request for admission contained same discrete subject [*see Safeco Ins. Co. of Am. v. Rawstron (CD Cal 1998) 181 FRD 441, 444*].

23.115[3] Obtain Court Permission or Stipulation to Exceed Limit. A party must secure a court order or a written stipulation from the responding party to exceed the 25-interrogatory limit [*Fed R Civ P 29*, *33(a)*].

Additionally, the court may grant leave to serve additional interrogatories:

- When it issues a scheduling order before trial [*Fed R Civ P 33(a)*, Committee Note of 1993; *see Fed R Civ P 16(b)*].

- At a pretrial conference [*see Fed R Civ P 26(a)*, Committee Note of 1983; *see also Fed R Civ P 16* (pretrial conference)].

Example:

The court found that Plaintiff demonstrated good cause for exceeding the numerical limit of interrogatories, when Plaintiff was placed at a disadvantage by defense counsel's failure to respond to Plaintiff's counsel's letter regarding the number of interrogatories. Noting that the use of additional interrogatories in lieu of depositions is a cost-effective method of conducting discovery, the court concluded that the number of interrogatories was reasonable and should not place an undue burden on the respondent to answer [Meadows v. Home Depot USA, Inc. (D Kan 2002) 2002 US Dist LEXIS 20058, at *9-*10].

Cross Reference:

Discussion of using stipulations for general discovery matters, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§ 22.11*.

Judge's Perspective:

In the majority of cases, the parties at the case management conference jointly agree to the 25-interrogatory limit. In more complex cases, stipulations providing for a larger limit is not uncommon. While practice varies from judge to judge, judges will generally approve requests for additional interrogatories beyond the set limit so long as the requesting party (1) seeks a manageable number above the limit, and (2) can articulate "good cause" why additional interrogatories are warranted as well as why the need for that extra set could not be anticipated at the time the limit was initially set. Generally, if additional interrogatories are extended to the requesting party, the adverse party will be provided with leave to submit additional interrogatories up to that extended limit.

23.115[4] LOCAL PRACTICE: ND Cal Requirements--Motion for Leave to Propound More Interrogatories Must State Proposed Interrogatories. In the Northern District, a motion for leave to propound more than 25 interrogatories must be accompanied by a memorandum that sets forth each proposed additional interrogatory and explains in detail why it is necessary to propound the additional questions [*ND Cal Civ LR 33-3*].

Warning:

A demand that a party set forth the basis for a denial of an admission requested under *Fed R Civ P 36* will be treated as a separate interrogatory and is allowable only to the extent that a party is entitled to propound additional interrogatories [*ND Cal Civ LR 33-2*].

23.115[5] LOCAL PRACTICE: ED Cal Requirements--Request Additional Interrogatories in Joint Status Report by Stipulation. Counsel may make the request for more interrogatories in the Joint Status Report and at the Status (Pretrial Scheduling) Conference [*see ED Cal Civ LR 250.2*; *see also ED Cal Civ LR 240* (pretrial conferences)].

Strategic Point:

Counsel should first try to resolve the need to propound additional interrogatories with opposing counsel through stipulation

23.115[6] LOCAL PRACTICE: SD Cal Requirements--Motion for Leave to Propound More Interrogatories Must State Proposed Interrogatories and Good Cause. In the Southern District, a motion for leave to propound more than 25 interrogatories must be accompanied by a memorandum that sets forth each proposed additional interrogatory and reasons establishing good cause for their use [*SD Cal Civ LR 33.1(a)*].

Warning:

Although the local rule mentions subparagraphs [*SD Cal Civ LR 33.1(a)* (subparagraphs must relate directly to subject matter of interrogatory)], the better practice is to avoid subparts entirely.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.116 Drafting Interrogatories.

23.116[1] Interrogatories Should Be Clear and Definite. Interrogatories must be definite, clear, narrowly tailored for the case, and adequately advise the interrogated party what information is being sought [*Roberts v. Heim (ND Cal 1989) 130 FRD 424, 427*].

Strategic Point--Propounding Party:

It is to the propounding party's advantage to craft precise and narrow interrogatories because an artlessly drafted question is unlikely to produce any useful information, and may be subject to objection on grounds that it is overly broad and ambiguous. When drafting interrogatories, counsel should consider all potential objections to the draft, and then revise the interrogatory accordingly. If the purpose of the interrogatory is to obtain a specific response to use as evidence, counsel should draft the interrogatory so that the responding party must give that response.

Definitions can sometimes make an interrogatory more precise. By defining a complicated term separately, the propounding party can avoid a long, difficult-to-understand interrogatory. However, the definition must be as precise as the interrogatory to avoid objections and non-responsive answers.

23.116[2] Large Amounts of Information Can Be Treated As Single Interrogatory. Parties cannot evade the presumptive 25-interrogatory limitation through the device of joining as "subparts" questions that seek information about discrete separate subjects; however, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication [*Fed R Civ P 33(a)*, Committee Note of 1993; *see, e.g.,* Multitechnology Servs., L.P. v. Verizon Southwest (ND Tex 2004) 2004 US Dist LEXIS 3744, at *3-*4 (although MTS' interrogatories include a spreadsheet of telephone numbers, each telephone number is not a discrete, separate subject or subpart for purposes of Rule 33(a))].

23.116[3] LOCAL PRACTICE: CD Cal Requirements--Number Interrogatories Sequentially. The Central District local rules require that interrogatories be numbered sequentially without repeating the numbers used on any prior set of interrogatories propounded by that party [*CD Cal Civ LR 33-1*].

23.116[4] LOCAL PRACTICE: ED Cal Requirements--Leave Space for Answer After Interrogatory. The propounding party must arrange the interrogatories so that after each separate question there is a blank space reasonably calculated to enable the answering party to insert the answer or objection [*ED Cal Civ LR 250.2(a)*].

23.116[5] Attorney's Signature Is Required. Interrogatories must be signed by the propounding party's attorney, or, if proceeding pro se, by the propounding party [*Fed R Civ P 26(g)(1)*].

Legal Topics:

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23.117 Interrogatories May Be Served After Rule 26(f) Conference.

23.117[1] Parties Must Meet and Confer. Except in categories of cases exempted from initial disclosure under *Fed R Civ P 26(a)(1)(B)*, or when authorized by court order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f) [*see Fed R Civ P 26(d)*, *(f)*].

Interrogatories can be served as determined by:

- Time limits prescribed by federal rules [*see Fed R Civ P 26*, *33*].
- Agreement of the parties [*see Fed R Civ P 26(f)*, *33(a)*].
- Order of the court [*see Fed R Civ P 33(a)*].

Cross Reference:

Discussion of the Rule 26(f) conference, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§§ 15.03 -15.14*.

23.117[2] Court May Postpone Answers to Contention Interrogatories. The court may order that a contention interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time [*Fed R Civ P 33(a)(2)*].

A party wishing to defer answering contention interrogatories until later in the proceeding should first attempt to resolve the problem by communicating with counsel for the propounding party. If the propounding party's counsel continues to insist on early answers, the responding party may then object or move for a protective order [*In re Convergent Techs. Sec. Litig. (ND Cal 1985) 108 FRD 328, 339* ; *see Fed R Civ P 37(a)(2)(B)* (meet and confer requirement)].

Cross Reference:

Discussion of contention interrogatories, see *§ 23.114[3]*.

23.117[3] Interrogatories May Be Served Before or After Other Types of Discovery. The methods of discovery may be used in any sequence, so that interrogatories may be served before or after other discovery devices have been used unless the court orders otherwise for the convenience of the parties and in the interests of justice [*Fed R Civ P 26(d)*].

The fact that a party is conducting a deposition or is in the midst of any other type of discovery does not operate to delay any other party's discovery [*Fed R Civ P 26(d)*].

23.117[4] Interrogatories Must Be Served 30 Days Before Discovery Deadline. When the court has established a discovery deadline, a party must serve interrogatories in sufficient time to permit the responding party the 30-day response time allowed under *Fed R Civ P 33* [*Northern Ind. Pub. Serv. Co. v. Colorado Westmoreland, Inc. (ND Ind 1986) 112 FRD 423, 424 , aff'd mem., 845 F2d 1024 (7th Cir 1988)*]. Accordingly, a party must serve its interrogatories at least 30 days before the discovery deadline [*see Smith v. Principal Cas. Ins. Co. (SD Miss 1990) 131 FRD 104, 105*].

Warning:

Serving discovery close to the discovery deadline means that there will be no time to serve follow-up discovery if the responses open new areas of inquiry.

23.117[5] Be Aware of Mandatory Disclosure Deadline. Rule 26(a) sets forth a schedule pursuant to which, absent court order or stipulation, specified information must be disclosed, contemplating that parties may use traditional discovery methods, including interrogatories, to obtain further information regarding these matters [*Fed R Civ P 26(a)*, Committee Note of 1993].

To the extent that a party attempts to anticipate mandatory disclosures by serving interrogatories seeking the same information prior to the time that the disclosures are due, whether pursuant to the Rule or court order, the interrogatories may be stricken as untimely [Basque Station, Inc. v. United States (D Idaho 1995) 1995 US Dist LEXIS 7085, at *6 n3 (plaintiff not entitled to defense expert information in response to interrogatory until such time as it is due under federal and local rule, nor is plaintiff entitled to defendant's witness list until it is due under *Fed R Civ P 26(a)(3)*)].

23.117[6] LOCAL PRACTICE: ND Cal Requirements--Untimely Discovery Requests Are Unenforceable. Interrogatories that call for responses after the discovery cutoff are not enforceable except by order of the court for good cause shown [*ND Cal Civ LR 26-2*].

Strategic Point:

The parties may stipulate to conduct some discovery after the formal cutoff date. Whether it is necessary to obtain court approval of such stipulations depends on the particular judge's practice and the pretrial order.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.118 Serve All Parties.

When interrogatories are served on one party, copies must be served on all other parties, even though responses are only sought from one party [*Fed R Civ P 5(a)*].

Parties to an action include any person or entity named in the summons and complaint, including public and private corporations, partnerships, associations, or governmental agencies [*see Fed R Civ P 33(a)*; *see also United States v. Kordel (1970) 397 US 1, 90 S Ct 763, 25 L Ed2d 1*].

If the party served is a public or private corporation or a partnership or governmental agency, an officer or agent answers the interrogatories on behalf of the entity [*see Fed R Civ P 33(a)*]. Thus, interrogatories may not be directed to a particular person within a corporation or business entity if that person is not a party; they must be directed to the corporation or business entity itself.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.119 Do Not File Interrogatories.

23.119[1] File Only When Used in Proceeding. Interrogatory requests and responses must not be filed until they are used in the proceeding or the court orders filing [*Fed R Civ P 5(d)(1)*].

23.119[2] LOCAL PRACTICE: CD Cal Requirements--Propounding Party Keeps Original of Interrogatories. The original of the interrogatories served on the opposing party must be kept by the attorney propounding the interrogatories pending use or further order of the court [*CD Cal Civ LR 33-3*].

23.119[3] LOCAL PRACTICE: ED Cal Requirements--File Only Relevant Portion of Interrogatories. Interrogatories, responses, and proofs of service must not be filed unless and until there is a proceeding in which the interrogatories or proof of service is at issue. When required in a proceeding, only that part of the set of interrogatories and answers that is in issue may be filed [*ED Cal Civ LR 250.2(c)*].

23.119[4] LOCAL PRACTICE: ND Cal Requirements--Propounding Party Is Custodian of Interrogatories and Responses. The party propounding interrogatories must retain the original of the discovery request and the original response. That party is the custodian of these materials [*ND Cal Civ LR 26-1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.120 Motion to Compel Is Available When Party Fails to Respond.

If opposing counsel fails to respond to an interrogatory, the propounding party may move for an order to compel discovery [*Fed R Civ P 37(a)(3)*].

For purposes of a motion to compel, an evasive or incomplete answer is treated as a failure to answer [*Fed R Civ P 37(a)(4)*].

Check local rules for meet and confer requirements for discovery disputes.

Cross References:

Discussion of motions to compel, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.03 -25.27*.

Detailed coverage of Rule 37, see 7 *Moore's Federal Practice, §§ 37.01 -37.23* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMotions to Compel

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23.121 CHECKLIST: Responding to Interrogatories.

23.121[1] Making Preliminary Determinations Concerning Answers.

☐ On receipt of interrogatories, take the following preliminary steps:

○ Calendar time for serving response: 30 days.

○ Determine whether additional time is needed to respond to interrogatories, and if so whether:

☐ Propounding party will stipulate to additional time.

☐ Court order for extending 30-day period for service of response is needed.

Authority:
Fed R Civ P 33(b)

Discussion:
See *§ 23.127*

○ Review interrogatories to get sense of information sought and possible objections.

○ Consider how responses to interrogatories can be used to further client's theory of case and other objectives.

○ Send copy of interrogatories to client with letter asking client to review them and contact counsel to discuss how

to proceed.

Timing:

Contact client shortly after receiving interrogatory, as it may take significant amount of time for client to collect responsive information.

- ○ If client is business or other entity, consider appointment of liaison to assist in gathering responsive information.
- ○ After client has reviewed interrogatories, discuss the following with client:
  - ☐ Which interrogatories, if any, are objectionable.
  - ☐ What information must be gathered to answer unobjectionable interrogatories.
  - ☐ How difficult it will be to obtain information, and attempt to devise strategy for minimizing burden while still complying with discovery rules.
- ○ Prepare rough draft of answers and review with client.
- ○ Have client collect additional information if answers are incomplete.
- ○ Consider specifying business records in lieu of answering questions.
- ☐ Consider options for responding to interrogatories:
  - ○ Answer interrogatories.
  - ○ Object to some or all interrogatories.
  - ○ Move for protective order.

Authority:
Fed R Civ P 26(c), 33(b)

Discussion:
See *§§ 23.129 -23.132*

- ☐ Consider grounds for objection:
  - ○ Argumentative or speculative.
  - ○ Available from another source.

- ○ Burden outweighs benefit.
- ○ Cumulative or duplicative.
- ○ Irrelevant information.
- ○ Legal conclusions.
- ○ Nonwitness experts.
- ○ Exceeds permitted number.
- ○ Other opportunities to obtain same information.
- ○ Overbroad.
- ○ Premature contention interrogatories.
- ○ Privilege.
- ○ Not related to discovery of admissible evidence.
- ○ Trade secrets.
- ○ Vague and ambiguous.
- ○ Work product protection.

Authority:
Fed R Civ P 26

Discussion:
See *§ 23.130[1]*

☐ Determine need for protective order, including extension of time to respond.

- ○ Grounds are:
  - ☐ Annoyance.
  - ☐ Embarrassment.

- ☐ Oppression.
- ☐ Undue burden or expense.

○ Check local rules for meet and confer requirements.

○ Decide what relief to request:

- ☐ Not answering interrogatories.
- ☐ Limiting number of interrogatories.
- ☐ Extending time to respond.
- ☐ Protecting of trade secrets and other confidential information.
- ☐ Sealing some or all responses.

Authority:
Fed R Civ P 26(c)

Discussion:
See *§ 23.132*

☐ Before objecting or requesting relief, contact opposing counsel in attempt to clarify or limit requests.

☐ Calendar supplementing and/or amending answers.

Authority:
Fed R Civ P 26(e)

Discussion:
See *§ 23.134*

23.121[2] Drafting and Serving Responses to Interrogatories.

☐ Prepare answers to interrogatories:

○ Precede each response with interrogatory, and number each response with same number as interrogatory.

○ Answer each interrogatory not objected to separately, fully, in writing, and under

oath.

○ State any objections; if terms are defined separately, consider objecting to definitions.

Authority:
Fed R Civ P 33(b)

Discussion:
See *§ 23.129*

☐ If desired, specify business records in lieu of answering certain interrogatories:

○ Use this method of response only if:

☐ Answer to interrogatory can be derived from business records.

☐ Burden of deriving answer from records is substantially same for propounding party as for responding party.

○ Specify records from which answer may be derived in sufficient detail to permit propounding party to locate and identify records.

○ Afford responding party reasonable opportunity to inspect records.

Authority:
Fed R Civ P 33(d)

Discussion:
See *§ 23.126*

☐ Obtain appropriate signatures:

○ Answers must be signed under oath by person making them.

○ Objections must be signed by attorney making them.

Authority:
Fed R Civ P 33(b)(5)

Discussion:
See *§§ 23.129[3], 23.131*

☐ Attach appropriate certification.

Authority:

Fed R Civ P 26(g)(1)

Discussion:
See *§ 23.123[5]*

☐ Serve interrogatory responses on propounding party's attorney, or, if party is unrepresented, on party, in timely manner.

Authority:
Fed R Civ P 5, *Fed R Civ P 33(b)(2)*

Discussion:
See *§ 23.119[3]*

Timing:
30 days after service of interrogatories unless shortened or extended.

☐ Serve copies of responses on all attorneys of parties or, if parties are unrepresented, on parties.

Authority:
Fed R Civ P 5(a), *(b)*

☐ Do not file interrogatory responses unless and until they are to be used in proceeding or court orders filing.

Authority:
Fed R Civ P 5(d); *ND Cal Civ LR 26-1*; *ED Cal Civ LR 250.2(c)*

Discussion:
See *§ 23.119*

Legal Topics:

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23.122 Options and Strategy for Responding Party.

When a parties receives a set of interrogatories, the party's options are [*see Fed R Civ P 33(b)(3), (5)*]:

- Answer the interrogatories in writing and under oath.
- Object to some or all of the interrogatories in writing and under oath.
- Move for a protective order.

A party does not have the option of simply ignoring one or more interrogatories [*Fed R Civ P 33(b)(3)*]. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer interrogatories.

Before objecting, counsel should contact opposing counsel to attempt to reach a written agreement to clarify or limit the request. If the overture is rejected, the responding party should note that in the interrogatory response.

Judge's Perspective:

There is a disturbing tendency to overdo boilerplate objections, essentially including every conceivable objection that might apply to any interrogatory. In addition, in some instances parties will object virtually to every word or phrase used. This approach should be avoided. Only applicable objections should be invoked and they should be tailored to the specific interrogatories at issue. The "blunderbuss" approach to objections can negatively impact the party's credibility with the court and detract from the force of reasonable objections.

Cross Reference:

Motion to compel, see Ch. 25, Motions to Compel and Discovery Sanctions.

The answers to interrogatories are admissions of a party and are otherwise admissible at trial to the extent permitted by the rules of evidence [*see Fed R Civ P 33(c)*].

Strategic Point--Responding Party:

Counsel should consider how to use the responses to present the client's case and to emphasize facts beneficial to the client. If the interrogatories call for information that is not helpful to the client, consider how to present the information in the least harmful way. Draft the answers so that they do not provide "sound bites" for the opposing party to use in a summary judgment motion or at trial.

Legal Topics:

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23.123 Who May Respond.

23.123[1] Interrogatories Directed to Individual Must Be Answered, Signed, and Verified by That Person. Interrogatories directed to an individual party must be answered in writing under oath and signed by that party [*Fed R Civ P 33(b)(5)*].

23.123[2] Interrogatories Directed to Organization Must Be Answered, Signed, and Verified by Officer or Agent. When the party to whom interrogatories are directed is a corporation, partnership, or association, the interrogatories must be signed by an officer or agent of the business [*Fed R Civ P 33(b)(1)(B)*].

The officer or agent who may sign includes an attorney for the business [*Wilson v. Volkswagen of Am., Inc. (4th Cir 1977) 561 F2d 494, 508* (counsel for automobile manufacturer could sign and verify answers to interrogatories)].

The officer or agent has a duty to provide all information available to the corporation, but may sign and verify the interrogatories on the basis of knowledge, information, and belief, without firsthand knowledge of the information in the responses [*Law v. National Collegiate Athletic Ass'n (D Kan 1996) 167 FRD 464, 476* (answers must speak of "composite knowledge" of party, whether or not officer or agent has personal knowledge of facts].

23.123[3] Organization Must Designate Agent; Attorney May Be Agent. When interrogatories are addressed to a corporation, partnership, or association, the business is entitled, and indeed is required, to designate its own officer or agent to answer the interrogatories [*United States v. Kordel (1970) 397 US 1, 8, 90 S Ct 763, 25 L Ed2d 1*]. The officer or agent designated to answer interrogatories may be an attorney for the business [*Rea v. Wichita Mortgage Corp. (10th Cir 1984) 747 F2d 567, 574 n6* (answers to interrogatories sworn to by corporate defendant's attorney acceptable under *Fed R Civ P 33*)].

23.123[4] Interrogatories Directed to Government Agency Must Be Answered, Signed, and Verified by Officer or Agent. Interrogatories addressed to governmental agencies may be answered by an officer or agent of the government [*Fed R Civ P 33(a)*]. Governments and governmental agencies generally are subject to the same rules as corporate entities in designating agents to answer interrogatories [*Trane Co. v. Klutznick (WD Wis 1980) 87 FRD 473,*

476-477 (officers to respond to interrogatories when initial response by chosen officer was inadequate)].

23.123[5] Attorney for Party Must Certify Responses. In addition to being signed and verified by the party making them, responses to interrogatories must be signed by at least one attorney of record; the attorney must include his or her address, e-mail address, and telephone number [*Fed R Civ P 26(g)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.124 Responding Party Must Answer or Object.

Each interrogatory must be answered separately and fully in writing, under oath, unless an objection is interposed [*Fed R Civ P 33(b)(3)*; *see 23.130* (objections)].

Legal Topics:

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23.125 Responding Party Has Duty to Furnish All Available Information.

23.125[1] Answer to the Extent Possible. If an interrogatory is objectionable in part, but some portions of the interrogatory are not subject to an objection, the responding party must answer to the extent that the interrogatories are not objectionable [*Fed R Civ P 33(b)(3)*].

Consider:

The responding party should provide a substantive response "subject to" the objections stated.

Failure to respond may result in a sanctions order for refusing to respond within the allotted time.

Cross Reference:

Sanctions for failure to make timely response, see *§ 23.127[5]*.

23.125[2] Information Under Responding Party's Control. A party answering interrogatories has an affirmative duty to furnish any and all information available to the party; this duty to provide all information available encompasses the responsibility to provide information controlled by a party [*Trane Co. v. Klutznick (WD Wis 1980) 87 FRD 473, 476* (responding party does not have duty to search out new information in response to interrogatories)]. For example, a parent corporation must respond to an interrogatory with information from a subsidiary if it has access to that information and that information is relevant and is not privileged [*In re ATM Fee Antitrust Litig. (ND Cal 2005) 233 FRD 542, 545*].

23.125[3] Business Entity Must Provide Information Known to Officers and Employees. A business organization has the duty to provide any information imputed to the organizational party itself, including information possessed by officers, employees, and former employees of the party, as well as the party's counsel [*General Dynamics Corp. v. Selb Mfg. (8th Cir 1973) 481 F2d 1204, 1210* (imposing sanctions when corporation's secretary failed to answer interrogatory due to "insufficient personal knowledge," because, as agent of corporation, he was obliged to furnish all information available to corporation).]

A corporation is not, however, required to uncover facts not within its control, especially when those facts are equally accessible to other parties [Directory Dividends, Inc. v. SBC Communications, Inc. (ED Pa 2003) 2003 US Dist LEXIS 24296, at *12-*14].

Legal Topics:

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23.126 Business Records May Be Provided in Lieu of Answer.

23.126[1] Specify Records and Provide Opportunity for Inspection. When the answer to an interrogatory can be derived or ascertained from business records, including electronically stored information, the responding party may, in lieu of answering [*Fed R Civ P 33(d)*]:

- Specify the records from which the answer may be derived or ascertained; and
- Afford the propounding party a reasonable opportunity to inspect the records.

Cross Reference:

Producing business records, see 7 *Moore's Federal Practice, § 33.105* (Matthew Bender 3d ed.).

This procedure can save significant time in responding if there are preexisting documents that contain all of the requested information.

Warning:

Pleadings, depositions, or exhibits are not "business records" under *Fed R Civ P 33(d)* [*Mancini v. Ins. Corp. (SD Cal 2009) 2009 US Dist LEXIS 51321, at *7* (plaintiffs' attempt to answer interrogatories by reference to litigation file in underlying class action did not comport with *Fed R Civ P 33*, collecting cases)].

23.126[2] Make Specification Detailed. A specification must be in sufficient detail to permit the propounding party to locate and identify, as readily as can the responding party, the records from which the answer may be ascertained [*Fed R Civ P 33(d)(1)*].

A responding party must specify, by category and location, the records from which answers to interrogatories can be derived. "Location" means *where* in the records an answer may be found. Thus, a general recitation that answers may be

found in company books of accounts, ledgers, and other records is not specific enough because it does not specify where in the records the answer can be found [*see Rainbow Pioneer # 44-18-04A v. Hawaii-Nevada Inv. Corp. (9th Cir 1983) 711 F2d 902, 906*].

Strategic Point--Responding Party:

If records have already been produced, the easiest way to identify the records is by Bates number. If records have not been produced, the easiest way to satisfy this requirement might be by producing the records with the interrogatory response.

Cross Reference:

Use of Bates stamp to number documents for production, see *§ 23.156[2]*.

23.126[3] Burden of Deriving Answer Must Be Same for Both Parties. The option of specifying business records is limited to situations in which the burden of deriving the answer from the records is substantially the same for the propounding party as for the responding party [*Fed R Civ P 33(d)*].

23.126[4] Responding Party May Be Required to Provide Index. Rule 33(d) is not satisfied by the "wholesale dumping" of documents. Thus, when voluminous documents are produced under Rule 33(d) they must be accompanied by indices designed to guide the propounding party to the documents responsive to the interrogatories [*see O'Connor v. Boeing N. Am., Inc. (CD Cal 1999) 185 FRD 272, 278*].

23.126[5] Court May Require That Interrogating Party Reimburse Respondent's Expenses. To the extent the expense of compliance is considered unduly burdensome, Rule 33(d) provides the responding party with the option of shifting the burden and expense by producing the business records in which the requested information can be found [Multitechnology Servs., L.P. v. Verizon Southwest (ND Tex 2004) 2004 US Dist LEXIS 3744, at *3-*4 (if Verizon invokes Rule 33(d), it may ask court in its discretion to order MTS to reimburse Verizon for expense of assembling business records and making them intelligible); *see Fed R Civ P 33*, Committee Note of 1970].

23.126[6] Claim of Privilege May Be Restricted. Under Rule 33(d) documents that would otherwise be responsive may be withheld based on privilege, provided the exercise of the privilege does not prevent the propounding party from ascertaining or deriving complete answers to the interrogatories and the withheld documents are listed in a privilege log [*O'Connor v. Boeing N. Am., Inc. (CD Cal 1999) 185 FRD 272, 279*].

When a party chooses to answer an interrogatory under Rule 33(d), that party may claim only the attorney-client privilege and work product protection, and must set forth the purportedly privileged documents on a privilege log. Other privileges, such as the patient-physician privilege and third-party privacy rights may not be claimed on the privilege log. Rather, a protective order, coupled with the redaction of selected information when necessary, has been found to be sufficient to safeguard the interests protected by such privileges and rights [*O'Connor v. Boeing N. Am., Inc. (CD Cal 1999) 185 FRD 272, 279-280*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.127 Thirty-Day Period for Response.

23.127[1] Extra Three Days for Service by Mail or Other Alternative Delivery. A party on whom interrogatories have been served must serve the answers and objections, if any, on the propounding party within 30 days after service of the interrogatories [*Fed R Civ P 33(b)(2)*].

An additional three days are allowed if interrogatories were served by mail or by electronic or alternative means of delivery [*Fed R Civ P 6(d)*].

23.127[2] Obtain Agreement of Parties or Court Order to Alter Timing. The time for responding may be shortened or lengthened by [*Fed R Civ P 33(b)(2)*]:

- Stipulation of the parties.
- Court order.

An agreement extending the time for responses requires court approval if it would interfere with any dates set by the court for completion of discovery, for the hearing of a motion, or for trial [*Fed R Civ P 29(b)*].

Decision Point:

Generally, parties should grant first requests for extensions of time, unless a party has abused such requests or deadlines are pressing. It usually is sensible to grant a request for an extension because denying the request is likely to cause the other party to deny your future requests for extensions or other accommodations.

23.127[3] Several Methods of Serving Response Are Available. Service of interrogatory responses is complete when the responses are hand-delivered to the party or the attorney for the party, or when they are placed in the mail [*Fed R Civ P 5(b)*].

Alternative methods of delivery, including by electronic means, may be used if the person being served has provided written consent to such service [*Fed R Civ P 5(b)(2)(E)*]. Service by electronic means is complete on transmission [*Fed R Civ P 5(b)(2)(E)*]. However, service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served [*Fed R Civ P 5(b)(2)(E)*]. Service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery [*Fed R Civ P 5(b)(2)(F)*].

23.127[4] Timing of Response for Removed Actions. In cases removed to federal court that have outstanding interrogatories at the time of removal, the time limit for responses to interrogatories is measured from the date of the parties' meeting under the federal meet and confer requirements [*Fed R Civ P 33(a)*, Committee Note of 1993; *see Fed R Civ P 26(d)*].

23.127[5] Failure to Make Timely Response Sanctionable. Sanctions may be levied against a party who fails to comply with discovery deadlines [*Fed R Civ P 16(f)*, *37(d)*].

Cross Reference:

Failure to comply, see Ch. 25, Motions to Compel and Discovery Sanctions, *§ 25.08[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.128 Restrictions on Filing Interrogatory Responses.

Interrogatory requests and responses must not be filed until they are used in the proceeding or the court orders filing [*Fed R Civ P 5(d)(1)*].

Cross Reference:

Further discussion on filing and retention of interrogatories and responses, including local rules, see *§ 23.119*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.129 Formatting Responses.

23.129[1] Draft Full and Separate Responses for Each Interrogatory. Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to. Objections must state the reason for the objection and the responding party must answer any portions of the interrogatory that are not objectionable [*Fed R Civ P 33(b)(1)*].

23.129[2] LOCAL PRACTICE: Response Must Immediately Follow Interrogatory.

23.129[2][a] LOCAL PRACTICE: CD Cal, ND Cal, and SD Cal Requirements--Set Forth Each Question Before Answer. Answers and objections to interrogatories must set forth each question in full immediately before the answer or objection [*ND Cal Civ LR 33-1*; *CD Cal Civ LR 33-2*; *SD Cal Civ LR 33.1(b)*].

23.129[2][b] LOCAL PRACTICE: ED Cal Requirements--Answer in Space Provided. In the Eastern District, interrogatories must be arranged so that there is a blank space after each question. The size of the blank space must be reasonably calculated to enable the answering party to insert the answers or objections. The answering party must try to answer or object in the spaces provided. If unable to do so, however, the responding party must retype the interrogatories along with the answers and objections [*ED Cal Civ LR 250.2(a)*].

23.129[3] Respondent and Attorney Must Sign. Answers to interrogatories must be signed by the person making them [*Fed R Civ P 33(b)(5)*], or by a representative of a corporate or entity party. Such a representative does not need to have personal knowledge of the answers [*see Law v. National Collegiate Athletic Ass'n (D Kan 1996) 167 FRD 464, 476*]. In addition, all interrogatory responses must be signed, and thereby certified, by the attorney for the responding party [*see Fed R Civ P 26(g)(1)*]. Objections must be signed by the attorney making them [*Fed R Civ P 33(b)(5)*].

Cross Reference:

Signing and certification of discovery responses under Rule 26, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.03 -25.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.130 Objecting to Interrogatories.

23.130[1] Rule 26 Is Primary Source of Objections. A responding party may object to interrogatories on the grounds that they request information outside of the permissible scope of discovery. Rule 26 is the main source of possible objections or of grounds for a protective order because it provides specific guidelines as to when the courts may impose limitations on the frequency or extent of discovery. Under that rule, interrogatories may be objectionable when [*see Fed R Civ P 26(b)(2)*]:

- They seek information that is unreasonably cumulative or duplicative, or obtainable from some other source that is more convenient, less burdensome, or less expensive.

- They seek information that the propounding party has had ample other opportunities to obtain.

- The burden or expense of the interrogatories outweighs their likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the interrogatories in resolving the issues.

Cross References:

Grounds for objection, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.

Wide range of grounds for objection, see 7 *Moore's Federal Practice, § 33.173* (Matthew Bender 3d ed.).

Among the common objections to interrogatories are:

- **Argumentative or Speculative:** Interrogatories are subject to objection if they call for argumentative or speculative answers [*see In re Erie Lackawanna Ry. Co. (6th Cir 1974) 496 F2d 1189, 1190*].

- **Available From Another Source:** Interrogatories may not seek information that is obtainable from some other source that is more convenient, less burdensome, or less expensive [*see Fed R Civ P 26(b)(2)(C)(i)*].

- **Burden Outweighs Benefit:** The burden or expense of the interrogatories must not outweigh their likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the interrogatories in resolving the issues [*see Fed R Civ P 26(b)(2)(C)(iii)*].

- **Cumulative or Duplicative:** Interrogatories may not seek information that is unreasonably cumulative or duplicative [*see Fed R Civ P 26(b)(2)(C)(i)*].

- **Irrelevant Information:** Information that is irrelevant to the claims or defenses of the parties is beyond the scope of discovery [*see Fed R Civ P 26(b)(1)*]. For example, one court denied a motion to compel an ADA plaintiff to respond to an interrogatory requesting that he state the total sum he received in settlement of disability lawsuits in the past five years. The court found that information irrelevant to the plaintiff's standing to sue and irrelevant to any defense [*Molski v. Franklin (SD Cal 2004) 222 FRD 433, 437*].

- **Legal Conclusions:** Interrogatories may not seek legal conclusions on questions of pure law [*Fed R Civ P 33(c)*, Committee Note of 1970].

- **Facts Known and Opinions Held by Nonwitness Experts:** Facts known and opinions held by nonwitness experts are beyond the scope of discovery [*see Fed R Civ P 26(b)(4)(B)*].

- **Number Exceeded:** Interrogatories served on a specific party must not exceed the 25-interrogatory, or other court-set, limit [*see Fed R Civ P 33(a)*].

- **Other Opportunity to Obtain Same Information:** Interrogatories may not seek information that the propounding party has had ample other opportunities to obtain [*see Fed R Civ P 26(b)(2)(C)*]. For example, one court denied a request for permission to propound additional interrogatories when there had been extensive questioning on the same subjects at deposition [*see Johnson v. Smith (ND Cal 1986) 630 F Supp 1, 4*].

- **Overbreadth:** Overbroad interrogatories are subject to objection [*see Cahela v. Bernard (ND Ga 1994) 155 FRD 221, 227-228*]. However, a mere statement by a party that an interrogatory is "overly broad, burdensome, oppressive and irrelevant" is not adequate to voice a successful objection [*St. Paul Reinsurance Co. v. Commercial Fin. Corp. (ND Iowa 2000) 198 FRD 508, 511-512*].

- **Premature Contention Interrogatories:** Prematurely served contention interrogatories may be subject to objection, and the responding party may be able to obtain a court order that the interrogatories need not be answered until a later time in the proceedings [*see Fed R Civ P 33(a)(2)*].

- **Privilege:** Privileged information is beyond the scope of discovery [*see Fed R Civ P 26(b)(1)*]. A "blanket" claim of privilege as to a set of interrogatories is improper. Instead, the respondent must identify with specificity, the interrogatories to which a claim of privilege pertains [*Davis v. Fendler (9th Cir 1981) 650 F2d 1154, 1160*].

Timing:

An objection based on privilege may be waived if it is not raised in a timely manner [*Davis v. Fendler (9th Cir 1981) 650 F2d 1154, 1160*].

Cross Reference:

Discussion of discovery privileges, see 6 *Moore's Federal Practice, §§ 26.47 -26.52* (Matthew Bender 3d ed.).

- **Trade Secrets:** Trade secrets and confidential business information are generally subject to restrictions on discovery. A party may protect trade secrets or confidential business information from disclosure by seeking an order limiting discovery or a protective order preventing the discovery [*see Fed R Civ P 26(c)(1)(G)*].

- **Unrelated to Discovery of Admissible Evidence:** Information that is not reasonably calculated to lead to the discovery of admissible evidence is beyond the scope of discovery [*see Fed R Civ P 26(b)(1)*].

- **Vagueness:** Interrogatories are subject to objection if they are so vague or ambiguous as to be burdensome or oppressive [*see, e.g., Frost v. Perry (D Nev 1995) 161 FRD 434, 435-436*].

- **Work Product Protection:** Protected work product is beyond the scope of discovery [*see Fed R Civ P 26(b)(3)*].

Cross Reference:

Discussion of work product protection, see 6 *Moore's Federal Practice, § 26.70* (Matthew Bender 3d ed.).

23.130[2] State Precise Grounds for Objection.

23.130[2][a] General Grounds Are Insufficient. All grounds for objection to an interrogatory must be stated with specificity and particularized as to the basis for the objection [*Fed R Civ P 33(b)(4)*; Collins v. JC Penney Life Ins. Co. (SD Cal 2003) 2003 US Dist LEXIS 8455, at *5]. Bare assertions that the discovery requested is overly broad, burdensome, oppressive or irrelevant are ordinarily insufficient, standing alone, to bar production [Collins v. JC Penney Life Ins. Co. (SD Cal 2003) 2003 US Dist LEXIS 8455, at *5-*6].

Boilerplate, generalized objections are inadequate, and the court may treat such objections as if the party failed to make an objection [*see Walker v. Lakewood Condo. Owners Ass'n (CD Cal 1999) 186 FRD 584, 587*].

Strategic Point--Responding Party:

Counsel may decide to provide an answer even when an interrogatory is objectionable. This is particularly true when the objection is a general one, such as the interrogatory seeks irrelevant information, is overbroad, or seeks information provided earlier in the discovery process. To lessen the possibility of a motion to compel, counsel may find it easier to provide at least some information in response to the interrogatory. The objection may be preserved by prefacing the response with a statement such as "subject to and without waiving the objection that the interrogatory is cumulative and duplicative, the responding party responds as follows... ."

23.130[2][b] LOCAL PRACTICE: ED Cal Requirements--State Reasons. Each objection to any interrogatory must include a statement of reasons and, if appropriate, citation to relevant authority [*ED Cal Civ LR 250.2(b)*; *see Fed*

R Civ P 33(b)(4)].

23.130[3] Respondent May Object in Part. If an interrogatory is objectionable in part, but some portions of the interrogatory are not subject to an objection, the responding party must answer to the extent that the interrogatories are not objectionable [*Fed R Civ P 33(b)(3)*].

23.130[4] Objector Has Burden of Proof. The burden is on the responding party to justify its objections or its failure to provide complete answers to interrogatories [*Fed R Civ P 33(a)*, Committee Note of 1970; Collins v. JC Penney Life Ins. Co. (SD Cal 2003) 2003 US Dist LEXIS 8455, at *5-*6].

Example:

Overruling respondent's objections that interrogatories were burdensome, the court emphasized that respondent has the burden to show not only "undue burden or expense," but also to show that the burden or expense is unreasonable in light of the benefits to be secured from the discovery. The court noted that respondent made no effort to show that any heavy expenditures of time, effort or money would be necessary to answer the interrogatories [*Hammond v. Lowe's Home Ctrs., Inc. (D Kan 2003) 216 FRD 666, 674*].

23.130[5] Format Requirement: Objection Must Immediately Follow Interrogatory.

23.130[5][a] LOCAL PRACTICE: CD Cal, ND Cal, and SD Cal--Set Forth Each Question Before Objection. Answers and objections to interrogatories must set forth each question in full immediately before the answer or objection [*CD Cal Civ LR 33-2*; *ND Cal Civ LR 33-1*; *SD Cal Civ LR 33.1(b)*].

23.130[5][b] LOCAL PRACTICE: ED Cal--Object in Space Provided. In the Eastern District, interrogatories must be arranged so that there is a blank space after each question. The answering party must try to answer or object in the spaces provided. If unable to do so, however, the responding party must retype the interrogatories along with the answers and objections [*ED Cal Civ LR 250.2(a)*].

23.130[6] Make Timely Objection. An objection to an interrogatory must be made in writing within 30 days after service of the interrogatories unless a shorter or longer time is ordered by the court. In the absence of an order, the parties may agree in writing to a shorter or longer time for responses to interrogatories, including an objection [*Fed R Civ P 33(b)(2)*].

23.130[7] Avoid Waiver of Objection.

23.130[7][a] General Rule: Failure to Timely Object Waives Objection. Any ground for objection to an interrogatory that is not raised in a timely manner is waived [*Walker v. Lakewood Condo. Owners Ass'n (CD Cal 1999) 186 FRD 584, 587*]. This is true even of an objection that the information sought is privileged [*see Davis v. Fendler (9th Cir 1981) 650 F2d 1154, 1160*].

Strategic Point--Responding Party:

If an interrogatory is at all objectionable, the responding party should make the objection. Otherwise the objection is waived. However, do not make unsupportable objections. When drafting responses, consider how each objection could be supported if the propounding party moved to compel further responses. Making objections that cannot be supported during motion practice can lead to a lack of credibility in front of the court.

It is especially important to object if an interrogatory calls for any kind of attorney- client privileged information. Failure to object will cause the privilege to be waived. Once the privilege is waived as to a

particular topic, the opposing party may be able to obtain other attorney-client communications on that topic.

23.130[7][b] Excuse for "Good Cause" Shown. The court may excuse a failure to make a timely objection for "good cause" [*Fed R Civ P 33(b)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.131 Attorney Must Sign Objections.

Objections must be signed by the attorney making them [*Fed R Civ P 33(b)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.132 Relief May Be Available by Obtaining Protective Order.

A protective order protects any person or party from whom discovery is sought from annoyance, embarrassment, oppression, or undue burden and expense. The moving party must show good cause for the order [*Fed R Civ P 26(c)*].

Check local rules for meet and confer requirements for discovery disputes.

District courts have broad discretion in determining whether to issue a protective order, but the courts nevertheless apply a balancing test in making that determination. Under the balancing test, the district judge must compare the hardship to the party against whom discovery is sought against the probative value of the information to the other party [*see Soto v. City of Concord (ND Cal 1995) 162 FRD 603, 616*].

A protective order may encompass any order justice requires to protect any party or person from annoyance, embarrassment, oppression, or undue burden and expense. It may include, but is not limited to, one or more of the following orders [*see Fed R Civ P 26(c)*]:

- That a party need not answer all or part of the interrogatories.
- That discovery not be had.
- That the number of interrogatories is improper.
- That the time to respond be extended.
- That certain matters not be inquired into, or that the scope of the disclosures be limited to certain matters.
- That a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.

- That some or all of the answers be sealed and thereafter subject to opening only by court order.

Cross Reference:

Protective orders, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.35 -22.66*.

Strategic Point--Responding Party:

Moving for a protective order can be expensive and puts the burden on the moving party. It may be more efficient simply to object (assuming good grounds exist for objections), which places the burden on the propounding party to move to compel further responses. The propounding party may decide that information sought is not worth the expense and effort of moving to compel. However, if the propounding party does move to compel, it will have the first and last words to the court in the opening and reply papers, and thus be able to frame the disputed issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.133 Effect of Answers.

23.133[1] Use at Trial. Answers to interrogatories are evidence [*Zaccagnini v. Chas. Levy Circulating Co. (7th Cir 2003) 338 F3d 672, 679*]. Answers to interrogatories may be used at trial to the extent permitted by the Federal Rules of Evidence, including:

- As admission of a party opponent [*see Fed R Evid 801(d)(2)*].
- For impeachment purposes [*see Fed R Evid 613(a)*].
- In support of motions, such as for summary judgment or motions to dismiss for lack of jurisdiction [*see, e.g., King v. E.F. Hutton & Co. (DDC 1987) 117 FRD 2, 6* ; *Duff v. Lobdell-Emery Mfg. Co. (ND Ind 1996) 926 F Supp 799, 804*].

Cross Reference:

Answers as evidence, 7 Moore's Federal Practice, *§ 33.160* (Matthew Bender 3d ed.).

23.133[2] Objections to Introduction of Answers. On proper objection, the court has the same power to exclude answers to interrogatories as it does any other offered evidence [*see Fed R Civ P 33(c)*]. Because the scope of discovery is very broad and not limited to admissible evidence, objections to the introduction of answers to interrogatories are often made on the grounds of irrelevance, unfair prejudice, and confusion of the issues [*see Fed R Evid 403*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.134 Respondent Must Supplement and Amend Answers.

If a party acquires material additional information or learns that information submitted was materially incorrect after submitting answers, and that additional information is not otherwise known to the propounding party, the responding party has a duty to supplement or amend its responses [*Fed R Civ P 26(e)*; *see Fortino v. Quasar Co. (7th Cir 1991) 950 F2d 389, 398* (*Fed R Civ P 26* requires party to supplement interrogatory answer when it is no longer true, and failure to amend is in substance a knowing concealment)].

The court may impose sanctions for failure to supplement interrogatory responses [*see Fed R Civ P 37(c)(1)*].

Cross References:

Discussion of the duty to supplement and amend discovery responses, see Ch. 21, Discovery Strategy and Planning, *§ 21.06[7]*; Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.50 -25.53*.

Continuing duty to supplement, see 7 *Moore's Federal Practice, § 33.106* (Matthew Bender 3d ed.).

Legal Topics:

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CHAPTER 23 Methods of Discovery
VI. REQUESTS FOR PRODUCTION AND INSPECTION
A. Planning Requests for Production and Inspection

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23.135 CHECKLIST: Planning to Obtain Documents, Electronically Stored Information, and Tangible Items Through Production or Inspection.

☐ Determine type of item needed for production or inspection:

○ Documents or electronically stored information, including:

☐ Writings;

☐ Drawings;

☐ Graphs;

☐ Charts;

☐ Photographs;

☐ Sound recordings and

☐ Data compilations, including electronic or digital files, such as e-mails, word processing documents, spreadsheets, and databases.

Authority:
Fed R Civ P 34(a)(1)

Discussion:
See *§§ 23.137[1], [4]*

○ Tangible items other than documents, which may include, for example, physical substances, mechanical devices, or computer hardware such as disk drives and backup tapes.

Authority:
Fed R Civ P 34(a)(1)

Discussion:
See *§ 23.137[2]*

○ The entry onto land or a particular premises to inspect, copy, sample, or conduct other investigative tests on:

☐ The land itself;

☐ Objects located on the land; or

☐ Processes or operations occurring on the land.

Authority:
Fed R Civ P 34(a)(2)

Discussion:
See *§ 23.137[3]*

☐ Consider activities related to production or inspection of item or land, including:

○ Measuring;

○ Surveying;

○ Photographing;

○ Testing; or

○ Sampling.

Authority:
Fed R Civ P 34(a)(1), (2)

Discussion:

See *§ 23.137[3]*

☐ Determine whether item is discoverable by considering whether:

○ Item is relevant to any claim or defense of parties;

○ Item is not protected by privilege or work product doctrine; and

○ If item is not itself admissible in evidence at trial, discovery of item appears reasonably calculated to lead to discovery of admissible evidence.

Authority:
Fed R Civ P 26(b)(1)-(5), 34(a)

Discussion:
See *§ 23.138*

☐ Determine whether sought document, electronically stored information, or tangible item is obtainable:

○ From party to action with a claim or defense in dispute in pending civil action.

Authority:
Fed R Civ P 34(a)

Discussion:
See *§ 23.139*

○ From party to action:

☐ In actual physical possession of item.

☐ In custody of item.

☐ Under control of item.

Authority:
Fed R Civ P 34(a)

Discussion:
See *§ 23.139[4]*

☐ If document, electronically stored information, or tangible item is not subject to production or inspection under Rule 34, determine whether information may be obtained by other means, such as:

○ Under initial disclosure requirements.

Authority:
Fed R Civ P 26(a)

Discussion:
See *§ 23.141*

○ Pursuant to subpoena to party or nonparty.

Authority:
Fed R Civ P 34(c), 45(a)

Discussion:
See *§ 23.141[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

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23.136 Options and Strategies Related to Planning for Production or Inspection.

23.136[1] Choosing Best Method of Obtaining Production or Inspection.

23.136[1][a] Sequence of Discovery Methods. A party has a limited number of depositions, interrogatories, and, in some districts, requests for admissions. Also, a party typically gets only one shot at deposing a witness, and will generally want to ask witnesses about relevant documents. Thus, it is usually preferable to serve requests for production before serving interrogatories or requests for admissions, or conducting depositions. As part of Rule 26's initial disclosures, a party will be required to disclose the identity and location of documents on which it will rely in proving its claims or defenses. With that information, counsel should be in position to propound a first set of requests for production.

Nevertheless, there is no timetable applicable to all cases for the staging of different discovery devices, and counsel should consider the value of coordinating the methods used. A request for production or inspection must set forth the items to be produced or inspected, and describe each item with reasonable particularity [*Fed R Civ P 34(b)(1)*; *see 23.137*]. Consequently, unless the previous interaction between the parties or the mandatory disclosures provide an accurate and thorough source of identification of pertinent documents and tangibles, other discovery methods might prove beneficial [*see* Ch. 21, Discovery Strategy and Planning], such as depositions, especially depositions of custodians of records [*see 23.03 -23.110*], interrogatories directed to a description of documents that address relevant facts [*see 23.111 -23.134*], and requests for admission [*see 23.217 -23.258*]. Requests for production of electronically stored information may be particularly challenging in terms of gaining knowledge of an opponent's computer systems, record retention policies, electronic document storage arrangements, and the types of information stored sufficient to fashion production requests with the requisite specificity. Finally, for items not in the possession, custody, or control of another party to the action [*Fed R Civ P 34(a)(1)*; *see 23.153[4]*], consider utilizing other discovery methods, such as a subpoena [*see 23.136[1][c]*].

23.136[1][b] Alternate Sources to Help Identify Items. Because it may prove difficult to describe items in a Rule 34 request for production or inspection with reasonable particularity [*see 23.145[2]*], parties may choose to explore sources of information other than the opposing party, such as the client, individuals similarly situated to the opposing

party, Internet sites, press articles, and regulatory agency files. Parties also may hire a private investigator to pursue this information. Informal discovery of a party's previous litigations can often be very productive. Briefs or other documents filed in other litigations and filings with regulatory agencies could contain admissions relevant to the present litigation, or could lead to the discovery of other admissible evidence. A benefit of seeking information outside the litigation process is that--unlike the use of formal discovery--informal discovery may be initiated before commencement of the action [*see* Bruner, *Discovery: An Ordered Approach,* 30 F.I.C.Q. 205, 210 (Spring, 1980)].

Cross Reference:

Using online resources to obtain public records, see Ch. 21, Discovery Strategy and Planning, *§ 21.05[6][b].*

23.136[1][c] Use of Subpoena for Items Not in Possession, Custody, or Control of Party. A party seeking production or inspection of items not in the possession, custody, or control of another party to the action should consider use of the subpoena procedure under Rule 45 to obtain access [*Fed R Civ P 34(c)*; *see 23.141[3]*]. If a dispute is likely over whether a party has possession, custody, or control over documents, such as when related corporate entities are involved, a party should consider using simultaneously a request to produce under Rule 34 and a subpoena under Rule 45. In some instances, a subpoenaed entity may be less likely to litigate objections to production. At the same time, utilizing a nonparty subpoena for documents may require an additional appearance by counsel in the discovery dispute that can increase delay and expense.

Strategic Point:

Courts may be more protective of the production burdens on third parties, so subpoenas requesting document should be drafted narrowly. For this same reason, be prepared to cooperate with and make the document production less burdensome for the third party, as the third party is likely to have the court's sympathy in a discovery motion. Sometimes it is better to seek informal discovery from third parties to avoid alerting your opponent to the relevance of the information that the third party possesses. On the other hand, cooperating third parties occasionally want to be subpoenaed, so they have the protection of having responded to compulsory process.

Cross References:

Discussion of requirement of party status, see *§ 23.139*. Discussion of possession, custody, or control of item, see *§ 23.153[4]*. Discussion of alternative discovery, see *§ 23.141*.

23.136[2] Preventing Destruction of Documents. Parties have an obligation to retain evidence that they have reason to believe will be relevant to a pending litigation. Counsel should determine, as early as possible, whether other parties are likely to destroy materials that may be responsive to a Rule 34 request, for example as part of a company's routine document retention/destruction policy or operation of its electronic information system. If so, consider a notice to the custodian of records, an action seeking preservation of evidence, or a stipulation or order preserving the documents. Interrogatories can help reveal a company's document retention policies and the method of operation of its electronic information system, and whether it has destroyed any relevant items.

Cross References:

Discussion of destruction of discoverable materials, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.91 -25.101*.

Discussion of sanctions for destruction of documents, see 7 *Moore's Federal Practice, § 34.16[4]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.137 Types of Documents, Electronically Stored Information, and Tangible Items That Party May Request.

23.137[1] Party May Request Production of Documents for Inspection and Copying. Any party may serve on any other party a request to produce and permit the requesting party, or someone else acting on the requesting party's behalf, to inspect and copy any designated documents that constitute or contain discoverable matter, and which are in the possession, custody, or control of the party upon whom the request is served [*Fed R Civ P 34(a)(1)(A)*; *see United States ex rel. Schwartz v. TRW, Inc. (CD Cal 2002) 211 FRD 388, 392* ; *see also 23.153[4]* (discussion of possession, custody, or control)]. A Rule 34 request for production of "documents" encompasses electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents" [Fed R Civ P 34(a), Committee Note of 2006].

Strategic Point--Requesting Party:

Sometimes it may be advantageous for the requesting party to request that documents be viewed and copied at the location where the original documents are stored, because the originals may reveal information that a copy would not. For example, at the storage location, the inspector may observe notations on the folder containing the documents, or variations in the color of ink used to make handwritten entries on a document [*see, e.g.,* Sunrich, Inc. v. Pac. Foods of Or., Inc. (D Or 2003) 2003 US Dist LEXIS 8186, at *5 (inspection of original documents)].

Strategic Point--Responding Party:

The client may not want counsel for the opposing party in its offices. If the volume of documents is not too large, consider arranging for the inspection in another location. Before allowing any party to inspect original documents, counsel must conduct a privilege review of the documents and remove privileged documents. Failure to do so may result in a waiver of the attorney-client privilege or work product protection.

23.137[2] Party May Request Production of Tangible Items for Inspection, Sampling, Testing and Copying. Any party may serve on any other party a request to produce and permit the requesting party, or someone else acting on the requesting party's behalf, to inspect and copy, test, or sample any tangible items that constitute or contain discoverable matters, and which are in the possession, custody, or control of the party upon whom the request is served [*Fed R Civ P 34(a)(1)*; *see also 23.153[4]* (discussion of possession, custody, or control)].

Example:

The court ordered that the requesting party's expert be given access to the responding party's computer to run particular programs specified by the requesting party [L.A. County Employees Ret. Ass'n v. Towers, Perrin, Forster & Crosby, Inc. (CD Cal 2003) 2003 US Dist LEXIS 10233, at *4-*5].

23.137[3] Party May Request Permission to Enter Land for Inspection, Sampling, and Copying Tangible Items. Any party may serve on any other party a request to enter on designated land or other property in the possession or control of the served party for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property [*Fed R Civ P 34(a)(2)*; *see McNierney v. Long Island R.R. (SDNY 2003) 215 FRD 458, 459*].

Example:

A plaintiff suing a defendant for misappropriation of trade secrets requested inspection of the defendant's operations facility property to observe the manufacturing process, with the intent of ascertaining if any elements of the plaintiff's alleged trade secret process were being used. [MONY Life Ins. Co. v. Hinsdale Mgmt. Corp. (ND Ill 2002) 2002 US Dist LEXIS 10771, at *8-*9].

23.137[4] Electronically Stored Information Is Discoverable Material. Electronically stored information is discoverable under Rule 34. This includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained. If necessary, the responding party must translate the information into a reasonably usable form [*Fed R Civ P 34(a)(1)(A)*]. Under Rule 34, a request for production of "documents" includes electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents" [Fed R Civ P 34(a), Committee Note of 2006].

Cross References:

Discussion of electronic discovery, see *§§ 23.157 -23.188*.

See also 7 *Moore's Federal Practice, § 34.12[3]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.138 Requested Documents, Electronically Stored Information, and Items Must Be Discoverable.

23.138[1] Parties Are Generally Entitled to Request Material Relevant to Claim or Defense of Parties.

23.138[1][a] Party May Request Production of All Items Within Scope of Discovery. A party may request production or access to documents, electronically stored information, and tangible items that are within the broad scope of discovery specified in Rule 26(b) [*see Fed R Civ P 26(b)*], namely, matters not privileged that are relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible items, and the identity and the location of persons having knowledge of any discoverable matter. For "good cause" parties may request discovery of any matter relevant to the subject matter involved in the action [*Fed R Civ P 26(b)(1)*; *Fed R Civ P 34(a)*].

23.138[1][b] Scope of Discovery Is Broad. The primary purpose of discovery is to remove surprise from trial preparation and to enable the parties to obtain evidence necessary to evaluate and resolve their dispute [*Oakes v. Halvorsen Marine Ltd. (CD Cal 1998) 179 FRD 281, 283*]. Consequently, courts should permit production of any documents, electronically stored information, and tangible items that contain information relevant to a claim or defense. This principle is broad and must be liberally interpreted [*see United States ex rel. Schwartz v. TRW, Inc. (CD Cal 2002) 211 FRD 388, 392*].

Cross Reference:

Discussion of requirement of relevancy to claim or defense, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§§ 24.03 -24.11*.

23.138[1][c] Requested Document, Electronically Stored Information, or Item Need Not Be Admissible If It Leads to Admissible Evidence. A party may obtain discovery of a document, electronically stored information, or tangible item under Rule 34 even if it would be inadmissible in evidence at trial, provided that discovery of the item appears reasonably calculated to lead to the discovery of admissible evidence [*Fed R Civ P 26(b)(1)*; *see Garcia v. City of El Centro (SD Cal 2003) 214 FRD 587, 590*].

Cross Reference:

Discussion of request for inadmissible materials leading to admissible evidence, see 7 *Moore's Federal Practice, § 34.12[4]* (Matthew Bender 3d ed.).

23.138[2] Parties May Not Request Privileged or Work Product Material. A party may not obtain discovery of privileged documents or electronically stored information [*Fed R Civ P 34(a)*; *see Fed R Civ P 26(b)(1)*], or other items falling under the limitations of Rule 26 [*Fed R Civ P 26(b)(2)-(5)*]. For example, a party may not request production under Rule 34 of any document if it constitutes "work product" prepared in anticipation of litigation or for trial, unless the party (1) can show substantial need of the materials for case preparation, and (2) cannot without undue hardship obtain the substantial equivalent of the materials by other means. Opinion work product, which contains counsel's mental impressions or legal strategies, "enjoys nearly absolute immunity and can be discovered only in very rare circumstances" [*Garcia v. City of El Centro (SD Cal 2003) 214 FRD 587, 591* ; *see Fed R Civ P 26(b)(3)*; *23.153* (grounds for objection to Rule 34 request)].

Distinguish:

A party is entitled to request a category of documents or electronically stored information that may include privileged documents, and it is up to the responding party to assert the privilege and withhold the privileged documents. The responding party may have waived the privilege previously by, for example, disclosing the document to a third party, producing the document in another lawsuit, or putting the document at issue in the lawsuit. In such a situation, the document is discoverable even if it was privileged at one time.

Cross Reference:

Discussion of exceptions and limitations on documents and tangible items that party may discover, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.139 Persons Subject to Rule 34 Discovery.

23.139[1] Rule Applies to Parties to Civil Action. Production of documents, electronically stored information, or entry on land is limited to parties to a civil action [*Fed R Civ P 34(a)*; *see United States ex rel. Schwartz v. TRW, Inc. (CD Cal 2002) 211 FRD 388, 392* (nonparty must be served request for production under Rule 45, and nonparty is subject to same scope of discovery under Rule 45 as party is under Rule 34)]. Thus, co-plaintiffs or co-defendants may serve Rule 34 requests on each other [*see, e.g., Biben v. Card (WD Mo 1987) 119 FRD 421, 424-425*].

Cross Reference:

Discussion of Rule 34's applicability to parties only, see 7 *Moore's Federal Practice, § 34.03[3]* (Matthew Bender 3d ed.).

Distinguish:

The limitation that Rule 34 procedures are applicable only to parties should not be confused with the provision that a document or object is discoverable if within the possession, custody, or control of a party. Thus, a party need not be the owner of the document or tangible item for that party to be required to produce the document or tangible item [*see Fed R Civ P 34(a)*; *see also McCoy v. Southwest Airlines Co. (CD Cal 2002) 208 FRD 617, 621* (airline required to produce manual of aircraft manufacturer)].

Cross Reference:

Discussion of the requirement that document or tangible item must be in possession, custody, or control of a party, see *§ 23.153[4]*.

23.139[2] Party Is Actual Claimant or Defendant in Civil Suit. For Rule 34 purposes, the party is the actual claimant or defendant in civil litigation currently pending in a United States district court [*Williams v. IRS (D Del 1972) 345 F Supp 591, 594* (no discovery rights under federal rules in tax court proceeding)]. The issue of party status typically arises in cases involving representative litigation; when a person brings an action or is sued in a representative capacity, the represented persons are not considered parties for discovery purposes unless the represented parties, rather

than the named representative, are the actual claimants or defendants [*see In re Greenwood Air Crash (SD Ind 1995) 161 FRD 387, 394-398*].

Examples:

- A plaintiff brought an action as the personal representative of decedent's estate. The court held that the plaintiff had to produce tax returns of the decedent's minor children, because the children were statutory wrongful death beneficiaries and were deemed "parties" within the meaning of Rule 34 [*In re Greenwood Air Crash (SD Ind 1995) 161 FRD 387, 394-398*].

- A receiver does not, by virtue of his or her appointment, become a party to a pending action against a corporation or individual for whose property the receiver is appointed. A receiver remains a nonparty to the action unless added or substituted by an order of the court in which the action is pending, and is not subject to Rule 34 discovery procedures until the court issues such an order [*Wolff v. Cash 4 Titles (11th Cir 2003) 351 F3d 1348, 1354*].

- Non-privileged documents in the files of a party's attorneys are within the party's control, even if they are not in the party's physical possession, and may be discoverable. Similarly, an employee's work files maintained on the employee's home computer may be within the control of the employer.

Distinguish:

An individual affiliated with a party is not considered a party under Rule 34. Thus, when a corporation is a party, the corporate directors, officers, employees, or subsidiaries that are not parties are not subject to service of a request for production; only the corporate party may be served. Note, however, that the corporate entity would have the ultimate obligation to require affiliated persons and entities to produce the documents, electronically stored information, and tangibles that are within the control of the corporation [*see* Sunrich, Inc. v. Pac. Foods of Or., Inc. (D Or 2003) 2003 US Dist LEXIS 8186, at *10-*12].

23.139[3] Only Representative Party in Class Action Litigation Is Deemed Party for Discovery Purposes.

Litigation initiated by or against a party as a class is known as a class action, and only persons named in the litigation are considered "parties" for purposes of *Fed R Civ P 34* discovery [*Enterprise Wall Paper Mfg. Co. v. Bodman (SDNY 1980) 85 FRD 325, 327*]. Consequently, in class action litigation, requests for production may not be served on absent class members without a strong showing of necessity. However, under Rule 23(d), the court may in appropriate circumstances order production and inspection of documents and other tangible items from absent class members [*Schwartz v. Celestial Seasonings, Inc. (D Colo 1999) 185 FRD 313, 318-319* ; *see Fed R Civ P 23(d)(5)*].

Cross Reference:

Discussion of discovery in class actions, see Ch. 20, Class Actions, *§ 20.38[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.140 Limits on Number of Rule 34 Requests.

Unlike other discovery methods, Rule 34 and the local rules of California's federal district courts place no limitations on the number of requests for production or inspection a party may propound [*see Fed R Civ P 34*]. The court nevertheless may limit the number of Rule 34 requests under the general discovery provisions of the federal rules [*see Fed R Civ P 26(b)(2)*; *Nestle Foods Corp. v. Aetna Cas. & Sur. Co. (DNJ 1990) 135 FRD 101, 106-107* (court limited number of claim files insurer must produce because of burdensomeness)], and may make any order that justice requires to protect parties from annoyance, embarrassment, oppression, or undue burden or expense [*Fed R Civ P 26(c)*].

Cross Reference:

Discussion of court's discretion to limit discovery, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.141 Other Discovery Procedures for Production of Documents, Electronically Stored Information, and Tangible Items.

23.141[1] Parties Must Produce Certain Documents, Electronically Stored Information, and Tangible Items As Part of Mandatory Initial Disclosures. Each party in a civil action is generally required, as part of mandatory initial disclosure, to produce a copy, or description by category and location, of all documents, electronically stored information, and tangible items that are in the possession, custody, or control of the party, and that the disclosing party may use to support any claim or defense [*Fed R Civ P 26(a)(1)(A)(ii)*; *see also 23.153[4]* (discussion of possession, custody, or control)]. The "documents" referred to in Rule 26(a)(1)(B) are letters, memos, calendars, e-mails, written contracts, and similar writings, but generally do not include declarations and affidavits. A party must produce or describe by category and location all documents and tangible items that the party intends to use, either at trial or in a "motion" [*Intel Corp. v. Via Techs., Inc. (ND Cal 2001) 204 FRD 450, 451-452*].

Warning:

A party failing to produce documents, electronically stored information, or tangible items that are subject to the initial disclosure requirements will be permitted to use the otherwise admissible documents and tangibles at trial for impeachment purposes only [*Lomascolo v. Otto Oldsmobile-Cadillac, Inc. (NDNY 2003) 253 F Supp2d 354, 360-361*]; additionally, the party could be sanctioned by the court [*Gebhardt v. Mentor Corp. (D Ariz 1999) 191 FRD 180, 182*].

Cross Reference:

Discussion of required initial disclosure of production of documents, electronically stored information, and tangible items, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§§ 15.15 -15.26*.

23.141[2] Party May Include Request for Production in Notice of Deposition. A party may use a deposition notice to request that another party bring specified documents and tangible things [*Fed R Civ P 30(b)(5)*; *see, e.g., LG Elecs., Inc. v. Q-Lity Computer, Inc. (ND Cal 2002) 211 FRD 360, 368*]. Such a list of documents is treated as a request for production of documents under Rule 34 [Reebok Int'l, Ltd. v. Jemmett (SD Cal 1988) 1988 US Dist LEXIS 16504,

at *3], and Rule 34 procedures apply to the request [*Fed R Civ P 30(b)(2)*].

Cross References:

Discussion of use of notice of deposition to request production of documents and tangible items, see *§§ 23.03 -23.18*.

See also 7 *Moore's Federal Practice, § 34.02[4][b]* (Matthew Bender 3d ed.).

23.141[3] Party May Serve Subpoena on Nonparty to Obtain Documents, Electronically Stored Information, and Tangible Items.

23.141[3][a] Subpoena Facilitates Discovery From Nonparties. Through the device of subpoena, a party may require that a nonparty produce and permit inspection, copying, testing or sampling of designated documents, books, electronically stored information, or other tangible items in the possession, custody or control of the person, or to permit inspection of premises, at a time and place specified in the subpoena [*Fed R Civ P 34(c)*, *45(a)(1)(C)*; *see also L.A. News Serv. v. CBS Broad., Inc. (9th Cir 2002) 305 F3d 924, 936* , *as amended*, 313 F3d 1093].

Distinguish:

Rules 34 and 45, though similar in scope, serve fundamentally different purposes: Rule 34 is invoked to obtain or inspect documents from parties prior to trial, while Rule 45 may be utilized to compel production of material for use at depositions or the trial from either parties or nonparties [*see Mortgage Info. Servs., Inc., v. Kitchens (WDNC 2002) 210 FRD 562, 565* (Rule 45 by its terms applies to parties and nonparties, and subpoena may be used against either when Rule's prerequisites are met)].

Cross Reference:

Discussion of nonparty subpoenas, see *§§ 23.259 -23.285*.

Discussion comparing Rules 34 and 45, see 7 *Moore's Federal Practice, § 34.02[5]* (Matthew Bender 3d ed.).

23.141[3][b] Subpoena Procedures Must Be Followed for Production or Inspection From Nonparty. Even though a Rule 45 subpoena to a nonparty for production or inspection is considered the equivalent of a Rule 34 request to a party [*see Klesch & Co. v. Liberty Media Corp. (D Colo 2003) 217 FRD 517, 520* ; *Fed R Civ P 45(a)*, Committee Note of 1991], Rule 45 procedures will apply, not Rule 34 procedures [*see Fed R Civ P 34(c)*; *Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicenter of Haverstraw, Inc. (D Kan 2003) 211 FRD 658, 662*]. Before issuing a subpoena to compel the production of documents, electronically stored information, and things or inspection of premises, notice must be served on each party in the manner prescribed by *Fed R Civ P 5(b)* [*Fed R Civ P 45(b)(1)*].

Cross Reference:

Discussion of procedure that must be followed for issuance of subpoena, see *§§ 23.259 -23.285*.

23.141[3][c] Nonparty Subpoena for Production or Inspection Is Subject to Court's Discovery Deadlines. A party may not use a subpoena to circumvent discovery deadlines; discovery deadlines apply to Rule 45 subpoenas directed to a nonparty. A subpoena for production or inspection, therefore, is subject to the same discovery scheduling orders as a Rule 34 request to a party [*see Mortgage Info. Servs., Inc. v. Kitchens (WDNC 2002) 210 FRD 562, 565* (subpoena duces tecum meets definition of discovery contained in former Rule 26(a)(5), and therefore is subject to same time deadlines that apply to all other methods of formal discovery)].

23.141[3][d] Subpoena May Be Used to Compel Testimony. A subpoena requiring production and inspection, copying, testing or sampling of designated books, papers, documents, electronically stored information, or tangible

things, or inspection of premises, may also require testimony of the responding person for deposition, hearing, or trial. However, if the subpoena does not require such deposition, hearing, or trial testimony [*Fed R Civ P 45(a)(1)(D)*], the person need not appear in person at the place of production or inspection [*Fed R Civ P 45(c)(2)(A)*]. If it commands attendance, the subpoena must issue from the district court in which the hearing or trial is to be held, or from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. A subpoena commanding attendance at a deposition must state the method by which the testimony will be recorded. If separate from a subpoena commanding attendance of a person, a subpoena for production or inspection must issue from the court for the district in which the production or inspection is to be made [*Fed R Civ P 45(a)(2)*].

Cross Reference:

Discussion of subpoena used to compel testimony, see *§ 23.262*.

23.141[3][e] Subpoena Procedure Must Protect Nonparty Against Significant Expense. Any subpoena to compel production or inspection must protect a nonparty, or an officer of a party, from significant expense resulting from the production or inspection. Thus, a person commanded to produce and permit inspection and copying may within 14 days after service of the subpoena or before the time specified for compliance serve a written objection on the party or attorney designated in the subpoena. After the objection, the court may order a limitation in the scope of the subpoena or may order the party requesting discovery to pay all or part of the legal fees or other expenses reasonably incurred by a nonparty in complying with a subpoena to produce documents or permit inspection [*Fed R Civ P 45(c)(2)(B)*; *see McCoy v. Southwest Airlines Co. (CD Cal 2002) 211 FRD 381, 385-386*].

23.141[3][f] Factors Court May Consider in Shifting Payment of Subpoena Discovery Expense. In determining whether and to what extent to reimburse a nonparty who has responded to a subpoena duces tecum, the court may consider factors such as: the scope of discovery; the need for the discovery; the financial resources of the party; the availability of a protective order to protect the nonparty; the extent to which the producing party must separate responsive information from privileged or irrelevant material; and the reasonableness of the expenses of production [*see* McCloskey v. UPS (D Or 1996) 1996 US Dist LEXIS 17465, at *14-*16].

23.141[4] Serving Subpoena on Parties. A subpoena may be served on parties [*see Mortgage Info. Servs., Inc., v. Kitchens (WDNC 2002) 210 FRD 562, 565*]. Ordinarily, when seeking documents from a party, the preferred device is a Rule 34 request rather than a Rule 45 subpoena duces tecum. A Rule 34 request has the benefit that it can be simply served on counsel of record rather than personally served on the party under Rule 45.

In rare circumstances, though, a Rule 45 subpoena might be directed to a party in an effort to obtain documents more quickly [*compare Fed R Civ P 45(c)(3)(A)(i)* (production required within "reasonable time") *with Fed R Civ P 34(b)* (written response to production request required within 30 days of service)], or because a Rule 34 request would be untimely. Violation of a Rule 45 subpoena also carries with it the prospect for a contempt sanction. Additionally, a Rule 45 subpoena may be employed when a party anticipates that its adversary will claim it does not have possession, custody, or control of requested documents, such as in the related corporate entity context [*see 23.139[2]*].

Warning:

Rule 45 subpoenas generally may not be used to evade Rule 34 time constraints [*see 23.141[3][c]*]. Also, depending on the local rules and the court's pretrial discovery order, counsel's ability to use Rule 45 may be restricted.

Judge's Perspective:

A party propounding a Rule 45 subpoena duces tecum on another party should be prepared to explain to the court why a Rule 34 request for production would not have been adequate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
VI. REQUESTS FOR PRODUCTION AND INSPECTION
B. Requesting Production or Inspection

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.142

23.142 CHECKLIST: Requesting Production or Inspection.

☐ To determine which items to request, review responses and answers to previously used discovery tools, including:

- ○ Depositions;
- ○ Interrogatories; and
- ○ Requests for admission.

Authority:
Fed R Civ P 34(a)

Discussion:
See *§ 23.136[1]*

☐ Consider timing of request for production:

- ○ Early requests will preserve items for use later at trial, and may help frame the rest of discovery, especially depositions.

Discussion:
See *§ 23.143[1]*

○ Party may generally serve a request for production or inspection only:

☐ After the action has been commenced by filing of complaint that commences case.

☐ After discovery conference.

☐ After deadlines for parties to make their initial disclosures.

Authority:
Fed R Civ P 34(a)

Discussion:
See *§ 23.144*

☐ Prepare a written request for production and inspection, numbered sequentially:

○ Specify duties of responding party, such as to:

☐ Conduct a reasonable search.

☐ Respond specifically and completely to each request and permit inspection to extent request is not objectionable.

☐ Supplement responses as appropriate.

☐ List privilege documents on a log.

☐ Produce documents as kept in the usual course of business.

Authority:
Fed R Civ P 26(e), 34(b)(2)(E)

○ Define terms that will be used throughout the requests, such as the parties and specific types of documents.

○ Specify items to be produced and inspected, either:

☐ By individual item; or

☐ By category.

Forms:

See *§§ 23.302*, *23.303*

Authority:
Fed R Civ P 34(b)

Discussion:
See *§ 23.145[1]*

○ Specify items to be produced and inspected with particularity, with a description sufficient to enable a reasonable person to determine precisely the documents or items requested.

Authority:
Fed R Civ P 34(b)(1)(A)

Discussion:
See *§ 23.145[2]*

○ Specify a reasonable place and manner of production and inspection that does not place an unreasonable relative expense and burden on parties, such as requesting delivery of copies of documents to office of requesting party's counsel.

Authority:
Fed R Civ P 34(b)(1)(B)

Discussion:
See *§ 23.145[3]*

○ Specify a reasonable time for production and inspection.

Timing:
The requesting party may choose any reasonable time for production, provided that the date of production is at least 30 days after service of the request [*Fed R Civ P 34(b)(2)(A)*; *see 23.144[4]*], plus three days if service is by mail or electronic delivery [*Fed R Civ P 6(d)*; *see Fed R Civ P 5(b)(2)(E)*]. A shorter or longer time may be directed by the court or by written agreement of the parties [*Fed R Civ P 34(b)*; *see Fed R Civ P 29(b)*].

Form:
See *§§ 23.302*, *23.303*

Authority:
Fed R Civ P 34(b)(1)(B)

Discussion:
See *§§ 23.144[4]*, *23.145[4]*

○ Specify form or forms in which electronically stored information is to be produced.

Authority:
Fed R Civ P 34(b)(1)(C)

Discussion:
See *23.145[2A]*

☐ Certify request for production and inspection:

○ If requesting party is represented by an attorney, the request must be signed by at least one attorney of record.

○ If requesting party is not represented by an attorney, the party must sign the requests personally and state his or her address.

Authority:
Fed R Civ P 26(g)(1), 34(b)

Discussion:
See *§ 23.146*

☐ Serve request on all parties to the action unless the court directs otherwise.

Authority:
Fed R Civ P 5(a), 34(a)

Discussion:
See *§ 23.147*

☐ Retain custody of original of the request and original response.

Authority:
ND Cal Civ LR 26-1; *ED Cal Civ LR 250.3(c)*; *CD Cal Civ LR 34-3*

Discussion:
See *§ 23.148*

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.143 Options and Strategies for Requesting Party.

23.143[1] Consider Early Requests for Production or Inspection. Securing documents, electronically stored information, other tangible items, and inspection of premises early in the litigation process is advantageous because:

- Analysis of the documents, electronically stored information, and tangible items will assist in establishing facts to formulate a case and discovery strategy.
- The analysis will make for more productive and thorough depositions by allowing the requesting party to ask witnesses about the documents.
- The items may reveal other claims, crossclaims, or defenses and allow the requesting party to amend its complaint, cross-complaint, or answer.
- The items are preserved for use later at trial.

However, a party may not obtain documents merely to determine whether it has a claim for relief; all requested documents and tangibles must be relevant to a claim or defense [*Caliper Techs. Corp. v. Molecular Devices Corp. (ND Cal 2003) 213 FRD 555, 558*].

Timing:

A party may make a request for production only after the complaint has been filed [*see Fed R Civ P 34(a)*; *23.144[1]*].

23.143[2] Consider Motion to Shorten Time to Respond to Requests for Production or Inspection. A party generally has 30 days after the service of a request to serve a response. However, the party requesting documents may request the court to shorten the response period [*Fed R Civ P 34(b)(2)(A)*; *see Cummings v. Standard Register Co. (1st Cir 2001) 265 F3d 56, 68*], or the time to respond may be shortened by agreement of the parties [*Fed R Civ P*

34(b)(2)(A)]. The court on its own may also set the date of the response [Garcia v. Texas Dep't of Human Servs. (WD Tex 2003) 2003 US Dist LEXIS 23876, at *2-*3].

Timing:

Absent a court's discretionary order or agreement of the parties, a party may not be compelled to respond prior to the end of the 30-day period [Garcia v. Texas Dep't of Human Servs. (WD Tex 2003) 2003 US Dist LEXIS 23876, at *2-*3].

Strategic Point--Requesting Party:

The requesting party should move for a response to a request for production of documents or electronically stored information or inspection of tangible objects at the earliest possible date if there is a probability that evidence could be imminently altered or destroyed, either intentionally [*see Barsoum v. N.Y. City Hous. Auth. (SDNY 2001) 202 FRD 396, 399* (sanctions may be imposed under Rule 34 for spoliation of evidence)], accidently, or by the passage of time. If there is danger of this happening, also consider moving for a protective order. The court may also shorten the time for a response to enable the parties to prepare properly for a motion (e.g., a motion for preliminary injunction or an opposition to an order to show cause), trial, or another discovery deadline [*see* Daumer v. Allstate Ins. Co. (ED Pa 1992) 1992 US Dist LEXIS 16184, at *2-*4]. However, the requesting party must establish why a shorter time for response to meet another deadline would be reasonable [*Gavenda v. Orleans County (WDNY 1997) 182 FRD 17, 20*].

Legal Topics:

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23.144 Time Restrictions on Requests for Production or Inspection.

23.144[1] Request Is Premature If Made Prior to Filing of Complaint. Rule 34 is available to obtain production and access only after a civil action has been commenced by the filing of a complaint [*Fed R Civ P 34(a)* (Rule 34 may only be used by party to civil action); *see Fed R Civ P 3*]. For example, *Fed R Civ P 34(a)(2)* does not allow a pre-action entry on the land of another for discovery purposes [*McNierney v. Long Island R.R. (SDNY 2003) 215 FRD 458, 459*].

Exception:

In some circumstances, Rule 27 permits perpetuation proceedings prior to an action to preserve evidence that may be lost if not immediately preserved [*see Fed R Civ P 27*]. Parties may be able to use the perpetuation mechanisms of Rule 27 to submit Rule 34 requests prior to an action or pending appeal. Such Rule 34 requests may be made on a restricted basis, subject to court approval [*see Martin v. Reynolds Metals Corp. (9th Cir 1961) 297 F2d 49, 56* (authorizing use of Rule 34 and Rule 35 discovery in prelitigation perpetuation)].

Cross References:

Use of Rule 27 perpetuation procedure before commencement of action, see *§§ 23.03 -23.18*.

Discussion of Rule 34's inapplicability before commencement of action, see 7 *Moore's Federal Practice, § 34.03[2][a]* (Matthew Bender 3d ed.).

23.144[2] Request Is Premature If Made Prior to Discovery Conference. The earliest time for a Rule 34 request is governed by the interaction of *Fed R Civ P 16*, *26*, *34* [*see Fed R Civ P 34(b)*], with the general rule that, absent leave of court or a written stipulation, a Rule 34 request may not be served prior to the discovery conference specified in Rule 26(f) [*see Fed R Civ P 26(d)*], which is used by the parties to develop a proposed discovery plan [*see Fed R Civ P 26(d)*; *SD Cal Civ LR 16.1(d)*].

Timing:

After the discovery conference, the parties may control the timing of their requests for production or inspection, subject to the court's orders regarding the scheduling of discovery [*see Fed R Civ P 26(d)*].

Cross Reference:

Discussion of Rule 16 case management conferences, see Ch. 16, Case Management Conferences.

23.144[3] Request Is Premature If Made Prior to Initial Disclosure. Rule 26(a) specifies a schedule of automatic initial disclosures by the parties, including the production of all documents, electronically stored information, and tangible items in the possession, custody, or control of the party, that the disclosing party may use to support any claim or defense [*Fed R Civ P 26(a)(1)(A)(ii)*; *see City & County of San Francisco v. Tutor-Saliba Corp. (ND Cal 2003) 218 FRD 219, 220*]. If a party requests production or inspection seeking this type of information prior to the time that the disclosures are due, the requests may be stricken as premature [*see* Basque Station, Inc. v. United States (D Idaho 1995) 1995 US Dist LEXIS 7085, at *6].

Cross Reference:

Discussion of impact of mandatory disclosure requirements on Rule 34 requests, see 7 *Moore's Federal Practice, §§ 34.02[2], 34.10[2]* (Matthew Bender 3d ed.).

23.144[4] Request May Not Be Made Later Than 30 Days Prior to Discovery Deadline. In a civil action, the district court will enter a scheduling order setting the time for completion of discovery [*Fed R Civ P 16(b)*]. Because parties are allowed 30 days to respond to requests for production [*Fed R Civ P 34(b)*], requests must be served at least 30 days prior to completion of the discovery deadline [*see* Pratt v. Crist (9th Cir 1997) 1997 US App LEXIS 8669, at *4 (unpublished opinion; generally not citable to court under 9th Cir R 36-3)]. A party, therefore, must seek leave of court to serve Rule 34 requests that would require production or inspection after the cutoff date [*Thomas v. Pacificorp (10th Cir 2003) 324 F3d 1176, 1179*].

23.144[5] Request Must Set Reasonable Time for Inspection. The request for production must specify a reasonable time for inspection of the produced documents and tangible items, along with copying and testing activities. Furthermore, the time specified in the request must be at least 30 days after service of the request. However, the court may on motion permit a longer or shorter time to produce the requested documents [*Fed R Civ P 34(b)(2)(A)*; *see, e.g.,* Holliday v. Extex (D Haw 2006) 237 FRD 425, 427].

23.144[6] LOCAL PRACTICE: ND Cal--Request Must Allow Time for Response Before Discovery Cutoff. In the Northern District, requests that call for a response after the discovery cutoff are not enforceable except by order of the court for good cause shown. The "discovery cutoff" is the date by which all responses to written discovery are due as set by the court [*ND Cal Civ LR 26-2*]. Thus, all requests must be served at least 30 days prior to the discovery cutoff [*see Fed R Civ P 34(b)*].

23.144[7] LOCAL PRACTICE: ED Cal--Relief From Discovery Termination Date Requires Strong Showing. In the Eastern District, a party requesting production that will require a response after the date of discovery termination set by a status conference order must specify the grounds for relief from that order. Motions for relief are not favored and will ordinarily be denied unless the moving party makes a strong showing [*ED Cal Civ LR 281(b)(13)*].

Legal Topics:

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23.145 Contents and Format of Request for Production or Inspection.

23.145[1] Written Request Must Specify Items Individually or by Category. A request for production or inspection must be in writing, because it must be served on the parties [*see Fed R Civ P 34(a)*]. The request must specify the items to be produced and inspected, either by individual item or by category [*Fed R Civ P 34(b)(1)(A)*].

Cross Reference:

Discussion of identifying requested material by item or category in written response, see 7 *Moore's Federal Practice, § 34.11[1], [2]* (Matthew Bender 3d ed.).

23.145[2] Request Must Specify Items With Reasonable Particularity. The request must set forth the items to be produced and inspected with reasonable particularity. The description should be sufficient to enable a reasonable person to determine precisely the documents requested [*De Saracho v. Custom Food Mach., Inc. (9th Cir 2000) 206 F3d 874, 881* (when request referred to documents relating to litigation, it should have specified litigation between particular parties)]. A court in another circuit has stated that the test for reasonable particularity is whether the request places a party on reasonable notice of what is called for and what is not. Thus, the party requesting the production of documents must provide sufficient information to enable the served party to identify responsive documents [*Bruggeman ex rel. Bruggeman v. Blagojevich (ND Ill 2004) 219 FRD 430, 436*].

Cross Reference:

Discussion of "reasonable particularity," see 7 *Moore's Federal Practice, § 34.11[3]* (Matthew Bender 3d ed.).

23.145[2A] Request May Specify Form of Production of Electronically Stored Information. A request for production may specify the form or forms in which electronically stored information is to be produced [*Fed R Civ P 34(b)(1)(C)*].

23.145[3] Request Must Specify a Reasonable Place and Manner of Inspection. A request for production or

inspection must specify a reasonable place and manner of making the inspection and performing the related acts such as copying and testing [*Fed R Civ P 34(b)(1)(B)*]. The parties may dispute the place and manner of inspection because of the relative expense and burden placed on the parties. The fact that production of documents might be expensive or burdensome is generally not a justification for refusing to produce or allow inspection. However, these factors may serve as the basis for a court order affecting the location or manner of the production [*see Rowlin v. Alabama Dep't of Pub. Safety (MD Ala 2001) 200 FRD 459, 461-463*].

Consider:

Usually the requesting party asks for copies of documents to be delivered to its counsel's office. A party requesting *electronic* documents should generally require that the documents be produced in electronic form, not merely printed out and produced in paper form. The electronic form contains information not available on the printed record, such as the date the document was created and edited.

Cross Reference:

Discussion of electronic discovery, see *§§ 23.157 -23.188*.

23.145[4] Request Must Specify a Reasonable Time for Inspection. A request for production or inspection must specify a reasonable time for making the inspection and performing the related acts such as copying, testing, and sampling [*Fed R Civ P 34(b)(1)(B)*].

Timing:

The requesting party may select a reasonable time, provided that the date of production is at least 30 days after service of the request [*Fed R Civ P 34(b)(2)(A)*; *see 23.144[5]*], plus three days if service is by mail or electronic delivery [*Fed R Civ P 6(d)*; *see Fed R Civ P 5(b)(2)(E)*].

Exception:

A shorter or longer time may be directed by the court or by written agreement of the parties, with court approval required if the agreed date conflicts with a court-ordered discovery or trial schedule [*Fed R Civ P 34(b)(2)(A)*; *see Fed R Civ P 29(b)*].

23.145[5] LOCAL PRACTICE: CD Cal Requirements--Requirements for Numbering Requests. In the Central District, the party making a request for production must number the requests sequentially, without repeating the numbers used on any prior set of requests for production propounded by that party [*CD Cal Civ LR 34-1*].

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23.146 Certification Is Required on Request.

If the requesting party is represented by an attorney, the request must be signed by at least one attorney of record. The attorney must include his or her address. If unrepresented, the party must sign the requests personally and state his or her address, e-mail address, and telephone number [*Fed R Civ P 26(g)(1)*; *see St. Paul Reinsurance Co. v. Commercial Fin. Corp. (ND Iowa 2000) 198 FRD 508, 515* (discovery requests governed by Rule 26(g))].

Warning:

If the attorney, or party, fails to certify the request properly, the other parties need not respond to the request, and the court will strike the request unless it is promptly signed after the requesting party has been notified of the omission [*Fed R Civ P 26(g)(2)*.]

Cross Reference:

Ch. 25, Motions to Compel and Discovery Sanctions, see *§§ 25.107 -25.112*.

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23.147 Service of Request Is Required on All Parties.

The requesting party must serve the request on the party to whom the request is directed [*Fed R Civ P 34(a)*], and also on all other parties to the action unless the court directs otherwise [*Fed R Civ P 5(a)* (every paper relating to discovery required to be served on party must be served on each party); *see* Waggoner v. Trans Union, LLC (ND Tex 2003) 2003 US Dist LEXIS 21491, at *14].

Cross Reference:

Discussion of parties entitled to service, see Ch. 5, Formatting, Serving, and Filing Papers, *§ 5.16*.

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VI. REQUESTS FOR PRODUCTION AND INSPECTION
B. Requesting Production or Inspection

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23.148 LOCAL PRACTICE: Requests for Production or Inspection Generally Should Not Be Filed.

23.148[1] LOCAL PRACTICE: CD Cal Requirements. In the Central District, requests for production should not ordinarily be filed with the court. Only when a request for production is required for use in a proceeding should that part of the document at issue be filed. The attorney propounding the requests must retain all requests and responses pending use, unless otherwise ordered by the court [*CD Cal Civ LR 26-2*; *CD Cal Civ LR 34-3*].

23.148[2] LOCAL PRACTICE: ED Cal Requirements. In the Eastern District, requests for production and responses, and proofs of service of those documents, should not be filed unless and until there is a proceeding in which the request, response, or proof of service is at issue. When required in a proceeding, only that part of the request for production, response, or proof of service at issue should be filed [*ED Cal Civ LR 250.3(c)*].

23.148[3] LOCAL PRACTICE: ND Cal Requirements. In the Northern District, the party requesting production must retain the original of the request and the original response, and is deemed the custodian of those materials [*ND Cal Civ LR 26-1*].

23.148[4] LOCAL PRACTICE: SD Cal Requirements. Local Court Rules in the Southern District do not include specific provisions regarding filing of requests.

Legal Topics:

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C. Responding to Request for Production or Inspection

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.149

23.149 CHECKLISTS: Responding to Request for Production or Inspection.

23.149[1] Checklist for Service of Response.

☐ Determine time for filing response.

Timing:

The responding party must serve a written response within 30 days after service of the request, unless the court directs otherwise or the parties agree to a shorter or longer time in writing, with court approval required if the agreed date conflicts with a prior court-ordered discovery or trial schedule [*Fed R Civ P 34(b)(2)(A)*; *see Fed R Civ P 29(b)*].

Exception:

The responding party has three additional days to serve the response if service of the request was by mail or electronic delivery [*Fed R Civ P 6(d)*; *see Fed R Civ P 5(b)(2)(E)*].

Authority:

Fed R Civ P 34(b)

Discussion:

See *§ 23.151[1]*

☐ Decide which response to utilize from among three choices:

○ If party has possession, custody, or control of requested items, a response that agrees to time, place, and manner of requested production or inspection.

○ An objection to all or some of items requested, to the requested form or forms for producing electronically stored information, or to time, method, and manner of requested production or inspection, stating specific reasons for objection.

○ A response that specifies a good faith, reasonable, alternative production, and that specifies a definite scope, time, place, or manner of production.

Consider:
In appropriate circumstances, a party may object to some items of the requested production, while answering the unobjectionable items.

Authority:
Fed R Civ P 34(b)

Discussion:
See *§ 23.150[2]*

☐ Determine whether to file motion for protective order instead of or in addition to response to production or inspection request.

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.35*

☐ Draft response to request for production of documents or tangible items, including:

○ Specification of items individually or by category, in conformance to numbering of requests.

○ Statement for each item or category that:

☐ For electronically stored information, if objection is made to the requested form or forms for production, or if no form was specified in the request, the form or forms of production that will be used.

☐ Responding party will permit inspection and related activities as requested; or

☐ Responding party objects to request or portion of request.

Form:
See *§ 23.304*

Authority:
Fed R Civ P 34(b)

Discussion:
See *§ 23.152*

○ Any objections, along with a statement clearly specifying grounds, such as:

☐ Privilege.

☐ Work product.

☐ Lack of relevance to claim or defense of party, or absence of good cause to seek discovery of matter merely relevant to subject matter of action.

☐ Lack of possession, custody, and control.

☐ Failure to designate with reasonable particularity.

☐ Overly intrusive request to enter land or premises.

☐ Compliance will unfairly reveal trade secrets or other confidential information.

☐ Vague and ambiguous, unduly burdensome, or overbroad

☐ Request for testing will harm item.

Authority:
Fed R Civ P 34(b)

Discussion:
See *§ 23.153*

☐ Certify response to request for production and inspection:

○ If requesting party is represented by an attorney, request must be signed by at least one attorney of record.

○ If requesting party is not represented by an attorney, party must sign requests personally and state his or her address e-mail address, and telephone number.

Authority:
Fed R Civ P 26(g)(1), 34(b)

Discussion:
See *§ 23.152[5]*

☐ Serve response on requesting party, and on all other parties to the action unless the court directs otherwise.

Authority:
Fed R Civ P 5(a), 34(a)

Discussion:
See *§ 23.154*

☐ Supplement response to request, as appropriate.

Authority:
Fed R Civ P 26(e)(2)

Discussion:
See *§ 23.152[7]*

23.149[2] Checklist for Response.

☐ Identify requested items that responding party has in possession, custody, or control, and that are not objectionable.

☐ Produce items in requests that are not objectionable:

○ At a reasonable time specified in request or at a time agreed on by the parties.

○ At the place specified in request, if reasonable, or at a place agreed on by the parties.

☐ Make items available for inspection and related activities such as copying, photographing, and testing activities.

☐ Produce documents in either of the following ways:

○ As they are kept in the usual course of business; or

○ Organized and labeled to correspond with categories specified in request for production.

☐ Produce electronically stored information:

○ In the form or forms specified in the request.

○ If the request does not specify the form of production or if the form contained in the request is being objected to, specify a form or forms in which the information is ordinarily maintained or is reasonably usable.

Authority:

Fed R Civ P 34(b)(1)(C)

Discussion:

See *§ 23.156*

Legal Topics:

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C. Responding to Request for Production or Inspection

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23.150 Options and Strategies for Responding Party.

23.150[1] Exercise Response Option Within Time Constraint. The responding party must serve some type of written response within 30 days after the service of a Rule 34 request, unless a shorter or longer time is directed by the court or agreed to in writing by the parties [*Fed R Civ P 34(b)(2)(A)*]. Only a written response will be effective to prevent sanctions or other potential negative effects of failure to respond to the request [*see Smith v. Conway Org., Inc. (SDNY 1994) 154 FRD 73, 76* (attorney work product objection waived because objection to document request made five months after request)].

It is not unusual for the responding party to ask for an extension of time to serve written responses and/or produce. Courts expect parties to accord each other the courtesy of reasonable extensions. Also, a requesting party that refuses a reasonable extension can expect its own request for an extension or some other professional courtesy to be rejected. Thus, unless the other party has been abusive with extensions or time is pressing, it is usually appropriate to grant requests for extensions.

23.150[2] Determine How to Respond to Each Request. For each requested item, the responding party must determine how to respond based on whether the request is relevant to a claim or defense of a party, the reasonableness of the time, manner, and location of the request, the burdensomeness of the request, etc. There are three proper written responses to a Rule 34 request [*see* EEOC v. Safeway Store, Inc. (ND Cal 2002) 2002 US Dist LEXIS 25200, at *2-*7]:

- If the party has possession, custody, or control of the requested items, serve a response that agrees to the time, place, and manner of the requested production or inspection.

- Serve an objection to the items requested or the time, method, and manner of the requested production or inspection, with specific reasons for the objection.

- Serve a response that specifies a good faith, reasonable, alternative production and that specifies a definite scope, time, place or manner. In appropriate circumstances, the party may object to some items

of the requested production, while answering the unobjectionable items.

Warning:

A party must respond to those requests or portions of requests to which no objection is advanced. A party should not assert, for example, a privilege objection and then wait until the privilege issue is resolved before producing documents clearly not privileged but otherwise responsive.

Decision Point:

A party that objects to a particular request may still want to produce documents that it may rely on at trial.

Distinguish--Protective Order:

The responding party may obtain a protective order to obviate the need to comply with onerous terms of a request for production or inspection. However, the mere filing of a motion for a protective order does not satisfy the requirement to serve timely a written response to a request, unless the protective order is entered before the time a response is due [*see Flaherty v. Seroussi (NDNY 2002) 209 FRD 300, 304*].

Legal Topics:

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Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
VI. REQUESTS FOR PRODUCTION AND INSPECTION
C. Responding to Request for Production or Inspection

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.151

23.151 Time Limit for Written Response.

23.151[1] Time Limit Is Generally 30 Days. A party served with a request for production or inspection has 30 days to file a written response [*Fed R Civ P 34(b)(2)(A)*], plus an additional three days if served by mail or electronic delivery [*Fed R Civ P 6(d)*; *see Fed R Civ P 5(b)(2)(E)*].

Cross Reference:

Discussion of time limit for Rule 34 response, see 7 *Moore's Federal Practice, § 34.13[1]* (Matthew Bender 3d ed.).

23.151[2] Time Limit May Be Altered by Court Order or by Agreement. The 30-day response period may be made shorter or longer bydirection of the court or by written agreement of the parties, with court approval required if the agreed date conflicts with a prior court-ordered discovery or trial schedule [*Fed R Civ P 34(b)(2)(A)*; *see Fed R Civ P 29(b)*]. The attorneys typically work together to set a reasonable time for production without the necessity of filing a motion, but the court may set the time if necessary [*see McCoy v. Southwest Airlines Co. (CD Cal 2002) 211 FRD 381, 385*]. If a shorter time has not been ordered by the court or agreed to by the parties, but the requesting party has despite the rule specified a time for production that is less than the time allowed by the Rule for a response, responding party has the full 30 days to respond [*Smith v. Conway Org., Inc. (SDNY 1994) 154 FRD 73, 76*].

Cross Reference:

Discussion of requests for extension, see *§ 23.150[1].*

23.151[3] Formal Response Necessary to Preclude Waiver. A party must make a written objection in its response to a party's request within the 30 days specified in Rule 34 or the objection is waived. However, all of the details concerning the objection need not be made until the requesting party brings a motion to compel. In other words, a responding party does not waive an objection raised formally later when a written response has been timely filed [*Caliper Techs. Corp. v. Molecular Devices Corp. (ND Cal 2003) 213 FRD 555, 559*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

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23.152 Contents and Format of Response to Request for Production or Inspection.

23.152[1] Response Must Be in Writing and Specify Items Individually or by Category. A response to a request for production or inspection must be in writing, because it must be served on the parties [*see Fed R Civ P 34(a)*]. The response must refer to each individual item or category in the request. The response to a request for inspection must state for each item or category that inspection and related activities will be permitted as requested, unless the party objects to the request, in which event the reasons for the objection must be stated. If objection is made to only part of an item or category, that part must be specified and inspection permitted of the remaining parts [*Fed R Civ P 34(b)*; *see* Collins v. JC Penney Life Ins. Co. (SD Cal 2003) 2003 US Dist LEXIS 8455, at *6].

The response to a request for production must contain an individualized and complete response to each request, and, unless an objection is raised, be accompanied by production of the documents or electronically stored information responsive to that request [Fed R Civ P 34(b)], regardless of whether those documents, or that information, have already been produced [Louen v. Twedt (ED Cal 2006) 236 FRD 502, 505]. If there are no documents or information responsive to a request, that should be stated in the response [Louen v. Twedt (ED Cal 2006) 236 FRD 502, 505].

Consider:

If the producing party produces by category, it must still keep a set of the documents as they were maintained in the usual course of business, because it may be necessary later to know the file folder title or in whose file a document was found.

23.152[2] Response Should Conform to Designation of Items and Categories in Request. The responding party should designate each item and category in the response with the same numeral or letter as in the request, and must present the response in the same order as in the request [*see Fed R Civ P 34(b)(2)(B)*].

Consider:

It is helpful to reprint each request and insert the response to each request after the specific request, resulting in a document containing all requests and their corresponding responses. This precludes the need to refer to two documents to find both the requests and responses. See local practice discussion in §

23.152[6].

23.152[2A] Response Must State Form of Production of Electronically Stored Information If No Form Was Specified in Request or If Responding Party Objects to Form Specified. If the responding party objects to the requested form or forms for producing electronically stored information specified in the request, or if no form was specified in the request, the responding party must state the form or forms it intends to use to produce electronically stored information [*Fed R Civ P 34(b)(2)(D)*]. Unless the parties otherwise agree, or the court otherwise orders, if the request does not specify the form or forms for producing electronically stored information, the responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable [*Fed R Civ P 34(b)(2)(E)(ii)*]. The responding party need not produce the same electronically stored information in more than one form [*Fed R Civ P 34(b)(2)(E)(iii)*].

Consider:

If the parties cannot agree on the form of production of electronically stored information, they must meet and confer [*see Fed R Civ P 37(a)(3)(B)*] to attempt to resolve the matter before the requesting party can move to compel production. If the parties cannot agree, the court will not be limited to the forms chosen by either party or the forms specified in Rule 34 for situations when there is no court order or party agreement [Fed R Civ P 34(b), Committee Note of 2006].

23.152[3] Responding Party Must Clearly Specify Reasons for Each Objection. A responding party must state the specific reason for objecting for each request that is objectionable [*Fed R Civ P 34(b)(2)(C)*]. General, boilerplate objections at the beginning of a set of responses are not sufficient to support a refusal to produce documents or permit inspection. Likewise, a general or boilerplate objection to any individual request is improper, particularly when the objecting party fails to submit any evidentiary declarations supporting the objection in response to a motion to compel further answers [*A. Farber & Partners, Inc. v. Garber (CD Cal 2006) 234 FRD 186, 188*]. For example, a claim of privilege must be made and sustained on a question-by-question or document-by-document basis; a blanket claim of privilege is unacceptable [*Burlington N. & Santa Fe Ry. v. United States Dist. Court (9th Cir 2005) 408 F3d 1142, 1149* , *cert. denied*, 546 US 939 (2005) ; *In re Air Crash at Taipei (CD Cal 2002) 211 FRD 374, 376* ; *see 23.153* (grounds for refusal to produce or allow inspection)].

23.152[4] Responding Party Must Comply With Unobjectionable Parts of Request. If an item or category is objectionable only in part, the responding party must comply with the unobjectionable portions of the request [*Fed R Civ P 33(b)(2)(C)*; *ED Cal Civ LR 250.3(b)*]. A party failing to specify the parts of the request to which the objections apply may be held to have waived any objections not adequately stated [*see McCoy v. Southwest Airlines Co. (CD Cal 2002) 208 FRD 617, 621*]. When a responding party makes noncomplying objections, the court also has the option to require that the responding party state its objection more completely or clearly [*Harris v. United States (WDNC 1988) 121 FRD 652, 655*].

23.152[5] Certification of Response. If the responding party is represented by an attorney, the response must be signed by at least one attorney of record. The attorney must include his or her address, e-mail address, and telephone number. If unrepresented, the party must certify the response by signing personally and stating his or her address [*Fed R Civ P 26(g)(1)*].

Warning:

If the attorney, or party, fails to certify the response properly, the response may be treated as ineffective, and objections asserted in the response may be deemed waived [*United States v. Philip Morris Inc. (DC Cir 2003) 347 F3d 951, 954*], unless the response is promptly signed after the requesting party has been notified of the omission [*Fed R Civ P 26(g)(2)*].

23.152[6] LOCAL PRACTICE: Format of Response.

23.152[6][a] LOCAL PRACTICE: CD Cal Requirements. In the Central District, the party responding or objecting to requests for production must quote each request for production in full immediately preceding the statement of any response or objection to the statement [*CD Cal Civ LR 34-2*].

23.152[6][b] LOCAL PRACTICE: ED Cal Requirements. In the Eastern District, a response to a request for production must set forth each request in full before each response [*ED Cal Civ LR 250.3(a)*]. A responding party must include a statement of reasons for each objection to any request for production and, if appropriate, citation to relevant authority [*ED Cal Civ LR 250.3(b)*; *see Fed R Civ P 33(b)(2)(C)*].

23.152[6][c] LOCAL PRACTICE: ND Cal Requirements. In the Northern District, a response to a request for production or inspection made pursuant to Rule 34(a) must set forth each request in full before each response or objection [*ND Cal Civ LR 34-1*].

23.152[6][d] LOCAL PRACTICE: SD Cal Requirements. Local Court Rules in the Southern District do not include specific provisions regarding format of responses to requests for production.

23.152[7] Supplementation of Responses. If a party acquires material additional information or learns that information submitted was materially incorrect after submitting Rule 34 responses, and that additional information is not otherwise known to the propounding party, the responding party has a duty to supplement or amend its responses [*Fed R Civ P 26(e)(1)(A)*].

The court may impose sanctions for failure to supplement responses to Rule 34 requests [*see Fed R Civ P 37(c)(1)*].

Cross References:

Discussion of the duty to supplement and amend discovery responses, see Ch. 21, Discovery Strategy and Planning, *§ 21.06[7]*; Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.50 -25.53*.

Continuing duty to supplement, see 6 *Moore's Federal Practice, § 26.131* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.153 Grounds for Refusal to Produce or Allow Inspection.

23.153[1] Privilege.

23.153[1][a] Requirements of Privilege Claim. A party need not under Rule 34 produce privileged or attorney work product material [*Fed R Civ P 34(a)*; *see Fed R Civ P 26(b)(1)*]. A party withholding information under a claim of privilege or work product must make the claim expressly and describe the nature of the documents withheld in a manner that enables the requesting party to assess the claim [*Jackson v. County of Sacramento (ED Cal 1997) 175 FRD 653, 655-656* ; *see Fed R Civ P 26(b)(5)(A)*]. This is usually done by producing a privilege log [*see 23.153[1][b]* (discussion of privilege log)].

23.153[1][b] Methods of Establishing Privilege Claim. A party asserting a privilege must make a prima facie showing that the privilege protects the information it intends to withhold from production; this may be done through a privilege log or, if ordered by the court, an in camera review [*Caliper Techs. Corp. v. Molecular Devices Corp. (ND Cal 2003) 213 FRD 555, 562-563*]. A privilege log is a list of documents or other items with a substantiation of a privilege claim on an item-by-item basis, without disclosing the contents of the items [*Safeco Ins. Co. of Am. v. Rawstrom (CD Cal 1998) 183 FRD 668, 670*].

Example:

For each document that the responding party claims is protected, a typical privilege log contains [*Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicenter of Haverstraw, Inc. (D Kan 2003) 211 FRD 658, 661*]:

- A description of the document, for example, whether it is a letter or a memo;
- The date the document was prepared or notations made;
- The identification of the person who prepared the document or made the notations on the document,

including if that person is an attorney;

- The person for whom the document was prepared, and other recipients, including if they are attorneys;

- The purpose of preparing the document or making the notations;

- The number of pages of each document; and

- The basis for withholding discovery.

Trap:

The protection of a privileged communication is extinguished by disclosure to another person, including the opposing party; consequently, the party claiming privilege should not specify in a privilege log the actual contents of the communication--an in camera review may be necessary [*see Kasza v. Browner (9th Cir 1998) 133 F3d 1159, 1169*]. A party should be careful to disclose only what is necessary to establish the privilege, and nothing more.

Strategic Point--Party Receiving Privilege Log:

A party receiving a privilege log should carefully examine it to determine whether documents and other items listed are being legitimately withheld.

Strategic Point--Responding Party:

Because compiling a privilege log within the 30-day period may be exceedingly difficult, the responding party should attempt at the earliest possible time, and certainly no later than before the 30-day response period, to secure an appropriate agreement or stipulation from the relevant parties. If that fails, apply for a discovery or protective order [*Burlington N. & Santa Fe Ry. v. United States Dist. Court (9th Cir 2005) 408 F3d 1142, 1149 n3* , *cert. denied*, *163 L Ed2d 326 (2005)*].

Judge's Perspective:

Enough information must be provided such that on review it will be obvious that the matter addressed involves the request for or receipt of legal advice. This may be supplied, for example, by the "Re:" line of a letter or the table of contents of a document. The author and all recipients of the document, which must be disclosed, may also reflect the likely privileged nature of the document when counsel appear to have been involved in its creation or circulation.

An attorney that is merely a "cc" recipient of a document should provide a more detailed description of the general nature and subject matter of the item in the privilege log. Courts are prone to be wary of entries that involve counsel only as a "cc" in light of the danger that a party has attempted to create privilege improperly by simply passing the document through counsel's hands. Likewise, in scrutinizing an opponent's privilege log, pay particular attention to "cc only" entries.

Warning:

The failure to produce a privilege log (or make an otherwise satisfactory demonstration of privilege) within the 30-day response period will not result in a *per se* waiver of the privilege. However, if a log is not produced within that time frame, the district court will make a case-by-case determination as to

whether privilege has been waived. The court may consider the following factors in evaulating waiver [*see Burlington N. & Santa Fe Ry. v. United States Dist. Court (9th Cir 2005) 408 F3d 1142, 1149* , *cert. denied*, *163 L Ed2d 326 (2005)*]:

- The degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld items is privileged.

- The timeliness of the objection and accompanying information about the withheld documents; service within 30 days is sufficient.

- The magnitude of the document production.

- Other circumstances of the case that influence the difficulty of responding to discovery.

Note, however, that privilege logs are exchanged in the ordinary course by agreement or stipulation, but not generally within the 30-day period allowed for responding to a document request. The district court's determination of waiver will be subject to agreements or stipulations among the parties, as well as applicable local rules and any existing discovery or protective orders [*Burlington N. & Santa Fe Ry. v. United States Dist. Court (9th Cir 2005) 408 F3d 1142, 1149* , *cert. denied*, (2005)].

Cross Reference:

Discussion of privileges, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§§ 24.12 -24.93*.

23.153[2] Work Product. To establish work product protection, the material in question must (1) be a document, item of electronically stored information or tangible thing, (2) which was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by or for its representative. If the conditions are satisfied, the burden shifts and the party seeking discovery must show substantial need for the materials and the inability without undue hardship to obtain the substantial equivalent of the materials by an alternative method. Opinion work product, which contains counsel's mental impressions or legal strategies, "enjoys nearly absolute immunity and can be discovered only in very rare circumstances" [*Garcia v. City of El Centro (SD Cal 2003) 214 FRD 587, 591* ; *see Fed R Civ P 26(b)(3)*]. A party's assertion of work product must be express and must describe the nature of the documents, communications, electronically stored information, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of work-product protection [*Fed R Civ P 26(b)(5)(A)*], such as by producing a privilege log.

Cross References:

Discussion of work product doctrine, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§§ 24.94 -24.102*. Discussion of privilege log, see *§ 23.153[1][b]*.

23.153[3] Lack of Relevance to Claim or Defense of Party. A party may not request production or access to documents, electronically stored information, and tangible items that are not relevant either to the claim or defense of any party or, with good cause shown, to the subject matter involved in the action [*Fed R Civ P 34(a)*; *see Fed R Civ P 26(b)*]. Consequently, irrelevance is a ground to object to a request, and should be stated clearly. However, a bare assertion that the discovery requested is irrelevant is ordinarily insufficient to bar production. The responding party must justify its objection by stating why the information is irrelevant [*see* Collins v. JC Penney Life Ins. Co. (SD Cal 2003) 2003 US Dist LEXIS 8455, at *6].

23.153[4] Lack of Possession, Custody, or Control.

23.153[4][a] Party Must Produce Only Items in Its Possession, Custody, or Control. A party may not be compelled to produce items that are not within either its possession, custody, or control [*see Fed R Civ P 34(a)(1)*], and a party may object to any request for production of items the party does not possess, have in its custody, or control [Collins v. JC Penney Life Ins. Co. (SD Cal 2003) 2003 US Dist LEXIS 8455, at *6-*7 ; *Italia di Navigazione, S.P.A. v. M.V. Hermes I (SDNY 1983) 564 F Supp 492, 495 , aff'd, 724 F2d 21 (2d Cir 1983)* ; *see Fed R Civ P 34(b)*]. The party seeking production of Material bears the burden of showing that the Material is in the possession, custody, or control of the responding party [*United States v. International Union of Petroleum & Indus. Workers, AFL-CIO (9th Cir 1989) 870 F2d 1450, 1452* (case involved subpoena for records)].

Cross Reference:

Discussion of possession, custody, or control, see 7 *Moore's Federal Practice, § 34.14[2][a]* (Matthew Bender 3d ed.).

23.153[4][b] Nature of Possession, Custody, or Control. For purposes of Rule 34, "possession" means physical retention with proximity to the item; legal ownership is not required [*Fed R Civ P 34(a)(1)*]. "Custody" means the party has an official responsibility to keep the item secure [*see Kessler Exp. Corp. v. Reliance Ins. Co. (EDNY 1962) 207 F Supp 355, 360*]. "Control" over the item means the party has the legal right to obtain the items requested on demand [7-*Up Bottling Co. v. Archer Daniels Midland Co (9th Cir 1999) 191 F3d 1090, 1107 , cert. denied, 529 US 1037 (2000)* ("[P]roof of theoretical control is insufficient; a showing of actual control is required"); *United States v. International Union of Petroleum & Indus. Workers, AFL-CIO (9th Cir 1989) 870 F2d 1450, 1452*]. This test must be applied broadly, and, when objecting to production on this basis, the responding party must clearly show that it has no legal right to the requested document or item [*In re ATM Fee Antitrust Litig. (ND Cal 2005) 233 FRD 542, 544-545* ; *In re Legato Sys., Inc. (ND Cal 2001) 204 FRD 167, 168-169*].

Examples:

- The Ninth Circuit has stated that a corporation must produce documents or items possessed by any subsidiary that the parent corporation owns or wholly controls [*United States v. International Union of Petroleum & Indus. Workers, AFL-CIO (9th Cir 1989) 870 F2d 1450, 1452*], bearing in mind that the responding party's obligation to conduct a reasonably inquiry into the factual basis of it responses to discovery creates an affirmative duty to seek out information reasonably available to it from those subject to its control [*A. Farber & Partners, Inc. v. Garber (CD Cal 2006) 234 FRD 186, 189* ; *see Gray v. Faulkner (ND Ind 1992) 148 FRD 220, 223*];

- Even though an individual agent or custodian of record of a corporate party is not a "party" subject to Rule 34 production, the corporation has control over the records sufficient to require the corporation itself to produce the records [Comcast of Los Angeles, Inc. v. Top End Int'l (CD Cal 2003) 2003 US Dist LEXIS 18640, at *13].

- In a securities case, the court held that, because a defendant was entitled by regulation to a copy of the transcript of his testimony before the Securities and Exchange Commission, the defendant had a legal right to the transcript on demand; therefore, the transcript was within the defendant's control and subject to production [*In re Legato Sys., Inc. (ND Cal 2001) 204 FRD 167, 168-169*].

Cross Reference:

Discussion of nature of possession, custody, or control, see 7 *Moore's Federal Practice, § 34.12[2][b]*

(Matthew Bender 3d ed.).

23.153[4A] Electronically Stored Information Is Not Readily Accessible. The responding party need not provide discovery of electronically stored information from sources that it identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the responding party from whom discovery is sought bears the burden of making that showing. If that showing is made, the court may still order discovery from those sources if the requesting party shows good cause, and may specify conditions for the discovery. In making a good cause determination, the court will consider the generally applicable limitations on discovery imposed by Rule 26(b)(2)(C) [Fed R Civ P 26(b)(2)(B)].

Cross Reference:

Generally applicable limitations on discovery imposed by Rule 26(b)(2)(C), 23.153[5].

23.153[5] Other Objections. Generally, a party may request production of materials within the scope of discovery allowed by Rule 26(b)(1) [*Fed R Civ P 34(a)*]. However, a court may limit discovery if "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit" [*Fed R Civ P 26(b)(2)(C)*; *see* EEOC v. United States Bakery (D Or 2004) 2004 US Dist LEXIS 11350, at *5-*6 (motion to compel inspection denied because it would likely unnecessarily disrupt defendant's operations)].

Examples:

Plaintiff requested every report prepared for an insurance company by its engineering expert. The court found that the likely value of the discovery to the plaintiff was outweighed by the burden to be imposed on the defendant [*Ricotta v. Allstate Ins. Co. (SD Cal 2002) 211 FRD 622, 623-624*].

Defendant requested an ADA plaintiff to produce file-stamped copies of all complaints filed by plaintiff in federal or state court since January 1, 2002. Plaintiff objected that this was too burdensome as the more than 200 complaints filed on his behalf each consisted of a minimum of 10 pages. Plaintiff also objected on the grounds that the complaints were public records accessible to the defense. The court granted the defense motion to compel but limited it to complaints filed in California since January 1, 2003, and limited the pages to be produced of each to page one through the page that includes the identity and location of the establishment visited and the date of the visit. Defendant was also ordered to reimburse plaintiff for the cost of production [*Molski v. Franklin (SD Cal 2004) 222 FRD 433, 437*].

Boilerplate or generalized objections to Rule 34 discovery requests to the effect that the requests are vague, ambiguous, or overly broad are generally insufficient [*Burlington N. & Santa Fe Ry. v. United States Dist. Court (9th Cir 2005) 408 F3d 1142, 1149* , *cert. denied*, 546 US 939 (2005) ; EEOC v. Safeway Store, Inc. (ND Cal 2002) 2002 US Dist LEXIS 25200, at *4-*5]. Parties, however, may make specific, fact-based objections in this regard [*see, e.g., Caliper Techs. Corp. v. Molecular Devices Corp. (ND Cal 2003) 213 FRD 555, 558* (responding party claimed that document request was overbroad)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.154 Service of Response Required on All Parties.

The responding party must serve the response on the party who requested the production [*Fed R Civ P 34(b)*], and also on all other parties to the action, unless the court directs otherwise [*see Fed R Civ P 5(a)(1)(C)* (every paper relating to discovery required to be served on party must be served on each party); *see also* Waggoner v. Trans Union, LLC (ND Tex 2003) 2003 US Dist LEXIS 21491, at *14].

Cross Reference:

Discussion of parties entitled to service, see Ch. 5, Formatting, Serving, and Filing Papers, *§ 5.16*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.155 Motion for Protective Order.

The recipient of a request for production or inspection may move the court where the action is pending for a protective order to prevent all or part of the production or inspection [Collins v. JC Penney Life Ins. Co. (SD Cal 2003) 2003 US Dist LEXIS 8455, at *6-*7 ; *see Fed R Civ P 26(c)*]. To obtain a protective order, the moving party must show good cause, and must certify that the moving party has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the discovery dispute without court action [*Fed R Civ P 26(c)(1)*].

Cross Reference:

Detailed discussion of protective orders, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.35 -22.66*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.156 Production of Documents, Electronically Stored Information, or Tangible Items by Responding Party.

23.156[1] Place of Production. The request for production must specify a reasonable place for inspection, copying, and testing of the produced documents, electronically stored information, and tangible items. When the parties cannot agree on a reasonable place, the court may order the requesting party to conduct the inspection at a reasonable location, considering factors such as [*see In re Dow Corning Corp. (ED Mich 2000) 250 BR 298, 320-321*]:

- The distance from the parties' locations.
- Whether the amount of materials requested would make copying and transporting burdensome or expensive.
- Whether the materials are needed by the responding party to transact its business.

23.156[2] Manner of Production. The responding party must produce documents for inspection in either of the following ways [*Fed R Civ P 34(b)*; *see, e.g.*, Sunrich, Inc. v. Pac. Foods of Or., Inc. (D Or 2003) 2003 US Dist LEXIS 8186, at *5-*6]:

- As they are kept in the usual course of business; or
- Organized and labeled to correspond with categories specified in the request for production.

Typically, documents are stamped or labeled with a sequential letter and numeric designation known as a "Bates stamp" or "document control number" to provide a means to record those documents that have been produced and to identify the documents for future reference [*see Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1139-1140*].

Strategic Point--Responding Party:

Counsel should remove privileged and nonresponsive documents before Bates stamping a set of documents. If the documents are Bates stamped first, with privileged and nonresponsive documents removed later, there will be gaps in the numbering, which will raise questions about why documents have been withheld.

Judge's Perspective:

In almost every case of any size, parties stipulate to a protective order (not to be confused with a motion of the same name), signed by the court, that governs access to produced documents. The protective order provides different levels of access: "confidential," "attorney's eyes only," etc. For an example, see the Northern District's Stipulated Protective Order at the court's website, www.cand.uscourts.gov.

The responding party must produce electronically stored information in the form or forms specified in the request, or in the form or forms specified in the response [*Fed R Civ P 34(b)(2)(E)(ii)*]. Unless the parties otherwise agree, or the court otherwise orders, if the request does not specify the form or forms for producing electronically stored information, the responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable [Fed R Civ P 34(b)(ii)]. Under some circumstances, the responding party may need to provide a reasonable amount of technical support, information on application software, or other assistance to enable the requesting party to use the information [Fed R Civ P 34(b), Committee Note of 2006]. The responding party need not produce the same electronically stored information in more than one form [*Fed R Civ P 34(b)(2)(E)(iii)*].

Cross References:

Discussion of manner of Rule 34 production, see 7 *Moore's Federal Practice, § 34.14[3]* (Matthew Bender 3d ed.).

Discussion of protective orders stipulated between the parties governing access to produced documents, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.11 -22.12*; *22.52[1]*.

23.156[3] Inspection and Copying of Produced Material.

23.156[3][a] Access to Produced Material. The responding party must produce and permit the requesting party to inspect and copy any designated documents, electronically stored information, and other tangibles, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations. If necessary, the responding party must translate any electronically stored information included in the request into reasonably usable form [*Fed R Civ P 34(b)(2)(E)(ii)*]. However, Rule 34 does not grant unrestricted, direct access to a responding party's electronically stored information, nor does it give the requesting party the right to conduct the actual search. Rather, Rule 34 allows a requesting party to inspect and to copy the product, whether it be a document, disk, or other device resulting from the responding party's translation of the data into a reasonably usable form [*In re Ford Motor Co. (11th Cir 2003) 345 F3d 1315, 1316-1317*].

Consider:

If the responding party produces copies of documents, the requesting party may still need to see the originals--for example, if the copies are difficult to read.

23.156[3][b] Court May Direct Manner of Production. The court may direct that the requesting party itself check the accuracy of a produced data compilation, for example, due to improper conduct on the part of the responding party. On the other hand, a district court must protect the responding party with respect to preservation of records and confidentiality of non-discoverable matters [*In re Ford Motor Co. (11th Cir 2003) 345 F3d 1315, 1316-1317*].

Cross Reference:

Discussion of court discretion to direct manner of production or inspection, see 7 *Moore's Federal Practice, § 34.14[4]* (Matthew Bender 3d ed.).

23.156[4] Testing of Produced Tangible Items. The requesting party is generally entitled to test or sample the tangible items produced in response to a request for production [*Fed R Civ P 34(a)(2)*]. However, if a test or sample would entirely or partially destroy the tangible item, the court may preclude testing or control the manner of testing to ensure that evidence is preserved and the rights of the responding party are protected. In the case of destructive testing, the court applies a balancing test between the "costs" of the alteration of the object and the "benefits" of ascertaining the true facts of the case. Alternative means of ameliorating those "costs" and alternative non-destructive means of obtaining the facts should be considered in evaluating the benefits of destructive tests [Hawthorne v. Michelin Tire Corp. (9th Cir 1996) 1996 US App LEXIS 29105, at *12 (unpublished opinion; generally not citable to court under 9th Cir R 36-3), *citing Cameron v. District Court of First Judicial Dist. (Colo. Sup. Ct. 1977), 193 Colo. 286, 565 P.2d 925, 929*].

Example:

The court considered the following factors in its determination to allow a destructive test of a failed section of rope: The test consisted of only one cut in the curvature of the failed section of the rope; the rope was photographed and videotaped prior to testing; both parties had the opportunity to attend and observe the testing; experts for both parties could also conduct tests on the severed piece of rope; and the inspection and test took place at a mutually agreed on testing facility [*see* Nugent v. Hercules Offshore Corp. (ED La 1999) 1999 US Dist LEXIS 20122, at *3].

23.156[5] Responsibility for Expenses of Production and Inspection of Documents, Electronically Stored Information, and Tangible Items.

23.156[5][a] Presumed Responsibility for Expenses. Ordinarily, the expenses of complying with requests for production are allocated as follows [OpenTV v. Liberate Techs. (ND Cal 2003) *219 FRD 474, at 476-477*]:

- The responding party pays the expense of complying with discovery requests by producing and providing access to the material, including the expense of converting data compilations into a usable form through the required use of the responding party's devices [*see* L.A. County Employees Ret. Ass'n v. Towers, Perrin, Forster & Crosby, Inc. (CD Cal 2003) 2003 US Dist LEXIS 10233, at *7].

- The responding party pays the expense of inspecting, copying, and testing the requested material [*see Illinois Tool Works, Inc. v. Coltec Indus. (ND Ill 1998) 31 F Supp2d 1044, 1050*].

Exception:

The court may vary the presumed expense responsibilities, and require either party to pay discovery expenses related to Rule 34 production, under a cost shifting analysis [*see OpenTV v. Liberate Techs. (ND Cal 2003) 219 FRD 474, 476-477* ; *see 23.156[5][b]*].

Cross Reference:

Discussion of costs of tasks associated with production, see 7 *Moore's Federal Practice, § 34.14[5]* (Matthew Bender 3d ed.).

23.156[5][b] Discretion of Court to Shift Costs. A court may shift the presumed cost of Rule 34 production [*see 23.156[5][a]*] when the presumed allocation of cost would impose an undue burden on the party who is responsible for the particular expense [*see Fed R Civ P 26(b)*; *see also OpenTV v. Liberate Techs. (ND Cal 2003) 219 FRD 474, 477*]. Thus, cost shifting may be appropriate when the responding party must search inaccessible data, which is expensive to

produce [*see Zubulake v. UBS Warburg LLC (SDNY 2003) 216 FRD 280, 284*]. The court should analyze the following factors to determine whether to apply cost-shifting [*see Fed R Civ P 26(b)*; *OpenTV v. Liberate Techs. (ND Cal 2003) 219 FRD 474, 476-477* ; *see also Zubulake v. UBS Warburg LLC (SDNY 2003) 216 FRD 280, 284*]:

- The degree to which the request is specifically tailored to discover relevant information;
- The availability of requested information from other sources;
- The total cost of production, compared to the amount in dispute;
- The total cost of production, compared to the resources available to each party;
- The relative ability of each party to control costs and its incentive to do so;
- The importance of the issues at stake in the litigation; and
- The relative benefits to the parties of obtaining the information.

Cross Reference:

Discussion of shifting of costs for discovery of electronic information, see *§ 23.174*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

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Unit 7 Discovery
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23.157 CHECKLIST: Making Requests for Electronically Stored Information.

☐ Identify sources of discoverable electronically stored information, such as:

- ○ Email.
- ○ Voicemail.
- ○ Computer hard drives.
- ○ Network servers.
- ○ Laptops.
- ○ Employee's home computer.
- ○ Peripheral storage devices.
- ○ PDAs.
- ○ DVDs.

- ○ CDs.
- ○ Back-up tapes or other back-up systems.
- ○ Archived files.
- ○ Deleted files.
- ○ Electronic bulletin boards.

Authority:
Fed. R. Civ. P. 26, 34

Discussion:
See *§ 23.158*

☐ Address scope of discovery of electronically stored information at discovery planning conference or pretrial conference.

Authority:
Fed R Civ P 16, 26(f)

Discussion:
See *§ 23.159*

☐ Inform opposing party of duty to preserve relevant evidence in form of electronically stored information.

Authority:
Fed R Civ P 26

Discussion:
See *§ 23.160*

Form:
See *§ 23.307*

☐ Obtain stipulated preservation order, or move for preservation order if consent to stipulation cannot be obtained.

Authority:
Fed R Civ P 37

Discussion:
See *§ 23.161[3]*

☐ Seek sanctions if responding party failed to preserve evidence.

Authority:
Fed R Civ P 37(b); *William T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1455*

Discussion:
See *§ 23.161[4]*

☐ Use interrogatories to discover details of opposing party's electronic information systems, and document retention and back-up policies.

Authority:
Fed R Civ P 33

Discussion:
See *§ 23.162[1]*

Form:
See *§ 23.308*

☐ Depose opposing party's person most knowledgeable about electronic information systems, back-ups, record management, storage, destruction and retention policies, and parties responsible for those activities.

Authority:
Fed R Civ P 30

Discussion:
See *§ 23.162[2]*

☐ Request inspection of computers, network, and other electronic storage equipment.

Authority:
Fed R Civ P 34

Discussion:
See *§ 23.162[3]*

☐ Request production of computer records and other electronically stored information.

Authority:
Fed R Civ P 34

Discussion:
See *§ 23.162[4]*

Form:
See *§ 23.309*

☐ Follow up with requests for after-acquired or discovered computer records or other electronically stored information.

Authority:
Fed R Civ P 26(e)

Discussion:
See *§§ 23.135 -23.156*, *23.162[5]*

☐ Move to compel further responses or production, if necessary.

Authority:
Fed R Civ P 34(b)

Discussion:
See *§ 23.163*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

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23.158 Electronically Stored Information Is Discoverable.

23.158[1] Electronically Stored Information Is Subject to Discovery. Email and other electronically stored information is subject to the disclosure requirements of Rule 26(a)(1) [*Fed R Civ P 26(a)(1)*], as well as discovery by a Rule 34 production request [*Fed R Civ P 34(a)*] or a Rule 45 subpoena [*Fed R Civ P 45*].

Distinguish:

Rule 34 procedures apply only to production from *parties*. Rule 45 procedures apply to production of documents from *nonparties* [*Fed R Civ P 34(a)*, *45(d)(1)*; *see 23.175*].

Cross References:

Discussion of disclosure requirements of *Fed R Civ P 26(a)(1)*, see Ch. 15, Rule 26(f) Conference and Initial Disclosures. Discussion of matter subject to production under *Fed R Civ P 34*, see *23.135 -23.156*.

Strategic Point:

Use the Internet and public filings (for publicly held corporations) to obtain financial and other background information on the opposing party that will aid you in mapping out your overall discovery strategy [*see Westlands Water Dist. v. United States (ED Cal 2001) 153 F Supp2d 1133, 1143 n9* ("Internet citations are appropriate for background information")]. Evidence obtained through informal investigation is not subject to discovery rules and also may be useful in impeaching witnesses.

Cross Reference:

Using online resources to obtain public records, see Ch. 21, Discovery Strategy and Planning, *§ 21.05[6][b]*.

Consider:

Counsel should conduct a thorough Internet search of the client, as well as a thorough review of the

client's websites, to discover what public information about the client is available to the opposing party.

Current Analysis of E-Discovery and Digital Document Retention:

Use Mealey's Litigation Reports to find current analysis of e-discovery and digital document retention:

- Legal tab> Secondary Legal> Mealey Reports> Reports by Practice Area> Litigation> Electronic Discovery: Mealey's Combined Reports

  - Sample Search: To find current analysis of e-discovery and digital document retention, enter the Terms and Connectors search: *electronic or digital or computer! or e-discovery and document or data /3 storage or retention*.

23.158[2] Types of Electronically Stored Information That Are Subject to Discovery. Computer records and other electronically stored information encompass many types of data, including voicemail, email, deleted email, data files, program files, back-up files, archival tapes, temporary files, system history files, website information in textual, graphical, or audio format, website files, cache files, "cookies," and other information not visible in a printed document, as well as computer tapes and hard drives.

Strategic Point:

The responding party may use an Internet service provider (ISP) or post messages to an electronic bulletin board or chat room. Be sure to request information about these potential sources of evidence in the initial interrogatories.

Cross Reference:

Checklist and forms for discovery from third parties, see *§§ 23.259 -23.285*, *23.317 -23.320*.

23.158[3] "Deleted" Electronically Stored Information Is Discoverable. The residual data remaining when electronically stored information is "deleted" is also discoverable [*see Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1053* ; *Simon Prop. Group, L.P. v. mySimon, Inc. (SD Ind 2000) 194 F.R.D. 639, 640*]. However, recovery of deleted files can be expensive and the responding party may obtain a protective order or an order for cost-shifting if the burden is undue [*see 23.173* (protective order), *23.174* (order shifting costs)].

Strategic Point--Responding Party:

Unless the requesting party can demonstrate a substantial need for it, a responding party does not ordinarily have a duty to take steps to try to restore data that has been deleted in the regular course of business, but that may not have been completely erased from computer memory [*see Fed R Civ P 37(e)*; *see also* Am. Bar Ass'n Civil Discovery Standards 29(a)(iii) (2002)].

Example:

To establish a substantial need to restore deleted material, the requesting party would at a minimum be expected to identify specific items that pertain directly to a central issue in the litigation. For example, in a breach of contract action, written materials presented at a meeting where the decision was made by a party to enter into the contract would be a likely candidate for requiring the restoration of that deleted data [*see, e.g., Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1055*].

23.158[4] Discovery of Electronically Stored Information Relied on by Experts.

23.158[4][a] Data Relied on by Testifying Expert Must Be Disclosed. Included in the information that must be provided along with the identity of any testifying expert is the data or other information considered by that expert in forming the opinions the expert intends to express [*Fed R Civ P 26(a)(2)(B)*]. This includes any electronically stored information relied on by the expert in forming an opinion. The request for electronically stored information relied on by the opposing party's expert should require a limited search by the responding party and the likely benefits of the information should clearly outweigh the cost and burden of production.

Cross Reference:

Checklist and forms for disclosure of expert testimony, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§§ 15.27 -15.34*, *15.39*.

23.158[4][b] Data Relied on by Non-Testifying Expert Is Discoverable Only Under Exceptional Circumstances. Data relied on by a non-testifying expert is discoverable "on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means" [*Fed R Civ P 26(b)(4)(B)*]. The requesting party is required to pay the responding party a fair portion of the fees and expenses reasonably incurred by the responding party in obtaining facts and opinions from the expert to comply with the request [*Fed R Civ P 26(b)(4)(C)*].

23.158[5] Production in Specific Format May Be Requested. The requesting party may ask for production of electronically stored information in one or more specific formats, such as hard-copy printouts, on diskettes, or posted to a website [*see* Fed R Civ P 34(b)]. Although production of information in "hard-copy" document form does not preclude a party from receiving that same information in computerized/electronic form [*see Anti-Monopoly, Inc. v. Hasbro, Inc. (SDNY 1995) 1995 US Dist LEXIS 16355, at *2-*4*], unless the parties agree or the court orders otherwise, a party need not produce the same electronically stored information in more than one format [*Fed R Civ P 34(b)(2)(E)(iii)*].

Consider:

If the costs of production in an alternative format are not proportional to the benefit to the requesting party, the court may order cost-shifting [*see § 23.174*].

23.158[6] Request Electronically Stored Information in Electronic Format. Request the electronically stored information in electronic format. This provides several benefits. First, electronically stored information often contains data that is not present when the data is printed out. For instance, some word processing programs can show when the document was first created, who created it, when edits were made to the document, and who made the edits [*see, e.g.,* Nova Measuring Instruments Ltd. v. Nanometrics, Inc. (ND Cal 2006) 417 F Supp2d 1121, 1122 (ordering documents produced in their native file format with original metadata)]. Second, electronically stored information is searchable electronically. For instance, a large collection of e-mails in electronic form can be searched for specific words, and can be arranged in various orders such as by date, recipient, or sender. Also, e-mails may have attachments. If the e-mails are produced in printed form, it may be difficult to determine which attachments belong to which e-mails. If requesting electronically stored information in electronic format, make sure that you have the programs necessary to access and use the data. If not, be sure to request the necessary programs from the responding party.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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23.159 Pre-Service Discovery May Be Available Under Limited Circumstances to Discover Identity of Doe Defendant Who Committed Tortious Acts On-Line Anonymously or Pseudonymously.

Tortious acts, such as defamation and trademark infringement, can be committed entirely online, and the tortfeasor can act anonymously or pseudonymously. The plaintiff will need discovery of the facts sufficient to identify the tortfeasor from the ISP, a third party who itself may be immune from suit under federal law [*Columbia Ins. Co. v. Seescandy.com (ND Cal 1999) 185 FRD 573, 577-578* ; *see 23.175* (discovery from third parties)]. As a general rule, discovery takes place after the defendant has been served, but in limited circumstances pre-service discovery is available to permit the plaintiff to learn identifying facts which will allow service on the defendant [*see Gillespie v. Civiletti (9th Cir 1980) 629 F2d 637, 642* ; *Columbia Ins. Co. v. Seescandy.com (ND Cal 1999) 185 FRD 573, 577*].

The following principles apply to the determination of whether discovery to uncover the identity of a defendant is warranted [*Columbia Ins. Co. v. Seescandy.com (ND Cal 1999) 185 FRD 573, 578-580*]:

- The plaintiff must identify the Doe defendant with specificity sufficient to permit the court to determine that the defendant is a real person or entity who can be sued in federal court.

- The plaintiff must identify all steps already taken to locate the Doe defendant.

- The plaintiff must establish that its suit against the Doe defendant would withstand a motion to dismiss [*see* Rocker Mgmt. v. Doe (ND Cal 2003) 2003 US Dist LEXIS 16277, at *3].

- The plaintiff must file a discovery request with the court, along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about the Doe defendant that would make service of process possible.

Cross Reference:

Checklist and forms for discovery from third parties, see *§§ 23.259 -23.285*, *23.317 -23.320*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsPerpetuation of Testimony

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.160

23.160 Address Discovery of Electronically Stored Information Early in Litigation.

23.160[1] Rule 26(a)(1) Requires Disclosure of Electronically Stored Information. Parties should address the discovery of computer records and other electronically stored information early in the case. With limited exceptions, initial disclosure requires parties to provide each other with a copy of, or a description by category and location of, all documents, electronically stored information and tangible things that are in the possession, custody, or control of that party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment [*Fed R Civ P 26(a)(1)(A)(ii)*].

Rule 26(a)(1) requires a party, *at the commencement of litigation and even before receiving any formal discovery request*, to search its available electronic systems for relevant information as part of its duty to conduct an appropriate analysis of potentially relevant documents and electronically stored information [*see McPeek v. Ashcroft (DDC 2001) 202 FRD 31, 32*].

Cross Reference:

Discussion of initial disclosures required under Rule 26(a)(1), see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§§ 15.15 -15.26*.

23.160[2] Pretrial Conferences May Be Used to Narrow Scope of Relevant Records. The parties should attempt to narrow the scope of electronically stored information that must be searched in response to discovery requests to avoid undue burden on the responding party and production of too many items, which may obfuscate the truly relevant material. This can be accomplished at a Rule 26(f) discovery plan conference [*Fed R Civ P 26(f)*], or at a Rule 16 pretrial conference [*Fed R Civ P 16*]. Under Rule 26(f), the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan [*Fed R Civ P 26(f)*].

At the Rule 26(f) conference, it is good practice to include a discussion of the following [*see In re Bristol-Myers Squibb Secs. Litig. (DNJ 2002) 205 FRD 437, 444*]:

- Whether each side possesses electronically stored information;
- Whether the parties intend to produce such material;
- The native formats in which the material is available;
- The form or forms in which electronically stored information should be produced;
- Whether any privilege issues require redaction; and
- How to allocate costs involved with the foregoing issues.

Cross Reference:

Discussion of development of pretrial discovery plan, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§ 15.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.161

23.161 Parties Have Duty to Preserve Evidence.

23.161[1] Knowledge of Litigation or Imminent Litigation Triggers Preservation Duty. A party's duty to preserve evidence is triggered when the party has notice that the evidence is relevant to litigation or when the party should have known that the evidence may be relevant to future litigation [*Zubulake v. UBS Warburg LLC (SDNY 2003) 220 FRD 212, 216* ; *William T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1455*].

Warning:

It is the responsibility of retained counsel to advise the client of the duty to preserve evidence [*see* Am. Bar Ass'n Civil Discovery Standards 10 (1999)]. An entity client must communicate that obligation to the employees with possession of the discoverable materials [*William T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1447-1448* ; *National Ass'n of Radiation Survivors v. Turnage (ND Cal 1987) 115 FRD 543, 557-558*].

However, absent exceptional circumstances, sanctions may not be imposed on a party for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system [*Fed R Civ P 37(e)*].

Cross References:

Forms, see *23.306*, *23.307*

Managing documents, see *Ch. 21, Discovery Strategy and Planning, 21.09 -21.11*.

Obtaining sanctions for spoliation of evidence, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.91 -25.106*.

23.161[2] ***Zubulake*** Guidelines for Preservation of Electronic Evidence.

23.161[2][a] ***Zubulake*** Cases Provide Detailed Guidance on Preservation Duties. The leading cases on electronic evidence preservation are the fourth and fifth cases in the *Zubulake* line of opinions issued by Judge Scheindlin in the Southern District of New York [*see Zubulake v. UBS Warburg LLC (SDNY 2004) 229 FRD 422* (*Zubulake V); Zubulake v. UBS Warburg LLC (SDNY 2003) 220 FRD 212, 216* (*Zubulake IV*)]. The *Zubulake* cases have been cited and followed by federal district courts all over the country [*see, e.g., OpenTV v. Liberate Techs. (ND Cal 2003) 219 FRD 474, 476-479* (following *Zubulake I and II*)]. Although they do not serve as binding precedent in California district courts, the opinions do provide valuable guidance to attorneys confronted with electronic evidence preservation issues.

23.161[2][b] Directives to Parties Under *Zubulake IV*. The fourth *Zubulake* case sets forth specific guidelines concerning a party's preservation obligations once the party reasonably anticipates litigation. Key directives include the following:

- **Party Anticipating Litigation Must Implement Litigation Hold:** "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents" [*Zubulake v. UBS Warburg LLC (SDNY 2003) 220 FRD 212, 218*].

  Consider:

  Zubulake IV does not define "litigation hold," but it appears from context that the court is addressing circulating a preservation notice or taking similar steps.

- **Litigation Hold Generally Does Not Apply to Inaccessible Backup Tapes:** "As a general rule, the litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes would likely be subject to the litigation hold" [*Zubulake v. UBS Warburg LLC (SDNY 2003) 220 FRD 212, 218*].

- **Litigation Hold Can Apply to Backup Tapes Storing Documents of Key Players:** "If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of "key players" to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This ... applies to all backup tapes" [*Zubulake v. UBS Warburg LLC (SDNY 2003) 220 FRD 212, 218*].

- **Corporation's Preservation Duty Is Not Unlimited:** "Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no'. Such a rule would cripple large corporations ... that are almost always involved in litigation" [*Zubulake v. UBS Warburg LLC (SDNY 2003) 220 FRD 212, 218*].

- **Duty to Preserve Extends to Individuals Likely to Have Relevant Information:** The duty to preserve extends to the following [*Zubulake v. UBS Warburg LLC (SDNY 2003) 220 FRD 212, 217-218*]:

  - Any documents or tangible things made by individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses;

  - Documents prepared for those individuals, to the extent those documents can be readily identified (e.g., from the "to" field in e-mails);

- Information that is relevant to the claims or defenses of any party; and
- Information that is relevant to the subject matter of the litigation

- **Parties Must Retain All Relevant Documents:** "A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter. In recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished. For example, a litigant could choose to retain all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at the time the duty to preserve attaches (to preserve the documents in the state they existed at the time), creates a complete set of relevant documents. Presumably there are a multitude of other ways to achieve the same result" [*Zubulake v. UBS Warburg LLC (SDNY 2003) 220 FRD 212, 218*].

23.161[2][c] Directives to Attorneys Under *Zubulake V*. The fifth *Zubulake* case details attorneys' specific duties concerning preservation of evidence. Key directives include the following:

- **Counsel Must Issue Litigation Hold Promptly:** "First, counsel must issue a 'litigation hold' at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees" [*Zubulake v. UBS Warburg LLC (SDNY 2004) 229 FRD 422, 433*].

- **Counsel Must Communicate With "Key Players":** "Second, counsel should communicate directly with the 'key players' in the litigation, i.e., the people identified in a party's initial disclosures and in any subsequent supplementation thereto. Because these 'key players' are the 'employees likely to have relevant information,' it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be reminded that the preservation duty is still in place" [*Zubulake v. UBS Warburg LLC (SDNY 2004) 229 FRD 422, 433-434*].

- **Counsel Must Instruct Employees to Produce Electronic Copies of Relevant Active Files:** "Finally, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place. In cases involving a small number of relevant backup tapes, counsel might be advised to take physical possession of backup tapes. In other cases it might make sense for relevant backup tapes to be segregated and placed in storage. Regardless of what particular arrangement counsel chooses to employ, the point is to separate relevant background tapes from others. One of the primary reasons that electronic data is lost is ineffective communication with information technology personnel. By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled" [*Zubulake v. UBS Warburg LLC (SDNY 2004) 229 FRD 422, 434*].

- **Counsel Must Become Familiar With Client's Documentation Retention Policies and Data Retention Architecture:** "Once a 'litigation hold' is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed 'on hold' ... . To do this, counsel must become fully familiar with her client's documentation retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical)

implementation of the firm's recycling policy. It will also involve communicating with the 'key players' in the litigation, in order to understand how they stored information ... Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected" [*Zubulake v. UBS Warburg LLC (SDNY 2004) 229 FRD 422, 432*].

- **Counsel Should Consider Running System-Wide Keyword Search:** "To the extent that it may not be feasible for counsel to speak with every key player, given the size of the company or the scope of the lawsuit, counsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each 'hit.' Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive documents. When the opposing party propounds its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as 'hits' on the second, more restrictive search. The initial broad cut merely guarantees that relevant documents are not lost" [*Zubulake v. UBS Warburg LLC (SDNY 2004) 229 FRD 422, 432*].

23.161[3] Obtain Stipulation or Order for Preservation of Evidence. Obtain a stipulation or an order for preservation of evidence to facilitate sanctions for spoliation or violation of the order. To enhance the likelihood of the imposition of sanctions for a violation, the stipulation or order should contain reasonable limits on the obligation to preserve evidence [*see Lawyers Title Ins. Corp. v. United States Fid. & Guar. Co. (ND Cal 1988) 122 FRD 567, 570*]. An order for expedited discovery, *i.e.*, before completion of Rule 26(a)(1) initial disclosures or the Rule 26(f) discovery plan conference, may be obtained under Rule 26(d) when a party reasonably suspects that the opposing party may destroy relevant electronically stored information in the course of normal business operations [*see Fed R Civ P 26(d)*, 37(b)]. An ex parte restraining order or seizure order under Rule 65(b) may be obtained in exceptional circumstances when imminent destruction of electronically stored information essential to the case is likely and no other less intrusive means are available to secure the information [*Fed R Civ P 65*; *see Sega Enters. v. MAPHIA (ND Cal 1996) 948 F Supp 923, 927* ; *Religious Tech. Ctr. v. Netcom On-Line Communications Servs. (ND Cal 1995) 923 F Supp 1231, 1259-1264*]. An ex parte TRO is not available merely because information may *possibly* be destroyed [*Adobe Sys., Inc. v. South Sun Prods., Inc. (SD Cal 1999) 187 FRD 636, 641*].

Cross References:

Discussion of order for expedited discovery under Rule 26(d), see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§ 22.23*. Discussion of temporary restraining order under Rule 65(b), see Ch. 19, Preliminary Injunctions, TROs, and Other Provisional Remedies, *§ 19.09*.

Warning--Responding Party:

Although the opposing party may request that you preserve electronically stored information or seek a court order directing that you do so, such a warning or order is not necessary to impose the obligation. A responding party has an independent obligation to preserve evidence once the complaint is filed or has notice that litigation is imminent. Failure to preserve evidence, or destruction of evidence, may result in sanctions, adverse inference instructions to the jury, and even criminal prosecution. Consider employing a forensic expert to preserve electronically stored information that may be relevant. If potentially relevant information would be destroyed under the aegis of the client's normal retention and destruction policy for its electronic information system, that policy must be suspended with respect to that information.

23.161[4] Sanctions May Be Imposed for Failure to Preserve Evidence.

23.161[4][a] Sanctions May Be Imposed for Violation of Preservation Order. A party who destroys electronically stored information in violation of an order to preserve that information may be sanctioned under Rule 37 [

Fed R Civ P 37(b); *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp. (9th Cir 1992) 982 F2d 363, 368*].

Example:

A federal district judge in the Central District ordered a default judgment and a penalty of $453,312 against a defendant who failed to retain back-up tapes and to halt routine destruction of records under its record disposition policy, despite a court order to do so [*William T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443*].

Cross References:

Checklist and forms for obtaining sanctions for violation of discovery orders, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.28 -25.42*. Discussion of seeking sanctions for spoliation of evidence, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.91 -25.106*.

23.161[4][b] Court Has Inherent Authority to Impose Sanctions for Destruction of Evidence. The court has inherent power to sanction a party who is on notice that certain information in its possession is relevant to litigation or potential litigation and who fails to preserve that evidence [*William T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1455* ; Pennar Software Corp. v. Fortune 500 Sys., Ltd. (ND Cal 2001) 2001 US Dist LEXIS 18432, at *15-*16]. This inherent power includes the power to enter a default judgment or dismissal, and to order fines, awards of attorney's fees, contempt citations, adverse evidentiary inferences, or exclusion of evidence [*William T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1455* ; Advantacare Health Partners, LP v. Access IV (ND Cal 2004) 2004 US Dist LEXIS 16835, at *11*12 ; Pennar Software Corp. v. Fortune 500 Sys., Ltd. (ND Cal 2001) 2001 US Dist LEXIS 18432, at *16]. However, a sanction for failure to preserve evidence is appropriate only when a party "consciously disregards" its obligation to preserve evidence [*Shepherd v. ABC (DC Cir 1995) 62 F3d 1469, 1481*].

Example:

Plaintiff's behavior amounted to willful spoliation, and the defendant was entitled to the sanction of dismissal, when the plaintiff, knowing he had a duty to preserve all data on a laptop, intentionally deleted more than 2,200 files and wrote a program to write over the deleted documents [Leon v. IDX Sys. Corp. (9th Cir 2006) 464 F3d 951].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryPreservationCivil ProcedureDiscoveryGeneral OverviewEvidenceRelevanceSpoliation

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A. Making Requests for Electronically Stored Information

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.162

23.162 Use Discovery Methods to Gather Evidence in Form of Electronically Stored Information.

23.162[1] Use Interrogatories to Identify Sources of Electronically Stored Information and Persons With Knowledge of Storage Policies and Procedures. Interrogatories are a good means of identifying the types and sources of electronically stored information that may contain relevant evidence and the persons with knowledge of the opposing party's electronic information storage and retention policies. The interrogatories should ask questions on the type of equipment used, how data is stored, storage policies and procedures, whether any relevant computer records have been deleted, and the identity of management personnel with knowledge of that equipment and those policies and procedures. Interrogatories may be answered by making business records, including electronically stored information, available for inspection and copying, when the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served [*Fed R Civ P 33(d)*].

Cross References:

Form, see *§ 23.308*. Checklists and forms for interrogatories, see *§§ 23.111 -23.134*, *23.298 -23.301*.

23.162[2] Depose Person With Knowledge of Electronic Information Systems and Storage. A deposition of the opposing party's person with knowledge of the electronic information systems and storage policies and procedures can help formulate an overall discovery strategy. The deposition notice must provide a description of the information requested sufficient to enable the opposing party to identify the person most knowledgeable in the area. The deposition notice should state that the deposition will cover computer equipment, software, maintenance, storage, security, retention policies and procedures, destruction policies and procedures, and back-up and archive policies and procedures [*see Fed R Civ P 30(b)(2), (6)*; *see also Carbon Dioxide Indus. Antitrust Litig. (MD Fla 1993) 155 FRD 209, 214*].

Cross References:

Deposition checklists and forms, see *§§ 23.19 -23.75*, *23.176 -23.110*, *23.289 -23.297*.

23.162[3] Demand Inspection of Electronic Information System.

23.162[3][a] Rule 34(a) Provides for Inspection of Electronic Information Systems. A party may request to inspect and copy any tangible thing that is discoverable [*Fed R Civ P 34(a)*]. The information learned from the interrogatories and deposition of the opposing party's person most knowledgeable may reveal the necessity of demanding a physical inspection of the opposing party's electronic information system including servers and hard drives [*see Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1053* (response to interrogatories revealed deletion of relevant e-mails, which required access to hard drive as those emails could longer be produced as "documents")].

Strategic Point--Requesting Party:

A demand for inspection may include an offer to conduct the inspection after normal business hours to minimize disruption to the opposing party's business. Work to minimize disruption to the business of the responding party to avoid imposing an undue burden, which may lead to a protective order [*see, e.g., Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1055*].

Consider:

A qualified forensic expert, who can generally be retained from major accounting and investigative firms, should be employed for the inspection of the opposing party's electronic information systems. The demand for inspection should be accompanied by the expert's declaration describing the method of inspection and how material will be located and downloaded.

Cross Reference:

Checklists and forms for inspection, see *§§ 23.135 -23.156*, *23.302 -23.305*.

23.162[3][b] Requesting Party Must Demonstrate Need and Likelihood of Finding Relevant Matter. The Rule 26(b)(2) proportionality test applies to on-site inspection of computers [*Fed R Civ P 26(b)(2)*; *Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1053-1054*]. Because of the intrusive nature of such an inspection, the requesting party must demonstrate that an on-site inspection is likely to lead to the recovery of relevant matter and that no less intrusive discovery will suffice [*see Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1053*].

Warning--Responding Party:

Consider objecting to requests for inspection as unnecessarily intrusive, because computers contain privileged as well as irrelevant matter. Privileged and other confidential information must be identified before any inspection that is ordered, and specific safeguards are prudent to prevent disclosure of privileged information. Allowing the propounding party access to information stored on hard drives and servers that contain attorney-client privileged information may result in a waiver of the privilege [*see Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1055*].

Cross Reference:

Discussion of preventing disclosure of privileged information, see *§§ 23.176 -23.181*.

23.162[3][c] Attempt Agreement on Confidentiality Protocol. If inspection and/or mirror-imaging of a computer hard drive is ordered, a protocol to ensure protection of confidential and privileged information is required. For example, a protocol may require [*Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1054-1055*]:

- The declaration of an expert retained by the requesting party that the inspection is likely to produce relevant matter and that no damage will result to the computer.

- The appointment of a neutral expert, selected by the parties or appointed by the court, to carry out the technical tasks.

- The designation of the neutral expert as an officer of the court, and provision that the disclosure of any confidential or privileged information to that expert will not result in waiver of confidentiality or privilege.

- An agreement of the parties as to date and time of inspection to minimize disruption to the responding party.

- A limitation of the parties present to the responding party, responding party's counsel, and the designated expert.

- An initial privilege review of the recovered material by the responding party's counsel and preparation of a privilege log.

- The requirement that responding party's counsel then turn over recovered and relevant, non-privileged documents.

23.162[4] Request Production of Electronically Stored Information.

23.162[4][a] Make Rule 34 Request for Production to Obtain Electronically Stored Information. Request production of electronically stored information identified as a result of interrogatories, depositions, and inspection [*Fed R Civ P 34(a)*]. The request may specify the form or forms in which electronically stored information is to be produced [*Fed R Civ P 34(b)(1)(C)*].

Strategic Point:

To avoid having information produced in an unusable form, the form of production should be addressed early in the litigation. The Manual for Complex Litigation observes that no single form of production will be appropriate for all types of data in all cases. Although production of computer-readable images may suffice for the vast majority of requested data, if raw data are produced, appropriate applications, file structures, manuals, and other tools necessary for the proper translation and use of the data must be provided. Likewise, files for which metadata is essential to the understanding of the primary data must be produced in an appropriate format [*see* Manual for Complex Litigation, Fourth, § 11.446].

Cross References:

Form, see *§ 23.309*. Checklist and forms for requesting production of documents, see *§§ 23.135 -23.156*, *23.302 -23.305*.

23.162[4][b] Responding Party Must Produce All Responsive Information Within Its Possession, Custody, or Control. Under Rule 34, a party must produce all information responsive to a request for production when that information is in the party's "possession, custody or control" [*Fed R Civ P 34(a)*]. Information is deemed to be within a party's possession, custody or control if the party has *actual* possession, custody, or control, or has the legal right to obtain the information on demand [*United States v. International Union of Petroleum & Indus. Workers, AFL-CIO (9th Cir 1989) 870 F2d 1450, 1452* ; *In re Legato Sys., Inc. (ND Cal 2001) 204 FRD 167, 169* ; Comcast of Los Angeles, Inc. v. Top End Int'l, Inc. (CD Cal 2003) 2003 US Dist LEXIS 18640, at *12-*13]. The responding party has an affirmative duty to seek that information reasonably available to it from its employees, agents, or others subject to its control [*Gray v. Faulkner (ND Ind 1992) 148 FRD 220, 223*].

Example:

A responding party was ordered to produce all the business records on its computers, even if it had

turned those computers over to others or otherwise transferred the information on the computers to others for safekeeping [Comcast of Los Angeles, Inc. v. Top End Int'l, Inc. (CD Cal 2003) 2003 US Dist LEXIS 18640, at *13].

The duty to seek information can include information on computers and other devices that employees use for business purposes away from the office.

Cross Reference:

Party's "possession, custody, or control," see *§ 23.153[4]*.

23.162[5] Make Supplemental Requests for After-Acquired or Discovered Information. Supplement previous discovery requests with requests for any later acquired information [*see Fed R Civ P 26(e)*].

Cross Reference:

Discussion of requests for after-acquired information, see Ch. 21, Discovery Strategy and Planning, *§ 21.06*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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23.163 Move to Compel Discovery If Responding Party Fails to Comply With Discovery Request.

The requesting party may move for an order compelling discovery if the responding party objects to the request for production or fails to comply with all or any part of the request [*Fed R Civ P 34(b)*; *see Fed R Civ P 37(a)(3)(B)*].

Judge's Perspective:

A separate sanctions motion might be advisable in appropriate cases if it is clear that the responding party has ignored its obligations.

Cross References:

Checklist and forms for motion to compel discovery, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.03*, *25.116*.

If the responding party fails to produce relevant evidence in response to a discovery request, sanctions may be imposed under Rule 37 unless the failure was substantially justified [*Fed R Civ P 37(a)(5)*; *but see ND Cal Civ LR 7-8*, *37-3* (separate sanctions motion required in Northern District)]. However, it is unlikely that a court will impose sanctions for an initial failure to produce. Courts are usually reluctant to impose sanctions unless the responding party has violated a previous order to produce and has required the propounding party to seek a second court order requiring the production.

Furthermore, absent exceptional circumstances, sanctions may not be imposed on a party under Rule 37 for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system [*Fed R Civ P 37(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to Compel

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23.164 CHECKLIST: Responding to Requests for Electronically Stored Information

☐ Implement plan to preserve evidence on awareness of potential litigation or litigation, including:

○ Determining what electronically stored information is relevant to claims or defenses of parties.

○ Notifying client's employees of duty to preserve records.

○ Preserving back-up systems.

○ Suspending routine record retention and destruction procedures that would destroy relevant records.

Authority:
William T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1455 ; *National Ass'n of Radiation Survivors v. Turnage (ND Cal 1987) 115 FRD 543, 557-558*

Discussion:
See *§§ 23.160*, 32.167

Form:
See *§ 23.306*

☐ Perform diligent search and reasonable inquiry to comply with demand for production.

Authority:
Fed R Civ P 26, *33*, *34*

Discussion:
See *§§ 23.166*, *23.168*

☐ Determine whether to resist discovery request because requested matter is not relevant.

Authority:
Fed R Civ P 26(b)

Discussion:
See *§ 23.169*

☐ Identify privileged or otherwise confidential information contained in items to be inspected or produced, and determine whether to object to discovery request based on privilege or confidentiality.

Authority:
Fed R Civ P 26(b)

Discussion:
See *§ 23.170*

☐ Determine whether to object to discovery request because burden and/or expense of production outweigh requesting party's right to evidence.

Authority:
Fed R Civ P 26(b)

Discussion:
See *§§ 23.171*, *23.172*

☐ Negotiate stipulated protective order to protect against disclosure and use of confidential or privileged information.

☐ If requesting party refuses to stipulate, seek protective order to protect confidential or privileged information.

Authority:
Fed R Civ P 26

Discussion:
See *§ 23.173*

☐ Determine whether production entails significant or special costs and, if so, move for order shifting costs.

Authority:
Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050

Discussion:
See *§ 23.174*

☐ If responding to Rule 45 subpoena:

○ Produce information in form specified in subpoena, or if no form specified, in form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

○ Identify records withheld based on privilege.

○ Seek protective order to prevent against, or to impose sanctions for, imposition of undue burden or expense.

Authority:
Fed R Civ P 45

Discussion:
See *§§ 23.135 -23.156*; *23.175*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

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23.165 Request for Production Includes Electronically Stored Information.

A Rule 34 request for production includes a request for production of electronically stored information [*Fed R Civ P 34(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

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23.166 Responding Party Has Duty to Perform Diligent Search.

The response to a discovery request must be signed by the party or the party's attorney. That signature constitutes a certification that, to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the response is consistent with the Federal Rules of Civil Procedure [*Fed R Civ P 26(g)*]. The failure to produce requested material in response to a discovery request may be sanctionable conduct [*see, e.g.,* Qualcomm Inc. v. Broadcom Corp (SD Cal 2008) 2008 US Dist LEXIS 911, at *45, *vacated in part, 2008 US Dist LEXIS 16897* (finding discovery misconduct and sanctioning corporate counsel who failed to conduct a reasonable inquiry into the adequacy of their client's document search and production)].

Strategic Point:

If relevant matter has been deleted, the requesting party may end up inspecting and copying the responding party's hard drive [*see, e.g., Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050*]. In this situation, steps must be taken to preserve privileged and confidential information on the hard drive [*see 23.162[3][b]*]. If the responding party fails to show that the deletion was routine, it may be subject to sanctions for failing to preserve evidence [*see* Fed R Civ P 37(f); *see also* Pennar Software Corp. v. Fortune 500 Sys., Ltd. (ND Cal 2001) 2001 US Dist LEXIS 18432, at *14-*16].

Warning:

The client is responsible for ascertaining the existence of relevant electronically stored information and will be subject to sanctions if its failure to do so leads to the unnecessary involvement of the court in discovery. For example, the Central District ordered the defendant County of Los Angeles to pay $54,375 in attorney's fees and costs incurred by a civil rights plaintiff due to the County's failure to produce highly-relevant, computer-based records in response to the plaintiff's motion to compel production. In awarding the sanctions under *Fed R Civ P 37(a)(4)(A)*, the court stated that the plaintiff's efforts to obtain discovery were unduly complicated and extraordinarily delayed due to the failure of the county and/or its counsel to effectively and promptly investigate the records available, a failure which the court characterized as "ineptitude" [*Green v. Baca (CD Cal 2005) 225 FRD 612, 613-614* ; *see also*

Zubulake v. UBS Warburg LLC (SDNY 2004) 229 FRD 422, 432-434 (attorneys' duties concerning electronic evidence); *Zubulake v. UBS Warburg LLC (SDNY 2003) 220 FRD 212, 218* (party's duties concerning electronic evidence)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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23.167 Routine Procedures That Would Destroy Relevant Records Must Be Suspended.

As soon as the duty to preserve evidence is triggered, the responding party must suspend any of its routine procedures, such as deleting old files, that could alter or destroy potentially relevant records [*see* Fed R Civ P 37(f); *William T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1455* ; *see also 23.161*].

Cross Reference:

Form, see *§ 23.306*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryPreservationCivil ProcedureDiscoveryMethodsRequests for Production & InspectionEvidenceRelevanceSpoliation

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23.168 Responding to Request for Production.

23.168[1] Produce Information in Form Specified in Request or Form in Which It Is Ordinarily Maintained or Form That Is Reasonably Usable. The request for production of electronically stored information may specify the form or forms in which the information is to be produced [*Fed R Civ P 34(b)(1)(C)*]. If the responding party objects to the requested form or forms, or if no form is specified in the request, the response must state the form or forms the responding party intends to use [*Fed R Civ P 34(b)(2)(D)*]. Unless the parties otherwise agree, or the court otherwise orders, if the request does not specify the form, the information must be produced in the form in which it is ordinarily maintained or in a form that is reasonably usable and any electronically stored information must be produced only in one form [*Fed R Civ P 34(b)(2)(E)*].

Cross Reference:

Discussion of cost-shifting, see *§ 23.174*.

Consider:

Producing electronically stored information in the form in which it is ordinarily maintained will be less expensive than producing the files in hard copy. Further, the electronic files will usually be easier to analyze, because massive sets of printouts may be unusable [*see Adams v. Dan River Mills, Inc. (WD Va 1972) 54 FRD 220, 222* ; *American Brass v. United States (Ct Int'l Trade 1988) 699 F Supp 934, 938*], and the electronic format will contain the embedded data that does not appear in a hard-copy printout.

Strategic Points--Requesting Party:

Requiring the requesting party to travel to the responding party's site to extract and copy information from the responding party's system may amount to unwarranted cost-shifting [*see OpenTV v. Liberate Techs. (ND Cal 2003) 219 FRD 474, 476*]. Consider an objection and a request for determination that cost-shifting is not warranted [*see § 23.174*]. In addition, the client may not want the requesting party in its offices, searching its hard drives and servers. If the responding party decides to allow the requesting

party such access, it should first ensure that there are not privileged, confidential, or harmful nonresponsive files and information on the hard drives and servers.

Producing documents as they are maintained in storage is not the same as producing documents that are kept in the "usual course of business" [*see Mancini v. Ins. Corp. (SD Cal 2009) 2009 US Dist LEXIS 51321, at *16-*17* (plaintiff's production of 73 computer disks containing all documents from underlying class action did not represent documents meeting *Fed R Civ P 33(b)(2)(E)(i)*'s requirements)].

23.168[2] Responding Party Has Duty to Create Compilations If Raw Data Exists. The responding party must produce electronically stored information--including ... data or data compilations stored in any medium from which information can be obtained--translated, if necessary, by the respondent into reasonably usable form" [*Fed R Civ P 34(a)*]. When data can, as a practical matter, be made usable only through devices of the responding party, the responding party may be required to use those devices to translate the data into usable form [*Fed R Civ P 34(a)*, Committee Note of 1970]. An expert may also be employed to perform the translation, including an expert designated by the requesting party [L.A. County Employees Ret. Ass'n v. Towers, Perrin, Forster, & Crosby, Inc. (CD Cal 2003) 2003 US Dist LEXIS 10233, at *5-*6].

23.168[3] Interrogatories May Be Answered by Making Records Available. Interrogatories may be answered by making business records, including electronically stored information, available for inspection and copying, including compilations, when the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served [*Fed R Civ P 33(d)*].

Cross Reference:

Discussion of answering interrogatories by making business records available, see *§§ 23.111 -23.134*.

23.168[4] Respond or Object in Timely Manner.

23.168[4][a] Failure to Object Within Time Required Waives Any Objections. Generally, a failure to object to discovery requests within the time required constitutes a waiver of any objection [*Davis v. Fendler (9th Cir 1981) 650 F2d 1154, 1160* ; *Richmark Corp. v. Timber Falling Consultants (9th Cir 1992) 959 F2d 1468, 1473*]. However, a court may determine that a brief period of tardiness does not amount to a waiver if the request exceeded the bounds of fair discovery by seeking information clearly privileged under the law [*see, e.g., United States ex rel. Burroughs v. DeNardi Corp. (SD Cal 1996) 167 FRD 680, 687*].

Warning--Responding Party:

A failure to object or respond within the time allowed can also subject the nonresponsive party to sanctions [*see Fed R Civ P 37(a)(5)*; *but see ND Cal Civ LR 7-8, 37-3* (separate sanctions motion required in Northern District)].

23.168[4][b] Objection Must Identify Specific Item As to Which It Is Made and Specify Reason for Objection. The response must identify the specific item or category as to which the objection is made and state the reason for the objection [*Fed R Civ P 34(b)(2)(B)*; *see Fed R Civ P 26(b)(5)(A)*]. A "blanket objection" is improper and ineffective [*Eureka Fin. Corp. v. Hartford Accident & Indem. Co. (ED Cal 1991) 136 FRD 179, 185* ; *Green v. Baca (CD Cal 2003) 219 FRD 485, 491*].

23.168[4][c] Response Must State Form of Production If Other Than That Stated in Request. The responding party must state the form it intends to use for producing electronically stored information if the request did not specify a form or if the responding party objects to the form specified in the request [*Fed R Civ P 34(b)(2)(D)*].

Strategic Point:

Clearly identifying the intended form of production before the production occurs will permit the parties to identify and seek to resolve disputes before production occurs. If the parties disagree on the form of production, they must meet and confer under *Fed R Civ P 37(a)(1)* to try and resolve the matter before the requesting party can file a motion to compel [Fed R Civ P 34(b), Committee Note of 2006].

23.168[5] Determine Whether to Retain Expert to Protect Against Manipulation of Data by Requesting Party. If the responding party decides to allow the requesting party access to its hard drives, servers, and other electronic storage devices, it should have its own personnel participate in the inspection so that no manipulation of data occurs. If the responding party allows its hard drives, for example, to be copied by the requesting party, it should keep a copy for itself so that it has a record of the data originally provided to the requesting party.

Alternatively, the parties can agree on a neutral third party to be the custodian of the electronic data to ensure that there is no manipulation of data. In such a procedure, the third party conducts the search or inspection of the storage device, thereby ensuring that the information is not altered by the responding party, and retrieves only nonprivileged, nonconfidential, responsive information [*see Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1055*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

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23.169 Requested Matter Must Be Relevant to Claim or Defense.

23.169[1] Wide-Ranging Discovery Is Allowed Under Liberal Interpretation of Rule 26(b). Although the information requested must be relevant to a pleaded claim or defense of a party [*Fed R Civ P 26(b)(1)*], Rule 26(b) is liberally interpreted to permit wide-ranging discovery of information even though the information may not be admissible at the trial [Comcast of Los Angeles, Inc. v. Top End Int'l, Inc. (CD Cal 2003) 2003 US Dist LEXIS 18640, at *6].

23.169[2] "Fishing Expeditions" Are Not Allowed. "Fishing expeditions," in which overly broad requests are made, in some cases merely to delay and frustrate the other party, are not allowed [*United States v. Nixon (1974) 418 US 683, 700, 94 S Ct 3090, 41 L Ed2d 1039*]. The mere possibility that some relevant information may be discovered from a search of an entire electronic information system is insufficient to warrant production [*see Lawyers Title Ins. Corp. v. United States Fid. & Guar. Co. (ND Cal 1988) 122 FRD 567, 570*].

Examples:

When a dispute involves the discrete activities of a corporate subsidiary, a request that by its terms would include all data contained on the entire corporation's electronic information systems will be deemed a "fishing expedition." Further, in an employment discrimination case, to request the computer record of every employee terminated not just in the subsidiary involved, but also companywide, might be deemed overbroad. Finally, a request asking for all back-up tapes from all of a company's servers may be extremely overbroad and call for a huge amount of irrelevant (and possibly privileged) material.

23.169[3] Burden Is on Responding Party to Show Lack of Relevance. A responding party resisting discovery has the burden to show discovery should not be allowed, and has the burden to clarify, explain, and support its objections. The responding party therefore has the initial burden of showing lack of relevance, provided that the burden may shift to the requesting party to show relevance if relevancy is not apparent [*Blankenship v. Hearst Corp. (9th Cir 1975) 519 F2d 418, 429* ; *DIRECTV, Inc. v. Trone (CD Cal 2002) 209 FRD 455, 458*].

Cross Reference:

Checklist for raising objections to discovery based on lack of relevancy to claim or defense, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§ 24.03*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryRelevance

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23.170 Requested Matter Must Not Be Privileged.

The information requested must not be privileged [*Fed R Civ P 26(b)(1)*]. When information is withheld on the ground of privilege, the matter that is assertedly privileged must be specifically described in a manner that will enable the requesting party to assess the applicability of the privilege [*Fed R Civ P 26(b)(5)(A)*].

Cross References:

Discussion of protecting confidentiality and privilege, see *23.176 -23.181*. Detailed checklist listing objections to discovery based on privilege, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§ 24.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview

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23.171 Determine Whether Burden or Expense Exceeds Right to Evidence.

23.171[1] Party Must Produce Evidence Unless Production Is Unduly Burdensome or Expensive. A party must produce relevant evidence unless the burden or expense of the discovery outweighs its likely benefit [*Fed R Civ P 26(b)(2)(C)(iii)*]. If a discovery request is relatively unintrusive and easy to satisfy, it is presumptively reasonable. On the other hand, if the request is intrusive, the requesting party has a higher burden with respect to demonstrating the likelihood that relevant and useful information will be produced [*see* New York State NOW v. Cuomo (SDNY 1998) 1998 US Dist LEXIS 10520, at *7-*8].

23.171[2] Evaluate Burden and Expense of Production Under Rule 26(b)(2)(C) Factors.

23.171[2][a] Burden of Producing Electronically Stored Information Can Be Substantial. Requests to discover electronically stored information may have a greater impact on the responding party than requests for hard copy documents [*see generally Thompson v. United States Dep't of Hous. & Urban Dev. (D Md 2003) 219 FRD 93, 96-97*]. The burden and cost associated with searching for all electronically stored information responsive to a Rule 34 request for production can be substantial, particularly since "deleted" computer records are discoverable. Searching for deleted records can be particularly time consuming and expensive due to the number of storage locations that may have to be checked and the possible need to use special search methods to locate deleted files.

23.171[2][b] Rule 26(b) Balancing Factors Determine Extent of Discovery of Electronically Stored Information. Because of the possible burden and expense, the Rule 26(b)(2) cost-benefit balancing factors are employed to determine how much discovery of electronically stored information is appropriate and which party should bear the cost associated with the production [*see 23.174* (cost-shifting)]. Those factors are: whether the discovery sought is unreasonably cumulative or duplicative; whether the information sought is obtainable from some other more convenient, less burdensome or inexpensive source; whether the party seeking the information already has had adequate opportunity to obtain the information; and whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into consideration the following: the needs of the case, the amount in controversy, the resources of the parties, the importance of the issues at stake in the litigation and of the discovery sought to the resolution of the issues [*Fed R Civ P 26(b)(2)*].

Cross References:

Discussion of Rule 26(b)(2) balancing factors, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§ 24.09*. Discussion of cost-shifting under Rule 34, see *§ 23.156[5][b]*.

23.171[2][c] Limitation on Discovery Can Be Obtained If Likely Benefit Is Outweighed by Burden or Expense. Under Rule 26(b)(2), a protective order may be obtained if the likely benefit of the discovery sought is outweighed by the burden on or expense to the responding party [*Fed R Civ P 26(b)(2)(C)(iii)*]. The requesting party must identify that likely benefit. Absent an overriding claim of privilege, the "likely benefit" of the production of the following types of information will almost always outweigh the burden or expense of production:

- Matter with independent evidentiary significance, such as a computer software program subject to a copyright infringement claim [*see, e.g., Sega Enters. v. MAPHIA (ND Cal 1996) 948 F Supp 923*], computerized accounting records, and e-mails.

Consider:

The mere suspicion that the responding party will not otherwise produce all relevant evidence does not justify a "fishing expedition," and the request must identify relevant material [*Lawyers Title Ins. Corp. v. United States Fid. & Guar. Co. (ND Cal 1988) 122 FRD 567, 570*].

- Matter that exists only in computerized form; extraordinary hardship must be shown to resist discovery when the electronically stored information is the only source of the information [*see, e.g., Daewoo Elecs. Co. v. United States (Ct Int'l Trade 1986) 650 F Supp 1003*].

Consider:

Although e-mails may exist only in electronic form, the cost of production may still be prohibitive due to the volume of messages that must be reviewed, particularly if the back-up system must be searched [*see, e.g., In re* Brand Name Prescription Drugs Antitrust Litig. (ND Ill 1995) 1995 US Dist LEXIS 8281, at *3-*7].

Because the responding party's computer software may show when changes were made to a document and by whom, those computer records may be uniquely useful in challenging the authenticity of a document. The requesting party must have more than a mere suspicion of tampering to justify production when the burden of retrieving the information is high and the likelihood of finding relevant evidence of tampering is low [*see, e.g., Fennell v. First Step Designs, Ltd. (1st Cir 1996) 83 F3d 526, 532* (requesting party failed to show "particularized likelihood" of tampering)].

23.171[2][d] Assess Whether Request for Discovery Is Too Broad. The requesting party is not entitled to discovery that is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive [*Fed R Civ P 26(b)(2)(C)*].

Example:

A request to discover all computer hard drives with access to a party's server was denied when the requesting party failed to provide sufficient justification for the significant disruption that the discovery would cause to the business operations of the responding party [Symantec Corp. v. McAfee Assocs., Inc. (ND Cal 1998) 1998 US Dist LEXIS 22591, at *10-*11].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryMethodsRequests for

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23.172 Responding to Request for Search of Back-Up System or Archive.

23.172[1] Search of Back-Up System or Archive May Be Difficult and Costly. Back-up systems and archives are intended to protect files in case of disaster and are not designed for search purposes [*McPeek v. Ashcroft (DDC 2001) 202 FRD 31, 32*]. Because these systems are not designed to be used in the typical everyday computer environment, they may not be organized or searchable in the same manner as the computer system used in daily business operations [*see, e.g., Alexander v. FBI (DDC 1998) 188 FRD 111, 117* (archived e-mails were not searchable by word)]. In addition, a redundancy problem can exist when many versions of the same document are stored on back-up media.

23.172[2] Proportionality Test Applies to Search of Back-Up Systems and Archives. The responding party need not provide discovery of electronically stored information from sources that it identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the responding party bears the burden of making that showing. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the general limitations on discovery imposed by Rule 26(b)(2)(C). The court may specify conditions for the discovery.

The proportionality analysis of Rule 26(b)(2)(C) requires that the scope of a search of the responding party's back-up system or archive be reasonable [*see 23.171[2]*]: the requesting party must show more than speculation that relevant matter will be turned up by a search of the back-up system or archive and must minimize the production of irrelevant items [*see, e.g., Alexander v. FBI (DDC 2000) 194 FRD 316, 325-326*].

Consider:

A court may find that in choosing a back-up system, a party should consider the need for retrieval of information from that system [*see In re* Brand Name Prescription Drugs Antitrust Litig. (ND Ill 1995) 1995 US Dist LEXIS 8281, at *4-*5]. On the other hand, a court may refuse to impose substantial costs of production on the responding party merely because of its choice of back-up system [*see Rowe Entm't, Inc. v. William Morris Agency, Inc. (SDNY 2002) 205 FRD 421, 429*].

Cross Reference:

Discussion of cost-shifting, see *§ 23.174*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.173 Protective Order Is Available If Burden or Expense of Production Is Too Great.

23.173[1] Burden of Searching Records and Translating Data Into Readable Form Is Necessary and Foreseeable. The responding party is responsible for the complexity and size of its own computer system. The fact that a vast volume of records must be searched in response to a discovery request does not excuse the party from making that search [*see Rowe Entm't, Inc. v. William Morris Agency, Inc. (SDNY 2002) 205 FRD 421, 429*]. Likewise, the burden of translating electronic data into a readable form is necessary and foreseeable [*see Daewoo Elecs. Co. v. United States (Ct Int'l Trade 1986) 650 F Supp 1003, 1006*].

23.173[2] Prepare Proffer Outlining Costs and Burdens. Prepare a proffer substantiating the costs and procedures of complying with the request for production to demonstrate the burden imposed [*see* Gambale v. Deutsche Bank AG (SDNY 2002) 2002 US Dist LEXIS 22931, at *2]. A conclusory or factually unsupported claim that the discovery of computer records should be denied because the burden or expense is undue will fail [*see Thompson v. United States Dep't of Hous. & Urban Dev. (D Md 2003) 219 FRD 93, 98* ; *Eureka Fin. Corp. v. Hartford Accident & Indem. Co. (ED Cal 1991) 136 FRD 179, 182-183*].

23.173[3] Attempt to Resolve Dispute With Requesting Party. The responding party must attempt to resolve any discovery dispute with the requesting party before seeking a protective order under Rule 26(c) [*Fed R Civ P 26(c)*]. Likewise, the requesting party must attempt a resolution before bringing a motion to compel production [*Fed R Civ P 37(a)(2)*; *CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*; *Sequoia Prop. & Equip. Ltd. P'ship v. United States (ED Cal 2001) 203 FRD 447, 451*].

Cross Reference:

Discussion of requirement that parties attempt to resolve discovery disputes before bringing motion to compel or motion for protective order, see Ch. 25, Motions to Compel and Discovery Sanctions, *§ 25.05*.

23.173[4] Protective Order Is Available If Dispute Cannot Be Resolved Between Parties. If the burden of production is too great, and the dispute could not be resolved between the parties without court action, bring a motion for a protective order. The court has broad discretion to fashion an appropriate protective order, which may include

provisions such as the following [*Fed R Civ P 26(c)*]:

- That the discovery not be had.
- That the discovery may be had only on specified terms and conditions, including a designation of the time or place.
- That the discovery may be had only by a method other than that selected by the requesting party.
- That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.
- That discovery be conducted with only designated persons present.
- That confidential information not be revealed, or revealed only in a designated way.

Cross Reference:

Protective order checklist, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§ 22.35*.

Strategic Point:

Be prepared with a less burdensome alternative means of locating relevant evidence, such as an initial sampling of documents [*see, e.g., Zubulake v. UBS Warburg LLC (SDNY 2003) 217 FRD 309, 324*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue Burdens

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23.174 Apply for Order Shifting Costs If Production Requires Significant or Special Costs.

23.174[1] Court Has Inherent Authority to Allocate Discovery Costs. Although no rule expressly authorizes cost-shifting, the power of the court to limit discovery under Rule 26(b)(2) includes the power to allocate costs [*see Manual for Complex Litigation, Fourth, § 11.446*]. The responding party usually must bear the cost of responding to discovery requests, although an order shifting costs may be available when production requires significant or special costs [*Oppenheimer Fund Inc. v. Sanders (1978) 437 US 340, 358, 98 S Ct 2380, 57 L Ed2d 253* ; *OpenTV v. Liberate Techs. (ND Cal 2003) 219 FRD 474, 476*]. Cost shifting need not be absolute, and the court may order an apportionment [*see, e.g., OpenTV v. Liberate Techs. (ND Cal 2003) 219 FRD 474, 479* (cost of extraction of source code to be split equally); *see also Rowe Entm't, Inc. v. William Morris Agency, Inc. (SDNY 2002) 205 FRD 421, 432-433*].

23.174[2] Cost-Shifting Is Appropriate When Data Is Inaccessible. When deciding whether to shift the cost of electronic production, the court may consider the accessibility of the data and order cost-shifting only when the data is relatively inaccessible and costly to restore and/or retrieve, such as data on back-up tapes and data that has been deleted or damaged [*see* Fed R Civ P 26(b)(2)(B); *OpenTV v. Liberate Techs. (ND Cal 2003) 219 FRD 474, 476*].

Whether or not electronic data is relatively inaccessible turns on the type of media on which the data is stored. Three types of data are generally presumed to be accessible [*Zubulake v. UBS Warburg LLC (SDNY 2003) 217 FRD 309, 318-319*]:

- Active, online data (e.g., hard drives);
- Near-line data (e.g., optical disks and other robotic or removal storage devices); and
- Offline storage/archives (e.g., removal optical disk or magnetic tape media, which can be labeled and stored in a shelf or rack).

Two types of data are generally presumed to be inaccessible [*Zubulake v. UBS Warburg LLC (SDNY 2003) 217 FRD*

309, 319]:

- Backup tapes, which are sequential access devices requiring one to read all of the preceding blocks to retrieve a particular block of data; and

- Erased, fragmented, or damaged data (data that has been "deleted" and can be converted and used again as free space).

In determining whether or not to shift costs for producing relatively inaccessible data, the court may consider the following [*see OpenTV v. Liberate Techs. (ND Cal 2003) 219 FRD 474, 476-477* ; *Zubulake v. UBS Warburg LLC (SDNY 2003) 216 FRD 280, 284*]:

- The extent to which the request is specifically tailored to discover relevant information.

- The availability of the information from other sources.

- The total cost of production, compared to the amount in controversy.

- The total cost of production, compared to the resources available to each party.

- The relative ability of each party to control costs and its incentive to do so.

- The importance of the issues at stake in the litigation.

- The relative benefits to the parties of obtaining the information.

Strategic Point--Responding Party:

To show that the cost of production is undue, a detailed explanation of the non-routine costs and procedures for retrieval of data should be provided to the court, because a mere conclusory objection that the burden is undue is insufficient to support a cost-shifting order [*see* Zapata v. IBP, Inc. (D Kan 1994) 1994 US Dist LEXIS 16285, at *9-*11 ; *Laufman v. Oakley Bldg. & Loan Co. (SD Ohio 1976) 72 FRD 116, 121*].

23.174[3] Responding Party Bears Cost of Review and Production Following Conversion to Accessible Form. Even when cost-shifting is appropriate considering the inaccessibility of the data sought by the requesting party, once the data is converted to an accessible form, the responding party will be responsible for reviewing and producing the data, such as making copies [*OpenTV v. Liberate Techs. (ND Cal 2003) 219 FRD 474, 479* ; *Zubulake v. UBS Warburg LLC (SDNY 2003) 216 FRD 280, 290*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.175 Third-Party Response to Subpoena Issued Under Rule 45.

23.175[1] Produce Information in Form Specified in Subpoena, Form Ordinarily Maintained, or Reasonably Usable Form. A subpoena may specify the form or forms in which electronically stored information is to be produced [*Fed R Civ P 45(a)(1)(C)*]. If the form specified is unobjectionable, production should be made in that form. If the form specified is objectionable, an objection should be made [*see Fed R Civ P 45(c)(2)(B)*]. If a subpoena does not specify the form or forms for producing electronically stored information, the person subject to the subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable [*Fed R Civ P 45(d)(1)(B)*], provided that electronically stored information need not be produced in more than one form [*Fed R Civ P 45(d)(1)(C)*].

23.175[2] Identify Documents Withheld Based on Privilege Sufficiently to Enable Requesting Party to Contest Claim. When information subject to a subpoena is withheld on a claim that it is privileged, the claim must be made expressly and must be supported by a description of the nature of the documents, communications, or things not produced sufficient to enable the requesting party to contest the claim [*Fed R Civ P 45(d)(2)(A)*].

23.175[3] Electronic Communications Privacy Act of 1986 Protects Customer Information Possessed by Provider of Electronic Communication Service. Under the Electronic Communications Privacy Act of 1986, a pretrial discovery subpoena under Rule 45 cannot be used to compel a provider of electronic communication service, such as an ISP, to disclose private consumer information to a government entity; discovery of such information can be compelled only in response to a trial subpoena [*18 USC § 2703(c)(1)(C)*; *FTC v. Netscape Communications Corp. (ND Cal 2000) 196 FRD 559, 561* ; *see Fed R Civ P 45*].

23.175[4] Seek Protective Order to Prevent, or Impose Sanctions for, Imposition of Undue Burden or Expense. The requesting party must take reasonable steps to avoid imposing undue burden or expense on the third party subject to a Rule 45 pretrial discovery subpoena; sanctions are authorized for breach of that duty [*Fed R Civ P 45(c)(1)*]. A protective order is available to protect the third party from undue burden or disclosure of privileged or other protected matter [*Fed R Civ P 45(c)(3)*].

Cross Reference:

Seeking protective orders and sanctions for imposition of undue burden or expense, see *§ 23.280*.

23.175[5] Discovery Order Is Normally Not Immediately Appealable. An order denying or granting a motion to quash a subpoena is ordinarily not considered final and appealable. However, if a motion to quash a subpoena served on a nonparty is granted by a court in a district other than the district in which the action is pending, that order is final and appealable, because it is the final disposition of the issues before it, and it would be unreviewable on appeal of the final judgment in the principal action [*Micro Motion, Inc. v. Kane Steel Co. (Fed Cir 1990) 894 F2d 1318, 1320*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenas

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23.176 CHECKLIST: Protecting Confidentiality and Privilege.

☐ Determine whether reasonable expectation of confidentiality exists in electronically stored information.

Authority:
Fed R Civ P 26

Discussion:
See *§ 23.177*

☐ Conduct review for privileged and other confidential information before production.

Authority:
Fed R Civ P 26

Discussion:
See *§§ 23.178*, *23.179*

☐ Seek stipulation to protect disclosure and use of privileged or otherwise confidential information.

Authority:
Fed R Civ P 36, *37*

Discussion:
See *§ 23.180*

☐ If requesting party will not stipulate, move for protective order if production of computer hardware, software, or electronically stored information will reveal confidential or privileged information.

Authority:
Fed R Civ P 26(c); *Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050*

Discussion:
See *§§ 23.135 -23.156*; *23.181*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersAttorney-Client PrivilegeCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryProtective Orders

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23.177 Privileged Matter Is Protected From Discovery.

Privileged matter is not subject to discovery and may be withheld [*Fed R Civ P 26(b)*]. The responding party asserting privilege must specifically designate the privileged matters, and has the burden of showing the withheld matter is privileged [*Fed R Civ P 26(b)(5)(A)*].

Cross Reference:

Discussion of protection for privileged matter, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§§ 24.12 -24.26*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryPrivileged InformationCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersAttorney-Client PrivilegeCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryProtective Orders

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.178

23.178 Reasonable Expectation of Confidentiality May Exist in Electronically Stored Information.

23.178[1] Electronically Stored Information May Contain Privileged or Confidential Information. Electronically stored information may contain privileged matter or other confidential information. Privacy may be waived by consent, and may also be waived by a failure to object to discovery.

Consider:

Information provided to a testifying expert is subject to disclosure under Rule 26(a)(2) [*Fed R Civ P 26(a)(2)*]. All data to be provided to a testifying expert should be screened for privilege to avoid inadvertent waiver [*see, e.g.,* United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co. (SDNY 2002) 2002 US Dist LEXIS 111, at *23].

23.178[2] Totality of Circumstances Is Considered in Determining Whether Inadvertent Disclosure Waives Privilege. The totality of the circumstances are considered in determining whether an inadvertent disclosure waived privilege. The factors considered include the following [*Transamerica Computer Co. v. IBM Corp. (9th Cir 1978) 573 F2d 646, 649-651* ; *Bud Antle, Inc. v. Grow-Tech, Inc. (ND Cal 1990) 131 FRD 179, 183* ; *United States ex rel. Bagley v. TRW, Inc. (CD Cal 2001) 204 FRD 170, 178*]:

- The reasonableness of precautions taken to avoid disclosure.
- The extent of the disclosure.
- The scope and burden of discovery.
- The number of documents inadvertently disclosed.
- The time constraints involved.
- The delay in correcting the error.

- Overall fairness.

Cross Reference:

Detailed discussion of waiver of privilege, see 6 *Moore's Federal Practice, § 26.47[5]* (Matthew Bender 3d ed.).

23.178[3] Employee Has No Reasonable Expectation of Privacy in E-mails Sent Over Employer's Computer System. An employee normally has no reasonable expectation of privacy in e-mail sent over the employer's computer system sufficient to protect that e-mail from discovery [*see Smyth v. Pillsbury Co. (ED Pa 1996) 914 F Supp 97, 101*], and will generally be found to have consented to employer access. The employee's consent may be express, for example, when the employee signs an employment contract waiving any expectation of privacy in e-mail on the employer's computer system, or may be implied from the employee's knowledge that the employer has access to the computer system over which the e-mail was sent [*see TBG Ins. Servs. Corp. v. Superior Court (2002) 96 CA4th 443, 452, 117 CR2d 155* ; *Bohach v. City of Reno (D Nev 1996) 932 F Supp 1232, 1236-1237*].

Cross Reference:

Discussion of privacy rights of employees in email, see 7 *Moore's Federal Practice, § 37A.33[5]* (Matthew Bender 3d ed.).

In addition, federal law protecting the privacy of e-mails generally exempts employers from its restrictions. Although federal law prohibits unauthorized interception of e-mails, there is no privacy violation if the person has consented to the interception or access [*18 USC § 2511(2)(d)*]. Further, employers can monitor an employee's use of a computer furnished by the employer in the ordinary course of business to the extent necessary to protect the rights and property of the employer [*18 USC § 2511(2)(a)(i)*]. Likewise, although federal law prohibits unauthorized access to stored electronic communications, conduct authorized by the entity that provides the electronic communications service, i.e., the employer, is exempt [*18 USC § 2701(c)*].

Decision Point:

If appropriate, counsel should consider moving for a protective order to protect an employee from annoyance, embarrassment, oppression, or undue burden or expense [*see Fed R Civ P 26(c)*].

Cross Reference:

Checklists and forms for obtaining protective order under Rule 26(c), see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.35*, *22.75*.

23.178[4] Attorney-Client Privilege Applies to Communication by E-mail. The attorney-client privilege applies to communications by e-mail, provided the client has maintained the confidentiality [*United States v. Chevron Texaco Corp. (ND Cal 2002) 241 F Supp2d 1065, 1078*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryPrivileged InformationCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral Overview

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23.179 Work Product Doctrine Can Apply to Computerized Litigation Support System.

23.179[1] Work Product Doctrine Protects Work Prepared Because of Litigation. The work product doctrine protects an attorney's work prepared for, or in anticipation of, litigation. The court may not order disclosure of an attorney's mental impressions, conclusions, opinions, or legal theories concerning the litigation. Protection for this type of work product, referred to as "opinion work product," is practically absolute [*see Upjohn Co. v. United States (1981) 449 US 383, 398, 101 S Ct 677, 66 L Ed2d 584*]. However, on a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means, the court may order disclosure of so-called "ordinary work product" [*Fed R Civ P 26(b)(3)*].

23.179[2] Attorney Involvement Determines Level of Protection for Computerized Litigation Support System. Information in a computerized litigation support system is work product. If the information is targeted for discovery, the issue becomes whether it is entitled to the protection afforded "ordinary" work product or the near-absolute protection afforded "opinion" work product. Courts have held that the attorney's personal involvement in the development of the support system is the key to determining the level of protection afforded [*see Shipes v. BIC Corp. (MD Ga 1994) 154 FRD 301, 309*]. For example, the level of attorney involvement in an index support program which is based on key terms and summaries of individual documents is more likely to merit "opinion" protection than a support program that merely uses a character search.

23.179[3] When Requesting Party Has Targeted Computerized Litigation Support System for Discovery, Determine Whether Material Is Available From Another Source. The mere fact that discoverable information has been put into a computerized litigation support system does not by itself prevent its discovery. The original source of information put into a computerized litigation support system should be retained so that any response to discovery targeting that information can provide the information from the original source rather than from the support system. This will eliminate the risk of incidentally revealing attorney strategy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryPrivileged InformationCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductScope

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23.180 Stipulated Protective Order May Be Used to Protect Confidential and Privileged Information.

The parties may enter into a stipulated protocol for the protection of confidential and privileged information [*see 23.162[3][c]*; *see also Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1054-1055*]. The volume of information stored electronically increases the risk of inadvertent disclosure of privileged material. For example, the Manual for Complex Litigation recognizes that broad database searches require safeguards against exposing confidential or irrelevant data to the opponent's scrutiny. Stipulation to a "non-waiver" agreement, which can be adopted as a case management order, can avoid the onerous burden of pre-production screening of vast quantities of unorganized electronically stored information for privilege to avoid inadvertent waiver. This stipulation protects the responding party by allowing "take back" of inadvertently produced privileged materials if discovered within a reasonable period. In addition, some data may be maintained in compilations that are entitled to trade-secret protection or that reflect attorney work product for use at trial or as a basis for expert opinions [*see Manual for Complex Litigation, Fourth, § 11.446*]. Such a stipulation may be especially appropriate when the only way to review a huge volume of electronic files, e-mails, and databases is by conducting electronic word searches, rather than by reading each individual electronic document. The word searches may not screen out every privileged or work product document, but may be the only way to conduct such a search without spending an inordinate amount of time and money.

Consider:

Parties may stipulate that disclosure to a forensic expert does not constitute waiver of privilege or confidentiality.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryPrivileged InformationCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective Orders

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23.181 Move for Protective Order If Requesting Party Will Not Stipulate.

23.181[1] Attempt Must Be Made to Resolve Dispute Before Moving for Protective Order. The responding party must attempt to resolve any discovery dispute with the requesting party before seeking a protective order under Rule 26(c) [*Fed R Civ P 26(c)(1)*].

Cross Reference:

Discussion of requirement that parties attempt to resolve discovery disputes before bringing motion for protective order, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§ 22.53[4]*.

23.181[2] Court Has Broad Discretion to Fashion Appropriate Order. The court has broad discretion to fashion an appropriate protective order, which may include provisions that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; that discovery be conducted with no one present except designated persons; and that confidential information not be revealed or revealed only in a designated way [*Fed R Civ P 26(c)*].

Cross Reference:

Discussion of protective order generally, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.35 -22.66*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective Orders

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23.182 CHECKLIST: Admitting Electronically Stored Information at Trial.

☐ Electronically stored information must be authenticated under *Fed R Evid 901* to be admissible.

Authority:
Fed R Evid 901

Discussion:
See *§§ 23.183*, *23.184*

☐ Questions of accuracy go to weight, not admissibility, of evidence.

Authority:
United States v. Catabran (9th Cir 1988) 836 F2d 453, 458

Discussion:
See *§ 23.185*

☐ Determine whether electronically stored information is inadmissible hearsay. Electronically stored information is nonhearsay when:

○ It is not a "statement"; or

○ It is a party admission.

Authority:
Fed R Evid 801,

Discussion:
See *§ 23.186[1]*

☐ If electronically stored information is hearsay, determine whether it is admissible under exception to hearsay exclusionary rule such as:

- ○ Business record exception.
- ○ Official record exception.
- ○ Statement against interest exception.
- ○ Catch-all exception for statement with circumstantial guarantees of trustworthiness.

Authority:
Fed R Evid 803, *804*, *807*

Discussion:
See *§ 23.186[2]*

☐ Prepare digital material that will be shown to jury for disclosure to opposing party if so required by judge.

Authority:
see Manual for Complex Litigation, Fourth, § 11.643

Discussion:
See *§ 23.187*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionEvidenceAuthenticationGeneral OverviewEvidenceHearsayGeneral Overview

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.183

23.183 Electronically Stored Information Is Writing Subject to Federal Rules of Evidence.

In general, the Federal Rules of Evidence apply to electronically stored information just as they do to other types of evidence [Manual for Complex Litigation, Fourth, § 11.446]. Under the Federal Rules of Evidence, "writing" includes letters, words, or numbers, or their equivalent, set down by magnetic impulse, mechanical or electrical recording, or other form of data compilation [*Fed R Evid 1001(1)*].

Legal Topics:

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

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23.184 Authenticity Is Governed by Fed R Evid 901.

23.184[1] Proponent Must Produce Evidence Sufficient to Support Finding That Matter in Question Is What Proponent Claims It to Be. The authenticity of electronically stored information is governed by *Fed R Evid 901* [*United States v. Siddiqui (11th Cir 2000) 235 F3d 1318, 1322*], which requires evidence sufficient to support a finding that the matter in question is what its proponent claims it to be [*Fed R Evid 901(a)*]. Proof of accuracy, maintenance, and reliability of computer hardware and software is not required for admission of computer records [*United States v. Catabran (9th Cir 1988) 836 F2d 453, 458*].

Cross Reference:

Discussion of authentication of computer-based evidence, see 5 *Weinstein's Federal Evidence, § 900.07* (Matthew Bender 2d ed.).

Consider:

The proponent must make only a prima facie showing of authenticity because, under *Fed R Evid 901(a)*, the court is to admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity [*United States v. Tank (9th Cir 2000) 200 F3d 627, 630*].

23.184[2] Website Printouts Must Be Authenticated. The authenticity of website printouts is governed by *Fed R Evid 901*.

Examples:

In a copyright and trademark infringement action, authentication of printouts of websites was sufficient when the plaintiff's CEO adequately established that the printouts were true and correct copies of pages printed from the Internet that were printed by him or under his direction [*Perfect 10, Inc. v. Cybernet Ventures, Inc. (CD Cal 2002) 213 F Supp2d 1146, 1154*]. On the other hand, documents allegedly taken from the defendant's website were inadmissible when the plaintiff could not authenticate the documents as statements of the defendant, and the plaintiff offered no witness with personal knowledge of who maintained the website, who authored the documents, or the accuracy of their contents [*Wady v.*

Provident Life & Accident Ins. Co. of Am. (CD Cal 2002) 216 F Supp2d 1060, 1064-1065].

23.184[3] Printouts of Electronically Stored Information Must Be Authenticated. The authenticity of printouts of electronically stored information is governed by *Fed R Evid 901*.

Examples:

Printouts of computerized records of purchaser approval numbers issued to the defendant's firearms business could not be authenticated with evidence describing a process or system used to produce a result and showing that the process or system produced an accurate result, because the printouts were not the result of a "process or system used to produce a result" within *Fed R Evid 901(b)(9)*, as they represented preexisting records that happened to be stored on computer. The printouts were authenticated by testimony of a government witness that the printouts reflected information contained in the government's records [*United States v. Meienberg (10th Cir 2001) 263 F3d 1177, 1181*]. Likewise, printouts from a co-conspirator's computer records were properly authenticated in a drug conspiracy prosecution by the testimony of a law enforcement agent as to how and when those records were retrieved [*United States v. Whitaker (7th Cir 1997) 127 F3d 595, 601-602*].

23.184[4] E-mail Must Be Authenticated. The authenticity of e-mail is governed by *Fed R Evid 901*. An e-mail may be self-authenticating under *Fed R Evid 902(7)*, which provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to "inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin." Therefore, if an e-mail contains the name of the sender or other identifying markers, it may satisfy the requirements for self-authentication [*see, e.g.*, Superhighway Consulting, Inc. v. Techwave, Inc. (ND Ill 1999) 1999 US Dist LEXIS 17910, at *6-*7]. Also, if an e-mail is produced in response to a request for production, no further authentication may be needed [*see Burgess v. Premier Corp. (9th Cir 1984) 727 F2d 826, 835*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral OverviewEvidenceDemonstrative EvidenceComputer-Generated Evidence

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23.185 Questions of Accuracy Go to Weight, Not Admissibility.

Questions as to the accuracy of electronically stored information, whether resulting from incorrect data entry or errors in the program, as with inaccuracies in any other type of business records, affect the weight of the evidence and not its admissibility [*United States v. Catabran (9th Cir 1988) 836 F2d 453, 458*]. The mere fact that it is possible to alter data contained in a computer is insufficient to establish untrustworthiness [*United States v. Bonallo (9th Cir 1988) 858 F2d 1427, 1436*]. The burden is on the proponent to lay a proper foundation by establishing the accuracy of the electronically stored information [*Manual for Complex Litigation, Fourth, § 11.446*].

Consider:

A special master, neutral court-appointed expert, or expert designated by the parties may be necessary to establish the accuracy of electronically stored information [*see* Manual for Complex Litigation, Fourth, § 11.446].

Legal Topics:

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

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23.186 Electronically Stored Information Will Be Excludable as Hearsay Unless an Exception Applies.

23.186[1] Electronically Stored Information Is Subject to Exclusion as Hearsay.

23.186[1][a] Electronically Stored Information May Be Statement Subject to Exclusion as Hearsay. Electronically stored information, like other types of evidence, is subject to exclusion as hearsay [*Fed R Evid 802*]. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted [*Fed R Evid 801(c)*]. For example, information from a website is excludable as hearsay when the information from a website is offered for the truth of its content and, to be admissible, the information must satisfy an exception to the hearsay rule [*Van Westrienen v. Americontinental Collection Corp. (D Ore 2000) 94 F Supp2d 1087, 1109* (representations made by defendant on its website were admissible as admissions of party-opponent)].

Cross Reference:

Discussion of hearsay exclusionary rule, see 5 *Weinstein's Federal Evidence, § 802.01 et seq.* (Matthew Bender 2d ed.)

23.186[1][b] Nonassertive Printout Is Not Hearsay. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion [*Fed R Evid 801(a)*]. If electronically stored information is not an assertion, then it is not a statement, and therefore is not hearsay. For example, when a printout from a website was introduced to show the images and text found on the website, the printout was not a statement at all and fell outside the ambit of the hearsay rule [*Florida Conference Ass'n of Seventh-Day Adventists v. Kyriakides (CD Cal 2001) 151 F Supp2d 1223, 1225-1226* ; *Perfect 10, Inc. v. Cybernet Ventures, Inc. (CD Cal 2002) 213 F Supp2d 1146, 1155*].

Cross Reference:

Discussion of requirement of assertion for evidence to be excludable as hearsay, see 5 *Weinstein's Federal Evidence, § 802.01 et seq.* (Matthew Bender 2d ed.)

23.186[1][c] Admission by Party-Opponent Is Not Hearsay. A statement is not hearsay if it is offered against a party and is any one of the following [*Fed R Evid 801(d)(2)*]:

- The party's own statement, in either an individual or a representative capacity.
- A statement of which the party has manifested an adoption or belief in its truth.
- A statement by a person authorized by the party to make a statement concerning the subject.
- A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.
- A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

An e-mail or a website may contain a party admission [*see Van Westrienen v. Americontinental Collection Corp. (D Ore 2000) 94 F Supp2d 1087, 1109* (representations made by defendant on its website were admissible as admissions of party-opponent); *Florida Conference Ass'n of Seventh-Day Adventists v. Kyriakides (CD Cal 2001) 151 F Supp2d 1223, 1226*].

Example:

An internal company e-mail forwarded by an employee of the plaintiff company to the defendant was not excludable hearsay because the employee's remarks in forwarding the e-mail manifested an adoption or belief in truth of the information contained in the original e-mail and satisfied the requirements for an adoptive admission of a party-opponent under *Fed R Evid 801(d)(2)(B)* [*Sea-Land Serv., Inc. v. Lozen Int'l, LLC (9th Cir 2002) 285 F3d 808, 821*].

Cross Reference:

Discussion of admission of party-opponent as nonhearsay under Federal Rules of Evidence, see 5 *Weinstein's Federal Evidence, § 802.01 et seq.* (Matthew Bender 2d ed.)

23.186[2] Hearsay Electronically Stored Information Is Admissible If an Exception Applies.

23.186[2][a] Federal Rules of Evidence Provide Exceptions That Allow Admission of Hearsay. Hearsay is admissible only as prescribed by the Federal Rules of Evidence or other rules prescribed by the Supreme Court or Congress [*Fed R Evid 802*]. The Federal Rules of Evidence contain a variety of exceptions to the hearsay rule that may apply to electronically stored information, including exceptions for:

- Business records [*Fed R Evid 803(6)*].
- Public records and reports [*Fed R Evid 803(8)*].
- Statements against interest [*Fed R Evid 804(b)(3)*].

23.186[2][b] Electronically Stored Information Is Admissible Under Business Records Exception to Hearsay Rule If Proper Foundational Requirements Are Established. For purposes of the business records exception to the hearsay rule provided by *Fed R Evid 803(6)*, it is immaterial that the business record is maintained in an electronic information system rather than in company books [*United States v. Catabran (9th Cir 1988) 836 F2d 453, 457* ; *Sea-Land Serv., Inc. v. Lozen Int'l, LLC (9th Cir 2002) 285 F3d 808, 818*]. Both printouts and e-mails are admissible as business records if the proper foundational requirements are first established [*United States v. Catabran (9th Cir 1988) 836 F2d 453, 457* ; *Monotype Corp. PLC v. International Typeface Corp. (9th Cir 1994) 43 F3d 443, 449-450*].

The foundational requirements are that the business records must be all of the following [*United States v. Bonallo (9th Cir 1988) 858 F2d 1427, 1435*]:

- Made or based on information transmitted by a person with knowledge at or near the time of the transaction.
- Made in the ordinary course of business.
- Trustworthy, with neither the source of information nor the method or circumstances of preparation indicating a lack of trustworthiness.

Cross Reference:

Discussion of business records exception to hearsay exclusionary rule, see 5 *Weinstein's Federal Evidence, § 802.01 et seq.* (Matthew Bender 2d ed.)

Evidence of the absence of a matter from an electronic information system to prove the nonexistence or nonoccurrence of the matter is also excepted from the hearsay exclusionary rule if the matter was of a kind of which a business record was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness [*Fed R Evid 803(7)*; *see United States v. De Georgia (9th Cir 1969) 420 F2d 889, 893-894*].

A witness must lay the foundation for the admission of electronically stored information under the business records exception to the hearsay rule. This testifying witness must be either the custodian of the records or another "qualified witness" [*Fed R Evid 803(6)*]. For example, a bookkeeper may be a qualified witness to lay the foundation for financial records [*see, e.g., United States v. Catabran (9th Cir 1988) 836 F2d 453*]. It is not necessary that a computer programmer testify to establish the foundation for computer-generated records [*United States v. Miller (9th Cir 1985) 771 F2d 1219, 1237*].

The fact that a printout of business records maintained in an electronic information system is prepared specially for purposes of trial does not affect the characterization of the records themselves as business records. As long as the original data compilation qualifies as a business record, the fact that the hard copy printout was prepared for the purposes of litigation does not affect its admissibility [*see United States v. Hernandez (10th Cir 1990) 913 F2d 1506, 1512-1513*].

23.186[2][c] Catch-All Exception for Statements With Circumstantial Guarantees of Trustworthiness. A statement not specifically covered by the exceptions to the hearsay exclusionary rule in the Federal Rules of Evidence [*Fed R Evid 803*, *804*] but that has equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule, if the court determines all of the following [*Fed R Evid 807*]:

- The statement is offered as evidence of a material fact.
- The statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts.
- The general purposes of the Federal Rules of Evidence and the interests of justice will best be served by admission of the statement into evidence.

For a statement to be admitted under this catch-all exception, the proponent of the statement must make it known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, along with the proponent's intention to offer the statement and the particulars of it, including the

name and address of the declarant [*Fed R Evid 807*; *see, e.g., United States v. Blackburn (7th Cir 1993) 992 F2d 666, 672* (computer printouts of lensometer readings for eyeglass lens admissible under former Fed R Evid 803(24), now *Fed R Evid 807*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayExceptionsGeneral OverviewEvidenceDemonstrative EvidenceComputer-Generated Evidence

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23.187 Court May Require Disclosure of Digital Material That Will Be Shown to Jury.

The court may require disclosure of all digital material that will be shown to the jury. Disclosure should be made in the same format that will be used at trial. Early disclosure helps the court in making rulings on admissibility. For example, the use of an animation or simulation raises issues such as the need for limiting instructions (such as to clarify the specific purpose for which the evidence is being offered), the authenticity and reliability of the underlying data, and the assumptions on which the exhibit is based. Guidance on admissibility should be obtained as early as possible to avoid the expense of preparing an animation or simulation that could be ruled inadmissible [*see* Manual for Complex Litigation, Fourth, § 11.643].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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23.188 Application of Best Evidence Rule to Printouts of Electronically Stored Information.

Under the Federal Rules of Evidence, to prove the contents of a writing, the original writing is required "except as otherwise provided" [*Fed R Evid 1002*]. When data is stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original" [*Fed R Evid 1001(3)*]. A copy of a printout is admissible as a duplicate unless a genuine question is raised as to the authenticity of the original, or unless in the circumstances it would be unfair to admit the duplicate in lieu of the original [*Fed R Evid 1003*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceBest Evidence Rule

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VIII. PHYSICAL AND MENTAL EXAMINATIONS
A. Determining Whether to Conduct Examination of Party

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23.189 CHECKLIST: Initial Considerations.

☐ Consider importance of party's physical or mental condition to your claims or defenses.

☐ Consider whether the nature and extent of party's claims regarding mental/physical condition appear to be overstated.

☐ If discovery concerning individual's physical or mental condition is sought, determine whether discovery by physical or mental examination would be available under Rule 35:

○ Mental or physical condition (including blood group) must be "in controversy" with regard to:

☐ Party; or

☐ Person in custody or under legal control of a party.

Authority:
Fed R Civ P 35(a)

Discussion:
See *§§ 23.192*, *23.202*

☐ Consider whether the information regarding party's mental or physical condition can be better obtained by other means of discovery, such as:

- ○ Interrogatories [*see Fed R Civ P 33*];
- ○ Requests for production [*see Fed R Civ P 34*]; or
- ○ Witness depositions [*see Fed R Civ P 30*].

Authority:
Fed R Civ P 26(b)(2)

Discussion:
See *§ 23.190*

☐ Evaluate likely outcome of examination:

- ○ Consider potential of harm if examination report is made available to examinee's counsel.

Authority:
Fed R Civ P 35(b)

Discussion:
See *§ 23.190*

☐ Consider who would be serving as examiner:

- ○ Inquire into prospective examiners' fees, qualifications, experience, and availability.
- ○ Examiner must be individual who is "suitably licensed or certified."

Authority:
Fed R Civ P 35(a)

Discussion:
See *§ 23.193*

☐ If mental or physical examination is sought, ascertain whether other parties will agree to examination:

- ○ Discuss potential use of Rule 35 examination at Rule 26(f) discovery planning conference.
- ○ If parties are agreeable to examination, prepare agreement for examination as part of the Rule 26(f) discovery plan.
- ○ Examinations not already agreed to at Rule 26(f) discovery conference may usually be arranged by

stipulation at a later time.

○ If agreement/stipulation is not possible, prepare to use noticed motion procedure for court-ordered mental or physical examination.

Authority:
Fed R Civ P 29, 35(a)

Discussion:
See *§§ 23.194 -23.204*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations

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A. Determining Whether to Conduct Examination of Party

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.190

23.190 Options and Strategy for Party Considering Examination.

Physical and mental examinations are available as a discovery device in the federal district courts under Rule 35 [*see Fed R Civ P 35*]. Such examinations are available only if both of the following conditions are met [*see Fed R Civ P 35*; *Schlagenhauf v. Holder (1964) 379 US 104, 118-119, 85 S Ct 234, 13 L Ed2d 152* ; *see also 23.202*, *23.203*]:

- The mental or physical condition of a party or a person in a party's custody or control is "in controversy."

- There is "good cause" for the examination.

Any attempt to use Rule 35 discovery must be preceded by analysis of the facts of the case in light of these two requirements. However, even if the party seeking the motion shows that the two requirements are met, the decision to grant or deny a Rule 35 examination always lies within the court's discretion [*see Fed R Civ P 35(a)* (court "may" order examination)]. Although examinations are sought most often in personal injury actions, they are available in any civil action in which the mental or physical condition of a party is at issue [*Maynard v. City of San Jose (9th Cir 1994) 37 F3d 1396, 1402* (defendant could have undertaken mental examination of plaintiff in civil rights case under *42 USC §§ 1983*, *1985*); *Ragge v. MCA/Universal Studios (CD Cal 1995) 65 FRD 605, 608* (Title VII civil rights action)].

Researching Medical Topics:

Many resources are available online for researching medical topics and articles. For example, helpful resources at *lexis.com* include:

- Legal tab> Area of Law-By Topic> Medical> Search Medical Journals & Abstracts> Medline & Abstracts> Medline References

  - Sample Search: To obtain a bibliographic list of medical articles on a particular topic, use the MAJOR-TERMS segment to search the MEDLINE(R) bibliographic

database: *major-terms (aspartame)*.

- Sample Search: To obtain a bibliographic list of medical articles by a particular author, enter a Terms & Connectors search, such as: *AUTHOR(last name/3 first name)*.

Cross Reference:

Applicability of Rule 35, see 7 *Moore's Federal Practice, § 35.02[1]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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A. Determining Whether to Conduct Examination of Party

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.191

23.191 Any Party May Seek Examination.

When the physical or mental condition of a party, or a person in the custody or control of a party, is "in controversy," an examination of that condition may be sought by *any* party to the action. There is no requirement that the examination be sought by an opposing party [*Schlagenhauf v. Holder (1964) 379 US 104, 115-116, 85 S Ct 234, 13 L Ed2d 152*].

Example:

Defendants may move to compel examination of a co-defendant, if the physical or mental condition of the co-defendant is in controversy [*Schlagenhauf v. Holder (1964) 379 US 104, 115-116, 85 S Ct 234, 13 L Ed2d 152*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations

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A. Determining Whether to Conduct Examination of Party

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.192

23.192 Party or Person in Custody or Control of Party May Be Examined.

23.192[1] Any Party Is Subject to Examination. Any party may be subject to a physical or mental examination when the physical or mental condition of the party is in controversy [*Fed R Civ P 35(a)*].

Although it is usually plaintiffs who are examined under Rule 35, a defendant may be subject to examination in appropriate circumstances [*Schlagenhauf v. Holder (1964) 379 US 104, 112-114, 85 S Ct 234, 13 L Ed2d 152*].

Cross Reference:

Party subject to examination, see 7 *Moore's Federal Practice, § 35.06* (Matthew Bender 3d ed.).

23.192[2] Person in Custody or Control of Party Is Subject to Examination. Under Rule 35, a person in the custody or under the legal control of a party may be subject to a physical or mental examination when the physical or mental condition of that person is in controversy [*Fed R Civ P 35(a)*].

Example:

A child or incompetent who is not technically a party to an action may nevertheless be compelled to submit to a physical or mental examination when suit is brought by a parent or guardian and the condition of the child or incompetent is "in controversy" [*see Scharf v. United States Attorney Gen. (9th Cir 1979) 597 F2d 1240, 1244*].

Distinguish:

A guardian or parent of a minor who is suing only in a representative capacity is not considered to be a "party" to the action, and may not be ordered to undergo an examination under Rule 35 [*Scharf v. United States Attorney Gen. (9th Cir 1979) 597 F2d 1240, 1243-1244* ; *Fong Sik Leung v. Dulles (9th Cir 1955) 226 F2d 74, 77-78*].

Cross Reference:

Person in custody or control subject to examination, see 7 *Moore's Federal Practice, § 35.06* (Matthew Bender 3d ed.).

23.192[3] Nonparty Is Not Subject to Examination. Physical or mental examinations may not be used against nonparties. For example:

- A person not a party to the action may not be ordered to submit to an examination under Rule 35 even if intimately connected to one of the parties to the action [*Dulles v. Quan Yoke Fong (9th Cir 1956) 237 F2d 496, 498-499*].

- A mere agent of a party may not be compelled to submit to an examination, unless the agent is also named as a party [*Schlagenhauf v. Holder (1964) 379 US 104, 115 n12, 85 S Ct 234, 13 L Ed2d 152*].

- An employee of a party may not be compelled to submit to a Rule 35 examination [*see Lewis v. Herrman's Excavating, Inc. (D Kan 2001) 200 FRD 657, 660-661*].

Distinguish:

The Federal Rules generally limit nonparty discovery to three methods: oral depositions, written depositions, and subpoenas [*see Fed R Civ P 30(a)(1), 31(a)(1), 34(c), 45*]. It may be possible to examine a nonparty by stipulation, however, if the examinee agrees to the examination [*see 23.194 -23.197*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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A. Determining Whether to Conduct Examination of Party

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.193

23.193 Examination Must Be Conducted by Qualified Examiner.

23.193[1] Examiner Must Be Suitably Licensed or Certified. The court may order a physical or mental examination only if the proposed examiner is "suitably licensed or certified" [*Fed R Civ P 35(a)(1)*].

The fact that an individual is not a physician or licensed psychologist will not disqualify him or her from serving as an examiner. The individual's qualifications, however, must be appropriate to the condition to be examined [*see Fed R Civ P 35*, Committee Note of 1991].

Cross Reference:

Qualifications of examiner, see 7 *Moore's Federal Practice, § 35.07[1]* (Matthew Bender 3d ed.).

23.193[2] Designation of Examiner by Moving Party Generally Conclusive. The movant's designation of a proposed examiner will generally be honored by the court, and a different examiner will be appointed only if the party to be examined raises some valid objection to the ability of the proposed examiner to conduct the examination [*Ragge v. MCA/Universal Studios (CD Cal 1995) 165 FRD 605, 609*].

Cross Reference:

Movant may select examiner, see 7 *Moore's Federal Practice, § 35.07[2]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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B. Agreeing or Stipulating to Physical or Mental Examination

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.194

23.194 CHECKLIST: Agreeing or Stipulating to Physical or Mental Examination.

☐ Consider what type of examination will achieve your discovery goals and what type of examiner you need.

☐ Review local rules and judge's individual rules to determine whether stipulation will need to be filed, or whether judge's signature/approval will be needed.

Authority:
CD Cal Civ LR 7.1, 52-4.1; *ED Cal Gen LR 143*; *ND Cal Civ LR 7-12*; *SD Cal Civ LR 7.2*

☐ At Rule 26(f) discovery planning conference, discuss your proposals for the examination with the other parties.

☐ Once logistics of examination have been planned, draft written agreement, including:

- ○ Time and place of examination.
- ○ Identity and specialty of the examiner.
- ○ What procedures will be used.

- Who will observe the examination.
- How the examination will be recorded.
- Scope of the examination.
- Length of time of the examination.

Authority:
Fed R Civ P 29, *35(a)*, *(b)(6)*

☐ Sign agreement and obtain signatures of other parties:

- If examination is to be of individual not ordinarily subject to examination under Rule 35 (e.g., a third-party witness), that examinee's signature must be obtained as well.
- Agreement may be included as a part of parties' Rule 26(f) discovery plan.
- Examinations not already agreed to at Rule 26(f) discovery conference may usually be arranged by a separate stipulation later in the pretrial stage.

☐ Ensure compliance with all local and individual judge's rules regarding stipulations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulations

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B. Agreeing or Stipulating to Physical or Mental Examination

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.195

23.195 Options and Strategy for Agreeing or Stipulating to Examination.

In most cases, any need for mental and physical examinations will be apparent at the beginning of the case and indisputable. When a party's physical or mental condition is clearly relevant to the claims or defenses presented in the case, the parties often agree in writing to have an examination, rather than seeking a court order under Rule 35. Rule 35 expressly recognizes the possibility and validity of a stipulated examination [*Fed R Civ P 35(b)(6)*; *see also Fed R Civ P 29* (setting conditions for discovery stipulations)].

Examination by agreement or stipulation may prove preferable to seeking a court order under Rule 35 for several reasons, including:

- A stipulation may provide for the examination of a key witness or other person not a party to the action, provided, of course, the witness or other person agrees to be examined.

- A stipulation provides greater flexibility in terms of scheduling and setting limits on the scope of the examination.

- A stipulation may permit counsel or some other third party to attend the examination, while a court order will often preclude such attendance [*see 23.204[2]*].

- The right of the examined party to obtain the report of the examiner [*Fed R Civ P 35(b)(1)*; *see 23.215[2]*] may be limited or eliminated by the stipulation.

- The consequences of obtaining or disclosing the report of the examiner that otherwise apply under the rule [*Fed R Civ P 35(b)(3)*, *(4)*; *see 23.215*] may be limited or eliminated by the stipulation.

- A stipulated examination obviates the need for a public hearing and publicly available briefing. Potentially embarrassing or otherwise private mental or physical problems may therefore not need to be publicly disclosed.

If the parties cannot agree on the terms of an examination, the party seeking the examination may proceed by motion under the standard noticed motion procedure [*Fed R Civ P 35(a)(2)*; *see 23.198 -23.204*].

Warning:

Local rules in all four California districts require the parties to attempt to resolve the matter informally before presenting the motion to the court [*see, e.g.*, *CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*]. For discussion of standard motion procedure, including informal resolution, see Ch. 22, Regulation of Discovery by Stipulation or Motion.

Cross Reference:

Stipulation of parties for examination, see 7 *Moore's Federal Practice, § 35.02[5]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulations

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B. Agreeing or Stipulating to Physical or Mental Examination

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.196

23.196 Parties May Agree to Mental or Physical Examination.

The parties to an action may stipulate to discovery by means of a physical or mental examination. The stipulation must be in writing [*see Fed R Civ P 29*].

The contents of the stipulation are not prescribed by rule. As a practical matter, the points referenced in Rule 35(a) (time, place, manner, conditions, scope of examination, and examiner(s)) will need to be specified as clearly as possible.

Cross Reference:

Form of stipulation for physical examination, see 8 Bender's Federal Practice Forms, Form 35:25 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulations

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.197

23.197 Examination Pursuant to Agreement Is Subject to Rule 35 Restrictions, Unless Agreement Explicitly Provides Otherwise.

Unless the stipulation expressly provides otherwise, the stipulation is deemed to incorporate the rules in Rule 35(b) for exchange of medical or psychological reports and waiver of privilege [*Fed R Civ P 35(b)(6)*].

Warning:

Consider the implications of Rule 35(b)(6) on your stipulation.

Party Seeking Examination:

Unless contrary provisions are expressly stipulated, the examining party will be required to disclose the results of the stipulated examination at the examinee's request [*Fed R Civ P 35(b)(1), (6)*].

Examinee:

Unless contrary provisions are expressly stipulated, if the examinee *does* request the examination report, the examining party will have a reciprocal right to receive future examination reports concerning the examinee's condition [*Fed R Civ P 35(b)(3), (6)*]. With regard to future examinations, the examinee will waive any testimonial privileges that would otherwise be available (e.g., the physician-patient privilege or the psychotherapist-patient privilege) [*Fed R Civ P 35(b)(4), (6)*].

Cross Reference:

Stipulations generally, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.03 -22.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulations

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C. Moving for Court-Ordered Physical or Mental Examination of Party

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.198

23.198 CHECKLIST: Moving for Physical or Mental Examination of Party.

☐ Review Rule 35 requirements.

Authority:
Fed R Civ P 35

Discussion:
See *§§ 23.191 -23.193*; *23.201 -23.203*

☐ Review local rules and individual judge's rules to ascertain preconditions for filing discovery motion.

☐ Ensure that timing of discovery is proper:

○ After preliminary discovery conference.

○ Before close of discovery.

Authority:
Fed R Civ P 26(d)

Discussion:
See *§ 23.200*

☐ Engage opposing parties in attempt at informal resolution, as required by local rule.

Authority:
CD Cal Civ LR 37-1; *ED Cal Gen LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

☐ Draft motion:

○ Include any additional papers required under local rules re attempt at informal resolution.

Authority:
CD Cal Civ LR 37-2.1; *ED Cal Gen LR 251(b)*; *SD Cal Civ LR 26.1(b)*

☐ Serve and file motion papers:

○ Follow standard noticed motion procedure.

Authority:
CD Cal Civ LR 7-1-7-20; *ED Cal Civ LR 230*; *ND Cal Civ LR 7-1*, *7-2*; *SD Cal Civ LR 7.1*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations

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C. Moving for Court-Ordered Physical or Mental Examination of Party

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.199

23.199 Options and Strategy for Moving Party.

The motion procedure for Rule 35 examinations should be used only as a last resort, if the parties cannot reach an agreement or stipulation concerning the terms of the examination. As noted above, proceeding by agreement or stipulation offers numerous advantages [*see 23.195*].

Judge's Perspective:

A party seeking to compel an examination should be sensitive to the intrusive nature of the request and should suggest examination parameters that will not needlessly make the process more onerous or invasive for the party being examined than is absolutely necessary. A court will react adversely if it appears that the request is in any way designed to discomfort or embarrass the party to be examined.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulations

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.200

23.200 Request and Examination Must Be Timed Properly.

23.200[1] Examinations Must Await Preliminary Discovery Conference. A party generally may not seek discovery, including Rule 35 examinations, before the parties have held the mandatory preliminary discovery conference [*Fed R Civ P 26(d)*; *see Fed R Civ P 26(f)* (discovery conference requirements)].

Exceptions:
Discovery before the mandatory preliminary discovery conference is permitted in [*Fed R Civ P 26(f)*]:

- Categories of cases exempted from initial disclosure requirements [*see Fed R Civ P 26(a)(1)(B)*]; and
- Cases where the court has authorized, or the parties have agreed to, early discovery.

Cross References:

Initial disclosure requirements, see Ch. 15, Rule 26(f) Conferences and Initial Disclosures, *§§ 15.15 -15.26*. Discovery conferences, see Ch. 15, Rule 26(f) Conferences and Initial Disclosures, *§§ 15.03 -15.14*.

23.200[2] Examinations Must Be Sought Before Close of Discovery. A Rule 35 examination must be sought and completed within the discovery cutoff established by the court for the action [*see Fed R Civ P 16(b)(3)*; *see also ED Cal Civ LR 240(a)(11)*; *ND Cal Civ LR 26-2*; *SD Cal Civ LR 16.1(d.2)*]. Even if an examination request is technically made within the discovery period, it may be denied if made so late that the examination and report cannot reasonably be produced within the discovery period [*see Shumaker v. West (SD W Va 2000) 196 FRD 454, 456-457* (denying request for examination when results of examination could not be included in required expert witness disclosures due in mere days)].

Cross References:

Timing of discovery, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§ 22.24*.

7 *Moore's Federal Practice, § 35.02[2]* (Matthew Bender 3d ed.).

23.200[3] Examination May Be Available Prior to Commencement of Action to Preserve Evidence. In some circumstances, Rule 27 permits perpetuation proceedings prior to an action to preserve evidence that may be lost if not immediately preserved [*see Fed R Civ P 27*]. Parties may be able to use the perpetuation mechanisms of Rule 27 to conduct a physical or mental examination under Rule 35 prior to an action or pending appeal. Such examinations are available on a restricted basis, subject to court approval [*see Martin v. Reynolds Metals Corp. (9th Cir 1961) 297 F2d 49, 56* (authorizing use of Rule 34 and Rule 35 discovery in prelitigation perpetuation)].

Cross References:

Perpetuation proceedings prior to action, see *§§ 23.03 -23.18*.

See also 7 *Moore's Federal Practice, § 35.02[3]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.201

23.201 Requisites of Motion Practice Must Be Followed.

A party who wishes to obtain a physical or mental examination of a party under Rule 35 through a court order must proceed by motion under the standard noticed motion procedure. The moving party must:

- Show that the physical or mental condition of the party to be examined is "in controversy" [*Fed R Civ P 35(a)*; *see Schlagenhauf v. Holder (1964) 379 US 104, 118-119, 85 S Ct 234, 13 L Ed2d 152* ; *see 23.202*];

- Show "good cause" for the conduct of the examination [*Fed R Civ P 35(a)*; *see Schlagenhauf v. Holder (1964) 379 US 104, 118-119, 85 S Ct 234, 13 L Ed2d 152* ; *see 23.203*]; and

- Provide specific facts about the proposed examination, including time, place, manner, and name of examiner, to put the other parties on notice [*Fed R Civ P 35(a)(2)*; *see 23.204*].

Warning:

Pay close attention to local rules and individual judge's rules. Motion procedure and the required format for motion papers vary from district to district.

Cross References:

Form of notice of motion and order, see §§ *23.310*, *23.311*.

Standard motion procedure, see Ch. 26, Pretrial Motion Practice, *§ 26.12*, and Ch. 22, Regulation of Discovery by Stipulation or Motion, *§ 22.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureDiscoveryMethodsMental & Physical Examinations

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VIII. PHYSICAL AND MENTAL EXAMINATIONS
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.202

23.202 Physical or Mental Condition Must Be Shown to Be "in Controversy."

23.202[1] Burden Is on Moving Party. The party moving to compel a physical or mental examination under Rule 35 has the burden of showing that the prospective examinee's mental or physical condition is genuinely "in controversy" [*Schlagenhauf v. Holder (1964) 379 US 104, 118, 85 S Ct 234, 13 L Ed2d 152* ; *Turner v. Imperial Stores (SD Cal 1995) 161 FRD 89, 91* ; *see Fed R Civ P 35(a)*].

The movant must show more than mere relevance to the claims or defenses in the action; instead, the movant must make an affirmative showing that each condition as to which the examination is sought is really and genuinely in controversy [*Schlagenhauf v. Holder (1964) 379 US 104, 118, 85 S Ct 234, 13 L Ed2d 152*].

When a plaintiff alleges only past mental or emotional suffering and does not allege a separate claim for relief for emotional distress, a Rule 35 exam is generally not appropriate [*Curtis v. Express, Inc. (NDNY 1994) 868 F Supp 467, 469*].

Cross Reference:

Burden of demonstrating condition in controversy, see 7 *Moore's Federal Practice, § 35.03[1]* (Matthew Bender 3d ed.).

23.202[2] Party to Be Examined Must Have Placed Condition "in Controversy." In order for a physical or mental examination to be ordered under Rule 35, the party to be examined must be the party that placed the physical or mental condition "in controversy" [*Houghton v. M&F Fishing, Inc. (SD Cal 2001) 198 FRD 666, 669*].

Example:

A plaintiff could not be subjected to psychiatric examination in a suit for personal injury because plaintiff alleged no mental injury or damages; allegations of defendant's expert witness could not place plaintiff's mental condition in controversy for purposes of Rule 35 [*Houghton v. M&F Fishing, Inc. (SD Cal 2001) 198 FRD 666, 669*].

23.202[3] Showing That Physical Condition Is in Controversy. Whenever a plaintiff seeks to recover damages for a physical injury that has either permanent or lasting effect, the plaintiff places his or her physical condition "in controversy" and may be subjected to a compelled examination of that condition by any other party to the action [Edson v. Liberty Mut. Ins. Co. (ND Cal 2002) 2002 US Dist LEXIS 25258, at *3-*4 ; *see Schlagenhauf v. Holder (1964) 379 US 104, 119, 85 S Ct 234, 13 L Ed2d 152*].

23.202[4] Showing That Mental Condition Is in Controversy.

23.202[4][a] Making Claim of "Garden-Variety" Emotional Distress or Mental Anguish Does Not Place Mental Condition "in Controversy." In many cases, a plaintiff suing to recover tort damages will assert that the alleged actions of the defendants have caused the plaintiff some emotional distress or mental anguish. Standing alone, such a claim of routine or "garden-variety" distress or anguish, however, does not place the plaintiff's mental condition "in controversy" for purposes of Rule 35, and cannot serve as the basis for a compelled mental examination [*Fitzgerald v. Cassil (ND Cal 2003) 216 FRD 632, 639-640* ; *Ford v. Contra Costa County (ND Cal 1998) 179 FRD 579, 579-580* ; *Turner v. Imperial Stores (SD Cal 1995) 161 FRD 89, 91, 98*]. Instead, a claim of "garden-variety" emotional distress or mental anguish places the plaintiff's mental condition "in controversy" only when asserted in conjunction with one or more of the following [*Turner v. Imperial Stores (SD Cal 1995) 161 FRD 89, 95*]:

- A claim for relief for intentional or negligent infliction of emotional distress [*Ragge v. MCA/Universal Studios (CD Cal 1995) 165 FRD 605, 608-609* (claim for relief for intentional infliction of emotional distress placed plaintiff's mental condition "in controversy")];

- An allegation of a specific mental or psychiatric injury or disorder [*see, e.g., Shepherd v. ABC (DDC 1993) 151 FRD 194, 213 , rev'd on other grounds by Shepherd v. ABC (DC Cir 1995) 62 F3d 1469* (plaintiffs' allegation of Post-Traumatic Stress Disorder placed plaintiff's mental condition "in controversy")];

- A claim of emotional distress so severe as to merit psychiatric care or psychological counseling [*see, e.g., Lowe v. Philadelphia Newspapers, Inc. (ED Pa 1983) 101 FRD 296, 298-299*];

- Plaintiff's offer of expert testimony to support a claim of emotional distress [*Tomlin v. Holecek (D Minn 1993) 150 FRD 628, 630*]; or

- A concession that the plaintiff's mental condition is "in controversy" [*see Ragge v. MCA/Universal Studios (CD Cal 1995) 165 FRD 605, 607* (plaintiff did not challenge propriety of mental examination); *see 23.202[4][c]*].

Cross Reference:

Demonstrating that mental condition is in controversy, see 7 *Moore's Federal Practice, § 35.03[3]* (Matthew Bender 3d ed.).

23.202[4][b] Making Claim of Ongoing Mental Injury Places Mental Condition "in Controversy." When the plaintiff alleges a "mental injury," the plaintiff places that mental injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of the asserted injury [*Schlagenhauf v. Holder (1964) 379 US 104, 119, 85 S Ct 234, 13 L Ed2d 152*]. Accordingly, an allegation that the defendants' actions have caused the plaintiff some mental injury that is either ongoing or persists beyond that normally associated with the actions at issue places the plaintiff's mental condition "in controversy" for purposes of Rule 35 [*Ragge v. MCA/Universal Studios (CD Cal 1995) 165 FRD 605, 608-609*].

Example:

In an employment discrimination/sexual harassment case, the plaintiff's allegation of ongoing humiliation and emotional distress placed plaintiff's mental condition "in controversy" [*Ragge v. MCA/Universal Studios (CD Cal 1995) 165 FRD 605, 608-609*].

23.202[4][c] Party to Be Examined May Concede That Mental Condition Is "in Controversy." If the party to be examined is willing to stipulate in writing that his or her mental condition is "in controversy" for purposes of Rule 35, the concession will eliminate any necessity to demonstrate that element of the Rule 35 inquiry. The party subject to examination will still be able to challenge any designated examiner, the conditions of the examination, or other matters on which the parties could not agree [*see, e.g., Ragge v. MCA/Universal Studios (CD Cal 1995) 165 FRD 605, 607*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations

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VIII. PHYSICAL AND MENTAL EXAMINATIONS
C. Moving for Court-Ordered Physical or Mental Examination of Party

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.203

23.203 Establishing "Good Cause" for Examination.

23.203[1] Burden Is on Moving Party. The party moving to compel a physical or mental examination under Rule 35 has the burden of showing that there is "good cause" to conduct the examination [*Schlagenhauf v. Holder (1964) 379 US 104, 118-119, 85 S Ct 234, 13 L Ed2d 152* ; *Turner v. Imperial Stores (SD Cal 1995) 161 FRD 89, 91* ; *see Fed R Civ P 35(a)*].

Cross Reference:

Burden of demonstrating good cause for examination, see 7 *Moore's Federal Practice, § 35.04[1]* (Matthew Bender 3d ed.).

23.203[2] "Good Cause" Requires Demonstration of Necessity to Discover Specific Relevant Facts Through Examination. To demonstrate "good cause" to conduct a physical or mental examination of a party under *Fed R Civ P 35*, the movant must show that the examination could lead to discovery of specific facts relevant to the claims or defenses in the action, and that the discovery of those facts is necessary to the movant's case [*Ragge v. MCA/Universal Studios (CD Cal 1995) 165 FRD 605, 609* ; *see also Schlagenhauf v. Holder (1964) 379 US 104, 117-118, 85 S Ct 234, 13 L Ed2d 152* (examining party must have affirmative need for information sought in examination)].

23.203[3] Moving Party's Ability to Obtain Information From Other Source May Obviate Need for Examination. Because the demonstration of "good cause" for an examination under Rule 35 requires the movant to demonstrate an affirmative need for the information sought from the examination [*Schlagenhauf v. Holder (1964) 379 US 104, 117-118, 85 S Ct 234, 13 L Ed2d 152*], the ability of the party to obtain the information from another source will generally preclude a finding of good cause [*see Schlagenhauf v. Holder (1964) 379 US 104, 117-118, 85 S Ct 234, 13 L Ed2d 152* ; *Ragge v. MCA/Universal Studios (CD Cal 1995) 165 FRD 605, 609*].

23.203[4] Prior Examination May Obviate Need for Second Examination. If a prior examination of the party would suffice to provide the desired information, discovery of the results of that examination may be an appropriate substitute for ordering a subsequent examination [*see DeCrescenzo v. Maersk Container Serv. Co. (2d Cir 1984) 741 F2d 17, 21*].

Distinguish:

Sometimes, a second examination will actually be necessary, e.g., when there is a need to determine a change in the plaintiff's physical condition since the first examination [Edson v. Liberty Mut. Ins. Co. (ND Cal 2002) 2002 US Dist LEXIS 25258, at *3-*4].

23.203[5] Court May Balance Privacy Interest of Party Against Need for Examination. Because compelling a party to submit to a physical or mental examination is a significant intrusion on the party's privacy interests, Rule 35 requires a demonstration of both the "in controversy" and "good cause" elements. Even if good cause is shown, an examination order is not mandatory [*see Gattegno v. Pricewaterhousecoopers, LLP (D Conn 2001) 204 FRD 228, 230*]. It is within the court's discretion to balance the privacy interests of the party to be examined against the need of the movant for the information [*see Curtis v. Express, Inc. (NDNY 1994) 868 F Supp 467, 468*].

In this regard, the court may also focus on the implications that a physical or mental examination will have on the physician-patient privilege [*see, e.g., Fitzgerald v. Cassil (ND Cal 2003) 216 FRD 632, 638, n2* (analogizing waiver of psychotherapist-patient privilege to examination under *Fed R Civ P 35*)].

Judge's Perspective:

The more expansive, and in some instances, subjective the symptoms identified by the plaintiff (such as nausea, anxiety, sleeplessness, fatigue, helplessness), the more likely an examination will be deemed to be required. Conversely, the more intrusive and burdensome the proposed examination (such as inconvenient location, scope of examination, discomfort entailed in the proposed procedure), the more likely the court will act to protect privacy rights.

Legal Topics:

For related research and practice materials, see the following legal topics:
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C. Moving for Court-Ordered Physical or Mental Examination of Party

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.204

23.204 Setting and Limiting Conditions of Examination.

23.204[1] Conditions Should Be Specified in Motion. The motion seeking to compel the examination should specify the intended conditions of the examination [*see Ragge v. MCA/Universal Studios (CD Cal 1995) 165 FRD 605, 610*]. The motion should address matters such as the time, place, and manner of examination, and the person or persons by whom the examination is to be made [*see Fed R Civ P 35(a)*].

23.204[2] Attendance of Third Parties, Including Counsel, Generally Disfavored. Because the presence of persons other than the party and the examiner may interfere with the conduct of the examination, third parties, including counsel for any party in the action, are usually prohibited from attending the examination [*Ragge v. MCA/Universal Studios (CD Cal 1995) 165 FRD 605, 609-610* (request by plaintiff for third-party observer of mental examination rejected); *see Cabana v. Forcier (D Mass 2001) 200 FRD 9, 12* (plaintiff not entitled to have his attorney present at psychiatric examination)]. There is authority from outside the Ninth Circuit, however, that a state rule of procedure granting a right of attendance may be enforced in a federal diversity action [*Gensbauer v. May Dep't Stores Co. (ED Pa 1999) 184 FRD 552, 553*]. The California Code of Civil Procedure does permit an observer at a physical examination [*CCP § 2032.510*], though there is no authority that this rule can be applied in a federal action.

Cross References:

Observers at examination, see 7 *Moore's Federal Practice, § 35.08* (Matthew Bender 3d ed.).

Observers at examination under California state law, see *Matthew Bender(R) Practice Guide: California Civil Discovery, § 11.47*.

23.204[3] Recording Examination Not Necessary. The intended record of the examination is the report to be prepared by the examiner [*see 23.213*, *23.214*]. Because of the potential intrusion on the examining process, generally neither party will be permitted to have the examination transcribed either by a stenographer or by electronic means [*see Abdulwali v. Washington Metro Area Transit Auth. (DDC 2000) 193 FRD 10, 13* (videotaping of psychiatric examination inappropriate); *Hertenstein v. Kimberly Home Health Care, Inc. (D Kan 1999) 189 FRD 620, 630-631*

(plaintiff has no right to presence of mechanical recording device at psychiatric examination when plaintiff did not demonstrate need)].

Cross Reference:

Transcription of examination, see 7 *Moore's Federal Practice, § 35.10* (Matthew Bender 3d ed.).

Legal Topics:

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D. Sanctioning Noncompliance With Court Order for Examination

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.205

23.205 CHECKLIST: Sanctioning Noncompliance With Court Order for Examination.

☐ Attempt to find out why noncompliance occurred:

○ If noncompliance was due to party's inability to produce person under its custody or control, noncompliance may be excused.

Authority:
Fed R Civ P 37(b)(2)(B)

Discussion:
See *§ 23.207*

☐ Engage noncomplying party in attempt at informal resolution, as required by local rule.

Authority:
CD Cal Civ LR 37-1; *ED Cal Gen LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

☐ Review *Fed R Civ P 37(b)(2)(A)(i)-(vi)* for types of sanctions potentially available in connection with noncompliance.

Discussion:
See *§ 23.208*

☐ If sanctions are sought against noncomplying party, draft motion for sanctions:

- ○ Include request to issue sanction(s) authorized under Rule 37(b)(2).
- ○ Include request for reasonable expenses caused by noncompliance.
- ○ Include any additional papers re attempt at informal resolution required under local rules.

Authority:
CD Cal Civ LR 37-2.1; *ED Cal Gen LR 251(b)*; *SD Cal Civ LR 26.1(b)*

☐ Serve and file motion papers:

- ○ Follow standard noticed motion procedure.

Authority:
CD Cal Civ LR 7-1-7-20; *ED Cal Civ LR 230*; *ND Cal Civ LR 7-1*, *7-2*; *SD Cal Civ LR 7.1*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*; Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.206

23.206 Examining Party Can Move for Sanctions If Party Fails to Comply With Examination Order.

If a party fails to comply with an examination order, the party seeking the examination can move for sanctions against the noncomplying party [*see Fed R Civ P 37(b)(2)*].

Cross Reference:

Form of motion for issue sanction, 8 Bender's Federal Practice Forms, Form 37:63 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMisconduct

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.207

23.207 Party May Escape Sanctions by Showing Inability to Produce Examinee.

If the Rule 35 order required the party to produce a person in the party's custody or control, the party can escape sanctions by demonstrating an inability to produce the designated person [*Fed R Civ P 35(b)(2)(B)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations

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23.208 Various Types of Sanctions Are Available, Including Attorney's Fees.

Possible sanctions for failure to comply with an order under Rule 35 requiring the party to submit to a physical or mental examination include an order [*Fed R Civ P 37(b)(2)(A)*]:

- Designating certain facts as established for purposes of the action.
- Refusing to allow the disobedient party to support or oppose designated claims or defenses, or introduce designated matters into evidence.
- Striking pleadings or parts of pleadings.
- Staying the action until the order is obeyed.
- Dismissing the action or parts of the action [*e.g., Schempp v. Reniker (8th Cir 1987) 809 F2d 541, 542-543* (sanction apt to be employed by court against plaintiff who disobeys Rule 35 order is dismissal)].
- Rendering default judgment.

In lieu of these orders or in addition to them, the court will require the party failing to obey the examination order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust [*Fed R Civ P 37(b)(2)(C)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.209

23.209 Failure to Comply May Not Be Punished by Contempt.

A federal court may not impose a contempt citation for disobeying an order under Rule 35 to submit to a physical or mental examination [*Fed R Civ P 37(b)(2)(A)(vii)*].

Cross References:

Discovery sanctions in general, see Ch. 25, Motions to Compel and Discovery Sanctions.

Sanctions under Rule 35, see 7 *Moore's Federal Practice, § 35.11* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMisconductCivil ProcedureSanctionsContemptGeneral Overview

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E. Opposing Request for Motion for Examination

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.210

23.210 CHECKLIST: Opposing Request or Motion for Examination.

☐ Consider alternatives to opposition:

- ○ Entering into stipulation with opposing party as to terms and conditions of examination.
- ○ Preparing client for the examination.

☐ Focus efforts on ensuring that scope of examination is limited to precise condition in controversy.

☐ Consider moving for protective order if proposed examination involves invasive or painful procedures or delves into highly personal matters.

☐ If examination is held, interview client immediately after examination to root out possible discrepancies in examiner's report.

Authority:
Fed R Civ P 26(c), 29, 35

Discussion:

See *§ 23.211*

Legal Topics:

For related research and practice materials, see the following legal topics:
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E. Opposing Request for Motion for Examination

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.211

23.211 Options and Strategies for Opposition.

23.211[1] Determine Whether Opposition Would Be Beneficial. Before opposing a request or motion for a physical or mental examination, counsel for the party to be examined should determine if anything can be gained by such resistance. Entering into a stipulation as to the terms and conditions of an agreed examination, as well as simple preparation of the client for the examination, might yield more fruitful results than simple opposition.

23.211[2] Attempt Negotiation Toward Stipulated Examination. In many cases, especially personal injury cases, there will be no question that the opposing party is entitled to the examination. An examination under a stipulation will allow for more flexibility than a court-ordered examination, and counsel will still be entitled to review the examiner's report, unless the stipulation expressly provides otherwise.

23.211[3] Focus on Scope of Examination. If it is clear that the opposition is entitled to an examination, focus your efforts on ensuring that the scope of the examination is properly limited to the precise condition in controversy [*see Schlagenhauf v. Holder (1964) 379 US 104, 119-122, 85 S Ct 234, 13 L Ed2d 152*].

A stipulation for an examination may include narrowing the scope of the examination.

If a motion for an order is sought, take advantage of the court's power to set terms and conditions on the examination, and make sure that the examiner has no power to expand the scope of the examination.

23.211[4] Consider Seeking Protective Order. If the proposed examination involves invasive or painful procedures or delves into highly personal matters, consider the possibility of seeking a protective order [*see Swift v. Swift (EDNY 1974) 64 FRD 440, 442-443* (Rule 35 examinations are subject to protective order provisions of Rule 26(c))]. Even if the court does not deny the examination outright, it can still ensure that all possible precautions are taken to protect the examined party.

Strategic Point--Plaintiff:

A protective order is also appropriate when the defendant, such as the plaintiff's employer, is attempting to coerce the plaintiff into undergoing an extra-judicial examination [*see, e.g., Partida v. Union Pac. R.R. Co. (CD Cal 2004) 221 FRD 623, 629-630*].

Cross Reference:

Regulating discovery by protective order, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.35 -22.66*.

23.211[5] Prepare Client for Examination. When an examination is held under stipulation or court order, the examiner will probably take a history of the facts surrounding the condition under examination. Prepare your client to reveal only the information necessary for the examination. Similarly, advise your client of the potential for trick questions, i.e., those that seem innocuous, but are designed to elicit information that may contradict your claim as to the condition under examination. Advise your client not to answer any questions that do not have an obvious relation to the condition for which the examination is conducted. Your client should generally be advised to provide the shortest and simplest answers possible.

23.211[6] Interview Client After Examination. Interview your client immediately following the examination. This provides a means of rooting out any discrepancies in the examiner's report, and may reveal whether the report is apt to be favorable to your position. It may also reveal improprieties in the examination procedure that could justify excluding the results of the examination [*Ragge v. MCA/Universal Studios (CD Cal 1995) 165 FRD 605, 609 n5* (if examination is improper, it may be excluded at trial)].

23.211[7] Consider Options for Obtaining Examination Report. Although the examined party is entitled to a copy of the examiner's report, requesting the report both obliges the party to furnish to the opposition its own experts' reports on the same condition, and also waives any privilege the examined party may have as to examinations of the condition. Counsel may wish to forego asking for the opposition's examination report to avoid these reciprocal obligations of disclosure [*Fed R Civ P 35(b)*].

Although Rule 35 guarantees the right of the examined party to the report, it does not preclude discovery of the report under other discovery rules [*Fed R Civ P 35(b)(6)*].

Cross Reference:

Obtaining examiner's report, see *§§ 23.212 -23.216*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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F. Obtaining and Using Examination Reports

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23.212 CHECKLIST: Obtaining Examination Reports.

☐ Draft demand for examination reports, specifying:

○ A copy of a detailed written report setting out the examiner's findings, including results of all tests made, diagnoses, and conclusions.

○ A copy of like reports of all earlier examinations of the same condition.

Authority:
Fed R Civ P 35(b)(1)-(3)

Discussion:
See *§ 23.213*

☐ If reports are not received, move to compel production:

○ Accompany motion with declaration stating failure of attempts at informal resolution.

○ Include request for sanctions.

Authority:
Fed R Civ P 35(b)(1)

Discussion:

See *§ 23.214[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.213 Obtaining Report on Request of Examined Party.

23.213[1] Examination Ordered After Motion. When an examination is ordered following a noticed motion under Rule 35(a), the party subject to the order of examination may request a copy of the report of the examiner and copies of all earlier examinations of the same condition [*Fed R Civ P 35(b)(1)*].

23.213[2] Stipulated Examination May Curtail Right to Report. The right of the examined party to receive the examiner's report applies to an examination performed under a stipulation of the parties, unless the stipulation expressly provides otherwise [*Fed R Civ P 35(b)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.214 Compelling Production of Report.

23.214[1] Examined Party May Move Court to Compel Production. If the party subject to an order for examination requests the examiner's report, but the party conducting the examination does not produce the report, the party requesting the report may compel delivery by moving for a court order under the standard noticed motion procedure [*Fed R Civ P 35(b)(5)*].

Cross Reference:

Standard motion procedure, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.17*; Ch. 26, Pretrial Motion Practice, *§§ 26.12 -26.36*.

23.214[2] Excluding Evidence for Failure to Produce Report. If the examined party makes a request for the examiner's report and moves the court for an order to compel production of the report, but the examiner fails or refuses to make the report, the court may exclude the examiner's testimony if offered at trial [*Fed R Civ P 35(b)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.215 Determining Effect of Request for and Delivery of Report.

23.215[1] Request of Examined Party Includes All Results of Earlier Examinations of Same Condition. If the party subject to an order for examination makes a request for the examiner's report, the examining party's duty of disclosure includes not only the results of the particular examination, but also "like reports of all earlier examinations of the same condition" [*Fed R Civ P 35(b)(1)*]. This duty also applies to an examination under a stipulation of the parties, unless the stipulation expressly provides otherwise [*Fed R Civ P 35(b)(6)*].

23.215[2] Delivery of Report by Examining Party Entitles Party to Results of Any Other Examination of Same Condition. Once the examining party furnishes the examiner's report after a request from the examined party, the examining party "may request--and is entitled to receive--from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition" [*Fed R Civ P 35(b)(3)*]. In short, making a request for and receiving the examiner's report carries the reciprocal obligation to provide the opposing party with any reports of any examination of the same condition. This reciprocal obligation applies to an examination under a stipulation of the parties, unless the stipulation expressly provides otherwise [*Fed R Civ P 35(b)(6)*]. There is authority from outside the Ninth Circuit that this reciprocal obligation applies only when the report is produced by the examining party under a request from the examined party, and not when the report is obtained under a court order [*Benning v. Phelps (2d Cir 1957) 249 F2d 47, 48*] or by voluntary disclosure by the examining party [*Sher v. De Haven (DC Cir 1952) 199 F2d 777, 780-781*].

23.215[3] Request of Examined Party Waives Any Privilege of Party As to Other Examinations of Same Condition. By requesting and obtaining a report of the examination or by taking the deposition of the examiner, the examined party waives any privilege regarding the testimony of any other person who examined or may examine the party with respect to the same condition [*Fed R Civ P 35(b)(4)*]. As a practical matter, however, this waiver will often be of little consequence, as the party's placing of the mental or physical condition "in controversy" will usually have already waived any privilege of the party as to the condition [*see Price ex rel. Price v. County of San Diego (SD Cal 1996) 165 FRD 614, 622-623*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.216 Obtaining Report Under Other Discovery Provisions Not Precluded.

The ability of the examined party to obtain the report of the examiner under Rule 35 does not preclude discovery of the report or a deposition of the examiner when appropriate under other discovery rules [*Fed R Civ P 35(b)(6)*].

Strategic Point:

The examined party may wish to employ other discovery methods to avoid the reciprocal obligation to disclose its own reports of any examination of the same condition.

Legal Topics:

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CHAPTER 23 Methods of Discovery
IX. REQUESTS FOR ADMISSION
A. Requesting Admissions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.217

23.217 CHECKLIST: Requesting Admissions.

☐ Determine whether matter under consideration may be subject of request for admission.

○ Requests for admission may cover matters of fact, such as:

☐ Statement of fact.

☐ Opinion on matter of fact.

☐ Application of law to fact.

☐ Genuineness of a document.

○ Requests for admission may not cover any matter that is:

☐ Irrelevant.

☐ Privileged.

☐ Pure legal conclusion unrelated to facts of case.

Authority:
Fed R Civ P 36(a)(1)

Discussion:
See *§ 23.218*

☐ Consider whether alternative discovery devices may provide more direct and efficient means of obtaining desired information.

Authority:
Fed R Civ P 26-35

Discussion:
See *§ 23.02[8]*

☐ Determine party or parties to whom requests for admission should be addressed.

Authority:
Fed R Civ P 36(a)

Discussion:
See *§ 23.219*

☐ Determine whether propounding requests for admission would violate time constraints.

○ Consider that requests for admission ordinarily may not be propounded prior to discovery conference.

Exception:
Earlier requests may be allowed by court order or by parties' stipulation.

○ Review any scheduling orders and other pretrial orders to determine applicable cutoff date for discovery, including requests for admission.

○ Review parties' proposed discovery plan and any scheduling orders and other pretrial orders to ascertain whether time constraints on propounding requests for admission have been modified.

Authority:
Fed R Civ P 26(d), (f), 36(a)

Discussion:
See *§§ 23.220[1], [3]*

☐ If requests for admission would violate time constraints, consider either:

○ Entering into stipulation with other party to allow early or late requests for admission.

○ Seeking leave of court to propound early or late requests for admission.

Authority:
Fed R Civ P 36(a)(3)

Discussion:
See *§ 23.220*

☐ Decide how many requests to propound:

○ Ascertain whether local rules limit number of requests for admission.

○ Ascertain whether standing order of court limits number of requests for admission.

○ Ascertain whether court in present case has issued scheduling order or other pretrial order that limits number of requests for admission.

○ Consider whether contemplated requests would be so voluminous as to be deemed unduly burdensome and subject to protective order.

Authority:
Fed R Civ P 26(b)(2)

Discussion:
See *§ 23.221*

☐ Prepare requests for admission, observing following formalities:

○ Include heading and caption.

○ State and number each request separately.

○ Frame each request as statement, rather than question.

○ Phrase each request clearly and specifically.

○ Comply with applicable limits on number of requests.

○ If any request concerns genuineness of document that has not already been provided to responding party, attach copy of document to request.

Authority:
Fed R Civ P 26(b)(2), 36(a)(2); Fed R Civ P Appendix of Forms, Form 51

Discussion:
See *§ 23.222*

Forms:
See *§§ 23.312*, *23.313*

☐ Sign requests for admission.

○ If propounding party is represented by counsel, attorney must sign.

○ If propounding party is not represented by counsel, propounding party must sign.

○ Signature must be accompanied by signer's address.

Authority:
Fed R Civ P 26(g)(1); Fed R Civ P Appendix of Forms, Form 51

Discussion:
See *§ 23.223*

☐ Serve requests for admission.

○ Serve signed requests for admission on responding party, sending copy of signed requests and retaining original if required to do so by local rules.

○ Serve copy of requests for admission on each other party that has appeared in case.

○ Execute and retain proof of service.

○ Do not file requests for admission until they are used in case or court orders filing.

Authority:
Fed R Civ P 5(a), *(d)*, *36(a)*

Discussion:
See *§§ 23.224*, *23.225*

☐ Calendar date for service of responses.

○ Note that responses to requests for admission ordinarily must be served within 30 days after service of requests.

○ Determine whether any court order, such as scheduling order or other pretrial order, has modified time for serving response to requests for admission.

○ Review any written agreement of parties that might have modified time for serving response to requests for admission.

Authority:
Fed R Civ P 36(a)(3)

Discussion:
See *§§ 23.231*, *23.232*

☐ Maintain record of requests for admission for use at trial or post-trial proceedings or as ordered by court.

○ Retain copy or, if required by local rules, original of requests for admission.

○ Retain original proof of service of requests for admission.

○ Retain original responses to requests.

Authority:
Fed R Civ P 36(a)

Discussion:
See *§§ 23.225*, *23.240*

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
IX. REQUESTS FOR ADMISSION
A. Requesting Admissions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.218

23.218 Determine Whether Matter Under Consideration Is Subject to Requests for Admission.

23.218[1] Requests Must Concern Matters Relating to Facts. Requests for admission may call for the admission of any of the following [*Fed R Civ P 36(a)(1)*]:

- A statement of fact.
- An opinion on a matter of fact.
- The application of law to fact.
- The genuineness of a document.

Strategic Point--Propounding Party:

Requests for admission as to genuineness of documents can be particularly useful in helping determine which documents that are to be introduced at trial will present foundational problems.

23.218[2] Requests May Relate to Ultimate Facts. Requests for admission and the resulting admissions may relate to the ultimate facts of a case (that is, facts that prove dispositive of the entire case) [*see Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 936-939* ; *Cereghino v. Boeing Co. (D Or 1994) 873 F Supp 398, 403*]. That a matter on which an admission has been requested presents a genuine issue for trial is not an appropriate basis to object to the request [*Fed R Civ P 36(a)*; *see Chemical Eng'g Corp. v. Essef Indus., Inc. (Fed Cir 1986) 795 F2d 1565, 1575*].

Because a request for admission may relate to opinions of fact, it may concern a matter that would otherwise be the subject of expert opinion [*see Fed R Civ P 36(a)(1)(A)*].

23.218[3] Requests May Relate to Application of Law to Facts. Requests for admission may relate to the

application of law to fact [*Fed R Civ P 36(a)(1)(A)*]. Thus, for example, a party may be requested to admit what its contractual obligations are as a matter of law [*Langer v. Monarch Life Ins. (3d Cir 1992) 966 F2d 786, 802*].

23.218[4] Requests May Relate to Genuineness of Documents. Requests for admission may seek to establish the genuineness of documents [*Fed R Civ P 36(a)(1)(B)*].

Because the text of a document is a matter of fact, a request may require the responding party to admit or deny the accuracy of quoted text from a particular document [*see Fed R Civ P 36(a)(1)(A)*].

23.218[5] Requested Matter Must Be Relevant and Not Privileged. Requests for admission may concern any matter on which discovery may be had, that is, any nonprivileged matter that is relevant to the claims and defenses in the pending case [*Fed R Civ P 36(a)*; *see Fed R Civ P 26(b)(1)*].

Cross Reference:

Relevancy and privileges, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.

23.218[6] Requested Matter Must Not Be Pure Legal Conclusion Unrelated to Facts of Case. Requests seeking legal conclusions or legal theories unrelated to the facts of the case are not authorized [*Fed R Civ P 36*, Committee Note of 1970; *Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1057*]. In addition, requests may not be directed at an opponent's litigation strategy [*Howell v. Maytag (MD Pa 1996) 168 FRD 502, 504*].

Cross Reference:

Form, substance, and procedure for requests, see 7 *Moore's Federal Practice, § 36.10* (Matthew Bender 3d ed.).

Judge's Perspective:

Requests for admission under *Fed R Civ P 36* are not intended principally as a discovery device, but rather presuppose that the propounding party knows the facts set forth or possesses the documents about which the party seeks concession of genuineness [*Safeco Ins. Co. of Am. v. Rawstron (CD Cal 1998) 181 FRD 441, 445*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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A. Requesting Admissions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.219

23.219 Propound Requests to Each Party Against Whom Admission Will Be Used.

Requests for admission may be directed to any party to the action, including coparties and adverse parties [*Fed R Civ P 36(a)*].

Strategic Point--Propounding Party:

An admission binds only the party to whom the request was propounded [*see Fed R Civ P 36*; *Riberglass, Inc. v. Techni-Glass Indus., Inc. (11th Cir 1987) 811 F2d 565, 566-567*]. The propounding party therefore should carefully review all parties' claims and defenses to determine which might be affected by a particular matter on which an admission might be sought. A separate request to admit that matter should be propounded to each party whose claim or defense might be affected by that matter.

Legal Topics:

For related research and practice materials, see the following legal topics:
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A. Requesting Admissions

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23.220 Determine Timing of Requests.

23.220[1] Service of Requests Generally Must Await Discovery Conference. Without leave of court or written stipulation, requests for admission may not be served before the parties' discovery conference under *Fed R Civ P 26(f)* [*Fed R Civ P 26(d)*].

Strategic Point:

Parties commonly serve several requests for admission at the beginning of a case to limit the scope of discovery needed. After most of discovery is completed, other requests can then be served to further limit issues for trial.

Warning:

Propounding requests for admission early in the litigation may prompt the objection that the request is premature. Such an objection is particularly likely when the requests seek opinions on a matter of fact.

Judge's Perspective:

Trial courts will presumably look with favor on requests for admission directed to undisputed matters, such as the genuineness of documents, that should have the effect of streamlining trial proceedings. In appropriate cases, counsel should consider stipulations with opposing counsel on matters such as document authenticity as an alternative to the more cumbersome request for admission mechanism.

Cross Reference:

Discussion of discovery planning, see Ch. 21, Discovery Strategy and Planning, *§§ 21.03 -21.08*.
Discussion of Rule 26(f) Conference, see Ch. 15, Rule 26(f) Conference and Initial Disclosures.

23.220[2] Earlier Service of Requests May Be Based on Parties' Stipulation or Leave of Court. Requests for

admission may be served prior to the parties' *Fed R Civ P 26(f)* discovery conference if permitted by the court or by the parties written stipulation [*Fed R Civ P 26(d)(1)*].

Warning:

Counsel should review the parties' proposed discovery plan [*see Fed R Civ P 26(f)*] and any scheduling orders and other pretrial orders entered in the case [*see Fed R Civ P 16(b), (e)*] to determine whether the standard time constraints on propounding requests for admission have been modified.

Cross Reference:

Stipulations, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.03 -22.13*.

23.220[3] Discovery Cutoff Date Applies to Requests for Admission. Requests for admission are a discovery device subject to the deadlines applicable to discovery in general [*see Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 936-937* ; *see, e.g., Fed R Civ P 26(b)(2), 29, 37(c)(2)*; Fed R Civ P Appendix of Forms, Form 35]. Accordingly, the discovery cutoff date specified in the scheduling order and any pretrial orders in the case apply to the use of requests for admission [*see Fed R Civ P 16(b), (d)*].

Judge's Perspective:

The requests, if extensive, should be sufficiently in advance of trial so that a burdensomeness objection will have less prospect of being sustained.

Legal Topics:

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IX. REQUESTS FOR ADMISSION
A. Requesting Admissions

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23.221 Comply With Local Rules Limiting Number of Requests.

23.221[1] Check Judge's Standing Orders. Counsel should check for generally applicable standing orders of the court, and review scheduling orders and other pretrial orders in the particular case [*see Fed R Civ P 16(b), (d)*] to determine whether the number of requests is limited. A voluminous set of requests for admission may justify the issuance of a protective order if the court finds the requests to be unduly burdensome [*see Fed R Civ P 26(c)*].

23.221[2] LOCAL PRACTICE: ND Cal Requirements. A demand that the responding party set forth the basis for a denial of a requested admission will be counted as a separate interrogatory for purposes of the limit on the number of interrogatories that each party may propound [*ND Cal Civ LR 33-2, 36-2*].

23.221[3] LOCAL PRACTICE: SD Cal Requirements. No party may serve on any other party more than 25 requests for admission, including subparagraphs, without leave of court. To obtain leave to propound additional requests for admission, a party must submit to the court a written memorandum setting forth the proposed additional requests and the reasons establishing good cause for their use [*SD Cal Civ LR 36.1(a)*].

Distinguish:

The Central District and Eastern District do not limit the number of requests a party may serve [*see CD Cal Civ LR 36-1-36-3*; *ED Cal Civ LR 250.4*].

Legal Topics:

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IX. REQUESTS FOR ADMISSION
A. Requesting Admissions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.222

23.222 Draft Requests Carefully.

23.222[1] Requests Must Be Clear and Precise. Statements posed by a party seeking their admission should be capable of an answer by yes or no [Honeycutt v. First Fed. Bank (WD Tenn 2003) 2003 US Dist LEXIS 3629, at *3-*4 (statements that are vague, or susceptible of more than one interpretation, are properly objectionable)].

Draft each request simply and concisely, so that the responding party can easily admit or deny the request without explanation [*Safeco Ins. Co. of Am. v. Rawstron (CD Cal 1998) 181 FRD 441, 447* ; *see Fed R Civ P 36(a)*].

Strategic Point--Propounding Party:

Counsel should consider preceding the first request with a preamble setting forth the time for responding, along with a brief explanation that a failure to respond will be deemed an admission. Although such a preamble is not required by *Fed R Civ P 36*, it will minimize the chances that the court might later grant a motion to withdraw a deemed admission based on the responding party's ignorance of the consequences of a failure to respond. A preamble is particularly advisable when propounding requests for admission to a pro se litigant [*see Diggs v. Keller (D Nev 1998) 181 FRD 468, 469*].

Cross References:

Official form of requests for admission, see *§ 23.312*. Unofficial form including explanation of the consequences of failure to respond, see *§ 23.313*.

23.222[2] State Each Request Separately. Each matter for which an admission is requested must be set forth separately [*Fed R Civ P 36(a)(2)*].

Strategic Point--Propounding Party:

Draft each request with the expectation that it will ultimately be read to the jury. Avoid argumentative, subjective, pejorative, legalistic, and conclusory terminology. To help keep the requests simple and direct, consider defining key terms separately at the beginning of the set of requests.

23.222[3] LOCAL PRACTICE: CD Cal Requirements. Number the requests sequentially, without repeating the numbers used on any prior set of requests propounded by that party [*CD Cal Civ LR 36-1*].

23.222[4] Frame Requests As Statements Not Questions. Draft each request for admission in the form of a declarative statement [*see Fed R Civ P 36(a)*].

Consider:

To minimize the possibility that a request may be found objectionable, or that a response may be found ambiguous (and therefore not effective as an admission), make sure that each request is directed to a single fact or issue. A compound request that requires the admission of two or more facts will only invite an evasive or unclear response. To help keep the requests simple and direct, consider defining key terms separately at the beginning of the set of requests.

23.222[5] Attach Relevant Documents. If a request pertains to the genuineness of a document, serve a copy of the document with the request, unless the document has been or is otherwise furnished or made available to the responding party [*Fed R Civ P 36(a)(2)*].

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23.223 Request Must Be Signed on Behalf of Propounding Party.

The request for admission must be signed by the attorney for the propounding party or, if that party is not represented by counsel, by the party [*see Fed R Civ P 26(g)(1)*]. The person signing a request for admission must state his or her address, e-mail address, and telephone number [*Fed R Civ P 26(g)(1)*].

Consider:

The signature of the attorney or party certifies that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the request complies with applicable rules, is not made for an improper purpose, and is not unreasonable or unduly burdensome or expensive [*Fed R Civ P 26(g)(1)(B)*]. Sanctions may be imposed for a certification that violates these requirements [*Fed R Civ P 26(g)(3)*].

Legal Topics:

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.224

23.224 Serve Requests.

23.224[1] Signed Request Must Be Served on Responding Party. The signed requests for admission must be served on the party from whom the admission is requested [*Fed R Civ P 5(a)*, *36(a)*].

Consider:

Having proper proof of service of the requests for admission will be essential if it later becomes necessary to establish that the responding party has made a deemed admission by failing to respond to a properly served request to admit [*see Fed R Civ P 36(a)(3)*, *(6)*].

Cross Reference:

Methods of service and other requirements pertaining to service of papers, see Ch. 5, Formatting, Serving, and Filing Papers, *§§ 5.15 -5.23*.

23.224[2] LOCAL PRACTICE: Retain Original.

23.224[2][a] LOCAL PRACTICE: CD Cal Requirements. A copy of the signed requests should be served on the responding party; the original should be retained by the attorney propounding the requests pending use or further order of the court [*CD Cal Civ LR 36-3*].

23.224[2][b] LOCAL PRACTICE: ND Cal Requirements. The propounding party must retain the original of the discovery request [*ND Cal Civ LR 26-1*].

23.224[3] Serve Copies of Requests on All Other Parties. Copies of the requests for admission must be served on all other parties that have appeared in the case [*Fed R Civ P 5(a)*].

Legal Topics:

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

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A. Requesting Admissions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.225

23.225 Do Not File Request.

23.225[1] Requests Should Not Be Filed Until Used in Case. Requests for admission generally must not be filed until they are used in the case or the court orders filing [*Fed R Civ P 5(d)(1)*].

23.225[2] LOCAL PRACTICE: Filing Requirements.

23.225[2][a] LOCAL PRACTICE: CD Cal Requirements. When a request or response is required for use in a proceeding, only the part of the document that is at issue may be filed [*CD Cal Civ LR 26-2*]. Unless otherwise ordered by the court, the attorneys must hold the original requests and responses until the expiration of the time for appeal, the entry of a stipulation waiving or abandoning the right to appeal, or final disposition of appeal, whichever occurs first [*CD Cal Civ LR 26-2*, *36-3*, *79-3*].

23.225[2][b] LOCAL PRACTICE: ED Cal Requirements. Requests for admission, responses, and proof of service must not be filed unless and until there is a proceeding in which the document or service is at issue. When required in a proceeding, only the part of the request and response that is at issue may be filed [*ED Cal Civ LR 250.4(c)*].

Legal Topics:

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IX. REQUESTS FOR ADMISSION
B. Responding to Requests for Admission

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.226

23.226 CHECKLIST: Responding to Requests for Admission.

☐ When requests for admission are received, calendar date for service of responses.

○ Responses to requests for admission ordinarily must be served within 30 days after service of requests.

○ Failure to make timely response will ordinarily result in requested matters being deemed admitted.

○ Determine whether any court order, such as scheduling order or other pretrial order, has modified time for serving response to requests for admission.

○ Review any written agreement of parties that might have modified time for serving response to requests for admission.

Authority:
Fed R Civ P 36(a)(3)

Discussion:
See *§§ 23.230 -23.232*

☐ If date for service of responses does not allow sufficient time to prepare responses, do either or both of following:

○ Negotiate with propounding party to obtain written agreement extending time for responses.

○ Move for court order extending time for responses, following standard noticed motion procedure.

Authority:
Fed R Civ P 36(a)(3)

Discussion:
See *§ 23.233*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§§ 22.03*, *22.14*

☐ Review grounds for objecting.

Authority:
Fed R Civ P 26(c)

Discussion:
See *§ 23.228*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§§ 22.12*, *22.19*

☐ Before answering or objecting, conduct reasonable inquiry.

Authority:
Fed R Civ P 36(a)

Discussion:
See *§ 23.227*

☐ Determine how to respond to each request, considering following possible responses, which may be used in combination:

○ Admission, either unqualified or qualified.

○ Complete or partial denial.

○ Stating inability to admit or deny, along with both of following:

☐ That responding party has made reasonable inquiry.

☐ That readily obtainable information is insufficient to enable responding party to

admit or deny.

- Asserting objection, based on any of following:
  - Undue burden.
  - Improper scope of request.
  - Irrelevance.
- Privilege.
- Propounding party's failure to provide necessary document.
- Improper format of request.
- Untimely request.
- Excessive number of requests.

Authority:
Fed R Civ P 36(a)

Discussion:
See *§ 23.229*

- Prepare written responses to requests for admission, observing following formalities:
  - Include heading and caption.
  - Set forth each request in full before each response.

    Authority:
    Fed R Civ P 36(a)(4)

    Discussion:
    See *§ 23.236*

    Form:
    See *§ 23.314*
- Sign responses to requests for admission.
  - If responding party is represented by counsel, attorney must sign.

- ○ If responding party is not represented by counsel, responding party must sign.
- ○ Signature must be accompanied by signer's address.
- ○ Verification is not required.

☐ Serve responses to requests for admission.

- ○ Serve signed original responses on propounding party.
- ○ Serve copy of responses on each other party that has appeared in case.
- ○ Execute and retain original proof of service.
- ○ Do not file responses until they are used in case or court orders filing.

Authority:
Fed R Civ P 5(a), (d)(1), 36(a)

Discussion:
See *§§ 23.237 -23.240*

☐ After serving responses, prepare and serve supplemental responses to requests for admission if and when both of the following occurs:

- ○ Responding party learns that original response is in some material respect incomplete or incorrect.
- ○ Additional or corrective information has not otherwise been made known to other parties during discovery process or in writing.

Authority:
Fed R Civ P 26(e)(1)

Discussion:
See *§ 23.241*

Legal Topics:

For related research and practice materials, see the following legal topics:
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IX. REQUESTS FOR ADMISSION
B. Responding to Requests for Admission

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.227

23.227 Responding Party Has Duty of Inquiry.

The answering party may not give lack of information or knowledge as a reason for failure to admit or deny, unless the party states that it has made a reasonable inquiry and insufficient information exists on which to base an admission or denial [*Fed R Civ P 36(a)(4)*]. The answering party must make reasonable inquiry and secure such knowledge and information as are readily obtainable [*Asea, Inc. v. Southern Pac. Transp. Co. (9th Cir 1981) 669 F2d 1242, 1247* ; *A. Farber & Partners, Inc. v. Garber (CD Cal 2006) 237 FRD 250, 256*].

Generally, a reasonable inquiry is limited to review and inquiry of those persons and documents that are within the responding party's control [*see T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co. (SDNY 1997) 174 FRD 38, 46*]. However, depending on the facts of the case, it might be reasonable for the responding party to inquire of a third party with whom the responding party has some relationship, such as a former employee of the responding party [*see Brown v. Arlen Mgmt. Corp. (5th Cir 1981) 663 F2d 575, 580*], or a co-defendant with whom the defendant has a close business and personal relationship [*see A. Farber & Partners, Inc. v. Garber (CD Cal 2006) 237 FRD 250, 256*].

Warning:

If the responding party has failed to make a reasonable inquiry and the propounding party makes a motion to determine the sufficiency of the response, the court may require an amended response, or order that the matter be deemed admitted [*Fed R Civ P 36(a)(6)*; *see, e.g.,* A. Farber & Partners, Inc. v. Garber (CD Cal 2006) 237 FRD 250, 256-257].

Cross Reference:

Motion to determine the sufficiency of a response, see *§ 23.243*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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B. Responding to Requests for Admission

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23.228 Review Grounds for Objecting.

23.228[1] Improper Format of Request. An objection may be based on the request's noncompliance with format requirements, such as the requirement that each matter on which an admission is requested be set forth separately [*Fed R Civ P 36(a)(2), (5)*]. Thus, a request that is set forth as a compound or complex statement may be objectionable [*see Fed R Civ P 36(a)(2)*].

23.228[2] Untimely Request. An objection may be based on the propounding party's service of the requests in violation of the applicable time constraints [*see Fed R Civ P 26(d)(1), 36(a)(5); see also 23.220*].

23.228[3] Excessive Number of Requests. An objection may be made to requests that exceed any applicable limit on the number of requests for admission [*see Fed R Civ P 26(b)(2); see also 23.221*].

23.228[4] Undue Burden. Undue burden may provide a ground for objection. Requests that are repetitive, voluminous, convoluted, vague, or ambiguous, or that otherwise require extensive analysis or explanation, may be objectionable [*see Fed R Civ P 36(a)*, Committee Note of 1970; *see also Nelson v. Capital One Bank (ND Cal 2001) 206 FRD 499, 500-501*].

Counter Attack--Responding Party:

In appropriate cases, in lieu of objecting to an unduly burdensome set of requests for admission, the responding party may move for a protective order [*Fed R Civ P 26(c); see Fed R Civ P 36*, Committee Note of 1970]. Filing a motion for a protective order may be more efficient than merely stating objections and waiting for the propounding party to make a motion to determine the sufficiency of the responses [*see Nelson v. Capital One Bank (ND Cal 2001) 206 FRD 499, 500*], although motion practice can in some cases be expensive and time-consuming, and in other cases unnecessary. Note that after meeting and conferring with the responding party, the propounding party may decide to serve alternative requests.

Cross Reference:

Protective orders, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.35 -22.66*.

23.228[5] Improper Scope of Request. Requests for admission are limited to statements or opinions of fact or the application of law to fact, including the genuineness of documents [*Fed R Civ P 36(a)(1)*]. A request that seeks an admission on other matters, for example, interpretations of law or the opponent's litigation strategy, is objectionable [*see Fed R Civ P 36*, Committee Note of 1970; *Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1057* ; *Howell v. Maytag (MD Pa 1996) 168 FRD 502, 504*].

23.228[6] Irrelevance. Because requests for admission are limited to matters within the scope of discovery [*Fed R Civ P 36(a)*], the responding party may validly object to a request to admit a matter that is irrelevant to the claims and defenses asserted in the case [*see Fed R Civ P 26(b)(1)*].

23.228[7] Privilege. Because requests for admission are limited to matters within the scope of discovery [*Fed R Civ P 36(a)*], the responding party may properly object to a request pertaining to a matter that is privileged, such as matters within the attorney-client privilege or the privilege against self-incrimination [*see United States v. 266 Tonawanda Trail (6th Cir 1996) 95 F3d 422, 428 n10*].

Strategic Point--Responding Party:

The responding party may object to a request for admission on the basis that responding to the request would infringe the responding party's right against self-incrimination. Although *Fed R Civ P 36* provides that an admission is to be used only in the pending action and may not be used against the responding party in any other proceeding, the rule does not provide immunity from criminal prosecution [*see FDIC v. Logsdon (WD Ky 1955) 18 FRD 57, 58*].

Cross Reference:

Discovery privileges, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§§ 24.12 -24.28*.

23.228[8] Failure to Provide Document. An objection may be based on the propounding party's failure to serve a document whose genuineness is the subject of the request, if the document is not otherwise available to the responding party [*Fed R Civ P 36(a)*].

Legal Topics:

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

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23.229 Respondent's Options.

23.229[1] Answer. When served with requests for admissions, the responding party may respond with an answer, which may be either an express admission, a denial, or an explanation of why the responding party cannot admit or deny [*see Fed R Civ P 36(a)(4)*].

Cross Reference:

Types of responses, see 7 *Moore's Federal Practice, § 36.11[5]* (Matthew Bender 3d ed.).

23.229[2] Object. When served with requests for admissions, the responding party may respond with an objection [*see Fed R Civ P 36(a)(5)*].

Warning:

If the court concludes that an objection to a request is unfounded, it can deem the request admitted [*see Fed R Civ P 36(a)(6)*; *see also 23.245*, *23.246*].

Judge's Perspective:

Hypertechnical objections to the meaning of straightforward requests for admission, especially those seeking easily discernible facts such as the genuineness of documents, are highly disfavored. In other words, "knee-jerk" objections that appear to flow from nothing more than the fear of making any type of admission have the potential of opening the objecting party to sanctions under Rules 37, 26, or 36.

23.229[3] Ask to Extend Time. The responding party may ask the propounding party to agree to an extension of the time to respond [*see Fed R Civ P 36(a)(3)*]. Further, the responding party may file a motion for an order extending the time to respond [*see Fed R Civ P 36(a)(3)*].

Cross Reference:

Discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.34*.

23.229[4] Seek Protective Order. If a request for admission is oppressive or would cause the responding party annoyance, embarrassment, oppression, or undue burden or expense, the court may issue a protective order sua sponte or on motion by the responding party [*see Fed R Civ P 26(c)*; *Nelson v. Capital One Bank (ND Cal 2001) 206 FRD 499, 500-501*].

The court's power to issue protective orders includes the power to limit the frequency or extent of requests for admission that the court determines are unreasonably cumulative, duplicative, or unduly burdensome or expensive [*see Fed R Civ P 26(b)(2), (c)*].

Cross Reference:

Protective orders, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.35 -22.66*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.230 Failure to Respond Is Deemed Admission.

If the party to whom a request for admission has been directed does not serve a timely response, the requested matter is admitted [*Fed R Civ P 26(a)(3)*; *see, e.g., In re Heritage Bond Litig. (CD Cal 2004) 220 FRD 624, 626-627* (requested matter deemed admitted when response served 12 days late after two extensions of time were granted)]. Failure to respond results in automatic admission with no motion necessary [*Switchmusic.com, Inc. v. U.S. Music Corp. (CD Cal 2006) 416 F Supp2d 812, 817* (Rule 36(a) is self-executing)].

Strategic Point--Propounding Party:

Although unanswered requests for admission are automatically deemed judicially admitted [*see Fed R Civ P 36(a)*; *Cook v. Allstate Ins. Co. (CD Cal 2004) 337 F Supp2d 1206, 1210*], the propounding party will still need to lay a foundation for the use of the deemed admission at trial. The propounding party therefore should prepare to present the request for admission and proof of service at trial, along with testimony that no response was ever received, to establish that the requirements for a deemed admission have been met. The propounding party may also rely on default admissions on summary judgment [*see, e.g., Switchmusic.com, Inc. v. U.S. Music Corp. (CD Cal 2006) 416 F Supp2d 812, 817*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.231 Response Must Be Served Within 30 Days.

The party to whom a request for admission has been directed must serve a written response on the party requesting the admission within 30 days of service of the requests for admission, unless another time is set by court order or by the parties' written agreement [*Fed R Civ P 36(a)(3)*].

If service is by a method other than hand delivery [*see Fed R Civ P 5(b)(2)(C)-(F)*], three days are added to the time for responding to the requests [*Fed R Civ P 6(d)*].

Cross Reference:

Service requirements, see Ch. 5, Formatting, Serving, and Filing Papers, *§§ 5.15 -5.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.232 Exceptions to 30-Day Period to Respond.

23.232[1] Court Order. The time for responding to requests for admission may be extended by court order [*Fed R Civ P 36(a)(3)*; *see Diggs v. Keller (D Nev 1998) 181 FRD 468, 469*].

Example:

Defendant was allowed to file a late response in one of plaintiff's requests for admissions when failure to respond was inadvertent, decision on the merits of the case would be advanced by allowing response, and plaintiff would not be prejudiced by the late response [*Upchurch v. USTNET, Inc. (D Or 1995) 160 FRD 131, 132*].

Warning:

Counsel should review the parties' proposed discovery plan [*see Fed R Civ P 26(f)*; *see also* Fed R Civ P Appendix of Forms, Form 35] and any scheduling orders and other pretrial orders [*see Fed R Civ P 16(b), (e)*] to determine whether the court has modified the 30-day period for responding to requests for admission.

Cross Reference:

Discovery conference, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, *§§ 15.03 -15.14*.

23.232[2] Parties' Written Stipulation. The time for responding to requests for admission may be shortened or extended by the parties' written agreement [*Fed R Civ P 36(a)(3)*]. However, an agreement extending the time for responses requires court approval if it would interfere with any time set for completion of discovery, for hearing of a motion, or for trial [*Fed R Civ P 29*].

Legal Topics:

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23.233 Responding Party May Move for Relief From Failure to Make Timely Response.

The court may under certain circumstances allow the withdrawal of a deemed admission, effectively permitting the filing of a late response and relieving the responding party of the effect of the failure to respond timely [*Fed R Civ P 36(b)*; *see Diggs v. Keller (D Nev 1998) 181 FRD 468, 469* ; *Upchurch v. USTNET, Inc. (D Or 1995) 160 FRD 131, 132-133*]. However, this discretion will be exercised only under compelling circumstances, i.e., when necessary to relieve a party from default by the use of the admissions to obtain a summary judgment or default [*Conlon v. United States (9th Cir 2007) 474 F3d 616, 622* ; *In re Heritage Bond Litig. (CD Cal 2004) 220 FRD 624, 626*].

Legal Topics:

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23.234 Responses Must Be in Writing.

The response to a request for admission must be in writing [*Fed R Civ P 36(a)(3)*].

Cross Reference:

Form of response, see *§ 23.314*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.235 LOCAL PRACTICE: Quote Requests in Response.

23.235[1] LOCAL PRACTICE: CD Cal Requirements. Responses or objections to requests for admission must quote each request in full immediately preceding the statement of any response or objection [*CD Cal Civ LR 36-2*].

23.235[2] LOCAL PRACTICE: ED Cal Requirements. Responses to requests for admission must set forth each request in full before each response[*ED Cal Civ LR 250.4(a)*].

23.235[3] LOCAL PRACTICE: ND Cal Requirements. Responses to requests for admission must set forth each request in full before each response or objection [*ND Cal Civ LR 36-1*].

23.235[4] LOCAL PRACTICE: SD Cal Requirements. Responses and objections to requests for admission must identify and quote each request in full immediately preceding the statement of any response or objection [*SD Cal Civ LR 36.1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.236 Drafting Response.

23.236[1] State Admission.

23.236[1][a] Unqualified Admission. If the responding party chooses to admit a requested matter without qualification, a simple admission is all that is necessary. No explanation is needed, and no evidence or authority need be cited [*see Fed R Civ P 36(a)(4)*].

Counter Attack--Responding Party:

If the responding party has admitted a matter and the propounding party attempts to conduct additional discovery on that matter, the responding party may seek a protective order [*see Fed R Civ P 26(c)*]. Although a request for admission is not objectionable merely because it may duplicate information obtained through discovery, once a matter is admitted, it is no longer an issue and is outside the scope of permissible discovery [*see Fed R Civ P 26(b)(1)*].

23.236[1][b] Admission With Qualification. When the responding party qualifies a response or denies only a part of a requested matter, the responding party must specify which part of the requested matter is true and qualify or deny the remainder [*Fed R Civ P 36(a)(4)*; *Holmgren v. State Farm Mut. Auto. Ins. Co. (9th Cir 1992) 976 F2d 573, 579-580*].

Warning--Responding Party:

The court may award the propounding party the expenses incurred in proving a matter that the responding party failed to admit, unless the court finds that the request was objectionable, the admission sought was of no substantial importance, the party failing to admit had reasonable ground to believe that it might prevail on the matter, or there was other good reason for failure to admit [*Fed R Civ P 37(c)(2)*; *see Fed R Civ P 26(g)(3), 36(a)*].

Cross Reference:

Motion to recover expenses of proof after an unreasonable failure to admit, see *§ 23.254*.

23.236[2] State Denial.

23.236[2][a] Complete Denial. A complete denial of a request for admission must specifically deny the requested matter and fairly meet the substance of the request. No explanation is needed, and no evidence or authority need be cited [*see Fed R Civ P 36(a)(4)*].

23.236[2][b] Partial Denial. When good faith requires that the responding party deny only a part of a requested matter, the responding party must specify which part of the requested matter is true and deny the remainder [*Fed R Civ P 36(a)(4)*; *Holmgren v. State Farm Mut. Auto. Ins. Co. (9th Cir 1992) 976 F2d 573, 579-580*].

23.236[3] Assert Lack of Information. If the responding party cannot truthfully admit or deny a request for admission, the response must state specifically the reasons why the responding party cannot admit or deny [*Fed R Civ P 36(a)(4)*]. The response may specify a lack of information or knowledge as the reason for a failure to admit or deny, but only if the response states both of the following [*Fed R Civ P 36(a)(4)*]:

- The responding party has made a reasonable inquiry.
- The information known to or readily obtainable by the responding party is insufficient to enable the party to admit or deny.

Warning:

A response asserting that the responding party made a reasonable inquiry (and that the inquiry did not uncover sufficient information to enable the party to admit or deny) will be deemed inadequate if the responding party did not actually make a reasonable inquiry [*Asea, Inc. v. Southern Pac. Transp. Co. (9th Cir 1981) 669 F2d 1242, 1247*].

Distinguish:

A party may respond to an interrogatory by stating that its answer is to be found in specified business records [*Fed R Civ P 33(d)*]. This is not a proper response to a request for admission [*In re Heritage Bond Litig. (CD Cal 2004) 220 FRD 624, 626*].

Cross Reference:

Providing business records in lieu of answer to interrogatory, see *§ 23.126*.

23.236[4] Assert Objections.

23.236[4][a] State Objections to Avoid Waiver. If the responding party responds to a request without objecting to it, any objection is waived [*see Fed R Civ P 36(a)*].

The responding party may seek relief from a waiver of objection by moving to withdraw or amend the resulting admission [*see Fed R Civ P 36(b)*; 23.249].

Warning:

An objection to a part of a request does not excuse the responding party from properly responding to the other parts of the request to which the responding party has raised no specific objection [*see Fed R Civ P 36(a)(4)*].

23.236[4][b] State Reasons for Objection. The reasons for any objection must be set forth in the response [*Fed R*

Civ P 36(a)(5); *ED Cal Civ LR 250.4(b)*].

In the Eastern District, the objection must also include, if appropriate, citation to relevant authority [*ED Cal Civ LR 250.4(b)*; *see Fed R Civ P 36(a)(5)*].

23.236[4][c] Avoid Improper Objections. The following objections are not allowable:

- That a matter on which an admission has been requested presents an ultimate issue in the case [*Fed R Civ P 36(a)(5)*; *Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 936-939*].

- That a requested opinion is a matter for expert opinion [*see Fed R Civ P 36(a)*].

- That the propounding party has the burden of proof on the matter requested, because the purpose of requests for admission is to eliminate the need to make discovery of uncontested facts [*see Fed R Civ P 36(a)*].

- That the responding party lacks personal knowledge, or that the requested matter consists of facts within the knowledge of the propounding party, if the information is obtainable on reasonable inquiry by the responding party [*Fed R Civ P 36*, Committee Note of 1970].

- That the requests cover many of the issues in the case, or the entire case [*see Fed R Civ P 36*, Committee Note of 1970].

- That the requested matter constitutes a genuine issue for trial or that the request goes to a disputed matter presenting a genuine issue for trial [*Fed R Civ P 36(a)(5)*; *Fed R Civ P 36*, Committee Note of 1970].

- That the request relates to opinions of fact or the application of law to fact [*Fed R Civ P 36(a)(1)(A)*].

- That the request has been or will be duplicated by upcoming discovery, since the purpose of requests for admission is to eliminate the need to make discovery of uncontested facts [*see Fed R Civ P 36(a)*].

Legal Topics:

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23.237 Response Must Be Signed on Behalf of Responding Party.

The response to requests for admission must be signed by the attorney for the responding party or, if that party is not represented by counsel, by the party. The person signing must also state his or her address, e-mail address, and telephone number [*Fed R Civ P 26(g)(1), 36(a)*].

Warning--Responding Party:

The signature of the attorney or party certifies that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the response complies with applicable rules, is not made for an improper purpose, and is not unreasonable [*Fed R Civ P 26(g)(1)*]. Sanctions may be imposed for a certification that violates these requirements [*Fed R Civ P 26(g)(3)*].

Cross Reference:

Detailed coverage of the certification implicit in the signature, see Ch. 25, Motions to Compel and Discovery Sanctions, *§ 25.109*.

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23.238 Verification Is Not Required.

The response to requests for admission need not be verified [*see Fed R Civ P 26(g)(1)*, *36(a)*; *see also Fed R Civ P 36*, Committee Note of 1970].

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23.239 Serve Responses.

23.239[1] Serve Original Response on Propounding Party. The signed response to the requests for admission must be served on the propounding party before the deadline, which is usually 30 days after service of the requests [*Fed R Civ P 5(a), 36(a)(3)*].

Warning:

Having proper proof of service of the responses will be essential if it later becomes necessary to resist a contention that the responding party has made a deemed admission by failing to serve a timely response [*see Fed R Civ P 36(a)*].

Cross Reference:

Serving papers, see Ch. 5, Formatting, Serving, and Filing Papers, *§§ 5.15 -5.23*.

23.239[2] Serve Copies of Response on All Other Parties. Copies of the response to the requests for admission must be served on all other parties that have appeared in the case [*Fed R Civ P 5(a)(1)*].

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23.240 Propounding Party Should Not File Response.

23.240[1] Responses Are Not Filed Until Used in Case. Responses to requests for admission generally must not be filed until they are used in the case or the court orders filing [*Fed R Civ P 5(d)(1)*].

23.240[2] Retain Original Response. Because responses ordinarily must not be filed until they are used at trial [*Fed R Civ P 5(d)(1)*], the propounding party should retain the original responses received from the responding party and ensure that they are available at trial and for any other proceedings for which they may be needed.

23.240[3] LOCAL PRACTICE: Filing and Retention Requirements.

23.240[3][a] LOCAL PRACTICE: CD Cal Requirements. When a request or response is required for use in a proceeding, only the part of the document that is at issue may be filed [*CD Cal Civ LR 26-2*]. Unless otherwise ordered by the court, the attorneys must hold the original requests and responses until the expiration of the time for appeal, the entry of a stipulation waiving or abandoning the right to appeal, or final disposition of appeal, whichever occurs first [*CD Cal Civ LR 26-2, 79-3*].

23.240[3][b] LOCAL PRACTICE: ED Cal Requirements. No request for admission, response, or proof of service may be filed unless and until there is a proceeding in which the document or service is at issue. When required in a proceeding, only the part of the request and response that is at issue may be filed [*ED Cal Civ LR 250.4(c)*].

23.240[3][c] LOCAL PRACTICE: ND Cal Requirements. The propounding party must retain the original of the request and the original response [*ND Cal Civ LR 26-1*].

23.240[3][d] LOCAL PRACTICE: SD Cal Requirements. Unless filing is ordered by the court sua sponte or on the motion of a party, requests for admission and responses to them need not be filed unless and until they are used in the case [*SD Cal Civ LR 36.1(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.241 Respondent Must Supplement Responses.

The responding party is under a duty to supplement or correct a response to include information thereafter acquired if ordered by the court [*Fed R Civ P 26(e)*]. Further, the responding party has an ongoing duty seasonably to amend a prior response to a request for admission if the party learns that the response is in some material respect incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing [*Fed R Civ P 26(e)(1)*; *see also Fed R Civ P 37(c)(1)* (sanctions for failure to amend)].

Warning:

Generally, any amended response may simply be served on the other parties to the action. However, if the original response is an admission, the responding party must first obtain a court order allowing the amendment [*Fed R Civ P 36(b)*].

Cross References:

Motions to withdraw or amend admissions, see *§ 23.249*. Sanctions for failure to supplement discovery responses, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.50 -25.58*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.242 Sanctions May Be Available for Inadequate Response.

If the response is considered inadequate, untimely, or incomplete, or if the responding party failed to supplement a response under Rule 26(e)(1), the requesting party can request sanctions under *Fed R Civ P 36(a)(6)*, *Fed R Civ P 26(g)(1)*, or *Fed R Civ P 37(c)(2)* [*see Hadley v. United States (9th Cir 1995) 45 F3d 1345, 1350* (district court should have considered lesser sanction for taxpayer's failure to respond timely to request for admission, rather than deeming it admitted)].

Cross References:

Recovering expenses of proving matters not admitted, see *§ 23.254*. Discovery sanctions, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.59 -25.70*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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IX. REQUESTS FOR ADMISSION
C. Moving to Determine Sufficiency of Responses

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23.243 CHECKLIST: Moving to Determine Sufficiency of Responses.

23.243[1] Propounding Party's Checklist.

☐ Review sufficiency of responses to requests for admission, considering following:

○ Response consisting of complete denial is sufficient, because it clearly leaves denied matter as issue in case.

○ Response consisting of complete admission is sufficient, because it clearly eliminates issue from case.

○ Lack of timely response to any request is sufficient, because it is automatically deemed complete admission of that matter.

○ Response consisting of partial admission or denial, refusal to admit or deny, or objection may be insufficient if it leaves doubts about whether requested matter is still at issue.

Authority:
Fed R Civ P 36(a)

Discussion:
See *§§ 23.228 -23.230*

☐ If any response appears to be insufficient, move for order determining sufficiency of response.

○ Comply with any applicable local requirement to confer with opposing counsel before making motion.

○ Draft notice of motion and motion, requesting following:

☐ Order that matter is deemed admitted.

☐ Award of reasonable expenses, including attorney's fees, incurred in relation to motion.

○ Include with motion and supporting papers original request for admission and response, authenticated by supporting affidavit or declaration.

○ Follow standard noticed motion procedure.

Authority:
Fed R Civ P 5(d), 26(g)(3), 36(a)(6), 37(a)(5)

Discussion:
See *§ 23.244*

Form:
See *§ 23.315*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation and Motion, see *§ 22.14*; Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ If court finds that response is insufficient and orders that matter is deemed admitted, adjust trial preparation accordingly.

☐ If court finds that response is insufficient and orders responding party to serve amended response:

○ Calendar date for service of amended response.

○ When amended response is received, review it for sufficiency.

○ If amended response appears to be insufficient, make further motion for order determining sufficiency of response.

Authority:
Fed R Civ P 36(a)(6)

Discussion:

See *§§ 23.244 -23.248*

☐ If court defers disposition of motion until pretrial conference or other designated time, calendar that date and prepare to renew motion at that time.

23.243[2] Responding Party's Checklist.

☐ If propounding party moves for order determining sufficiency of response:

○ Calendar dates for filing and serving opposition to motion and for hearing.

○ Prepare opposition, including request for leave to file amended response if court finds original response to be insufficient.

○ Follow standard noticed motion procedure.

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation and Motion, see *§ 22.14*; Ch. 26, Pretrial Motion Practice, see *§ 26.37*

☐ If court finds that response is insufficient and orders that matter is deemed admitted, consider making motion to withdraw or amend that admission.

☐ If court finds that response is insufficient and orders responding party to serve amended response, prepare amended response and serve it within time specified by court.

Authority:
Fed R Civ P 36(a)

Discussion:
See *§§ 23.249 -23.253*

☐ If court defers disposition of motion until pretrial conference or other designated time, calendar that date and prepare to reassert opposition to motion at that time.

Authority:
Fed R Civ P 36(a)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponses

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.244

23.244 Requesting Party May Move to Determine Sufficiency of Responses.

A party that has requested admissions may file a motion asking the court to determine the sufficiency of the responses [*Fed R Civ P 36(a)(6)*; *see* Collins v. JC Penney Life Ins. Co. (SD Cal 2003) 2003 US Dist LEXIS 8455, at *9].

Distinguish:

A motion to determine the sufficiency of a response should not be used to test the accuracy of a denial that fairly meets the substance of the requested admission [*see Fed R Civ P 36(a)(4), (6)*]. In the case of such a denial, the propounding party's proper course is to prove the inaccuracy of the denial at trial, and then move to recover the expenses and fees incurred in making that proof [*Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 937-938* ; *see Fed R Civ P 37(c)(2)*; *see also Fed R Civ P 26(g)(3)*].

Strategic Point--Propounding Party:

If the propounding party's trial strategy or presentation will be affected by the response to a request for admission, use of this motion could reduce the propounding party's time and expense. Moreover, the propounding party may not want to wait until trial to prove the insufficiency of the answer. Establishing the sufficiency of an admission before trial can allow a party to focus trial preparation on other issues.

Cross References:

Challenging sufficiency, see 7 *Moore's Federal Practice, § 36.12* (Matthew Bender 3d ed.).

Form of motion to determine the sufficiency of responses, see *§ 23.315*.

Judge's Perspective:

A motion to determine the sufficiency of responses is an infrequently used device most likely because the expense and burden of bringing the motion is seldom commensurate with the results. In the event that the denial is in proper form, the court will often be disinclined to delve into the question further at the motion stage and will prefer to address the matter at trial. An exception to that general approach is when

nailing down an admission is critical for use in a motion for summary judgment. In that instance, a party may find it necessary to pursue a sufficiency motion and should alert the court that the need to confront the accuracy of the denial is owing to the party's expectation of making a dispositive motion implicating the issue addressed in the request for admission.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponses

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.245

23.245 Unless Objection Is Justified, Court Will Order Answer.

If an objection has been asserted, unless the court determines that the objection is justified, the court will order that an answer be served [*Fed R Civ P 36(a)(6)*]. The order may specify that if the answer is not served within a certain time, the matter will be deemed admitted [*Asea, Inc. v. Southern Pac. Transp. Co. (9th Cir 1981) 669 F2d 1242, 1247*].

Legal Topics:

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

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23.246 If Answer Is Insufficient, Court May Order Matter Admitted or Answer Amended.

If the court determines that a denial or an explanation of a failure to admit or deny does not comply with the requirements of *Fed R Civ P 36*, the court may order either that the matter is admitted or that an amended or supplemental response be served [*Fed R Civ P 36(a)(6)*; *Asea, Inc. v. Southern Pac. Transp. Co. (9th Cir 1981) 669 F2d 1242, 1247*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsResponses

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.247

23.247 Court May Order Parties to Confer.

The court may defer the final disposition of a request for admission until a pretrial conference [*see Fed R Civ P 16*] or a designated time prior to trial [*Fed R Civ P 36(a)(6)*].

Legal Topics:

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

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.248

23.248 Expenses May Be Awarded.

The court may make an award of expenses, including attorney's fees, incurred in relation to the motion [*Fed R Civ P 36(a)(6)*; *see Fed R Civ P 37(a)(4)*; *but see ND Cal Civ LR 7-8*, *37-3* (separate sanctions motion required in Northern District)].

Warning:

If the response to the requests for admission was signed in violation of the requirements of *Fed R Civ P 26(g)(1)*, the court may award sanctions, which may include attorney's fees incurred on the motion [*see Fed R Civ P 26(g)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMisconduct

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.249

23.249 CHECKLIST: Withdrawing or Amending Admissions.

23.249[1] Responding Party's Checklist.

☐ Review to determine whether withdrawal or amendment is desirable:

○ Express admissions, including any partial admission made in response to request for admission.

○ Deemed admissions resulting from failure to serve timely response to requests for admission.

○ Any statement of inability to admit or deny that might be deemed admission because of failure to comply with duty to make reasonable inquiry or failure to comply with other requirements for responses to requests for admission.

○ Any objection that might be deemed admission because of invalidity of objection.

Authority:
Fed R Civ P 36(b)

Discussion:
See *§ 23.250*

☐ If withdrawal or amendment of any admission is desirable, determine whether all of the following grounds for withdrawal or amendment are present:

○ Presentation of merits of action will be served by allowing withdrawal or amendment.

○ Withdrawal or amendment will not prejudice propounding party in maintaining action or defense on merits.

○ If trial has already begun, or if admission has been incorporated in court's order following final pretrial conference, withdrawal or amendment is necessary to prevent manifest injustice.

Authority:
Fed R Civ P 16(e), 36(b)

Discussion:
See *§ 23.250*

☐ If seeking withdrawal or amendment:

○ Comply with any applicable local requirement to confer with opposing counsel before making motion.

○ Draft notice of motion and motion to withdraw or amend admission, including following:

☐ Statement of grounds for motion.

☐ Request for order allowing withdrawal or amendment of admission.

○ Prepare affidavit or declaration for filing with moving papers, to authenticate text of request and existing admission, and to propose new or amended response to request for admission.

○ Follow standard noticed motion procedure.

Authority:
Fed R Civ P 36(b)

Discussion:
See *§ 23.252*

Form:
See *§ 23.316*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*; Ch. 26, Pretrial Motion Practice, see *§ 26.12*

23.249[2] Propounding Party's Checklist.

☐ If responding party moves for leave to withdraw or amend an admission:

○ Calendar dates for filing and serving opposition to motion and for hearing.

○ Prepare opposition showing that grounds for withdrawal or amendment are not present, arguing as follows:

☐ Withdrawal or amendment will prejudice propounding party in maintaining action or defense on merits.

☐ Presentation of merits of action will not be subserved by allowing withdrawal or amendment.

☐ If trial has already begun, or if admission has been incorporated in court's order following final pretrial conference, denial of withdrawal or amendment will not cause manifest injustice.

○ If appropriate, include in opposition argument that proposed new or amended response would itself be insufficient.

○ Include with opposition papers original request for admission and response, authenticated by supporting affidavit or declaration.

○ Follow standard noticed motion procedure.

Authority:
Fed R Civ P 5(d), *Fed R Civ P 16(d)*, *36(b)*

Discussion:
See *§§ 23.250*, *23.253*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*; Ch. 26, Pretrial Motion Practice, see *§ 26.37*

☐ If court grants motion, adjust trial preparation accordingly.

○ Review new or amended response to determine whether further requests for admission should be propounded.

○ If matter on which admission was withdrawn or amended is proven at trial, move for award of expenses of making that proof.

Authority:
Fed R Civ P 36(a)(6), *37(c)(2)*

Discussion:

See *§ 23.254*

Legal Topics:

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

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.250

23.250 Withdrawal or Amendment Must Advance Decision on Merits and Not Prejudice Requesting Party.

A party that made an admission may move for the admission to be withdrawn or amended [*Fed R Civ P 36(b)*]. The court ordinarily has discretion to permit the withdrawal or amendment of an admission, including a deemed admission [*see Hadley v. United States (9th Cir 1995) 45 F3d 1345, 1348*], only if the following two circumstances exist [*Fed R Civ P 36(b)*]:

- The presentation of the merits of the action will be subserved by allowing the withdrawal or amendment.

- The party that propounded the request for admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

Example:

A patentee was allowed to amend answers to requests for admission because failure to allow amendment would deny the patentee opportunity to litigate underlying merits of claim, and the alleged infringer would not be prejudiced [*Sage Prods., Inc. v. Devon Indus., Inc. (CD Cal 1994) 880 F Supp 718, 741-742*].

The prejudice contemplated by Rule 36(b) relates to the difficulty a party may face in proving its case, including problems caused by the unavailability of key witnesses, or the sudden need to obtain evidence with respect to the questions previously deemed admitted [*Gallegos v. City of Los Angeles (9th Cir 2002) 308 F3d 987, 993*].

Distinguish:

Fed R Civ P 36(b) contemplates the withdrawal or amendment of admissions only (including deemed admissions resulting from a failure to respond). Thus, there is no procedure for the responding party to obtain a court order to withdraw or amend other kinds of responses: a denial, a statement of inability to admit or deny, or an objection. However, these responses will not be deemed admissions unless the propounding party brings the matter before the court, usually on a motion to determine the sufficiency of the responses [*see, e.g., Asea, Inc. v. Southern Pac. Transp. Co. (9th Cir 1981) 669 F2d 1242, 1245*]. In that event, the responding party will have an opportunity to argue for withdrawal or amendment of the

response before the court decides whether to deem the matter as admitted [*see Fed R Civ P 36(a)(6)*].

Strategic Point--Responding Party:

If there is a legitimate doubt about the proper answer to a request, a party should consider responding that the information reasonably available is insufficient to allow the party to admit or deny the request [*Fed R Civ P 36(a)(4)*].

Judge's Perspective:

The primary consideration in motions to withdraw or amend is avoiding delay. Because prejudice to the propounding party is a key part of the analysis, delay in bringing the motion to withdraw or amend increases the prospect that prejudice will be successfully demonstrated. Moreover, from a practical standpoint, the longer the period from admission to the motion to withdraw, the more the court will expect an explanation for why a motion was not forthcoming earlier.

Cross References:

Procedure for withdrawal and amendment, see 7 *Moore's Federal Practice, § 36.13* (Matthew Bender 3d ed.).

Notice of motion to withdraw or amend admissions, see *§ 23.316*.

Legal Topics:

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

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.251

23.251 Stricter Standard for Withdrawal Applies After Entry of Final Pretrial Order.

If the admission has been incorporated in the court's order following the final pretrial conference, or if the trial has already begun, withdrawal or amendment may be permitted only if necessary to prevent manifest injustice [*Fed R Civ P 16(e), 36(b)*; *AAA v. AAA Legal Clinic (5th Cir 1991) 930 F2d 1117, 1120* ; *see Hadley v. United States (9th Cir 1995) 45 F3d 1345, 1348*].

Legal Topics:

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

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.252

23.252 Moving Party's Burden on Motion.

The party moving to withdraw or amend an admission (the responding party to the requests for admission) has the burden of convincing the court that allowing the amendment or withdrawal will subserve the presentation of the merits of the case [*Fed R Civ P 36(b)*; *see Hadley v. United States (9th Cir 1995) 45 F3d 1345, 1348*].

Example:

That withdrawal of an admission will subserve the presentation of the merits may be established by showing that the admission goes to the heart of the case, such that leaving the admission in place would effectively eliminate a determination on the merits [*see Sonoda v. Cabrera (9th Cir 2001) 255 F3d 1035, 1040*].

Judge's Perspective:

The responding party should emphasize that the admission sought to be withdrawn or amended is factually inaccurate. *Fed R Civ P 36(b)* does not mention the factual inaccuracy of the admission as a factor the court should consider in deciding a motion for withdrawal or amendment. Nevertheless, a strong showing that the admission is inaccurate may help convince the court that withdrawal or amendment would subserve the presentation of the true merits of the case.

Legal Topics:

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

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.253

23.253 Propounding Party's Burden on Motion.

The party that propounded the request for admission has the burden of convincing the court that it will be prejudiced if the amendment or withdrawal is allowed [*Hadley v. United States (9th Cir 1995) 45 F3d 1345, 1348-1349*]. Prejudice in this context is not simply that the propounding party will have to convince the factfinder of the truth; rather, it relates to the difficulty the party may face in proving its case [*Sonoda v. Cabrera (9th Cir 2001) 255 F3d 1035, 1039*].

Example:

A demonstration of prejudice in this context may consist of a showing that key witnesses have become unavailable between the time that the admission was made and the time of the motion to withdraw the admission [*see Sonoda v. Cabrera (9th Cir 2001) 255 F3d 1035, 1039*].

Judge's Perspective:

The court has discretion to combine an order granting a motion to withdraw a deemed admission with an order requiring the responding party to pay the propounding party's costs incurred in opposing the motion. Such an order may be particularly appropriate if denying withdrawal of the admission would significantly impair the responding party's ability to present the case on the merits, while the only substantial prejudice the propounding party would suffer from the withdrawal of the admission is the expense of opposing the motion [*see Mid Valley Bank v. North Valley Bank (ED Cal 1991) 764 F Supp 1377, 1391*].

Legal Topics:

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

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.254

23.254 CHECKLIST: Recovering Expenses of Proving Matters Not Admitted.

23.254[1] Propounding Party's Checklist.

☐ After trial, if propounding party proved any matter that responding party had failed to admit in response to request for admission, determine whether grounds for award of expenses of proof are present.

○ Verify that expenses were necessarily incurred in proving precise matter as literally framed in request for admission.

○ Ascertain that none of following circumstances is present:

☐ Request for admission was held objectionable on earlier motion to determine sufficiency of responses.

☐ Admission sought was of no substantial importance.

☐ Responding party had reasonable ground to believe that party might prevail on matter.

☐ There was other good reason for failure to admit.

Authority:
Fed R Civ P 37(c)(2)

Discussion:

See *§ 23.258*

☐ If grounds for expense award appear to be present, move for award as soon as possible after trial.

○ Draft notice of motion and motion, requesting award of reasonable expenses, including attorney's fees, incurred in proving matter that responding party had failed to admit.

○ Include the following with motion and supporting papers:

☐ Argument showing that grounds for expense award are present, emphasizing that expenses would not have been incurred if matter had been admitted.

☐ Documentation of expenses, including attorney's fees, authenticated by supporting affidavit or declaration.

☐ Original request for admission and response, authenticated by supporting affidavit or declaration.

○ Follow standard noticed motion procedure.

Authority:
Fed R Civ P 5(d), 37(a)(3)

Discussion:
See *§§ 23.255 -23.257*

Form:
Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.119*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*; Ch. 26, Pretrial Motion Practice, see *§ 26.12*

23.254[2] Responding Party's Checklist.

☐ If propounding party moves for award of expenses incurred in proving matter at trial:

○ Calendar dates for filing and serving opposition to motion and for hearing.

○ Prepare opposition showing that grounds for award of expenses are not present, advancing and supporting any or all of the following arguments, as appropriate:

☐ Request for admission was held objectionable on earlier motion to determine sufficiency of responses.

☐ Admission sought was of no substantial importance.

☐ Responding party had reasonable ground to believe that party might prevail on matter.

☐ There was other good reason for failure to admit.

☐ Claimed expenses would have been incurred even if matter had been admitted.

☐ Claimed expenses are in excess of reasonable amounts.

○ Follow standard noticed motion procedure.

Authority:
Fed R Civ P 36(b)

Discussion:
See *§§ 23.255 -23.258*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*; Ch. 26, Pretrial Motion Practice, see *§ 26.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMisconduct

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23.255 Move for Order Requesting Reasonable Expenses.

If the responding party fails to admit the genuineness of a document or the truth of a matter as requested pursuant to *Fed R Civ P 36*, the propounding party may move for an order requiring the responding party to pay the reasonable expenses, including reasonable attorney's fees, of proving the genuineness of the document or the truth of the matter at trial [*Fed R Civ P 37(c)(2)*].

Example:

Plaintiff was entitled to expenses for physician's failure to admit when physician neither provided frank answers, nor set forth why physician could not truthfully admit or deny, and objections to wording of question were unfounded [*Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 937* ; *see also Washington State Dep't of Transp. v. Washington Natural Gas Co. (9th Cir 1995) 51 F3d 1489, 1500* (request for attorney's fees denied because responding party could have reasonably believed its failures to admit were justified)].

Distinguish:

Liability for the expenses of proof under *Fed R Civ P 37(c)(2)* may be imposed on the responding party, not against that party's attorney. However, the court may rely on other sources of authority to impose sanctions on an attorney who has played a culpable role in a party's improper response to a request for admission [*see, e.g., 28 USC § 1927*; *Fed R Civ P 11(c), 26(g)(3)*].

Cross References:

Form of motion to recover the expenses of proof after a failure to admit, see Ch. 25, Motions to Compel and Discovery Sanctions, *§ 25.119*. Sanctions generally, see Ch. 25, Motions to Compel and Discovery Sanctions.

Judge's Perspective:

The court is likely to interpret expenses of proof quite narrowly. Unlike an award of fees and costs to a prevailing party when authorized by statute, an order of expenses entailed in proving a denied matter is very specific and limited. Accordingly, counsel making the motion must be careful to segregate only the

expense items involved in presenting proof on that particular issue. Any commingling of expense entries with other aspects of case presentation may lead to a denial of the motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMisconduct

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23.256 File Motion As Soon As Possible.

The motion to recover expenses should be filed after the trial [*see Fed R Civ P 37*, Committee Note of 1970].

Warning:

Counsel should file the motion as soon as possible after trial. *Fed R Civ P 37(c)(2)* does not specify a deadline for filing, and the Ninth Circuit has not considered the question, but the Seventh Circuit has held that a motion to recover expenses of proof is untimely unless it is filed prior to the entry of judgment and appeal [*see Popeil Bros., Inc. v. Schick Elec., Inc. (7th Cir 1975) 516 F2d 772, 778*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.257 Show How Expenses Were Incurred.

To recover expenses of proof under *Fed R Civ P 37(c)(2)*, the propounding party must show that the expenses were directly incurred in proving the matter framed in the request for admission [*Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 939*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMisconduct

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.258

23.258 Expenses Will Be Awarded Unless Failure to Admit Was Justifiable.

On motion by the propounding party, the court must order the responding party to pay the propounding party's expenses of proof, unless one of the following circumstances exists [*Fed R Civ P 37(c)(2)*]:

- The request was held objectionable pursuant to *Fed R Civ P 36*. Apparently, this provision applies only to a request that was actually held objectionable in a pretrial motion testing the sufficiency of responses to requests for admission [*Fed R Civ P 37*, Committee Note of 1970; *see Fed R Civ P 36(a)*].

- The admission sought was of no substantial importance [*see Washington State Dep't of Transp. v. Washington Natural Gas Co. (9th Cir 1995) 59 F3d 793, 806*].

- The responding party had a reasonable ground to believe that the party might prevail on the matter [*see Washington State Dep't of Transp. v. Washington Natural Gas Co. (9th Cir 1995) 59 F3d 793, 806* ; *Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 938-939*].

- There was other good reason.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMisconduct

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.259

23.259 CHECKLIST: Determining Whether Use of Subpoena Is Appropriate.

☐ Determine whether discovery is sought from a *nonparty*.

Authority:
Fed R Civ P 45

Discussion:
See *§ 23.02[9]*

☐ Determine whether formal discovery from nonparty is desirable by asking whether:

- ○ Nonparty is friendly or hostile.
- ○ There is a need to perpetuate testimony for trial.

☐ Determine whether there is a pending action.

Authority:
Sullivan v. Dickson (9th Cir 1960) 283 F2d 725, 727 , cert. denied, 366 US 951 (1961)

Discussion:
See *§ 23.261[4]*

☐ Determine whether discovery cutoff has passed.

Authority:

Integra Lifesciences I, Ltd. v. Merck KgaA (SD Cal 1999) 190 FRD 556, 561

Discussion:

See *§ 23.261*

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.260

23.260 CHECKLISTS: Drafting Subpoenas for Nonparty Discovery.

23.260[1] Subpoena to Compel Testimony.

☐ State name of court from which subpoena is issued, either:

- ○ Court of district where deposition will be held; or
- ○ Court in which hearing or trial will be held.

Authority:
Fed R Civ P 45(a)(1)(A)(i), (2)(A), (B)

Discussion:
See *§ 23.262[1]*

☐ State title of action.

☐ State name of court in which action is pending.

☐ Include civil action number.

Authority:
Fed R Civ P 45(a)(1)(A)(ii)

Discussion:

See *§ 23.262[2]*

☐ Command witness to attend and give testimony, including:

- ○ Advising nonparty organization of duty to designate witness(es).
- ○ Describing subject of testimony "with reasonable particularity."
- ○ If for deposition, state method for recording testimony.

Authority:
Fed R Civ P 45(a)(1)(A)(iii), (2)(B)

Discussion:
See *§§ 23.262[3], [4], [5]*

☐ Indicate time and place for deposition, hearing, or trial.

Authority:
Fed R Civ P 45(a)(1)(A)(iii)

Discussion:
See *§ 23.262[5]*

☐ Include text of *Fed R Civ P 45(c), (d)*.

Authority:
Fed R Civ P 45(a)(1)(A)(iv)

Discussion:
See *§ 23.262[6]*

☐ Include proper signature.

Authority:
Fed R Civ P 45(a)(3)

Discussion:
See *§ 23.262[7]*

☐ Provide reasonable time for compliance.

Authority:
Fed R Civ P 45(c)(3)(A)(i)

Discussion:
See *§ 23.262[8]*

☐ Include appropriate witness fees.

Authority:
Fed R Civ P 45(b)(1)

Discussion:
See *§ 23.262[9]*

Form:
See *§ 23.317*

23.260[2] CHECKLIST: Subpoena to Compel Production.

☐ State name of court from which subpoena is issued, either:

○ Court of district where production will be made; or

○ Court from which testimony subpoena is issued.

Authority:
Fed R Civ P 45(a)(1)(A)(i), (2)(C)

Discussion:
See *§ 23.263[1]*

☐ State title of action.

☐ State name of court in which action is pending.

☐ Include civil action number.

Authority:
Fed R Civ P 45(a)(1)(A)(ii)

Discussion:
See *§ 23.263[2]*

☐ Command production of:

○ Designated documents.

○ Designated electronically stored information.

○ Designated things.

Authority:

Fed R Civ P 45(a)(1)(C)

Discussion:
See *§ 23.263[3]*

☐ Specify form of production of electronically stored information, if appropriate.

Authority:
Fed R Civ P 45(a)(1)(C)

Discussion:
23.263[3]

☐ Command witness in control of items to permit:

- ○ Inspection.
- ○ Copying.
- ○ Testing.
- ○ Sampling.

Authority:
Fed R Civ P 45(a)(1)(D)

Discussion:
23.263[3]

☐ State time and place for production.

Authority:
Fed R Civ P 45(a)(1)(A)(iii)

Discussion:
See *§ 23.263[4]*

☐ Include text of *Fed R Civ P 45(c), (d)*.

Authority:
Fed R Civ P 45(a)(1)(A)(iv)

Discussion:
See *§ 23.263[5]*

☐ Include proper signature.

Authority:
Fed R Civ P 45(a)(3)

Discussion:
See *§ 23.263[6]*

☐ Provide reasonable time for compliance.

Authority:

Fed R Civ P 45(c)(3)(A)(i)

Discussion:

See *§ 23.263[7]*

Form:

See *§ 23.318*

23.260[3] CHECKLIST: Subpoena to Compel Permission to Inspect Premises.

☐ State name of court from which subpoena is issued, either:

○ Court of district where inspection will be made; or

○ Court from which testimony subpoena is issued.

Authority:
Fed R Civ P 45(a)(1)(A)(i), (2)(C)

Discussion:
See *§ 23.264[1]*

☐ State title of action.

☐ State name of court in which action is pending.

☐ Include civil action number.

Authority:
Fed R Civ P 45(a)(1)(A)(ii)

Discussion:
See *§ 23.264[2]*

☐ Command witness in control of premises to permit inspection.

Authority:
Fed R Civ P 45(a)(1)(A)(iii)

Discussion:
See *§ 23.264[3]*

☐ Designate time and place for inspection.

Authority:
Fed R Civ P 45(a)(1)(A)(iii)

Discussion:
See *§ 23.264[4]*

☐ Include text of *Fed R Civ P 45(c), (d)*.

Authority:
Fed R Civ P 45(a)(1)(A)(iv)

Discussion:
See *§ 23.264[5]*

☐ Include proper signature.

Authority:
Fed R Civ P 45(a)(3)

Discussion:
See *§ 23.264[6]*

☐ Provide reasonable time for compliance.

Authority:

Fed R Civ P 45(c)(3)(A)(i)

Discussion:

See *§ 23.264[7]*

Form:

See *§ 23.319*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersSubpoenas

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
X. NONPARTY DISCOVERY: SUBPOENA
A. Drafting Subpoena

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.261

23.261 Options and Strategy.

23.261[1] Informal Discovery Available From Nonparties. Parties may obtain discovery from nonparties without the use of the formal requirements of *Fed R Civ P 45*. Informal discovery against nonparties may help to control litigation costs and conserve time.

Informal discovery may be particularly appropriate at the early stages of the case to develop the facts and to provide insight into what formal discovery needs to be obtained. For example, when a third party is willing to provide an off-the-record interview, the party seeking such discovery will be in a better position to determine if a deposition is needed and, if so, what questions to ask. Of course, such informal contact will be discoverable once formal discovery is requested. Informal discovery also has the benefit of being initiated and conducted without the requirement of notice to adverse parties.

The following are some informal discovery methods:

- Interviews of clients and other witnesses.
- Review of documents and other evidence obtained from clients and other witnesses.
- Review of publicly available information.

Drawback:

Informal discovery obtained from a nonparty witness may not be admissible at trial unless the witness is called to testify at the trial. Further, nonparties might not voluntarily give testimony, produce documents, or otherwise comply with informal discovery requests. In these circumstances, parties should use a subpoena. In addition, counsel should consider serving deposition subpoenas even on friendly witnesses because the party noticing the deposition is responsible for the witness's attendance, and if an unsubpoenaed witness does not attend, the noticing party might be ordered to pay for the other parties' expenses.

Cross References:

Using online resources to obtain public records, see Ch. 21, Discovery Strategy and Planning, *§ 21.05[6][b]*.

Detailed discussion of the use of informal discovery against nonparties, see 9 Moore's Federal Practice, Ch. 45, Subpoena (Matthew Bender 3d ed.).

23.261[2] Prior to Drafting, Verify That Subpoena May Be Served. In the interest of efficiency, a party should verify--prior to drafting--that the subpoena may be properly served.

Cross Reference:

Discussion of serving subpoenas, see *§§ 23.266 -23.273*.

23.261[3] Consider Issuing More Than One Subpoena. A subpoena commanding the production of documents, electronically stored information, or things; to permit the inspection, testing, copying, or sampling of specified items; or to permit inspection of premises may be issued with a subpoena to compel testimony at a deposition, hearing, or trial, or may be issued separately [*Fed R Civ P 45(a)(1)*].

Consider:

When deposition subpoenas are issued, they are almost always merged with the request for production.

Cross References:

Explanation of the proper court from which to issue subpoenas, see *§ 23.262[1]* (subpoena to compel testimony), *§ 23.263[1]* (subpoena to compel production), and *§ 23.264[1]* (subpoena to permit inspection).

23.261[4] Party May Not Issue Subpoena Absent Pending Litigation. Subpoenas issued pursuant to *Fed R Civ P 45* may not be issued absent a pending action [*see Sullivan v. Dickson (9th Cir 1960) 283 F2d 725, 727 , cert. denied, 366 US 951 (1961)*]. *Fed R Civ P 27* governs discovery taken or sought before an action has been filed.

Cross Reference:

Discussion of obtaining discovery prior to the commencement of an action, see *§§ 23.03 -23.18*.

23.261[5] Party Must Issue Subpoena Before Discovery Cutoff. Subpoenas issued pursuant to Rule 45 are discovery, and therefore must be used within the time period permitted for discovery in the case [*see Integra Lifesciences I, Ltd. v. Merck KgaA (SD Cal 1999) 190 FRD 556, 561*].

Cross Reference:

Further discussion of this requirement, see *§ 23.268*.

23.261[6] Consult Local Rules When Issuing Subpoena. The party issuing a subpoena should consult the local rules and the particular district court for any special requirements that may exist for issuing subpoenas, e.g., whether the district requires the use of an official form of subpoena. This is especially important when an attorney issues a subpoena from a court located in a district in which the attorney does not regularly practice.

Cross References:

Discussion of an attorney's authority to issue a subpoena, see *§ 23.262[7]*. Forms of subpoena, see *§§ 23.317 -23.319*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
X. NONPARTY DISCOVERY: SUBPOENA
A. Drafting Subpoena

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.262

23.262 Essential Components of Subpoena to Compel Testimony.

23.262[1] Subpoena Must Issue From Proper Court. A subpoena for attendance at a deposition properly issues from the court for the district designated as the district in which the deposition is to be taken [*Fed R Civ P 45(a)(2)(B)*].

When determining the court from which to issue a subpoena to compel testimony, select the court that will properly be able to enforce compliance over the nonparty [*Fed R Civ P 45(a)(2)(B)*; *see also Fed R Civ P 45*, Committee Note of 1991 (subpoena for deposition must issue from court in which deposition would be compelled)].

Consider:

A Rule 45 subpoena may be issued from a different district than where the action is pending [*see Fed R Civ P 45(a)(2)(B)*].

Cross References:

Example describing an attorney's authority to issue subpoenas, see *§ 23.262[7]*. Discussion of determining the proper court in which to file motions to modify, quash, or enforce a subpoena, see *§ 23.279[2]* (modify or quash), and *§ 23.283[3]* (enforce/compel).

23.262[2] Indicate Title of Action, Name of Court in Which Action Is Pending, and Civil Action Number. A subpoena must "state the title of the action, the name of the court in which it is pending, and its civil-action number" [*Fed R Civ P 45(a)(1)(A)(ii)*].Include this information in the caption, or, if using the official form, as indicated by the form.

23.262[3] Command Witness to Attend and Give Testimony. A subpoena to compel testimony must "command each person to whom it is directed to ... attend and testify" [*Fed R Civ P 45(a)(1)(A)(iii)*].

23.262[4] Advise Corporate Witnesses of Subject Matter and Duty to Designate Witness. When a nonparty corporation, partnership, or organization is subpoenaed to give testimony, the subpoena must advise the nonparty organization of its duty to designate one or more officers, directors, managing agents, or other persons who consent to

testify on its behalf [*Fed R Civ P 30(b)(6)*].

Additionally, the subpoena must describe "with reasonable particularity" the matters on which the testimony is being sought [*Fed R Civ P 30(b)(6)*].

23.262[5] Indicate Time and Place for Deposition, Hearing, or Trial, and Method of Recording Deposition Testimony. A subpoena must command a person to attend and give testimony "at a specified time and place" specified in the subpoena [*Fed R Civ P 45(a)(1)(A)(iii)*]. A subpoena for attendance at a deposition must state the method for recording the testimony [*Fed R Civ P 45(a)(1)(B)*].

23.262[6] Include Text of Federal Rule of Civil Procedure 45(c) and (d). The *entire text* of both subsection (c) ("Protecting a Person Subject to a Subpoena") and subsection (d) ("Duties in Responding to a Subpoena") must be set forth in the subpoena [*Fed R Civ P 45(a)(1)(A)(iv)*].

23.262[7] Include Proper Signature. The subpoena must be signed either by the clerk of the court (not the judge) from which the subpoena is issued, or an attorney [*Fed R Civ P 45(a)(3)*].

Attorneys may issue subpoenas for courts in which they are authorized to practice. Attorneys may also issue subpoenas for courts in the district where the subpoena is compelling a deposition, production, or inspection if the deposition, production, or inspection pertains to an action pending in a court where the attorney is authorized to practice [*Fed R Civ P 45(a)(3)*].

Example:

If an attorney in an action in District A needs to subpoena a witness for a deposition in District B, the attorney may issue a subpoena on behalf of District Court B, even if the attorney is not authorized to practice law in District B [*see Fed R Civ P 45*, Committee Note of 1991].

Cross Reference:

Discussion of an attorney's authority to issue subpoenas, see 9 Moore's Federal Practice, Ch. 45, Subpoena (Matthew Bender 3d ed.).

23.262[8] Provide Reasonable Time to Comply. Failure to allow a reasonable time for compliance constitutes grounds to modify or quash a subpoena [*Fed R Civ P 45(c)(3)(A)(i)*]. Generally, what is "reasonable" will be determined on a case-by-case basis, depending on such factors as the witness' need to retain counsel, the burdens and scope of document production, and the witness's work schedule [*see, e.g., Donoghue v. County of Orange (9th Cir 1987) 848 F2d 926, 931* (subpoena served one week before trial seeking extensive data pertaining to 20 years of employment records quashed because it would be impossible to comply with request at such a late date)].

Judge's Perspective:

While there is no general rule as to what constitutes "reasonable time," *Fed R Civ P 45(c)(2)(B)* uses 14 days as a starting point in the sense that it requires objections to be filed in that period unless a response is demanded in a shorter period. While that does not provide an "at least 14 day" production rule, it does underscore that counsel who seeks to obtain testimony in less than 14 days from service of the subpoena should be prepared to show that there are special circumstances that both demonstrate the need for accelerated witness appearance and explain why the requesting party did not serve its subpoena earlier. Courts are often particularly sensitive to burden and inconvenience to third parties who have no direct stake in the outcome of the litigation.

23.262[9] Appropriate Witness and Mileage Fees Must Accompany Subpoena to Compel Testimony. Service of a subpoena to compel testimony requires the tendering to the witness of fees for one day's attendance and the mileage allowed by law [*Fed R Civ P 45(b)(1)*].

Cross Reference:

Further discussion of witness and mileage fees, see *§ 23.272*.

23.262[10] Subpoena Must Not Be Unduly Burdensome. A subpoena that subjects a person to undue burden may be modified or quashed [*Fed R Civ P 45(c)(3)(A)(iv)*].

Cross Reference:

Further discussion of the requirement that a subpoena not be unduly burdensome, see *§ 23.276[9]*.

23.262[11] Subpoena Must Not Require Witness to Travel More Than 100 Miles. A subpoena that requires a witness to travel more than 100 miles from where the person resides, is employed, or regularly conducts business may be modified or quashed [*Fed R Civ P 45(c)(3)(A)(ii)*].

Distinguish:

A person subpoenaed pursuant to *Fed R Civ P 45* to give testimony *at trial* may be required to travel to any place in the state where the trial is held, even in excess of 100 miles [*Fed R Civ P 45(c)(3)(A)(ii), (B)(iii)*].

The 100 miles is generally measured "as the crow flies," but the case law in California is not clear in this regard [*see, e.g., Mark IV Properties, Inc. v. Club Dev. Mgmt. Corp. (Bankr SD Cal 1981) 12 BR 854, 858* (100-mile limitation would have been satisfied whether method of calculation used was "shortest railroad route from residence," "as the crow flies," or "distance measured from residence or regular place of employment")].

Cross References:

Discussion of service of subpoenas, see *§§ 23.266 -23.273*. Discussion of the 100-mile limit in the context of responding to a subpoena, see *§ 23.276[5]*. Forms of subpoenas to compel testimony, see *§ 23.317*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
X. NONPARTY DISCOVERY: SUBPOENA
A. Drafting Subpoena

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.263

23.263 Essential Components of Subpoena to Compel Production.

23.263[1] Subpoena Must Issue From Proper Court. If separate from a subpoena commanding the attendance of a person, a subpoena for production, inspection copying, testing, or sampling must issue from the court for the district in which the production or inspection is to be made [*Fed R Civ P 45(a)(2)(C)*].

When determining the court from which to issue a subpoena to compel production, select the court that will properly be able to enforce compliance of the nonparty [*see Fed R Civ P 45*, Committee Note of 1991; *see also Mabe v. San Bernardino County (9th Cir 2001) 237 F3d 1101, 1112* (access to high school records denied for failure to issue subpoena from federal district in which high school was located)].

Consider:

A Rule 45 subpoena may be issued from a different district than where the action is pending [*see Fed R Civ P 45(a)(2)(C)*].

Cross References:

Example describing an attorney's authority to issue subpoenas, see *§ 23.262[7]*. Discussion of how to determine the proper court in which to file motions to modify, quash, or enforce a subpoena, see *§ 23.279[2]* (modify or quash), and *§ 23.283[3]* (enforce/compel).

23.263[2] State Title of Action, Name of Court in Which Action Is Pending, and Civil Action Number. A subpoena to compel production of documents, electronically stored information, and things must "state the title of the action, the name of the court in which it is pending, and its civil-action number" [*Fed R Civ P 45(a)(1)(A)(ii)*]. Include this information in the caption, or, if using the official form, as indicated by the form.

23.263[3] Command Production of Documents, Electronically Stored Information, and Things. A subpoena to compel production of documents, electronically stored information, and things must "command each person to whom it is directed to ... produce designated documents, electronically stored information, or tangible things in that person's possession, custody or control" [*Fed R Civ P 45(a)(1)(A)(iii)*].

A subpoena to produce electronically stored information may specify the form or forms in which electronically stored information is to be produced [*Fed R Civ P 45(a)(1)(C)*].

23.263[4] Designate Time and Place for Production. A subpoena to produce must command a person to produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or things in their possession, custody, or control "at a specified time and place" [*Fed R Civ P 45(a)(1)(A)(iii)*].

23.263[5] Include Text of Federal Rule of Civil Procedure 45(c) and (d). The *entire text* of both subsection (c) ("Protecting a Person Subject to a Subpoena") and subsection (d) ("Duties in Responding to Subpoena") must be set forth in the subpoena [*Fed R Civ P 45(a)(1)(A)(iv)*].

23.263[6] Include Proper Signature. The subpoena must be signed either by an attorney or the clerk of the court (not the judge) from which the subpoena is issued [*Fed R Civ P 45(a)(3)*].

Attorneys may issue subpoenas for courts in which they are authorized to practice. Attorneys may also issue subpoenas for courts in the district where the subpoena is compelling a deposition, production, or inspection if the deposition, production, or inspection pertains to an action pending in a court where the attorney is authorized to practice [*Fed R Civ P 45(a)(3)*].

Example:

If an attorney to an action in District A needs to subpoena the production of documents and things in District B, the attorney may issue a subpoena on behalf of District Court B, even if the attorney is not authorized to practice law in District B [*see Fed R Civ P 45*, Committee Note of 1991].

23.263[7] Provide Reasonable Time for Compliance. Failure to allow a reasonable time for compliance constitutes grounds to modify or quash a subpoena [*Fed R Civ P 45(c)(3)(A)(i)*]. Generally, what is "reasonable" will be determined on a case-by-case basis [*see, e.g., Donoghue v. County of Orange (9th Cir 1987) 848 F2d 926, 931* (subpoena served one week before trial seeking extensive data pertaining to 20 years of employment records quashed because it would be impossible to comply with request at such a late date)].

Cross Reference:

Further discussion of "reasonable time" for compliance, see *§ 23.262[8]*.

23.263[8] Subpoena Must Not Be Unduly Burdensome. A subpoena that subjects a person to undue burden may be modified or quashed [*Fed R Civ P 45(c)(3)(A)(iv)*].

Cross Reference:

Further discussion of the requirement that a subpoena not be unduly burdensome, see *§ 23.276[9]*.

23.263[9] Requesting Production of Electronically Stored Information Requires Special Attention.

23.263[9][a] Subpoena to Compel Production of Electronically Stored Information Implicates Issues of Undue Burden and Cost Shifting. Requesting production of electronically stored information may implicate issues of undue burden and mandatory cost shifting [*Fed R Civ P 45(c)(2)(B)*; *see, e.g., OpenTV v. Liberate Techs. (ND Cal 2003) 219 FRD 474, 477-478*]. In the context of discovery of electronic documents, "whether production of such documents is unduly burdensome or expensive turns primarily on whether it is kept in an accessible or inaccessible format" [*OpenTV v. Liberate Techs. (ND Cal 2003) 219 FRD 474, 478* (source code sought found to be stored in an inaccessible format for purposes of discovery where it was expensive and time consuming to make data available in usable form for discovery); *see Zubulake v. UBS Warburg LLC (SDNY 2003) 216 FRD 280, 284*].

Strategic Point--Compensation for Cost of Production:

If the party seeking production agrees to compensate the third party for any reasonable costs of compliance, burdens such as additional programming required to extract data are less likely to be seen as undue [*see, e.g., Gonzales v. Google, Inc. (ND Cal 2006) 234 FRD 674, 683*].

Cross References:

Further discussion of the requirement that a subpoena not be unduly burdensome, see *§ 23.276[9]*.
Further discussion of electronic discovery and cost shifting, see *§§ 23.157 -23.188*.

23.263[9][b] Four-Part Test for Subpoena Seeking Identity of Anonymous Nonparty Internet User. A subpoena seeking the identity of an anonymous nonparty Internet user implicates issues of the *First Amendment* [*see Doe v. 2TheMart.com, Inc. (WD Wa 2001) 140 F Supp2d 1088, 1091*]. The United States District Court for the Western District of Washington adopted the following four-part test for evaluating whether a civil subpoena that seeks the identity of an anonymous nonparty should issue. The court will consider whether [*Doe v. 2TheMart.com, Inc (WD Wa 2001) 140 F Supp2d 1088, 1095*]:

- The subpoena seeking the information was issued in good faith and not for an improper purpose;
- The information sought relates to a core claim or defense;
- The identifying information is directly and materially relevant to that claim or defense; and
- Information sufficient to establish or disprove that claim or defense is unavailable from any other source.

Cross Reference:

Discussion of electronic discovery, see *§§ 23.157 -23.188*.

23.263[10] Prior Notice of Commanded Production of Documents and Things Must Be Served on Each Party. Before issuing a subpoena to compel the production of documents, electronically stored information, and things, notice must be served on each party in the manner prescribed by *Fed R Civ P 5(b)* [*Fed R Civ P 45(b)(1)*].

Cross References:

Further discussion of the prior notice requirement, see *§ 23.267*. Discussion of service under Rule 5(b), see Ch. 5, Formatting, Serving, and Filing Papers, *§ 5.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenas

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Unit 7 Discovery
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X. NONPARTY DISCOVERY: SUBPOENA
A. Drafting Subpoena

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.264

23.264 Essential Components of Subpoena to Compel Permission to Inspect Premises.

23.264[1] Subpoena Must Issue From Proper Court. If separate from a subpoena commanding the attendance of a person, a subpoena for inspection must issue from the court for the district in which the production or inspection is to be made [*Fed R Civ P 45(a)(2)(C)*].

When determining the court from which to issue a subpoena to compel inspection of premises, select the court that will properly be able to enforce compliance over the nonparty. The court in whose name the subpoena is issued is responsible for the enforcement of the subpoena [*see Fed R Civ P 45*, Committee Note of 1991; *see also Mabe v. San Bernardino County (9th Cir 2001) 237 F3d 1101, 1112* (access to high school records denied for failure to issue subpoena from federal district in which high school was located)].

Consider:

A Rule 45 subpoena may be issued from a different district than where the action is pending [*see Fed R Civ P 45(a)(2)(C)*].

Cross References:

Example describing an attorney's authority to issue subpoenas, see *§ 23.262[7]*. Discussion of determining the proper court in which to file motions to modify, quash, or enforce a subpoena, see *§ 23.279[2]* (modify or quash), and *§ 23.283[3]* (enforce/compel).

23.264[2] State Title of Action, Name of Court in Which Action Is Pending, and Civil Action Number. A subpoena must "state the title of the action, the name of the court in which it is pending, and its civil-action number" [*Fed R Civ P 45(a)(1)(A)(ii)*]. Include this information in the caption, or, if using the official form, as indicated by the form.

23.264[3] Command Permission to Inspect Premises. A subpoena to compel permission to inspect premises must "command each person to whom it is directed to ... permit the inspection of premises ..." [*Fed R Civ P 45(a)(1)(A)(iii)*].

23.264[4] Designate Time and Place for Inspection. A subpoena must command a person to permit inspection of premises "at a specified time and place" [*Fed R Civ P 45(a)(1)(A)(iii)*].

23.264[5] Include Text of Federal Rule of Civil Procedure 45(c) and (d). *Fed R Civ P 45* requires that the *entire text* of both subsection (c) ("Protecting a Person Subject to a Subpoena") and subsection (d) ("Duties in Responding to a Subpoena") be set forth in the subpoena [*Fed R Civ P 45(a)(1)(A)(iv)*].

23.264[6] Include Proper Signature. The subpoena must be signed either by the clerk of the court (not the judge) from which the subpoena is issued, or an attorney. [*Fed R Civ P 45(a)(3)*].

Attorneys may issue subpoenas for courts in which they are authorized to practice. Attorneys may also issue subpoenas for courts in the district where the subpoena is compelling a deposition, production, or inspection if the deposition, production, or inspection pertains to an action pending in a court where the attorney is authorized to practice [*Fed R Civ P 45(a)(3)*].

Example:

If an attorney to an action in District A needs to issue a subpoena to inspect premises in District B, the attorney may issue a subpoena on behalf of District Court B, even if the attorney is not authorized to practice law in District B [*see Fed R Civ P 45*, Committee Note of 1991].

23.264[7] Provide Reasonable Time for Compliance. Failure to allow a reasonable time for compliance constitutes grounds to modify or quash a subpoena [*Fed R Civ P 45(c)(3)(A)(i)*]. Generally, what is "reasonable" will be determined on a case-by-case basis [*see, e.g., Donoghue v. County of Orange (9th Cir 1987) 848 F2d 926, 931* (subpoena served one week before trial seeking extensive data pertaining to 20 years of employment records quashed because it would be impossible to comply with request at such a late date)].

Cross Reference:

Further discussion of "reasonable time" for compliance, see *§ 23.262[8]*.

23.264[8] Subpoena Must Not Be Unduly Burdensome. A subpoena that subjects a person to undue burden may be modified or quashed [*Fed R Civ P 45(c)(3)(A)(iv)*].

Cross Reference:

Further discussion of the requirement that a subpoena not be unduly burdensome, see *§ 23.276[9]*.

23.264[9] Prior Notice of Commanded Inspection of Premises Must Be Served on Each Party. Before issuing a subpoena to compel the production of documents and things, a party must serve notice on each other party in the manner prescribed by *Fed R Civ P 5(b)* [*Fed R Civ P 45(b)(1)*].

Cross References:

Further discussion of the prior notice requirement, see *§ 23.267*.

Discussion of service under Rule 5(b), see Ch. 5, Formatting, Serving, and Filing Papers, *§ 5.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
X. NONPARTY DISCOVERY: SUBPOENA
A. Drafting Subpoena

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.265

23.265 LOCAL PRACTICE: Requirements for Subpoena for Nonparty Discovery.

For all subpoenas in civil cases in California's federal district courts, use your district's version of Official Form AO 88, "Subpoena in a Civil Case."

Cross Reference:

Local District Court Forms, see *§ 23.321*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersSubpoenas

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.266

23.266 CHECKLIST: Serving Subpoenas.

☐ Provide prior notice to all parties (subpoenas to compel production or to inspect premises only).

Authority:
Fed R Civ P 45(b)(1)

Discussion:
See *§ 23.267*

☐ Verify that subpoena is being served before discovery cutoff.

Authority:
Integra Lifesciences I, Ltd. v. Merck KgaA (SD Cal 1999) 190 FRD 556, 561

Discussion:
See *§ 23.268*

☐ Verify that person serving is at least 18 and is not a party to the action.

Authority:
Fed R Civ P 45(b)(1)

Discussion:
See *§ 23.269*

☐ Verify that manner of service is proper.

Authority:
Fed R Civ P 45(b)(1)

Discussion:
See *§ 23.270*

☐ Verify that service is within prescribed territorial limits.

Authority:
Fed R Civ P 45(b)(2)

Discussion:
See *§ 23.271*

☐ Include proper witness fees (subpoena to compel testimony only).

Authority:
Fed R Civ P 45(b)(1)

Discussion:
See *§ 23.272*

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.267 Provide Prior Notice to All Parties (Subpoena to Compel Production or to Inspect Premises Only).

Before issuing a subpoena to compel the production of documents, electronically stored information, and things, notice must be served on each party in the manner prescribed by *Fed R Civ P 5(b)* [*Fed R Civ P 45(b)(1)*].

Cross Reference:

Discussion of service under Rule 5(b), see Ch. 5, Formatting, Serving, and Filing Papers, *§ 5.22*.

The prior notice requirement has been interpreted to mean notice prior to service of the subpoena on the nonparty rather than prior to production [*see, e.g.*, McCurdy v. Wedgewood Capital Mgmt. Co. (ED Pa 1998) 1998 US Dist LEXIS 18875, at *24 , *citing Biocore Med. Techs., Inc. v. Khosrowshahi (D Kan 1998) 181 FRD 660, 667*].

The purpose of providing this notice is "to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things," such that the other parties can "monitor the discovery" and "pursue access to any information that may or should be produced" [*see Fed R Civ P 45*, Committee Note of 1991].

Distinguish:

Prior notice is *not* required with respect to a subpoena to compel testimony [*see Fed R Civ P 45*, Committee Note of 1991].

Warning:

Failure to serve prior notice of the issuing party's demand for production has been found to constitute a basis for quashing the subpoena [*see Firefighters' Inst. for Racial Equal. v. City of St. Louis (8th Cir 2000) 220 F3d 898, 903 , cert. denied, 532 US 921 (2001)*].

Judge's Perspective:

While there is no set time period, prior notice should be sufficient to allow the receiving party to have input, for example by objecting to the subpoena [*see Biocore Med. Techs., Inc. v. Khosrowshahi (D Kan 1998) 181 FRD 660, 667*]. Accordingly, a day before service of the subpoena might not be enough, but three to four days before would likely be sufficient.

Cross References:

Discussion of service of subpoenas, see *23.266 -23.273*. Discussion of response to subpoenas, see *§ 23.276*. Form of subpoenas to compel production, see *§ 23.318*.

Further discussion of the prior notice requirement, see *§ 23.267*; 9 Moore's Federal Practice, see § 45.03[4][b][iii] (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.268

23.268 Ensure That Subpoena Is Served Before Discovery Cutoff.

Subpoenas issued pursuant to Rule 45 are discovery and must be used within the time period permitted for discovery in the case [*see Integra Lifesciences I, Ltd v. Merck KgaA (SD Cal 1999) 190 FRD 556, 561-562*]. Thus, subpoenas should not be served before the parties have met and conferred and made a discovery plan pursuant to *Fed R Civ P 26(d) & (f)*, unless the parties have made an agreement otherwise or the court has ordered otherwise.

The time period permitted for discovery is usually set in the Rule 16(b) Scheduling Order.

Cross Reference:

Discussion of the consequences of serving a subpoena inconsistent with discovery deadlines, see *§ 23.276[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.269 Verify That Person Serving Subpoena Is at Least 18 and Is Not a Party to the Action.

A subpoena may be served by any person who is not a party to the action and who is not younger than 18 [*Fed R Civ P 45(b)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.270 Ensure That Proper Method of Service Is Used.

Service of a subpoena is made by "delivering a copy to such person" [*Fed R Civ P 45(b)(1)*].

It is not clear whether personal service is required in the Ninth Circuit. The Ninth Circuit held a subpoena served by mail and not accompanied by appropriate witness fees to be invalid. However, the court did not rule on the issue of the propriety of the service by mail [*Tedder v. Odel (9th Cir 1989) 890 F2d 210, 212* ; *see also Chima v. DOD (9th Cir 2001) 2001 US App LEXIS 25055, at *6-*7* , (interpreting Rule 45(b)(1) as requiring personal service; unpublished opinion, generally not citable to court under 9th Cir R 36-3)].

There is disagreement among circuits regarding whether personal service is required, or whether service by mail or electronic means is acceptable. Although Rule 45 does not use the term "personal service," some courts have interpreted the relevant language as permitting only this method of service:

- *DC Cir: FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson (DC Cir 1980) 636 F2d 1300, 1312-1313* ("under the Federal Rules, compulsory process may be served upon an unwilling witness only in person").

- 2d Cir: Agran v. City of New York (SDNY 1997) 1997 US Dist LEXIS 2577, at *1 ("the weight of authority is that a subpoena duces tecum must be served personally" and "the Court is without authority to sanction an alternative form of service").

Other courts have held, however, that personal service of a subpoena is not required:

- 2d Cir: *First Nationwide Bank v. Shur (EDNY 1995) 184 BR 640, 642* (" 'delivering' a copy of a subpoena, for the purposes of Rule 45, includes any act or series of acts that reasonably assures the entity to which it is addressed fair and timely notice of its issuance, contents, purpose and effect").

- 10th Cir: Western Res., Inc. v. Union Pac RR (D Kan 2002) 2002 US Dist LEXIS 14897, at *9 ("effective service under Rule 45 is not limited to personal service").

Cross Reference:

Further discussion of proper service under *Fed R Civ P 45*, see 9 *Moore's Federal Practice, § 45.03[4][b]* (Matthew Bender 3d ed.).

The serving and filing requirements of *Fed R Civ P 5(b)* are inapplicable to nonparties because the rule expressly applies only to parties [*Fed R Civ P 5(b)(1)*; *see also Lehman v. Kornblau (EDNY 2001) 206 FRD 345, 347*].

Warning:

Failure to serve a subpoena properly has been held to constitute sufficient basis to quash the subpoena [*see, e.g.*, Rotter v Cambrex Corp. (ND Ill 1995) 1995 US Dist LEXIS 8561, at *4].

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.271

23.271 Verify That Service Is Within Prescribed Territorial Limits.

A subpoena may be served [*Fed R Civ P 45(b)(2)*]:

- At any place within the district of the court by which it is issued; or

- Any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, inspection, or other activity specified in the subpoena; or

- At any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena.

In California, "[a] witness, including a witness specified in subdivision (b) of Section 1987, is not obliged to attend as a witness before any court, judge, justice or any other officer, unless the witness is a resident within the state at the time of service" [*CCP § 1989*]. The Northern District interpreted *CCP § 1989* as permitting statewide service of trial subpoenas [*see* Collins v. JC Penney Life Ins. Co. (ND Cal 2002) 2002 US Dist LEXIS 5676, at *10].

Further, a nonparty corporation is amenable to service in any forum within which the corporation has minimum contacts [*In re Jee (Bankr CD Cal 1989) 104 BR 289, 293*].

28 USC § 1783 governs service of subpoenas on witnesses in foreign countries who are nationals or residents of the United States [*Fed R Civ P 45(b)(2)*]. Service of a subpoena on an individual in a foreign country must conform to *Fed R Civ P 4(f)* [*see Rio Props., Inc. v. Rio Int'l Interlink (9th Cir 2002) 284 F3d 1007, 1014*].

A court may also authorize the service of a subpoena at any other place upon a proper application to the court and cause shown, when so provided by a United States statute [*Fed R Civ P 45(b)(2)(C)*].

Cross Reference:

Serving individuals in foreign countries, see Ch. 7, Service of Summons, *§ 7.37*.

Legal Topics:

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.272

23.272 Enclose Correct Amount of Witness and Mileage Fees (Subpoena to Compel Testimony Only).

Proper service of a subpoena to compel testimony requires that the subpoena be accompanied by payment to the witness of "the fees for 1 day's attendance and the mileage allowed by law" [*Fed R Civ P 45(b)(1)*; *see also Tedder v. Odel (9th Cir 1989) 890 F2d 210, 211*]. The amount of these witness fees is determined by statute [*see, e.g., 28 USC § 1821*]. Currently, the witness fee for a day of attendance is $40.00.

Warning:

Failure to tender appropriate witness fees with a subpoena to compel testimony may lead to the quashing of the subpoena or to the witness not appearing.

Cross References:

Further discussion of the consequences of failing to serve a subpoena properly, including tender of witness fees, see *§ 23.276[2]*. Form of subpoenas to compel production, see *§ 23.318*.

Discussion of witness fees, see 9 *Moore's Federal Practice, § 45.03[4][b][ii]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.273

23.273 LOCAL PRACTICE: Requirements for Filing and Serving Subpoenas.

23.273[1] LOCAL PRACTICE: CD Cal Requirements. Use proof of service contained in official form AO-088.

23.273[2] LOCAL PRACTICE: ED Cal Requirements.

23.273[2][a] Service of Subpoenas Duces Tecum. Subpoenas duces tecum directed to nonparties must be served on all parties to the action [*ED Cal Civ LR 250.5(c)*].

23.273[2][b] Filing of Subpoenas Duces Tecum. A subpoenas duces tecum and proof of service must not be filed unless and until the subpoena or proof of service is at issue [*ED Cal Civ LR 250.5(d)*].

23.273[2][c] Proof of Service. Use proof of service contained in official form AO-088.

23.273[3] LOCAL PRACTICE: ND Cal Requirements.

23.273[3][a] Serve Subpoena Prior to Discovery Cutoff. Discovery requests that call for responses or depositions after the discovery cutoff are not enforceable except by court order upon a showing of good cause [*ND Cal Civ LR 26-2*].

23.273[3][b] Proof of Service. Use proof of service contained in official form AO-088.

23.273[4] LOCAL PRACTICE: SD Cal Requirements. Use proof of service contained in official form AO-088.

Cross Reference:

Local District Court Forms, see *§ 23.321*.

Legal Topics:

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

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X. NONPARTY DISCOVERY: SUBPOENA
C. Responding to Subpoenas

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.274

23.274 CHECKLISTS: Responding to Subpoenas.

23.274[1] Analyzing Subpoena.

☐ Verify that subpoena is served within discovery cutoff.

Authority:
Integra Lifesciences I, Ltd. v. Merck KgaA (SD Cal 1999) 190 FRD 556, 561

Discussion:
See *§ 23.276[1]*

☐ Verify that subpoena was properly served.

Authority:
Fed R Civ P 45(b)(1)

Discussion:
See *§ 23.276[2]*

☐ Verify that subpoena was issued from proper court.

Authority:
Fed R Civ P 45(a)(2)

Discussion:
See *§ 23.276[3]*

☐ Verify that subpoena affords reasonable time for compliance.

Authority:
Fed R Civ P 45(c)(3)(A)(i)

Discussion:
See *§ 23.276[4]*

☐ Verify that subpoena does not exceed 100-mile limit on travel.

Authority:
Fed R Civ P 45(c)(3)(B)(iii)

Discussion:
See *§ 23.276[5]*

☐ Determine whether subpoena seeks privileged or protected materials.

Authority:
Fed R Civ P 45(c)(3)(A)(iii)

Discussion:
See *§ 23.276[6]*

☐ Determine whether subpoena seeks trade secrets, confidential research or development information, or commercial information.

Authority:
Fed R Civ P 45(c)(3)(B)(i)

Discussion:
See *§ 23.276[7]*

☐ Determine whether subpoena is directed against a retained or unretained expert.

Authority:
Fed R Civ P 45(c)(3)(B)(ii)

Discussion:
See *§ 23.276[8]*

☐ Determine whether subpoena imposes undue burden.

Authority:
Fed R Civ P 45(c)(3)(A)(iv)

Discussion:
See *§ 23.276[9]*

☐ Determine whether prior notice of production or inspection was served.

Authority:
Fed R Civ P 45(b)(1)

Discussion:
See *§ 23.276[10]*

☐ Determine whether to serve written objections or move to quash or modify subpoena.

Authority:
Fed R Civ P 45(c)(2), (3)

Discussion:
See *§§ 23.278, 23.279*

23.274[2] Drafting Written Objection.

☐ Ensure objection is timely made and served.

Authority:
Fed R Civ P 45(c)(2)(B)

Discussion:
See *§ 23.278[1]*

☐ Clearly state objection(s) and basis for objection(s).

Authority:
Fed R Civ P 45(d)(2)

Discussion:
See *§ 23.278[2]*

☐ Determine whether subpoena seeks privileged information.

Authority:
Fed R Civ P 45(c)(2)(B), (d)(2)

Discussion:
See *§ 23.278[2]*

☐ Include privilege log if making claim of privilege.

Authority:
Fed R Civ P 45(d)(2)

Discussion:
See *§ 23.278[2]*

23.274[3] Drafting Motion to Modify or Quash a Subpoena.

☐ Determine if subpoena:

○ Fails to allow a reasonable amount of time for compliance.

○ Requires a person who is not a party or an officer of a party to travel more than 100 miles from where that person resides, is employed, or regularly transacts business.

○ Requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial.

○ Requires disclosure of privileged or other protected materials.

○ Subjects a person to undue burden.

○ Is served for an improper purpose.

○ Requires disclosure of a trade secret or other confidential research, development, or commercial information.

○ Requires disclosure of an unretained expert's opinion.

Authority:
Fed R Civ P 45(c)(3)(A), (B)

Discussion:
See *§ 23.279*

☐ Determine whether subpoena was properly served.

Authority:
Fed R Civ P 45(b)(1)

Discussion:
See *§ 23.276[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.275

23.275 Options and Strategy.

23.275[1] Appropriate Response Depends on Subpoena. The appropriate response to a subpoena depends on how the subpoena is drafted and the discovery that is sought. It is important to determine quickly the appropriate response to the subpoena to ensure the timeliness of the response.

23.275[2] Make Good-Faith Effort to Resolve Disputes. The subpoenaed party must make a good-faith effort to resolve any issues with the person or party who issued the subpoena. This is a prerequisite to filing a motion to compel or to obtaining a protective order [*Fed R Civ P 26(c)*, *Fed R Civ P 37(a)(3)(B)*].

Regarding motions to compel, parties should consult the local district rules as well as individual judge's rules and Standing Orders. Some judges' rules mirror the requirement of *Fed R Civ P 37(a)(3)(B)* that a certification of the parties' good-faith efforts to resolve the dispute be attached to the motion. Some judges, however, do not permit resolution of discovery disputes by motion and instead require that disputes be resolved in a conference with the judge.

23.275[3] Good-Faith Effort Generally Not Required for Motions to Modify or Quash Subpoenas. The requirement that counsel meet and confer prior to moving for a protective order or to compel production does not apply to motions to modify or quash a subpoena pursuant to *Fed R Civ P 45(c)(3)(A)* or *(B)* [*Fed R Civ P 26(c)*, *Fed R Civ P 37(a)(3)(B)*].

It may be advisable, however, to attempt to resolve scheduling conflicts should either a protective order or a motion to compel prove to be necessary. Further, the judge's rules and Standing Orders should be consulted to determine whether it is necessary to meet and confer prior to moving to modify or quash a subpoena.

23.275[4] Service of Written Objections Stays Discovery. Service of written objections to a subpoena automatically stays discovery [*Fed R Civ P 45(c)(2)(B)*].Do not, therefore, permit the particular discovery requested by that subpoena after written objections have been served, absent a court order [*Fed R Civ P 45(c)(2)(B)*].

Distinguish:

The filing of a motion to modify or quash a subpoena, or a motion to compel, *does not* automatically stay discovery.

Judge's Perspective:

When the party receiving the subpoena contests the requests contained in the subpoena by objection or motion, most courts will expect that no further response will be provided until the court resolves the issue. If, however, there are aspects of the request to which no objection will be asserted, the subpoenaed party should be prepared to provide a substantive response to that extent promptly after the hearing on any motion to compel or for a protective order.

23.275[5] Choosing Between Written Objections and Motion to Quash. A party resisting a subpoena may either serve written objections [*Fed R Civ P 45(c)(1)(B)*] or move to quash or modify the subpoena [*Fed R Civ P 45(c)(3)*]. Written objections may be preferable when it appears likely that the party serving the subpoena will not proceed with the burden and expense of bringing a motion to compel. Alternatively, when the issue will likely be pursued by the party serving the subpoena, the receiving party may elect to bring a motion to quash in order to be in control of the timing of the motion and to frame the questions presented by initiating the briefing process.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.276

23.276 Analyze Validity of Subpoena and Determine Appropriate Response.

23.276[1] Verify That Subpoena Is Served Within Discovery Cutoff. Subpoenas issued pursuant to Rule 45 are discovery and must be used within the time period permitted for discovery in the case [*see Integra Lifesciences I, Ltd v. Merck KgaA (SD Cal 1999) 190 FRD 556, 561-562*].

Further, discovery requests that call for responses or depositions after the discovery cutoff may not be enforceable except by court order upon a showing of good cause [*see, e.g., ND Cal Civ LR 26-2*].

Cross References:

Discussion of moving to modify or quash a subpoena, see *§ 23.279*. Further discussion of discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.34*.

23.276[2] Verify That Subpoena Was Properly Served. Service of a subpoena is made by delivering a copy of the subpoena to the person named in the subpoena, and, in the case of a subpoena to compel testimony, fees for one day's attendance and mileage as allowed by law [*Fed R Civ P 45(b)(1)*].

Although not expressly stated in Rule 45, failure to serve a subpoena properly has been found to constitute grounds to quash or modify a subpoena [*see, e.g.,* Rotter v. Cambrex Corp. (ND Ill 1995) 1995 US Dist LEXIS 8561, at *4]. Additionally, failure to provide the requisite attendance and mileage fees may be grounds to modify or quash a subpoena [*see CF&I Steel Corp v Mitsui & Co. (9th Cir 1983) 713 F2d 494, 496*].

Moreover, there is no obligation to file a motion to quash if service of a subpoena is defective [*see Barnhill v. United States (7th Cir 1993) 11 F3d 1360, 1370* ; *Martin v. Howard Univ. (DDC 2002) 209 FRD 20, 20-21* (court upheld witness's refusal to appear].

If the subpoena was not properly served, or if the subpoena to compel testimony was not accompanied by the appropriate fees, attempt informal resolution of the issue. If informal resolution is unsuccessful, then move to modify or

quash the subpoena.

Judge's Perspective:

A subpoenaed party that believes service has been improper should usually seek informal resolution of the problem with the subpoenaing party. Through this process, the subpoenaed party can arrange a more convenient time for response or limit the scope of the subpoena, using to its advantage the prospect that, if the other party disagrees, motion practice will be necessary. It is dangerous to ignore the subpoena because if a court ultimately concludes service was proper the subpoenaed party will have more difficulty persuading the court to ameliorate any burden imposed [*see § 23.285* (contempt sanction)].

Cross References:

Discussion of service of subpoenas, see *§§ 23.266 -23.273*. Discussion of witness fees in the context of service of a subpoena, see *§ 23.272*. Instructions regarding moving to modify or quash a subpoena, see *§ 23.279*. Further discussion of discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.34*.

Further discussion of witness fees, see 9 *Moore's Federal Practice, § 45.03[4][b][ii]* (Matthew Bender 3d ed.).

23.276[3] Verify That Subpoena Was Issued From Proper Court. To be enforceable, a subpoena must be issued from the proper court [*Fed R Civ P 45(a)(2)*; *see also Fed R Civ P 45*, Committee Note of 1991].

Cross References:

Discussion of the proper court from which a subpoena must issue, see *§ 23.262[1]* (subpoena to compel testimony), *§ 23.263[1]* (subpoena to compel production), and *§ 23.264[1]* (subpoena to compel inspection).

If a subpoena is not issued from the proper court, and if informal resolution is unsuccessful, move to quash or modify the subpoena.

Consider:

Counsel should attempt informal resolution to avoid wasted time and expense in fighting over a defect that the subpoenaing party can easily remedy.

Cross References:

Instructions regarding moving to modify or quash a subpoena, see *§ 23.279*. Judge's perspective on the advantage of informal resolution, see *§ 23.276[2]*. Further discussion of discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.34*.

23.276[4] Verify That Subpoena Affords Reasonable Time for Compliance. A subpoena must provide a reasonable time for compliance [*Fed R Civ P 45(c)(3)(A)(i)*]. A court will modify or quash a subpoena that fails to provide a reasonable time for compliance [*Fed R Civ P 45(c)(3)(A)(i)*]. Consider informal resolution before moving to quash or modify the subpoena.

Cross References:

Discussion of what constitutes a reasonable time to respond, see *§ 23.262[8]* (subpoena to compel testimony), *§ 23.263[7]* (subpoena to compel production), and *§ 23.264[7]* (subpoena to compel inspection). Judge's perspective on the advantage of informal resolution, see *§ 23.276[2]*. Instructions regarding moving to modify or quash a subpoena, see *§ 23.279*. Further discussion of discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.34*.

23.276[5] Verify That Subpoena Does Not Exceed 100-Mile Limit on Travel. A subpoena to compel testimony may not require a nonparty to travel to a place that is more than 100 miles from where that person resides, is employed, or regularly transacts business [*Fed R Civ P 45(c)(3)(A)(ii)*]. A court will quash or modify a subpoena that requires a nonparty to travel to a place that is more than 100 miles from where that person resides, is employed, or regularly transacts business [*Fed R Civ P 45(c)(3)(A)(ii)*]. Consider informal resolution before moving to quash or modify such a subpoena.

Judge's Perspective:

The advantages of informal resolution [*see § 23.276[2]*] are particularly salient when the dispute concerns the "100 mile bulge" because that requirement is fraught with ambiguity in terms of how to measure it; a subpoenaed party, therefore, would not want to rely on the assumption that the subpoena was improper and simply ignore it.

Consider:

Though informal resolution may be advisable, most nonparties will insist on the 100-mile limit.

A subpoena that "purports to require a nonparty to attend or produce at a place" in excess of 100 miles from the place where the person resides, is employed, or regularly transacts business provides an "adequate excuse" for failure to obey the subpoena [*Fed R Civ P 45(e)*].

Cross References:

Discussion of the 100-mile limit in the context of drafting a subpoena to compel production, see *§ 23.262[11]*. Instructions regarding moving to modify or quash a subpoena, see *§ 23.279*. Further discussion of discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.34*.

Further discussion of moving to modify or quash a subpoena based on the 100-mile limit, see 9 *Moore's Federal Practice, § 45.04[3][b][ii]* (Matthew Bender 3d ed.).

23.276[6] Determine Whether Subpoena Seeks Privileged or Protected Materials. Upon a timely motion, a court will modify or quash a subpoena that seeks disclosure of privileged or other protected matter as to which no exception or waiver applies [*Fed R Civ P 45(c)(3)(A)(iii)*].

The subpoenaed individual may make written objections in response to a subpoena seeking privileged or other protected matter as to which no exception or waiver applies [*Fed R Civ P 45(c)(2)(B)*]. The objections must be express and supported by a description of the documents or things not produced that is sufficient to enable the demanding party to contest the claims made in the objections [*Fed R Civ P 45(d)(2)*].

A nonparty may claim work-product protection when the nonparty "is in substance equally concerned with the outcome of litigation," and the documents sought were created "with an eye toward litigation" [*see* AT&T v Microsoft (ND Cal 2003) 2003 US Dist LEXIS 8710, at *16].

A motion to modify or quash a subpoena that seeks disclosure of privileged or other protected matter as to which no exception or waiver applies is also a proper response to such a subpoena [*Fed R Civ P 45(c)(3)(A)(iii)*].

Cross References:

Discussion of moving to modify or quash a subpoena, see *§ 23.279*. Further discussion of discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.34*. Discussion of written objections, see *§ 23.278*.

Further discussion of moving to modify or quash a subpoena based on privilege, see 9 *Moore's Federal Practice, § 45.04[3][b][iii]* (Matthew Bender 3d ed.).

23.276[7] Determine Whether Subpoena Seeks Trade Secrets, Confidential Research or Development Information, or Commercial Information. On timely motion, a court may modify or quash a subpoena that seeks disclosure of trade secrets, confidential research or development information, or commercial information [*Fed R Civ P 45(c)(3)(B)(i)*], or the court may issue a protective order [*Fed R Civ P 26(c)*].

Judge's Perspective:

Protective orders are routinely issued in cases involving trade secrets and other confidential information. If a stipulated general protective order governing discovery has already been issued in the case, the court will often extend its terms to cover subpoenaed material from third parties.

Decision Point:

A party receiving a subpoena should make a motion for a protective order when it seeks constraints and limits on the dissemination and treatment of materials to be produced. When the receiving party seeks to preclude production altogether based on an argument that sensitive material would not be sufficiently probative or relevant to warrant production, then the most appropriate mechanism to use would be a motion to quash. Generally, if there is a reasonable chance of succeeding on a motion to quash, then consider making the motion and then seeking a protective order as a fallback request to the court.

A claim that material is privileged because it seeks trade secrets, confidential research or development information, or commercial information must show that the information sought is a trade secret or confidential and demonstrate that its disclosure might be harmful [*see, e.g., Gonzales v. Google, Inc. (ND Cal 2006) 234 FRD 674, 684-685* ; AT&T v Microsoft (ND Cal 2003) 2003 US Dist LEXIS 8710, at *22].

Cross References:

Discussion of moving to modify or quash a subpoena, see *§ 23.279*. Further discussion of discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.34*.

23.276[8] Determine Whether Subpoena Is Directed Against Unretained Expert. On timely motion, a court may modify or quash a subpoena that seeks disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made without the request of any party [*Fed R Civ P 45(c)(3)(B)(ii)*].

The Central District issued sanctions pursuant to *Fed R Civ P 45(c)(1)* against a party attempting to obtain expert testimony from an unretained expert on the grounds that the subpoena was issued for an improper purpose and subjected the recipient to an undue burden [*see Mattel, Inc. v. Walking Mountain Prods. (9th Cir 2003) 353 F3d 792, 813-815*].

Distinguish:

A subpoena may not be modified or quashed on the basis that it seeks such information from a retained expert. The subpoena should be carefully examined to see if it is objectionable on other grounds.

Cross References:

Discussion of moving to modify or quash a subpoena, see *§ 23.279*. Further discussion of discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.34*.

23.276[9] Determine Whether Subpoena Imposes Undue Burden. On timely motion, a court may modify or quash a subpoena that subjects a person to an undue burden [*Fed R Civ P 45(c)(3)(A)(iv)*]. If the subpoena imposes an undue burden, attempt to resolve the issue with the attorney who issued the subpoena. If informal resolution is

unsuccessful, move to quash or modify the subpoena.

A person subject to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost; on a motion to compel discovery or to quash, the person subject to the subpoena bears the burden of making that showing. If that showing is made, the court may still order discovery from those sources if the requesting party shows good cause, considering the limits imposed under Fed R Civ P 26(b)(2)(C). The court may also specify conditions for the discovery [Fed R Civ P 45(d)(1)(D)].

Whether a subpoena imposes an undue burden is a "case specific inquiry," and depends on factors such as [*Gonzales v. Google, Inc. (ND Cal 2006) 234 FRD 674, 680-681* ; *Concord Boat Corp. v. Brunswick Corp. (SDNY 1996) 169 FRD 44, 53*]:

- Relevance [*see Moon v. SCP Pool Corp. (CD Cal 2005) 232 FRD 633, 637*].
- The subpoenaing party's need for the documents.
- The breadth of the request.
- The time period covered by the request.
- The particularity of the document descriptions.
- The burden imposed.

Example:

In connection with litigation in the Eastern District of Pennsylvania, the federal government moved to compel Google, Inc. to respond to its third-party subpoena requesting production of 50,000 URLs and a sample of 5,000 queries (text of the search string entered by a user) randomly selected from Google's data base for use in a scientific study of the effectiveness of filters. The Northern District found the requested information was relevant. The court rejected Google's argument that the subpoena imposed an undue burden, pointing out that the government agreed to compensate Google for the reasonable costs of producing the information, which Google estimated would require up to eight full time days of engineering time. However, the court determined that producing both the 50,000 URLs and the 5,000 queries would be unreasonably cumulative and duplicative and granted the motion to compel only as to the sample of 50,000 URLs [*Gonzales v. Google, Inc. (ND Cal 2006) 234 FRD 674, 680-686*].

Common examples of undue burden include [*In re Yassai (Bankr CD Cal 1998) 225 BR 478, 484*]:

- Untimely service.
- Inability to appear.
- Inability to produce requested documents or things.
- Failure to identify items requested.
- Excessive costs.

Warning:

The party who issues the subpoena, or the party's attorney, is responsible for taking "reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." [*Fed R Civ P 45(c)(1)*]. Failure to take "reasonable steps" may result in the imposition of sanctions, which may include lost earnings and reasonable attorney's fees [*Fed R Civ P 45(c)(1)*; *see e.g., Theofel v. Farey-Jones (9th Cir 2004) 359 F3d 1066, 1071 , cert. denied, 543 US 813 (2004)* (sanction for subpoena seeking production of "all copies of e-mails sent or received," with no limitation as to time or scope)].

Cross References:

Further discussion of the requirement that a subpoena not be unduly burdensome, see 9 *Moore's Federal Practice, § 45.04[1]* (Matthew Bender 3d ed.).

Discussion of discovery sanctions, see Ch. 25, Motions to Compel and Discovery Sanctions.

23.276[9A] Determine Whether to Object to Form Specified for Production of Electronically Stored Information. A subpoena to produce electronically stored information may specify the form or forms in which electronically stored information is to be produced [*Fed R Civ P 45(a)(1)(C)*]. An objection may be made to the form specified [Fed R Civ P 45(c)(2)(B)].

23.276[10] Determine Whether Subpoena Was Served for Improper Purpose. Sanctions may be imposed under Rule 45(c)(3)(A)(iv) if a subpoena was served for an improper purpose [*Mattel, Inc. v. Walking Mountain Prods. (9th Cir 2003) 353 F3d 792, 814* (in case involving infringement of Mattel's copyright, trademark, and trade dress in Barbie doll, district court found Mattel's Rule 30(b)(6) subpoena "way too broad for the explanation given by [Mattel's counsel]" and "abusively drawn," and that "no attempt had been made to try to tailor the information request to the immediate needs of the case"); *see Fed R Civ P 45(c)(3)(A)(iv)*].

It is improper to use subpoenas for the following purposes [*Mattel, Inc. v. Walking Mountain Prods. (9th Cir 2003) 353 F3d 792, 814*]:

- To annoy or to harass.
- To exert pressure on witnesses not to testify.
- Another purpose not related to obtaining information.

23.276[11] If Subpoena Presents Scheduling Conflict, Attempt Informal Resolution of Conflict. If a subpoena presents a scheduling conflict, contact the party who issued the subpoena and attempt to reschedule the date of the sought deposition, production, or inspection.

The subpoenaed individual should attempt to resolve the conflict informally as soon as possible because, if informal resolution is unsuccessful, he or she must determine the proper response and ensure that the response is timely made and served.

23.276[12] Verify Serving of Prior Notice of Production or Inspection. Prior notice of any commanded production of documents, electronically stored information, and things or inspection of premises must be served on each party to the action in the manner prescribed by *Fed R Civ P 5(b)* [*Fed R Civ P 45(b)(1)*].

Cross Reference:

Discussion of service under Rule 5(b), see Ch. 5, Formatting, Serving, and Filing Papers, *§ 5.22*.

If prior notice was not properly served and informal resolution is unsuccessful, move to quash the subpoena [*see Firefighters' Inst. For Racial Equal. v. City of St. Louis (8th Cir 2000) 220 F3d 898, 903 , cert. denied, 532 US 921 (2001)* (failure to serve prior notice of demand for production is basis for quashing subpoena)].

Cross Reference:

Further discussion of the prior notice requirement, see *§ 23.267*.

23.276[13] Choose Method of Resisting Discovery. A subpoenaed nonparty may resist a subpoena by:

- Serving written objections [*see 23.278*].
- Moving to quash or modify the subpoena [*see 23.279*].

A party generally may not challenge a nonparty subpoena unless the party claims a personal right or privilege to the subpoenaed documents [*see 23.278[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.277 LOCAL PRACTICE: ED Cal Requirements--Responding to Subpoenas.

Responses to subpoenas duces tecum must comply with *Fed R Civ P 45(d)(2)* and must identify each category in the subpoena as to which no documents are produced because no documents exist in the possession of the person subpoenaed [*ED Cal Civ LR 250.5(a)*].

Consider:

Compliance with local rules regarding document production under Rule 34 (such as setting forth each request separately) in connection with Rule 45 subpoena motions are not required. Parties, however, may use such rules as a guide for crafting the structure of their Rule 45 motions.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.278 Making Written Objection to Subpoena.

23.278[1] Written Objections Must Be Timely Made and Served. A person who is commanded to produce or permit inspection, copying, testing, or sampling may serve written objections to inspection, copying, testing or sampling of any or all of the designated materials or of the premises [*Fed R Civ P 45(c)(2)(B)*]. The objections must be served within 14 days after service of the subpoena, or before the time specified for compliance in the subpoena if the time for compliance is less than 14 days [*Fed R Civ P 45(c)(2)(B)*].

Cross References:

Forms of objections to subpoenas, see *§ 23.320*, and 9 Bender's Federal Practice Forms, Rule 45, Subpoena (Matthew Bender).

Further discussion of the timing of service of written objections, see 9 *Moore's Federal Practice, § 45.04[2]* (Matthew Bender 3d ed.).

Warning:

Failure to serve written objections to a subpoena within the time specified by *Fed R Civ P 45(c)(2)(B)* may constitute a waiver of the objections and any privileges that may have been claimed. In unusual circumstances and for good cause, untimely objections may be considered. "Courts have found unusual circumstances where: (1) the subpoena is overbroad on its face and exceeds the bounds of fair discovery; (2) the subpoenaed witness is a nonparty acting in good faith; and (3) counsel for the witness and counsel for the subpoenaing party were in contact concerning the witness' compliance prior to the time the witness challenged the legal basis for the subpoena" [*McCoy v. Southwest Airlines Co. (CD Cal 2002) 211 FRD 381, 385*].

23.278[2] Clearly State Objection and Include Privilege Log If Making Claim of Privilege. If material is withheld on the ground that it is privileged or subject to protection as trial preparation material, the claim must be expressly made and supported by a description of the nature of the material not produced that is sufficient to enable the

demanding party to contest the claim [*Fed R Civ P 45(d)(2)(A)*].

The Southern District has stated that, in the Ninth Circuit, one method of identifying documents to which claims of privilege are asserted is by a document-by-document privilege log; when circumstances warrant, though, the court in its discretion may permit other methods such as a summary of the purportedly privileged documents by category [*see In re Imperial Corp. of Am. (SD Cal 1997) 174 FRD 475, 477-478*].

The Northern District, however, stated that general objections do not satisfy the requirements of *Fed R Civ P 45(d)(2)*, and on that basis ordered a subpoenaed party to "serve a privilege log listing all documents withheld on the ground of privilege against disclosure and providing information as to each such document sufficient to sustain the burden of asserting the privilege(s)" [*Compaq Computer Corp. v. Packard Bell Elecs., Inc. (ND Cal 1995) 163 FRD 329, 338*].

Although the written objections must clearly state the basis for each objection, it is not necessary that the privilege log be served with the objections, as long as the log is served within a reasonable time [*see Tuite v. Henry (DC Cir 1996) 98 F3d 1411, 1416-1417* (Advisory Committee Notes indicate that purpose of *Fed R Civ P 45(d)(2)* "is to provide a party whose discovery is constrained by a claim of privilege ... with information sufficient to evaluate such a claim and to resist if it seems unjustified")]. The time deemed reasonable to serve the privilege log will depend on the complexity and extensiveness of the log (*e.g.*, number of items, identification of addresses, etc.).

Cross References:

Discussion of producing a privilege log within a reasonable time, see 9 Moore's Federal Practice, Ch. 45, Subpoena (Matthew Bender 3d ed.).

Discussion of privilege logs and form, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, *§§ 24.26*, *24.103*.

23.278[3] Because Objection Stays Discovery, Do Not Permit Party Seeking Discovery to Proceed Without a Court Order. The serving of written objections to a subpoena automatically stays discovery [*Fed R Civ P 45(c)(2)(B)*]. The party serving the subpoena, therefore, may not obtain the discovery sought without a court order [*Fed R Civ P 45(c)(2)(B)*].

23.278[4] Person Making Objections Must Have Standing to Object to Subpoena. Only the person subject to a subpoena has standing to object to it [*In re* Seagate Tech. II Sec. Litig. (ND Cal 1993) 1993 US Dist LEXIS 18065, at *2].

Distinguish:

In certain circumstances, persons other than the person at whom a subpoena is directed may move to quash or modify the subpoena, such as when the subpoena violates a case management order [*see, e.g., Integra Lifesciences I, Ltd. v. Merck KgaA (SD Cal 1999) 190 FRD 556, 561*].

Cross Reference:

Discussion of standing to modify or quash a subpoena, see *§ 23.279[8]*.

23.278[5] LOCAL PRACTICE: ED Cal Requirements--Written Objection to Subpoena. Each objection to a subpoena to compel production must include a statement of reasons and, if appropriate, citation to relevant authority [*ED Cal Civ LR 250.5(b)*].

Legal Topics:

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

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23.279 Moving to Modify or Quash Subpoena.

23.279[1] When Subpoena Must Be Modified or Quashed. On timely motion, a court *must* modify or quash a subpoena that [*Fed R Civ P 45(c)(3)(A)(i)-(iv)*]:

- Fails to allow a reasonable time for compliance;
- Requires a person who is not a party or an officer of a party to travel more than 100 miles from where that person resides, is employed, or regularly transacts business;
- Requires disclosure of privileged or other protected materials; or
- Subjects a person to an undue burden.

Cross References:

Discussion of what constitutes a reasonable time for compliance, see *§§ 23.262[8]*, *23.263[7]*, and *23.264[7]*. Discussion of the 100-mile limit on travel, see *§ 23.262[11]*. Discussion of subpoenas seeking privileged material, see *§ 23.276[6]*. Discussion of what constitutes an undue burden, see *§§ 23.262[10]*, *23.268[8]*, *23.264[8]*, and *23.276[9]*.

23.279[2] When Subpoena May Be Modified or Quashed. On timely motion, a court *may* modify or quash a subpoena that [*Fed R Civ P 45(c)(3)(B)(i)-(iii)*]:

- Requires disclosure of a trade secret or other confidential research, development, or commercial information; or
- Requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made without the request of any party; or

- Requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial.

Public policy concerns may weigh in favor of quashing a subpoena. The Northern District of California suggested that the federal government withdraw its subpoenas served on nonparty affiliates of plaintiff for patient's medical records, stating that "allowing disclosure of the records will have a chilling effect on communications between patients and providers" [*see* Planned Parenthood Fed'n of Am., Inc. v. Ashcroft (ND Cal 2004) 2004 US Dist LEXIS 3383, at *6-*8].

Cross References:

Discussion of subpoenas seeking disclosure of trade secrets or other confidential research, development, or commercial information, see *§ 23.276[7]*. Discussion of subpoenas seeking disclosure of an unretained expert's opinion, see *§ 23.276[8]*. Discussion of subpoenas that seek to require a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, see *§ 23.262[11]*.

23.279[3] Motion Must Be Timely Made. A court must modify or quash a subpoena "on timely motion" for good cause [*Fed R Civ P 45(c)(3)(A)*].

Although the rule does not define "timely," courts in other districts have held that a motion to quash a subpoena is timely if it is made at any time before the date of compliance specified in the subpoena [*see, e.g., Nova Biomedical Corp v. i-Stat Corp. (SDNY 1998) 182 FRD 419, 422*].

Warning:

If substantial notice was provided, the moving party should not wait until the eve of the compliance date so as not to be susceptible to the charge that the timing was intended to inconvenience unnecessarily the party serving the subpoena or to delay resolution of the dispute. Additionally, the motion must be made promptly so that there is enough time for the motion to be heard and granted before the date of a scheduled deposition [*King v. Fidelity Nat'l Bank of Baton Rouge (5th Cir 1983) 712 F2d 188, 191*].

23.279[4] Motion Must Be Made in Proper Court. A motion to modify or quash a subpoena should be made in the court that issued the subpoena [*Fed R Civ P 45(c)(3)(A)*]. Only the court from which the subpoena was issued will quash or modify the subpoena [*see Visx, Inc. v Nidek Co. (ND Cal 2002) 208 FRD 615, 616*].

23.279[5] Motion Does Not Automatically Stay Discovery. Discovery is not automatically stayed upon the filing of a motion to modify or quash a subpoena [*Fed R Civ P 45(c)(3)(A)*]. Thus, consider moving to stay discovery or for a protective order when moving to modify or quash a subpoena.

Cross References:

Discussion of motion for protective order, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.35 -22.66*. Discussion of motion for stay of discovery, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§ 22.40*.

23.279[6] Good-Faith Effort Generally Not Technically Required for Motions to Modify or Quash Subpoenas. The requirement that counsel meet and confer prior to moving for a protective order or to compel production does not apply to motions to modify or quash a subpoena pursuant to *Fed R Civ P 45(c)(3)(A)* or *(B)* [*Fed R Civ P 26(c), 37(a)(3)(B)*].

Consult local rules and individual judges' Standing Orders; some judges require counsel to make an effort to resolve the issue prior to the filing of *any* discovery motion. Counsel also should attempt to resolve the issue informally in case either a protective order or a motion to compel prove to be necessary, as certification of efforts taken to resolve the dispute is required for either course of action.

Judge's Perspective:

The safest and best course, even absent a specific requirement, is to establish a record that informal resolution was attempted through the meet and confer process.

23.279[7] LOCAL PRACTICE: Requirements for Motion to Modify or Quash Subpoena.

23.279[7][a] LOCAL PRACTICE: CD Cal Requirements. Prior to the filing of a motion pursuant to *Fed R Civ P 26 through 37*, counsel are required to confer in good faith to resolve the dispute [*CD Cal Civ LR 37-1*].

23.279[7][b] LOCAL PRACTICE: ED Cal Requirements. Motions pursuant to *Fed R Civ P 26-37*, including motions for protective orders, require a prior attempt at informal resolution, and a Joint Statement re Discovery Disagreement [*ED Cal Civ LR 251(b)*].

23.279[7][c] LOCAL PRACTICE: ND Cal Requirements. The court will not entertain either a request or a motion to resolve a disclosure or discovery dispute unless counsel have conferred to attempt to resolve the dispute [*ND Cal Civ LR 37-1(a)*].

23.279[7][d] LOCAL PRACTICE: SD Cal Requirements. The court will not entertain any motion brought pursuant to *Fed R Civ P 26-37* unless counsel have conferred and attempted to resolve the dispute [*SD Cal Civ LR 26.1(a)*]. A certificate of compliance that the parties have conferred must be filed with the motion [*SD Cal Civ LR 26.1(b)*].

23.279[8] Standing to Modify or Quash Subpoena. Generally, only the person served with a subpoena has standing to quash or modify the subpoena [*Fed R Civ P 45(c)(2)(B), (3)(A)*]. However, the Southern District has held that any party to the litigation has the right to move for a protective order when a subpoena is issued in violation of case management orders issued under *Fed R Civ P 16* or *Fed R Civ P 26* [*see, e.g., Integra Lifesciences I, Ltd. v. Merck KgaA (SD Cal 1999) 190 FRD 556, 561*]. The Central District has stated that although a party may not object to a subpoena served on a nonparty, the party may either move for a protective order or move to quash a subpoena served on a nonparty [*Moon v. SCP Pool Corp. (CD Cal 2005) 232 FRD 633, 637* (granting defense motion to quash subpoena served on nonparty)].

The Northern District has held that a nonparty asserting that the material sought by a subpoena is not relevant to the underlying action has standing to quash the subpoena [*see Compaq Computer Corp. v. Packard Bell Elecs., Inc. (ND Cal 1995) 163 FRD 329, 335-336*].

District courts in other states have held that a party does not have standing to quash a subpoena served on a third party unless the party seeks to quash based on claims of privilege relating to documents being sought [*Thomas v. Marina Assocs. (ED Pa 2001) 202 FRD 433, 434*].

Cross References:

Form of notice of motion to quash subpoena, see *§ 23.320*.

Forms of motions to modify or quash subpoenas, see *§ 23.320*, and 9 Bender's Federal Practice Forms, Rule 45, Subpoena (Matthew Bender).

Discussion of formatting, service, and filing requirements for motions, see Ch. 5, Formatting, Serving,

and Filing Papers.

General discussion of discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.34*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.280 Moving for a Protective Order.

23.280[1] When to Move for a Protective Order. An individual objecting to a subpoena should consider making a motion for a protective order [*see Fed R Civ P 26(c)*]. Consider moving for a protective order simultaneously to (1) moving to modify or quash a subpoena, or (2) serving written objections to a subpoena.

Example:

If the time set for a deposition in a subpoena to compel testimony presents a scheduling conflict, first attempt to resolve the issue informally. If informal resolution is unsuccessful, counsel for the proposed deponent should file a motion for a protective order with the court that issued the subpoena, accompanied by a certification of counsel's attempt to resolve the issue informally [*Fed R Civ P 26(c)*].

Cross Reference:

Discussion of using protective orders, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.35 -22.66*.

23.280[2] LOCAL PRACTICE: SD Cal Requirements--Moving for Protective Order When Served With Motion to Compel. Any party or nonparty against whom a motion under *Fed R Civ P 37(a)* or *45(d)(1)* is being made may notice for hearing at the same time a motion for protective order under *Fed R Civ P 26(c)* [*SD Cal Civ LR 26.1(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23.281 Producing Documents and Electronically Stored Information in Response to Subpoena.

23.281[1] Materials in "Control" Must Be Produced. The person subject to the subpoena "is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served" [*see Fed R Civ P 45*, Committee Note of 1991]. "Control" is defined as "the legal right to obtain documents upon demand" [*7-Up Bottling Co. v. Archer Daniels Midland Co. (9th Cir 1999) 191 F3d 1090, 1107 , cert. denied, 529 US 1037 (2000)* ("[P]roof of theoretical control is insufficient; a showing of actual control is required")].

Cross Reference:

Further discussion of the nature of "control," see *§ 23.153[4][b]*.

23.281[2] How to Produce Documents. A person responding to a subpoena to produce documents must produce the documents as they are kept in the usual course of business, or must organize and label the documents to correspond with the categories in the demand [*Fed R Civ P 45(d)(1)(A)*].

Cross Reference:

Further discussion of production of documents, see *§§ 23.135 -23.156*.

23.281[2A] How to Produce Electronically Stored Information. A subpoena may specify the form or forms in which electronically stored information is to be produced [*Fed R Civ P 45(a)(1)(C)*]. If the form specified is unobjectionable, production should be made in that form. If the form specified is objectionable, an objection should be made [*see Fed R Civ P 45(c)(2)(B)*]. If a subpoena does not specify the form or forms for producing electronically stored information, the person subject to the subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable [*Fed R Civ P 45(d)(1)(B)*], provided that electronically stored information need not be produced in more than one form [*Fed R Civ P 45(d)(1)(C)*].

23.281[3] Nonparty May Be Entitled to Reimbursement for Costs Incurred in Complying With Subpoena. A

nonparty may be entitled to reimbursement for the costs incurred in complying with a subpoena [*see United States v. Columbia Broad. Sys., Inc. (9th Cir 1982) 666 F2d 364, 372 , cert. denied, 457 US 1118 (1982)*]. The court will consider the following factors [*see United States v. Columbia Broad. Sys., Inc. (9th Cir 1982) 666 F2d 364, 372-373 , cert. denied, 457 US 1118 (1982)* ; *see also Compaq Computer Corp. v. Packard Bell Elecs., Inc. (ND Cal 1995) 163 FRD 329*]:

- The scope of the discovery.
- The invasiveness of the requests.
- The need to separate responsive from privileged or irrelevant material.
- The reasonableness of the cost of production.

23.281[4] LOCAL PRACTICE: ED Cal Requirements--Responding to Subpoenas Duces Tecum. Responses to subpoenas duces tecum must identify each category in the subpoena as to which no documents exist in the possession of the person subpoenaed and must comply with *Fed R Civ P 45(d)(2)* [*ED Cal Civ LR 250.5(a)*].

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
X. NONPARTY DISCOVERY: SUBPOENA
D. Enforcing Subpoena

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.282

23.282 Attempt to Resolve Contested Issues Through Meet and Confer With Counsel.

A motion to compel compliance with discovery requires a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the subpoenaed information or material without court action [*Fed R Civ P 37(a)(1)*].

Cross References:

Discussion of motions to compel, including local rule coverage, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.03 -25.27*.

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
X. NONPARTY DISCOVERY: SUBPOENA
D. Enforcing Subpoena

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.283

23.283 Moving to Compel.

23.283[1] Filing Motion to Compel After Being Served With Written Objections to Subpoena. If, after serving a subpoena, you are served with written objections to the subpoena, you may move at any time for an order to compel production once you have given notice to the subpoenaed person [*Fed R Civ P 45(c)(2)(B)*].

23.283[2] Order Compelling Production Must Protect Nonparty From Significant Expense. An order to compel production must protect a nonparty from significant expense resulting from the inspection and copying demanded [*Fed R Civ P 45(c)(2)(B)*].

23.283[3] Motion Must Be Made to Proper Court. The court in whose name the subpoena is issued is responsible for its enforcement [*see Fed R Civ P 45*, Committee Note of 1991; *see also Visx, Inc. v Nidek Co. (ND Cal 2002) 208 FRD 615, 616* (in multidistrict litigation, subpoenas duces tecum may only be enforced in district in which subpoenas were issued; plaintiff's motion to enforce subpoenas was denied for being brought in improper court)].

23.283[4] Motion to Compel Pursuant to Federal Rule of Civil Procedure 37(a). A party may move for an order to compel disclosure or discovery against a nonparty [*Fed R Civ P 37(a)(1)*]. The motion must be made to the court in the district where the discovery is being, or is to be, taken [*Fed R Civ P 37(a)(2)*]. The motion must include a certification that the party has conferred or has attempted to confer in good faith with the nonparty failing to make the discovery [*Fed R Civ P 37(a)(1)*].

Cross Reference:

Further discussion of moving for an order compelling disclosure or discovery pursuant to *Fed R Civ P 37(a)*, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.03 -25.27*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMotions to CompelCivil ProcedurePretrial MattersSubpoenas

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X. NONPARTY DISCOVERY: SUBPOENA
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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.284

23.284 Motion to Compel When Motion to Quash Is Sought by Recipient of Subpoena.

Consider making a motion to compel when, after serving a subpoena, the recipient of the subpoena moves to quash the subpoena; denial of the motion to quash may not, alone, compel compliance [*see Pennwalt Corp. v. Durand-Wayland, Inc. (9th Cir 1983) 708 F2d 492, 494* ; *see also Diamond State Ins. Co. v. Rebel Oil Co. (D Nev 1994) 157 FRD 691, 695*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMotions to CompelCivil ProcedurePretrial MattersSubpoenas

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CHAPTER 23 Methods of Discovery
X. NONPARTY DISCOVERY: SUBPOENA
D. Enforcing Subpoena

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.285

23.285 Contempt Sanction for Failing or Refusing to Respond to Subpoena.

A person who fails to obey a subpoena without an adequate excuse may be deemed in contempt of the court from which the subpoena issued [*Fed R Civ P 45(e)*].

An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place that is more than 100 miles from where the person resides, is employed, or regularly transacts business [*Fed R Civ P 45(e)*].

Some courts will not consider a contempt sanction based solely on the failure to obey a subpoena. Instead, these courts will require that a motion to compel and a resulting court order compelling discovery be issued as well [*see, e.g., Pennwalt Corp. v. Durand-Wayland, Inc. (9th Cir 1983) 708 F2d 492, 494* (denying motion to quash is not enough to make contempt order available; there must be an order to compel)].

Further, a witness who fails to comply with a subpoena may be afforded an opportunity to demonstrate an adequate excuse for the noncompliance [*see, e.g., Fremont Energy Corp. v. Seattle Post Intelligencer (9th Cir 1982) 688 F2d 1285, 1287*].

Cross References:

Ch. 22, Regulation of Discovery by Stipulation or Motion. Discussion of the sanctions available under *Fed R Civ P 37*, see Ch. 25, Motions to Compel and Discovery Sanctions. Discussion of contempt sanctions, see Ch. 35, Contempt.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsContemptGeneral Overview

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
A. Perpetuation of Testimony

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.286

23.286 Petition for Perpetuation of Testimony.

Petition for Perpetuation of Testimony.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
In the Matter of	)	
the Petition of _____	)	
[*name of petitioner*],	)	PETITION TO
to Perpetuate Testimony	)	PERPETUATE TESTIMONY
	)	(*Fed R Civ P 27(a)*)
	)	

IN THE MATTER OF _____ [*name of petitioner*], PETITION FOR PERPETUATION OF

TESTIMONY

This petition of _____ [*name of petitioner*] for the perpetuation of the testimony respectfully alleges:

1. Petitioner, _____ [*name*], is a citizen and resident of the State of _____. Potential adverse party _____ [*name*], is a citizen and resident of the State of _____ and is within the jurisdiction of this court.

2. Petitioner expects to be a party to an action _____ [*describe nature of anticipated action, e.g.,* for breach of contract], as _____ [*describe petitioner's interest in prospective action, e.g.,* plaintiff].

3. Parties who will be adverse to petitioner in the prospective action are:

_____ [*list names and addresses, if known, of anticipated adverse parties*].

4. The basis of federal jurisdiction for the prospective action is that _____ [*describe jurisdictional basis of action, e.g.,* diversity exists between Petitioner and the prospective adverse party as citizens and residents of different states, and the amount in controversy is more than the statutory minimum of $75,000].

5. The prospective action cannot be filed at this time because _____ [*describe reasons prospective action cannot be filed*].

6. Petitioner requests that this court issue an order permitting petitioner to perpetuate the testimony of _____ [*name*], who resides at _____ [*address*], who will testify as follows: _____ [*describe nature of testimony to be perpetuated*].

7. It is urgent and necessary that petitioner take the deposition of _____ [*name*] before the prospective action can be filed because _____ [*state reasons for urgency for perpetuating testimony*].

WHEREFORE, petitioner prays the court for an order authorizing petitioner to take the deposition of _____ [*name*] on oral examination for the purpose of perpetuating [his/her] testimony pursuant to *Federal Rules of Civil Procedure, Rule 27*.
Date: _____.

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Set forth verification or declaration under penalty of perjury*.]

NOTES.

Authority:

Fed R Civ P 27(a)(1)

Required Elements of Petition:
See *§ 23.07*

Venue Requirement:
See *§ 23.08[1]*

Related Form of Notice of Petition for Perpetuation of Testimony:
See *§ 23.287*

Related Form of Order Authorizing Perpetuation of Testimony:
See *§ 23.288*

Additional Forms of Perpetuation Petitions:
See 6 *Bender's Federal Practice Forms, Forms 27:1*, *27:2* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
A. Perpetuation of Testimony

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.287

23.287 Notice of Petition for Perpetuation of Testimony.

Notice of Petition for Perpetuation of Testimony.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	Civil Action No. _____
Plaintiff	NOTICE OF APPLICATION
vs.	TO PERPETUATE _____
_____ [*name*],	[TESTIMONY *OR* EVIDENCE] (*Fed. R. Civ. P. 27(a)*)
Defendant	Date of Hearing: _____
	Time of Hearing: _____
	Courtroom No. _____

To _____ [*name of expected adverse party*]

_____ [*street address, city, state*]

Take notice that _____ [*name of petitioner*], petitioner in the above-entitled matter, will apply to the United States District Court for the _____ District of _____, at _____ [*street address*], _____ [*city, state*] at _____ [*time*], in Courtroom No. _____, for the order to perpetuate certain testimony or other evidence that is more particularly described in the Petition, a copy of which is attached to this Notice.

You may appear and show cause, if you have any, at the time and place described above, why the Order requested in the attached Petition should not be granted. You are not required to appear if you do not oppose the Order set out in the Petition, but if you choose to do so, you are advised to consult with an attorney well in advance of the date set out above in order to be advised of the proper method and manner of opposing the Petition and the Order sought in the Petition.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 27(a)(2)

Requirements for Notice:
See *§ 23.08*

Timing:
See *23.08[5]*

Related Form of Petition for Perpetuation of Testimony:
See *§ 23.286*

Related Form of Order Authorizing Perpetuation of Testimony:
See *§ 23.288*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony

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CHAPTER 23 Methods of Discovery
XI. FORMS
A. Perpetuation of Testimony

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.288

23.288 Order Authorizing Perpetuation of Testimony.

Order Authorizing Perpetuation of Testimony.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	ORDER GRANTING PETITION
Defendant	)	TO PERPETUATE TESTIMONY
	)	
	)	

In the Matter of _____ [*name*], to Perpetuate the Testimony of _____ [*name*]

ORDER AUTHORIZING PERPETUATION OF TESTIMONY

The petition of _____ [*name*] for an order authorizing petitioner to take the deposition of _____ [*name*] on oral examination for the purpose of perpetuating _____ [his *or* her]

testimony pursuant to *Federal Rules of Civil Procedure, Rule 27* came on regularly for hearing by the court this date. Petitioner appeared by counsel _____ [*name*]; expected adverse party _____ [*name*] appeared by counsel _____ [*name*]. On proof made to the satisfaction of the court that perpetuation of the testimony may prevent a failure to delay of justice,

IT IS ORDERED that the petition be, and it hereby is, granted and that petitioner is authorized to take the deposition of _____ [*name*] on oral examination for the purpose of perpetuating [his/her] testimony pursuant to *Federal Rules of Civil Procedure, Rule 27*. The subject matter of the deposition is limited to _____ [*describe subject matter on which deposition may be taken*].
Dated: _____

_____

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
Fed R Civ P 27(a)(3)

Contents of Court Order on Petition to Perpetuate Testimony:
See *§ 23.11*

Taking of Deposition After Order Authorizing Perpetuation of Testimony:
See *§ 23.12*

Related Form of Notice of Petition for Perpetuation of Testimony:
See *§ 23.287*

Related Form of Petition for Perpetuation of Testimony:
See *§ 23.286*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
B. Oral Depositions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.289

23.289 Notice of Deposition.

Notice of Deposition.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	NOTICE OF DEPOSITION ON ORAL EXAMINA-
	)	TION
	)	

TO _____ [*list all parties or attorneys for parties*]:

PLEASE TAKE NOTICE that _____ [*identify party, e.g.,* Defendant Mary Jones] will take the deposition, on oral examination, of _____ [*identify deponent, e.g.,* Plaintiff John Smith]. The deposition will be taken on _____ [*date*], commencing at _____ [*time*], at _____ [*address where deposition will be taken*].

[*ADD, if deponent is a corporation or other entity*]

NOTICE IS FURTHER GIVEN that the matters on which examination is requested are _____ [*specify matters with reasonable particularity*]. _____ [*Name of deponent organization*] must designate and produce at the deposition one or more of its officers, directors, managing agents, or other persons who consent to testify on its behalf as to matters known or reasonably available to the organization. It is hereby requested that _____ [*name of deponent organization*] provide prompt notification in writing to the undersigned as to the name, address, telephone number, capacity, and job title of each person so designated to testify and the matters on which this person will testify.

[*ADD, if deponent is to produce documents or things at deposition pursuant to a subpoena duces tecum*]

NOTICE IS FURTHER GIVEN that _____ [*name of deponent*] shall bring and produce at the deposition, at the time and place specified in this notice, _____ [*specify materials to be produced pursuant to subpoena or refer to attachment*].

[*CONTINUE*]

The deposition will be taken before _____ [*identify deposition officer, or* a deposition officer who is authorized to administer an oath]. The testimony will be recorded by _____ [*specify, e.g.,* stenographic means]. If the deposition is not completed on the date specified in this notice, the taking of the deposition will continue from day to day until completed.

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 30(b)

Drafting Notice:
See *§§ 23.29*, *23.30*

Serving Notice:
See *§ 23.33*

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
B. Oral Depositions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.290

23.290 Notice of Motion and Motion for Leave to Take Deposition.

Notice of Motion and Motion for Leave to Take Deposition.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR
_____ [*name*],	)	LEAVE TO TAKE DEPOSITION
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order, pursuant to *Fed R Civ P 30(a)*, granting leave to take the deposition of _____ [*name of deponent*].

[*EITHER*]

Leave of court is required to take this deposition because _____ [*name of deponent*] is incarcerated in prison.

[*OR*]

Leave of court is required to take this deposition because the proposed deposition would result in more than 10 depositions being taken by _____ [*party's status and name*].

As explained in the Affidavit of _____ [*name of affiant*], prior to filing this motion, the attorney for _____ [*party's status and name*] sought, but was unable to obtain, a stipulation by the parties for the deposition of _____ [*name of deponent*].

[*OR*]

Leave of court is required to take this deposition because _____ [*name*], the proposed deponent, has already been deposed in this case.

As explained in the Affidavit of _____ [*name of affiant*], prior to filing this motion, the attorney for _____ [*party's status and name*] sought, but was unable to obtain, a stipulation by the parties for the deposition of _____ [*name of deponent*].

[*OR*]

Leave of court is required to take this deposition because _____ [*party's status and name*] seeks to take this deposition before the parties have agreed to a discovery plan.

As explained in the Affidavit of _____ [*name of affiant*], prior to filing this motion, the attorney for _____ [*party's status and name*] sought, but was unable to obtain, a stipulation by the parties for the deposition of _____ [*name of deponent*].

[*CONTINUE*]

Leave to take the deposition of _____ [*name of deponent*] should be granted for the following reason(s):

[*ADD, if appropriate*]

(a) The discovery sought by the proposed deposition of _____ [*name of deponent*] is not unreasonably cumulative or duplicative, nor is it obtainable from some other source that is more convenient, less burdensome, or less expensive, in that _____ [*specify*].

[*ADD, if appropriate*]

(b) _____ [*Party's status and name*] has not had ample opportunity by discovery in the action to obtain the information sought from the proposed deposition of _____ [*name of deponent*] because _____ [*specify*].

[*ADD, if appropriate*]

(c) The burden or expense of the proposed deposition of _____ [*name of deponent*] does not outweigh its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed deposition in resolving the issues, because _____ [*specify*].

[*CONTINUE*]

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ (Statement *or* Stipulation),] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
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B. Oral Depositions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.291

23.291 Objections to Errors or Irregularities in Notice of Deposition or to Deposition Officer.

Objections to Errors or Irregularities in Notice of Deposition or to Deposition Officer.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	
_____ [*name*],	)	OBJECTIONS TO _____
Defendant	)	[IRREGULARITIES IN NOTICE OF DEPOSITION
	)	*OR* DEPOSITION OFFICER]
	)	

NOTICE IS HEREBY GIVEN that _____ [*identify objecting party, e.g.,* Plaintiff John Smith] objects

to the notice of the taking of the deposition of _____ [*name*], which was served on _____ [*date*] by _____ [*identify party noticing deposition, e.g.,* Defendant Mary Jones], on the following grounds:

[*EITHER*]

_____ [*State error or irregularity of deposition notice not complying with Fed R Civ P 30(b), e.g.,* The notice of deposition is accompanied by a request for production, but the date of the deposition does not allow the 30 days' notice required for that request under *Fed R Civ P 34*].

[*Set forth further errors or irregularities, e.g.,* The notice names a corporation as deponent but does not describe with reasonable particularity the matters on which examination is requested.]

[*AND/OR*]

The deposition officer identified in the notice of deposition, _____ [*name of officer*], is disqualified because _____ [*specify, e.g.,* the officer is a relative of an attorney for Defendant Mary Jones].

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 32(d)(1), (2)

Objections to Notice of Deposition:
See *§ 23.38*

Objections to Deposition Officer:
See *§ 23.39*

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
B. Oral Depositions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.292

23.292 Notice of Motion and Motion to Take Deposition by Telephone or Other Electronic Means.

Notice of Motion and Motion to Take Deposition by Telephone or Other Electronic Means.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	Civil Action No. _____
Plaintiff	
vs.	NOTICE OF MOTION AND MOTION TO TAKE DEPOSITION BY _____
_____ [*name*],	[*SPECIFY, E.G.,* TELEPHONE]
Defendant	
	Date of Hearing: _____
	Time of Hearing: _____
	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order, pursuant to *Fed R Civ P 30(b)(7)*, permitting _____ [*party's status and name*] to take the deposition of _____ [*name of deponent*] by _____ [telephone *or specify other remote electronic means*], because _____ [*specify ground for motion, e,g,* the deponent is frail and bedridden].

As explained in the Affidavit of _____ [*name of affiant*], prior to filing this motion, the attorney for _____ [*party's status and name*] sought, but was unable to obtain, a stipulation by the parties for the deposition of _____ [*name of deponent*] by _____ [telephone *or specify other remote electronic means*].

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ (Statement *or* Stipulation),] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 30(b)(4); *CD Cal Civ LR 37-2* (Joint Stipulation); *ED Cal Civ LR 251(c)* (Joint Statement re Discovery Disagreements); *SD Cal Civ LR 26.1(b)* (Certificate of Compliance)

Motion for Deposition by Telephone:
See *§ 23.31*

Legal Topics:

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

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
B. Oral Depositions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.293

23.293 Notice of Motion and Motion for Protective Order During Deposition in Progress.

Notice of Motion and Motion for Protective Order During Deposition in Progress.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR PRO-
_____ [*name*],	)	TECTIVE ORDER
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for a protective order, pursuant to *Fed R Civ P 30(d)(4)*, that the deposition of _____ [*name*], which commenced on _____ [*date*] at _____ [*time*] at _____ [*place*], pursuant to a notice served on _____ [*date*], be _____ [*specify order sought, e.g.*, terminated].

[*Add if sanctions may be requested in same motion under local rules* _____ (*Party's status and name*) will also move for an award of expenses incurred in bringing this motion.]

The motion will be made on the ground that the deposition is being conducted _____ [*specify grounds, e.g.*, in bad faith and in a manner that is unreasonably annoying and embarrassing to the deponent].

There is a particular and specific need for the protective order in that _____ [*specify*].

As explained in the Affidavit of _____ [*name of affiant*], prior to filing this motion, the attorney for _____ [*party's status and name*] sought, but was unable to obtain, a stipulation by the parties to _____ [terminate *or* limit] the deposition of _____ [*name of deponent*].

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ (Statement *or* Stipulation),] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 30(d)(3); *CD Cal Civ LR 37-2* (Joint Stipulation); *ED Cal Civ LR 251(c)* (Joint Statement re Discovery Disagreements); *SD Cal Civ LR 26.1(b)* (Certificate of Compliance)

Grounds for Motion:
See *§ 23.53[2]*

Relief Available:
See *§ 23.53[3]*

Award of Expenses:
See *§ 23.53[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective Orders

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
C. Written Depositions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.294

23.294 Notice of Deposition by Written Questions.

Notice of Deposition by Written Questions.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	NOTICE OF DEPOSITION BY WRITTEN QUES-
	)	TIONS
	)	

TO _____ [*list all parties or attorneys for parties*]:

PLEASE TAKE NOTICE that _____ [*identify party, e.g.,* Defendant Mary Jones] will take the deposition, by written questions, of _____ [*state name and address of deponent, if known, or describe deponent, if name not known*]. The deposition will be taken by _____ [*name or descriptive title and address of deposition officer*].

The deposition upon written questions will be taken _____ [*specify date, time, and place of deposition*].

[*ADD, if deponent is a corporation or other entity*]

NOTICE IS FURTHER GIVEN that the matters on which examination is requested are _____ [*specify matters with reasonable particularity*]. _____ [*Name of deponent organization*] must designate and produce at the deposition one or more of its officers, directors, managing agents, or other persons who consent to testify on its behalf as to matters known or reasonably available to the organization. It is hereby requested that _____ [*name of deponent organization*] provide prompt notification in writing to the undersigned as to the name, address, telephone number, capacity, and job title of each person so designated to testify and the matters on which this person will testify.

[*ADD, if deponent is to produce documents or things at deposition pursuant to a subpoena duces tecum*]

NOTICE IS FURTHER GIVEN that _____ [*name of deponent*] shall bring and produce at the deposition, at the time and place specified in this notice, _____ [*specify materials to be produced pursuant to subpoena or refer to attachment*].

[*CONTINUE*]

The testimony will be recorded by _____ [*specify, e.g.,* stenographic means]. If the deposition is not completed on the date specified in this notice, the taking of the deposition will continue from day to day until completed.

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 31(a)(3)

Drafting Notice:
See *§ 23.33*

Legal Topics:

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

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
C. Written Depositions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.295

23.295 Notice of Motion and Motion for Leave to Take Deposition by Written Questions.

Notice of Motion and Motion for Leave to Take Deposition by Written Questions.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	Civil Action No. _____
Plaintiff	
vs.	NOTICE OF MOTION AND MOTION
_____ [*name*],	FOR LEAVE TO TAKE DEPOSITION
Defendant	
	Date of Hearing: _____
	Time of Hearing: _____
	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order, pursuant to *Fed R Civ P 31(a)(2)*, granting leave to take the deposition by written questions of _____ [*name of deponent*].

[*EITHER*]

Leave of court is required to take this deposition because _____ [*name of deponent*] is incarcerated in prison.

[*OR*]

Leave of court is required to take this deposition because the proposed deposition would result in more than ten depositions being taken by _____ [*moving party, e.g.,* Defendant Mary Jones].

As explained in the Affidavit of _____ [*name of affiant*], prior to filing this motion, the attorney for _____ [*moving party, e.g.,* Defendant Mary Jones] sought, but was unable to obtain, a stipulation by the parties for the deposition by written questions of _____ [*name of deponent*].

[*OR*]

Leave of court is required to take this deposition because _____ [*name*], the proposed deponent, has already been deposed in this case.

As explained in the Affidavit of _____ [*name of affiant*], prior to filing this motion, the attorney for _____ [*moving party, e.g.,* Defendant Mary Jones] sought, but was unable to obtain, a stipulation by the parties for the deposition by written questions of _____ [*name of deponent*].

[*OR*]

Leave of court is required to take this deposition because _____ [*moving party, e.g.,* Defendant Mary Jones] seeks to take this deposition before the parties have agreed to a discovery plan.

As explained in the Affidavit of _____ [*name of affiant*], prior to filing this motion, the attorney for _____ [*moving party, e.g.,* Defendant Mary Jones] sought, but was unable to obtain, a stipulation by the parties for the deposition by written questions of _____ [*name of deponent*].

[*CONTINUE*]

Leave to take the deposition of _____ [*name of deponent*] should be granted for the following reason(s):

[*ADD, if appropriate*]

(a) The discovery sought by the proposed deposition by written questions of _____ [*name of deponent*] is not unreasonably cumulative or duplicative, nor is it obtainable from some other source that is more convenient, less burdensome, or less expensive, in that _____ [*specify*].

[*ADD, if appropriate*]

(b) _____ [*Moving party, e.g.,* Defendant Mary Jones] has not had ample opportunity by discovery in the action to obtain the information sought from the proposed deposition by written questions of _____ [*name of deponent*] because _____ [*specify*].

[*ADD, if appropriate*]

(c) The burden or expense of the proposed deposition by written questions of _____ [*name of deponent*] does not outweigh its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed deposition in resolving the issues, because _____ [*specify*].

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ (Statement *or* Stipulation),] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:

Fed R Civ P 31(a)(2); *CD Cal Civ LR 37-2* (Joint Stipulation); *ED Cal Civ LR 251(c)* (Joint Statement re Discovery Disagreements); *SD Cal Civ LR 26.1(b)* (Certificate of Compliance)

Circumstances When Motion for Leave Is Required:

See *§ 23.85*

Legal Topics:

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

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
C. Written Depositions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.296

23.296 Objections to Errors or Irregularities in Notice of Deposition, Qualifications of Deposition Officer, or Form of Questions.

Objections to Errors or Irregularities in Notice of Deposition, Qualifications of Deposition Officer, or Form of Questions.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	
_____ [*name*],	)	OBJECTIONS TO _____
Defendant	)	[IRREGULARITIES IN NOTICE OF DEPOSITION
	)	*OR* DEPOSITION OFFICER
	)	*OR* FORM OF QUESTIONS]
	)	

NOTICE IS HEREBY GIVEN that _____ [*identify objecting party, e.g.,* Plaintiff John Smith] objects to the notice of the taking of the deposition upon written questions of _____ [*name*], which was served on _____ [*date*] by _____ [*identify party noticing deposition, e.g.,* Defendant Mary Jones], on the following grounds:

[*EITHER*]

_____ [*State error or irregularity of deposition notice not complying with Fed R Civ P 31(a), e.g.,* The notice of deposition sets a date of deposition that does not allow adequate time for the service of cross, redirect, recross questions as required under *Fed R Civ P 31(a)(4)*].

[*Set forth further errors or irregularities, e.g.,* The notice does not name a particular deponent and does not contain a general description sufficient to identify the person or the particular class or group to which the person belongs.]

[*AND/OR*]

The deposition officer identified in the notice of deposition upon written questions, _____ [*name of officer*], is disqualified because _____ [*specify, e.g.,* the officer is a relative of an attorney for Defendant Mary Jones].

[*ADD, IF APPROPRIATE*]

NOTICE IS FURTHER GIVEN that _____ [*identify objecting party, e.g.,* Plaintiff John Smith] objects to the following question(s) submitted by _____ [*identify party propounding questions, e.g.,* Defendant Mary Jones] on the following grounds:

_____ [*Set forth question objected to, and specify ground for objection, e.g.,* The question is vague and asks the deponent, a fact witness, to state a conclusion as to liability instead of specific facts].

[*Set forth further questions objected to and grounds for objections.*]

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 32(d)(1), (2), (3)(C)

Objections to Notice of Deposition:
See *§§ 23.93 -23.95*

Legal Topics:

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

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
C. Written Depositions

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.297

23.297 Notice of Motion and Motion for Protective Order That Discovery Be Taken by Other Means.

Notice of Motion and Motion for Protective Order That Discovery Be Taken by Other Means.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR PRO-
_____ [*name*],	)	TECTIVE ORDER
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for a protective order, pursuant to *Fed R Civ P 26(c)*, that the discovery of _____ [*name*], which is to be taken by deposition upon written questions on _____ [*date*] at _____ [*time*] at _____ [*place*], pursuant to a notice served on _____ [*date*], be _____ [*specify other method for obtaining discovery, e.g.*, done by interrogatories].

[*Add if sanctions may be requested in same motion under local rules* _____ (*Party's status and name*) will also move for an award of expenses incurred in bringing this motion.]

The motion will be made on the ground that good cause exists for the order because _____ [*specify, e.g.*, the deponent is confined to his home due to a broken leg and will be unable to travel to the site of the deposition].

As explained in the Affidavit of _____ [*name of affiant*], prior to filing this motion, the attorney for _____ [*party's status and name*] sought, but was unable to obtain, an agreement by the parties to _____ [*specify, e.g.*, pursue this discovery by interrogatories].

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ (Statement *or* Stipulation),] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 26(c); *CD Cal Civ LR 37-2* (Joint Stipulation); *ED Cal Civ LR 251(c)* (Joint Statement re

Discovery Disagreements); *SD Cal Civ LR 26.1(b)* (Certificate of Compliance)

Grounds for Motion:
See *§ 23.41*

Relief Available:
See *§ 23.41[3]*

Legal Topics:

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

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
D. Interrogatories

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.298

23.298 Sample Interrogatories.

Sample Interrogatories.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	INTERROGATORIES
	)	
	)	

_____ [*Identify propounding party, e.g.,* PLAINTIFF JOHN SMITH]'S _____ [*specify interrogatories, e.g.,* FIRST SET OF INTERROGATORIES] TO _____ [*identify responding*

party, e.g. DEFENDANT MARY JONES]

_____ [*Identify propounding party, e.g.,* Plaintiff John Smith] requests that _____ [*identify responding party, e.g.,* Defendant Mary Jones], answer all of the following interrogatories, in writing and under oath, as required by the *Federal Rules of Civil Procedure, Rule 33*. Under Rule 33, a copy of your written response to these interrogatories must be served on _____ [*name of attorney for propounding party*] within 30 days after service, at the address listed in this document.

INSTRUCTIONS

[*Instructions are not necessary because the responding party is bound by the procedures for responding set forth in the Rules. If instructions are used, make sure they comport with the Rules; otherwise the responding party will have grounds to object.*]

In answering these interrogatories, furnish all information that is available to you. If you cannot answer an interrogatory completely, answer it to the extent possible. If you do not have personal knowledge sufficient to respond fully to an interrogatory, so state, but make a reasonable and good-faith effort to obtain the information by inquiry to other natural persons or organizations, unless the information is equally available to the propounding party.

In answering each interrogatory:

(a) Identify by date, sender, recipient, location, and custodian each document relied on that forms a basis for the answer given or the substance of what is given in the answer to these interrogatories.

(b) State the name of each person to whom the information is a matter of personal knowledge.

(c) Identify each person who assisted or participated in preparing or supplying any of the information given in answer to or relied on in preparing answers to these interrogatories.

(d) If you maintain that any document or record that refers to or relates to anything about which these interrogatories ask has been destroyed, set forth the content of that document, the location of any copies of the document, the date of destruction, and the name of the person who ordered or authorized the destruction.

DEFINITIONS

The following definitions apply for purposes of responding to these interrogatories:

(a) "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

(b) "Document" is defined according to *Federal Rules of Civil Procedure, Rule 34(a)*, including, without limitation, electronic or computerized data compilations. A draft or nonidentical copy is a separate document within the meaning of this term.

(c) "To identify a person" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of

employment. Once a person has been so identified, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(d) "To identify documents" means to give to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s), and recipients.

(e) The designation of "Plaintiff," "Defendant," a party's full or abbreviated name, or a pronoun referring to a party, means the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries, or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

(f) "Person" means any natural person or any business, legal, or governmental entity or association.

(g) "Concerning" means relating to, referring to, describing, evidencing, or constituting.

INTERROGATORIES

[*Insert numbered interrogatories, taking into account format and numerical limitations imposed by Rule 33 and local court rules. For example:*]

1. Identify each person who saw _____ [*describe occurrence*].

2. State which of the persons in the answer to Interrogatory 1 made written statements concerning _____ [*describe subject matter*], and further state in whose custody each written statement reposes.

3. Identify each person who was present during _____ [*describe occurrence*].

4. State which of the persons in the answer to Interrogatory 3 made written statements concerning _____ [*describe subject matter*], and further state in whose custody each written statement reposes.

5. Identify all persons with knowledge of [*describe occurrence*].

[*Continue in this manner, numbering sequentially*].

Dated: _____

_____ [*firm name*]

By: _____

_____ [*typed name*]

Attorney for _____ [*propounding party*]

Authority:
Fed R Civ P 33(a)

Subject Matter of Interrogatories:

See *§ 23.114*

Timing:

See *§ 23.117*

Drafting Interrogatories:

See *§ 23.116*

Related Form of Motion to Propound Additional Interrogatories:

See *§ 23.299*

Legal Topics:

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

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
D. Interrogatories

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.299

23.299 Notice of Motion and Motion for Leave to Propound Interrogatories in Excess of Number Permitted by Rule.

Notice of Motion and Motion for Leave to Propound Interrogatories in Excess of Number Permitted by Rule.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
	)	
	)	
_____ [*name*],	)	NOTICE OF MOTION AND
Plaintiff	)	MOTION FOR LEAVE TO
vs.	)	PROPOUND INTERROGATORIES
_____ [*name*],	)	IN EXCESS OF NUMBER
Defendant	)	PERMITTED BY RULE
	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____

) Courtroom No. _____
)

_____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Pursuant to *Federal Rule of Civil Procedure 33(a)*, _____ [*identify propounding party,* e.g., Plaintiff John Smith], moves the court for an order permitting Plaintiff to propound interrogatories in excess of the number generally available under Rule 33.

This motion is made on the grounds that _____ [*specify need for additional interrogatories, e.g.,* this is a complex case involving _____, and additional information as to _____ is needed to prepare this case for trial].

Plaintiff's counsel has made a reasonable and good-faith attempt to resolve this issue informally, but the parties were unable to reach an agreement.

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

The additional proposed interrogatories are as follows:

[*Insert numbered interrogatories, starting with the next consecutive number following the last number in the previous set of interrogatories to this party. For example:*

26. Identify each person who saw _____ [*describe occurrence*].

27. State which of the persons in the answer to Interrogatory 26 made written statements concerning _____ [*describe subject matter*], and further state in whose custody each written statement reposes.

[*Continue in this manner, numbering sequentially*].

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ (Statement *or* Stipulation),] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 33(a); *CD Cal Civ LR 37-2* (Joint Stipulation); *ED Cal Civ LR 251(c)* (Joint Statement re Discovery Disagreements); *SD Cal Civ LR 26.1(b)* (Certificate of Compliance)

Grounds for Motion:
See *§ 23.115[b]*

Prerequisite to Motion:
See *§ 23.117[1]*

Related Form of Order:
See *§ 23.300*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesForm

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
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XI. FORMS
D. Interrogatories

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.300

23.300 Order Granting Motion for Leave to Propound Interrogatories in Excess of Number Permitted by Rule.

Order Granting Motion for Leave to Propound Interrogatories in Excess of Number Permitted by Rule.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	ORDER GRANTING MOTION
vs.	)	FOR LEAVE TO PROPOUND
_____ [*name*],	)	INTERROGATORIES IN
Defendant	)	EXCESS OF NUMBER
	)	PERMITTED BY RULE
	)	
	)	

On consideration of _____ [*identify propounding party, e.g.,* Plaintiff John Smith]'s MOTION FOR LEAVE TO PROPOUND INTERROGATORIES IN EXCESS OF NUMBER PERMITTED BY RULE, as provided in *Federal Rule of Civil Procedure 33(a)*:

It appears to the Court that Plaintiff has established the need for additional interrogatories because the information sought is relevant and necessary for the preparation of plaintiff's case:

It further appears that the proposed interrogatories presented to the Court are appropriately drafted to elicit the information needed:

And, it further appears that the parties conferred in a good-faith attempt to resolve this discovery dispute but were unable to do so:

THEREFORE, IT IS HEREBY ORDERED that the Plaintiff is granted leave to propound the additional Proposed Interrogatories as stated in Plaintiff's Motion.
Dated: _____

_____

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
Fed R Civ P 33(a)

Grounds for Motion:
See *§ 23.115[3]*

Prerequisite to Motion:
See *§ 23.117[1]*

Related Form of Motion:
See *§ 23.299*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesForm

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
D. Interrogatories

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.301

23.301 Response to Interrogatories.

Response to Interrogatories.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	RESPONSES TO INTERROGATORIES
	)	
	)	

ANSWERS TO _____ [*identify propounding party, e.g.,* PLAINTIFF JOHN SMITH]'S
_____ [*specify interrogatories, e.g.,* FIRST SET OF] INTERROGATORIES TO

_____ [*identify responding party, e.g.* DEFENDANT MARY JONES]

Responding Party: _____ [*Identify responding party, e.g.,* Defendant Mary Jones].

Propounding Party: _____ [*Identify propounding party, e.g.,* Plaintiff John Smith].

Defendant Mary Jones responds to the interrogatories served on her by Plaintiff John Smith as follows:

Interrogatory No. 1: [*Repeat interrogatory verbatim*]?

Response No. 1: _____ [*State answer, e.g.,* My name is Mary Jones; I reside at 1000 Main Street, Farallon City, California, 90000].

Interrogatory No. 2: [*Repeat interrogatory verbatim*]?

Response No. 2: _____ [*If stating an objection, clearly set forth specific ground for it; if invoking a privilege, clearly state which one; and answer any portion of interrogatory that is not objectionable, e.g.,* Objection on the ground that the subject matter concerns privileged lawyer-client communications, in that the communications consist of information transmitted in confidence from defendant to her lawyer in the course of the lawyer-client relationship. As to that portion of the interrogatory asking the date on which this conversation took place, the answer is _____].

Interrogatory No. 3: [*Repeat interrogatory verbatim*]?

Response No. 3: _____ [*If exercising the option to produce business records in lieu of an answer under Fed R Civ P 33(d), state, e.g.:* Pursuant to *Federal Rule of Civil Procedure 33(d)*, the documents from which the answer may be ascertained are identified as investigative reports regarding traffic accidents involving Metro Transit System buses for the years 2000-2002, and these documents may be examined on or after August 2, 2004, between the hours of 9 a.m. and 5 p.m. at 9876 Main Street, Farallon City, CA, 90000, or at any other time and place pursuant to stipulation.

[*CONTINUE setting forth each interrogatory and the appropriate responses*]

_____ [*date*]

[*EITHER, attorney signs if response contains one or more objections*]

_____ [*Firm Name*]

By: _____

[*signature*]

_____

[*typed name*]

Attorney for Mary Jones

[*AND/OR, party, its agent, or its officer signs, unless response contains only objections*]

_____ [*signature of responding party or agent or officer*]

_____ [*typed name*]

NOTES.

Authority:
Fed R Civ P 33(b), (d)

Timing:
See *§ 23.127*

Drafting:
See *§ 23.129*

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
E. Requests for Production and Inspection

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.302

23.302 Request for Production of Documents and Tangible Items for Inspection, Copying, or Testing.

Request for Production of Documents and Tangible Items for Inspection, Copying, or Testing.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	
_____ [*name*],	)	_____ [*NAME'S*]
Defendant	)	_____ [*NUMBER, E.G.*, FIRST]
	)	REQUEST FOR _____
	)	[*SPECIFY, E.G.*, PRODUCTION OF DOCU-
	)	MENTS]

Requesting Party: _____ [*requesting party, e.g.,* Plaintiff John Smith]

Responding Party: _____ [*responding party, e.g.,* Defendant Mary Jones]

SET NUMBER: _____ [*Specify number, e.g.,* One]

_____ [*Requesting party, e.g.,* Plaintiff John Smith] makes the following requests pursuant to *Federal Rule of Civil Procedure 34*. Rule 34(b) states that you must serve a written response to this request, indicating whether you will comply with each request listed in this request below, no later than 30 days after the date this request is served on you].

[*State either or both of following forms of request, numbering all requests consecutively*]

[*Alternative One. Request for documents. Specify separately the documents to be produced by specifically describing each individual document, or specify each category of documents with reasonable particularity.*]

DOCUMENTS REQUESTED

_____ [*requesting party, e.g.,* Plaintiff John Smith] requests that you produce the following [categories of] documents for inspection and copying:

1. _____ [*First document or category of documents requested, e.g.,* The report of Doctor Thomas Jones on the tests performed on Plaintiff John Smith on April 10, 2003, which you specified in Paragraph Number 4 of your Defendants Set One of Answers to Interrogatories in this action, which you filed on September 6, 2003].

RESPONSE TO REQUEST NO. 1: _____

2. _____ [*Second document or category of documents requested, e.g.,* all Maintenance Procedure Manuals for Model Number 654321 Vehicles that were in effect and used by Defendant Mary Jones on March 2, 2003].

RESPONSE TO REQUEST NO. 2: _____

3. _____ [*Third document or category of documents requested, e.g.,* The written warranty covering Vehicle Identification Number 123456 in Paragraph Number 4 of your Answer to the Complaint].

RESPONSE TO REQUEST NO. 3: _____

[*Alternative Two. Request for tangible items. Specify separately the things to be produced by specifically describing each individual item, or specify each category with reasonable particularity.*]

TANGIBLE ITEMS REQUESTED

_____ [*requesting party, e.g.,* Plaintiff John Smith] requests that you produce or provide access to the

following tangible items within the meaning of *Federal Rule of Civil Procedure 34(a)* for inspection and _____ [*specify applicable related activities from among following, e.g.*: copying, testing, sampling, photographing, and measuring].

4. _____ [*First tangible item to be produced or made available, e.g.,* The left front tire from Vehicle Identification Number 123456, which blew out on March 2, 2003, as asserted in Paragraph Number 11 of your Answer to the Complaint].

RESPONSE TO REQUEST NO. 4: _____

5. _____ [*Second tangible item to be produced or made available, e.g.,* All of the engine parts that you removed for inspection or testing from Vehicle Identification Number 123456 on March 2, 2003, as asserted in Paragraph Number 16 of your Answer to the Complaint].

RESPONSE TO REQUEST NO. 5: _____

TIME AND PLACE OF PRODUCTION AND _____ [*specify, e.g.,* INSPECTION AND COPYING *or* INSPECTION AND TESTING]

_____ [*requesting party, e.g.,* Plaintiff John Smith] requests that you produce or provide access to the [documents or tangible items] specified in these requests on _____ [*date*] at _____ [*time*] at _____ [*specify location, e.g.,* the offices of the attorney for Plaintiff John Smith, whose address is: Law Offices of Tom Doe, 100 North Main St., Suite 200, Farallon City, California 90000, Phone: 555-555-5555.]
Dated: _____

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 34(a)

Requirements for Request for Production:
See *§§ 23.137 -23.147*

Request for Production of Electronically Stored Information:
See *§ 23.309*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
E. Requests for Production and Inspection

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.303

23.303 Request for Permission to Enter on Land or Premises for Inspection, Copying, Testing, or Related Activities.

Request for Permission to Enter on Land or Premises for Inspection, Copying, Testing, or Related Activities.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	
_____ [*name*],	)	_____ [*NAME'S*]
Defendant	)	_____ [*NUMBER, E.G.,* FIRST]
	)	REQUEST
	)	FOR _____
	)	[*SPECIFY, E.G.,* PERMISSION TO ENTER PROPERTY FOR INSPECTION]

Requesting Party: _____ [*requesting party, e.g.,* Plaintiff John Smith]

Responding Party: _____ [*responding party, e.g.,* Defendant Mary Jones]

SET NUMBER: _____ [*Specify number, e.g.,* Two]

_____ [*Requesting party, e.g.,* Plaintiff John Smith] makes the following requests pursuant to *Federal Rule of Civil Procedure 34*. Rule 34(b) states that you must serve a written response to this request, indicating whether you will comply with each request listed in this request below, no later than 30 days after the date this request is served on you].

[*State all requests and number consecutively*.]

[*Specify separately and with reasonable particularity land or premises where the requesting party wants access*.]

REQUEST FOR ACCESS TO PROPERTY

_____ [*Requesting party, e.g.,* Plaintiff John Smith] requests that you provide access to the following property for inspection and _____ [*specify appropriate combination of following terms*: surveying or testing or photographing or measuring or sampling].

_____ [*Specify the manner in which the related activity will be performed, and whether it will permanently alter or destroy the property or anything on the property, e.g.,* The soil sampling will be performed by Acme Drilling Co., Inc., Professional Drillers, in accordance with standard soil sampling practice, and will not result in any permanent alteration or damage to the real property.]

1. _____ [*Property to which access sought, e.g.,* The 40 acres of land located in Farallon County, California owned by Defendant Mary Jones and known as the Jones tract, on which the injuries in the complaint took place].

RESPONSE TO REQUEST NO. 1: _____

2. _____ [*Property to which access sought, e.g.,* The Jones Manufacturing Plant Records Department, owned by Defendant Mary Jones and located in Farallon County, California, at 555 South Main St., Farallon City, California 90000].

RESPONSE TO REQUEST NO. 2: _____

TIME OF INSPECTION AND _____ [*specify, e.g.,* COPYING *or* TESTING *or* SAMPLING]

_____ [*requesting party, e.g.,* Plaintiff John Smith] requests that you produce or provide access to the [property *or* premises] specified in these requests on _____ [*date*] at _____ [*time*].
Dated: _____

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 34(a)

Requests for Entry on Land:
See § *23.137[3]*

General forms of requests for production of documents:
See 8 *Bender's Federal Practice Forms, Forms 34:1-34:5* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
E. Requests for Production and Inspection

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.304

23.304 Response to Request for Production, Inspection, and Copying of Documents.

Response to Request for Production, Inspection, and Copying of Documents.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	
_____ [*name*],	)	_____ [*NAME'S*] RESPONSE TO
Defendant	)	_____ [*NUMBER, E.G.*, FIRST]
	)	REQUEST FOR _____
	)	[*SPECIFY, E.G.*, PRODUCTION OF DOCU-
	)	MENTS]

Requesting Party: _____ [*requesting party, e.g.*, Plaintiff John Smith]

Responding Party: _____ [*responding party, e.g.*, Defendant Mary Jones]

SET NUMBER: _____ [*Specify number, e.g.*, One]

_____ [*Responding party, e.g.*, Defendant Mary Jones] makes the following responses to _____ [*requesting party, e.g.*, Plaintiff John Smith's Requests for Production Set Number One.], served on _____ [*date*].

[*State responses immediately following a verbatim statement of the complete request*.]

DOCUMENT REQUESTS AND CORRESPONDING RESPONSES

1. _____ [*First document or category of documents requested, e.g.*, All Maintenance Procedure Manuals for Model Number 654321 Vehicles that were in effect and used by Defendant Mary Jones on March 2, 2003].

RESPONSE TO REQUEST NO. 1: _____ [*Specify, e.g., if responding party agrees to request in entirety:* Defendant Mary Jones will produce all Maintenance Procedure Manuals for Model Number 654321 Vehicles that were in effect and used by Defendant on March 2, 2003, and that are currently in Defendant's possession, custody, or control].

2. _____ [*Second document or category of documents requested, e.g.*, "The Statement of Retail Prices" compiled by Tom Doe on April 10, 2003, which you referred to in Paragraph Number 4 of your Defendants Set One of Answers to Interrogatories in this action, which you filed on September 6, 2003].

RESPONSE TO REQUEST NO. 2: _____ [*Specify, e.g., if responding party objects to request in entirety:* Defendant Mary Jones objects to Request No. 2 in its entirety because the Statement of Retail Prices requested is protected by the attorney-client privilege].

_____ [*Responding party, e.g.*, Defendant Mary Jones] will produce or provide access to the documents specified in these responses on _____ [*date*] at _____ [*time*] at _____ [*specify location, e.g.*, the offices of the attorney for Defendant, Jane Lee, whose address is: Law Offices of Jane Lee, 50 South Main St., Suite 100, Farallon City, California 90000, Phone 555-999-9999].
Dated: _____

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 34(b)

Requirements for Responses to Request for Production:
See *§§ 23.149 -23.156*

Additional Form of Response to a Request for Production:
See 8 Bender's Federal Practice Forms, Form 34:85 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
E. Requests for Production and Inspection

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.305

23.305 Notice of Motion and Motion for Protective Order to Avoid Production of Documents.

Notice of Motion and Motion for Protective Order to Avoid Production of Documents.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR PRO-
_____ *name*],	)	TECTIVE ORDER
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for a protective order pursuant to *Fed R Civ P 26(c)*, _____ [*specify protective order sought, e.g.,* directing that Request No. 8 in the Request for Production and Inspection of Documents, Set Number 1, requested by Plaintiff John Smith and served on Defendant Mary Jones on August 18, 2003, need not be produced] [*add if sanctions may be requested in same motion under local rules*, and for an order imposing a monetary sanction against Plaintiff John Smith in the amount of $ _____]. The motion will be made on the grounds that _____ [*specify grounds, e.g.,* producing the records in Request No. 8 will result in undue burden and expense for Defendant Mary Jones].

As stated in the attached Affidavit of _____ [*name of affiant*], _____ [*specify grounds, e.g.,* Request No. 8 that Defendant Mary Jones produce all customer contracts she procured during 20 years in business would require that Defendant search through thousands of individual customer files, many of which are in storage facilities located in other states and countries, resulting in an estimated labor cost of 2700 worker hours, which constitutes an undue burden and expense for Defendant].

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ (Statement *or* Stipulation),] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 26(c); *Fed R Civ P 34(b)*; *CD Cal Civ LR 37-2* (Joint Stipulation); *ED Cal Civ LR 251(c)* (Joint Statement re Discovery Disagreements); *SD Cal Civ LR 26.1(b)* (Certificate of Compliance)

Basis for Motion:
See *§ 23.155*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
F. Discovery of Electronically Stored Information

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.306

23.306 Sample Internal Memo Regarding Suspension of Document Retention Policy.

Sample Internal Memo Regarding Suspension of Document Retention Policy.

Date: _____
To: All Employees
From: _____ [*name and title, e.g.,* President Tom Doe]
Re: Suspension of _____ [*name of client, e.g.,* ABC Corporation]'s Retention Policy

[*If suit has been filed:*]

_____ [*Name of client, e.g.,* ABC Corporation] has been sued by _____ [*name of plaintiff, e.g.,* Plaintiff XYZ Corporation] in connection with _____ [*description of dispute, e.g.*, the infringement of Plaintiff's trademark]. _____ [*Name of client, e.g.,* ABC Corporation] needs to preserve evidence that it believes may be relevant to the claims of _____ [*name of plaintiff, e.g.,* Plaintiff XYZ Corporation] and our defenses. Our normal policy for handling documents and electronic data has been suspended in light of this litigation.

[*OR, if litigation is imminent:*]

_____ [*Name of client, e.g.,* ABC Corporation] is aware of a dispute with _____ [*name of potential plaintiff, e.g.,* XYZ Corporation] regarding _____ [*description of dispute, e.g.*, the infringement of XYZ Corporation's trademark]. _____ [*Name of client, e.g.,* ABC Corporation] needs to preserve evidence that it believes may be relevant to the claims of _____ [*name of potential plaintiff, e.g.,* XYZ Corporation] and our defenses. Our normal policy for handling documents and electronic data has

been suspended in light of this threatened litigation.

[*CONTINUE*]

Do not alter, destroy, remove, or throw away any of your paper files or records. Do not alter or delete electronic files, including electronic mail, word processing files, databases, spreadsheets, image files, presentations, multimedia, and engineering files relating to the subject matter of the dispute.

The devices subject to this policy include, without limitation, any desktop or laptop computer used by you, regardless of where the computer is; network servers; shared servers, floppy discs, PDAs; voicemail; back-up tapes; and peripheral storage devices.

If you have any questions or concerns regarding the suspension of the document retention policy, please contact me.

[*Insert signature block*]

NOTES.

Authority:

William T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1455 ; *National Ass'n of Radiation Survivors v. Turnage (ND Cal 1987) 115 FRD 543, 557-558*

Duty to Preserve Evidence:

See *§ 23.161*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionEvidenceRelevanceSpoliation

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
F. Discovery of Electronically Stored Information

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.307

23.307 Sample Request for Preservation of Evidence.

[*Set forth heading including date and addressee information*]

Re: Preservation of Evidence

Dear _____:

As you are aware, _____ [*name of potential defendant, e.g.,* ABC Corporation] is currently in a dispute with my client, _____ [*name of client, e.g.,* Plaintiff XYZ Corporation], and the dispute may lead to litigation despite my sincere hope that we can resolve the dispute amicably. Because litigation is possible, _____ [*name of potential defendant, e.g.,* ABC Corporation] has an obligation to preserve potentially relevant evidence related to the dispute.

Accordingly, we request that you immediately suspend any retention or destruction policy currently in effect at _____ [*name of potential defendant, e.g.,* ABC Corporation]. In particular, do not alter or destroy any e-mails, electronic files, databases, whether maintained on servers, hard drives, disks, or any other storage devise. Do not destroy, alter, or copy over any back-up tapes. If you are planning to replace hard drives or perform routine systems or program upgrades, please preserve the old hard drives and perform the upgrades so as not to destroy any data. Please also instruct your employees to likewise suspend their practice of deleting or removing electronic or paper materials that relate in any way to the dispute. Any destruction or alteration of any electronic data, even if done pursuant to your retention policy, may result in claims for spoliation of evidence and sanctions.

Thank you for your anticipated cooperation.

[*Insert signature block*]

NOTES.

Authority:

William T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1455

Knowledge of Imminent Litigation Triggers Duty to Preserve Evidence:

See *§ 23.161[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionEvidenceRelevanceSpoliation

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.308

23.308 Sample Interrogatories Concerning Document Retention Policy and Data Storage.

Sample Interrogatories Concerning Document Retention Policy and Data Storage.

[*Include the following definitions for these interrogatories:*]

#. "YOU," and/or "CORPORATION" means Defendant _____ [*name of defendant, e.g.,* ABC Corporation] and any other PERSON representing it or acting on its behalf.

#. "PERSON" means, unless otherwise specified, any natural person, firm, entity, corporation, partnership, proprietorship, association, joint venture, other form of organization or arrangement, and government and government agency of every nature or type.

#. "ELECTRONIC INFORMATION SYSTEM" means any disk, including hard disks and floppy disks, CD-ROMs, DVDs, network servers, shared servers, computers, magnetic tape, back-up tape, voicemail, temporary files, and PDAs, whether currently on CORPORATION'S premises or otherwise, e.g., at an employee's home or remote office.

#. "ELECTRONIC DATA" means any information, including files, documents, images, video, metadata or any combination thereof stored, created or used on ANY CORPORATION ELECTRONIC INFORMATION SYSTEM.

[*Add these interrogatories to set:*]

INTERROGATORY NO. _____:

Describe every policy implemented by YOU to retain ELECTRONIC DATA.

INTERROGATORY NO. _____:

Describe every policy implemented by YOU to destroy ELECTRONIC DATA.

INTERROGATORY NO. _____:

Describe in detail CORPORATION'S use and maintenance of its ELECTRONIC INFORMATION SYSTEMS.

INTERROGATORY NO. _____:

Identify all ELECTRONIC DATA that CORPORATION destroyed, altered, or moved, including timing and circumstances of such destruction, alteration, or movement, as follows: _____ [*parameters of request, e.g.,* all electronic data related to the Plaintiff's trademark].

INTERROGATORY NO. _____:

Identify all individuals responsible for implementation of any policies related to storage and/or retention of ELECTRONIC DATA.

NOTES.

Authority:
Fed R Civ P 33

Use of Interrogatories to Discover Document Retention Policies:
See *§ 23.162[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesForm

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
F. Discovery of Electronically Stored Information

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.309

23.309 Sample Requests for Production of Electronically Stored Information.

Sample Requests for Production of Documents.

[*Include the following definitions and instructions for these requests:*]

#. "YOU," and/or "CORPORATION" means Defendant _____ [*name of defendant, e.g.,* ABC Corporation] and any other PERSON representing it or acting on its behalf.

#. "PERSON" means, unless otherwise specified, any natural person, firm, entity, corporation, partnership, proprietorship, association, joint venture, other form of organization or arrangement, and government and government agency of every nature or type.

#. "ELECTRONIC INFORMATION SYSTEM" means any disk, including hard disks and floppy disks, CD-ROMs, DVDs, network servers, shared servers, computers, magnetic tape, back-up tape, voicemail, temporary files, and PDAs, whether currently on CORPORATION'S premises or otherwise, e.g., at an employee's home or remote office.

#. "ELECTRONICALLY STORED INFORMATION" means any information, including files, documents, images, video, metadata, or any combination thereof stored, created, or used on ANY CORPORATION ELECTRONIC INFORMATION SYSTEM.

#. "RELATE," or any variant thereof, including, but not limited to, the term "relating to," shall be understood to apply if the data or information evidences, mentions, constitutes, contains, summarizes, describes, concerns, refers to directly or indirectly, supports, contradicts, addresses in any way, or otherwise deals with the subject matter described in the Request in which the term "relate," or any variant thereof, appears.

#. "EVIDENCE," or any variant thereof, including, but not limited to, the term "evidencing," shall be understood to

apply if the data or information directly or indirectly mentions, discusses, constitutes, concerns, supports, contradicts, refers, or in any way deals with the subject matter described in the Request in which the term appears.

#. "DOCUMENT" means a writing as defined by *Federal Rules of Evidence 1001(1)*, and shall include without limitation ELECTRONICALLY STORED INFORMATION, the original (and absent the original then a copy thereof), all file copies and copies not identical to the original of any writing or record of every type, form, and description that is in the possession, custody, or control of the responding party, or that no longer is in the responding party's possession but of that the responding party still has knowledge, whether or not said writings or records are claimed to be privileged or otherwise immune from discovery including by way of illustration and not limitation, the following items, whether said writings or records are on paper, magnetic disk, tape, or other computer or digital storage medium, microfilm, microfiche, floppy, or any other storage or recording medium: _____ [*describe any particular items, e.g.,* e-mails, voicemails, word processing documents, and written memos relating to Plaintiff's trademark].

#. If any document requested herein is withheld pursuant to any objection based on privilege, identify each document for which the privilege is claimed and state:

a. The type of document, including any title or identifying number on it;

b. Its date or origin or preparation;

c. The name of its originator;

d. The name(s) of the addressee(s), if any;

e. A brief summary of its substance; and

f. A factual and legal basis on which a privilege is claimed sufficient to permit the court to adjudicate the validity of the claim.

#. If any document requested to be produced by this request was in your possession, custody, or control, but has since been disposed of, lost, discarded, destroyed, or otherwise become unavailable, please identify which documents were destroyed, identify the person who ordered them destroyed, and state the reason for their destruction.

#. All requests are continuing in nature to the present.

DOCUMENTS REQUESTED

REQUEST FOR PRODUCTION NO. _____:

A copy of each version of CORPORATION'S policy RELATED to the retention or destruction of ELECTRONICALLY STORED INFORMATION.

REQUEST FOR PRODUCTION NO. _____:

All DOCUMENTS EVIDENCING policies, guidelines, or practices RELATED to CORPORATION'S retention or destruction policies.

REQUEST FOR PRODUCTION NO. _____:

A copy of each version of CORPORATION'S guidelines or practices RELATED to its back-up systems.

REQUEST FOR PRODUCTION NO. _____:

All DOCUMENTS discussing or describing the destruction of ELECTRONICALLY STORED INFORMATION, including directories and network logs since _____ [*date*].

REQUEST FOR PRODUCTION NO. _____:

All DOCUMENTS EVIDENCING the storage of ELECTRONICALLY STORED INFORMATION since _____ [*date*].

REQUEST FOR PRODUCTION NO. _____:

All logs or records concerning access to CORPORATION'S computer network since _____ [*date*].

REQUEST FOR PRODUCTION NO. _____:

All DOCUMENTS describing the configuration or design of CORPORATION'S internal computer networks.

REQUEST FOR PRODUCTION NO. _____:

All policies RELATED to storage allocation for individuals, departments, or divisions.

REQUEST FOR PRODUCTION NO. _____:

All policies RELATED to computer or network use.

REQUEST FOR PRODUCTION NO. _____:

All electronic mail policies.

NOTES.

Authority:
Fed R Civ P 34

Requesting Production of Electronically Stored Information:
See *§ 23.162[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
G. Physical and Mental Examinations

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.310

23.310 Notice of Motion and Motion Requesting Physical or Mental Examination.

Notice of Motion and Motion Requesting Physical or Mental Examination.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	Civil Action No. _____
Plaintiff	
vs.	NOTICE OF MOTION AND MOTION FOR ORDER COMPELLING
_____ [*name*],	_____ [PHYSICAL *OR* MENTAL]
Defendant	EXAMINATION
	Date of Hearing: _____
	Time of Hearing: _____
	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order compelling [*name and party designation or description of examinee, e.g.,* Plaintiff John Smith] to appear for and submit to a _____ [*describe nature of examination, e.g.,* physical] examination by _____ [*state name of examiner*, e.g., Dr. Patricia Brown] who is a duly licensed _____ [*describe relevant license, e.g.,* physician] specializing in _____ [*describe specialty of examiner, e.g.*, neurology].

The examination will concern [one of] the _____ [physical *or* mental] condition[s] of _____ [*name of person examined, e.g.,* John Smith] that is in controversy in this action, specifically, _____ [*describe specific physical or mental condition that is in controversy*].

The examination is scheduled for _____ [*time, e.g.,* 10:00 a.m.] on _____ [*date*] at the offices of _____ [*name of examiner*], which are located at _____ [*street address*], _____ [*city, state*]. The examination will take approximately _____ [*number*] hours, and will consist of _____ [*describe examination and any tests that will be performed*].

Grounds for Motion

As shown in the pleadings of this case and in the Affidavits of _____ and _____ [*names of affiants*], the _____ [*describe condition to be examined, e.g.,* neurological] condition of _____ [*name of person to be examined, e.g.,* John Smith] is in controversy in this action because _____ [*describe how condition to be examined is in controversy*].

Good cause exists for an examination of this condition because _____ [*describe why examination needed*].

As explained in the Affidavit of _____ [*name of affiant*], prior to filing this motion seeking a court order for this examination, the attorney for _____ [*name of moving party*] discussed this issue with the attorney for _____ [*name of party being examined*] and sought a voluntary stipulation that _____ [*name of person being examined*] would voluntarily submit to the examination described in this motion. The attorney for _____ [*name of party being examined*] refused to agree to this examination.

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ (Statement *or* Stipulation),] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 35; *CD Cal Civ LR 37-2* (Joint Stipulation); *ED Cal Civ LR 251(c)* (Joint Statement re Discovery Disagreements); *SD Cal Civ LR 26.1(b)* (Certificate of Compliance)

Drafting Motion:
See *§§ 23.198 -23.204*

Timing:
See *23.200*

Grounds for Motion:
See *§§ 23.202*, *23.203*

Related Form of Order:
See *§ 23.311*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
G. Physical and Mental Examinations

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.311

23.311 Order Granting Motion for Physical or Mental Examination.

Order Granting Motion for Physical or Mental Examination.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	
_____ [*name*],	)	ORDER GRANTING
Defendant	)	MOTION FOR
	)	_____ [PHYSICAL *OR* MENTAL]
	)	EXAMINATION
	)	

ORDER

This cause came on to be heard on motion of _____ [*moving party, e.g.,* Defendant Mary Jones] for an order requiring _____ [*name and party designation or description of examinee, e.g.,* Plaintiff John

Smith *or* Robert Smith, a person in the custody or control of Plaintiff John Smith] to submit to a _____ [*describe nature of examination, e.g.,* physical *or* mental *or* vocational *or* psychological *or other*] examination. It appearing to the court that the _____ [physical *or* mental] condition of _____ [*name of examinee*] is in controversy, and that the motion shows good cause for the examination,

IT IS ORDERED:

1. That _____ [*name of examinee, e.g.,* John Smith] submit to a _____ [*describe nature of examination, e.g.,* physical *or* mental *or* vocational *or* psychological *or other*] examination, to be conducted by _____ [*name of examiner*] at _____ [*place of examination*] on _____ [*date*] at _____ [*time of day*]. The examination will include the following: _____ [*describe nature and conditions of examination, including any specific procedures*].

2. That _____ [*name of examinee*] fully cooperate in the examination, including answering all inquiries of _____ [*name of examiner*] that are appropriate to an assessment or diagnosis of the _____ [physical *or* mental] condition of _____ [*name of examinee*].

3. That _____ [*state persons, if any, permitted to attend examination, and conditions of that attendance, e.g.,* the personal physician of John Smith will be permitted to attend the examination if John Smith so desires, but no other person, including counsel for any party to this action, will be permitted to attend the examination].

4. That _____ [*moving party, e.g.,* Defendant Mary Jones] will bear the costs of the examination.

IT IS SO ORDERED.
Dated: _____.

_____

UNITED STATES DISTRICT COURT JUDGE

NOTES.

Authority:
See *Fed R Civ P 35*

Grounds for Order:
See *§§ 23.202, 23.203*

Related Form of Motion:
See *§ 23.310*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
H. Requests for Admission

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.312

23.312 Requests for Admission--Official Form 51.

Requests for Admission--Official Form 51.

The plaintiff _____ asks the defendant _____ to respond within 30 days to these requests by admitting, for purposes of this action only and subject to objections to admissibility at trial:

1. The genuineness of the following documents, copies of which [are attached] [are or have been furnished or made available for inspection and copying].

(*List each document*.)

2. The truth of each of the following statements:

(*List each statement*.)
Date: _____

_____ [*signature of the attorney or unrepresented party*]

_____ [*printed name*]

_____ [*address*]

_____ [*e-mail address*]

_____ [*telephone number*]

NOTES.

Authority:
Fed R Civ P 36(a); Fed R Civ P Appendix of Forms, Forms 2, 51

Timing:
See *23.220*

Drafting Requests:
See *§ 23.222*

Service and Filing of Requests:
See *§§ 23.224*, *23.225*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsContent & Form

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
H. Requests for Admission

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.313

23.313 Requests for Admission--Unofficial Form.

Requests for Admission--Unofficial Form.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	REQUESTS FOR ADMISSION
	)	SET _____ [*e.g.*, ONE]
	)	

_____ [*Identify propounding party, e.g.,* Defendant Mary Jones] requests _____ [*identify party from whom admissions are sought, e.g.,* Plaintiff John Smith] to admit, for the purpose of this action only

and subject to all pertinent objections to admissibility that may be interposed at trial, the truth of the following matters:

Under the provisions of *Rule 36(a) of the Federal Rules of Civil Procedure*, you are required to respond to these Requests for Admission in writing within 30 days after service of the requests. Your response must be signed as required by *Rule 26(g) of the Federal Rules of Civil Procedure*. If you fail to respond to these Requests for Admission within the 30-day period, every matter set forth in the requests may be deemed admitted and conclusively established against you for purposes of this action.

REQUEST NO. 1: _____ [*State matter on which admission is requested, e.g.,* Plaintiff John Smith was operating a blue 2002 Lexus, California license number 9XYZ876, at the time of the collision alleged in Paragraph 5 of the Complaint in this action].

REQUEST NO. 2: _____ [*State matter on which admission is requested, e.g.,* Exhibit A attached to these requests is a true copy of Part 1 of the application for Policy No. 2938475, which was signed by Plaintiff John Smith on June 28, 2004].

REQUEST NO. 3: _____ [*Set forth request in full, e.g.,* During the entire six months that the Plaintiff was employed by the Defendant, seven other African-American males over age 40 were employed in the Defendant's field sales department].
Dated: _____

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 36(a)

Official Form:
See *§ 23.312*

Timing:
See *23.220*

Drafting Requests:
See *§ 23.222*

Service and Filing of Requests:
See *§§ 23.224*, *23.225*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsContent & Form

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
H. Requests for Admission

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.314

23.314 Responses to Requests for Admission.

Responses to Requests for Admission.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	
_____ [*name*],	)	RESPONSES TO REQUESTS
Defendant	)	FOR ADMISSION
	)	SET _____ [*e.g.*, ONE]
	)	

_____ [*Identify responding party, e.g.,* Plaintiff John Smith] responds to the Requests for Admission,

_____ [*identifying number, e.g.,* Set One], served on him/her by _____ [*identify propounding party, e.g.,* Defendant Mary Jones] on _____ [*date*], as follows:

REQUEST NO. 1: _____ [*Set forth request in full, e.g.,* Plaintiff John Smith was operating a blue 2002 Lexus, California license number 9XYZ876, at the time of the collision alleged in Paragraph 5 of the Complaint in this action].

RESPONSE TO REQUEST NO. 1: _____ [Admitted or Denied *or set forth other response, e.g.,* Plaintiff John Smith admits that he was operating a blue automobile bearing California license number 9XYZ876 at the time of the collision alleged in Paragraph of the Complaint in this action, but he denies that the automobile was a Lexus or a 2002 model].

REQUEST NO. 2: _____ [*Set forth request in full, e.g.,* Exhibit A attached to these requests is a true copy of Part 1 of the application for Policy No. 2938475, which was signed by Plaintiff John Smith on June 28, 2004].

RESPONSE TO REQUEST NO. 2: _____ [Admitted or Denied *or set forth other response, e.g.,* Plaintiff John Smith objects to this request on the ground that the admission sought is irrelevant to the subject matter of this action, because the Plaintiff's claim in this action does not seek any benefits payable under Policy No. 2938475].

REQUEST NO. 3: _____ [*Set forth request in full, e.g.,* During the entire six months that the Plaintiff was employed by the Defendant, seven other African-American males over age 40 were employed in the Defendant's field sales department].

RESPONSE TO REQUEST NO. 3: _____ [Admitted or Denied *or set forth other response, e.g.,* Plaintiff John Smith cannot truthfully admit or deny the matter set forth in Request No. 3, for the reason that during the relevant six-month period, the only co-workers Plaintiff met were his supervisor and three other sales trainees. Further, the Plaintiff has made a reasonable inquiry into this matter by telephoning his former supervisor, but the calls have not been returned].
Dated: _____

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 36(a)

Timing:
See *23.231*

Drafting Responses:
See *§ 23.236*

Service and Filing of Responses:

See *§§ 23.239*, *23.240*

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
H. Requests for Admission

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.315

23.315 Notice of Motion and Motion to Determine Sufficiency of Responses to Requests for Admission.

Notice of Motion and Motion to Determine Sufficiency of Responses to Requests for Admission.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION TO DE-
_____ [*name*],	)	TERMINE
Defendant	)	SUFFICIENCY OF RESPONSES TO REQUESTS
	)	FOR ADMISSION
	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
		Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*propounding party's status and name, e.g.,* Defendant Mary Jones] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for the following:

(A) pursuant to *Rule 36(a) of the Federal Rules of Civil Procedure*, an order determining the sufficiency of the responses given by _____ [*identify responding party, e.g.,* Plaintiff John Smith] to the Requests for Admission, _____ [*identifying number, e.g.,* Set One], served on him/her by _____ [*identify propounding party, e.g.,* Defendant Mary Jones] on _____ [*date*], on the grounds that _____ [*specify grounds for motion, e.g.,* despite the Plaintiff's assertion that he could not admit or deny the request based on the information known to him, sufficient information to enable the Plaintiff to admit or deny the request was readily available to him];

(B) pursuant to *Rule 37(a)(4) of the Federal Rules of Civil Procedure*, an award of reasonable expenses, including attorney's fees, incurring in making this motion; and

(C) an order granting further relief as may be appropriate.

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ (Statement *or* Stipulation),] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:

Fed R Civ P 36(a), 37(a)(3); *CD Cal Civ LR 37-2* (Joint Stipulation); *ED Cal Civ LR 251(c)* (Joint Statement re Discovery Disagreements); *SD Cal Civ LR 26.1(b)* (Certificate of Compliance)

Availability of Motion:

See *§ 23.244*

Relief Available:

See *§§ 23.245 -23.248*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponses

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3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.316

23.316 Notice of Motion and Motion to Withdraw or Amend Admission.

Notice of Motion and Motion to Withdraw or Amend Admission.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*], Plaintiff vs. _____ [*name*], Defendant	)	Civil Action No. _____ NOTICE OF MOTION AND MOTION TO _____ [WITHDRAW *OR* AMEND] ADMISSION Date of Hearing: _____ Time of Hearing: _____ Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for the following:

(A) pursuant to *Rule 36(b) of the Federal Rules of Civil Procedure*, an order granting leave to _____ [withdraw *or* amend] the admission to Request No. _____ [*identifying number*] given by _____ [*identify responding party, e.g.,* Plaintiff John Smith] on _____ [*date*] in response to the Requests for Admission, _____ [*identifying number, e.g.,* Set One], served by _____ [*identify propounding party, e.g.,* Defendant Mary Jones] on _____ [*date*]; and

(B) an order granting further relief as may be appropriate.

This motion is made on the grounds that an order allowing _____ [withdrawal *or* amendment] of the admission will subserve the presentation of the merits of the action, and the order will not prejudice _____ [*identify propounding party, e.g.,* Defendant Mary Jones] in maintaining the _____ [action *or* defense] on the merits. [*If trial has begun or if admission sought to be withdrawn or amended has been incorporated in court's order following final pretrial conference, add:* In addition, withdrawal or amendment of the admission is necessary to prevent manifest injustice.]

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ (Statement *or* Stipulation),] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:

Fed R Civ P 36(b); *CD Cal Civ LR 37-2* (Joint Stipulation); *ED Cal Civ LR 251(c)* (Joint Statement re Discovery Disagreements); *SD Cal Civ LR 26.1(b)* (Certificate of Compliance)

Availability of Motion:

See *§ 23.250*

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
I. Nonparty Discovery: Subpoena

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.317

23.317 Subpoena to Compel Attendance of Witness at Deposition.

Subpoena to Compel Attendance of Witness at Deposition.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	SUBPOENA
	)	
	)	

TO: _____ [*name*]

YOU ARE HEREBY COMMANDED TO APPEAR at _____ [*location of deposition*] on _____ [*date*] at _____ [*time*] to testify in the case known as _____ [*title of action and civil action number*], pending in the United States District Court for the _____ [*district*] District of _____ [*state*].

This subpoena has been issued by the United States District Court for the _____ [*district*] District of _____ [*state*]. You must appear and give testimony at the time and place designated in this subpoena.

Pursuant to the requirements of *Rule 45(a)(1)(A) of the Federal Rules of Civil Procedure*, a copy of the provisions of *Rule 45(c)* and *(d) of the Federal Rules of Civil Procedure* are reproduced _____ [below *or* on the reverse of this subpoena *or* in the attached document].
Dated: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*printed name*]

_____ [*firm address*]

Attorneys for _____ [*name*]

[Reproduce or attach text of Federal Rule of Civil Procedure 45(c) and (d) in manner indicated in subpoena.]

NOTES.

Authority:
Fed R Civ P 45(a)

Discussion:
See *§ 23.262*

Related Form of Subpoena:
See 9 Bender's Federal Practice Forms, Rule 45, Subpoena (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedurePretrial MattersSubpoenas

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
I. Nonparty Discovery: Subpoena

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.318

23.318 Subpoena to Compel Production.

Subpoena to Compel Production.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	SUBPOENA
	)	
	)	

TO: _____ [*name*]

YOU ARE HEREBY COMMANDED TO PRODUCE, for inspection and copying, _____ [identify documents and/or electronically stored information *or* indicate that they are identified in attached Schedule A].

[*If requesting electronically stored information, add if appropriate*]

Production of the following information is requested in the form specified _____.

[*CONTINUE*]

PRODUCTION IS REQUIRED at _____ [*location*] on _____ [*date*] at _____ [*time*]. You are not required to appear or testify in this matter.

This subpoena has been issued by the United States District Court for the _____ [*district*] District of _____ [*state*] in connection with the case known as _____ [*title of action and civil action number*], pending in the United States District Court for the _____ [*district*] District of _____ [*state*].

You must produce the requested materials described in this subpoena [and its attachments] for inspection and copying and must do so at the time and place designated in this subpoena.

Pursuant to the requirements of *Rule 45(a)(1)(A) of the Federal Rules of Civil Procedure*, a copy of the provisions of *Rule 45(c)* and *(d) of the Federal Rules of Civil Procedure* are reproduced _____ [below *or* on the reverse of this subpoena *or* in the attached document].
Dated: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*printed name*]

_____ [*firm address*]

Attorneys for _____ [*name*]

[Reproduce or attach text of Federal Rule of Civil Procedure 45(c) and (d) in manner indicated in subpoena.]

NOTES.

Authority:
Fed R Civ P 45(a)

Discussion:
See *§ 23.263*

Related Form of Subpoena:
See 9 Bender's Federal Practice Forms, Rule 45, Subpoena (Matthew Bender)

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
I. Nonparty Discovery: Subpoena

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.319

23.319 Subpoena to Compel Permission to Inspect Premises.

Subpoena to Compel Permission to Inspect Premises.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	SUBPOENA
	)	
	)	

TO: _____ [*name*]

YOU ARE HEREBY COMMANDED TO PERMIT INSPECTION OF THE FOLLOWING PREMISES _____ [identify premises *or* indicate that premises are identified in attached Schedule A] on _____ [*date*] at _____ [*time*]. You are not required to appear or testify in this matter.

This subpoena has been issued by the United States District Court for the _____ [*district*] District of _____ [*state*] in connection with the case known as _____ [*title of action and civil action number*], pending in the United States District Court for the _____ [*district*] District of _____ [*state*].

You must permit inspection of the premises described in this subpoena [and its attachments] and must do so at the time and place designated in this subpoena.

Pursuant to the requirements of *Rule 45(a)(1)(A) of the Federal Rules of Civil Procedure*, a copy of the provisions of *Rule 45(c)* and *(d) of the Federal Rules of Civil Procedure* are reproduced _____ [below *or* on the reverse of this subpoena *or* in the attached document].
Dated: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*printed name*]

_____ [*firm address*]

Attorneys for _____ [*name*]

[*Reproduce or attach text of Federal Rule of Civil Procedure 45(c) and (d) in manner indicated in subpoena*.]

NOTES.

Authority:
Fed R Civ P 45(a)

Discussion:
See *§ 23.264*

Related Form of Subpoena:
See 9 Bender's Federal Practice Forms, Rule 45, Subpoena (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenas

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
I. Nonparty Discovery: Subpoena

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.320

23.320 Notice of Motion and Motion to Quash a Subpoena.

Notice of Motion and Motion to Quash a Subpoena.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION TO QUASH
_____ *name*],	)	SUBPOENA
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on _____ [*date*], _____ [*movant*] will move the Court pursuant to *Federal Rule of Civil Procedure 45(c)(3)(A)* _____ [*indicate specific subsection of Rule 45(c)(3)(A), e.g.,* (iii)] to quash a subpoena issued by _____ [*name of person or party issuing subpoena*]. _____ [*State reason for motion, e.g., Federal Rule of Civil Procedure 45(c)(3)(A)(iii)* provides that "[o]n timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it requires disclosure of privileged or other protected matter and no exception or waiver applies"].

Good cause exists to quash the subpoena because _____ [*state reasons, e.g.,* "the materials sought were prepared with an eye toward litigation"].

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 45(c)(3)(A)

Discussion:
See *§ 23.279*

Related Forms of Motion:
See 9 Bender's Federal Practice Forms, Rule 45, Subpoena (Matthew Bender)

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial MattersSubpoenas

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Unit 7 Discovery
CHAPTER 23 Methods of Discovery
XI. FORMS
I. Nonparty Discovery: Subpoena

3-23 MB Practice Guide: Fed Pretrial Civ Proc in CA 23.321

23.321 Local District Court Forms.

Local district court forms relating to matters addressed in this chapter are shown below.

Central District

Subpoena to Appear and Testify at a hearing or Trial in a Civil Action (AO 88)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Eastern District

Civil Subpoena (AO 88)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Northern District

Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action (AO 88)

Click here to view image.

Go to Interactive Fillable Form.

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Southern District

Subpoena in a Civil Action (AO 88)

Click here to view image.

Go to Interactive Fillable Form.

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Cross Reference:

Automated HotDocs(R) and PDF versions of these forms may be accessed and filled in from the online version of this publication, and are also available at www.LexisOne.com/forms.

Legal Topics:

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

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Unit 7 Discovery
Special Alert to Chapter 24

3- MB Practice Guide: Fed Pretrial Civ Proc in CA Scope

Scope

Editor's Note: The following proposed amendment to Rule 26 will take effect on December 1, 2010, barring any Congressional action. Set forth below is a comparison of the amended rule with the rule as it appeared before the amendment. New matter is underlined; matter to be omitted is lined through. Asterisks indicate unaffected material. The explanatory Advisory Committee Note is also set forth below.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

* * *

(2) ***Disclosure of Expert Testimony***.

(A) *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data The material within the following brackets is overstruck in the original. [or other information] considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(The material within the following brackets is overstruck in the original. [C] D) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(The material within the following brackets is overstruck in the original. [D] E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

* * *

(b) Discovery Scope and Limits.

* * *

(3) *Trial Preparation: Materials*.

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts*.

(A) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(The material within the following brackets is overstruck in the original. [**B**] **D)** *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(The material within the following brackets is overstruck in the original. [**C**] **E**) *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (The material within the following brackets is overstruck in the original. [B] D); and

(ii) for discovery under (The material within the following brackets is overstruck in the original. [B] D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

* * *

Committee Note of 2010

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and--with three specific exceptions--communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including--for many experts--an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts--one for purposes of consultation and another to testify at trial--because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications. The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming

the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii)--that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

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Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 24 Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection

3-24 MB Practice Guide: Fed Pretrial Civ Proc in CA 24.syn

§ 24.syn Synopsis to Chapter 24: Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection

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24.34 Privilege Covers Confidential Communications Between Client and Attorney.

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24.80 Privilege Applies to Pre-decisional Documents.

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24.82 Government Agency Must Establish Applicability of Privilege.

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24.94 CHECKLIST: Work Product Protection.

24.95 Federal Rule Applies.

24.96 Defining Work Product.

24.96[1] Material to Be Protected Must Be Document or Other Tangible Thing.

24.96[2] Material Must Be Prepared by or for Party, Attorney, or Representative.

24.96[3] Material Must Be Prepared Because of Existing or Anticipated Litigation.

24.96[4] Protection Extends Beyond Confidential Communications.

24.97 Protection Does Not Expire.

24.98 Protection May Apply to Dual-Purpose Documents.

24.99 Either Client or Attorney May Claim Work Product Protection.

24.100 Initial Burden of Proof Is on Party Claiming Work Product Protection.

24.101 Work Product Is Not Absolute Protection.

24.101[1] Material May Be Discoverable on Showing of Substantial Need and Undue Hardship.

24.101[2] Parties Must Distinguish "Fact" and "Opinion" Work Product.

24.101[3] Party Seeking Discovery Must Show Need for Opinion Work Product Is Compelling.

24.102 Waiver of Work Product Protection.

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24.102[3] Disclosure to Co-Party or Other With Common Interest May Not Constitute Waiver.

24.102[4] Disclosure to Government Agency May Waive Protection.

24.102[5] Disclosure to Expert Witness May Waive Protection.

24.102[6] Placing Material in Controversy Waives Protection.

24.102[7] Claim of Protection May Be Asserted After Disclosure.

24.103 Privilege Log.

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Unit 7 Discovery
CHAPTER 24 Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection
I. STRATEGY

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24.01 Scope.

This chapter covers the scope of available discovery, including:

- What material is sufficiently relevant to be discoverable [*see 24.03 -24.09*].
- The sources of law and procedure for claiming that materials or information sought through discovery is privileged [*see 24.12 -24.28*].
- The different grounds for claiming that materials or information sought through discovery is privileged or otherwise undiscoverable, including:
  - Attorney-client privilege [*see 24.29 -24.40*].
  - Protection for attorney work product [*see 24.94 -24.102*].
  - Physician-patient privilege [*see 24.41 -24.43*].
  - Psychotherapist-patient privilege [*see 24.44 -24.51*].
  - Clergy-penitent privilege [*see 24.52 -24.55*].
  - Spousal privileges [*see 24.56 -24.59*].
  - *Fifth Amendment* privilege against self-incrimination [*see 24.60 -24.66*].
  - Journalist's privilege [*see 24.67 -24.72*].

- California Right to Privacy [*see 24.73 -24.76*].
- Protection of trade secrets [*see 24.89 -24.93*].
- Governmental and law enforcement privileges [*see 24.77 -24.88*].

Core Rule:

Fed R Civ P 26(b).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersAttorney-Client PrivilegeCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryRelevanceEvidencePrivilegesGeneral Overview

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24.02 Objective and Strategy.

The initial exchange of factual information between the parties is accomplished through mandatory disclosure under the Federal Rules [*Fed R Civ P 26(a)*; *see* Ch. 15, Rule 26(f) Conference and Initial Disclosures]. Usually, that exchange proves to be insufficient to one or more of the parties. Discovery is the method through which the parties may obtain additional factual information and materials to prove the various claims and defenses asserted in the pleadings [*see Hickman v. Taylor (1947) 329 US 495, 500, 67 S Ct 385, 91 L Ed 451* (discussing purposes of discovery)]. The available forms of discovery include deposition [*Fed R Civ P 30*, *31*, *32*; *see Ch. 23, Methods of Discovery, 23.19 -23.110*], interrogatory [*Fed R Civ P 33*; *see Ch. 23, Methods of Discovery, 23.111 -23.134*], requests for production or inspection [*Fed R Civ P 34*; *see Ch. 23, Methods of Discovery, 23.135 -23.156*], requests for admission [*Fed R Civ P 36*; *see Ch. 23, Methods of Discovery, 23.217 -23.258*], and physical or mental examinations [*Fed R Civ P 35*; *see Ch. 23, Methods of Discovery, 23.189 -23.216*].

In general, the scope of party-initiated discovery is limited to information that is not privileged, but is "relevant to any party's claim or defense" [*Fed R Civ P 26(b)(1)*; *see 24.06*]. A stipulation or court order on a showing of good cause, however, may authorize discovery as to any information relevant to the "subject matter" of the action [*Fed R Civ P 26(b)(1)*; *see 24.11*]. Under either the "subject matter" or "claim or defense" standard, discovery may be sought as to any matter if [*Fed R Civ P 26(b)(1)*; *see 24.05*]:

- The matter is itself admissible in evidence; or
- The matter appears reasonably calculated to lead to the discovery of admissible evidence.

Determining whether to seek information through discovery, or whether to object to such discovery, is a two-step inquiry requiring consideration of the following questions:

- Is the information sought within the scope of the proper relevance standard applicable under *Fed R Civ P 26(b)(1)*?
- Is the information, even though relevant, nevertheless protected from discovery by an available claim of privilege or work product protection?

Strategic Points:

Seeking discovery of information that is clearly irrelevant or subject to a clear claim of privilege may expose the attorney (or client) to discovery sanctions. Similarly, opposing discovery by raising a frivolous claim of irrelevance or privilege may also merit sanctions [*Fed R Civ P 37*; *see* Ch. 25, Motions to Compel and Discovery Sanctions].

Even if relevant and not privileged, information should not be sought by counsel through discovery if doing so is unreasonable under the circumstances [*Fed R Civ P 26(b)(2)*].

A party served with a discovery request that the party believes infringes on some evidentiary privilege must raise that objection promptly, either by objecting in lieu of a response to the discovery request [*see 24.24*], or by seeking a protective order [*Fed R Civ P 26(c)*]. The former option is often better, as it shifts the onus to the party seeking the discovery to move to compel in order to test the validity of the claim of privilege (although losing on a motion to compel can require you to pay the other side's attorney's fees) [*see 24.28*]. Always keep in mind the general rule to assert an objection or seek a protective order only when the issue is worth fighting about, and you are very likely to win.

Keep in mind not to use the limited discovery tools to seek information that can be obtained through other means, or that the other side will be required to turn over automatically, such as the mandatory initial disclosures [*see Fed R Civ P 26(a)*; *see also* Ch. 15, Rule 26(f) Conference and Initial Disclosures, 15.15-15.26].

Strategic Point:

Do not make a discovery request (or an objection) that is broader or more onerous than you are prepared to respond to yourself, because it is very easy for the other party, in response, to make the same request of you.

Judge's Perspective:

The impact of the 2000 amendments to *Fed R Civ P 26(b)(1)* that added a "good cause" requirement to requests for discovery regarding the "subject matter involved" (as opposed to discovery as of right for "claim or defense of any party") has not fully evolved [*see Fed R Civ P 26(b)(1)*; *EEOC v. Caesars Entertainment, Inc. (D Nev 2006) 237 FRD 428, 431-432*]. In other words, in practice, will courts view the amendment as a real limitation on available discovery? In any event, counsel seeking "subject matter" discovery should be careful in citing pre-amendment case authority construing the rule that did not include the "good cause" requirement. Conversely, a party opposing discovery of such material will want to point out that pre-amendment case law interpreted a more permissive discovery rule.

Detailed Discussion

/Forms: 6 Moore's Federal Practice, Ch. 26, Duty to Disclose; General Provisions Governing Discovery (Matthew Bender 3d ed.)

3 Weinstein's Federal Evidence, Chs. 501- 514 (Matthew Bender 2d ed.).

6 Bender's Federal Practice Forms, Rule 26, Duty to Disclose; General Provisions Governing Discovery (Matthew Bender).

Cross References:

Motions to compel, see Ch. 25, Motions to Compel and Discovery Sanctions *§ 25.03 -25.12*. Protective

orders, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§§ 22.35 -22.66*.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryRelevance

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Unit 7 Discovery
CHAPTER 24 Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection
II. DISCOVERY LIMITED TO RELEVANT MATTERS

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24.03 CHECKLIST: Relevance.

☐ Determine propriety of seeking discovery of materials or information, which must be relevant to:

- ○ Claim or defense of any party in the action; or
- ○ Subject matter of action, if stipulation or court order on "good cause" shown permits broader standard of relevance.

Authority:
Fed R Civ P 26(b)(1)

Discussion:
See *§§ 24.06*, *24.11*

☐ Consider whether matter to be sought through discovery is relevant based on whether it:

- ○ Has any tendency to make the existence of any material fact more or less probable than it would be without the matter; and
- ○ Is either:
  - ☐ Admissible in evidence; or

☐ Appears reasonably calculated to lead to the discovery of admissible evidence.

Authority:
Fed R Civ P 26(b)(1); *Fed R Evid 401*

Discussion:
See *§ 24.05*

☐ Relevant matter to be discovered may relate to:

○ Existence, description, nature, custody, condition, and location of any books, documents, or other tangible things; and

○ Identity and location of persons having knowledge of any discoverable matter.

Authority:
Fed R Civ P 26(b)(1)

Discussion:
See *§ 24.07*

Legal Topics:

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

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24.04 Options and Strategy in Evaluating Relevance.

The scope of discovery is generally limited to information that is not privileged, but is "relevant to any party's claim or defense" [*Fed R Civ P 26(b)(1)*; *see 24.06*]. Discovery may be sought as to any matter that is itself admissible in evidence, or appears reasonably calculated to lead to the discovery of admissible evidence [*Fed R Civ P 26(b)(1)*; *see 24.06*].

With this broad standard of the scope of discovery in mind, a party seeking discovery has substantial latitude in framing its discovery requests of both parties and non-parties. This latitude, however, is not infinitely expansive, so that a party preparing a discovery request must have a reasonable basis for believing that the information sought satisfies the test for relevance in that it:

- Relates to a claim or defense of any party [*Cacique, Inc. v. Robert Reiser & Co. (9th Cir 1999) 169 F3d 619, 623-624* (sales figures not discoverable when evidence had relevance as to only one potential remedy and plaintiff could not claim that remedy)]; and

- Is either admissible or is reasonably calculated to lead to the discovery of admissible evidence.

Warning:

There is a duty to preserve documents and information that are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence. The duty to preserve "pre-exists" the imposition of a discovery ruling and arises once a party has knowledge of a claim [*Fed R Civ P 37(b)(2)*; *P&G v. Haugen (D Utah 1998) 179 FRD 622, 631*].

Cross References:

Managing documents, see Ch. 21, Discovery Strategy and Planning, *§§ 21.09 -21.11*. Preservation of electronic evidence, see Ch. 23, Methods of Discovery, *§ 23.161*. Sanctions for spoliation of evidence, see Ch. 25. Motions to Compel and Discovery Sanctions, *§§ 25.91 -25.106*.

Scope of discovery under *Fed R Civ P 26(b)(1)*, see 6 *Moore's Federal Practice, §§ 26.41 -26.45*

(Matthew Bender 3d ed.).

Legal Topics:

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

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24.05 Admissibility Is Not Component of Discoverability.

Information or materials sought through discovery need not be admissible at trial. Instead, discoverability is proper if the information is "reasonably calculated to lead to the discovery of admissible evidence" [*Fed R Civ P 26(b)(1)*]. A party seeking discovery of relevant evidence therefore need not establish the admissibility of the evidence, nor is inadmissibility a ground for objection to the discovery [*Baker v. CNA Ins. Co. (D Mont 1988) 123 FRD 322, 329-330* (though financial condition of party was not admissible, claim for punitive damages made that information relevant and subject to discovery)].

Distinguish:

The Federal Rules of Evidence provide that several types of relevant evidence are nevertheless inadmissible for certain purposes. For example, an offer to pay medical expenses resulting from an injury is not admissible to prove liability for the injury [*Fed R Evid 409*]. This restriction, however, is expressly limited to the *admissibility* of the evidence, and the Evidence Rule in no way restricts the *relevance* of the information, nor its discoverability.

Cross Reference:

Scope of discovery not keyed to admissibility, see 6 Moore's Federal Practice, see *§ 26.42* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryRelevance

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24.06 Material Sought Must Be Relevant to Claim or Defense.

The scope of party-initiated discovery is limited to information that is not privileged, but is "relevant to any party's claim or defense" [*Fed R Civ P 26(b)(1)*].

Example--Relevant:
When plaintiff sought attorney fees, hours expended by defense counsel on case, hourly rate charged by defense counsel, and total billings and costs were relevant to amount of reasonable fee award and therefore subject to discovery [*Real v. Continental Group, Inc. (ND Cal 1986) 116 FRD 211, 212-213*].

Example--Not Relevant:
In a suit by tenants against a landlord alleging violations of the Fair Housing Act, the plaintiffs had not made any claim of physical or bodily injury, and had not put their physical condition at issue, so that subpoena served to discover the medical records of the plaintiffs would be quashed as seeking irrelevant evidence [*Fitzgerald v. Cassil (ND Cal 2003) 216 FRD 632, 634*].

Technically, the "claim or defense" standard applicable under the Federal Rules is more narrow than the traditional standard of relevance to the "subject matter" of the action that was applied before the 2000 amendments to the discovery rules, and continues to apply under California state rules of discovery [*CCP § 2017.010*]. This earlier standard, however, continues to be recognized, as the rules permit discovery as to any matter relevant to the subject matter of the litigation under a stipulation of the parties or a court order on a showing of "good cause" [*Fed R Civ P 26(b)(1)*; *see 24.02*, *24.11*].

The scope of relevance and available discovery is the same irrespective of the method of that discovery, whether by:

- Deposition [*Fed R Civ P 30*, *31*, *32*; *see Ch. 23, Methods of Discovery, 23.19 -23.110*];
- Interrogatory [*Fed R Civ P 33*; *see Ch. 23, Methods of Discovery, 23.111 -23.134*];
- Requests for production or inspection [*Fed R Civ P 34*; *see Ch. 23, Methods of Discovery, 23.135 -23.156*];

- Requests for admission [*Fed R Civ P 36*; *see Ch. 23, Methods of Discovery, 23.217 -23.258*]; or

- Physical or mental examinations [*Fed R Civ P 35*; *see Ch. 23, Methods of Discovery, 23.189 -23.216*].

Cross Reference:

Claim or defense standard of relevance, see 6 *Moore's Federal Practice, §§ 26.41, 26.43* (Matthew Bender 3d ed.).

Legal Topics:

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

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24.07 Relevance Is Broadly Construed but Has Limitations.

24.07[1] Identity of Parties, Witnesses, or Other Persons Is Generally Discoverable. Discovery is appropriate as to relevant information relating to the identity and the location of any persons having knowledge of any discoverable matter, including potential witnesses or persons that might become parties to the action [*Fed R Civ P 26(b)(1)*; *see Walt Disney Co. v. DeFabiis (CD Cal 1996) 168 FRD 281, 283-284*]. The fact that the person or witness whose identity is sought might have a claim of privilege or other protection from discovery does not prevent discovery of the person's identity [*see Laxalt v. McClatchy (D Nev 1987) 116 FRD 438, 443* (identity of investigator hired by attorney and the identities of the persons contacted by the investigator are discoverable)].

Warning--Class Actions:

Class actions present complicated identification issues [*see Hoffman-La Roche, Inc. v. Sperling (1989) 493 US 165, 169-174, 110 S Ct 482, 107 L Ed2d 480* ; 6 *Moore's Federal Practice, § 26.41[10]* (Matthew Bender 3d ed.)].

Strategic Point:

As a practical matter, the use of discovery to obtain the identities of persons having knowledge of relevant facts is superseded to some extent by the mandatory disclosure obligation that requires such information to be exchanged without request [*Fed R Civ P 26(a)(1)(A)*].

Cross Reference:

Ch. 15, Rule 26(f) Conference and Initial Disclosures.

Required disclosures, see 6 *Moore's Federal Practice, § 26.22 et seq.* (Matthew Bender 3d ed.).

24.07[2] Existence of Documents or Other Demonstrative Evidence Is Discoverable. Discovery is appropriate as to relevant information relating to the existence, description, nature, custody, condition, and location of any books,

documents, or other tangible things [*Fed R Civ P 26(b)(1)*]. Though usually such information will be sought in order to obtain later actual production of the books, documents, or other tangible things, that is not an element of discoverability. Accordingly, even if the books, documents, or other tangible things are themselves privileged or otherwise inadmissible, discovery is appropriate as to their existence, description, nature, custody, condition, and location [*see Cox v. E.I. DuPont de Nemours & Co. (DSC 1965) 38 FRD 396, 398* (party entitled to learn of existence and location of tangible thing even if production of thing cannot be compelled)].

Example:

Though actual production of a document might be resisted on the ground that the document contains attorney work product, discovery into the issue of whether such a document exists is proper [*In re Convergent Techs. Sec. Litig. (ND Cal 1985) 108 FRD 328, 334 n20*].

Cross Reference:

Discovery of existence or location of tangible things, see 6 *Moore's Federal Practice, § 26.44* (Matthew Bender 3d ed.).

24.07[3] Financial Condition of Party May Be Discoverable. If the claims or defenses of the parties directly raise the issue of the financial condition of a party in a way that affects the merits of those claims or defenses, discovery into that party's financial condition is appropriate [*G-K Props. v. Redevelopment Agency of San Jose (ND Cal 1976) 409 F Supp 955, 956-960* (dismissing suit for failure to produce financial records as ordered)].

When the plaintiff seeks punitive damages, the ability of the defendant to pay any prospective judgment on punitive damages is relevant to the appropriate amount of that judgment, so that discovery of the defendant's net worth and financial condition is appropriate [*e.g., Baker v. CNA Ins. Co. (D Mont 1988) 123 FRD 322, 329-330*].

Warning:

California state law requires deferral of any discovery as to the financial condition of the defendant until the plaintiff has established a substantial probability of prevailing on its claim for punitive damages [*CC § 3295(c)*]. Because this is a rule of procedure, it technically is inapplicable in federal court [*see, e.g., Oakes v. Halvorsen Marine Ltd. (CD Cal 1998) 179 FRD 281, 285-286* (§ 3295 is rule of procedure that conflicts with federal rules and is not binding on federal court)]. Nevertheless, some district courts in California have deferred discovery relating to punitive damages until the plaintiff has established a prima facie case for recovery of those damages [*see, e.g.,* Collins v. JC Penney Life Ins. Co. (SD Cal 2003) 2003 US Dist LEXIS 8455, at *23-*24].

24.07[4] Discovery of Tax Returns Is Subject to Policy Favoring Confidentiality. While tax returns and related documents are not absolutely privileged, public policy favors confidentiality to encourage taxpayers to file complete and accurate returns [*Premium Serv. Corp. v. Sperry & Hutchinson Co. (9th Cir 1975) 511 F2d 225, 229* ; *A. Farber & Partners, Inc. v. Garber (CD Cal 2006) 234 FRD 186, 191*]. To order production of these documents when an objection is raised, the court must first find that the returns are relevant to the subject matter of the action, and then must find that there is a compelling need for discovery of the returns because the information contained in them is not otherwise readily obtainable [*A. Farber & Partners, Inc. v. Garber (CD Cal 2006) 234 FRD 186, 191* ; *Aliotti v. The Vessel Senora (ND Cal 2003) 217 FRD 496, 497-498*]. The burden of establishing relevancy is on the party seeking production. Once that burden is satisfied, the burden shifts to the party opposing production to show that the information is otherwise readily obtainable [*A. Farber & Partners, Inc. v. Garber (CD Cal 2006) 234 FRD 186, 191*].

Legal Topics:

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

ProcedureDiscoveryRelevanceEvidenceDemonstrative EvidenceGeneral Overview

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24.08 Matters Affecting Jurisdiction or Venue of Action May Be Discovered.

The "claim or defense" standard of relevance for discovery purposes includes matters relating to the propriety of subject matter jurisdiction, personal jurisdiction, or venue of the action, so that discovery into the facts underlying a determination of jurisdiction or venue is proper [*Oppenheimer Fund, Inc. v. Sanders (1978) 437 US 340, 351 n13, 98 S Ct 2380, 57 L Ed2d 253* (discovery is available to ascertain facts bearing on jurisdiction or venue)]. Because jurisdiction and venue are preliminary issues, it is not uncommon for a federal court to restrict discovery on the merits until those preliminary issues have been resolved [*see, e.g., Hayashi v. Red Wing Peat Corp. (9th Cir 1968) 396 F2d 13, 14-15* (noting that plaintiff was not entitled to unlimited discovery on merits until propriety of venue established, even if discovery as to venue was also required)]. If, however, it is clear from the record that jurisdiction or venue is absent, the court may dispose of the action without permitting discovery [*see Wells Fargo & Co. v. Wells Fargo Express Co. (9th Cir 1977) 556 F2d 406, 430-431 n24*]

Example:

In plaintiff's action under the Foreign Sovereign Immunities Act alleging torture and expropriation of property by a foreign government, the factual allegations of the plaintiff's complaint were sufficient to state a prima facie claim that the claims fell within certain exceptions to the foreign sovereign's immunity. The plaintiff and the foreign sovereign were entitled to conduct discovery to develop the factual record to determine whether the claims asserted were within the jurisdiction conferred by the FSIA [*Siderman de Blake v. Republic of Argentina (9th Cir 1992) 965 F2d 699, 713 , cert. denied, 507 US 1017 (1993)*].

Cross Reference:

Discovery of jurisdictional facts or facts relating to venue, see 6 *Moore's Federal Practice, § 26.41[11]* (Matthew Bender 3d ed.).

Legal Topics:

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

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24.09 Discovery May Not Be Cumulative or Unduly Burdensome.

Even if discovery is sought as to relevant evidence, a federal court may nevertheless limit discovery if it determines that [*Fed R Civ P 26(b)(2)*]:

- The sought material is unreasonably cumulative or duplicative, or is more readily obtainable from some other source;

- The party seeking the information has had ample opportunity to obtain it; or

- After balancing the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the sought discovery in resolving those issues, the burden or expense of the proposed discovery outweighs its likely benefit [*see Munoz-Santana v. U.S. Immigration & Naturalization Service (9th Cir 1984) 742 F2d 561, 563-564* (district court erred in entering discovery order when cost of further discovery outweighed need for information)].

Examples:

In a property insurance case, the plaintiff sought discovery of all expert reports prepared by the engineer who had examined his home and recommended denial of the plaintiff's claim. The defendant resisted discovery on several grounds, including the burden of compliance. The district court refused to compel production of the reports, concluding that any probative value the reports might have had was purely speculative, and that the burden of compliance on the defendants was substantial, so that discovery was unwarranted under former Fed R Civ P 26(b)(2)(iii) (now see Fed R Civ P 26(b)(2)(C)) [*Ricotta v. Allstate Ins. Co. (SD Cal 2002) 211 FRD 622, 624*].

Plaintiff's request for every claim file in which an insurance company had denied a claim similar to the plaintiff's claim might have been relevant to the claims of bad faith and misrepresentation, but the cost and burden of compliance was substantial, and insurer had legitimate interest in protecting privacy interest of its insureds, so discovery was denied as overly burdensome [Collins v. JC Penney Life Ins. Co. (SD Cal 2003) 2003 US Dist LEXIS 8455, at *12-*19].

Cross Reference:

Limitation of cumulative or burdensome discovery, see 6 *Moore's Federal Practice, § 26.41[5]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

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24.10 Resolving Disputes Over Relevance.

24.10[1] LOCAL PRACTICE: Meet and Confer Required. Local rules in all four California district courts require the parties to attempt to resolve any matter relating to discovery informally before presenting the dispute to the court by motion [*CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*].

Cross Reference:

Discussion of discovery motion practice, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.34*.

24.10[2] District Court Will Determine Relevance. If the parties are unable to agree on whether information or materials sought through discovery are relevant to the claims or defenses of the parties in the action, the district court may have to resolve the dispute. When a party served with a discovery request has objected to the discovery on the ground of relevance, the sufficiency of that objection may be tested by either: (1) a motion to compel served and filed by the party propounding the discovery request [*Fed R Civ P 37(a)*; *see also Ch. 25, Motions to Compel and Discovery Sanctions, 25.71 -25.75*]; or (2) a motion for a protective order served and filed by the objecting party [*Fed R Civ P 26(c)*]. Whether a matter is "relevant" for the purposes of discovery is necessarily a fact-specific inquiry, so that the district court enjoys broad discretion to determine relevance [*see, e.g., Surfvivor Media, Inc. v. Survivor Prods. (9th Cir. 2005) 406 F3d 625, 635*].

Cross Reference:

District court determination of relevance, see 6 *Moore's Federal Practice, § 26.41[7]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevance

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24.11 Broader Discovery May Be Available by Stipulation or Court Order.

Discovery may be undertaken as to any matter relevant to the "subject matter involved in the action" under either a stipulation of the parties, or a court order for good cause shown [*Fed R Civ P 26(b)(1)*]. As a practical matter, the distinction between the "claim or defense" standard and the "subject matter" standard of relevance generally will not be of significance. If it appears, however, that material sought through discovery falls within the "subject matter" standard of relevance, but might not fall within the "claim or defense" standard, a stipulation to expand the scope of discovery should be considered.

Cross Reference:

Stipulations, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.03 -22.13*.

In the absence of a stipulation, the court may expand the scope of permissible discovery to the "subject matter" standard of relevance on a showing of good cause. The court should permit such enhanced discovery whenever doing so would be consistent with the overarching purposes of the discovery rules, i.e., to "promote fair trials, eliminate surprise, and achieve justice" [*Oppenheimer Fund, Inc. v. Sanders (1978) 437 US 340, 351, 98 S Ct 2380, 57 L Ed2d 253*].

Cross Reference:

Expansion of scope of discovery, see 6 *Moore's Federal Practice, § 26.41[3]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryRelevance

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24.12 CHECKLIST: Privileges.

☐ Consider whether a discovery request calls for potentially privileged information under any of the following evidentiary privileges or protections:

○ Attorney-client privilege.

Discussion:
See *§§ 24.29 -24.40*

○ Attorney work product.

Authority:
Fed R Civ P 26(b)(3)

Discussion:
See *§§ 24.94 -24.102*

○ Physician-patient privilege.

Discussion:
See *§§ 24.41 -24.43*

○ Psychotherapist-patient privilege.

Discussion:
See *§§ 24.44 -24.51*

○ Clergy-penitent privilege.

Discussion:
See *§§ 24.52 -24.55*

○ Marital privileges, including:

☐ Confidential communications privilege.

Discussion:
See *§ 24.58*

☐ Adverse testimony privilege.

Discussion:
See *§ 24.59*

○ *Fifth Amendment* privilege.

Authority:
US Const, amend V

Discussion:
See *§§ 24.60 -24.66*

○ Journalist privilege to protect sources.

Authority:
US Const, amend I

Discussion:
See *§§ 24.68 -24.72*

○ Privacy guarantees of the California constitution.

Authority:
Cal Const, art I, § 1

Discussion:
See *§§ 24.74 -24.76*

○ Governmental privileges, including:

☐ Deliberative process privilege.

Discussion:
See *§§ 24.77 -24.84*

☐ State secrets privilege.

Discussion:
See *§ 24.86*

☐ Law enforcement privilege.

Discussion:
See *§§ 24.87*, *24.88*

○ Trade secrets.

Discussion:
See *§§ 24.90 -24.93*

☐ Consider whether holder has waived or will waive privilege by:

○ Failure to assert privilege.

○ Voluntary disclosure of privileged information.

○ Placing privileged matter in controversy.

Discussion:
See *§ 24.23*

☐ If responding party, assert any available claim of privilege in lieu of discovery response by:

○ Raising claim expressly.

○ Stating ground of claim of privilege.

○ Describing withheld materials.

Authority:
Fed R Civ P 26(b)(5)(A)

Discussion:
See *§ 24.24*

☐ If claim of privilege raised, consider whether propounding party should test claim of privilege by motion to

compel discovery.

Authority:
Fed R Civ P 37(a)

Discussion:
See *§§ 24.27*, *24.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.13 Options and Strategy When Material Sought in Discovery May Be Privileged.

All discovery requests, whether interrogatories, requests for production, requests for admission, or questions asked in depositions should be examined by both the propounding party and the responding party for privilege issues. Review is especially critical for the responding party, as the failure to assert an available claim of privilege in responding to discovery is generally a waiver of the privilege [*see 24.24*].

In cases in which the sheer volume of materials to be produced makes a quick and comprehensive document review for privilege issues impractical, the responding party may assert generally the attorney-client privilege and work product protection, identify the known documents subject to the privilege on a privilege log, and produce all documents then known to be nonprivileged [*see, e.g., United States ex rel. Bagley v. TRW, Inc. (CD Cal 2001) 204 FRD 170, 172-175* (describing defendant's use of privilege log in review of hundreds of thousands of documents)]. As additional documents are discovered and reviewed, they may then be added to the privilege log or produced as appropriate.

When information that has been produced in discovery is later determined by the responding party to be subject to a claim of privilege, the responding party may notify any party that received the information of the privilege claim and the basis for it. After receiving notice, a receiving party must promptly return, sequester, or destroy it, and any copies, and may not use or disclose the information until the claim is resolved. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. A receiving party may present the information to the court under seal for a determination of the claim and the producing party must preserve the information until the claim is resolved [Fed R Civ P 26(b)(5)(B)].

Cross Reference:

Discussion of privilege log, see *§ 24.26*. Form, see *§ 24.103*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.14 Federal Common Law Generally Governs Privileges.

The scope of available discovery is limited to "nonprivileged matter" [*Fed R Civ P 26(b)(1)*]. This language generally refers to the evidentiary privileges defined at common law [*United States v. Reynolds (1953) 345 US 1, 6, 73 S Ct 528, 97 L Ed 727*]. Accordingly, the privileges generally available to a party in federal court, including in discovery proceedings, are those defined by federal common law [*Fed R Evid 501*; *see, e.g., Heathman v. United States Dist. Court for Cent. Dist. of Cal. (9th Cir 1974) 503 F2d 1032,1034* (question of existence and scope of taxpayer's privilege, if any, to withhold tax return information determined by federal law in federal question case)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.15 Federal Common Law May Recognize New Privileges.

Federal common law is constantly developing through court decisions. The federal courts may recognize new evidentiary privileges [*see Jaffee v. Redmond (1996) 518 US 1, 15, 116 S Ct 1923, 135 L Ed2d 337* (recognizing federal psychotherapist-patient privilege as part of federal common law)]. Such recognition, however, is generally disfavored, as privileges restrict access to proof, and are therefore a potential impediment to the truth-finding function of courts [*see University of Pennsylvania v. EEOC (1990) 493 US 182, 199, 110 S Ct 577, 107 L Ed2d 571* (rejecting *First Amendment* right of academic freedom)].

Warning:

Federal common law does not recognize the following communications as privileged:

- Accountant-client [*Couch v. United States (1973) 409 US 322, 335-336, 93 S Ct 611, 34 L Ed2d 548*];
- Banker-client [*Harris v. United States (9th Cir 1969) 413 F2d 316, 319-320*]; and
- Stockbroker-client [*King v. E.F. Hutton & Co. (DDC 1987) 117 FRD 2, 7-8*].

Cross Reference:

Federal professional privileges, see 6 *Moore's Federal Practice, § 26.50[2]* (Matthew Bender 3d ed.).

Warning:

The Ninth Circuit has not recognized the following privileges:

- Self-critical analysis privilege [*Union Pac. R.R. Co. v. Mower (9th Cir 2000) 219 F3d 1069, 1076* ; *Granberry v. Jet Blue Airways (ND Cal 2005) 228 FRD 647, 650-651* ; *but see Leon v. County of San*

Diego (SD Cal 2001) 202 FRD 631, 637].

- Parent-child privilege [*United States v. Penn (9th Cir 1980) 647 F2d 876, 885*].

- Privilege for medical peer review report [*Agster v. Maricopa County (9th Cir 2005) 422 F3d 836, 839* (noting that, in addition to other considerations, court was constrained by fact that report bore on death of prisoner)].

Cross Reference:

Proposed and developing privileges, see 3 *Weinstein's Federal Evidence, § 501.04* (Matthew Bender 2d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewGovernmentsCourtsCommon Law

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24.16 State Privilege Law May Apply.

24.16[1] State Privilege Law Applies in Diversity Cases. In a diversity case in federal court, the substantive law applied, including that as to privileges, is the law of the state [*Fed R Evid 501*; *Liew v. Breen (9th Cir 1981) 640 F2d 1046, 1049* (state law as to attorney-client privilege applied in diversity action)].

Exception:

Because the work product protection is found in a federal rule of procedure [*Fed R Civ P 26(b)(3)*], work product is governed by federal law even in a diversity action. [*see 24.95*].

Cross Reference:

See *§ 24.95*.

24.16[2] State Privilege Law Applies to State Law Component of Federal Claim. If state law provides the rule of decision as to a component of the claims or defenses asserted, the state law of privilege applies, even in a federal question case [*Fed R Evid 501*].

Example:

In an action involving the Federal Deposit Insurance Company (FDIC), a federal forum was available only because of the presence of the FDIC as a party, and there was no other federal element to the action. State law therefore supplied all rules of decision, including the applicability and waiver of the attorney-client privilege [*FDIC v. Fidelity & Deposit Co. (SD Cal 2000) 196 FRD 375, 377-380*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.17 Federal Privilege Law Applied in Action Presenting Both Federal and State Claims.

When an action in federal court presents both state and federal claims, and a claim of privilege is raised as to evidence that relates to both the federal and state claims, federal law controls the application of the privilege [*Kerr v. United States Dist. Ct. (9th Cir 1975) 511 F2d 192, 197* ("[i]In federal question cases the clear weight of authority and logic supports reference to federal law on the issue of the existence and scope of an asserted privilege"); *Fitzgerald v. Cassil (ND Cal 2003) 216 FRD 632, 635* ; *Perrignon v. Bergen Brunswig Corp. (ND Cal 1978) 77 FRD 455, 459*]. If, however, the federal law does not conflict with the state law or the federal law is not well-developed, the court may apply the state privilege law as a matter of comity between the two systems [*see, e.g., Tennenbaum v. Deloitte & Touche (9th Cir 1996) 77 F3d 337, 340-342* (federal court may consider state privilege law, but rule ultimately adopted, whatever its substance, is not state law but federal common law); *United States v. Alperin (ND Cal 2001) 128 F Supp2d 1251, 1253-1255* (applying state law as to psychotherapist-patient privilege in light of paucity of precedent on federal privilege); *see also 24.74*]. On the other hand, if recognition of the state privilege could frustrate federal policy, the federal court need not follow the state rule, and may apply federal common law [*Guadalupe Leon v. County of San Diego (SD Cal 2001) 202 FRD 631, 634-636* (protection of *Evid Code § 1157* for medical peer review records would not be applied in federal civil rights action, as restriction of discovery could frustrate vigorous enforcement of federal constitutional rights)].

Cross Reference:

Choice of law as to privileges, see 6 Moore's Federal Practice, § 26.47[4] (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesGeneral Overview

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24.18 Federal Statutes May Require or Prohibit Disclosure of Information.

Though a comprehensive treatment of these provisions is beyond the scope of this publication, applicable federal statutory or regulatory law may prohibit or restrict the discovery of materials in the hands of private parties or state government agencies.

Example:

23 USC § 409 restricts the discovery of any information compiled or collected by state agencies in connection with federal highway safety programs. This statutory protection includes records compiled or collected by the agency for any of the included statutory reasons, but does not extend to any records that remain in the hands of others, even if the agency has collected those records [*Pierce County v. Guillen (2003) 537 US 129, 143-147, 123 S Ct 720, 154 L Ed2d 610*].

Example:

The Health Insurance Portability and Accountability Act and its accompanying regulations provide protection as to the medical and health records of individuals in the hands of health plans, clearinghouses, or health care providers. In general, that information may be discovered only if: (1) the person who is the subject of the records provides a written authorization form [*45 CFR § 164.508(c)* (required content of authorization form)]; (2) a court order is obtained; or (3) the party seeking the records complies with certain requisites as to notice of the request and confidentiality of the records [*see 45 CFR §§ 164.508*, *164.512(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.19 Discovery of Information in Hands of Federal Government Is Limited.

24.19[1] Federal Common Law or Specific Statutory Law May Govern. A party to a federal action may seek discovery from the federal government, whether or not the government is also a party to the action [*e.g., United States v. Procter & Gamble Co. (1958) 356 US 677, 681, 78 S Ct 983, 2 L Ed2d 1077*]. The government generally may claim any evidentiary privilege to resist discovery that would be available to a private litigant or nonparty witness [*e.g., In re Grand Jury Subpoena Duces Tecum (8th Cir 1997) 112 F3d 910, 917-919* (government may assert attorney-client privilege)], but may also be able to resist discovery based on certain evidentiary privileges available only to it under either federal common law or specific federal statutes.

Example:

Census reports are expressly protected from compelled disclosure [*13 USC § 9(a)*; *see Baldrige v. Shapiro (1982) 455 US 345, 361, 102 S Ct 1103, 71 L Ed2d 199* (strong policy of nondisclosure requires that even raw data be protected from discovery)].

Cross Reference:

Federal governmental privileges, see 6 *Moore's Federal Practice, § 26.52* (Matthew Bender 3d ed.).

24.19[2] Public Access and Exceptions Under Freedom of Information Act. When there is no specific federal statutory provision applicable to information in the hands of the federal government, the availability of discovery or other disclosure of that information to the public is essentially the same as that established by the Freedom of Information Act (FOIA) [*5 USC § 552*]. FOIA provides generally that all documents should be available to the public, but provides numerous exceptions, including those for: (1) state secrets; (2) personnel rules of agencies, or inter- and intra-agency communications; (3) matters exempted by statute; (4) trade secrets; (5); personnel, medical, or other files when disclosure would constitute an invasion of privacy; (6) investigatory files; or (7) reports on financial institutions.

Cross Reference:

Freedom of Information Act and exceptions, see 3 *Weinstein's Federal Evidence, §§ 509.60 -509.64*

(Matthew Bender 2d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.20 California Statutes May Restrict or Require Discovery.

In a diversity action or other action in which California law provides the substantive law to be applied, California statutory provisions may either restrict or require discovery. Those statutory provisions include:

- Official information [*Evid Code § 1040*];
- Consumer and employment information [*CCP § 1985.3*];
- Tax return information [*R&T Code §§ 19542-19566*];
- Settlement and mediation information [*Evid Code §§ 1119, 1152*]; and
- Medical staff committees [*Evid Code § 1157*].

Cross Reference:

California statutory privileges, see *Matthew Bender(R) Practice Guide: California Civil Discovery, §§ 2.23, 2.40, 2.44 -2.46*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.21 Party Asserting Protection of Privilege Has Burden of Proof.

In any case in which an evidentiary privilege is raised as a ground for resisting discovery, the party asserting the privilege bears the burden of establishing its applicability [*see Davis v. Fendler (9th Cir 1981) 650 F2d 1154, 1160* ; EEOC v. Safeway Store, Inc. (ND Cal 2002) 2002 US Dist LEXIS 25200, at *2-*3]. A party asserting a claim of privilege in lieu of a discovery response must raise that claim expressly by stating the ground of the claim of privilege, and by describing the withheld materials so that the validity of the claim may be judged [*Fed R Civ P 26(b)(5)(A)*].

Cross Reference:

Discussion of raising claim of privilege in lieu of response, see *§ 24.24*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.22 Nonparty From Whom Discovery Sought May Assert Privilege.

Because discovery is available from nonparties, and such nonparties may also have valid evidentiary privileges, a nonparty may also assert a claim of privilege in responding to a discovery request from a party [*see, e.g., SNK Corp. v. Atlus Dream Entm't Co. (ND Cal 1999) 188 FRD 566, 571-576* (deciding validity of claims of attorney-client privilege and work product protection raised by third party served with subpoena duces tecum)]. The nonparty should assert its claim of privilege in the same way as a party or risk waiver of the claim of privilege [*see McCoy v. Southwest Airlines Co. (CD Cal 2002) 211 FRD 381, 384-385*].

Cross Reference:

Ch. 23, Methods of Discovery, see *§§ 23.259 -23.285*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.23 Avoiding Waiver of Privilege.

24.23[1] Waiver by Failure to Assert Privilege. A party asserting a claim of privilege in lieu of a discovery response must raise that claim expressly by stating the ground of the claim of privilege, and by describing the withheld materials so that the validity of the claim may be judged [*Fed R Civ P 26(b)(5)(A)*; *see 24.24*]. If the privilege holder fails to comply with these requirements, any claim of privilege may be waived. For example, boilerplate objections or blanket refusals inserted into a response to a request for production of documents under *Fed R Civ P 34* are insufficient to assert a privilege but a *per se* waiver does not result if a privilege log is not produced within the 30-day response period. Instead, the district court should engage in a "holistic reasonableness analysis" [*Burlington N. & Santa Fe Ry. v. United States Dist. Court (9th Cir 2005) 408 F3d 1142, 1149*]. Moreover, an asserted claim of privilege preserves only those grounds expressly stated, so that a party cannot raise new privilege arguments in response to a motion to compel [*Moloney v. United States (D Mass 2001) 204 FRD 16, 21*].

Example:

When a responding party does make an objection that places the opposing party on notice of the claim of privilege, the failure of the objection to comply with the formal requirements of *Fed R Civ P 26* may, in the court's discretion, be forgiven [*e.g.,* EEOC v. Safeway Store, Inc. (ND Cal 2002) 2002 US Dist LEXIS 25200, at *2-*8 (though initial objection was inadequate, it provided notice of privilege claim and later production of privilege log sufficient to preserve objection given harshness of waiver)].

Exception:

Because national security interests are at issue with respect to the state secrets privilege [*see 24.86*], the government's failure properly to invoke the privilege may often be forgiven [*see, e.g., United States ex rel. Schwartz v. TRW, Inc. (CD Cal 2002) 211 FRD 388, 392-394* (court granted government additional 60 days to raise state secrets privilege despite failure to do so in response to earlier subpoena)].

Cross Reference:

Discussion of sufficiency of assertion of privilege in response to a request for production of documents

under *Fed R Civ P 34*, see Ch. 23, Methods of Discovery, *§ 23.153[1][b]*.

24.23[2] Waiver Through Voluntary Disclosure. Despite an available claim of privilege or work product protection, a voluntary disclosure of the information or materials may constitute a waiver of the privilege and make the materials subject to discovery [*see Commodity Futures Trading Comm'n v. Weintraub (1985) 471 US 343, 105 S Ct 1986, 85 L Ed2d 372* (voluntary disclosure by trustee of bankrupt corporation waived attorney-client privilege with respect to prebankruptcy communications)]. Because the instances of waiver through disclosure are most frequently encountered with respect to the attorney-client privilege and work product protection, these issues are discussed in detail in the discussions of those particular discovery protections in §§ 24.29- 24 .40 and 24.94-24.102.

Strategic Point:

If information later determined to be privileged was inadvertently disclosed in discovery, a procedure exists for the responding party to assert the privilege claim, and, if that claim is contested, for the receiving party to present the information to the court for resolution of the dispute [*see* Fed R Civ P 26(b)(5)(B)].

Cross Reference:

Procedure for asserting privilege after disclosure, 24.24[5].

24.23[3] Implicit Waiver by Placing Privileged Matter in Controversy. The general rule is that the mere bringing of an action does not waive any privilege that the plaintiff may enjoy. If, however, the plaintiff's claims put at issue the very matters that the plaintiff wishes to shield from discovery, the privilege will be deemed to be waived [*see Rutgard v. Haynes (SD Cal 1999) 185 FRD 596, 598-600* (by claiming malpractice and damages resulting from subsequent settlement of malicious prosecution suit, plaintiff waived attorney-client privilege as to counsel in both original suit and in settlement of malicious prosecution claim)].

Example:

Plaintiff's mental health records were subject to discovery because plaintiff made her emotional health near the time of the defendants' alleged misconduct an issue in the litigation by electing to seek monetary relief for emotional distress [*Fritsch v. City of Chula Vista (SD Cal 1999) 196 FRD 562, 568-570*].

The same rule applies to privileges raised by a defendant, so that if the defendant places the privileged information at issue, the privilege is waived [*Chevron Corp. v. Pennzoil Co. (9th Cir 1992) 974 F2d 1156, 1162-1163*].

Cross Reference:

Waiver of privilege, see 6 *Moore's Federal Practice, § 26.47[5]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.24 Claim of Privilege Must Be Raised in Lieu of Response.

24.24[1] Claim of Privilege Must Be Raised Expressly. If a claim of privilege or work product protection is to be asserted to resist discovery, the party must expressly assert that claim by either an objection to the sought discovery, or by seeking a protective order to prohibit or condition the sought discovery [*Fed R Civ P 26(b)(5)(A)*].

Cross Reference:

Protective orders, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.35 -22.66*.

24.24[2] Ground of Privilege Claim Must Be Stated. Any objection to discovery based on a claim of privilege must expressly disclose the particular evidentiary privilege on which the objector relies [*Fed R Civ P 26(b)(5)(A)*]. An asserted claim of privilege preserves only those grounds expressly stated, so that a party cannot raise new privilege arguments in response to a motion to compel [*Moloney v. United States (D Mass 2001) 204 FRD 16, 21*].

Cross Reference:

Procedure for asserting claim of privilege, see 6 *Moore's Federal Practice, § 26.90* (Matthew Bender 3d ed.).

24.24[3] Claimant Must Describe Withheld Materials. If a claim of privilege is asserted as an objection to discovery, the objecting party must describe the documents, communications, or things not produced in a manner that, without revealing the actual privileged information, will permit the other parties to assess the applicability of the claimed privilege [*Fed R Civ P 26(b)(5)(A)(ii)*].

Cross Reference:

Procedure for asserting claim of privilege, see 6 *Moore's Federal Practice, § 26.90* (Matthew Bender 3d ed.).

24.24[4] Third Parties May Intervene to Raise Claim of Privilege. Third parties may intervene in a criminal

trial to challenge the production of subpoenaed documents on the ground of privilege [*United States v. Bergonzi (ND Cal 2003) 216 FRD 487, 492* (granting motion to intervene)].

24.24[5] Claim of Privilege May Be Asserted After Disclosure. If information later determined to be privileged was inadvertently disclosed in discovery, a procedure exists for the responding party to assert the privilege claim and for the receiving party to contest the claim. The responding party may notify any party that received the information of the privilege claim and the basis for it. The notice should be in writing unless the circumstances preclude it. After receiving notice, a receiving party must promptly return, sequester, or destroy it, and any copies, and may not use or disclose the information until the claim is resolved. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. A receiving party may present the information to the court under seal for a determination of the claim and the producing party must preserve the information until the claim is resolved [*Fed R Civ P 26(b)(5)(B)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.25 Claimant May Move for Protective Order.

24.25[1] LOCAL PRACTICE: Parties Must Meet and Confer. Local rules in all four California district courts require the parties to attempt to resolve any matter relating to discovery informally before presenting the dispute to the court by motion [*CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*].

24.25[2] Claimant Must Show Good Cause. If a discovery dispute cannot be resolved informally between the parties, a party or other person from whom discovery is sought can make a motion for a protective order, asserting good cause [*Fed R Civ P 26(c)*]. The court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, based on any of the reasons listed in Rule 26(c) [*Fed R Civ P 26(c)*; *see Phillips v. GMC (9th Cir 2002) 307 F3d 1206, 1212*].

A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted [*Foltz v. State Farm Mut. Auto. Ins. Co. (9th Cir 2003) 331 F3d 1122, 1130-1131*].

Cross Reference:

Motion for protective order, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.47 -22.49*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective Orders

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24.26 Privilege Log Is Valuable Tool.

Counsel should consider maintaining a privilege log as standard practice. With respect to documents, the privilege log should contain [*see, e.g.,* AT&T v. Microsoft (ND Cal 2003) 2003 US Dist LEXIS 8710, at *4-*5]:

- The date the document was prepared;
- The identity of the person or persons who prepared the document;
- The identity of any person or persons to whom the document was disseminated;
- A brief description or summary of the contents of the document;
- The specific privilege or protection allegedly applicable to the document; and
- A description of how each element of the privilege or protection is met as to the document.

The brief description or summary of the document provided in a privilege log should be specific enough for opposing counsel and the court to determine the applicability of the privilege, but should not be so detailed as to reveal the privileged information itself [*Fed R Civ P 26(b)(5)(A)*].

Example:

A privilege log submitted to claim attorney-client privilege identified: (1) attorney and client involved; (2) the nature and subject matter of the document; (3) all persons or entities shown on the document to have received or sent the document; and (4) the date the document was generated, prepared, or dated. That, coupled with an affidavit as to whom the documents were shown or were intended to be shown met party's burden in demonstrating the applicability of the attorney-client privilege [*In re Grand Jury Investigation (9th Cir 1992) 974 F2d 1068, 1071*].

Judge's Perspective:

When the attorney is neither the author nor the addressee of a document, but instead merely a "cc"

recipient, be prepared to provide more detail to your description of the general nature and subject matter of the item in the privilege log. Courts are prone to be wary of entries that involve counsel only as a "cc" in light of the danger that a party has attempted to create privilege improperly by simply passing the document through counsel's hands. Likewise, in scrutinizing an opponent's privilege log, pay particular attention to such "cc only" entries.

Cross References:

Form of privilege log, see *§ 24.103*. Use of privilege log in establishing a privilege claim, see Ch. 23, Methods of Discovery, *§ 23.153[1][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.27 LOCAL PRACTICE: Parties Must Meet and Confer.

Local rules in all four California district courts require the parties to attempt to resolve any matter relating to discovery informally before presenting the dispute to the court by motion [*CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.28 Party Seeking Discovery May Move to Compel.

If a claim of privilege is raised in order to resist discovery, the party propounding the discovery request may bring a motion to compel discovery [*Fed R Civ P 37(a)*]. The presentation of such a motion, however, should not be automatic. Instead, whether to file a motion to compel requires a balancing of many factors, most notably the importance of the information sought and whether it can be obtained by someone else, as well as the merits of the claim of privilege.

Cross Reference:

Motions to compel, see Ch. 25, Motions to Compel and Discovery Sanctions, *§§ 25.03 -25.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.29 CHECKLIST: Attorney-Client Privilege.

☐ **Client Status.** Ascertain whether prospective privilege claimant either:

- ○ Was client in attorney-client relationship, or
- ○ Sought legal advice, whether or not attorney was retained.

Discussion:
See *§§ 24.30*, *24.34*

☐ **Attorney Status.** Ascertain whether person to whom the communication was made:

- ○ Is either:
  - ☐ A member of the bar, or
  - ☐ A bar member's subordinate; and
- ○ That person was acting as a lawyer in connection with the communication.

☐ **Communication to Attorney.** Ascertain whether allegedly privileged communication made to attorney relates to

a fact that was:

- ○ Related by the client, or an employee or agent of the client;
- ○ Made in confidence, i.e., without the presence of any third party; or
- ○ Communicated for the purpose of securing primarily any of the following:
  - ☐ An opinion of law;
  - ☐ Legal services; or
  - ☐ Assistance in some legal proceeding; and
- ○ Not communicated for the purpose of committing a crime or tort.

Discussion:
See *§ 24.34*

☐ **Communication by Attorney.** Ascertain whether disclosure of communication from attorney to privilege claimant would tend to reveal underlying confidential communication of client to attorney.

☐ **Waiver of Privilege.** Ascertain whether privilege claimant has waived privilege by:

- ○ Express waiver.
- ○ Disclosure of communication, whether by:
  - ☐ Voluntary disclosure;
  - ☐ Involuntary disclosure; or
  - ☐ Inadvertent disclosure.

Authority:
Fed R Civ P 26(b)(3); *Fed R Evid 502*

Discussion:
See *§ 24.40*

○ Failure to assert privilege.

Discussion:

See *§ 24.23*

○ Implied waiver by placing privileged matter in controversy.

Discussion:
See *§ 24.40[8]*

☐ Claimant:

○ Keep privilege log.

○ Meet and confer to try to resolve privilege issues.

○ Consider motion for protective order.

Authority:
Fed R Civ P 26(c); *CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.25*, *24.36*

Form:
See *§ 24.103*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.47*

☐ Opponent:

○ Meet and confer to try to resolve privilege issues.

○ Consider motion to compel.

Authority:
CD Cal Civ LR 37-1; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.27*, *24.28*

Standard Procedure Checklist:
Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.03*

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.30 Federal Common Law Privilege.

The attorney-client privilege is recognized as part of federal common law [*e.g., Swidler & Berlin v. United States (1998) 524 US 399, 118 S Ct 2081, 141 L Ed2d 379*]. The attorney-client privilege applies only if the following elements are established [*Admiral Ins. Co. v. United States Dist. Court (9th Cir 1989) 881 F2d 1486, 1492* ; Space Sys./Loral, Inc. v. Lockheed Martin Corp. (ND Cal 1999) 1999 US Dist LEXIS 10602, at *4-*5]:

- The asserted holder of the privilege is or sought to become a client;
- The person to whom the communication was made:
  - Is a member of the bar or the member's agent; and
  - In connection with the communication is acting as a lawyer.
- The communication relates to a fact of which the attorney was informed:
  - By the client;
  - Without the presence of strangers; and
  - For the purpose of securing primarily any of the following:
    - An opinion of law;
    - Legal services; or
    - Assistance in some legal proceeding.

- Not for the purpose of committing a crime or tort.

- The privilege has been:
  - Claimed by the client; and
  - Not waived by the client.

Cross Reference:

Scope of federal attorney-client privilege, see 6 *Moore's Federal Practice, § 26.49* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.31 California Law.

Under California law [*Evid Code §§ 950-962*], a client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and the client's lawyer [*Evid Code § 954*]. The attorney-client privilege as defined by California law will be applicable in diversity actions, or when state law provides the rule of decision [*Fed R Evid 501*; *see, e.g., Barton v. United States Dist. Court (9th Cir 2005) 410 F3d 1104, 1108*].

Cross Reference:

Scope of California attorney-client privilege, see *Matthew Bender(R) Practice Guide: California Civil Discovery, § 2.16*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.32 Client Is Holder of Privilege.

24.32[1] Attorney Is Not Holder of Privilege. The attorney-client privilege belongs to the client, not the attorney [*United States v. Blackman (9th Cir 1995) 72 F3d 1418, 1424*].

Cross Reference:

Federal attorney-client privilege, see 6 *Moore's Federal Practice, § 26.49* (Matthew Bender 3d ed.).

24.32[2] Corporation or Other Artificial Entity May Be Entitled to Claim Privilege.

24.32[2][a] Both Entity and Individual Employees May Invoke Privilege. A corporation, governmental entity, or other artificial entity recognized as having a separate existence may be a "client" entitled to invoke the attorney-client privilege [*Upjohn Co. v. United States (1981) 449 US 383, 389, 101 S Ct 677, 66 L Ed2d 584* (corporation may be holder of attorney-client privilege)]. Employees at all levels of the company may invoke the privilege as long as the communications were made at the behest of corporate superiors for the purpose of obtaining legal advice [*Upjohn Co. v. United States (1981) 449 US 383, 389, 101 S Ct 677, 66 L Ed2d 584*].

Distinguish:

There is no individual attorney client privilege between corporate counsel and an employee unless it is clearly shown that the employee consulted the corporate counsel in his or her individual capacity and specifically requested personal representation [*see Tuttle v. Combined Ins. Co. (ED Cal 2004) 222 FRD 424, 429* (factors to be considered in determining whether individual attorney-client privilege exists between employee and corporate counsel)].

The attorney-client privilege applies to communications by any corporate employee to counsel when the communications concern matters within the scope of the employee's corporate duties, and the employee is aware that the information is being furnished to enable the attorney to provide legal advice or service to the corporation [*Upjohn Co. v. United States (1981) 449 US 383, 394, 101 S Ct 677, 66 L Ed2d 584*].

The fact that a corporation may contain a large number of employees creates unique issues for purposes of applying principles of the attorney-client privilege. In recognition of the diffuse nature of corporate decisionmaking, courts have routinely found that transmission of information and materials between employees when done in the process of obtaining legal advice does not vitiate the principle [*see, e.g., Bank Brussels Lambert v. Credit Lyonnais (SDNY 1995) 160 FRD 437, 442*]. At the same time, it follows that just as there are more potential participants in the privileged communication in the corporate context, there are more individuals in a position to waive the privilege through disclosure to third parties.

Example:

E-mails and technical memoranda that were written by employees of defendant software developer concerned matters on which developer sought legal advice of patent counsel, and so were protected by attorney-client privilege [AT&T v. Microsoft (ND Cal 2003) 2003 US Dist LEXIS 8710, at *8-*13].

24.32[2][b] Privilege Extends to Former Corporate Employees. Expressly left open by the Supreme Court's decision in *Upjohn* is whether the lawyer-client privilege applies to communications by former employees concerning activities during their period of employment [*Upjohn Co. v. United States (1981) 449 US 383, 394 n3, 101 S Ct 677, 66 L Ed2d 584*]. The Ninth Circuit has held that the *Upjohn* rationale necessarily extends the privilege to former corporate employees [*Admiral Ins. Co. v. United States Dist. Court (9th Cir 1989) 881 F2d 1486, 1493*]. Further, the Ninth Circuit has stated that the attorney-client privilege is served by the certainty that conversations between the attorney and client will remain privileged after the employee leaves [*In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig. (9th Cir 1981) 658 F2d 1355, 1361, n7 , cert. denied, 455 US 990 (1982)*].

Example:

When corporate counsel interviewed executives of corporation, and those executives later resigned and refused to be deposed on *Fifth Amendment* grounds, opposing party could not compel production of the content of the interviews. The interviews were clearly within the executives' corporate duties and were conducted to assist corporate counsel in expected litigation, so that the material was within corporation's attorney-client privilege [*Admiral Ins. Co. v. United States Dist. Court (9th Cir 1989) 881 F2d 1486, 1492-1495*].

24.32[2][c] Privilege Belongs to Successor Corporation After Merger. After a merger, the attorney-client privilege of the corporation no longer in existence belongs to the successor corporation, because *Evid Code § 953(d)* provides that the successor of a disappeared corporation becomes the holder of the attorney-client privilege. The privilege may be claimed by the person who was the lawyer at the time of the confidential communication, but that person may not claim the privilege if there is no holder of the privilege in existence, or if otherwise instructed by a person authorized to permit disclosure [*Evid Code § 954(c)*]. Thus, as long as there is a holder of the privilege in existence at the time disclosure is sought, the attorney has the duty to exercise the privilege unless the holder of the privilege instructs the attorney not to do so [*Venture Law Group v. Superior Court (2004) 118 CA4th 96, 103, 12 CR3d 656* ; *Dickerson v. Superior Court (1982) 135 CA3d 93, 98, 185 CR 97*].

Cross Reference:

Corporate clients, see 3 *Weinstein's Federal Evidence, § 503.22* (Matthew Bender 2d ed.).

24.32[3] Attorney or Other Representative May Claim Privilege on Client's Behalf. When the client is absent, incapacitated, or otherwise unable to assert an available claim of attorney-client privilege, the attorney or a legally appointed representative of the plaintiff may claim the privilege on behalf of the client [*see United States v. Blackman (9th Cir 1995) 72 F3d 1418, 1424-1425* (attorney served with subpoena for records could withhold them based on attorney-client privilege, but only if disclosure would convey substance of confidential communication of client)]. A legally appointed representative may also waive the attorney-client privilege [*see Commodity Futures Trading Comm'n v. Weintraub (1985) 471 US 343, 358, 105 S Ct 1986, 85 L Ed2d 372* (voluntary disclosure by trustee of bankrupt corporation waived attorney-client privilege with respect to prebankruptcy communications)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.33 Privilege Survives Death of Client.

The attorney-client privilege survives the death of the client and may therefore be claimed by the decedent's personal representative [*see Swidler & Berlin v. United States (1998) 524 US 399, 410-411, 118 S Ct 2081, 141 L Ed2d 379*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.34 Privilege Covers Confidential Communications Between Client and Attorney.

Any confidential communication between an attorney and an actual or prospective client is privileged when the communication is made for the purpose of securing an opinion of law, legal services, or assistance in some legal proceeding [*Barton v. United States Dist. Court (9th Cir 2005) 410 F3d 1104, 1109-1110* ; Space Sys./Loral, Inc. v. Lockheed Martin Corp. (ND Cal 1999) 1999 US Dist LEXIS 10602, at *4-*5 ; Olen Props. Corp. v. Sheldahl, Inc. (CD Cal 1994) 1994 US Dist LEXIS 7125, at *2 ; *see also Evid Code § 952* (defining confidential communication under California law)]. Though usually the privilege is invoked as to communications from the client to the attorney, it also applies to communications from the attorney to the client in the course of providing legal advice [*United States v. Chevron Texaco Corp. (ND Cal 2002) 241 F Supp2d 1065, 1069*].

Example:

Technical information imparted to a patent attorney that does not call for any legal interpretation or opinion, but is shared to assist the attorney in completing a patent application, is nevertheless communicated for use in legal proceedings, and therefore presumptively falls within attorney-client privilege [*Advanced Cardiovascular Sys., Inc. v. C.R. Bard, Inc. (ND Cal 1992) 144 FRD 372, 374-377*].

Communications between a client and counsel must be made to secure legal advice or assistance. Accordingly, when the communications primarily serve some other purpose, the communications are not protected [*McCaugherty v. Siffermann (ND Cal 1990) 132 FRD 234, 238-240*].

Example:

When a claims adjuster interviewed police officers to determine whether or not an insurer should pay certain claims, and not for the purposes of offering legal advice, interviews could not be subject to attorney-client privilege [*Garcia v. City of El Centro (SD Cal 2003) 214 FRD 587, 590-591*].

Cross Reference:

Privileged communications, see 3 *Weinstein's Federal Evidence, § 503.14* (Matthew Bender 2d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.35 Privilege Covers Communications With Agents.

24.35[1] Communications Between Client and Attorney's Agent. A client need not invariably communicate directly with his or her attorney in order to ensure that the communication is protected by the attorney-client privilege. If the client communicates with an agent of the attorney, such as an investigator or other professional, and that agent has been hired by the attorney to assist with the legal representation of the client, the attorney-client privilege extends to communications with the attorney's agent [*e.g., United States v. Chevron Texaco Corp. (ND Cal 2002) 241 F Supp2d 1065, 1070 n2* (client may communicate with counsel through secretary or paralegal and maintain privilege)].

24.35[2] Communications Between Attorney and Client's Agent. Communications made by an agent or employee of a client to an attorney are within the attorney-client privilege if the communication was made for the purpose of securing legal advice or assistance for the client [*see Upjohn Co. v. United States (1981) 449 US 383, 394, 101 S Ct 677, 66 L Ed2d 584*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.36 Privilege Covers Communications to or Among Clients With Common Interests.

24.36[1] Often Referred to As Joint Defense Doctrine. When parties share a common interest and are therefore pursuing a joint defense strategy, the sharing of privileged information among the parties or their attorneys does not waive the attorney-client privilege of any of the parties [*Lectrolarm Custom Sys., Inc. v. Pelco Sales, Inc. (ED Cal 2002) 212 FRD 567, 572-573* (company's disclosure of privileged material to lawyers for its insurer did not waive attorney-client privilege)].

The common interest privilege, frequently referred to as the joint defense doctrine, applies when [*United States v. Bergonzi (ND Cal 2003) 216 FRD 487, 495* ; *see OXY Res. Cal. v. Superior Court (2004) 115 CA4th 874, 890, 9 CR3d 621*]:

- Communication is made by separate parties in the course of a matter of common interest;
- Communication is designed to further that effort; and
- The attorney-client privilege has not been waived.

Rather than being considered an extension of the attorney-client privilege, the common interest doctrine is more appropriately characterized as a non-waiver doctrine, analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine [*see Raytheon Co. v. Superior Court (1989) 208 CA3d 683, 687-689, 256 CR 425*]. Therefore, a party seeking to rely on the common interest doctrine does not satisfy its burden to justify a claim of privilege simply by demonstrating that a confidential communication took place between parties who purportedly share a common interest. Rather, the party must first establish that the communicated information would otherwise be protected from disclosure by a claim of privilege. The next step in the analysis is to determine whether disclosing the information to a party outside the attorney-client relationship waived any applicable privileges [*OXY Res. Cal. v. Superior Court (2004) 115 CA4th 874, 890-891, 9 CR3d 621*].

24.36[2] Parties' Interest May Be Adverse. The common interest doctrine does not require a complete unity of

interests among the participants, and it may apply where the parties' interests are adverse in substantial respects [*United States v. Bergonzi (ND Cal 2003) 216 FRD 487, 495* ; *see In re Mortg. Realty Trust (Bankr CD Cal 1997) 212 BR 649, 653*].

Legal Topics:

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24.37 Identity of Client Is Not Protected by Privilege.

The attorney-client privilege protects only confidential communications between counsel and the client, so that the mere fact of representation or the conditions of the attorney's employment by the client are not protected from discovery by the privilege [*Clarke v. American Commerce Nat'l Bank (9th Cir 1992) 974 F2d 127, 129*].

Examples:

The attorney-client privilege did not protect the identities of clients of an attorney charged with promoting an abuse tax shelter. Although disclosure of the clients' identities might eventually result in their becoming IRS targets, the disclosure in itself would not be incriminating [*Reiserer v. United States (9th Cir 2007) 479 F3d 1160, 1166*].

It was improper for an attorney to instruct the client not to answer a deposition question as to whether legal advice was sought at a particular time, as the question merely related to the fact of seeking advice, and did not seek revelation of nature of confidential communications between client and counsel [*Methode Elecs., Inc. v. Finisar Corp. (ND Cal 2001) 205 FRD 552, 556*].

Exception:

An attorney may be able to resist divulging the identity of the client or the fact of representation if, under the facts of the case, revealing that information would be tantamount to revealing a confidential communication between the client and the attorney [*see Baird v. Koerner (9th Cir 1960) 279 F2d 623, 632-633* ; (client's identity is privileged if revealing that identity would constitute acknowledgment of guilt of offense that lead client to seek legal assistance); *see also In re Grand Jury Subpoenas (9th Cir 1986) 803 F2d 493, 496* (explaining and limiting *Baird*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.38 Privilege Can Apply to Documentary Evidence.

24.38[1] Documents Must Contain Confidential Communications Between Client and Attorney. The attorney-client privilege attaches to documentary evidence to the extent that the documents contain communications otherwise within the scope of the privilege [AT&T v. Microsoft (ND Cal 2003) 2003 US Dist LEXIS 8710, at *8-*13 (e-mails and technical memoranda seeking legal advice of patent counsel protected)].

Consider:

> Under California law, it is the client's (or prospective client's) expectation of confidentiality that is determinative, not the attorney's. When a communication is made in the course of an attorney-client relationship, it is presumed to have been made in confidence. For example, when a law firm posted a questionnaire on the Internet relating to an antidepressant drug, the Ninth Circuit determined that the disclaimer on that questionnaire, which required those submitting answers to acknowledge that no attorney-client relationship was formed by the submission, did not disclaim the confidentiality of the responses [*Barton v. United States Dist. Court (9th Cir 2005) 410 F3d 1104, 1110-1112*].

24.38[2] Forwarding Documents to Attorney Does Not Make Documents Privileged. The application of the attorney-client privilege turns on the nature and purpose of the communications between counsel and client, so that a client cannot create privilege by merely forwarding nonprivileged documents to counsel [*Guzzino v. Felterman (WD La 1997) 174 FRD 59, 61* ; *see also United States ex rel. Burroughs v. DeNardi Corp. (SD Cal 1996) 167 FRD 680, 683* (relation of facts to attorney so that counsel could file False Claims action did not make facts subject to attorney-client privilege)].

24.38[3] Documents May Be Redacted to Preserve Privileged Components. If documentary evidence contains both privileged and nonprivileged material, the documents may be redacted or otherwise edited to preserve the privileged portions while simultaneously granting access to the nonprivileged portions [*see, e.g., Cuno, Inc. v. Pall Corp. (EDNY 1988) 121 FRD 198, 204*].

Legal Topics:

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24.39 Exceptions to Privilege.

24.39[1] Communications in Furtherance of Crime or Fraud Are Not Privileged.

24.39[1][a] Crime or Fraud May Be by Either Client or Attorney. The protections of the attorney-client privilege may be overcome by showing that the communications between client and counsel were in furtherance of a future or ongoing crime or fraud [*United States v. Zolin (1989) 491 US 554, 562-564, 109 S Ct 2619, 105 L Ed2d 469*]. The crime or fraud may be that of either the client, the attorney, or both, and there is no requirement that the attorney be aware of the criminal or fraudulent intent [*Clark v. United States (1933) 289 US 1, 15, 53 S Ct 465, 77 L Ed 993*].

24.39[1][b] Party Asserting Exception Bears Burden of Establishing Illegality. The party asserting the applicability of the crime-fraud exception to attorney-client privilege bears the burden of establishing the exception [*Clark v. United States (1933) 289 US 1, 15, 53 S Ct 465, 77 L Ed 993* ; *United States v. Martin (9th Cir 2002) 278 F3d 988, 1001*]. Demonstrating that the communications were "in furtherance of an intended or present illegality and that there is some relationship between the communications and the illegality" makes a prima facie case for the crime-fraud exception [*United States v. Martin (9th Cir 2002) 278 F3d 988, 1001*].

Proof of the exception, however, is not restricted to independent evidence, so that the exception can be proven through an in camera inspection of the allegedly privileged material if the party establishes cause to believe that the exception is potentially applicable [*United States v. Zolin (1989) 491 US 554, 570-572, 109 S Ct 2619, 105 L Ed2d 469*].

Cross Reference:

Crime-fraud exception to attorney-client privilege, see 6 *Moore's Federal Practice, § 26.49[6]* (Matthew Bender 3d ed.).

24.39[1][c] Consideration of Evidence and Burden of Proof in Civil Cases. In civil cases in which outright disclosure of attorney-client communications is requested, the party seeking to preserve the attorney-client privilege against a crime-fraud challenge has the right to introduce countervailing evidence [*UMG Recording, Inc. v. Bertelsmann AG (In re Napster, Inc. Copyright Litig.) (9th Cir 2007) 479 F3d 1078, 1093*]. The burden of proof the

party seeking disclosure of communications under the crime-fraud exception must meet is the preponderance of the evidence [*UMG Recording, Inc. v. Bertelsmann AG (In re Napster, Inc. Copyright Litig.) (9th Cir 2007) 479 F3d 1078, 1094-1095*].

24.39[2] Suit for Malpractice. When the client sues the attorney for malpractice or some other breach of duty, the attorney-client privilege does not bar discovery or other disclosure of the communications between client and counsel [*Rutgard v. Haynes (SD Cal 1999) 185 FRD 596, 597-598*].

24.39[3] California Statutory Exceptions. In a diversity case or other case in which the substantive law of California provides the rule of decision, statutory exceptions to the attorney-client privilege as defined by California law may be applicable [*see Evid Code §§ 956-962*].

Cross Reference:

Exceptions to attorney-client privilege, see *Matthew Bender(R) Practice Guide: California Civil Discovery, § 2.16[6].*

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.40 Waiver of Privilege.

24.40[1] Only Client May Waive Privilege. The attorney-client privilege belongs to the client, and so may be waived only by the client, not by the attorney [*In re Carter (Bankr CD Cal 1986) 62 BR 1007, 1014* (express instruction to former attorneys to preserve privilege was effective)].

24.40[2] Corporate Client May Waive Privilege for Communications of Employees or Agents. Because the privilege belongs to the corporation, it may be waived by the corporation, even if the employee or officer desires to keep the communications secret, and an employee or former employee bears a substantial burden in establishing that the employee sought and obtained legal advice from corporate counsel in an individual capacity [*United States v. Martin (9th Cir 2002) 278 F3d 988, 1000*].

Cross Reference:

Corporate employee communications and attorney-client privilege, see 6 *Moore's Federal Practice, § 26.49[4]* (Matthew Bender 3d ed.).

24.40[3] Disclosure to Third Party Waives Privilege. Because communications between an attorney and client must be confidential to be protected by the attorney-client privilege, communications that occur in the presence of a third party lack the required element of confidentiality and are not within the privilege [Lovell v. Evergreen Res., Inc. (ND Cal 1990) 1990 US Dist LEXIS 11223, at *17].

The voluntary disclosure may be made by the client directly, or may be made by counsel with the express or implied permission of the client [*see Fox v. California Sierra Fin. Servs. (ND Cal 1988) 120 FRD 520, 526-528* (when client permitted attorney to testify before agency as to allegedly privileged matter, privilege was implicitly waived)].

Example--Voluntary Cooperation With Investigation:

When an attorney for a corporation voluntarily cooperated with an investigation by the Department of Labor by submitting and testifying about certain corporate documents, the corporation waived any attorney-client privilege with respect to those documents and any related communications [*McMorgan*

& Co. v. First Cal. Mortgage Co. (ND Cal 1996) 931 F Supp 703, 707-708].

Exception--Settlement Negotiations:

If a disclosure of privileged material to an opposing party occurs in the context of settlement negotiations and under a stipulation of the parties to preserve privilege, the agreement of the parties is effective and the privilege is preserved [Akamai Techs., Inc. v. Digital Island, Inc. (ND Cal 2002) 2002 US Dist LEXIS 13515, at *7-*20]. The stipulation, however, must be express and must clearly apply to the allegedly privileged material [*Atari Corp. v. Sega of Am. (ND Cal 1994) 161 FRD 417, 419-420* (providing videotape to opposing party during settlement negotiations constituted voluntary disclosure that waived attorney-client privilege and work product protection)].

Cross Reference:

Waiver of attorney-client privilege by disclosure, see 6 *Moore's Federal Practice, § 26.49[5]* (Matthew Bender 3d ed.).

24.40[4] Compelled Disclosure Does Not Waive Privilege. Waiver of privilege through disclosure is premised on *voluntary* disclosure, so that if a party is *compelled* to disclose privileged information, no waiver can be implied from the disclosure [*see Transamerica Computer Co. v. IBM Corp. (9th Cir 1978) 573 F2d 646, 651-652* (rigorous discovery schedule required by a court order in prior proceedings required party to produce evidence without adequate opportunity for privilege review)].

24.40[5] Inadvertent Disclosure May Not Constitute Waiver. *Fed R Evid 502*, enacted on September 19, 2008, protects against the inadvertent waiver of the attorney-client privilege or work product protection. The rule applies in all proceedings commenced after the date of enactment and, if "just and practicable," in all proceedings pending on that date.

Fed R Evid 502 limits waiver as follows [*see Fed R Evid 502(a)-(e)*]:

- If a party produces a privileged document under circumstances that constitute a waiver of the privilege, that waiver extends to other related information only if the disclosed and undisclosed information "ought in fairness" be considered together.

- Inadvertent disclosure made at the federal level will not operate as a waiver if the holder of the privilege has taken reasonable steps to prevent disclosure and has taken reasonably prompt measures to retrieve the inadvertently disclosed information, including (if applicable) following *Fed R Civ P 26(b)(5)(B)*.

- Disclosure made in a state proceeding that is not subject to a state-court order concerning waiver does not constitute waiver of the attorney-client privilege or work product immunity in a federal proceeding if: (1) the disclosure would not be a waiver if it had been made in a federal proceeding, or (2) if the disclosure would not be a waiver under the law of the state where the disclosure occurred.

- Federal courts may enter confidentiality orders providing that disclosure of privileged or protected material does not constitute waiver in other state or federal proceedings.

- An agreement on the effect of disclosure of a communication or information covered by the attorney client privilege or work product protection is binding only on the parties to the agreement, unless the agreement is incorporated into a court order.

In making the "fairness" determination required for a broader waiver after an unintended or inadvertent disclosure of

information under the attorney-client privilege, courts should consider the totality of the circumstances, including balancing the following factors developed in prior case law [*see U.S. ex rel. Bagley v. TRW, Inc. (CD Cal 2001) 204 FRD 170, 177-179* (considering five factors and all relevant circumstances, court found that inadvertent production of privileged documents did not waive attorney-client privilege)]:

- Reasonableness of the precautions taken to prevent inadvertent disclosures;
- Number of inadvertent disclosures;
- Extent of the inadvertent disclosures;
- Promptness of efforts to remedy the inadvertent disclosures; and
- Whether the overriding interest of fairness would be served by relieving the disclosing party of its error.

Cross References:

Fed R Evid 502, see generally 3 Weinstein's Federal Evidence, Ch. 502 (Matthew Bender 2d ed.).

Warning:

A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances in which it is clear that the materials were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer, and abide by the instructions of the lawyer who sent them. Thus, part of the duty to prevent and remedy inadvertent disclosure falls on the lawyer in receipt of that inadvertent disclosure [*Gomez v. Vernon (9th Cir 2001) 255 F3d 1118, 1131-1132 , cert. denied sub nom. Beauclair v. Gomez, 534 US 1066 (2001) , quoting*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 368 (1992)].

Cross References:

Procedure for asserting claim of privilege after inadvertent disclosure, *24.24[5]*. Inadvertent disclosure, see 3 *Weinstein's Federal Evidence, § 503.42* (Matthew Bender 2d ed.); see generally 3 Weinstein's Federal Evidence, Ch. 502 (Matthew Bender 2d ed.).

24.40[6] Waiver May Extend to Entire Subject Matter. Evidence Rule 502(a) provides that any waiver of attorney-client privilege is limited to actual material disclosed and not all material on the same subject, unless the waiver is intentional and fairness requires the disclosed and undisclosed material to be considered together, in which case the waiver extends to all related material [*Fed R Evid 502(a)*].

24.40[7] Limited Waiver Permitted in Absence of Prejudice. When the party seeking access to privileged information would not be prejudiced, a waiver of attorney-client privilege may be restricted to the particular communications or information as to which the waiver relates [*see, e.g.,* Akamai Techs., Inc. v. Digital Island, Inc. (ND Cal 2002) 2002 US Dist LEXIS 13515, at *20-*28].

24.40[8] Placing Matter in Controversy Waives Privilege. If the claims of a plaintiff put at issue the very matters that the plaintiff alleges are within the protection of the attorney-client privilege, the privilege is waived [*see Rutgard v. Haynes (SD Cal 1999) 185 FRD 596, 598-600* (by claiming malpractice and damages resulting from subsequent settlement of malicious prosecution suit, plaintiff waived attorney-client privilege as to counsel in both original suit and in settlement of malicious prosecution claim)]. This same rule applies to clients who are defendants in an action, so that raising advice of counsel as a defense waives any attorney-client privilege as to communications

between defendant and counsel on those particular claims [*Chevron Corp. v. Pennzoil Co. (9th Cir 1992) 974 F2d 1156, 1162-1163* ; *cf.* PostX Corp. v. Secure Data in Motion, Inc. (ND Cal 2004) 2004 US Dist LEXIS 24260, at *19 (assertion of good faith defense to antitrust counterclaim did not impliedly waive attorney-client privilege because plaintiff did not use privilege as a sword)].

Example:

In a patent infringement action, the plaintiff responded to the defendant's counterclaim of infringement by raising the defense that its infringement, if any, was not willful because it relied on advice of counsel. The plaintiff therefore waived attorney-client privilege with respect to any communications between counsel and client that bore on the issue of the plaintiff's state of mind [*Verizon Cal., Inc. v. Ronald A. Katz Tech. Licensing, L.P. (CD Cal 2003) 266 F Supp2d 1144, 1148-1150*].

Distinguish:

Any waiver of the attorney-client privilege resulting from an advice-of-counsel defense in patent litigation does not extend to litigation-related communications after the complaint is filed, at least in cases in which trial counsel did not provide any pre-litigation advice [*see Collaboration Props. v. Polycom, Inc. (ND Cal 2004) 224 FRD 473, 475-477*], or in cases in which there was separately retained litigation counsel [*see Sharper Image Corp. v. Honeywell Int'l Inc. (ND Cal 2004) 222 FRD 621, 643-646*]. However, at least one court has held that when opinion and trial counsel are members of the same firm, waiver of attorney-client privilege and the work product doctrine for all communications on the same subject matter as the opinion relied on in the advice-of-counsel defense extends to advice and work product given after the litigation began [*see Celerity, Inc. v. Ultra Clean Holding, Inc. (ND Cal 2007) 476 F Supp2d 1159, 1166-1168* (waiver of opinions extended to advice and work product that was given both before and after litigation began)].

Therefore, when the trial counsel's firm is also opinion counsel's firm, a litigant should not presume the privilege of shielding all opinion-related work product and communications to which trial counsel is privy [*see Celerity, Inc. v. Ultra Clean Holding, Inc. (ND Cal 2007) 476 F Supp2d 1159, 1166-1168*].

Strategic Point--Defendant:

Under some circumstances, a defendant may assert that the plaintiff has impliedly waived the attorney-client privilege. For example, in a patent infringement action the defendant may assert inequitable conduct or fraud on the PTO by the plaintiff and request production of documents that the plaintiff claims are privileged to demonstrate the guilty knowledge of the plaintiff. In such a case, the defendant should first move for in camera review of the contested documents, rather than outright disclosure [*see, e.g. Genentech, Inc. v. Insmed Inc. (ND Cal 2006) 233 FRD 556, 558-562* (in camera review granted; if documents contained information probative of inventor's knowledge, they would be relevant to defense of inequitable conduct which could defeat patent infringement case)].

Cross Reference:

Waiver of attorney-client privilege, see 6 *Moore's Federal Practice, § 26.49[5]* (Matthew Bender 3d ed.).

Legal Topics:

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24.40A Discovery Order Adverse to Attorney-Client Privilege Is Not Appealable Collateral Order.

A court's disclosure order adverse to the attorney-client privilege is not immediately appealable under the collateral order doctrine, because effective appellate review can be had by other means [*see Mohawk Indus. v. Carpenter (2009) -- US --, 130 S Ct 599, 175 L Ed2d 458, 468* ("post-judgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege").

Legal Topics:

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24.41 CHECKLIST: Physician-Patient Privilege.

☐ Determine whether federal statutes or state privilege law applies.

Discussion:
See *§§ 24.42*, *24.43*

☐ Check local discovery rules.

☐ Review California Doctor-Patient Privilege law:

- ○ Check definitions.
- ○ Determine whether a confidential communication was made.
- ○ Determine whether communication was made during professional relationship.
- ○ Ascertain who can raise claim.

Authority:
Evid Code §§ 990-995

Discussion:

See *§ 24.43*

☐ Has medical condition been placed in controversy?

☐ Has there been waiver of the privilege?

Authority:
Evid Code § 996

Discussion:
See *§ 24.43[6]*

☐ Check state law exceptions.

Authority:
Evid Code §§ 997-1006

Discussion:
See *§ 24.43[7]*

☐ Review whether claim has been properly raised:

- ○ Was the claim timely?
- ○ Was the claim expressly raised?
- ○ Were the grounds stated?
- ○ Was there sufficient description of withheld material or testimony?

Discussion:
See *§ 24.24*

☐ Claimant:

- ○ Keep privilege log.
- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion for protective order.

Authority:
Fed R Civ P 26(c); *CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.25*, *24.36*

Form:
See *§ 24.103*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.47*

☐ Opponent:

○ Meet and confer to try to resolve privilege issues.

○ Consider motion to compel.

Authority:
CD Cal Civ LR 37-1; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.27*, *24.28*

Standard Procedure Checklist:
Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.03*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeElementsEvidencePrivilegesDoctor-Patient PrivilegeScope

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24.42 No Federal Common Law Doctor-Patient Privilege Exists.

The physician-patient privilege is not recognized in the federal common law, federal statutes, or the U.S. Constitution [*Whalen v. Roe (1977) 429 US 589, 602 n28, 97 S Ct 869, 51 L Ed2d 64* ; *Hutton v. City of Martinez (ND Cal 2003) 219 FRD 164, 166*].

In a federal question case in which federal law governs privileges [Fed R *Evid 501*; *see 24.14*], any physician-patient privilege that might be recognized by state law is inapplicable when inconsistent with the application of federal law [*Galarza v. United States (SD Cal 1998) 179 FRD 291, 293-294* (state doctor-patient privilege inapplicable in Federal Tort Claims Act case); *Hutton v. City of Martinez (ND Cal 2003) 219 FRD 164, 166-167* (state law might have protected the officer's medical records but it was inapplicable to a federal civil rights action)].

Exception:

Though federal *common law* does not recognize any physician-patient privilege, federal *statutes* or *regulations* may provide an independent basis for restricting access to medical records [*e.g., United States ex rel. Chandler v. Cook County (7th Cir 2002) 277 F3d 969, 981-982 , aff'd on other grounds, 538 US 119 (2002)* (permitting mandamus to review discovery order compelling production of patient records from county hospital when federal regulation restricted release of that data)].

Distinguish:

The Health Insurance Portability and Accountability Act and its accompanying regulations provide protection as to the medical and health records of individuals in the hands of health plans, clearinghouses, or health care providers. In general, that information may be discovered only if: (1) the person who is the subject of the records provides a written authorization form [*45 CFR § 164.508(c)* (required content of authorization form)]; (2) a court order is obtained; or (3) the party seeking the records complies with certain requisites as to notice of the request and confidentiality of the records [*see 45 CFR §§ 164.508, 164.512(e)*].

Cross Reference:

Physician-patient privilege, see 6 *Moore's Federal Practice, § 26.50[3]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeGeneral Overview

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24.43 Physician-Patient Privilege Under California Law Applies in Diversity Actions.

24.43[1] "Patient" and "Physician" Defined. Under California law, a *patient* is a person who consults a physician or submits to an examination for the purpose of securing a diagnosis or treatment of a physical, mental, or emotional condition [*Evid Code § 991*]. A *physician* is any person authorized or reasonably believed by the patient to be authorized to practice medicine in any state or nation [*Evid Code § 990*].

Communications between a patient and physician include diagnoses made and advice given by the physician [*Evid Code § 992*], as well as photos, x-rays, or other diagnostic aides [*Binder v. Superior Court (1987) 196 CA3d 893, 897, 242 CR 231* (photos taken as part of diagnosis are within physician-patient privilege)].

Cross Reference:

Physician-patient privilege, see *Matthew Bender(R) Practice Guide: California Civil Discovery, § 2.17*.

24.43[2] Communication Must Be Confidential and During Professional Relationship. A *confidential communication* refers to any information exchanged between a patient and a physician in the course of that relationship and in confidence [*Evid Code § 992*].

Cross Reference:

California physician-patient privilege, see *Matthew Bender(R) Practice Guide: California Civil Discovery, § 2.17*.

24.43[3] Patient Is Holder of Privilege. The California physician-patient privilege permits a patient, as the holder of the privilege, to refuse to disclose, and to prevent another from disclosing, a confidential communication between the patient and the physician [*Evid Code § 994*].

24.43[4] Physician or Other Representative May Claim Privilege on Patient's Behalf. A person authorized to claim the physician-patient privilege by the patient may claim the privilege [*Evid Code § 994(b)*]. Similarly, the person

who was the physician at the time of the confidential communication may also claim the privilege on behalf of the patient, unless instructed otherwise by the patient or other authorized person [*Evid Code § 994(c)*].

24.43[5] Physician Must Claim Privilege If Present When Disclosure Sought. The physician who participated in a communication covered by the physician-patient privilege must claim the privilege if the physician is present when disclosure is sought and is authorized to claim the privilege [*Evid Code § 995*].

Cross Reference:

California physician-patient privilege, see *Matthew Bender(R) Practice Guide: California Civil Discovery, § 2.17*.

24.43[6] Placing Medical Condition in Controversy Will Waive Privilege. The California physician-patient privilege is generally inapplicable when the patient is a litigant and has placed his or her medical condition in controversy [*Evid Code § 996*].

24.43[7] Express Statutory Exceptions. The California physician-patient privilege is subject to numerous statutory exceptions, including:

- Commission of crime or tort [*Evid Code § 997*];
- Criminal proceedings [*Evid Code § 998*];
- Damages for patient's conduct [*Evid Code § 999*];
- Issue of breach of duty [*Evid Code § 1001*];
- Matters that must be publicly reported [*Evid Code § 1006*]; and
- Proceedings as to patient's competency [*Evid Code §§ 1004*, *1005*].

Cross Reference:

California physician-patient privilege, see *Matthew Bender(R) Practice Guide: California Civil Discovery, § 2.17*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeElementsEvidencePrivilegesDoctor-Patient PrivilegeScope

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24.44 CHECKLIST: Psychotherapist-Patient Privilege.

☐ Determine whether federal common law or state privilege law applies.

Discussion:
See *§ 24.50*

☐ Check local discovery rules.

☐ Determine whether there has been a communication with a licensed professional:

- ○ Was communication confidential?

Discussion:
See *§ 24.46*

○ Determine if mental condition of patient is in controversy.

Discussion:
See *§ 24.47*

☐ Review whether claim has been properly raised:

- ○ Was the claim timely?
- ○ Was the claim expressly raised?
- ○ Were the grounds stated?
- ○ Was there sufficient description of withheld material or testimony?

Discussion:
See *§ 24.24*

☐ Determine whether the claim of privilege has been waived.

Discussion:
See *§ 24.23*

☐ Claimant:

- ○ Keep privilege log.
- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion for protective order.

Authority:
Fed R Civ P 26(c); *CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.25*, *24.36*

Form:
See *§ 24.103*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.47*

☐ Opponent:

- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion to compel.

Authority:
CD Cal Civ LR 37-1; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR*

26.1(a)

Discussion:
See *§§ 24.27*, *24.28*

Standard Procedure Checklist:
Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.03*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeElementsEvidencePrivilegesPsychotherapist-Patient PrivilegeExceptionsEvidencePrivilegesPsychotherapist-Patient PrivilegeScope

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24.45 Psychotherapist-Patient Privilege Is Part of Federal Common Law.

Federal common law recognizes the psychotherapist-patient privilege [*Jaffee v. Redmond (1996) 518 US 1, 11-15, 116 S Ct 1923, 135 L Ed2d 337*].

Cross Reference:

Psychotherapist-patient privilege, see 3 *Weinstein's Federal Evidence, § 504.03* (Matthew Bender 2d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral Overview

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3-24 MB Practice Guide: Fed Pretrial Civ Proc in CA 24.46

24.46 Communications With Licensed Professionals Protected.

24.46[1] Communication Must Be Confidential. The federal psychotherapist-patient privilege shields from discovery any confidential communications between a patient and a licensed psychotherapist in the course of diagnosis or treatment [*Jaffee v. Redmond (1996) 518 US 1, 11-12, 116 S Ct 1923, 135 L Ed2d 337* ; *see In re Grand Jury Investigation (D Or 2000) 114 F Supp2d 1054, 1056-1057* (consultation with therapist to obtain VA benefits was not confidential, so no privilege was created)]. The privilege also extends to licensed social workers engaged in psychotherapy [*Jaffee v. Redmond (1996) 518 US 1, 15-17, 116 S Ct 1923, 135 L Ed2d 337*].

Warning:

The federal psychotherapist-patient privilege does not extend to communications with unlicensed counselors or social workers [*see* Jane Student 1 v. *Williams (SD Ala 2002) 206 FRD 306, 310*].

24.46[2] Employee Assistance Programs Are Within Privilege. The federal psychotherapist-patient privilege extends to communications with counselors at worksite Employee Assistance Programs [*Oleszko v. State Comp. Ins. Fund (9th Cir 2001) 243 F3d 1154, 1157*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeElementsEvidencePrivilegesPsychotherapist-Patient PrivilegeScope

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24.47 Placing Mental Condition in Controversy Will Waive Privilege.

The federal psychologist-patient privilege is generally inapplicable when the patient is a litigant and has placed his or her mental or emotional condition in controversy [*EEOC v. Danka Indus. (ED Mo 1997) 990 F Supp 1138, 1142*].

Warning--Ninth Circuit Split:

There is a split of authority in the Ninth Circuit district courts over whether a mere claim of emotional distress is sufficient to waive the privilege, or whether the plaintiff must intend to offer the testimony of the therapist or otherwise rely on the privileged communications in order to waive the privilege [*Fitzgerald v. Cassil (ND Cal 2003) 216 FRD 632, 636*].

Example--Narrow View of Waiver:

Plaintiffs had not waived the privilege because they stipulated that they would not rely on any treating psychotherapist or other expert to prove their emotional distress damages, and they had not pleaded a claim for intentional or negligent infliction of emotional distress or any specific psychiatric injury or disorder [*Fitzgerald v. Cassil (ND Cal 2003) 216 FRD 632, 638-640*].

Example--Broad View of Waiver:

Plaintiff waived the psychologist-patient privilege because she made her emotional health near the time of the defendants' alleged misconduct an issue in the litigation by electing to seek monetary relief for emotional distress [*Fritsch v. City of Chula Vista (SD Cal 1999) 196 FRD 562, 568-570*].

Cross Reference:

Waiver of psychologist-patient privilege, see 6 *Moore's Federal Practice, § 26.50[5]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesPsychotherapist-Patient

PrivilegeWaiver

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24.48 Ninth Circuit Does Not Recognize Crime-Fraud Exception.

The Ninth Circuit has not determined whether the crime-fraud exception applies in this context [*United States v. Chase (9th Cir 2003) 340 F3d 978, 992 n8* , *cert. denied*, (2004) (expressly reserving issue)].

There is authority in other circuits that the federal psychotherapist-patient privilege is subject to the crime-fraud exception, so that communications to a therapist in furtherance of an ongoing or future crime are not protected [*see, e.g., In re Grand Jury Proceedings (Violette) (1st Cir 1999) 183 F3d 71, 74*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeExceptions

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24.49 Ninth Circuit Does Not Recognize Dangerous Patient Exception.

The Ninth Circuit has expressly declined to recognize a dangerous-patient exception to the federal psychotherapist-patient privilege [*United States v. Chase (9th Cir 2003) 340 F3d 978, 992 , cert. denied, 540 U.S. 1220 (2004)* (admission of psychiatrist's testimony about defendant's threats against FBI agents was harmless error).

Distinguish:

California law recognizes the dangerous patient exception [*Evid Code § 1024*; *see also Tarasoff v. Regents of Univ. of Cal. (1976) 17 C3d 425, 439-440, 131 CR 14* (psychotherapist's duty to disclose to avert danger to others)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeExceptions

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24.50 Psychologist-Patient Privilege Under California Law.

In a diversity action or other action in which California law provides the substantive law, the psychologist-patient privilege as defined by California statutes will govern. These statutes contain numerous express provisions as to the scope of the privilege, who may claim it, and waiver and exceptions to the privilege [*see Evid Code §§ 1010-1026*].

Cross Reference:

California psychologist-patient privilege, see *Matthew Bender(R) Practice Guide: California Civil Discovery, § 2.18*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-24 MB Practice Guide: Fed Pretrial Civ Proc in CA 24.51

24.51 Related California Privileges.

24.51[1] Sexual Assault Counselor and Victim. In addition to a psychologist-patient privilege, California statutes also recognize a privilege of a sexual-assault victim to refuse to disclose confidential communications between the victim and the victim's counselor [*see Evid Code § 1035 et seq*.].

Cross Reference:

California sexual-assault victim-counselor privilege, see *Matthew Bender(R) Practice Guide: California Civil Discovery, § 2.21*.

24.51[2] Domestic Violence Counselor and Victim. California statutes recognize a privilege of a domestic-violence victim to refuse to disclose confidential communications between the victim and the victim's counselor [*see Evid Code § 1037 et seq*.].

Cross Reference:

California domestic-violence victim-counselor privilege, see *Matthew Bender(R) Practice Guide: California Civil Discovery, § 2.22*.

24.51[3] Human Trafficking Victim and Caseworker. California statutes recognize a privilege of a human trafficking victim to refuse to disclose confidential communications between the victim and the victim's caseworker [*see Evid Code § 1038 et seq*.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesGeneral OverviewEvidencePrivilegesClergy CommunicationsScopeEvidencePrivilegesDoctor-Patient PrivilegeScopeEvidencePrivilegesPsychotherapist-Patient PrivilegeScope

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3-24 MB Practice Guide: Fed Pretrial Civ Proc in CA 24.52

24.52 CHECKLIST: Clergy-Penitent Privilege.

☐ Determine whether federal common law or state privilege law applies.

Discussion:
See *§§ 24.53*, *24.55*

☐ Check local discovery rules.

☐ Determine whether there has been a confidential communication with a member of the clergy:

- ○ Was the communication made during spiritual counseling?

Discussion:
See *§ 24.54*

☐ Review whether claim has been properly raised:

- ○ Was the claim timely?
- ○ Was the claim expressly raised?
- ○ Were the grounds stated?

- ○ Was there sufficient description of withheld material or testimony?

Discussion:
See *§ 24.24*

☐ Determine whether the claim of privilege has been waived.

Discussion:
See *§ 24.23*

☐ Claimant:

- ○ Keep privilege log.
- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion for protective order.

Authority:
Fed R Civ P 26(c); *CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.25*, *24.36*

Form:
See *§ 24.103*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.47*

☐ Opponent:

- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion to compel.

Authority:
CD Cal Civ LR 37-1; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.27*, *24.28*

Standard Procedure Checklist:
Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.03*

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.53 Privilege Is Part of Federal Common Law.

Federal common law recognizes a clergy-penitent privilege [*see Trammel v. United States (1980) 445 US 40, 51, 100 S Ct 906, 63 L Ed2d 186* ; *Mockaitis v. Harcleroad (9th Cir 1995) 104 F3d 1522, 1532*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.54 Privilege Applies to Spiritual Counseling.

The federal clergy-penitent privilege applies only to communications between a penitent and a clergyperson that are made to the minister in a spiritual capacity to obtain spiritual aid or counseling [*see Mockaitis v. Harcleroad (9th Cir 1995) 104 F3d 1522, 1532*].

Cross Reference:

Federal clergy-penitent privilege, see 6 *Moore's Federal Practice, § 26.50[4]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-24 MB Practice Guide: Fed Pretrial Civ Proc in CA 24.55

24.55 California Statutory Provisions Apply in Diversity Actions.

In a diversity action or other action in which California law provides the substantive law to be applied, the California statutes creating and defining the scope of the clergy-penitent privilege will be applicable [*Evid Code §§ 1030-1034*].

Cross Reference:

California clergy-penitent privilege, see *Matthew Bender(R) Practice Guide: California Civil Discovery, § 2.20*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesClergy CommunicationsGeneral Overview

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E. Privileges From Marital Relationship

3-24 MB Practice Guide: Fed Pretrial Civ Proc in CA 24.56

24.56 CHECKLIST: Marital Privileges.

☐ Determine whether federal common law or state privilege law applies.

Discussion:
See *§§ 24.57*, *24.58[6]*, *24.59[4]*

☐ Check local discovery rules.

☐ Ascertain whether the confidential marital communication privilege applies:

- ○ Was there a valid marriage?
- ○ Was the communication during the marriage?
- ○ Was the communication confidential?
- ○ Does the criminal activities exception apply?

Discussion:
See *§ 24.58*

☐ Ascertain whether the adverse testimony privilege applies:

- Was there a valid marriage at the time of the testimony?
- Is the privilege holder willing to testify against spouse?

Discussion:
See *§ 24.59*

☐ Review whether claim has been properly raised:

- Was the claim timely?
- Was the claim expressly raised?
- Were the grounds stated?
- Was there sufficient description of withheld material or testimony?

Discussion:
See *§ 24.24*

☐ Determine whether the claim of privilege has been waived.

Discussion:
See *§ 24.23*

☐ Claimant:

- Keep privilege log.
- Meet and confer to try to resolve privilege issues.
- Consider motion for protective order.

Authority:
Fed R Civ P 26(c); *CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.25*, *24.36*

Form:
See *§ 24.103*

Standard Procedure Checklist:

Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.47*

☐ Opponent:

- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion to compel.

Authority:
CD Cal Civ LR 37-1; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.27*, *24.28*

Standard Procedure Checklist:
Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.03*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsFederal Common LawApplicabilityCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesMarital PrivilegesGeneral OverviewEvidencePrivilegesMarital PrivilegesAdverse Spousal TestimonyGeneral OverviewEvidencePrivilegesMarital PrivilegesConfidential CommunicationsGeneral Overview

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Unit 7 Discovery
CHAPTER 24 Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection
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E. Privileges From Marital Relationship

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24.57 Spousal Privileges Are Part of Federal Common Law.

Federal common law recognizes spousal privilege [*Trammel v. United States (1980) 445 US 40, 51, 100 S Ct 906, 63 L Ed2d 186* ; *Wolfle v. United States (1934) 291 US 7, 13, 54 S Ct 279, 78 L Ed 617*], which consists of two components:

- The confidential communications privilege; and
- The adverse testimony privilege.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesMarital PrivilegesGeneral Overview

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24.58 Privilege Exists for Confidential Marital Communications.

24.58[1] Claimant Must Be Validly Married at Time of Communication. In order to invoke the marital privilege protecting confidential communications between spouses, the privilege claimant must have been validly married under state law at the time of the communications [*United States v. Lustig (9th Cir 1977) 555 F2d 737, 747-748* (because Alaska does not recognize common law marriage, defendant cannot claim marital communications privilege)].

Distinguish--Privileges Accorded Registered Domestic Partners Under California Law:
Under California law, registered domestic partners are accorded the same privileges with respect to not testifying against each other and with respect to confidential communications as spouses [*see Fam Code § 297.5*; *see also Evid Code §§ 970 et seq*. (privilege not to testify against spouse), 980 et seq. (privilege for confidential marital communications)].

24.58[2] Privilege Persists After Marriage Ends. As long as the parties were married when the confidential marital communications occurred, the privilege protecting those communications persists even if the marriage is later dissolved [*Pereira v. United States (1954) 347 US 1, 6, 74 S Ct 358, 98 L Ed 435* ; *United States v. Lustig (9th Cir 1977) 555 F2d 737, 747*].

24.58[3] Privilege Protects Only Communications. The marital communications privilege applies only to written or verbal communications between the spouses, and so does not apply to conduct or actions of a spouse [*United States v. Lustig (9th Cir 1977) 555 F2d 737, 747*].

24.58[4] Communication Must Be Confidential. The marital communications privilege applies only to confidential communications between spouses, so that the simultaneous presence of a third party makes the privilege inapplicable [*Wolfle v. United States (1934) 291 US 7, 13, 54 S Ct 279, 78 L Ed 617* (letter to wife that was dictated to stenographer could not be within marital communications privilege)].

24.58[5] Privilege Does Not Apply to Criminal Activities.

24.58[5][a] Crime Against Spouse or Child. The marital communications privilege does not apply to communications relating to a crime against the person or property of the spouse, or the person or property of a child of either spouse [*United States v. White (9th Cir 1992) 974 F2d 1135, 1137-1138* (in prosecution for murder of child, privilege inapplicable to death threats made by defendant against spouse and victim)].

24.58[5][b] Joint Crimes of Spouses. The marital communications privilege does not apply to communications having to do with present or future crimes in which both spouses are participants [*United States v. Marashi (9th Cir 1990) 913 F2d 724, 730*]

24.58[6] California Law. In a diversity action or other action in which California law provides the substantive law to be applied, California statutes as to the marital communications privilege will be applicable [*Evid Code §§ 980-986*]. California state law is similar to the federal common law marital communications privilege.

Cross Reference:

California marital communications privilege, see *Matthew Bender(R) Practice Guide: California Civil Discovery, §§ 2.19[1], [3].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesMarital PrivilegesConfidential CommunicationsGeneral OverviewEvidencePrivilegesMarital PrivilegesConfidential CommunicationsElementsEvidencePrivilegesMarital PrivilegesConfidential CommunicationsScope

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24.59 Privilege Exists for Spouse's Adverse Testimony.

24.59[1] Valid Marriage Required at Time of Testimony. In order to invoke the marital adverse testimony privilege, the spouse from whom testimony is sought must be validly married under state law at the time of the sought testimony [*United States v. Lustig (9th Cir 1977) 555 F2d 737, 747-748* (because Alaska does not recognize common law marriage, defendant was not married and could not claim marital adverse testimony privilege)].

Warning--Sham Marriage:

The marital adverse testimony privilege is inapplicable when the marriage is a sham [*United States v. Saniti (9th Cir 1979) 604 F2d 603, 604*]. However, the mere fact that the marriage occurred in close proximity to the sought testimony is insufficient to support a determination that the marriage is a sham [*In re Grand Jury Proceedings (9th Cir 1985) 777 F2d 508, 509* (fact that couple married after service of grand jury subpoena not sufficient to support finding of sham marriage)].

24.59[2] Privilege Holder May Not Be Compelled to Testify Against Spouse. The marital adverse testimony privilege permits a spouse to elect not to provide adverse testimony against the other spouse in a criminal proceeding. The adverse testimony privilege belongs to the spouse from whom testimony is sought, not to the accused spouse [*Trammel v. United States (1980) 445 US 40, 51-53, 100 S Ct 906, 63 L Ed2d 186*]. In the Ninth Circuit, the privilege applies even when the spouses are jointly engaged in criminal activity [*United States v. Ramos-Oseguera (9th Cir 1977) 120 F3d 1028, 1042 , overruled on other grounds by United States v. Nordby (9th Cir 2000) 225 F3d 1053*].

Warning:

Because the adverse testimony privilege belongs to the spouse from whom testimony is sought, the accused spouse may not invoke the privilege to exclude voluntary testimony [*Trammel v. United States (1980) 445 US 40, 51-53, 100 S Ct 906, 63 L Ed2d 186*].

Cross Reference:

Privilege held by spouse witness, see 3 *Weinstein's Federal Evidence, § 505.04* (Matthew Bender 2d ed.).

24.59[3] Termination of Marriage Ends Privilege. The marital adverse testimony privilege lasts only as long as the marriage lasts, so that termination of the marriage by death or divorce also terminates the privilege [*Pereira v. United States (1954) 347 US 1, 6, 74 S Ct 358, 98 L Ed 435*].

24.59[4] California Law May Apply. In a diversity action or other action in which California law provides the substantive law to be applied, California statutes as to the marital adverse testimony privilege will be applicable [*Evid Code §§ 970-973*]. California state law is similar to the federal common law marital adverse testimony privilege.

Cross Reference:

California marital adverse testimony privilege, see *Matthew Bender(R) Practice Guide: California Civil Discovery, §§ 2.19[2], [4].*

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.60 CHECKLIST: Privilege Against Self-Incrimination.

☐ Determine whether *Fifth Amendment* privilege applies:

- ○ Is the claimant a natural person?
- ○ Is the claim for testimony?
- ○ Does the claimant have reasonable expectation of potential prosecution?

Discussion:
See *§§ 24.61 -24.63*

☐ Check local discovery rules.

☐ Review whether claim has been properly raised:

- ○ Must be claimed on question-by-question basis.

Discussion:
See *§ 24.65*

☐ Claimant:

- ○ Keep privilege log.
- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion for protective order.

Authority:
Fed R Civ P 26(c); *CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.25*, *24.36*

Form:
See *§ 24.103*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.47*

☐ Opponent:

- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion to compel.

Authority:
CD Cal Civ LR 37-1; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.27*, *24.28*

Standard Procedure Checklist:
Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.03*

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.61 Only Natural Persons Have Fifth Amendment Rights.

The *Fifth Amendment* and the other provisions of the *Bill of Rights* establish the rights of individuals, so that only natural persons have *Fifth Amendment* rights [*e.g., Hale v. Henkel (1906) 201 US 43, 69, 26 S Ct 370, 50 L Ed 652* (corporation may not claim *Fifth Amendment* privilege)].

Warning:

Corporations, associations, partnerships, labor unions, governmental bodies or agencies, and other artificial entities do not have *Fifth Amendment* rights and may not resist discovery on self-incrimination grounds [*United States v. White (1944) 322 US 694, 698, 64 S Ct 1248, 88 L Ed 1542* (labor union); *Hale v. Henkel (1906) 201 US 43, 69, 26 S Ct 370, 50 L Ed 652* (corporation)].

Cross Reference:

Fifth amendment privilege, see 6 *Moore's Federal Practice, § 26.51* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.62 Privilege Extends to Testimony Only.

The *Fifth Amendment* privilege protects only against compelled *testimony*, so that a person may be compelled to engage in certain *conduct* even if that conduct may produce incriminating evidence [*e.g., Schmerber v. California (1966) 384 US 757, 763-764, 86 S Ct 1826, 16 L Ed2d 908* (compelled blood sample)].

A person may be compelled to produce documentary evidence even though the contents of those documents might incriminate the person [*e.g., Fisher v. United States (1976) 425 US 391, 409-410, 96 S Ct 1569, 48 L Ed2d 39* ; *United States v. Blackman (9th Cir 1995) 72 F3d 1418, 1426-1427* (partner in law firm could not invoke *Fifth Amendment* as to production of documents belonging to firm)]. The production of the documents themselves, however, may have a testimonial aspect, and to the extent that it does, the privilege protects the individual from compelled production [*United States v. Hubbell (2000) 530 US 27, 35-43, 120 S Ct 2037, 147 L Ed2d 24* (testimonial aspects of act of production were necessary step in discovery of evidence)].

Cross Reference:

Fifth amendment privilege, see 6 *Moore's Federal Practice, § 26.51* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.63 Reasonable Belief of Potential Prosecution Is Sufficient.

The *Fifth Amendment* provides protection whenever the holder of the privilege has a reasonable belief in the possibility of criminal prosecution, and there is no requirement that such a prosecution be imminent or even likely [*In re Master Key Litig. (9th Cir 1974) 507 F2d 292, 293* (privilege does not depend on likelihood, but on possibility of prosecution, so that when statute of limitations had not expired, privilege was properly invoked)].

Warning--Domestic Prosecution Only.

The *Fifth Amendment* provides protection only as to domestic criminal prosecutions, i.e., prosecution by the federal government, or one of the States or its political subdivisions. If the declarant fears foreign prosecution, the *Fifth Amendment* provides no protection [*United States v. Balsys (1998) 524 US 666, 669, 118 S Ct 2218, 141 L Ed2d 575*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.64 Civil Litigant May Invoke Fifth Amendment.

Although the *Fifth Amendment* provides protection only from criminal prosecution, a civil litigant may invoke the privilege, including in discovery, to avoid providing evidence that might be used in a subsequent criminal prosecution [*e.g.*, *Campbell v. Gerrans (9th Cir 1979) 592 F2d 1054, 1056* (district court abused discretion in dismissing action when plaintiff invoked *Fifth Amendment* in response to interrogatories)].

Warning--Invocation of Privilege May Have Adverse Consequences in Civil Proceedings.

Though the invocation of the *Fifth Amendment* may not be used against the claimant in criminal prosecutions, adverse inferences may be drawn from the invocation of the privilege in civil litigation [*Baxter v. Palmigiano (1976) 425 US 308, 318-320, 96 S Ct 1551, 47 L Ed2d 810*]. If the invocation of the privilege is sufficiently prejudicial to the civil litigation opponent, the claims or defenses of the privilege claimant may be dismissed [*Serafino v. Hasbro, Inc. (1st Cir 1996) 82 F3d 515, 517-519*].

Cross Reference:

Fifth amendment privilege, see 6 *Moore's Federal Practice, § 26.51* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.65 Privilege Must Be Claimed on Question-by-Question Basis.

The *Fifth Amendment* privilege does not operate as a blanket protection from any questioning or discovery, but instead must generally be asserted on an issue-by-issue basis to be effective [*see United States v. Blackman (9th Cir 1995) 72 F3d 1418, 1426* (IRS summons could not be resisted on *Fifth Amendment* grounds; instead, party must appear as summoned and raise objection to particular questions); *Lyons v. Johnson (9th Cir 1969) 415 F2d 540, 541-542 , cert. denied, 397 U.S. 1027 (1970)* (complete refusal to cooperate in discovery based on plaintiff's *Fifth Amendment* rights was improper, so district court properly dismissed action)].

Cross Reference:

Fifth amendment privilege, see 6 *Moore's Federal Practice, § 26.51* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.66 California Law Recognizes Privilege Against Self-Incrimination.

California recognizes the existence of the federal and California constitutional privilege against self-incrimination [*Evid Code § 940*].

Cross Reference:

California privilege against self-incrimination, see *Matthew Bender(R) Practice Guide: California Civil Discovery, § 2.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.67 CHECKLIST: Journalist's Privilege.

☐ Determine whether qualified *First Amendment* privilege applies.

Discussion:
See *§§ 24.68*, *24.70*, *24.71*

☐ Check local discovery rules.

☐ Can claim of privilege be defeated by the need for the information?

Discussion:
See *§ 24.69*

☐ Review whether claim has been properly raised:

- ○ Was the claim timely?
- ○ Was the claim expressly raised?
- ○ Were the grounds stated?
- ○ Was there sufficient description of withheld material or testimony?

Discussion:
See *§ 24.24*

☐ Determine whether the claim of privilege has been waived.

Discussion:
See *§ 24.23*

☐ Claimant:

○ Keep privilege log.

○ Meet and confer to try to resolve privilege issues.

○ Consider motion for protective order.

Authority:
Fed R Civ P 26(c); *CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.25*, *24.36*

Form:
See *§ 24.103*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.47*

☐ Opponent:

○ Meet and confer to try to resolve privilege issues.

○ Consider motion to compel.

Authority:
CD Cal Civ LR 37-1; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.27*, *24.28*

Standard Procedure Checklist:
Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.03*

Legal Topics:

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

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24.68 First Amendment Protects Journalists.

The federal courts have recognized the propriety of a qualified journalists' privilege that derives from the *First Amendment* freedom of the press [*Shoen v. Shoen (9th Cir 1993) 5 F3d 1289, 1292* ; *cf.* *Branzburg v. Hayes (1972) 408 US 665, 680-682, 92 S Ct 2646, 33 L Ed2d 626* (news reporter required to testify before grand jury as to confidential source)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.69 Privilege Is Qualified Not Absolute.

The privilege of a journalist to protect sources is qualified: the privilege may be overcome by a showing that discovery of the materials sought from the journalist is appropriate under the circumstances [*see Herbert v. Lando (1979) 441 US 153, 99 S Ct 1635, 60 L Ed2d 115*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.70 Privilege Applies to Both Confidential and Nonconfidential Information.

Though the qualified journalist's privilege is designed generally to protect *confidential* sources of a journalist, confidentiality is not a prerequisite to the application of the privilege, as the privilege is designed to protect the news-gathering and dissemination process in general, not the specific context of confidential sources [*Shoen v. Shoen (9th Cir 1993) 5 F3d 1289, 1294-1296*]. That the information was not intended to be confidential, however, is an appropriate factor for consideration as to whether discovery should be permitted in spite of the privilege [*Shoen v. Shoen (9th Cir 1993) 5 F3d 1289, 1295* ; *see Gonzales v. NBC (2d Cir 1999) 194 F3d 29, 35* (when information is not confidential, privilege is overcome by showing relevance to significant issue in case and that information is not readily obtainable from other sources)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.71 Privilege Applies to Any Information Intended to Be Disseminated to Public.

Though the qualified journalist's privilege is often invoked as to members of the print or broadcast media, it is not so limited, and may be invoked by any person collecting information when the person has an intent to disseminate the information to the public [*Shoen v. Shoen (9th Cir 1993) 5 F3d 1289, 1292-1294* (author of investigative book is "journalist" entitled to invoke privilege)].

Cross Reference:

Qualified journalist's privilege, see 6 *Moore's Federal Practice, § 26.48[1]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesJournalist's PrivilegeGeneral OverviewEvidencePrivilegesJournalist's PrivilegeScope

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24.72 Party Seeking Discovery Must Show Requested Material Is Unavailable, Relevant, and Non-Cumulative.

A litigant may be entitled to discovery despite a valid assertion of the qualified journalist's privilege by showing that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case [*Shoen v. Shoen (9th Cir 1995) 48 F3d 412, 416*].

The exhaustion element is applied fairly rigorously, so that the party seeking discovery must have exhausted all reasonable avenues of obtaining the desired information from another source [*Shoen v. Shoen (9th Cir 1993) 5 F3d 1289, 1292-1294* ; *Condit v. National Enquirer, Inc. (ED Cal 2003) 289 F Supp2d 1175* (plaintiff required to pursue evidence as to identity of informant before seeking discovery of that information from journalist)].

Cross Reference:

Qualified journalist's privilege, see 6 *Moore's Federal Practice, § 26.48[1]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.73 CHECKLIST: Right to Privacy.

☐ Determine whether California constitutional right to privacy applies.

Discussion:
See *§ 24.74*

☐ Check local discovery rules.

☐ Determine whether need for disclosure outweighs privacy interest.

Discussion:
See *§ 24.74*

☐ Review whether claim has been properly raised:

- ○ Was the claim timely?
- ○ Was the claim expressly raised?
- ○ Were the grounds stated?
- ○ Was there sufficient description of withheld material or testimony?

Discussion:
See *§ 24.24*

☐ Determine whether the claim of privilege has been waived.

Discussion:
See *§ 24.23*

☐ Claimant:

- ○ Keep privilege log.
- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion for protective order.

Authority:
Fed R Civ P 26(c); *CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.25*, *24.36*

Form:
See *§ 24.103*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.47*

☐ Opponent:

- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion to compel.

Authority:
CD Cal Civ LR 37-1; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.27*, *24.28*

Standard Procedure Checklist:
Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.03*

Legal Topics:

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

Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewConstitutional LawState Constitutional OperationEvidencePrivilegesGeneral Overview

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IV. USING PARTICULAR PRIVILEGES
H. California Right to Privacy

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24.74 California Constitution Guarantees Right to Privacy.

In a diversity action or other action in which California law provides the substantive law to be applied, the California constitutional guarantee of privacy may provide protection from discovery as to matters that fall within a "zone of privacy" recognized by that guarantee [Cal Const, art I, § 1]. Matters that fall within the "zone of privacy" include:

- Associational affairs [*Britt v. Superior Court (1978) 20 C3d 844, 852-856, 143 CR 695, 574 P2d 766*];
- Medical history [*Heda v. Superior Court (1990) 225 CA3d 525, 529, 275 CR 136*];
- Personnel files [*El Dorado Sav. & Loan Ass'n v. Superior Court (1987) 190 CA3d 342, 345-346, 235 CR 303*]; and
- Sexual history [*Vinson v. Superior Court (1987) 43 C3d 833, 841-842, 239 CR 292, 740 P2d 404*].

To the extent that the California Constitution creates a state privilege against disclosure, it is not entitled to legal recognition in a federal question case pending in federal court [*Ceramic Corp. of Am. v. Inka Mar. Corp. (CD Cal 1995) 163 FRD 584, 588* ; *see Kerr v. United States Dist. Ct. (9th Cir 1975) 511 F2d 192, 197* ("[i]n federal question cases the clear weight of authority and logic supports reference to federal law on the issue of the existence and scope of an asserted privilege")]. However, if a state doctrine promoting confidentiality does not conflict with federal interest, it may be taken into account as a matter of comity [*Ceramic Corp. of Am. v. Inka Mar. Corp. (CD Cal 1995) 163 FRD 584, 588* ; *see 24.17*].

Cross Reference:

California privilege deriving from guarantee of privacy, see *Matthew Bender(R) Practice Guide: California Civil Discovery, §§ 2.33 -2.38.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewConstitutional LawState Constitutional OperationEvidencePrivilegesGeneral Overview

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24.75 Privacy Interest Is Balanced Against Need for Disclosure.

When a party resists discovery based on an applicable privacy guarantee of the California constitution, the privilege is not absolute; instead, the court is to balance the privacy interest of the privilege claimant against the need of the parties for the desired information. If the balance weighs in favor of disclosure, the court should narrowly tailor the discovery to protect the privacy interest to the greatest extent possible [*see, e.g., Save Open Space Santa Monica Mountains v. Superior Court (2001) 84 CA4th 235, 252-254, 100 CR2d 725*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewConstitutional LawState Constitutional OperationEvidencePrivilegesGeneral Overview

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24.76 Party May Claim Privacy Interest of Non-Party.

A party in receipt of a discovery request that implicates the California constitutional privacy rights of some third party may assert that party's rights [*Denari v. Superior Court (1989) 215 CA3d 1488, 1498-1499, 264 CR 261* ; *see Cook v. Yellow Freight Sys. (ED Cal 1990) 132 FRD 548, 551-552*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewConstitutional LawState Constitutional OperationEvidencePrivilegesGeneral Overview

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24.77 CHECKLIST: Deliberative Process Privilege.

☐ Determine whether federal common law or state privilege law applies.

Discussion:
See *§ 24.78*

☐ Check local discovery rules.

☐ Is the government withholding documents or testimony that reflects advisory opinions, recommendations, and deliberations:

- ○ Is a government decision making process involved?
- ○ Is the material withheld pre-decisional?
- ○ Does the material related to process not facts?

Discussion:
See *§§ 24.80, 24.83*

☐ Does the need for the information outweigh the government's interest?

Discussion:
See *§ 24.84*

☐ Review whether claim has been properly raised:

- ○ Formal claim of privilege must be made, after actual consideration by the head of the department;
- ○ Government must provide precise and certain reasons for asserting confidentiality; and
- ○ The claim must identify and describe the information or documents sought to be shielded.

Discussion:
See *§ 24.82*

☐ Determine whether the claim of privilege has been waived.

Discussion:
See *§ 24.23*

☐ Claimant:

- ○ Keep privilege log.
- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion for protective order.

Authority:
Fed R Civ P 26(c); *CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.25*, *24.36*

Form:
See *§ 24.103*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.47*

☐ Opponent:

- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion to compel.

Authority:

CD Cal Civ LR 37-1; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:

See *§§ 24.27*, *24.28*

Standard Procedure Checklist:

Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.03*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesGovernment PrivilegesGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeDeliberative Process PrivilegeEvidencePrivilegesGovernment PrivilegesProcedures to Claim PrivilegesEvidencePrivilegesGovernment PrivilegesWaiver

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24.78 Federal Common Law Recognizes Qualified Deliberative Process Privilege.

Under the privilege, a government can withhold documents or prevent testimony that reflects advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated [*Sanchez v. City of Santa Ana (9th Cir 1990) 936 F2d 1027, 1040* ; *FTC v. Warner Communications, Inc. (9th Cir 1984) 742 F2d 1156, 1161* ; *North Pacifica, LLC v. City of Pacifica (ND Cal 2003) 274 F Supp2d 1118, 1120-1121*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeDeliberative Process Privilege

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24.79 Privilege Protects Documents and Testimony.

In most cases, the privilege has been invoked to protect documents [*North Pacifica, LLC v. City of Pacifica (ND Cal 2003) 274 F Supp2d 1118, 1120-1121*]. However, courts have applied the privilege to testimony as well as documents and have made no distinction in the application of the privilege with respect to the two kinds of evidence [*see, e.g.*, *Newport Pac., Inc. v. County of San Diego (SD Cal 2001) 200 FRD 628, 636-638* (discussing privilege with respect to depositions of legislative aides to county board); Artfield Builders, Inc. v. Buffalo Grove (ND Ill 1992) 1992 US Dist LEXIS 16328, at *4-*11 (discussing privilege with respect to depositions of village board members)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeDeliberative Process Privilege

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24.80 Privilege Applies to Pre-decisional Documents.

In order to qualify for the privilege, the document must be both pre-decisional and deliberative, meaning it must actually be related to the process by which policy is formulated [*Greenpeace v. National Marine Fisheries Serv. (WD Wash 2000) 198 FRD 540, 543*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeDeliberative Process Privilege

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24.81 Privilege Applies to State Agencies.

Though the privilege is primarily a creation of federal common law, it has also been applied to state agencies [*e.g., J.R. Norton Co. v. Arizmendi (SD Cal 1985) 108 FRD 647, 649* (California state labor agency)] and political subdivisions of the state [*North Pacifica, LLC v. City of Pacifica (ND Cal 2003) 274 F Supp2d 1118, 1121* (city council); *Newport Pac. Inc. v. County of San Diego (SD Cal 2001) 200 FRD 628, 638* (legislative aides to local planning commission)].

Distinguish:

The Freedom of Information Act (FOIA) and its exemptions must be consulted as to discovery of information in the hands of the federal government. Exemption 5 of FOIA [*5 USC § 552(b)(5)*] is essentially a recognition of the deliberative process privilege as it applies to federal agencies [*see Carter v. United States Dept. of Commerce (9th Cir 2002) 307 F3d 1084, 1088-1089*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.82 Government Agency Must Establish Applicability of Privilege.

The government bears the burden of invoking the deliberative process privilege and establishing its applicability to the materials sought through discovery [*Greenpeace v. National Marine Fisheries Serv. (WD Wash 2000) 198 FRD 540, 543*] and must [*see United States v. Ernstoff (DNJ 1998) 183 FRD 148, 152*]:

- Make a formal claim of privilege, after actual consideration by the head of the department,
- Provide precise and certain reasons for asserting the confidentiality over the information or documents, and
- Identify and describe the information or documents sought to be shielded.

Cross Reference:

Government privilege for deliberative process, 6 *Moore's Federal Practice, § 26.52[5]* (Matthew Bender 3d ed.)

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.83 Facts Relied on by Government Are Not Protected.

The mere facts relied on to reach a decision generally fall outside the privilege, though a court should be careful to order disclosure of those facts in a way that will protect the agency's deliberative process relating to those facts [*e.g., FTC v. Warner Communications, Inc. (9th Cir 1984) 742 F2d 1156, 1161* (memoranda could not be discovered when facts underlying agency's deliberative process could not be severed from analysis itself)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.84 Government's Interest Weighed Against Need for Information.

Because the deliberative process privilege is a qualified privilege, it may be overcome when the party seeking discovery can show a particularized need for the information that outweighs the governmental interest in protecting the materials [*Newport Pac. Inc. v. County of San Diego (SD Cal 2001) 200 FRD 628, 638-641* (permitting deposition of legislative aides to board member when plaintiff made required showing of relevance and need)].

Among the factors to be considered in making this determination are [*FTC v. Warner Communications, Inc. (9th Cir 1984) 742 F2d 1156, 1161-1162* ; *North Pacifica, LLC v. City of Pacifica (ND Cal 2003) 274 F Supp2d 1118, 1122*]:

- Relevance of the evidence;
- Availability of other evidence;
- Government's role in the litigation;
- Extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions;
- Interest of the litigants and society in accurate judicial fact finding;
- Seriousness of the litigation and the issues involved;
- Presence of issues concerning alleged governmental misconduct; and
- Federal interest in the enforcement of federal law.

Example:

In plaintiff's civil rights action alleging equal protection violations from the conditions placed on a condominium development, the plaintiff sought discovery of materials relating to the city counsel's

decisions as to those conditions. The district court agreed that the deliberative process privilege applied, but held that it was overcome by the plaintiff because there was a substantial federal interest in the enforcement of federal constitutional rights, the testimony sought was highly relevant to the developer's equal protection claim, the decision-making process of the city council was central to the litigation, and the information sought might well be relevant in the ascertainment of motive [*North Pacifica, LLC v. City of Pacifica (ND Cal 2003) 274 F Supp2d 1118, 1122-1126*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.85 CHECKLIST: Other Governmental and Law Enforcement Privileges.

☐ Privilege to withhold state secrets.

Discussion:
See *§ 24.86*

☐ Privilege to withhold identity of government informer.

Discussion:
See *§ 24.87*

☐ Privilege to withhold law enforcement information.

Discussion:
See *§ 24.88*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesGovernment PrivilegesGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeInformer PrivilegeEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeInvestigative Files PrivilegeEvidencePrivilegesGovernment PrivilegesState Secrets Privilege

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24.86 Privilege of Government to Withhold State Secrets.

24.86[1] Privilege Is Absolute. The state secrets privilege is a federal common law evidentiary privilege that permits the government to resist discovery when the sought documents or other information should be shielded to protect state secrets with respect to military interests, national security, or related subjects [*United States v. Reynolds (1953) 345 US 1, 7-8, 73 S Ct 528, 97 L Ed 727* ; *Kasza v. Browner (9th Cir 1998) 133 F3d 1159, 1165* , *cert. denied, 525 US 967 (1998)* ; Hepting v. AT&T Corp. (ND Cal 2006) 439 F Supp2d 974, 980]. When the privilege is validly invoked, it is absolute, and no showing of need or burden can justify overriding the privilege [*Kasza v. Browner (9th Cir 1998) 133 F3d 1159, 1166* , *cert. denied, 525 US 967 (1998)* ; *United States ex rel. Schwartz v. TRW, Inc. (CD Cal 2002) 211 FRD 388, 393*]. Moreover, once a document is found to be a privileged state secret, its contents cannot be proved in any way, including by any individual's memories of the document's contents [*Al-Haramain Islamic Foundation, Inc. v. Bush (9th Cir 2007) 507 F3d 1190, 1204-1205]* .

Strategy--Plaintiff:

The state secrets privilege, as interpreted by *United States v. Reynolds (1953) 345 US 1, 73 S Ct 528, 97 L Ed 2d 727* , protects only the disclosure of the evidence itself; it does not protect against disclosure of the underlying facts, provided they can be proven without resort to the privileged materials. "By invoking the privilege over particular evidence, the evidence is completely removed from the case. The plaintiff's case then goes forward based on evidence not covered by the privilege." Therefore, within the *Reynolds* framework, dismissal is justified only if specific privileged evidence is itself indispensable to establishing either the truth of the plaintiff's allegations or a valid defense that would otherwise be available to the defendant [*Mohamed v. Jeppesen Dataplan, Inc. (9th Cir 2009) 579 F.3d 943, 957-958]* .

Cross Reference:

State secrets privilege, see 3 *Weinstein's Federal Evidence, §§ 509.10 -509.13* (Matthew Bender 2d ed.).

24.86[2] Privilege Must Be Claimed by Head of Department. A claim of state secrets privilege must be made by the head of the department that has control over the matter, after actual personal consideration by the officer. The privilege belongs to the government alone, and can be neither claimed nor waived by a private party [*United States v. Reynolds (1953) 345 US 1, 7-8, 73 S Ct 528, 97 L Ed 727*]. Even if the government is not a party to the action, the government may intervene to assert the state secrets privilege [*United States ex rel. Schwartz v. TRW, Inc. (CD Cal 2002) 211 FRD 388, 393*]. Once asserted, the court should afford some deference to the claim of privilege, but must also determine whether the circumstances are appropriate for the claim of privilege, without, of course, forcing disclosure of the very thing the privilege is designed to protect [*United States v. Reynolds (1953) 345 US 1, 7-8, 73 S Ct 528, 97 L Ed 727*].

Because of the importance of the issues at stake, when the head of the department has not properly claimed the privilege, the court may grant additional time for the government to do so [*e.g., United States ex rel. Schwartz v. TRW, Inc. (CD Cal 2002) 211 FRD 388, 393-394* (court granted government additional 60 days to raise state secrets privilege despite failure to do so in response to earlier subpoena)].

24.86[3] Dismissal of Action May Result. If the state secrets privilege applies, and the claims or defenses of the parties cannot succeed without the protected matter, the court may have no choice but to dismiss the action or grant summary judgment [*Kasza v. Browner (9th Cir 1998) 133 F3d 1159, 1166 , cert. denied, 525 US 967 (1998)* (if plaintiff cannot prove prima facie elements of claim with nonprivileged evidence, then court may dismiss claims as it would with any plaintiff who cannot prove case)].

Distinguish:

A case based on the government's breach of an alleged espionage agreement is categorically barred and must be dismissed on the pleadings without ever reaching the question of the state secrets evidentiary privilege [*see Tenet v. Doe (2005) 544 US 1, 125 S Ct 1230, 161 L Ed 2d 82, 92* ; *Totten v. United States (1875) 92 US 105, 107, 23 L Ed 605*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesGovernment PrivilegesState Secrets Privilege

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24.87 Identity of Government Informant May Be Withheld.

24.87[1] Privilege Is Qualified. The government has a qualified privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law [*Roviaro v. United States (1957) 353 US 53, 59, 77 S Ct 623, 1 L Ed2d 639*].

Cross Reference:

Informant identity privilege, see 3 *Weinstein's Federal Evidence, §§ 510.01 -510.09* (Matthew Bender 2d ed.).

24.87[2] Showing of Fairness Required to Overcome Privilege. The qualified privilege to withhold an informant's identity must be applied in light of the fundamental requirements of fairness. When the disclosure of the informant's identity, or of the contents of the informant's communication, is relevant and essential to a fair determination of an action, the privilege is overcome [*Roviaro v. United States (1957) 353 US 53, 60-62, 77 S Ct 623, 1 L Ed2d 639*]. When the party seeking disclosure of the identity of an informant fails to demonstrate how the information is relevant or essential to its claims or defenses, the identity of the informant must remain confidential [McCray v. Castro (ND Cal 2002) 2002 US Dist LEXIS 7259, at *25-*26 (raising nothing more than mere suspicion that information might be helpful is insufficient)].

24.87[3] Law Enforcement Officer Is Not Informant. The qualified privilege to withhold an informant's identity applies to private citizens or other parties who assist law enforcement officers, and does not apply to the officers themselves [*e.g., Wahad v. FBI (SDNY 1990) 132 FRD 17, 24* (corrections officer)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeInformer Privilege

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24.88 Government May Withhold Information to Assist Law Enforcement.

The "official information privilege" is available to protect information collected by a law enforcement agency and may be asserted by the agency in a federal civil rights suit against it [*Kelly v. City of San Jose (ND Cal 1987) 114 FRD 653, 660*].The government may also refuse to disclose the contents of an investigative file or other documents or information relating to an ongoing investigation if disclosure of the materials would tend to undermine the integrity of the investigation [*see In re Sealed Case (DC Cir 1988) 856 F2d 268, 271* (privilege applies both to files themselves, and testimony about their contents)]. This privilege is referred to as the law enforcement investigative privilege. Factors to be considered when evaluating a claim of law enforcement investigative privilege include [*see Tri-Star Airlines, Inc. v. Willis Careen Corp. (WD Tenn 1999) 75 F Supp2d 835, 840*]:

- Whether disclosure will thwart governmental processes by discouraging citizens from giving the government information;
- The impact upon persons who have given information of having their identities disclosed;
- The degree to which governmental self-evaluation and improvement will be chilled;
- Whether the information is factual or evaluative;
- Whether the party seeking discovery is an actual or potential defendant in any criminal proceeding pending or likely to follow;
- Whether the police investigation has been completed;
- Whether any interdepartmental proceedings have arisen or may arise from the investigation;
- Whether the plaintiff's suit is non-frivolous and brought in good faith;
- Whether the information sought is available through other discovery; and

- The importance of the information sought to the plaintiff's case.

The law enforcement investigative privilege belongs to the government, not the person or entity investigated, so that only the government has standing to assert the privilege [Dean Foods Co. v. Eastman Chem. Co. (ND Cal 2001) 2001 US Dist LEXIS 25447, at *9].

To invoke the official information privilege in response to a discovery request, an agency must submit a declaration or affidavit, under oath or penalty of perjury, from a responsible official within the agency who has personal knowledge of the principal matters to be attested to in the affidavit or declaration at the time it files and serves its response to the discovery request. The declaration must, among other things [*Ramirez v. County of Los Angeles (CD Cal 2005) 231 FRD 407, 411* ; *Miller v Pancucci (CD Cal 1992) 141 FRD 292, 300*]:

- Specifically identify the governmental or privacy interests that would be threatened by disclosure;

- Specifically describe how disclosure of the requested information in the instant case would be harmful;

- Describe how disclosure subject to a carefully crafted protective order would create a substantial risk of harm to significant governmental or privacy interests; and

- Provide a projection of how much harm would be done to the threatened interests if the disclosure were made.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeInvestigative Files Privilege

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24.89 CHECKLIST: Trade Secrets.

☐ Determine whether federal common law or state privilege law applies.

Discussion:
See *§ 24.90*

☐ Check definition of trade secrets.

Discussion:
See *§ 24.90*

☐ Check local discovery rules.

☐ Is there a possibility of limited disclosure?

Discussion:
See *§§ 24.91*, *24.92*

☐ Review whether claim has been properly raised:

○ Was the claim timely?

- ○ Was the claim expressly raised?
- ○ Were the grounds stated?
- ○ Was there sufficient description of withheld material or testimony?

Discussion:
See *§ 24.24*

☐ Determine whether the claim of privilege has been waived.

Discussion:
See *§ 24.23*

☐ Claimant:

- ○ Keep privilege log.
- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion for protective order.

Authority:
Fed R Civ P 26(c); *CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.25*, *24.36*

Form:
See *§ 24.103*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.47*

☐ Opponent:

- ○ Meet and confer to try to resolve privilege issues.
- ○ Consider motion to compel.

Authority:
CD Cal Civ LR 37-1; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:

See *§§ 24.27*, *24.28*

Standard Procedure Checklist:

Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.03*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsFederal Common LawGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesTrade SecretsGeneral OverviewEvidencePrivilegesTrade SecretsElementsEvidencePrivilegesTrade SecretsScope

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K. Trade Secrets

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24.90 Defining "Trade Secret."

The term *trade secret* is quite broadly defined in the common law, and includes any business data or process that gives its holder a better competitive position, and the value of which is dependent on or enhanced by secrecy. The Supreme Court has approved the following formulation of the term [*Ruckelshaus v. Monsanto Co. (1984) 467 US 986, 1001, 104 S Ct 2862, 81 L Ed2d 815* , *quoting* Restatement of Torts, § 757, Comment b)]:

> Any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

In a diversity action or other action in which California law provides the substantive law to be applied, the California definition of "trade secret" may be applicable. That definition provides that a *trade secret* is information, including a formula, pattern, compilation, program, device, method, technique, or process that: (1) derives independent economic value from not being known generally to the public or other persons; and (2) is the subject of efforts that are reasonable to maintain its secrecy [*Evid Code § 1060(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.91 Limited Disclosure May Be Allowed.

A district court can make any order to protect a trade secret or confidential information by designating the way in which it is disclosed [*see Fed R Civ P 26(c)*; *Chan v. Intuit, Inc. (ND Cal 2003) 218 FRD 659, 661-662*].

When determining counsel's access to the opposing parties' confidential information, a court should balance the risk of inadvertent disclosure of trade secrets and the risk of impairing the process of litigation by denying discovery [*Chan v. Intuit, Inc. (ND Cal 2003) 218 FRD 659, 661-662*].

Cross Reference:

Protection of trade secrets, see 3 *Weinstein's Federal Evidence, §§ 508.01 -508.07* (Matthew Bender 2d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.92 Party Claiming Trade Secret Must Show Need to Protect Information.

A party or other person resisting discovery bears the burden of establishing that the information sought constitutes a trade secret, and that the need to protect the information outweighs the need of the parties to obtain the information for the conduct of the litigation [*see Valley Indus. Servs., Inc. v EEOC (ND Cal 1983) 570 F Supp 902* (request for protective order as to trade secrets obtained during investigation by Equal Employment Opportunity Commission (EEOC) denied when Act requires that all information obtained during investigation and conciliation stages of EEOC proceedings be kept confidential)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.93 State Law Requires Pleading of Trade Secret in Misappropriation Case.

California law requires that a plaintiff suing for misappropriation of trade secrets must specifically identify the trade secrets it claims the defendant misappropriated before engaging in discovery related to the trade secrets [*CCP § 2019.210*]. Though this statute could be interpreted as providing merely a pleading rule, the Southern District court has concluded that this is a substantive provision of law that is applicable even in a diversity action in federal court [*Computer Econs., Inc. v. Gartner Group, Inc. (SD Cal 1999) 50 F Supp2d 980, 986-990* (because statute does not conflict with federal pleading rules or discovery rules, it may be applied even in diversity action removed to federal court)]. The Northern District has also applied this state-law requirement to a suit based on disclosure of trade secrets in violation of a nondisclosure agreement [*Neothermia Corp. v. Rubicor Med., Inc. (ND Cal 2004) 345 F Supp2d 1042, 1043-1044*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.94 CHECKLIST: Work Product Protection.

☐ **Item Status.** Ascertain whether allegedly protected material is:

- ○ Embodied in:
  - ☐ Document.
  - ☐ Other tangible thing.
- ○ Prepared or produced by:
  - ☐ Attorney.
  - ☐ Client.
  - ☐ Representative of attorney or client.
- ○ Prepared or produced because of:
  - ☐ Ongoing litigation.
  - ☐ Anticipated future litigation.

Authority:
Fed R Civ P 26(b)(3)

Discussion:
See *§ 24.96*

☐ **Nature of Materials.** Ascertain whether protected material contains:

- ○ Facts.
- ○ Opinions, mental impressions, or conclusions of attorney.

Authority:
Fed R Civ P 26(b)(3)

Discussion:
See *§§ 24.101[2], [3]*

☐ **Degree of protection.** Ascertain whether protected material can be discovered due to:

- ○ Substantial need for materials.
- ○ Unavailability from other means without hardship.

Authority:
Fed R Civ P 26(b)(3)

Discussion:
See *§ 24.101[1]*

☐ **Waiver of protection.** Ascertain whether protection of material has been waived by:

- ○ Disclosure to adversary, whether:
  - ☐ Voluntary, or
  - ☐ Inadvertent.
- ○ Disclosure to third party, including:
  - ☐ Co-party.
  - ☐ Government agency.

☐ Expert witness.

○ Placing material in controversy.

Authority:
Fed R Civ P 26(b)(3); Fed R *Evid 502*

Discussion:
See *§ 24.102*

☐ Claimant:

○ Keep privilege log.

○ Meet and confer to try to resolve privilege issues.

○ Consider motion for protective order.

Authority:
Fed R Civ P 26(c); *CD Cal Civ LR 37-1*; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.25*, *24.36*

Form:
See *§ 24.103*

Standard Procedure Checklist:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.47*

☐ Opponent:

○ Meet and confer to try to resolve privilege issues.

○ Consider motion to compel.

Authority:
CD Cal Civ LR 37-1; *ED Cal Civ LR 251(b)*; *ND Cal Civ LR 37-1(a)*; *SD Cal Civ LR 26.1(a)*

Discussion:
See *§§ 24.27*, *24.28*

Standard Procedure Checklist:
Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.03*

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.95 Federal Rule Applies.

Because the work product protection is found in a federal rule of procedure [*Fed R Civ P 26(b)(3)*], the required elements to invoke the work product protection are defined exclusively by federal law, even in a diversity action [*Connolly Data Sys., Inc. v. Victor Techs., Inc. (SD Cal 1987) 114 FRD 89, 95*], or other action in which California law provides the substantive law.

Example:

In an action involving the Federal Deposit Insurance Company, a federal forum was available only because of the presence of the FDIC as a party, and there was no other federal element to the action. Though state law therefore supplied all rules of decision, the scope and extent of any work product protection was nevertheless governed by the Federal Rules, not by state law [*FDIC v. Fidelity & Deposit Co. (SD Cal 2000) 196 FRD 375, 381*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.96 Defining Work Product.

24.96[1] Material to Be Protected Must Be Document or Other Tangible Thing. To be eligible for protection as attorney work product, materials sought through discovery must be either "documents" or other "tangible things" [*Fed R Civ P 26(b)(3)(A)*; *see Resolution Trust Corp. v. Dabney (10th Cir 1995) 73 F3d 262, 266* (conduct of attorney could not be work product)]. Moreover, even if a document or tangible thing is work product, the facts contained in the work product are not protected from discovery, though the document may be redacted or otherwise edited if necessary to protect the work product [*see Powell v. United States Dep't of Justice (ND Cal 1984) 584 F Supp 1508, 1520* (in context of work product, court must be sensitive to possibility that disclosure of facts in documents will reveal attorney's tactical or strategic thoughts)].

Cross Reference:

Attorney work product restricted to documents and tangible things, see 6 *Moore's Federal Practice, § 26.70[2]* (Matthew Bender 3d ed.).

24.96[2] Material Must Be Prepared by or for Party, Attorney, or Representative. To be eligible for protection as attorney work product, materials must be prepared by or for a party, or by or for a party's representative, including an "attorney, consultant, surety, indemnitor, insurer or agent" [*Fed R Civ P 26(b)(3)(A)*]. Accordingly, a document prepared by or for a nonparty to an action cannot be work product in that action, even if the nonparty admittedly prepared the document for other related litigation [*see In re Cal. Public Util. Comm'n (9th Cir 1989) 892 F2d 778, 781* (nonparty governmental agency could not assert work product protection for documents it prepared for separate administrative action)].

Example:

In a civil rights suit alleging malicious prosecution, discovery was sought of the content of the files of the deputy district attorneys prosecuting the prior actions. The district court denied the motion to quash the subpoenas, concluding that because the County was not a party in the civil rights action, the district attorneys could not assert work product protection for the files [*Doubleday v. Ruh (ED Cal 1993) 149 FRD 601, 605-606*]. In contrast, the work product privilege of a *criminal defendant* does apply in a

subsequent civil litigation in which the criminal defendant is the civil rights plaintiff [*see, e.g., Tennison v. City & County of San Francisco (ND Cal 2005) 226 FRD 615, 619-620*].

Exception:

A document or other tangible thing produced by illegal or unethical conduct of a party or attorney will not be protected as attorney work product [*e.g., Smith v. WNA Carthage, L.L.C. (ED Tex 2001) 200 FRD 576, 578* (clandestine recordings of witness interviews, whether by party or counsel, are not shielded under work product doctrine)].

Cross Reference:

Attorney work product requires preparation by party, attorney, or representative, see 6 *Moore's Federal Practice, § 26.70[4]* (Matthew Bender 3d ed.).

24.96[3] Material Must Be Prepared Because of Existing or Anticipated Litigation. To be eligible for protection as attorney work product, materials must be "prepared in anticipation of litigation or for trial" [*Fed R Civ P 26(b)(3)(A)*]. This language clearly includes materials prepared for the particular action being litigated. The litigation for which the materials were prepared, however, need not have already commenced; instead, work product protection extends to materials generated because of an identifiable prospect of future litigation [*Fox v. California Sierra Fin. Servs. (ND Cal 1988) 120 FRD 520, 524*]. Materials produced in the ordinary course of business, however, do not enjoy work product protection merely because they prove to be of value in subsequent litigation [*Miller v. Pancucci (CD Cal 1992) 141 FRD 292, 303* (police report prepared as matter of course after citizen complaint was not work product)].

Examples:

When a claims adjuster for a city's insurer interviewed police officers for the purposes of determining whether or not the insurer should pay the plaintiff's claims, the interviews were in the ordinary course of the insurer's business and therefore could not be attorney work product. Subsequent interviews conducted by the same adjuster after denial of the claim, however, were in anticipation of the plaintiff's litigation against the insurer, and so were protected work product [*Garcia v. City of El Centro (SD Cal 2003) 214 FRD 587, 593-595*].

An attorney's communications with state agencies as to compliance with securities laws were not protected work product when the work was performed to assist in the sale and marketing of the securities, not in anticipation of any litigation over those securities [*Fox v. California Sierra Fin. Servs. (ND Cal 1988) 120 FRD 520, 524*].

24.96[4] Protection Extends Beyond Confidential Communications. The work product doctrine extends beyond confidential communications between the attorney and client to documents prepared in anticipation of litigation by or for the attorney [*United States v. Bergonzi (ND Cal 2003) 216 FRD 487, 492* (noting that there is no requirement, when determining whether the protection applies, that the attorney and client intend to maintain the material in confidence)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.97 Protection Does Not Expire.

Work product protection, once attached to a document, does not expire merely because the litigation for which the document was produced has come to an end [*see FTC v. Grolier Inc. (1983) 462 US 19, 25-28, 103 S Ct 2209, 76 L Ed2d 387*]. If a document is created both in anticipation of litigation, and for a distinct, unrelated purpose, the document is not work product when the document would have been prepared irrespective of the prospect of litigation [*see Griffith v. Davis (CD Cal 1995) 161 FRD 687, 698-699*]. If, however, the other reason is inextricably intertwined with the litigation-related reason, the document is work product [*United States ex rel. Bagley v. TRW, Inc. (CD Cal 2003) 212 FRD 554, 560*].

Strategic Point:

When a document has been admittedly prepared for multiple reasons, the party trying to invoke work product protection should attempt to show that the prospect of litigation was a substantial factor in the mix of considerations, purposes, or forces that led to preparation of the document [*see Jumpsport, Inc. v. Jumpking, Inc. (ND Cal 2003) 213 FRD 329, 330-331*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.98 Protection May Apply to Dual-Purpose Documents.

With respect to dual-purpose documents: a document should be deemed prepared in anticipation of litigation and thus eligible for work product protection under *Fed R Civ P 26(b)(3)* if in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation [*United States v. Torf (In re Grand Jury Subpoena) (9th Cir 2003) 357 F3d 900, 907*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.99 Either Client or Attorney May Claim Work Product Protection.

The work product protection may be claimed either by a party or by an attorney [*Doubleday v. Ruh (ED Cal 1993) 149 FRD 601, 606 n5* (counsel who prepare work product are holders of work product immunity in addition to party for whom work product was prepared)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.100 Initial Burden of Proof Is on Party Claiming Work Product Protection.

The party asserting that materials sought through discovery enjoy work product protection bears the initial burden of establishing that the doctrine applies [*Garcia v. City of El Centro (SD Cal 2003) 214 FRD 587, 591*].

If the party resisting discovery carries its initial burden to show that work product protection is available, the burden of proof shifts, and the party seeking discovery must overcome the work product protection by showing substantial need for the materials and inability to obtain their equivalent without undue hardship [*Garcia v. City of El Centro (SD Cal 2003) 214 FRD 587, 591*].

Cross Reference:

Burden of proof as to work product protection, see 6 *Moore's Federal Practice, § 26.70[5]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.101 Work Product Is Not Absolute Protection.

24.101[1] Material May Be Discoverable on Showing of Substantial Need and Undue Hardship. The applicability of the work product doctrine is not an absolute protection of the materials from discovery; instead, discovery is nevertheless available when the requesting party shows that it "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means" [*Fed R Civ P 26(b)(3)(A)(ii)*].

The determination as to whether the party requesting discovery has made the necessary showing to overcome work product protection turns primarily on the application of two factors [*Fletcher v. Union Pac. R.R. (SD Cal 2000) 194 FRD 666, 671*]:

- Whether the sought information is an essential element in the requesting party's case; and
- Whether the party can reasonably obtain the sought information from an alternate source.

Example:

Because evidence that merely corroborates other evidence already in the case cannot be an essential element of the discovering party's case, work product sought merely for corroboration does not meet the "substantial need" test and cannot be discovered [*O'Connor v. Boeing N. Am., Inc. (CD Cal 2003) 216 FRD 640, 643*].

Cross Reference:

Substantial need and undue hardship as to work product protection, see 6 *Moore's Federal Practice, § 26.70[5][b], [c], [d]* (Matthew Bender 3d ed.).

24.101[2] Parties Must Distinguish "Fact" and "Opinion" Work Product. The federal courts recognize a distinction between "fact" work product and "opinion" work product.

Fact word product refers to the work product of an attorney in collecting factual information, [*see, e.g., Holmgren v. State Farm Mut. Auto. Ins. Co. (9th Cir 1992) 976 F2d 573, 576*]. "Fact" work product is also known as "ordinary" work product [*see, e.g., O'Connor v. Boeing N. Am., Inc. (CD Cal 2003) 216 FRD 640, 642*].

Opinion word product is any work product that reflects the mental impressions, conclusions, opinions, or legal theories of the attorney [*see, e.g., Holmgren v. State Farm Mut. Auto. Ins. Co. (9th Cir 1992) 976 F2d 573, 576* (document prepared by insurance adjuster as to range of potential damages in litigation was opinion work product).]

Example:

Statement of material facts required to be filed as prerequisite to suit under False Claims Act was opinion work product because the statement revealed the attorney's legal analysis as to which facts were material to the claims presented [*United States ex rel. Bagley v. TRW, Inc. (CD Cal 2003) 212 FRD 554, 563-565*].

24.101[3] Party Seeking Discovery Must Show Need for Opinion Work Product Is Compelling. When a party seeks discovery of "opinion" work product, the party must make a showing beyond the basic substantial need/undue hardship test that applies to "fact" work product. Instead, the party must show that the "opinion" work product is the pivotal issue in the litigation, and that the need for the material is compelling [*Holmgren v. State Farm Mut. Auto. Ins. Co. (9th Cir 1992) 976 F2d 573, 577-578* ; *see Upjohn Co. v. United States (1981) 449 US 383, 401-402, 101 S Ct 677, 66 L Ed2d 584*].

Distinguish:

Although some federal courts apply the rule that "opinion" work product is absolutely protected irrespective of the strength of the showing of need of the requesting party, the Ninth Circuit has rejected that rule, instead permitting discovery when the materials are pivotal to the case and the need for the material is compelling [*Holmgren v. State Farm Mut. Auto. Ins. Co. (9th Cir 1992) 976 F2d 573, 577-578*].

Cross Reference:

Discovery of "opinion" work product, see 6 *Moore's Federal Practice, § 26.70[5][b], [c], [d]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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24.102 Waiver of Work Product Protection.

24.102[1] Voluntary Disclosure Waives Protection. Because the work product protection is designed to restrict discovery of the protected materials from other parties to the action, voluntarily disclosing that information to an adverse party is fundamentally inconsistent with work product protection and therefore waives the protection as to the disclosed materials [*see First Pac. Networks v. Atlantic Mutual Ins. Co. (ND Cal 1995) 163 FRD 574, 582-583* (sharing alleged work product with potential adversary waives protection)].

Cross Reference:

Waiver of attorney work product protection, see 6 *Moore's Federal Practice, § 26.70[6]* (Matthew Bender 3d ed.).

24.102[2] Inadvertent Disclosure May Waive Protection. *Fed R Evid 502*, enacted on September 19, 2008, protects against the inadvertent waiver of work product protection, as well as the attorney-client privilege. The rule applies in all proceedings commenced after the date of enactment and, if "just and practicable," in all proceedings pending on that date.

- If a party produces a privileged document under circumstances that constitute a waiver of the privilege, that waiver extends to other related information only if the disclosed and undisclosed information "ought in fairness" be considered together.

- Inadvertent disclosure made at the federal level will not operate as a waiver if the holder of the protection has taken reasonable steps to prevent disclosure and has taken reasonably prompt measures to retrieve the inadvertently disclosed information, including (if applicable) following *Fed R Civ P 26(b)(5)(B)*.

- Disclosure made in a state proceeding that is not subject to a state-court order concerning waiver does not constitute waiver of the work product immunity in a federal proceeding if: (1) the disclosure would not be a waiver if it had been made in a federal proceeding, or (2) if the disclosure would not be a

waiver under the law of the state where the disclosure occurred.

- Federal courts may enter confidentiality orders providing that disclosure of protected material does not constitute waiver in other state or federal proceedings.

- An agreement on the effect of disclosure of a communication or information covered by the work product protection is binding only on the parties to the agreement, unless the agreement is incorporated into a court order.

Fed R *Evid 502* applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances stated in the rule. The rule applies even if state law supplies the rule of decision [*Fed R Evid 502(f)*; *see Fed R Evid 501*].

Cross References:

Fed R Evid 502, see generally 3 Weinstein's Federal Evidence, Ch. 502 (Matthew Bender 2d ed.). Forms of stipulated protective orders addressing disclosure of privileged or protected information, see §§ 22.76, 22.77.

Warning:

A lawyer who receives materials that on their face appear to be subject to work product protection or otherwise confidential, under circumstances in which it is clear that the materials were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer, and abide by the instructions of the lawyer who sent them. Thus, part of the duty to prevent and remedy inadvertent disclosure falls on the lawyer in receipt of that inadvertent disclosure [*Gomez v. Vernon (9th Cir 2001) 255 F3d 1118, 1131-1132* , *cert. denied sub nom. Beauclair v. Gomez, 534 US 1066 (2001)* , *quoting*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 368 (1992)].

Cross References:

Asserting claim of protection after inadvertent disclosure, *24.102[7]*.

Waiver of attorney work product protection, see 6 *Moore's Federal Practice, § 26.70[6]* (Matthew Bender 3d ed.).

24.102[3] Disclosure to Co-Party or Other With Common Interest May Not Constitute Waiver. If a party or attorney discloses attorney work product to a co-party or other third party that has a common interest in the litigation, the disclosure waives work product protection only if it is made under circumstances that create a substantial danger that the disclosure will fall into the hands of an adverse party [*Samuels v. Mitchell (ND Cal 1994) 155 FRD 195, 200-201* (revealing work product to accounting firm acting as consultant did not waive protection)].

Cross Reference:

Waiver of attorney work product protection, see 6 *Moore's Federal Practice, § 26.70[6]* (Matthew Bender 3d ed.).

24.102[4] Disclosure to Government Agency May Waive Protection. When a party or attorney shares protected work product with a governmental agency, the extent of any waiver of the protection turns on whether or not the disclosure occurred in an adversarial context. If the party's interests are similar to the government's, the "common interest" rule will apply and the work product protection will be preserved [*United States ex rel. Burroughs v. DeNardi Corp. (SD Cal 1996) 167 FRD 680, 685-686* (government and private party in action under False Claims Act have common interest, so that disclosure of work product does not waive protection)]. If, on the other hand, the party and the

government are in an essentially adversarial position, the disclosure of work product is a waiver of the protection [*In re Steinhardt Partners (2d Cir 1993) 9 F3d 230, 234-236* (because SEC and bond trader were in adversarial position when trader provided work product to agency, work product protection waived as to subsequent litigation)].

Cross Reference:

Waiver of attorney work product protection, see 6 *Moore's Federal Practice, § 26.70[6]* (Matthew Bender 3d ed.).

24.102[5] Disclosure to Expert Witness May Waive Protection. An opposing party is entitled to discover not only the opinions of a testifying expert witness, but also the basis for those opinions, so that any factual or other information relied on by the expert in forming opinions is subject to discovery [*Fed R Civ P 26(b)(4)*]. Accordingly, if an attorney communicates work product to a testifying expert, and that information is considered or relied on in forming the expert's opinion, the information is discoverable as part of the basis of the expert's opinion and the work product protection is waived [*Intermedics, Inc. v. Ventritex, Inc. (ND Cal 1991) 139 FRD 384, 388-389*].

Example:

In a plaintiff's civil rights action, a consulting expert for the plaintiff provided plaintiff's counsel with some analysis of data. The plaintiff then forwarded that analysis on to its testifying expert. When the defendant sought production of the data, the plaintiff objected, arguing work product protection. The court ordered production, holding that when counsel forwards documents prepared by a non-testifying consultant to a testifying expert, they become discoverable, and any work product protection the documents may have had no longer applies [*United States v. City of Torrance (CD Cal 1995) 163 FRD 590, 593*].

Cross Reference:

Disclosure of attorney work product to expert, see 6 *Moore's Federal Practice, § 26.80[1], [2]* (Matthew Bender 3d ed.).

24.102[6] Placing Material in Controversy Waives Protection. Even if materials enjoy protection as attorney work product, the placing of those very materials in controversy in the action waives the work product protection [*see United States v. Nobles (1975) 422 US 225, 239, 95 S Ct 2160, 45 L Ed2d 141* (defense decision to call investigator as impeachment witness waived work product protection as to investigator's report)].

24.102[7] Claim of Protection May Be Asserted After Disclosure. If information later determined to be protected as attorney work product was inadvertently disclosed in discovery, a procedure exists for the responding party to assert the protection claim and for the receiving party to contest the claim. The responding party may notify any party that received the information of the protection claim and the basis for it. The notice should be in writing unless the circumstances preclude it. After receiving notice, a receiving party must promptly return, sequester, or destroy the subject information, and any copies, and may not use or disclose the information until the claim is resolved. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. A receiving party may present the information to the court under seal for a determination of the claim and the producing party must preserve the information until the claim is resolved [Fed R Civ P 26(b)(5)(B)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductWaivers

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 24 Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection
VI. FORMS

3-24 MB Practice Guide: Fed Pretrial Civ Proc in CA 24.103

24.103 Privilege Log.

Privilege Log.

PRIVILEGE LOG OF:	[*name and party designation, if any, of privilege claimant*]
Nature of Privilege:	[*identify privilege or protection*] [*cite statutory or other authority for privilege*]
Type of Document:	[*describe document*]
Date of Document:	[*date*]
Author of Document:	[*name and, if appropriate, designation*]
Recipient(s) of Document:	[*name(s) and, if appropriate, designation(s)*]
Custodian of Document:	[*name and address of person in possession*]
Subject Matter:	[*describe subject matter of document in reasonable factual detail so that validity of claim of privilege can be judged*]
Application of Privilege:	[*describe how each element of the claim of privilege is established with respect to the document*]

NOTES.

Authority:
See *Fed R Civ P 26(b)(1)*

Cross Reference:
Preparation of privilege log, see *§ 24.26*

Legal Topics:

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

Civil ProcedureDiscoveryPrivileged MattersGeneral Overview

1 of 123 DOCUMENTS

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 7 Discovery
CHAPTER 25 Motions to Compel and Discovery Sanctions

3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.syn

§ 25.syn Synopsis to Chapter 25: Motions to Compel and Discovery Sanctions

25.01 Scope.

25.02 Objective and Strategy.

25.03 CHECKLIST: Bringing Motion to Compel Mandatory Disclosure or Discovery.

25.04 Options and Strategies for Compelling Mandatory Disclosure or Discovery.

25.04[1] Parties Should Attempt to Resolve Discovery Disputes Informally.

25.04[1][a] Parties Should Clarify Discovery Requests Without Formal Motion.

25.04[1][b] Proceeding With Discovery Response After Rejection of Informal Request for Clarification.

25.04[2] Counsel Should Weigh Cost and Delay of Motion.

25.05 Local Rules Require Attempt at Informal Resolution of Discovery Disputes Prior to Filing of Discovery Motions.

25.05[1] LOCAL PRACTICE: CD Cal Requirements--Counsel Must Confer in Good Faith to Attempt Resolution of Any Discovery Dispute.

25.05[1][a] Good-Faith Attempt at Resolution Required Prior to Filing Motion.

25.05[1][b] Conference Required Within 10 Days of Service of Request.

25.05[2] LOCAL PRACTICE: CD Cal Requirements--Stipulation of Discovery Dispute Required Prior to Filing Motion.

25.05[2][a] Written Stipulation of Nonresolution Must Be Filed and Served With Notice of Motion.

25.05[2][b] Form of Stipulation.

25.05[2][c] Counsel Must Exchange Stipulation Portions in Timely Manner.

25.05[2][d] Parties May File Supplemental Memoranda of Law.

25.05[2][e] Court Will Not Consider Discovery Motion Absent Stipulation or Declaration of Noncooperation.

25.05[3] LOCAL PRACTICE: ED Cal Requirements--Counsel Must Confer Prior to Filing of Any Discovery Motion, and Must Prepare Joint Statement.

25.05[3][a] Counsel Must Confer Prior to Filing of Motion.

25.05[3][b] Moving Party Must Draft Joint Statement If Disagreement Continues.

25.05[3][c] Moving Party May File and Serve Affidavit of Opposing Party's Refusal to Confer or Prepare Joint Statement.

25.05[3][d] Joint Statement Requirement May Be Waived Under Certain Circumstances and Pursuant to Motion.

25.05[4] LOCAL PRACTICE: ND Cal Requirements--Counsel Must Confer in Good Faith to Attempt Resolution of Discovery Disputes Under Rule 37.

25.05[4][a] Counsel Must Confer Prior to Request or Motion Involving Discovery Dispute.

25.05[4][b] Counsel Must Attempt to Settle Dispute During Discovery Event.

25.05[5] LOCAL PRACTICE: SD Cal Requirements--Counsel Must Confer in Attempt to Resolve Any Discovery Dispute.

25.05[5][a] Conference Is Prerequisite to Motion.

25.05[5][b] Counsel Must Confer in Person or Telephonically.

25.05[5][c] Certificate of Compliance With Conference Requirement.

25.06 Mandatory Disclosures Under Rule 26.

25.07 Distinction Between Mandatory Disclosure and Discovery.

25.08 Motion for Order Compelling Mandatory Disclosure or Discovery.

25.08[1] Motion for Order Compelling Mandatory Disclosure.

25.08[1][a] Party May Seek Order Compelling Disclosure and Request Sanctions After Reasonable Notice.

25.08[1][b] Good-Faith Certificate of Attempt at Resolution Required.

25.08[2] Motion to Compel Discovery.

25.08[2][a] Party Seeking Discovery May Compel Discovery Concerning Depositions, Interrogatories, and Requests for Inspection, and May Request Sanctions.

25.08[2][b] Good-Faith Certificate of Attempt at Resolution Required.

25.08[3] Evasive or Incomplete Disclosure, Answer, or Response.

25.09 Seeking Order to Compel With Respect to Specific Discovery Methods.

25.09[1] Failure to Answer Deposition Questions.

25.09[1][a] Moving for Order to Compel Answer.

25.09[1][b] Evaluating Whether to Complete Remainder of Deposition After Deponent Refuses to Answer.

25.09[1][c] Understanding Situations When Deponent May Decline to Answer.

25.09[2] Written Deposition.

25.09[3] Failure to Designate Deponent.

25.09[4] Failure to Respond to Interrogatories or a Request for Production or Inspection.

25.10 Notice of Motion and Motion to Compel.

25.10[1] Standing for Motion to Compel Disclosure or Discovery.

25.10[1][a] Any Other Party May Move to Compel Disclosure.

25.10[1][b] Party Seeking Discovery May Move to Compel Discovery.

25.10[2] LOCAL PRACTICE: ND Cal Requirements--Motion to Compel Must Be Filed Seven Court Days or Fewer After Discovery Cutoff.

25.10[3] LOCAL PRACTICE: ND Cal Requirements--Form of Motion to Compel Must Set Forth Each Request and Response.

25.10[4] Moving Party on Motion to Compel Must Provide Reasonable Notice.

25.10[5] LOCAL PRACTICE: CD Cal Requirements--Required Notice for Any Discovery Motion; Ex Parte Rules.

25.10[5][a] At Least 21 Days' Notice Is Required on Any Discovery Motion.

25.10[5][b] No Ex Parte Motions Are Permitted Absent Proper Showing.

25.10[6] LOCAL PRACTICE: ED Cal Requirements--Filing of Any Discovery Motion and Hearing on Motion for Any Discovery Motion.

25.10[7] Application Is Made to Court Where Action Is Pending for Party, Court Where Discovery Is Taken for Nonparty.

25.10[8] LOCAL PRACTICE: SD Cal Requirements--Motion to Compel Is Referred to Magistrate Judge in Charge of Case.

25.11 Court's Determination of Motion to Compel Discovery.

25.11[1] Courts Use Broad Standard to Determine Relevance of Pretrial Discovery.

25.11[2] LOCAL PRACTICE: SD Cal Requirements--Local Rule 1.1(c) Applies to Motion to Compel, Requiring Just, Efficient, and Economical Determination.

25.12 Discovery Rulings Are Reviewed Under Abuse of Discretion Standard.

25.13 CHECKLIST: Opposing Motion to Compel Mandatory Disclosure or Discovery.

25.14 Protective Orders.

25.14[1] Denial or Partial Denial of Motion May Result in Protective Order.

25.14[2] Seeking Protective Order in Conjunction With Opposition to Motion.

25.14[3] LOCAL PRACTICE: SD Cal--Responding Party May Serve Notice of Protective Order.

25.15 Factors Supporting Denial of Motion to Compel Discovery.

25.15[1] Relevance Factors Favoring Denial.

25.15[2] Proportionality Factors Favoring Denial.

25.15[3] Good-Faith Requirements Favoring Denial.

25.15[4] Privilege or Work-Product Protection Favoring Denial.

25.16 CHECKLIST: Seeking Imposition of Expense-Shifting Sanctions on Motion to Compel Mandatory Disclosure or Discovery.

25.17 Court Award of Reasonable Expenses, Including Attorney's Fees, and Entry of Protective Order.

25.17[1] If Motion for Order Compelling Disclosure or Discovery Is Granted.

25.17[2] If Motion for Order Compelling Disclosure or Discovery Is Denied.

25.17[3] If Motion for Order Compelling Disclosure or Discovery Is Granted in Part and Denied in Part.

25.18 Due Process Requirements of Expense-Shifting Sanctions: Opportunity to Be Heard.

25.19 Rebuttable Presumption Favors Party Seeking Expense-Shifting Sanctions.

25.20 Moving Party May Recover Attorney's Fees Incurred in Requesting Expense-Shifting Sanctions.

25.21 CHECKLIST: Opposing Expense-Shifting Sanctions on Motion to Compel Mandatory Disclosure or Discovery.

25.22 If Moving Party Prevails, Responding Party May Raise Failure to Make Good-Faith Effort at Informal Resolution.

25.23 If Moving Party Prevails, Responding Party May Raise Substantial Justification.

25.24 If Responding Party Prevails, Moving Party May Raise Substantial Justification.

25.25 Unsuccessful Party May Raise Other Circumstances That Render Imposition of Sanctions Unjust.

25.26 Substantial Justification Is Determined by Objective Standard.

25.27 Opposing Reasonableness of Amount of Sanctions Requested.

25.28 CHECKLIST: Requesting Imposition of Rule 37(b) Sanctions.

25.29 Person Who Fails to Be Sworn or Deposed May Be in Contempt of Court.

25.30 Party or Party's Representative or Designee Who Disobeys Court Order Is Subject to Sanctions.

25.30[1] Party Who Fails to Obey Discovery Order Is Subject to Sanctions.

25.30[2] Party's Representative or Designee Who Fails to Obey Discovery Order Is Subject to Sanctions.

25.30[3] Party Who Fails to Obey Order to Produce Another for Examination Is Subject to Sanctions Absent Showing of Inability.

25.30[4] Pro Se Litigants Are Subject to Sanctions.

25.31 Underlying "Order" Is Construed Broadly.

25.32 Court That Issued Order Determines Whether Order Was Violated.

25.33 Sanctions Available Under Rule 37(b)(2).

25.33[1] List of Sanctions.

25.33[2] Sanction Precluding Party From Defending Claim Is Severe Penalty Authorized Only in Extreme Circumstances.

25.34 Dismissal and Default Sanctions Are Severe Penalties Imposed Only After Weighing Certain Factors.

25.34[1] Dismissal and Default Sanctions Are Authorized Only in Extreme Circumstances.

25.34[2] Factors for Determining Dismissal or Default.

25.34[3] Determining Whether Court Considered Alternative Sanctions.

25.34[4] When Court Should Explicitly Discuss Alternatives or Warn of Dismissal.

25.34[4][a] Discussion of Alternatives.

25.34[4][b] Warning of Dismissal.

25.34[5] Appellate Courts Will Affirm Dismissal If Four Factors Support Dismissal, or Three Factors Strongly Support Dismissal.

25.34[6] Dismissal and Default Sanctions Reviewed Under Same Standard; Cases Involving Court's Inherent Power Apply.

25.35 Contempt of Court Is Available Under Rule 37(b)(2).

25.35[1] Failure to Obey Order May Be Treated As Contempt of Court.

25.35[2] Protective Order May Be Basis for Contempt Sanction.

25.35[3] Civil and Criminal Contempt Distinguished by Character and Purpose.

25.36 Civil Contempt.

25.36[1] Civil Contempt Consists of Disobedience of Specific Order by Failure to Comply Reasonably.

25.36[2] Civil Contempt May Be Compensatory or Coercive.

25.36[3] Civil Contempt Requires Showing of Violation Absent Good Faith and Reasonable Interpretation of Order.

25.36[4] Standard of Proof Is Clear and Convincing Evidence.

25.36[5] Civil Contempt Is Reviewed Under Abuse of Discretion Standard.

25.36[6] Burden Shifts After Party Is Found to Have Violated Court Order.

25.37 Criminal Contempt.

25.37[1] Purpose of Criminal Contempt Is Punitive.

25.37[2] Criminal Contempt Requires Willful Conduct.

25.37[3] Court Must Provide Notice, and Appoint Prosecutor.

25.37[4] Person Is Entitled to Jury Trial When Federal Law Provides.

25.37[5] Judge Disrespected or Criticized Is Disqualified From Presiding at Contempt Proceeding.

25.37[6] Judge May Punish Person Committing Criminal Contempt in His or Her Presence.

25.37[7] Standard of Proof Is Beyond Reasonable Doubt.

25.38 Monetary Sanctions Are Imposed Under Rule 37(b)(2), Absent Substantial Justification or Other Circumstances.

25.39 Sanction Must Be Specifically Related to Claim at Issue in Discovery Order.

25.40 Motion for Sanctions Under Rule 37(b).

25.40[1] LOCAL PRACTICE: All Districts--Counsel Must Make Good-Faith Effort to Resolve Dispute Informally.

25.40[2] Determining Jurisdiction for Motion.

25.40[2][a] Motion Seeking Sanctions Against Party May Be Brought in Court Where Action Is Pending.

25.40[2][b] Motion Seeking Sanctions Against Nonparty Deponent Is Brought in Court That Issued Discovery Order.

25.40[3] Time for Filing Motion.

25.40[3][a] Motion Should Be Filed Within Reasonable Time After Violation.

25.40[3][b] LOCAL PRACTICE: ND Cal Requirements--Motion Must Be Made As Soon As Practicable After Notice of Violation, and Served and Filed 14 Days After Judgment Is Entered or Earlier.

25.40[4] LOCAL PRACTICE: ND Cal Requirements--Form of Motion Must Comply With Local Rules 7-2 and 7-8.

25.40[4][a] Motion Must Comport With Format Requirements of Local Rule 7-2.

25.40[4][b] Motion Must Be Separately Filed.

25.40[5] Content of Motion.

25.40[5][a] Moving Party Must Provide Adequate Description of Alleged Violation.

25.40[5][b] Motion Seeking Expenses Must Show Connection Between Violation and Expenses.

25.40[5][c] LOCAL PRACTICE: ND Cal Requirements--Required Affidavits and Declarations in Motion for Sanctions Under Rule 37.

25.40[5][d] LOCAL PRACTICE: ND Cal Requirements--Motion Must Be Accompanied by Proposed Order.

25.40[6] LOCAL PRACTICE: CD Cal Requirements--Required Notice for Any Discovery Motion; Ex Parte Rules.

25.40[6][a] At Least 21 Days' Notice Is Required on Any Discovery Motion.

25.40[6][b] No Ex Parte Motions Permitted Absent Proper Showing.

25.40[7] LOCAL PRACTICE: ED Cal Requirements--Filing of Discovery Motion and Hearing on Motion for Discovery Motion.

25.40[8] LOCAL PRACTICE: ND Cal Requirements--Notice of Motion for Sanctions Under Rule 37.

25.40[8][a] Motion for Sanctions Based on Disclosure or Discovery Dispute Must Comply With Local Rules 7-2 and 7-8.

25.40[8][b] Motion Must Be Served and Filed at Least 35 Days Before Hearing.

25.41 Court's Determination of Imposition of Sanctions.

25.41[1] Court in Which Action Is Pending May Make Just Orders Regarding Sanctions.

25.41[2] Purpose of Sanctions Is to Prevent Party From Benefitting From Failure to Respond, and to Deter Sanctioned Conduct.

25.41[3] Court Evaluates All Incidents of Party's Misconduct.

25.42 Discovery Rulings Are Reviewed Under Abuse of Discretion Standard.

25.43 CHECKLIST: Opposing Imposition of Rule 37(b) Sanctions.

25.44 Options and Strategies for Opposing Imposition of Rule 37(b) Sanctions.

25.45 Opposing Imposition of Monetary Sanctions.

25.45[1] Disobedient Party Has Burden of Proving That Failure Was Substantially Justified.

25.45[2] Opposing Sanctions on Ground That Other Circumstances Make Monetary Sanctions Unjust.

25.46 Opposing Sanctions on Ground That an Underlying Order Was Not Issued, or That Party Did Not Disobey Any Order.

25.47 Opposing Sanctions on Ground That Requested Sanction Is Unrelated to Particular Discovery Order That Was Disobeyed.

25.48 Opposing Civil Contempt.

25.48[1] Opposing Civil Contempt on Ground of Substantial Compliance With Court Order.

25.48[2] Opposing Civil Contempt on Ground of Impossibility.

25.49 Opposing Severe Sanctions on Ground That Less Severe Sanctions Are Appropriate Under Circumstances.

25.49[1] Party Who Disobeyed Discovery Order May Assert That Sanctions Sought Are Too Severe Under Circumstances.

25.49[2] Imposing Severe Sanctions Is Inappropriate When Party Was Unable to Comply With Discovery Order.

25.49[3] Refuting Requested Amount of Sanctions.

25.50 CHECKLIST: Requesting Imposition of Rule 37(c)(1) Sanctions.

25.51 Party Who Fails to Make Mandatory Disclosures or Amended Responses Is Subject to Evidence-Preclusion Sanctions.

25.51[1] Unjustified Failure to Disclose or Amend Information As Required Under Rule 26 Results in Evidence-Preclusion Sanctions.

25.51[2] Evidence-Preclusion Sanction Is Self-Executing.

25.51[3] Making Proper Showing to Obtain Preclusion Order.

25.52 Additional Sanctions Available.

25.52[1] Issue and Evidence Preclusion, Termination, and Monetary Sanctions.

25.52[2] Court May Inform Jury of Failure to Make Disclosure.

25.53 Discovery Rulings Are Reviewed Under Abuse of Discretion Standard.

25.54 CHECKLIST: Opposing Imposition of Rule 37(c)(1) Sanctions.

25.55 Party May Oppose Sanctions on Ground That Failure to Disclose or Supplement Was Substantially Justified.

25.55[1] Failure to Disclose or Supplement Was Substantially Justified.

25.55[2] Reasonable Predisclosure Investigation Justified Failure to Disclose or Supplement.

25.55[3] Unforeseen Relevance of Discovery Material.

25.55[4] Pro Se Party May Show Ignorance of Discovery Requirement.

25.56 Party May Oppose Sanctions on Ground That Failure to Disclose or Supplement Was Harmless.

25.57 Party May Oppose Sanctions on Ground That Factors Weigh Against Sanctions.

25.58 Party May Oppose Severity of Sanctions.

25.59 CHECKLIST: Requesting Imposition of Rule 37(c)(2) Sanctions.

25.60 Party Failing to Admit Genuineness of Document or Truth of Matter Later Proved Is Subject to Monetary Sanctions.

25.61 Party May Object, Admit or Deny the Matter, or State That Matter Cannot Be Admitted or Denied.

25.62 Expense-Shifting Sanctions Under Rule 37(c)(2) May Be Imposed Against Party Only.

25.62[1] Sanctions Available Against Party, Not Counsel.

25.62[2] Sanctions Against Attorney May Be Available From Other Sources of Authority.

25.63 Motion for Expense-Shifting Sanctions Based on Party's Unreasonable Failure to Admit.

25.63[1] LOCAL PRACTICE: All Districts--Counsel Must Make Good-Faith Effort to Resolve Dispute Informally.

25.63[2] Motion Is Filed After Trial Is Completed.

25.63[3] Counsel Must Comply With Local Procedural Rules for Motions.

25.64 Appellate Courts Apply "Abuse of Discretion" Standard Regarding Sanction Orders Under Rule 37(c)(2).

25.65 CHECKLIST: Opposing Imposition of Rule 37(c)(2) Sanctions.

25.66 Opposing Sanctions on Ground That Request Was Objectionable Under Rule 36(a).

25.67 Opposing Sanctions on Ground That Admission Sought Was Not Substantially Important.

25.68 Opposing Sanctions on Ground of Reasonable Belief That Party Might Prevail.

25.68[1] Party May Assert Reasonable Belief That It Might Prevail, Whether or Not It Prevailed at Trial.

25.68[2] Reasonableness Is Determined by Objective Test.

25.69 Opposing Sanctions on Ground of Other Good Reason for Failure to Admit.

25.70 Party May Assert Lack of Proof, Unreasonableness of Amount of Sanctions Requested, or Lack of Connection Between Expenses and Objectionable Response.

25.71 CHECKLIST: Requesting Imposition of Rule 37(d) Sanctions.

25.72 Sanctions for Party's Failure to Attend Own Deposition, Serve Answers to Interrogatories, or Respond to Request for Inspection.

25.73 Motion for Sanctions Under Rule 37(d).

25.73[1] Motion Based on Failure to Respond to Interrogatories or Request for Inspection Must Include Certification of Good-Faith Attempt to Obtain Response.

25.73[2] Court in Which Action Is Pending Has Jurisdiction Over Motion.

25.73[3] Motion Should Be Filed Promptly After Discovery Failure, and When Circumstances Dictate.

25.73[4] Counsel Must Comply With Local Procedural Rules for Motions.

25.74 Court Must Order Expense-Shifting Sanctions Against Party or Attorney or Both for Failure to Act, Absent Substantial Justification or Other Circumstances.

25.75 Appellate Courts Apply "Abuse of Discretion" Standard Regarding Sanction Orders Under Rule 37(d).

25.76 CHECKLIST: Opposing Imposition of Rule 37(d) Sanctions.

25.77 Defense Based on Objection to Discovery Must Be Supported by Protective Order Procedure.

25.78 Opposing Sanctions on Ground That Failure to Appear or Respond Was Substantially Justified.

25.78[1] Party May Avoid Expense-Shifting Sanctions by Showing Substantial Justification.

25.78[2] Burden of Establishing Substantial Justification Is on Party Opposing Sanctions.

25.78[3] Substantial Justification Is Determined on Case-by-Case Basis.

25.79 Opposing Expense-Shifting Sanctions on Ground That Other Circumstances Make Imposition of Sanctions Unjust.

25.79[1] Court May Elect Not to Impose Sanctions Based on Other Circumstances.

25.79[2] Burden of Proof Is on Person Subject to Sanctions.

25.80 Opposing Sanctions on Ground That Rule 37(d) Does Not Encompass Particular Conduct.

25.81 CHECKLIST: Requesting Imposition of Rule 37(f) Sanctions.

25.82 Party or Attorney's Failure to Participate in Discovery Plan May Result in Monetary Sanctions.

25.83 Parties and Attorneys Have Duty to Participate in Discovery Plan.

25.84 Court or Party May Raise Issue of Sanctions Under Rule 37(f).

25.85 Party Subject to Sanctions Must Be Afforded Opportunity to Be Heard.

25.86 Motion for Sanctions Under Rule 37(f).

25.86[1] LOCAL PRACTICE: All Districts--Counsel Must Make Good-Faith Effort to Resolve Dispute Informally.

25.86[2] Counsel Must Comply With Local Procedural Rules for Motions.

25.87 Discovery Rulings Are Reviewed Under Abuse of Discretion Standard.

25.88 CHECKLIST: Opposing Imposition of Rule 37(f) Sanctions.

25.89 Opposing Sanctions on Grounds of Procedural Defects.

25.90 Party May Assert That Amount of Sanctions Is Unreasonable or That Expenses Are Unrelated to Failure to Participate in Discovery Plan.

25.91 CHECKLIST: Requesting Imposition of Sanctions for Spoliation of Evidence.

25.92 Options and Strategies for Requesting Imposition of Sanctions for Spoliation of Evidence.

25.93 Litigants Must Preserve Certain Evidence in Their Control.

25.94 Sanctions May Be Awarded for Spoliation of Evidence Under Inherent Powers of Court.

25.95 Sanctions May Be Awarded Under Rule 37 If Failure to Produce Evidence Because of Spoliation Violated Rule.

25.96 Party That Violates Rule 37 Based on Spoliation Is Subject to Sanctions Available Under Rule.

25.97 Sanctions Available Under Court's Inherent Powers.

25.97[1] Range of Sanctions, Including Dismissal, Are Available Under Court's Inherent Powers.

25.97[2] Requirements for Imposing Severe Sanctions Under Court's Inherent Powers.

25.97[2][a] Imposition of Severe Sanctions Requires Finding of Willfulness, Fault, or Bad Faith.

25.97[2][b] Imposition of Severe Sanctions Requires Consideration of Less Drastic Sanctions.

25.97[2][c] Imposition of Severe Sanctions Requires Nexus Among Sanction, Misconduct, and Matters in Controversy.

25.97[2][d] Prejudice to Opposing Party Is Factor in Determining Imposition of Sanctions.

25.97[2][e] Imposition of Severe Sanctions Requires Consideration of Public Interest and Policy.

25.97[3] Sanction Must Be Commensurate With Degree to Which Evidence Was Compromised or Destroyed.

25.98 Rebuttable Presumption Arises Against Party Responsible for Tampering With Evidence.

25.99 Counsel Must Comply With Local Procedural Rules for Motions.

25.100 Ruling on Imposition of Sanctions Is Reviewed for Abuse of Discretion.

25.101 Court Order for Sanctions Should Specify Authority.

25.102 CHECKLIST: Opposing Imposition of Sanctions.

25.103 Options and Strategies for Opposing Imposition of Sanctions for Spoliation.

25.104 Party May Show No Duty to Preserve Evidence.

25.105 Party May Show Undue Burden in Preserving Documents in Certain Form.

25.105A Party May Show Electronically Stored Information Was Lost in Routine Operations.

25.106 Severe Sanctions Sought Under Court's Inherent Power May Be Opposed on Grounds That Requirements for Imposition of Sanctions Are Not Met.

25.107 CHECKLIST: Requesting Imposition of Rule 26(g) Sanctions.

25.108 Required Signatures on Disclosures, Requests, Responses, and Objections.

25.108[1] Disclosures, Requests, Responses and Objections Must Be Signed by Attorney or Unrepresented Party.

25.108[2] Signatures on Disclosures, Requests, Responses and Objections Constitute Certification.

25.108[3] Reasonableness of Inquiry Is Judged by Objective Standard.

25.108[4] Unsigned Disclosure, Request, Response or Objection Is Stricken Unless Promptly Signed.

25.109 [Reserved]

25.110 Sanctions Under Rule 26(g).

25.110[1] Person Who Makes Certification in Violation of Rule 26(g) Is Subject to Sanctions.

25.110[2] Sanctions May Include Amount of Reasonable Expenses and Attorney's Fees.

25.111 Motion for Rule 26(g) Sanctions.

25.111[1] LOCAL PRACTICE: All Districts--Counsel Must Make Good-Faith Effort to Resolve Dispute Informally.

25.111[2] Person Subject to Sanctions Must Be Afforded Due Process.

25.111[3] Motion Should Be Filed Soon After Violation Occurs.

25.111[4] Counsel Must Follow Procedures Applicable to Discovery Motions.

25.112 Discovery Rulings Are Reviewed Under Abuse of Discretion Standard.

25.113 CHECKLIST: Opposing Imposition of Rule 26(g) Sanctions.

25.114 Opposing Sanctions on Grounds That Certification Was Substantially Justified, and That Asserted Grounds Are Inapplicable.

25.115 Notice of Motion and Motion to Compel Mandatory Disclosure.

25.116 Notice of Motion and Motion to Compel Compliance With Discovery Request.

25.117 Notice of Motion and Motion for Sanctions for Failure to Comply With Court Order.

25.118 Notice of Motion and Motion for Sanctions for Failure to Make Mandatory Disclosures or Failure to Supplement Discovery Responses.

25.119 Notice of Motion and Motion for Sanctions for Unreasonable Failure to Admit Genuineness of Document or Truth of Matter.

25.120 Notice of Motion and Motion for Sanctions for Failure to Appear or Respond.

25.121 Notice of Motion and Motion for Sanctions for Failure to Participate in Discovery Plan.

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Unit 7 Discovery
CHAPTER 25 Motions to Compel and Discovery Sanctions
I. STRATEGY

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25.01 Scope.

This chapter covers:

- Motions for an order under *Fed R Civ P 37(a)* to compel mandatory disclosure or discovery [*see 25.03 -25.05*; *Forms: 25.115*, *25.116*].

- Expense-shifting sanctions on a motion to compel mandatory disclosure or discovery [*see 25.16 -25.27*].

- California local district court rules regarding meet-and-confer requirements for discovery disputes [*see 25.05*].

- Motions for an order for sanctions under *Fed R Civ P 37(b)* based on failure to comply with an order compelling mandatory disclosure or discovery [*see 25.28 -25.49*; *Form: 25.117*].

- Motions for an order for sanctions under *Fed R Civ P 37(c)(1)* based on failure to make mandatory disclosure or failure to supplement discovery responses [*see 25.50 -25.58*; *Form: 25.118*].

- Motions for an order for sanctions under *Fed R Civ P 37(c)(2)* based on failure to admit genuineness of a document or truth of matter [*see 25.59 -25.70*; *Form: 25.119*].

- Motions for an order for sanctions under *Fed R Civ P 37(d)* based on failure to appear at a deposition, or to respond to discovery requests [*see 25.71 -25.80*; *Form: 25.120*].

- Motions for an order under *Fed R Civ P 37(f)* for sanctions based on failure to participate in a discovery plan [*see 25.81 -25.90*; *Form: 25.121*].

- Motions for an order for sanctions based on spoliation of evidence [*see 25.91 -25.106*].

- Motions for an order for sanctions under *Fed R Civ P 26(g)* based on improper certification of

discovery request, response, objection, or disclosure [*see 25.107 -25.114*].

Core Rules:

Fed R Civ P 26, *37*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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25.02 Objective and Strategy.

Fed R Civ P 37 provides a detailed roadmap for the remedies available when an adversary has not been forthcoming in meeting its disclosure or discovery obligations. Remedies offered by the rule include expenses and sanctions, some of which could be severe, including orders of preclusion and advice to the jury of the default.

Determine at the outset whether informal procedures are available, through the district or magistrate judge, to deal with discovery disputes without Rule 37 motion practice. Use of the informal procedures is far preferable for anything but the most egregious offenses. In fact, it is generally unrealistic to expect a formal Rule 37 motion will yield a result justifying the cost and time unless the adversary's conduct is inexcusable or a true obstacle to trial preparation.

Judge's Perspective:

Most judges abhor involvement in discovery issues and are reluctant to order sanctions. First-time offenses will rarely justify sanctions unless egregious. Judges are very appreciative of counsel who resolve discovery problems informally, so do whatever is within reason to work things out with your opponent before seeking court intervention. If all informal procedures fail and a motion is necessary, document all informal efforts made. Wait until you have a sufficient record to demonstrate your efforts at amicable solutions. Avoid name-calling and be straightforward and professional. Always inquire if the judge is willing to hold an informal conference call before filing a formal motion.

Detailed Discussion/Forms:

7 Moore's Federal Practice, Ch. 37, Failure to Make Disclosure or to Cooperate in Discovery: Sanctions (Matthew Bender 3d ed.)

Cross Reference:

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to

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A. Bringing Motion to Compel Mandatory Disclosure or Discovery

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25.03 CHECKLIST: Bringing Motion to Compel Mandatory Disclosure or Discovery.

☐ Determine if grounds for motion to compel mandatory disclosure exist.

Authority:
Fed R Civ P 26, 37(a)(3)(A)

Discussion:
See *§ 25.08[1]*

Form:
See *§ 25.115*

Grounds:
See *§§ 25.06 -25.08*

☐ Determine if grounds for motion to compel discovery exist, such as:

- ○ Failure to comply with discovery requests.
- ○ Failure to answer deposition questions.
- ○ Failure to answer interrogatories.

- ○ Failure to produce or permit inspection.

Authority:
Fed R Civ P 37(a)(3)(B)

Discussion:
See *§ 25.08[2]*

Form:
See *§ 25.116*

Grounds:
See *§§ 25.08*, *25.09*

☐ Consider whether motion is advisable, with respect to:

- ○ Costs of motion against value of information.
- ○ Delay caused by motion.

Discussion:
See *§ 25.04*

☐ Follow local rules regarding meet-and-confer requirements.

Discussion:
See *§ 25.05*

☐ If appropriate, prepare motion and serve papers.

- ○ Include the following allegations:
  - ☐ The court has jurisdiction.
  - ☐ The moving party has the right to bring the motion.
  - ☐ The moving party made a good-faith effort at a resolution of issues.
  - ☐ The information is discoverable.
  - ☐ The motion is timely.
  - ☐ Reasonable notice was given.

☐ Follow local rules regarding motion procedures.

Authority:
Fed R Civ P 26(a), (b), 37(a)

Content Note:
Local court rules contain specific requirements for filing of motion papers with respect to documenting prior attempts to resolve discovery disputes, and other requirements.

Warning--Standing Orders:
Be sure to ascertain whether there are any relevant standing orders for the particular judge assigned to hear the dispute. Some judges set forth alternate ways to bring a discovery motion.

Discussion:
See *§§ 25.05, 25.10*

Forms:
See *§§ 25.115, 25.116*

Prerequisite:
Good-faith attempt to resolve discovery disputes.

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, 22.14; Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryMotions to Compel

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25.04 Options and Strategies for Compelling Mandatory Disclosure or Discovery.

25.04[1] Parties Should Attempt to Resolve Discovery Disputes Informally.

25.04[1][a] Parties Should Clarify Discovery Requests Without Formal Motion. Parties should attempt informally to resolve disputes concerning the scope of discovery requests. Consultation between attorneys often results in punctual delivery of clearly discoverable information pursuant to an appropriately framed discovery request.

A party served with an interrogatory or document request that it considers ambiguous or unclear should contact the propounding attorney for clarification, rather than simply objecting. Similarly, a party served with an interrogatory or document request that it considers overly broad, partially irrelevant, or unduly burdensome should contact the propounding attorney in an attempt to reach an agreement reducing the scope of the request.

Any agreement clarifying a discovery request should be reduced to writing. Furthermore, if there is a meaningful chance that the response to an interrogatory might be used at trial, the clarification should be set forth in a revised interrogatory.

Judge's Perspective:

Counsel should focus on the need for the requested discovery and minimize name-calling and personal attacks on the motives of the opposing side. Courts see an enormous number of motions to compel and are generally not receptive to an argument devoted primarily to the accusation that the other side is hiding and deceiving. If that is indeed occurring, place those issues in a separate sanctions motion and concentrate in the motion to compel on why the material or information targeted for discovery is both important and within the scope of discovery. Make sure that the motion is not susceptible to being read as motivated by the desire to inflict pain and burden on the other side as opposed to a sincere need to obtain the requested discovery.

25.04[1][b] Proceeding With Discovery Response After Rejection of Informal Request for Clarification. If an informal request for clarification is rejected, the responding party should note that fact in its responses, set forth in good faith its understanding of the unclear terms, and then, on the basis of that understanding, provide answers.

Similarly, if an informal request to narrow the scope of a document request is rejected, the responding party should note that fact, identify the scope of a request that it would consider appropriate, and then provide the documents responsive to that narrowed request.

25.04[2] Counsel Should Weigh Cost and Delay of Motion. Before filing a motion to compel, counsel should first weigh the importance of the disputed discovery matter against the cost and delay of bringing the motion.

Strategic Points--Moving Party:

A motion to compel would most likely be filed when the information to be disclosed might be helpful to the party seeking the disclosure, but not to the party required to make it. When the information sought is more likely to be helpful to the party with the duty to disclose, the more effective enforcement mechanism is the court's power under *Fed R Civ P 37(c)(1)* to preclude use of the information that was not disclosed [*see Fed R Civ P 37(c)(1)*; *see also Fed R Civ P 37(a)*, Committee Note of 1993)].

The more targeted the discovery request is, *i.e.*, with respect to specific individuals or time periods, the more likely the court will side with the requesting party in compelling discovery. The court ruling on the motion to compel has the discretion to narrow the requests rather than sustain the responding party's objections to them completely. In doing so, the court effectively sustains an objection that the requests are vague, ambiguous, or overbroad in part, and overrules it in part [*see Green v. Baca (CD Cal 2003) 219 FRD 485, 490*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctions

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25.05 Local Rules Require Attempt at Informal Resolution of Discovery Disputes Prior to Filing of Discovery Motions.

25.05[1] LOCAL PRACTICE: CD Cal Requirements--Counsel Must Confer in Good Faith to Attempt Resolution of Any Discovery Dispute.

25.05[1][a] Good-Faith Attempt at Resolution Required Prior to Filing Motion. In the Central District of California, prior to the filing of any motion relating to discovery pursuant to *Fed R Civ P 26-37*, counsel for the parties must confer in a good-faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible. Counsel for the moving party must arrange for this conference. If both counsel are located within the same county of the Central District, the conference must take place in person at the office of the moving party's counsel, unless the parties agree to meet someplace else. If both counsel are not located within the same county of the Central District, the conference may take place telephonically [*CD Cal Civ LR 37-1*].

25.05[1][b] Conference Required Within 10 Days of Service of Request. Unless relieved by written order of the court on good cause shown, counsel for the opposing party must confer with counsel for the moving party within ten days of service on him or her of a letter requesting the conference. The moving party's letter must [*CD Cal Civ LR 37-1*]:

- Identify each issue and/or discovery request in dispute.
- State briefly with respect to each issue/request the moving party's position (and provide any legal authority the moving party believes is dispositive of the dispute as to that issue/request).
- Specify the terms of the discovery order to be sought.

Warning--Sanctions for Noncompliance:

The failure of any counsel to comply with or cooperate in the procedures set forth in *CD Cal Civ LR 37-1*

through 37-3 may result in the imposition of sanctions [*CD Cal Civ LR 37-4*; *see McCoy v. Southwest Airlines Co. (CD Cal 2002) 208 FRD 617, 620* (district court amended discovery order to assure that meet-and-confer process under *CD Cal Civ LR 37-1* "is more successful in resolving discovery disputes than it has been to date," and awarded sua sponte monetary sanctions as warning that more drastic sanctions might follow, for failure to comply with court's discovery order)].

25.05[2] LOCAL PRACTICE: CD Cal Requirements--Stipulation of Discovery Dispute Required Prior to Filing Motion.

25.05[2][a] Written Stipulation of Nonresolution Must Be Filed and Served With Notice of Motion. In the Central District of California, if counsel are unable to settle their differences with respect to a discovery dispute, they must formulate a written stipulation. The stipulation must be filed and served with the notice of motion [*CD Cal Civ LR 37-2*].

25.05[2][b] Form of Stipulation. The stipulation of nonresolution must be set forth in one document signed by both counsel. The stipulation must contain all issues in dispute and, with respect to each issue, the contentions and points and authorities of each party. The stipulation must not refer the court to any other documents [*CD Cal Civ LR 37-2.1*].

If the sufficiency of an answer to an interrogatory is in issue, the stipulation must contain, verbatim, both the interrogatory and the allegedly insufficient answer, followed by each party's contentions as to that particular interrogatory, separately stated. If the allegations made in a prior filing are relevant, a copy of that prior filing should be attached as an exhibit [*CD Cal Civ LR 37-2.1*].

The specification of the issues in dispute, and the parties' contentions and points and authorities with respect to those issues, may be preceded by an introductory statement from each party, provided that no party's introductory statement exceeds three pages in length. When a party states its contentions with respect to a particular issue, that party must also state how it proposed to resolve the dispute over that issue at the conference of counsel [*CD Cal Civ LR 37-2.1*].

The title page of the stipulation must state the discovery cutoff date, the pretrial conference date, and the trial date. In addition, a copy of the order establishing the initial case schedule, as well as any amendments, must be attached to the stipulation or to a declaration filed in support of the motion [*CD Cal Civ LR 37-2.1*].

25.05[2][c] Counsel Must Exchange Stipulation Portions in Timely Manner. Following the conference of counsel, counsel for the moving party must personally deliver, e-mail or fax to counsel for the opposing party the moving party's portion of the stipulation, together with all declarations and exhibits to be offered in support of the moving party's position. Unless the parties agree otherwise, within seven days of receipt of the moving party's papers, counsel for the opposing party must personally deliver, e-mail, or fax to counsel for the moving party the opposing party's portion of the stipulation, together with all declarations and exhibits to be offered in support of the opposing party's position. After the opposing party's papers are added to the stipulation by the moving party's counsel, the stipulation must be provided to opposing counsel, who must sign it (electronically or otherwise) and return it to counsel for the moving party, no later than the end of the next business day, so that it can be filed with the notice of motion [*CD Cal Civ LR 37-2.2*].

25.05[2][d] Parties May File Supplemental Memoranda of Law. After the Joint Stipulation is filed, each party may file a supplemental memorandum of law not later than 14 days prior to the hearing date. Unless otherwise ordered by the court, a supplemental memorandum must not exceed five pages in length. No other separate memorandum of points and authorities may be filed by either party in connection with the motion [*CD Cal Civ LR 37-2.3*].

25.05[2][e] Court Will Not Consider Discovery Motion Absent Stipulation or Declaration of Noncooperation. The court will not consider any discovery motion in the absence of a joint stipulation, or a declaration

from counsel for the moving party establishing that opposing counsel did one of the following [*CD Cal Civ LR 37-2.4*]:

- Failed to confer in a timely manner in accordance with *CD Cal Civ LR 37-1*;
- Failed to provide the opposing party's portion of the joint stipulation in a timely manner in accordance with *CD Cal Civ LR 37-2.2*; or
- Refused to sign and return the joint stipulation after the opposing party's portion was added.

If the declaration accompanies the motion, then *CD Cal Civ LR 6-1* (notice and service of motion), 7-9 (requirements for opposing papers) and 7-10 (reply papers) apply [*CD Cal Civ LR 37-2.4*].

Warning--Sanctions for Noncompliance:

The failure of any counsel to comply with or cooperate in the procedures set forth in *CD Cal Civ LR 37-1 through 37-3* may result in the imposition of sanctions [*CD Cal Civ LR 37-4*].

Cross References:

CD Cal Civ LR 37-1, see *§ 25.05[1]*; *CD Cal Civ LR 37-2.2*, see *§ 25.05[2]*.

25.05[3] LOCAL PRACTICE: ED Cal Requirements--Counsel Must Confer Prior to Filing of Any Discovery Motion, and Must Prepare Joint Statement.

25.05[3][a] Counsel Must Confer Prior to Filing of Motion. In the Eastern District of California, a motion made pursuant to *Fed R Civ P 26 through 37*, including any motion to exceed discovery limitations or motion for protective order, may not be heard unless (1) the parties have conferred and attempted to resolve their differences, and (2) the parties have set forth their differences and the bases for their differences in a Joint Statement re Discovery Disagreement. This rule is subject to exceptions set forth in *ED Cal Civ LR 251*. Counsel for all interested parties must confer in advance of the filing of the motion or in advance of the hearing of the motion in a good-faith effort to resolve the differences that are the subject of the motion. Counsel for the moving party or prospective moving party is responsible for arranging the conference, which must be held at a time and place and in a manner mutually convenient to counsel [*ED Cal Civ LR 251(b)*].

25.05[3][b] Moving Party Must Draft Joint Statement If Disagreement Continues. If the moving party is still dissatisfied after the conference of counsel, that party must draft and file a document entitled "Joint Statement re Discovery Disagreement." All parties concerned with the discovery motion must assist in the preparation of, and must sign, the joint statement, which must specify with particularity the following matters [*ED Cal Civ LR 251(c)*]:

- The details of the conference or conferences;
- A statement of the nature of the case and its factual disputes insofar as they are pertinent to the matters to be decided and the issues to be determined at the hearing;
- The contentions of each party as to each contested issue, including a memorandum of each party's respective arguments concerning the issues in dispute and the supporting legal authorities.

Each specific interrogatory, deposition question, or other item objected to, or concerning which a protective order is sought, as well as the objection, must be reproduced in full. The respective arguments and supporting authorities of the parties must be set forth immediately following each objection. When an objection is raised to a number of items or a general protective order is sought that is related to a number of specific items, the arguments and briefing need not be repeated. If a protective order is sought that is unrelated to specific, individual items, repetition of the original discovery

document is not required. All arguments and briefing that would otherwise be included in a memorandum of points and authorities supporting or opposing the motion must be included in this joint statement, and no separate briefing is filed [*ED Cal Civ LR 251(c)*].

Warning:

Failure to file the Joint Statement on or before three court days before the scheduled hearing will result in the hearing being dropped from the calendar without prejudice [*ED Cal Civ LR 251(a)*].

25.05[3][c] Moving Party May File and Serve Affidavit of Opposing Party's Refusal to Confer or Prepare Joint Statement. If counsel for the moving party is unable, after a good-faith effort, to secure the cooperation of counsel for the opposing party in arranging the required conference, or in preparing and executing the required joint statement, counsel for the moving party may file and serve an affidavit so stating, setting forth [*ED Cal Civ LR 251(d)*]:

- The nature and extent of counsel's efforts to arrange the required conference or procure the required joint statement;
- The opposing counsel's responses or refusals to respond to those efforts;
- The issues to be determined at the hearing; and
- The moving party's contentions with regard to the issues, including any briefing in respect to the contentions.

Warning--Refusal to Cooperate May Result in Adverse Order:

Refusal of any counsel to participate in a discovery conference, or refusal without good cause to execute the required joint statement, is grounds, in the discretion of the court, for entry of an order adverse to the party represented by counsel so refusing or adverse to counsel [*ED Cal Civ LR 251(d). See ED Cal Gen LR 110*].

25.05[3][d] Joint Statement Requirement May Be Waived Under Certain Circumstances and Pursuant to Motion. The requirement set forth above for a Joint Statement re Discovery Disagreement does not apply to the following situations [*ED Cal Civ LR 251(e)*]:

- When there has been a complete and total failure to respond to a discovery request or order, or
- When the only relief sought by the motion is the imposition of sanctions.

In either instance, the aggrieved party may bring a motion for relief for hearing on 14 days' notice. The responding party must file a response not later than seven days before the hearing date. The moving party may file and serve a reply no fewer than two court days before the hearing date [*ED Cal Civ LR 251(e)*].

Consider--General Civil Motion Rules Inapplicable to Discovery Motions:

By reason of the notice provisions set forth in *ED Cal Civ LR 251(a)* and *(e)*, the provisions of *ED Cal Civ LR 230* (civil motion calendar and procedure) do not apply to motions and hearing dealing with discovery matters [*ED Cal Civ LR 251(f)*].

25.05[4] LOCAL PRACTICE: ND Cal Requirements--Counsel Must Confer in Good Faith to Attempt Resolution of Discovery Disputes Under Rule 37.

25.05[4][a] Counsel Must Confer Prior to Request or Motion Involving Discovery Dispute. The court will not

entertain a request or a motion to resolve a disclosure or discovery dispute unless, pursuant to *Fed R Civ P 37*, counsel have previously conferred for the purpose of attempting to resolve all disputed issues [*ND Cal Civ LR 37-1(a)*].

Warning--Opposing Counsel Refusing to Confer Is Subject to Sanctions:

If counsel for the moving party seeks to arrange a conference to resolve a disclosure or discovery dispute, and opposing counsel refuses or fails to confer, the judge may impose an appropriate sanction, which may include an order requiring payment of all reasonable expenses, including attorney's fees, caused by the refusal or failure to confer [*ND Cal Civ LR 37-1(a)*].

25.05[4][b] Counsel Must Attempt to Settle Dispute During Discovery Event. If a dispute arises during a discovery event, the parties must attempt to resolve the matter without judicial intervention by conferring in good faith. If good-faith negotiations between the parties fail to resolve the matter, and if disposition of the dispute during the discovery event likely would result in substantial savings of expense or time, counsel or a party may contact the chambers of the assigned district or magistrate judge to ask if the judge is available to address the problem through a telephone conference during the discovery event [*ND Cal Civ LR 37-1(b)*].

25.05[5] LOCAL PRACTICE: SD Cal Requirements--Counsel Must Confer in Attempt to Resolve Any Discovery Dispute.

25.05[5][a] Conference Is Prerequisite to Motion. In the Southern District of California, the court will not entertain a motion pursuant to *Fed R Civ P 26-37* unless counsel have previously met and conferred concerning all disputed issues [*SD Cal Civ LR 26.1(a)*].

Warning--Counsel Refusing to Confer May Be Sanctioned:

If counsel for the moving party seeks to arrange a conference to resolve a discovery dispute, and counsel for the party against whom the motion will be made willfully refuses or fails to meet and confer, the judge (in absence of a prior order dispensing with such a meeting for good cause) may order a payment of reasonable expenses, including attorney's fees, pursuant to *Fed R Civ P 37* and *SD Cal Civ LR 83.1* [*SD Cal Civ LR 26.1(a)*].

Pursuant to *SD Cal Civ LR 83.1*, failure of counsel or of any party to comply with Southern District local rules, with the Federal Rules of Civil or Criminal Procedure, or with any order of the court may be ground for imposition by the court of any and all sanctions authorized by statue or rule or within the inherent power of the court. These sanctions include, without limitation, dismissal of any actions, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions [*SD Cal Civ LR 83.1(a)*].

For violations of the local rules, or of a specific court order, the court may, in imposing monetary sanctions, order that the monetary sanctions be paid to the nonappropriated fund of the court [*SD Cal Civ LR 83.1(b)*].

25.05[5][b] Counsel Must Confer in Person or Telephonically. If counsel have offices in the same county, they are to meet in person. If counsel have offices in different counties, they are to confer by telephone. Under no circumstances may the parties satisfy the meet-and-confer requirement by exchanging written correspondence [*SD Cal Civ LR 26.1(a)*].

25.05[5][c] Certificate of Compliance With Conference Requirement. At the time of filing any motion with respect to *Fed R Civ P 26-37*, counsel for the moving party must serve and file a certificate of compliance with this rule [*SD Cal Civ LR 26.1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryMotions to Compel

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25.06 Mandatory Disclosures Under Rule 26.

Fed R Civ P 26 imposes on parties the following disclosure obligations [*see Fed R Civ P 26(a)*]:

- Initial disclosures, including: information about individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses; documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses; claims and calculations of damages; and insurance coverage.

- Disclosure of expert testimony, including information regarding the background and qualifications of expert witnesses, and the content of and bases for expert opinions.

- Final pretrial disclosures, including identification of trial witnesses and exhibits, and designation of deposition testimony that will be used at trial.

This rule does not apply to exempt cases, or to the extent otherwise stipulated or directed by the court [*Fed R Civ P 26(a)*].

Cross Reference:

Ch. 15, Rule 26(f) Conference and Initial Disclosures, see *§§ 15.15 -15.34*.

Legal Topics:

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

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25.07 Distinction Between Mandatory Disclosure and Discovery.

The *Fed R Civ P 26(a)* requirements apply to information "that the disclosing party may use to support its claims or defenses" [*Fed R Civ P 26(a)(1)*]. The relevancy standard for discovery in general permits the discovery of any matter, not privileged, "that is relevant to the claim or defense of any party" [*Fed R Civ P 26(b)(1)*].

Distinguish:

The general discovery standard is broader than the initial disclosure standard because parties may obtain discovery that supports or contradicts the claim or defense of either party, whereas the initial disclosure obligation pertains only to information that the disclosing party may use to support its claims or defenses; it does not apply to information in opposition to the party's claims or defenses, and it applies only to the disclosing party. Furthermore, under the general discovery standard, the court may, for good cause, order discovery of any matter relevant to the subject matter involved in the action [*Fed R Civ P 26(b)(1)*].

Cross Reference:

Different standards for mandatory disclosure and discovery, see 7 *Moore's Federal Practice, § 37.22* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory Disclosures

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25.08 Motion for Order Compelling Mandatory Disclosure or Discovery.

25.08[1] Motion for Order Compelling Mandatory Disclosure.

25.08[1][a] Party May Seek Order Compelling Disclosure and Request Sanctions After Reasonable Notice. If a party fails to make the required mandatory disclosures [*see Fed R Civ P 26(a)*], any other party may move to compel disclosure and for appropriate sanctions [*Fed R Civ P 37(a)(3)(A)*; *see Fed R Civ P 37(a)(5)*]. The moving party must first provide reasonable notice to other parties and all persons affected [*Fed R Civ P 37(a)*].

The objective of Rule 37(a) is the prevention of delay and costs to other litigants caused by the filing of groundless motions [*see Cunningham v. Hamilton County (1999) 527 US 198, 208-209, 119 S Ct 1915, 144 L Ed2d 184* (monetary sanctions against attorney not immediately appealable)].

A motion to compel pursuant to *Fed R Civ P 37* is the proper vehicle to address instances in which the responding party fails to make or cooperate in providing the requested discovery [*see Patelco Credit Union v. Sahni (9th Cir 2001) 262 F3d 897, 913*].

Cross Reference:

Monetary sanctions under *Fed R Civ P 37(a)(4)*, see *§ 25.17[1]*.

Distinguish:

Rule 37(a) sanctions to recoup motion costs are limited to expenses incurred in connection with the motion to compel. *Fed R Civ P 37(b)* sanctions for failure to comply with a court order, by contrast, also include issue preclusion, evidence preclusion, and termination sanctions [*see Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1170* ; *Liew v. Breen (9th Cir 1981) 640 F2d 1046, 1051*].

Example:

Plaintiffs successfully brought a motion to compel the production of an unedited recording from the cockpit voice recorder from the defendant airliner, in an action arising from a crash of the airplane.

Production of a transcript of the CVR was insufficient because is was not complete, and did not reflect noises that might be meaningful to plaintiffs' experts [*see McCoy v. Southwest Airlines Co. (CD Cal 2002) 208 FRD 617, 620*].

25.08[1][b] Good-Faith Certificate of Attempt at Resolution Required. A motion for an order to compel mandatory disclosure must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action [*Fed R Civ P 37(a)(1)*].

25.08[2] Motion to Compel Discovery.

25.08[2][a] Party Seeking Discovery May Compel Discovery Concerning Depositions, Interrogatories, and Requests for Inspection, and May Request Sanctions. A party, on reasonable notice to other parties and all affected persons, may apply for an order compelling discovery under the following circumstances [*Fed R Civ P 37(a)(3)(B)*]:

- If a deponent fails to answer a question propounded or submitted under *Fed R Civ P 30* or *31*.
- If a corporation or other entity fails to make a designation under *Fed R Civ P 30(b)(6)* or *31(a)*.
- If a party fails to answer an interrogatory submitted under *Fed R Civ P 33*.
- If a party, in response to a request for inspection submitted under *Fed R Civ P 34*, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested.

In these circumstances, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request [*Fed R Civ P 37(a)(3)(B)*].

Consider--Sanctions for Failing to Supplement Responses:

Parties are also subject to sanctions for failure to supplement prior responses to discovery [*Fed R Civ P 37(c)(1)*].

Cross References:

Sanctions for failure to supplement prior responses to discovery under *Fed R Civ P 37(c)(1)*, see *§§ 25.51*, *25.52*.

Grounds for motion to compel disclosure or discovery, see 7 *Moore's Federal Practice, §§ 37.02*, *37.03* (Matthew Bender 3d ed.).

Distinguish:

The complete failure to respond with respect to (1) appearance at a party's own deposition, (2) interrogatories, and (3) requests for inspection is subject to the sanction provisions of *Fed R Civ P 37(d)*.

25.08[2][b] Good-Faith Certificate of Attempt at Resolution Required. The motion for an order to compel discovery must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action [*Fed R Civ P 37(a)(1)*].

Warning--Local Rules Require Specific Procedures for Good-Faith Showing:

Local rules in each district provide detailed requirements for counsel's attempt to reach an informal resolution of discovery disputes. These rules are *covered in § 25.05*.

25.08[3] Evasive or Incomplete Disclosure, Answer, or Response. An evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond [*Fed R Civ P 37(a)(4)*]. Nevertheless, there are different consequences to a complete failure to respond versus an incomplete response:

- The party objecting to an incomplete response must move to compel an adequate response [*Fed R Civ P 37(a)(3)*, *(4)*]; without a court order, sanctions are limited to expenses incurred in making the motion.

- When the party completely fails to respond to discovery, and no motion for protective order is filed, the moving party has a broader array of sanctions available, without the need first to obtain a court order [*see Fed R Civ P 37(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctions

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25.09 Seeking Order to Compel With Respect to Specific Discovery Methods.

25.09[1] Failure to Answer Deposition Questions.

25.09[1][a] Moving for Order to Compel Answer. If a party or witness during an oral deposition refuses to answer a question, and if counsel for the examining party has made a good faith but unsuccessful attempt to resolve the matter without judicial intervention, then the examining party may [*Fed R Civ P 37(a)(3)(C)*]:

- Suspend the examination and move immediately for a court order to compel an answer.
- Complete the examination regarding other matters, then move for a court order to compel an answer.

Consider:
An evasive or incomplete answer is treated as a failure to answer [*see Fed R Civ P 37(a)(4)*].

Distinguish:
Failure of a party to attend his or her own deposition may be sanctioned under *Fed R Civ P 37(d)*.

25.09[1][b] Evaluating Whether to Complete Remainder of Deposition After Deponent Refuses to Answer. When a deponent refuses to answer a question, the proponent of the question may complete or adjourn the examination before applying for an order to compel discovery [*Fed R Civ P 37(a)(3)(C)*].

Completing the remainder of the deposition is often advantageous for the following reasons:

- The deponent has an opportunity to reconsider his or her position, and may later provide the answers.
- The information later provided may lead the attorney conducting the deposition to conclude that there is no substantial need for answers to those unanswered questions.

- A court looks more favorably on a motion to compel when it focuses on a few questions, rather than requests an open-ended order to compel questions not yet posed in subject areas not yet reached.

25.09[1][c] Understanding Situations When Deponent May Decline to Answer. A party may instruct a deponent not to answer a question only when necessary to [*Fed R Civ P 30(d)(1), (3)*]:

- Preserve a privilege.

- Enforce a court-ordered limitation.

- Present a motion for a protective order on the ground that the examination is being conducted in bad faith, or in a manner that unreasonably annoys, embarrasses, or oppresses either the deponent or a party.

Cross References:

Depositions, see *Ch. 23, Methods of Discovery, 23.19 -23.75*. Privileges, see *Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, 24.12 -24.93*. Protective orders, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§§ 22.35 -22.66*.

25.09[2] Written Deposition. A motion to compel may be used, after exhaustion of good-faith efforts to secure responses by conferring with opposing counsel, to require answers to written questions that are posed to a party or to a nonparty witness through a deposition by written questions [*Fed R Civ P 37(a)(3)(B)(i) see Fed R Civ P 31*].

Cross Reference:

Depositions by written questions, see Ch. 23, Methods of Discovery, see *§§ 23.76 -23.110*.

25.09[3] Failure to Designate Deponent. If a business entity or governmental agency served with a deposition fails to designate a deponent in accordance with *Fed R Civ P 30(b)(6)* or *31(a)(4)*, the discovering party may bring a motion to compel [*Fed R Civ P 37(a)(3)(B)(ii)*].

25.09[4] Failure to Respond to Interrogatories or a Request for Production or Inspection. A party that fails to respond or object within the proper time to interrogatories or requests for production or inspection is subject to sanctions [*Fed R Civ P 37(d)*]. A party that responds evasively or incompletely may be subject to a motion to compel. [*Fed R Civ P 37(a)(4) see also* Collins v. JC Penney Life Ins. Co. (SD Cal 2003) 2003 US Dist LEXIS 8455, at *5].

A court will not grant a motion to compel production or inspection unless the moving party has properly made and served a Rule 34 request [*see Fed R Civ P 37(a)(3)(B)(iv)*]. The enforcement process of Rule 37 contemplates that the parties have formally resorted to the underlying discovery rule, and the served party must have an opportunity to respond voluntarily to the request for production [*see Schwartz v. Marketing Publ'g Co. (D Conn 1994) 153 FRD 16, 21 n12*].

Cross References:

Sanctions for failure to respond to discovery, see *§ 25.72*. Evasive response to discovery, see *§ 25.08[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryMotions to Compel

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25.10 Notice of Motion and Motion to Compel.

25.10[1] Standing for Motion to Compel Disclosure or Discovery.

25.10[1][a] Any Other Party May Move to Compel Disclosure. If a party fails to make a disclosure required by *Fed R Civ P 26(a)*, any other party may move to compel disclosure and for appropriate sanctions [*Fed R Civ P 37(a)(3)(A)*].

25.10[1][b] Party Seeking Discovery May Move to Compel Discovery. Only the party seeking discovery may move to compel compliance when [*Fed R Civ P 37(a)(3)(B)*]:

- A deponent fails to answer a question.
- A corporation or other entity fails to make a required designation.
- A party fails to answer an interrogatory.
- A party fails to respond to a request for inspection.

Cross Reference:

7 Moore's Federal Practice, see *§ 37.04* (Matthew Bender 3d ed.).

25.10[2] LOCAL PRACTICE: ND Cal Requirements--Motion to Compel Must Be Filed Seven Court Days or Fewer After Discovery Cutoff. In the Northern District of California, no motions to compel discovery may be filed more than seven days after the discovery cutoff for fact or expert discovery, respectively. A "discovery cutoff" is the date by which all responses to written discovery are due and by which all depositions must be concluded. Discovery requests that call for responses or depositions after the applicable discovery cutoff are not enforceable, except by order of the court for good cause shown [*ND Cal Civ LR 26-2*].

Strategic Point--Moving Party:

Parties have a continuing duty to supplement both their mandatory disclosures and their responses to formal discovery requests [*see Fed R Civ P 26(e)*]. A motion to compel brought too soon might negate the beneficial effects of the supplementation rule.

25.10[3] LOCAL PRACTICE: ND Cal Requirements--Form of Motion to Compel Must Set Forth Each Request and Response. In addition to complying with applicable provisions of *ND Cal Civ LR 7-1 et seq.*, a motion to compel further responses to discovery requests must set forth each request in full, followed immediately by the objections and/or responses. For each request, the moving papers must detail the basis for the party's contention that it is entitled to the requested discovery and must show how the proportionality and other requirements of *Fed R Civ P 26(b)(2)* are satisfied [*ND Cal Civ LR 37-2*].

25.10[4] Moving Party on Motion to Compel Must Provide Reasonable Notice. The party applying for an order to compel disclosure or discovery must give reasonable notice to the other parties, and to all other persons affected by the order [*Fed R Civ P 37(a)(1)*].

Absent a contrary local rule, standing order, or case-specific directive from the assigned judge, counsel must apply to the court for an order compelling disclosures or discovery by motion. Notice of the hearing must be served at least 14 days before the date set for that hearing [*Fed R Civ P 6(c)(1)*; *see Fed R Civ P 7(b)(1)* (motion requirement)].

25.10[5] LOCAL PRACTICE: CD Cal Requirements--Required Notice for Any Discovery Motion; Ex Parte Rules.

25.10[5][a] At Least 21 Days' Notice Is Required on Any Discovery Motion. In the Central District of California, a discovery motion may be noticed to be heard on the particular judge's regular Motion Day, which must not be earlier than 21 days after the filing of the motion [*CD Cal Civ LR 37-3*].

25.10[5][b] No Ex Parte Motions Are Permitted Absent Proper Showing. Unless the court in its discretion otherwise allows, no discovery motions may be filed or heard on an ex parte basis, absent a showing of irreparable injury or prejudice not attributable to the lack of diligence of the moving party [*CD Cal Civ LR 37-3*].

Warning--Sanctions for Noncompliance:

The failure of any counsel to comply with or cooperate in the procedures set forth in *CD Cal Civ LR 37-1 through 37-3* may result in the imposition of sanctions. [*CD Cal Civ LR 37-4*].

25.10[6] LOCAL PRACTICE: ED Cal Requirements--Filing of Any Discovery Motion and Hearing on Motion for Any Discovery Motion. In the Eastern District of California, a hearing of a motion pursuant to *Fed R Civ P 26 through 37*, including any motion to exceed discovery limitations or motion for protective order, may be had by the filing of a notice of motion and motion scheduling the hearing date on the appropriate calendar at least 21 days from the date of filing and service. No other documents need be filed at this time [*ED Cal Civ LR 251(a)*].

The hearing may be dropped from the calendar without prejudice if a Joint Statement re Discovery Disagreement or an affidavit is not filed at least seven days before the scheduled hearing date. If the notice of motion and motion are filed concurrently with the joint statement, the motion must be placed on the next regularly scheduled calendar for the magistrate judge or judge hearing the motion at least seven days thereafter [*ED Cal Civ LR 251(a)*].

Exception:

The 21-day notice rule and the Joint Statement requirement do not apply (1) when there has been a complete and total failure to respond to a discovery request or order and (2) when the only relief sought

by the motion is the imposition of sanctions. In either instance, the aggrieved party may bring a motion for relief for hearing on 14 days' notice [*ED Cal Civ LR 251(e)*].

Consider--General Civil Motion Rules Inapplicable to Discovery Motions:

By reason of the notice provisions set forth in *ED Cal Civ LR 251(a)* and *(e)*, the provisions of *ED Cal Civ LR 230* (civil motion calendar and procedure) do not apply to motions and hearing dealing with discovery matters [*ED Cal Civ LR 251(f)*].

Cross Reference:

Joint statement requirement under *ED Cal Civ LR 251(e)*, see *§ 25.05[3]*.

25.10[7] Application Is Made to Court Where Action Is Pending for Party, Court Where Discovery Is Taken for Nonparty. An application for an order to compel disclosure or discovery to a party must be made to the court in which the action is pending. An application for an order to a nonparty must be made to the court in the district where the discovery is being, or is to be, taken [*Fed R Civ P 37(a)(2)*].

Cross Reference:

7 Moore's Federal Practice, see *§ 37.06* (Matthew Bender 3d ed.).

25.10[8] LOCAL PRACTICE: SD Cal Requirements--Motion to Compel Is Referred to Magistrate Judge in Charge of Case. In the Southern District of California, all motions to compel discovery are referred to the magistrate judge assigned to the case. The magistrate judge may waive all or part of the requirements of *SD Cal Civ LR 7.1(f)* in deciding discovery motions [*SD Cal Civ LR 26.1(e)*]. *SD Cal Civ LR 7.1(f)* sets forth deadlines and requirements for motions.

Cross References:

Forms of motion, see *§§ 25.115*, *25.116*. Motion practice rules, see Ch. 26, Pretrial Motion Practice.

Forms of motion to compel, see 8 *Bender's Federal Practice Forms, Forms 37:1-37:23* (Matthew Bender). Motion for order to compel disclosure or discovery, see 7 *Moore's Federal Practice, §§ 37.04 -37.06* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMotions to Compel

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25.11 Court's Determination of Motion to Compel Discovery.

25.11[1] Courts Use Broad Standard to Determine Relevance of Pretrial Discovery. In determining whether information is relevant for purposes of pretrial discovery, courts apply a substantially broader standard than that for relevance during trial [*see Fed R Civ P 26(b)(1)*].

Judge's Perspective:
The standard is not as broad as it used to be.

Even if the material sought is within the broad scope of the potential reach of discovery, a request for discovery must also satisfy the separate and often more demanding requirements that are set forth in *Fed R Civ P 26(b)(2)* and *(g)*, which may limit the scope of discovery based on the concept of proportionality. These factors include [*see Fed R Civ P 26(b)(2), (g)*]:

- The needs of the case.
- The amount in controversy.
- The parties' resources.
- The importance of the issues at stake in the litigation.
- The importance of the proposed discovery in resolving the issues.

Cross References:
7 *Moore's Federal Practice, §§ 37.20 -37.23* (Matthew Bender 3d ed.).

Distinction between mandatory disclosure and discovery, see *25.07*. Factors supporting denial of motion

to compel discovery, see *§ 25.15*.

25.11[2] LOCAL PRACTICE: SD Cal Requirements--Local Rule 1.1(c) Applies to Motion to Compel, Requiring Just, Efficient, and Economical Determination. In the Southern District of California, with respect to the disposition of any motion made under *Fed R Civ P 26(c)* (protective orders) or *Fed R Civ P 37(a)*, the court is guided by the rule of construction contained in *SD Cal Civ LR 1.1(c)* to secure just, efficient, and economical determination of every action and proceeding [*SD Cal Civ LR 26.1(d)*].

Cross Reference:

Forms of order on motion to compel, see 8 Bender's Federal Practice Forms, Forms 37:39-*37:50* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryRelevance

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25.12 Discovery Rulings Are Reviewed Under Abuse of Discretion Standard.

The Ninth Circuit reviews discovery rulings for abuse of discretion [*Mabe v. San Bernardino County (9th Cir 2001) 237 F3d 1101, 1112*]. The imposition of discovery sanctions pursuant to *Fed R Civ P 37* is reviewed for abuse of discretion [*Adriana Int'l Corp. v. Thoeren (9th Cir 1990) 913 F2d 1406, 1408* , *cert. denied sub nom. Lewis & Co. v. Thoeren, 498 US 1109 (1991)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMotions to CompelCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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25.13 CHECKLIST: Opposing Motion to Compel Mandatory Disclosure or Discovery.

☐ Determine if grounds to oppose motion to compel exist, such as:

- ○ Information sought is not relevant.
- ○ Proportionality factors favor denial of motion.
- ○ Good-faith requirements favor denial of motion.
- ○ Materials sought are privileged or protected by the work product doctrine.

☐ Prepare and serve response papers.

Discussion:
See *§§ 25.14*, *25.15*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, 22.14; Ch. 26, Pretrial Motion Practice, see *§ 26.37*

☐ Determine whether to seek a protective order.

Authority:

Fed R Civ P 37(a)(5)(B); see *Fed R Civ P 26(c)*

Discussion:

See *§ 25.14*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryRelevance

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25.14 Protective Orders.

25.14[1] Denial or Partial Denial of Motion May Result in Protective Order. If a motion for an order compelling disclosure or discovery is denied in whole or in part, the court may enter a protective order authorized under *Fed R Civ P 26(c)* [*see Fed R Civ P 37(a)(5)(B), (C)*].

25.14[2] Seeking Protective Order in Conjunction With Opposition to Motion. A party opposing a motion to compel may also seek a protective order in the event that the motion to compel is granted [*see Molski v. Franklin (SD Cal 2004) 222 FRD 433, 436* ; *McCoy v. Southwest Airlines Co. (CD Cal 2002) 208 FRD 617, 620* (although motion to compel cockpit voice recorder was granted, "a protective order will prevent the dissemination of the CVR tape in a manner contrary to Congress' intent in enacting *49 USC § 1154*" (limiting discovery of CVR); if existing protective order was insufficient, parties could draft more detailed one)].

Warning--Sanctions Available Regarding Protective Order:

Expense-shifting sanctions may be awarded in connection with a motion for a protective order, i.e., on a party or nonparty who, without substantial justification, unsuccessfully moved or opposed the motion for a protective order [*Fed R Civ P 26(c)*; *see also Fed R Civ P 37(a)(5)*; *Rickels v. City of South Bend (7th Cir 1994) 33 F3d 785, 788*]. Note that in the Northern District, sanctions must be sought in a separate motion [*see ND Cal Civ LR 7-8*].

25.14[3] LOCAL PRACTICE: SD Cal--Responding Party May Serve Notice of Protective Order. In the Southern District of California, any party or nonparty against whom a motion under *Fed R Civ P 37(a)* or *45(d)(1)* (subpoena to produce documents) is being made may notice for hearing at the same time a motion for protective order under *Fed R Civ P 26(c)* [*SD Cal Civ LR 26.1(c)*].

Cross Reference:

Protective orders generally, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§§ 22.35 -22.66*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders

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25.15 Factors Supporting Denial of Motion to Compel Discovery.

25.15[1] Relevance Factors Favoring Denial. The court should deny a motion to compel if the party opposing the discovery persuades the court that the discovery does not meet the applicable relevance standard.

Ordinarily, any discovery sought must be relevant to "any party's claim or defense" [*Fed R Civ P 26(b)(1)*].

However, on a showing of good cause by the movant, the court may apply a more lenient relevance standard--that the discovery simply be relevant to "the subject matter involved in the action" [*Fed R Civ P 26(b)(1)*].

Judge's Perspective:
Courts are not usually sympathetic to parties who oppose legitimate discovery. If you are in the wrong, admit it and promise to comply quickly to resolve the dispute.

Cross References:

Scope of relevance standard, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, see *§§ 24.03 -24.11*.

7 Moore's Federal Practice, see *§ 37.22[2][a]*, [b] (Matthew Bender 3d ed.).

25.15[2] Proportionality Factors Favoring Denial. The court should deny a motion to compel if the party opposing the discovery persuades the court that any of the following are true [*see Fed R Civ P 26(b)(2)*]:

- The discovery sought is unreasonably cumulative or duplicative.

- The discovery sought is obtainable from a more convenient, less burdensome, or less expensive source.

- The party seeking the discovery has had ample opportunity by discovery in the action to obtain the information sought.

- The burden or expense of the proposed discovery outweighs its likely benefit [*see also Fed R Civ P 26(g)(1)(B)(iii)* (also articulating burden and expense element)].

Cross Reference:

7 Moore's Federal Practice, see *§ 37.22[2][d]* (Matthew Bender 3d ed.).

25.15[3] Good-Faith Requirements Favoring Denial. The court should deny a motion to compel if the party opposing the discovery persuades the court that either of the following is true [*Fed R Civ P 26(g)(1)(B)(iii)*]:

- The discovery sought is not warranted by existing law or a good-faith argument to change existing law.

- The discovery has been sought for an improper purpose, such as to harass or to cause unnecessary delay or needlessly to increase in the cost of litigation.

Cross References:

Scope of discovery under *Fed R Civ P 26*, see Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection, see *§§ 24.03 -24.11*.

7 Moore's Federal Practice, see *§ 37.22[2][d]* (Matthew Bender 3d ed.).

25.15[4] Privilege or Work-Product Protection Favoring Denial. A motion to compel discovery generally will be denied if the materials sought are privileged or protected by the work-product doctrine, regardless of whether the materials fall within the broad definition of relevance [*Fed R Civ P 26(b)(1)* (privilege); *Fed R Civ P 26(b)(3)* (work-product doctrine)].

Cross Reference:

7 Moore's Federal Practice, see *§ 37.22[2][c]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

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25.16 CHECKLIST: Seeking Imposition of Expense-Shifting Sanctions on Motion to Compel Mandatory Disclosure or Discovery.

☐ When motion to compel mandatory disclosure or discovery is granted, request sanctions against party opposing the motion.

○ Prepare documentation for the amount of sanctions requested, including:

☐ Costs incurred in bringing motion.

☐ Attorney's fees.

Authority:
Fed R Civ P 37(a)(5)(A), (C)

Discussion:
See *§§ 25.17 -25.20*

Forms:
See *§§ 25.115, 25.116*

☐ When motion to compel mandatory disclosure or discovery is denied, request sanctions against party bringing motion.

- ○ Prepare documentation for the amount of sanctions requested, including:
  - ☐ Costs incurred in bringing motion.
  - ☐ Attorney's fees.

Authority:
Fed R Civ P 37(a)(5)(A), (B)

Discussion:
See *§ 25.17*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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Unit 7 Discovery
CHAPTER 25 Motions to Compel and Discovery Sanctions
II. SEEKING ORDER TO COMPEL MANDATORY DISCLOSURE OR DISCOVERY
C. Seeking Imposition of Expense-Shifting Sanctions on Motion to Compel Mandatory Disclosure or Discovery

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25.17 Court Award of Reasonable Expenses, Including Attorney's Fees, and Entry of Protective Order.

25.17[1] If Motion for Order Compelling Disclosure or Discovery Is Granted. If the motion for an order compelling disclosure or discovery is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court must, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising the conduct, or both of them, to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that [*Fed R Civ P 37(a)(5)(A)*]:

- The motion was filed without a prior good-faith effort to obtain the disclosure or discovery without court action; or
- The opposing party's nondisclosure, response, or objection was substantially justified; or
- Other circumstances make an award of expenses unjust.

An award of expense-shifting sanctions does not require that the party against whom the sanctions are sought have acted in "bad faith" [*Green v. Baca (CD Cal 2005) 225 FRD 612, 614*].

The party against whom an award of expenses is sought has the burden of showing the special circumstances that make his or her failure to comply substantially justified [*Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 784*].

Judge's Perspective:

First contact opposing counsel to see if he or she will voluntarily reimburse you. This will probably not work.

If you elect to file a motion, state that you have attempted to resolve the issue without court intervention and include the number of hours, costs, etc. that were incurred because of opponent's delay. Do not

engage in name-calling or hyperbole. Be forthright and concise.

If the case involves an ongoing relationship between the parties or the opposing attorney is someone with whom you often work, consider forgetting the sanctions request. It's always good to remember the old adage, "What goes around comes around."

Cross Reference:

7 Moore's Federal Practice, see *§ 37.23* (Matthew Bender 3d ed.).

25.17[2] If Motion for Order Compelling Disclosure or Discovery Is Denied. If the motion for an order compelling disclosure or discovery is denied, the court may enter any protective order authorized under *Fed R Civ P 26(c)*. The court must, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust [*Fed R Civ P 37(a)(5)(B)*].

Cross Reference:

7 Moore's Federal Practice, see *§ 37.23* (Matthew Bender 3d ed.).

25.17[3] If Motion for Order Compelling Disclosure or Discovery Is Granted in Part and Denied in Part. If the motion for an order compelling disclosure or discovery is granted in part and denied in part, the court may enter any protective order authorized under *Fed R Civ P 26(c)*. The court may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion [*Fed R Civ P 37(a)(5)(C)*].

Cross References:

Protective orders under *Fed R Civ P 37(a)*, see *25.14*. Protective orders generally, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§§ 22.35 -22.66*.

7 Moore's Federal Practice, see *§ 37.23[4][b]* (Matthew Bender 3d ed.).

Strategic Point:

Expense-shifting sanctions may be awarded in connection with a motion for a protective order, i.e., on a party or nonparty who, without substantial justification, unsuccessfully moved or opposed the motion for a protective order [*Fed R Civ P 26(c)*; *see also Fed R Civ P 37(a)(4)*; *Rickels v. City of South Bend (7th Cir 1994) 33 F3d 785, 788*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders

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25.18 Due Process Requirements of Expense-Shifting Sanctions: Opportunity to Be Heard.

Before imposing expense-shifting sanctions on a party who unsuccessfully made or opposed a motion to compel mandatory disclosures or discovery, a court must afford the persons or parties to be sanctioned an opportunity to be heard [*see Fed R Civ P 37(a)(5)(A), (B)*].

Courts may comply with the requirement for an opportunity to be heard by either of the following procedures [*see Fed R Civ P 37(a)(4)*, Committee Note of 1993]:

- An oral hearing on adequate notice.
- Consideration of written submissions from the affected parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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25.19 Rebuttable Presumption Favors Party Seeking Expense-Shifting Sanctions.

A rebuttable presumption favors imposing expense-shifting sanctions on the party against whom a motion to compel disclosures or discovery is resolved [*see Fed R Civ P 37(a)(5)(A)*; *Fed R Civ P 37*, Committee Note of 1970].

Cross Reference:

7 Moore's Federal Practice, see *§ 37.23[1]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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25.20 Moving Party May Recover Attorney's Fees Incurred in Requesting Expense-Shifting Sanctions.

Attorney's fees incurred in preparing a request for expense-shifting sanctions are recoverable [*Sure Safe Indus. Inc. v. C & R Pier Mfg. (SD Cal 1993) 152 FRD 625, 626*].

Cross Reference:

Seeking expense-shifting sanctions under *Fed R Civ P 37(a)(4)(C)*, see 7 *Moore's Federal Practice, § 37.23* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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25.21 CHECKLIST: Opposing Expense-Shifting Sanctions on Motion to Compel Mandatory Disclosure or Discovery.

☐ If position on motion to compel is unsuccessful, oppose imposition of expense-shifting sanctions based on the following grounds:

- ○ The unsuccessful position was substantially justified.
- ○ Other circumstances make the imposition of sanctions unjust.
- ○ The prevailing party did not make a good-faith attempt at resolving the issues.
- ○ The amount requested is excessive.

Authority:
Fed R Civ P 37(a)(5)(A), (C)

Discussion:
See *§§ 25.22 -25.27*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDiscoveryDisclosuresMotions

to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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25.22 If Moving Party Prevails, Responding Party May Raise Failure to Make Good-Faith Effort at Informal Resolution.

If the moving party prevails, the responding party may rebut the presumption in favor of the imposition of expense-shifting sanctions by demonstrating that the moving party failed to make a good-faith effort to obtain the disclosure or discovery prior to filing the motion [*see Fed R Civ P 37(a)(5)(A)(i)*; *but see Green v. Baca (CD Cal 2005) 225 FRD 612, 614* (no rebuttal of presumption when responding party's conduct was ultimately responsible for extensive court intervention in the discovery process)].

Judge's Perspective:

If you have good cause, state it. *Never* blame your secretary, paralegal, or associate. If the fault was partly your opponent's, say so without being unpleasant. If it was your fault, admit it, apologize, and don't let it happen again.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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25.23 If Moving Party Prevails, Responding Party May Raise Substantial Justification.

If the moving party prevails, the responding party may rebut the presumption in favor of the imposition of expense-shifting sanctions by demonstrating that its nondisclosure, response, or objection was substantially justified [*see Fed R Civ P 37(a)(5)(A)(ii)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryRelevance

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25.24 If Responding Party Prevails, Moving Party May Raise Substantial Justification.

If the responding party prevails, the moving party may rebut the presumption in favor of imposition of expense-shifting sanctions by demonstrating that the motion was substantially justified [*see Fed R Civ P 37(a)(5)(B)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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25.25 Unsuccessful Party May Raise Other Circumstances That Render Imposition of Sanctions Unjust.

Regardless of who prevails, the unsuccessful party on the motion to compel may rebut the presumption in favor of the imposition of expense-shifting sanctions by demonstrating that other circumstances make an award of expenses unjust [*Fed R Civ P 37(a)(5)(A), (B)*].

Example:

If the prevailing party also acted unjustifiably, a court might find that imposing sanctions against the unsuccessful party would be unjust [*see Fed R Civ P 37*, Committee Note of 1970].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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25.26 Substantial Justification Is Determined by Objective Standard.

A party meets the substantial justification standard by demonstrating that the dispute about the matter was "genuine," that is, reasonable lawyers could disagree about the appropriateness of the disputed position [*see Fed R Civ P 37(a)(4)*, Committee Note of 1970; *see also Pierce v. Underwood (1988) 487 US 552, 565, 108 S Ct 2541, 101 L Ed2d 490* (establishing meaning of substantial justification within context of Equal Access to Justice Act)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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25.27 Opposing Reasonableness of Amount of Sanctions Requested.

The provisions for expense-shifting sanctions require that the recoverable expenses be reasonable [*see Fed R Civ P 37(a)(5)*]. The unsuccessful party to a motion to compel mandatory disclosure or discovery may therefore raise the issue that the amount of expenses sought is unreasonable [*see, e.g., Green v. Baca (CD Cal 2005) 225 FRD 612, 614-616*].

Consider:

Due process requirements must also be met. See *§ 25.18*.

Legal Topics:

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

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25.28 CHECKLIST: Requesting Imposition of Rule 37(b) Sanctions.

☐ Determine if party failed to obey a court order for discovery.

○ If the disobedient person is a nonparty deponent, move for contempt sanction.

○ If the disobedient person is a party (or party designee), determine which sanction to seek.

Authority:
Fed R Civ P 37(b)(1), (2)

Discussion:
See *§§ 25.29*, *25.30*

☐ Follow local rules regarding meet-and-confer requirements.

Discussion:
See *§ 25.05*

☐ Follow local rules regarding discovery motions.

Discussion:

See *§ 25.40*

☐ Prepare motion and serve papers.

○ Include the following allegations:

☐ The court has jurisdiction.

☐ A valid order was violated by a person against whom sanctions are sought.

☐ The moving party made a good-faith effort at a resolution of issues.

☐ The motion is timely.

☐ An adequate description of the disobedience and sanction sought was given.

☐ Reasonable notice was given.

☐ The papers and procedures followed comply with local rules.

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, 22.14; *Ch. 26, Pretrial Motion Practice, 26.12*

☐ If monetary sanctions are requested, prepare documentation for the amount of sanctions requested, including:

○ Costs incurred by the party's failure to obey the order.

○ Attorney's fees.

Authority:
Fed R Civ P 37(b)(1), (2)

Content Note:
Local court rules contain specific requirements for filing of motion papers with respect to documenting prior attempts to resolve discovery disputes, and other requirements.

Discussion:
See *§ 25.40*

Form:
25.117

Standard Procedure Checklists:

Ch. 22, Regulation of Discovery by Stipulation or Motion, 22.14; Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

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

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25.29 Person Who Fails to Be Sworn or Deposed May Be in Contempt of Court.

If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court [*Fed R Civ P 37(b)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconductCivil ProcedureSanctionsContemptGeneral Overview

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25.30 Party or Party's Representative or Designee Who Disobeys Court Order Is Subject to Sanctions.

25.30[1] Party Who Fails to Obey Discovery Order Is Subject to Sanctions. If a party fails to obey an order to provide or permit discovery, including an order made under *Fed R Civ P 35* or *37(a)*, or if a party fails to obey an order entered under *Fed R Civ P 26(f)*, the court in which the action is pending may make such orders in regard to the failure as are just [*see Fed R Civ P 37(b)(2)*].

Consider:

A *Fed R Civ P 37(a)* motion is not a prerequisite to Rule 37(b) sanctions. Sanctions are available if a party "fails to obey an order to provide or permit discovery." The order need not be a Rule 37(a) motion to compel order, nor must it be a written one [*Professional Seminar Consultants, Inc. v. Sino Am. Tech. Exch. Council, Inc. (9th Cir 1984) 727 F2d 1470, 1474*].

Distinguish:

If a party or attorney fails to participate in good faith in the framing of a discovery plan, then the sanctions under *Fed R Civ P 37(f)*, rather than *Fed R Civ P 37(b)(2)*, apply. Rule 37(f) authorizes only monetary sanctions. The harsher sanctions under Rule 37(b)(2) apply only after an order is entered [*see United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co. (9th Cir 1988) 857 F2d 600, 602-603, n3*].

Cross References:

Physical and mental examinations under *Fed R Civ P 35*, see Ch. 23, Methods of Discovery, see *§§ 23.189 -23.216*. Duty of parties to develop proposed discovery plan under *Fed R Civ P 26(f)*, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, see *§ 15.14*.

Grounds for Rule 37(b) sanctions, see 7 *Moore's Federal Practice, §§ 37.40*, *37.42* (Matthew Bender 3d ed.).

25.30[2] Party's Representative or Designee Who Fails to Obey Discovery Order Is Subject to Sanctions. If an officer, director, or managing agent of a party, or a person designated under *Fed R Civ P 30(b)(6)* or *31(a)(4)* to testify on behalf of a party, fails to obey an order to provide or permit discovery, including an order made under *Fed R Civ P 35* or *37(a)*, the court in which the action is pending may make such orders in regard to the failure as are just [*see Fed R Civ P 37(b)(2)*].

Cross Reference:

Physical and mental examinations under *Fed R Civ P 35*, see Ch. 23, Methods of Discovery, see *§§ 23.189 -23.216*.

25.30[3] Party Who Fails to Obey Order to Produce Another for Examination Is Subject to Sanctions Absent Showing of Inability. A party who has failed to comply with an order under *Fed R Civ P 35(a)* requiring that party to produce another for examination is subject to issue preclusion, evidence preclusion, and termination sanctions under *Fed R Civ P 37(b)(2)(A)(i)-(vi)* unless the party failing to comply shows that that party is unable to produce the person for examination [*Fed R Civ P 37(b)(2)(B)*].

Cross Reference:

Physical and mental examinations under Rule 35, see Ch. 23, Methods of Discovery, see *§§ 23.189 -23.216*.

25.30[4] Pro Se Litigants Are Subject to Sanctions. Pro se litigants are subject to sanctions. However, the determination of appropriate sanctions will necessarily reflect the circumstances surrounding the party's conduct, including absence of counsel and unfamiliarity with procedures, in addition to the party's ability to comply with the order in question.

Example:

In a *42 USC § 1983* action brought by a former prisoner against a law enforcement agency, the plaintiff, who was homeless, indigent, and severely handicapped, attempted to comply with massive discovery requests by the defendants by attending depositions and medical exams, and responding to interrogatories. His failure to comply fully with discovery requests did not rise to the level of flagrant bad faith. After the magistrate judge recommended dismissal, the plaintiff retained counsel. The court of appeals vacated the order of dismissal as too harsh a sanction under the circumstances [*see Porter v. Martinez (9th Cir 1991) 941 F2d 732, 733-734*].

Cross Reference:

Sanctions under Rule 37(b), see 7 *Moore's Federal Practice, § 37.41* (Matthew Bender 3d ed.).

Legal Topics:

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

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25.31 Underlying "Order" Is Construed Broadly.

The definition of "order" in *Fed R Civ P 37(b)(2)* has been read broadly [*Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp. (9th Cir 1992) 982 F2d 363, 367* , citing *Henry v. Sneiders (9th Cir 1974) 490 F2d 315, 318* , *cert. denied, 419 US 832 (1974)*].

Example:

Rule 37 sanctions may be imposed on a party for disobedience of a court's request to produce documents in oral proceedings, so long as those proceedings give the party unequivocal notice that a court has asked that certain documents be produced [*see Henry v. Sneiders (9th Cir 1974) 490 F2d 315, 318* , *cert. denied*, *419 US 832 (1974)*].

However, the requirement that there be some form of court order that has been disobeyed is an incontrovertible criterion for imposition of Rule 37(b)(2) sanctions. This rule has never been read to authorize sanctions for more general discovery abuse [*see Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp. (9th Cir 1992) 982 F2d 363, 367-368*].

Cross Reference:

Order need not be formal or written, see 7 *Moore's Federal Practice, § 37.42[3]* (Matthew Bender 3d ed.).

Legal Topics:

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

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25.32 Court That Issued Order Determines Whether Order Was Violated.

The court that issued the discovery order determines whether a party has violated that order [*United States v. National Med. Enters., Inc. (9th Cir 1986) 792 F2d 906, 911*].

Cross Reference:

7 Moore's Federal Practice, see *§ 37.44* (Matthew Bender 3d ed.).

Legal Topics:

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

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25.33 Sanctions Available Under Rule 37(b)(2).

25.33[1] List of Sanctions. Sanctions under *Fed R Civ P 37(b)(2)* include:

- An order that the matters regarding which the order was made or any other designated facts must be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order [*Fed R Civ P 37(b)(2)(A)(i)*].

- An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence [*Fed R Civ P 37(b)(2)(A)(ii)*].

- An order striking out pleadings or parts thereof [*Fed R Civ P 37(b)(2)(A)(iii)*].

- An order staying further proceedings until the order is obeyed [*Fed R Civ P 37(b)(2)(A)(iv)*].

- An order dismissing the action or proceeding or any part thereof [*Fed R Civ P 37(b)(2)(A)(v)*].

- An order rendering a judgment by default against the disobedient party [*Fed R Civ P 37(b)(2)(A)(vi)*].

Cross References:

List of sanctions, see 7 *Moore's Federal Practice, § 37.51*. Court discretion in determining motion for sanctions, see 7 *Moore's Federal Practice, § 37.50* (Matthew Bender 3d ed.).

25.33[2] Sanction Precluding Party From Defending Claim Is Severe Penalty Authorized Only in Extreme Circumstances. A sanction precluding a defendant from opposing a claim is a severe penalty subject to the same standards applicable to the sanctions of dismissal and default judgment [*United States ex rel. Wiltec Guam, Inc. v.*

Kahaluu Constr. Co. (9th Cir 1988) 857 F2d 600, 603 (sanction resulted in judgment for plaintiff)].

Example:

When defendants failed to pay previously ordered monetary sanctions imposed for their failure to comply with a discovery order, the district court determined that an appropriate sanction, reasonably related to the subject of discovery that was frustrated by sanctionable conduct, was to preclude the defendants from defending against fraudulent transfer allegations in one claim for relief [*In re Heritage Bond Litig. (CD Cal 2004) 223 FRD 527, 531*].

Cross Reference:

Standards for imposing dismissal and default sanctions, see *§ 25.34*.

Legal Topics:

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

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25.34 Dismissal and Default Sanctions Are Severe Penalties Imposed Only After Weighing Certain Factors.

25.34[1] Dismissal and Default Sanctions Are Authorized Only in Extreme Circumstances. The severe sanctions of dismissal and default judgment are authorized only in extreme circumstances [*Fjelstad v. American Honda Motor Co. (9th Cir 1985) 762 F2d 1334, 1338*].

25.34[2] Factors for Determining Dismissal or Default. The Ninth Circuit has identified the following five factors that a district court must weigh in determining whether to impose the dismissal or default sanction [*Thompson v. Housing Auth. of L.A. (9th Cir 1986) 782 F2d 829, 831 , cert. denied, 479 US 829 (1986)* (regarding dismissal sanctions); *see also Computer Task Group, Inc. v. Brotby (9th Cir 2004) 364 F3d 1112, 1115* ; *United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co. (9th Cir 1988) 857 F2d 600, 603* (standards for imposing dismissal sanction apply to imposition of default sanction)]:

1. The public's interest in expeditious resolution of litigation.

2. The court's need to manage its docket.

3. The risk of prejudice to the defendants.

4. The public policy favoring disposition of cases on their merits.

5. The availability of less drastic sanctions.

Consider:

The first two factors favor imposition of sanctions in most cases, while the fourth cuts against a dismissal sanction. Thus, as a general rule the key factors are prejudice and the availability of lesser sanctions [*see Adriana Int'l Corp. v. Thoeren (9th Cir 1990) 913 F2d 1406, 1412 , cert. denied sub nom. Lewis & Co. v. Thoeren, 498 US 1109 (1991)* ; *In re Heritage Bond Litig. (CD Cal 2004) 223 FRD 527, 530-531* ;

Anheuser-Busch, Inc. v. Natural Beverage Distribs. (ND Cal 1993) 151 FRD 346, 347 , aff'd, 69 F3d 337 (9th Cir 1995)]. When considering risk of prejudice and less drastic sanctions, the "most critical" factor is whether the discovery violations "make it impossible for a court to be confident that the parties will ever have access to the true facts" [*Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills (9th Cir 2007) 482 F3d 1091, 1097*].

Distinguish:

In some published cases, the Ninth Circuit has required a showing of prejudice only when courts are acting under *Fed R Civ P 37*, which applies when a party disobeys a court order regarding discovery [*Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 382* (prejudice is an optional factor when courts are acting under their inherent authority); *In re Napster, Inc. Copyright Litig. (ND Cal 2006) 462 F Supp 2d 1060, 1075 n.4* ; *cf. Henry v. Gill Indus., Inc. (9th Cir 1993) 983 F2d 943, 948* (prejudice is a "key factor[]" when courts are acting under the authority of Rule 37)]. These cases hold that when acting under its inherent authority, a district court need not consider prejudice to the party moving for sanctions [*In re Napster, Inc. Copyright Litig. (ND Cal 2006) 462 F Supp 2d 1060, 1075* & n.4, 1078].

Cross Reference:

Requirements for imposing severe sanctions under court's inherent powers, see *25.97[2][d]*.

When the drastic sanction of dismissal or default is imposed, the range of discretion is narrowed, and the losing party's noncompliance must be due to willfulness, fault, or bad faith [*Fair Hous. of Marin v. Combs (9th Cir 2002) 285 F3d 899, 905 , cert. denied, 537 US 1018 (2002)* ; *Henry v. Gill Indus., Inc. (9th Cir 1993) 983 F2d 943, 948* ; *see Fed R Civ P 37(b)(2)*].

Disobedient conduct not shown to be outside the litigant's control meets this standard [*Jorgensen v. Cassiday (9th Cir 2003) 320 F3d 906, 912* ; *Fair Hous. of Marin v. Combs (9th Cir 2002) 285 F3d 899, 905 , cert. denied, 537 US 1018 (2002)* ; *Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1167*].

25.34[3] Determining Whether Court Considered Alternative Sanctions. The following factors are of particular relevance in determining whether a district court has considered alternatives to dismissal [*Malone v. USPS (9th Cir 1987) 833 F2d 128, 132 , cert. denied sub nom. Malone v. Frank, 488 US 819 (1988)*]:

- Did the court explicitly discuss the feasibility of less drastic sanctions and explain why alternative sanctions would be inadequate?

- Did the court implement alternative methods of sanctioning or curing the malfeasance before ordering dismissal?

- Did the court warn the plaintiff of the possibility of dismissal before actually ordering dismissal?

Cross Reference:

When explicit discussion of alternatives or warning is necessary, see *§ 25.34[4]*.

25.34[4] When Court Should Explicitly Discuss Alternatives or Warn of Dismissal.

25.34[4][a] Discussion of Alternatives. The Ninth Circuit has indicated a preference for explicit discussion by the district court of the feasibility of alternatives when ordering dismissal [*Malone v. USPS (9th Cir 1987) 833 F2d 128, 132 , cert. denied sub nom. Malone v. Frank, 488 US 819 (1988)*]. As a general rule, the district court must consider less severe alternatives and discuss them if it elects to dismiss [*United States ex rel. Wiltec Guam, Inc. v. Kahaluu*

Constr. Co. (9th Cir 1988) 857 F2d 600, 604].

However, although an explicit discussion of alternatives is preferred, it is not always necessary [*United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co. (9th Cir 1988) 857 F2d 600, 604* ; *Malone v. USPS (9th Cir 1987) 833 F2d 128, 132* , *cert. denied sub nom. Malone v. Frank, 488 US 819 (1988)*]. Under circumstances sufficiently egregious, it may be unnecessary (although still helpful) for a district court to discuss why alternatives to dismissal are infeasible [*Malone v. USPS (9th Cir 1987) 833 F2d 128, 132* , *cert. denied sub nom. Malone v. Frank, 488 U.S. 819 (1988)* (affirming dismissal absent record that district court explicitly discussed alternatives, when plaintiff purposefully and defiantly violated a court order)].

In exceptional cases in which it is clear that no other alternative would have been reasonable, the Ninth Circuit may affirm a dismissal or default judgment despite the absence of a discussion of alternatives [*see United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co. (9th Cir 1988) 857 F2d 600, 604*]. This is in keeping with the tenet that consideration of less severe penalties must be a reasonable explanation of possible and meaningful alternatives [*Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 381*].

Example:

In a Title VII case, the district court granted defendant's motion to dismiss plaintiff's action, citing plaintiff counsel's flagrant disobedience, her bad faith and her repeated failure to comply in any respect with the court's pretrial order, and her failure to communicate with the court or opposing counsel in an attempt to clarify or modify the court's pretrial order. The court of appeals affirmed, stating that, under the egregious circumstances present here, when the plaintiff has purposefully and defiantly violated a court order, it is unnecessary (although still helpful) for a district court to discuss why alternatives to dismissal are infeasible [*see Malone v. USPS (9th Cir 1987) 833 F2d 128, 129-132* , *cert. denied sub nom. Malone v. Frank, 488 US 819 (1988)*].

Moreover, in some cases explicit discussion of alternatives is unnecessary if the district court actually tries alternatives before employing the ultimate sanction of dismissal [*Malone v. USPS (9th Cir 1987) 833 F2d 128, 132* , *cert. denied sub nom. Malone v. Frank, 488 US 819 (1988)* ; *see also Adriana Int'l Corp. v. Thoeren (9th Cir 1990) 913 F2d 1406, 1413* , *cert. denied sub nom. Lewis & Co. v. Thoeren 498 US 1109 (1991)* , citing *Malone*]. This series of previously imposed sanctions constitutes a "natural progression, much like discipline, with dismissal the last step" [*United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co. (9th Cir 1988) 857 F2d 600, 604*].

25.34[4][b] Warning of Dismissal. It is advisable for the court to warn a plaintiff about the potential for a dismissal sanction prior to imposition of the sanction.

Example:

Prior to imposing the sanction of dismissal on plaintiffs, the district court and master warned them that continued noncompliance would result in dismissal. It had also denied earlier motions to dismiss and imposed costs on plaintiffs as a lesser sanction [*see Allen v. Exxon Corp. (In re Exxon Valdez) (9th Cir 1996) 102 F3d 429, 433*].

Nevertheless, an explicit warning of the possibility of dismissal is not always necessary, at least in a case involving egregious circumstances. A warning must identify the specific conduct that will trigger the sanction, and must identify the specific sanction that the court is contemplating [*Adriana Int'l Corp. v. Thoeren (9th Cir 1990) 913 F2d 1406, 1413* , *cert. denied sub nom. Lewis & Co. v. Thoeren, 498 US 1109 (1991)* (court warned that specific conduct would result in dismissal, without mentioning subsequent default judgment, but, under circumstances, that warning was sufficient to later impose dismissal and default); *United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co. (9th Cir 1988) 857 F2d 600, 605* (discussion of alternatives nevertheless weighed against imposition of sanction of precluding opposition to claim, which resulted in judgment for plaintiff)].

Strategic Point--Moving Party:

A record of the district court's explicit discussion of alternatives is the best method of assuring that the consideration of this factor will be preserved for appeal purposes. If the court merely relies on the prior imposition of lesser sanctions to satisfy this factor, however, those "lesser sanctions" should be of the type available under *Fed R Civ P 37(b)(2)*, rather than some other punitive type of order. Moreover, those sanctions should be in response to the particular discovery abuse that becomes the basis for the dismissal or other severe sanction [*see, e.g., Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 992* (in imposing dismissal sanction under *Fed R Civ P 41(b)*, district court's prior grant of time to amend complaint could not be considered lesser sanction because it was not sanction in response to plaintiffs' failure to obey a court order)]. The moving party otherwise risks a reversal of the dismissal order because of the court's failure to find that the minimum number of factors [*see § 25.34[5]*] support dismissal.

25.34[5] Appellate Courts Will Affirm Dismissal If Four Factors Support Dismissal, or Three Factors Strongly Support Dismissal. The Ninth Circuit tends to affirm orders of dismissal sanctions if at least four factors support dismissal, or at least three factors strongly support dismissal [*Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 992* (affirming imposition of dismissal sanction under the analogous *Fed R Civ P 41(b)*)].

25.34[6] Dismissal and Default Sanctions Reviewed Under Same Standard; Cases Involving Court's Inherent Power Apply. The Ninth Circuit applies the same standards in reviewing the imposition of both dismissal and default sanctions [*see United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co. (9th Cir 1988) 857 F2d 600, 603*]. Dismissal sanctions under *Fed R Civ P 37* are subject to similar considerations as those under a court's inherent power. Therefore, the Ninth Circuit uses both types of cases interchangeably [*United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co. (9th Cir 1988) 857 F2d 600, 603 n5* , citing *Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 380*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDismissalsInvoluntary DismissalsFailures to Comply

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25.35 Contempt of Court Is Available Under Rule 37(b)(2).

25.35[1] Failure to Obey Order May Be Treated As Contempt of Court. In lieu of or in addition to any of the other orders set forth in *Fed R Civ P 37(b)(2)*, a sanction may include an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination [*Fed R Civ P 37(b)(2)(A)(vii)*].

Cross References:

Discussion of contempt, see Ch. 35, Contempt.

Form of motion to hold deponent in contempt, see 8 *Bender's Federal Practice Forms, Form 37:60* (Matthew Bender).

See also 7 *Moore's Federal Practice, § 37.51[7][a]* (Matthew Bender 3d ed.).

25.35[2] Protective Order May Be Basis for Contempt Sanction. A protective order is a discovery order subject to the provisions of *Fed R Civ P 37*, including provision for a contempt sanction [*Westinghouse Elec. v. Newman & Holtzinger, P.C. (9th Cir 1993) 992 F2d 932, 935*].

Example:

In a patent infringement case, plaintiff used materials produced by defendant during discovery and subject to a protective order as a basis for filing a separate lawsuit against the defendant in state court. The district court held that the defendant, who brought a motion for civil contempt, was entitled to monetary sanctions based on the plaintiff's violation of the protective order [*On Command Video Corp. v. Lodgenet Entm't Corp. (ND Cal 1997) 976 F Supp 917, 922-923* (defendant nevertheless failed to provide factual basis for amount of sanctions sought.)].

25.35[3] Civil and Criminal Contempt Distinguished by Character and Purpose. To distinguish civil from criminal contempt, the focus of the inquiry is often not on the fact of punishment, but rather its character and purpose [

Shillitani v. United States (1966) 384 US 364, 369, 86 S Ct 1531, 16 L Ed2d 622 ; *Go-Video v. Motion Picture Ass'n of Am. (9th Cir 1993) 10 F3d 693, 695* ; *Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 778*].

Strategic Point--Early Clarification of Whether Proceeding Is Civil or Criminal in Nature:

The Ninth Circuit has recommended that an early determination be made as to the nature of contempt, so that the proceedings can be conducted in accordance with appropriate rules, statutes, and due process requirements [*see Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 777*].

Warning--Contempt Sanction May Be Invalidated If Confusion Leads to Prejudice:

A contempt sanction could be invalidated if the district court's confusion as to the nature of the contempt proceeding resulted in prejudice to the contemnor [*see Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 777 n1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureSanctionsContemptGeneral Overview

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25.36 Civil Contempt.

25.36[1] Civil Contempt Consists of Disobedience of Specific Order by Failure to Comply Reasonably. Civil contempt is characterized by the court's desire to compel a party's obedience to a specific and definite court order after the party has failed to take all reasonable steps within the party's power to comply [*Go-Video v. Motion Picture Ass'n of Am. (9th Cir 1993) 10 F3d 693, 695* ; *McCoy v. Southwest Airlines Co. (CD Cal 2002) 208 FRD 617, 621*]. A contempt adjudication is civil in nature when the sanction imposed is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public [*Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 778*].

25.36[2] Civil Contempt May Be Compensatory or Coercive. There are two forms of civil contempt: compensatory and coercive. The power to impose a coercive sanction to compel obedience to an order in a civil contempt is limited by the individual's ability to comply with the court's order [*Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 778, 781*].

25.36[3] Civil Contempt Requires Showing of Violation Absent Good Faith and Reasonable Interpretation of Order. Although a civil contempt need not be willful, and there is no "good faith" exception to the requirement of obedience to a court order, a person should not be held in contempt if his or her action appears to be based on a good faith and reasonable interpretation of the court's order [*Go-Video v. Motion Picture Ass'n of Am. (9th Cir 1993) 10 F3d 693, 695*].

The moving party in a motion for civil contempt must show clear and convincing evidence that the other party violated the order beyond substantial compliance, and that the violation was not based on a good faith and reasonable interpretation of the order [*Wolfard Glassblowing Co. v. Vanbragt (9th Cir 1997) 118 F3d 1320, 1322*].

25.36[4] Standard of Proof Is Clear and Convincing Evidence. Civil contempt must be proved by clear and convincing evidence [*Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 777*].

25.36[5] Civil Contempt Is Reviewed Under Abuse of Discretion Standard. Review of civil contempt is limited to the abuse of discretion standard [*Go-Video v. Motion Picture Ass'n of Am. (9th Cir 1993) 10 F3d 693, 695*].

25.36[6] Burden Shifts After Party Is Found to Have Violated Court Order. After the party seeking sanctions shows by clear and convincing evidence that the party in question violated a specific and definitive court order, the burden then shifts to the contemnors to demonstrate why they were unable to comply [*McCoy v. Southwest Airlines Co. (CD Cal 2002) 208 FRD 617, 621*].

Cross Reference:

Discussion of contempt sanctions generally, see Ch. 35, Contempt.

Discussion of civil contempt sanctions for discovery misconduct, see 7 *Moore's Federal Practice, § 37.51[7][b]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureSanctionsContemptCivil Contempt

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25.37 Criminal Contempt.

25.37[1] Purpose of Criminal Contempt Is Punitive. The primary purpose of criminal contempt is to punish past defiance of a court's judicial authority, thereby vindicating the court [*Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 778* ; *McCoy v. Southwest Airlines Co. (CD Cal 2002) 208 FRD 617, 621*]. The principal beneficiaries of such an order are the courts and the public interest [*Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 778*].

25.37[2] Criminal Contempt Requires Willful Conduct. A party's disobedience of a court order must be willful to constitute a basis for criminal contempt sanctions [*see Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 772* (criminal contempt sanction not available because, among other things, evidence failed to show that party was guilty of willful disobedience of district court's order)].

25.37[3] Court Must Provide Notice, and Appoint Prosecutor. Any person who commits criminal contempt may be punished for that contempt after prosecution on notice [*Fed R Crim P 42(a)*; *see Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 772*].

The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must [*Fed R Crim P 42(a)(1)*]:

- State the time and place of the trial;
- Allow the defendant a reasonable time to prepare a defense; and
- State the essential facts constituting the charged criminal contempt and describe it as such.

The court must appoint a prosecutor, or another attorney if appropriate, to prosecute the contempt [*see Fed R Crim P 42(a)(2)*].

Cross Reference:

Discussion of contempt sanctions generally, see Ch. 35, Contempt.

Discussion of criminal contempt sanctions for discovery misconduct, see 7 *Moore's Federal Practice, § 37.51[7][c]* (Matthew Bender 3d ed.).

25.37[4] Person Is Entitled to Jury Trial When Federal Law Provides. A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides, and must be released or detained as *Fed R Crim P 46* provides [*Fed R Crim P 42(a)(3)*; *Muniz v. Hoffman (1975) 422 US 454, 474-476, 95 S Ct 2178, 45 L Ed2d 319*]. A jury trial is required only for a "serious offense" [*Codispoti v. Pennsylvania (1974) 418 US 506, 94 S Ct 2687, 41 L Ed2d 912* ; *Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 777*].

25.37[5] Judge Disrespected or Criticized Is Disqualified From Presiding at Contempt Proceeding. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. On a finding or verdict of guilty, the court must impose the punishment [*Fed R Crim P 42(a)(3)*].

25.37[6] Judge May Punish Person Committing Criminal Contempt in His or Her Presence. Notwithstanding any other provision of the Federal Rules of Criminal Procedure, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies. A magistrate judge may summarily punish a person as provided in *28 USC § 636(e)*. The contempt order must recite the facts, be signed by the judge, and be filed with the clerk [*Fed R Crim P 42(b)*].

25.37[7] Standard of Proof Is Beyond Reasonable Doubt. Criminal contempt must be proved beyond a reasonable doubt [*Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 777*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.38 Monetary Sanctions Are Imposed Under Rule 37(b)(2), Absent Substantial Justification or Other Circumstances.

Generally, the court must require the party failing to obey an order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust [*Fed R Civ P 37(b)(2)*].

The court need not find that an attorney acted in bad faith before imposing these sanctions [*see, e.g., Toth v. Trans World Airlines, Inc. (9th Cir 1988) 862 F2d 1381, 1385-1386* (attorney and client jointly and severably liable for expenses, with no discussion of bad faith; imposition of sanction upheld, but case remanded for determination of proper amount)].

The party against whom an award of expenses is sought has the burden of showing the special circumstances that make his or her failure to comply substantially justified [*Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 784*].

Distinguish:

Compensatory monetary sanctions awarded for failure to obey a discovery order may compensate for a broader range of losses than monetary sanctions in connection with a motion to compel discovery, which are limited to the reasonable expenses incurred in making or opposing the motion [*see Fed R Civ P 37(a)(5)(A)*].

Warning--Failure to Substantiate Amount of Sanctions May Result in Denial of Sanctions:

Counsel should take care to provide a factual basis to substantiate the amount of sanctions requested. Even if sanctions would be proper under the circumstances, the court may deny them completely if unsubstantiated [*see, e.g., On Command Video Corp. v. Lodgenet Entm't Corp. (ND Cal 1997) 976 F Supp 917, 922-923*].

Cross Reference:

Monetary sanctions under Rule 37(b), see 7 *Moore's Federal Practice, § 37.51[9]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.39 Sanction Must Be Specifically Related to Claim at Issue in Discovery Order.

Due process considerations require that the sanction be specifically related to the particular claim that was at issue in the order to provide discovery [*Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee (1982) 456 US 694, 707, 102 S Ct 2099, 72 L Ed2d 492* ; *Navellier v. Sletten (9th Cir 2001) 262 F3d 923, 947*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.40 Motion for Sanctions Under Rule 37(b).

25.40[1] LOCAL PRACTICE: All Districts--Counsel Must Make Good-Faith Effort to Resolve Dispute Informally. The four district courts in California require counsel to make a good-faith attempt to reach an informal resolution of a discovery dispute prior to filing a discovery motion.

Cross Reference:

See *§ 25.05*.

25.40[2] Determining Jurisdiction for Motion.

25.40[2][a] Motion Seeking Sanctions Against Party May Be Brought in Court Where Action Is Pending. A motion seeking sanctions against a party for failure to comply with a discovery order, or an order entered under *Fed R Civ P 26(f)* regarding a discovery plan, may be brought in the court where the action is pending [*Fed R Civ P 37(b)(2)*].

Strategic Point--Moving Party:

The court is not limited to a finding of contempt, but may fashion an appropriate sanctions order, including sanctions that directly affect the parties' substantive rights [*see Fed R Civ P 37(b)(2)(A)(i)-(vi)*].

25.40[2][b] Motion Seeking Sanctions Against Nonparty Deponent Is Brought in Court That Issued Discovery Order. A motion seeking sanctions against a nonparty deponent for failure to comply with a discovery order must be brought pursuant to *Fed R Civ P 37(b)(1)*, in which case only the court that issued the discovery order has jurisdiction over the motion [*see Fed R Civ P 37(b)(1)*].

Strategic Point--Moving Party:

If the court that issued the discovery order against the nonparty is not the court where the action is pending, the only sanction that the court may impose pursuant to *Fed R Civ P 37(b)(1)* is contempt [*see Fed R Civ P 37(b)(1)*].

Cross Reference:

7 Moore's Federal Practice, see *§ 37.44* (Matthew Bender 3d ed.).

25.40[3] Time for Filing Motion.

25.40[3][a] Motion Should Be Filed Within Reasonable Time After Violation. *Fed R Civ P 37(b)* does not establish specific time limits for making a motion for sanctions. In the absence of a specific local rule to the contrary, *Fed R Civ P 37(b)* motions should be filed within a reasonable time after the alleged violation occurred, was discovered, or should have been discovered through reasonable diligence. The amount of time that is reasonable varies with the circumstances, but long delays will significantly reduce the likelihood that the motion will be granted [*see Brandt v. Vulcan, Inc. (7th Cir 1994) 30 F3d 752, 756-757*].

Cross Reference:

7 Moore's Federal Practice, see *§ 37.43* (Matthew Bender 3d ed.).

25.40[3][b] LOCAL PRACTICE: ND Cal Requirements--Motion Must Be Made As Soon As Practicable After Notice of Violation, and Served and Filed 14 Days After Judgment Is Entered or Earlier. Any motion for sanctions, regardless of the sources of authority invoked, must comply with any applicable Federal Rules of Civil Procedure, and must be made as soon as practicable after the filing party learns of the circumstances that it alleges make the motion appropriate [*ND Cal Civ LR 7-8(c)*; *see ND Cal Civ LR 37-3* (applying Rule 7-8 to motions under *Fed R Civ P 37*].

Unless otherwise ordered by the court, no motion for sanctions may be served and filed more than 14 days after entry of judgment by the district court [*ND Cal Civ LR 7-8(d)*; *see ND Cal Civ LR 37-3* (applying Rule 7-8 to motions under *Fed R Civ P 37*)].

25.40[4] LOCAL PRACTICE: ND Cal Requirements--Form of Motion Must Comply With Local Rules 7-2 and 7-8.

25.40[4][a] Motion Must Comport With Format Requirements of Local Rule 7-2. In the Northern District of California, a party moving for an award of attorney's fees or other form of sanction under *Fed R Civ P 37* in connection with a dispute about disclosure or discovery must comply with *ND Cal Civ LR 7-2* and *7-8* [*ND Cal Civ LR 37-3*].

ND Cal Civ LR 7-2 states that in one filed document not exceeding 25 pages in length, a motion must contain the following [*ND Cal Civ LR 7-2(b)*; *see ND Cal Civ LR 7-8(a)* (requiring compliance with Rule 7-2 for all motions for sanctions)]:

- On the first page in the space opposite the caption and below the case number, the noticed hearing date and time.
- In the first paragraph, notice of the motion including date and time of hearing.
- In the second paragraph, a concise statement of what relief or court action the movant seeks.

- In the succeeding paragraphs, the points and authorities in support of the motion, in compliance with *ND Cal Civ LR 7-4(a)*.

25.40[4][b] Motion Must Be Separately Filed. A motion for sanctions, regardless of the sources of authority invoked, must be separately filed [*ND Cal Civ LR 7-8(a)*, *37-3*].

25.40[5] Content of Motion.

25.40[5][a] Moving Party Must Provide Adequate Description of Alleged Violation. A motion for sanctions must describe the alleged violation of the order with enough specificity to enable the accused party to understand the charges, so that he or she is given a fair opportunity to develop a defense. The motion must comport with the requirements of due process. It must be real, reasonable, and afford some opportunity to be heard [*see Hathcock v. Navistar Int'l Transp. Corp. (4th Cir 1995) 53 F3d 36, 41-42*].

Warning--Both Client and Attorney Subject to Sanctions:

Absent a clear, contrary indication in the moving papers, any motion for sanctions based on an alleged violation of a discovery order places both the party and the party's counsel on notice that the court might assess sanctions against either or both, unless they provide the court with substantial justification for their conduct [*DeVaney v. Continental Am. Ins. Co. (11th Cir 1993) 989 F2d 1154, 1160*].

25.40[5][b] Motion Seeking Expenses Must Show Connection Between Violation and Expenses. A motion for sanctions seeking an award of expenses, including attorney's fees, should describe the causal connection between the expenses and the alleged violation of the underlying court order [*see, e.g., In re Heritage Bond Litig. (CD Cal 2004) 223 FRD 527, 533* (court constrained to award only attorney fees as civil contempt sanctions because aggrieved party did not provide court any basis for award of additional sanctions)]. It should also set forth with particularity the following [*Henry v. Gill Indus., Inc. (9th Cir 1993) 983 F2d 943, 946* ; *see Fed R Civ P 37(b)(2)*]:

- The nature of the services rendered.
- The amount of attorney time spent.
- The rates at which the time was billed to the client.

25.40[5][c] LOCAL PRACTICE: ND Cal Requirements--Required Affidavits and Declarations in Motion for Sanctions Under Rule 37. In the Northern District of California, a motion for an award of attorney's fees or other form of sanction under *Fed R Civ P 37* in connection with a dispute about disclosure or discovery must be accompanied by competent declarations that [*ND Cal Civ LR 37-3*]:

- Set forth the facts and circumstances supporting the motion;
- Describe in detail the efforts made by the moving party to secure compliance without intervention by the court; and
- If attorney's fees or other costs or expenses are requested, itemize with particularity the otherwise unnecessary expenses, including attorney's fees, directly caused by the alleged violation or breach, and set forth an appropriate justification for any attorney-fee hourly rate claimed.

In addition, a motion for sanctions under *Fed R Civ P 37* must be accompanied by affidavits or declarations pursuant to *ND Cal Civ LR 7-5* [*ND Cal Civ LR 7-2(d)*, *37-3*]. Factual contentions made in support of or in opposition to any motion must be supported by an affidavit or declaration and by appropriate references to the record. Extracts from

depositions, interrogatory answers, requests for admission, and other evidentiary matters must be appropriately authenticated by an affidavit or declaration [*ND Cal Civ LR 7-5(a)*].

An affidavit or declaration may contain only facts, must conform as much as possible to the requirements of *Fed R Civ P 56(e)* (form of affidavit for summary judgment), and must avoid conclusions and argument. Any statement made on information and belief must specify the basis for it. An affidavit or declaration not in compliance with Rule 7-5 may be stricken in whole or in part [*ND Cal Civ LR 7-5(b)*].

25.40[5][d] LOCAL PRACTICE: ND Cal Requirements--Motion Must Be Accompanied by Proposed Order. Unless excused by the judge who will hear the motion, each motion must be accompanied by a proposed order [*ND Cal Civ LR 7-2(c)*, *37-3*].

Cross Reference:

Motion papers generally, see Ch. 26, Pretrial Motion Practice, see *§§ 26.16 -26.23*.

25.40[6] LOCAL PRACTICE: CD Cal Requirements--Required Notice for Any Discovery Motion; Ex Parte Rules.

25.40[6][a] At Least 21 Days' Notice Is Required on Any Discovery Motion. In the Central District of California, a discovery motion may be noticed to be heard on the particular judge's regular Motion Day, which may not be earlier than 21 days after the filing of the motion [*CD Cal Civ LR 37-3*].

25.40[6][b] No Ex Parte Motions Permitted Absent Proper Showing. Unless the court in its discretion otherwise allows, discovery motions may not be filed or heard on an ex parte basis, absent a showing of irreparable injury or prejudice not attributable to the lack of diligence of the moving party [*CD Cal Civ LR 37-3*].

Warning--Sanctions for Noncompliance:

The failure of any counsel to comply with or cooperate in the procedures set forth in *CD Cal Civ LR 37-1 through 37-3* may result in the imposition of sanctions. [*CD Cal Civ LR 37-4*].

25.40[7] LOCAL PRACTICE: ED Cal Requirements--Filing of Discovery Motion and Hearing on Motion for Discovery Motion. When there has been a complete and total failure to respond to a discovery request or order *or* when the only relief sought by the motion is the imposition of sanctions, the aggrieved party may bring a motion for relief for hearing on 14 days' notice [*ED Cal Civ LR 251(e)*].

The responding party must respond no later than seven days before the hearing date [*ED Cal Civ LR 251(e)*].

The moving party may file and serve a reply not less than two court days before the hearing date [*ED Cal Civ LR 251(e)*].

All discovery motions, including Rule 37 motions for sanctions, are to be heard before the magistrate judge [*ED Cal Mag LR 302(c)(1)*; *see Pickern v. Pier 1 Imports (U.S.), Inc. (ED Cal 2004) 339 F Supp 2d 1081, 1091*].

Cross References:

Motion practice rules, see Ch. 26, Pretrial Motion Practice.

25.40[8] LOCAL PRACTICE: ND Cal Requirements--Notice of Motion for Sanctions Under Rule 37.

25.40[8][a] Motion for Sanctions Based on Disclosure or Discovery Dispute Must Comply With Local Rules 7-2 and 7-8. In the Northern District of California, a motion for an award of attorney's fees or other form of sanction

under *Fed R Civ P 37* in connection with a dispute about disclosure or discovery must comply with *ND Cal Civ LR 7-2* and *7-8* [*ND Cal Civ LR 37-3*].

25.40[8][b] Motion Must Be Served and Filed at Least 35 Days Before Hearing. Except as otherwise ordered or permitted by the assigned judge or local rules of the Northern District, and except for motions made during the course of a trial or hearing, all motions must be filed, served, and noticed in writing on the motion calendar of the assigned judge for hearing no fewer than 35 days after service of the motion [*ND Cal Civ LR 7-2(a)*; *see ND Cal Civ LR 7-8(a)*, *37-3* (requiring compliance with Rule 7-2)].

Cross References:

Form of motion, see *25.117*.

Forms of motion for sanctions under Rule 37(b), see 8 Bender's Federal Practice Forms, Forms 37:61-37:64 (Matthew Bender).

Motion procedure for sanctions under Rule 37(b), see 7 *Moore's Federal Practice, § 37.43* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureSanctionsGeneral Overview

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Unit 7 Discovery
CHAPTER 25 Motions to Compel and Discovery Sanctions
III. SEEKING IMPOSITION OF SANCTIONS FOR FAILURE TO COMPLY WITH ORDER COMPELLING MANDATORY DISCLOSURE OR DISCOVERY
A. Bringing Motion for Rule 37(b) Sanctions

3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.41

25.41 Court's Determination of Imposition of Sanctions.

25.41[1] Court in Which Action Is Pending May Make Just Orders Regarding Sanctions. If a party has failed to comply with a discovery order, the court in which the action is pending may make such orders in regard to the failure as are just [*Fed R Civ P 37(b)(2)*]. The specific sanctions set forth in *Fed R Civ P 37(b)(2)(A)(i)-(vi)* are illustrative, rather than exclusive.

Example:

The district court may make an order that benefits parties other than those wronged. The dismissal of a case may benefit additional parties if the dismissal applies to them in addition to the party seeking sanctions [*see, e.g., Valley Eng'rs, Inc. v. Electric Eng'g Co. (9th Cir 1998) 158 F3d 1051, 1059 , cert. denied, 526 US 1064 (1999)*].

Cross Reference:

7 Moore's Federal Practice, see *§ 37.51* (Matthew Bender 3d ed.).

25.41[2] Purpose of Sanctions Is to Prevent Party From Benefitting From Failure to Respond, and to Deter Sanctioned Conduct. Sanctions are intended to serve the following purposes [*National Hockey League v. Metropolitan Hockey Club, Inc. (1976) 427 US 639, 642-643, 96 S Ct 2778, 49 L Ed2d 747*]:

- Ensure that a party will not benefit from its own failure to comply with discovery requests.
- Specifically deter sanctioned conduct, and ensure compliance with discovery orders.
- Generally deter sanctionable conduct in the instant case and in other cases.

Cross Reference:

7 Moore's Federal Practice, see *§§ 37.50* -37.51 (Matthew Bender 3d ed.).

25.41[3] Court Evaluates All Incidents of Party's Misconduct. In evaluating the propriety of sanctions, the district court evaluates all the incidents of a party's misconduct [*see Henry v. Gill Indus., Inc. (9th Cir 1993) 983 F2d 943, 947*].

A court may consider prior misconduct when weighing a subsequent sanctions motion when all the conduct is of the same type, e.g., when all the conduct constitutes discovery abuse [*Adriana Int'l Corp. v. Thoeren (9th Cir 1990) 913 F2d 1406, 1412* , *cert. denied sub nom. Lewis & Co. v. Thoeren, 498 US 1109 (1991)*].

Legal Topics:

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

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25.42 Discovery Rulings Are Reviewed Under Abuse of Discretion Standard.

The Ninth Circuit reviews discovery rulings for abuse of discretion [*Mabe v. San Bernardino County (9th Cir 2001) 237 F3d 1101, 1112*]. The imposition of discovery sanctions under *Fed R Civ P 37* is reviewed for abuse of discretion [*Payne v. Exxon Corp. (9th Cir 1997) 121 F3d 503, 507*].

A district court's dismissal of a case with prejudice is reviewed for abuse of discretion. The issue on appeal is not whether the court of appeals would have, as an original matter, imposed the sanctions chosen by the trial court, but, rather, whether the trial court exceeded the limits of its discretion [*Toth v. Trans World Airlines, Inc. (9th Cir 1988) 862 F2d 1381, 1385*].

Cross Reference:

7 Moore's Federal Practice, see *§ 37.50* (Matthew Bender 3d ed.).

Prerequisite--Final Decision Required for Appeal of Monetary Sanctions Against Attorney:

An award of monetary sanctions against an attorney is not immediately appealable. An attorney sanctioned for such conduct suffers no inordinate injury from a deferral of appellate consideration [*Cunningham v. Hamilton County (1999) 527 US 198, 208-209, 119 S Ct 1915, 144 L Ed2d 184*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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25.43 CHECKLIST: Opposing Imposition of Rule 37(b) Sanctions.

☐ If appropriate, seek a protective order.

Authority:
Fed R Civ P 26(c)

Discussion:
See *§ 25.44*

☐ Determine if grounds to oppose motion for sanctions exist, such as:

- ○ Failure was substantially justified.
- ○ Other circumstances make monetary sanctions unjust.
- ○ Underlying order was not issued.
- ○ Underlying order was not disobeyed.
- ○ Sanction is unrelated to disobeyed order.

☐ Prepare and serve response papers.

☐ If monetary sanctions are sought, argue the following:

- ○ Other circumstances make the imposition of sanctions unjust.
- ○ The amount requested is excessive.

Authority:
Fed R Civ P 37(b)

Discussion:
See *§§ 25.44 -25.47*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, 22.14; Ch. 26, Pretrial Motion Practice, see *§ 26.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryProtective Orders

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25.44 Options and Strategies for Opposing Imposition of Rule 37(b) Sanctions.

A party who is unable to comply with a discovery order should promptly inform the court and other parties. The party should explain the circumstances to opposing counsel well before the discovery deadline, and request from the court a modification of the original order. If opposing counsel is uncooperative, the party to whom the order is directed should then file a formal motion for reconsideration or modification of the original discovery order, or for a protective order [*see Fed R Civ P 26(c)*]. This practice may protect the responding party from the imposition of sanctions, and obviate the need of other parties to incur expenses in the enforcement of discovery orders.

Warning--Belated Compliance Does Not Preclude Imposition of Sanctions:

Belated compliance with a discovery order does not preclude the imposition of sanctions [*see National Hockey League v. Metropolitan Hockey Club, Inc. (1976) 427 US 639, 643, 96 S Ct 2778, 49 L Ed2d 747 ; Fair Hous. of Marin v. Combs (9th Cir 2002) 285 F3d 899, 906 , cert. denied, 537 US 1018 (2002)*].

Cross Reference:

Protective orders, see *Ch. 22, Regulation of Discovery by Stipulation or Motion, §§ 22.35 -22.66*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.45 Opposing Imposition of Monetary Sanctions.

25.45[1] Disobedient Party Has Burden of Proving That Failure Was Substantially Justified. Under *Fed R Civ P 37(b)(2)*, the burden of showing substantial justification and special circumstances is on the party being sanctioned [*Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1171*]. This is appropriate because the court already will have found that the resisting party has violated the discovery order [*see Fed R Civ P 37(b)(2)*, Committee Note of 1970].

Example:

A good-faith dispute concerning a discovery question might, in the proper case, constitute substantial justification under Rule 37(b)(2) [*see Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1171*].

Consider:

An attorney subject to monetary sanctions must argue that the *client's* failure to obey the court order was substantially justified, not that the *attorney's defense* of the client was substantially justified [*Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1171*].

25.45[2] Opposing Sanctions on Ground That Other Circumstances Make Monetary Sanctions Unjust. The district court may elect not to impose compensatory monetary sanctions if "other circumstances make an award of expenses unjust" [*Fed R Civ P 37(b)(2)(C)*].

Example:

"Other circumstances" are likely to arise when a litigant is proceeding pro se, and is not held to the same standards as represented parties, or when the disobedient party is impecunious [*see, e.g., Porter v. Martinez (9th Cir 1991) 941 F2d 732, 733-734*]. In these circumstances, a court that is reluctant in good conscience to impose a monetary sanction might instead impose another type of sanction, especially when the disobedience is willful, repeated, or particularly egregious, and the administration of justice requires a response from the court.

Legal Topics:

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

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25.46 Opposing Sanctions on Ground That an Underlying Order Was Not Issued, or That Party Did Not Disobey Any Order.

Application of *Fed R Civ P 37(b)(2)* sanctions requires that an order has been issued, and that the order was disobeyed. If an underlying order was not issued, sanctions may be opposed on that ground [*see, e.g., Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 379*].

Consider:

Although the definition of "order" in *Fed R Civ P 37(b)(2)* has been read broadly, the requirement that there be some form of court order that has been disobeyed has not been read out of existence [*see Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp. (9th Cir 1992) 982 F2d 363, 367-368* ; *see also § 25.31*].

Similarly, a party who did not disobey any discovery court order is not subject to sanctions under *Fed R Civ P 37(b)(2)* [*see, e.g., Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1170* (abuse of discretion of court to order $6,000 in sanctions when party did not violate any discovery order)].

Legal Topics:

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

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25.47 Opposing Sanctions on Ground That Requested Sanction Is Unrelated to Particular Discovery Order That Was Disobeyed.

A person may oppose the imposition of sanctions under *Fed R Civ P 37(b)(2)* on the ground that the sanction sought is unrelated to the particular claim at issue in the discovery that was disobeyed [*see United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co. (9th Cir 1988) 857 F2d 600, 602*].

The application of Rule 37 sanctions is foreclosed when a party's alleged discovery-related misconduct is not encompassed by the language of the rule [*Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group (9th Cir 1995) 55 F3d 463, 467* (trial judge may not impose Rule 37 sanctions for bringing motion for reconsideration)].

Legal Topics:

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

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25.48 Opposing Civil Contempt.

25.48[1] Opposing Civil Contempt on Ground of Substantial Compliance With Court Order. Substantial compliance with the court order is a defense to civil contempt based on violation of a court order. The defense is not vitiated by a few technical violations when every reasonable effort has been made to comply [*Go-Video v. Motion Picture Ass'n of Am. (9th Cir 1993) 10 F3d 693, 695* ; *McCoy v. Southwest Airlines Co. (CD Cal 2002) 208 FRD 617, 621*].

25.48[2] Opposing Civil Contempt on Ground of Impossibility. Generally, impossibility is a complete defense to a charge of contempt. Inability, whether or not self-induced, is a complete defense to a charge of coercive civil contempt [*Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 782*].

Distinguish--Self-Induced Impossibility in Criminal Contempt:
An exception exists in the criminal context when the impossibility is self-induced [*see, e.g., United States v. Bryan (1950) 339 US 323, 330-331, 70 S Ct 724, 94 L Ed 884* ; *Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 782*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureSanctionsContemptCivil Contempt

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25.49 Opposing Severe Sanctions on Ground That Less Severe Sanctions Are Appropriate Under Circumstances.

25.49[1] Party Who Disobeyed Discovery Order May Assert That Sanctions Sought Are Too Severe Under Circumstances. A party who disobeyed a discovery order and is unsuccessful in defeating the imposition of sanctions entirely may argue that, under the circumstances, sanctions less severe than those sought are more appropriate. If severe sanctions such as dismissal are sought, counsel should argue that the court must entertain, among other factors, the feasibility of less drastic sanctions [*see Thompson v. Housing Auth. of L.A. (9th Cir 1986) 782 F2d 829, 831 , cert. denied, 479 US 829 (1986)* ; *United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co. (9th Cir 1988) 857 F2d 600, 603-605*].

Strategic Point--Party Opposing Sanctions:

The party opposing the imposition of serious sanctions on the ground that noncompliance was not willful should provide evidence supporting that assertion. For example, a party claiming that he or she was too ill to comply should provide some credible proof of the illness during the relevant time [*see, e.g., Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1168*].

25.49[2] Imposing Severe Sanctions Is Inappropriate When Party Was Unable to Comply With Discovery Order. If a party's disobedience of a discovery order is due to its inability to comply with it, and the inability was not fostered by its own conduct or by circumstances within its control, severe sanctions, such as dismissal, are not authorized [*Societe Internationale Pour Participations Industrieles et Commerciales v. Rogers (1958) 357 US 197, 210-212, 78 S Ct 1087, 2 L Ed2d 1255* (reversing dismissal when compliance with order mandating disclosure of bank records would be violation of Swiss laws); *Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 784* (improper to exclude evidence)].

Warning:

Courts may require the production of meaningful evidence tending to support the necessary finding that a party was unable to comply with a discovery order. Courts are unlikely to accept a party's mere assertion of this claim [*see Malautea v. Suzuki Motor Co. (11th Cir 1993) 987 F2d 1536, 1543 , cert. denied, 510 US 863 (1993)*].

Strategic Point--Party Opposing Sanctions:

A party unable to comply with a discovery order should inform the court and affected parties at the earliest possible time, thus avoiding the necessity of later responding to a request for imposition of sanctions, and arguing for less severe sanctions.

25.49[3] Refuting Requested Amount of Sanctions. Inasmuch as *Fed R Civ P 37(b)(2)* provides for the award of reasonable expenses and attorney's fees caused by the failure to obey a court order to provide or permit discovery, the amount requested may be refuted on the ground that the expenses are unreasonable, or that the expenses were incurred outside of the context of the failure to obey the court order [*see Toth v. Trans World Airlines, Inc. (9th Cir 1988) 862 F2d 1381, 1385-1386*].

Example:

Attorney time before and during a hearing in which a court order is imposed is not attorney time incurred on account of the failure to obey that order [*Toth v. Trans World Airlines, Inc. (9th Cir 1988) 862 F2d 1381, 1386*].

Strategic Point--Object to Amount of Requested Sanctions Before Sanctions Award Made:

A party subject to the imposition of monetary sanctions should refute a disputed itemization of expenses and fees prior to the court's award for those sanctions [*see, e.g., Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 784*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDismissalsInvoluntary DismissalsFailures to ComplyCivil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsContemptCivil Contempt

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CHAPTER 25 Motions to Compel and Discovery Sanctions
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A. Bringing Motion for Rule 37(c)(1) Sanctions

3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.50

25.50 CHECKLIST: Requesting Imposition of Rule 37(c)(1) Sanctions.

- ☐ Determine if party who failed to disclose information proffered that evidence.
- ☐ Raise the issue with the court.
- ☐ If necessary, prepare the motion, and serve the papers.
- ☐ Prepare documentation for the amount of sanctions requested, including:
  - ○ Costs incurred by the party's failure to properly disclose evidence.
  - ○ Attorney's fees.

Authority:
Fed R Civ P 37(c)

Discussion:
See *§§ 25.51, 25.52*

Form:
See *§ 25.118*

Standard Procedure Checklists:

Ch. 22, Regulation of Discovery by Stipulation or Motion, 22.14; *Ch. 26, Pretrial Motion Practice, 26.12*

Legal Topics:

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

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Unit 7 Discovery
CHAPTER 25 Motions to Compel and Discovery Sanctions
IV. SEEKING SANCTIONS FOR FAILURE TO MAKE MANDATORY DISCLOSURE OR FAILURE TO SUPPLEMENT DISCOVERY RESPONSES
A. Bringing Motion for Rule 37(c)(1) Sanctions

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25.51 Party Who Fails to Make Mandatory Disclosures or Amended Responses Is Subject to Evidence-Preclusion Sanctions.

25.51[1] Unjustified Failure to Disclose or Amend Information As Required Under Rule 26 Results in Evidence-Preclusion Sanctions. A party that without substantial justification fails to disclose information required by *Fed R Civ P 26(a)*, or to supplement or amend a prior discovery response as required by *Fed R Civ P 26(e)*, is not, unless the failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed [*Fed R Civ P 37(c)(1)*; *see Zhang v. American Gem Seafoods, Inc. (9th Cir 2003) 339 F3d 1020, 1028* ; *Yeti by Molly Ltd. v. Deckers Outdoor Corp. (9th Cir 2001) 259 F3d 1101, 1106-1107*]. This applies to expert evidence as well [*see Olson v. Montana Rail Link, Inc. (D Mont 2005) 227 FRD 550, 552-553* ;].

A party who has made a disclosure under *Fed R Civ P 26(a)* is under a duty to supplement at appropriate intervals that disclosure to include information later acquired under the following circumstances [*see Fed R Civ P 26(e)(1)*]:

- If ordered by the court.

- If that party learns that in some material respect the information so disclosed is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties.

Cross References:

Duty of disclosure under *Fed R Civ P 26(a)*, see *25.06* and Ch. 15, Rule 26(f) Conference and Initial Disclosures, §§ 15.11, 15.15- 15 .25, 15.27-15.33. Duty of supplemental disclosure under *Fed R Civ P 26(e)*, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, 15.26, 15.34.

Grounds for sanctions under Rule 37(c)(1), see 7 *Moore's Federal Practice, § 37.60* (Matthew Bender 3d ed.).

25.51[2] Evidence-Preclusion Sanction Is Self-Executing. The drafters described the evidence-preclusion sanction for a party's failure to make mandatory, voluntary disclosures as "self-executing" and "automatic," indicating an intent that evidence-preclusion sanctions are to be imposed without need for a motion [*see Fed R Civ P 37(c)*, Committee Note of 1993; *see also Olson v. Montana Rail Link, Inc. (D Mont 2005) 227 FRD 550, 553*].

Cross Reference:

7 *Moore's Federal Practice, § 37.60[2]* (Matthew Bender 3d ed.).

25.51[3] Making Proper Showing to Obtain Preclusion Order. Before evidence will be precluded, the following must occur [*see Fed R Civ P 37(c)(1)*]:

- The party seeking to invoke the sanction must first prove that the opposing party violated *Fed R Civ P 26(a)* or *26(e)* by failing to disclose the evidence in question.

- The party to be sanctioned must have an opportunity to demonstrate that its failure to disclose was substantially justified or harmless [*see, e.g., Fonseca v. Sysco Food Servs., Inc. (9th Cir 2004) 374 F3d 840, 846* (pro se plaintiff not given proper notice that declaration of witness disclosed after deadline would be excluded unless he filed motion to show good cause for late disclosure)].

Consider:

An evidence-preclusion sanction may be tantamount to dismissal with prejudice, or entry of a default judgment. Many courts are reluctant to exclude evidence that is important to the merits of the case without a showing of substantial and largely irremediable prejudice, and bad faith, willfulness, or some other substantial fault.

Strategic Point--Party Seeking Sanctions:

Be prepared to object if the opposing party attempts to proffer the nondisclosed witness or information at a hearing or on a motion. Be prepared to prove that this proffer is in violation of *Fed R Civ P 37(c)(1)*, and request additional time if necessary. If objection is not made at the hearing, be prepared to follow a formal motion procedure.

Cross References:

General motion procedures, see Ch. 26, Pretrial Motion Practice. Discovery motions, see *Ch. 22, Regulation of Discovery by Stipulation or Motion, §§ 22.14 -22.34*.

Sanctions under Rule 37(c)(1), see 7 *Moore's Federal Practice, § 37.60* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.52 Additional Sanctions Available.

25.52[1] Issue and Evidence Preclusion, Termination, and Monetary Sanctions. In addition to or in lieu of the evidence-preclusion sanction [*see 25.51*], the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the issue-preclusion, evidence-preclusion, and termination sanctions authorized under *Fed R Civ P 37(b)(3)(A)(i)-(vi)* [*Fed R Civ P 37(c)(1)(C)*].

Cross References:

Sanctions under *Fed R Civ P 37(b)(3)(A)(i)-(vi)* see *§§ 25.33 -25.35*. Local rules requiring good-faith attempt at informal resolution, see *25.05*. Motion procedures for sanctions under Rule 37, see *§§ 25.40[4] -[8]*. General motion procedures, see Ch. 26, Pretrial Motion Practice. Form of motion, see *§ 25.118*.

Forms of motion for sanctions under Rule 37(c)(1), see 8 *Bender's Federal Practice Forms, Forms 37:70*, *37:75* (Matthew Bender).

Other sanctions available for failure to comply with mandatory disclosure or supplemental-response requirements, see 7 *Moore's Federal Practice, § 37.61* (Matthew Bender 3d ed.).

25.52[2] Court May Inform Jury of Failure to Make Disclosure. Sanctions for failure to make disclosures may include informing the jury of the failure to make the disclosure [*Fed R Civ P 37(c)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.53 Discovery Rulings Are Reviewed Under Abuse of Discretion Standard.

The Ninth Circuit reviews discovery rulings for abuse of discretion [*Mabe v. San Bernardino County (9th Cir 2001) 237 F3d 1101, 1112*]. The imposition of discovery sanctions pursuant to *Fed R Civ P 37* is reviewed for abuse of discretion [*Payne v. Exxon Corp. (9th Cir 1997) 121 F3d 503, 507* ; *Adriana Int'l Corp. v. Thoeren (9th Cir 1990) 913 F2d 1406, 1408 , cert. denied sub nom. Lewis & Co. v. Thoeren, 498 US 1109 (1991)*].

The Ninth Circuit gives particularly wide latitude to the district court's discretion to issue sanctions under *Fed R Civ P 37(c)(1)* [*see Yeti by Molly Ltd. v. Deckers Outdoor Corp. (9th Cir 2001) 259 F3d 1101, 1106*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.54 CHECKLIST: Opposing Imposition of Rule 37(c)(1) Sanctions.

☐ Determine if grounds to oppose preclusion exist, such as:

- ○ Failure was substantially justified.
- ○ Failure was harmless.
- ○ Factors weigh against sanctions.
- ○ Sanctions are too severe.

☐ If appropriate, prepare and serve response papers.

Authority:
Fed R Civ P 37(c)(1)

Discussion:
See *§§ 25.55 -25.57*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, 22.14; *Ch. 26, Pretrial Motion Practice, 26.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.55 Party May Oppose Sanctions on Ground That Failure to Disclose or Supplement Was Substantially Justified.

25.55[1] Failure to Disclose or Supplement Was Substantially Justified. If a party shows that its failure to disclose or amend information required by *Fed R Civ P 26(a)* or *26(e)* was substantially justified, then sanctions may not be imposed [*Fed R Civ P 37(c)(1)*; *see, e.g., Wechsler v. Macke Int'l Trade, Inc. (CD Cal 2004) 221 FRD 619, 621*].

Example:

A party's position in failing to disclose or supplement may be substantially justified if it appears that it is based on a genuine discovery dispute [*see Fed R Civ P 37(a)(4)*, Committee Note of 1970].

Cross Reference:

7 *Moore's Federal Practice, § 37.62* (Matthew Bender 3d ed.).

25.55[2] Reasonable Predisclosure Investigation Justified Failure to Disclose or Supplement. A party's predisclosure investigation may be considered by the court in determining whether that party's failure to comply with *Fed R Civ P 26(a)* or *26(e)* was substantially justified [*see Fed R Civ P 26(a)(1)*; *see also Fed R Civ P 26(a)*, Committee Note of 1993].

25.55[3] Unforeseen Relevance of Discovery Material. A party may be substantially justified in not disclosing evidence if that party could not have been expected to foresee its relevance.

Example:

A party may not be barred from calling an undisclosed witness or from using an undisclosed document if the need for the witness's testimony or for the evidence is based on developments during trial that could not reasonably have been anticipated [*see Fed R Civ P 26(a)*, Committee Note of 1993].

25.55[4] Pro Se Party May Show Ignorance of Discovery Requirement. When the party failing to comply with disclosure or amendment requirements is proceeding pro se, that party's lack of knowledge of the requirements may indicate that the failure was substantially justified [*see Fed R Civ P 37(c)*, Committee Note of 1993].

Cross Reference:

7 *Moore's Federal Practice, § 37.62* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.56 Party May Oppose Sanctions on Ground That Failure to Disclose or Supplement Was Harmless.

A party may oppose sanctions on the ground that the failure to disclose as required by *Fed R Civ P 26(a)* or *26(e)* was harmless [*see Fed R Civ P 37(c)(1)*].

Examples:

The inadvertent omission from a *Fed R Civ P 26(a)* disclosure of the name of a potential witness known to all parties, and the failure to list as a trial witness in a disclosure mandated by *Fed R Civ P 26(a)(3)* a person so listed by another party, may be harmless [*see Fed R Civ P 37(c)*, Committee Note of 1993].

Cross Reference:

7 *Moore's Federal Practice, § 37.63* (Matthew Bender 3d ed.).

Legal Topics:

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25.57 Party May Oppose Sanctions on Ground That Factors Weigh Against Sanctions.

A party may oppose the imposition of sanctions under *Fed R Civ P 37(c)(1)* on the ground that the factors considered by the court weigh in its favor [*see, e.g., F.D.S. Marine, LLC v. Brix Maritime Co. (D Or 2001) 211 FRD 396, 400* ("all of the above factors favor leniency")].

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.58 Party May Oppose Severity of Sanctions.

A party subject to sanctions under *Fed R Civ P 37(c)(1)* may assert that the sanction sought is too severe under the circumstances.

Example:

In a class action discrimination suit filed against a county, the defendants failed to produce many requested documents until shortly before and after the trial ended. Although the plaintiff sought an extreme sanction of default judgment, the district court noted that the defendants' conduct was not willful, but rather grossly negligent. As a more appropriate sanction, the court ordered that the trial be reopened, with all costs for the extended trial imposed on defendants [*see L. Tarango Trucking v. County of Contra Costa (ND Cal 2001) 202 FRD 614*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.59 CHECKLIST: Requesting Imposition of Rule 37(c)(2) Sanctions.

☐ Determine if party failed to admit the genuineness of any matter that was later proved.

☐ Review local rule requirements.

Discussion:
See *§§ 25.05*, *25.40*

☐ If appropriate, prepare motion and serve papers.

○ Prepare documentation for the amount of sanctions requested, including:

☐ Costs incurred in making proof.

☐ Attorney's fees.

Authority:
Fed R Civ P 37(c)(2)

Discussion:
See *§§ 25.60 -25.63*

Form:

See *§ 25.119*

Standard Procedure Checklists:

Ch. 22, Regulation of Discovery by Stipulation or Motion, 22.14; Ch. 26, Pretrial Motion Practice, *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.60 Party Failing to Admit Genuineness of Document or Truth of Matter Later Proved Is Subject to Monetary Sanctions.

If a party fails to admit the genuineness of any document or the truth of any matter as requested under *Fed R Civ P 36*, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, then the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees [*Fed R Civ P 37(c)(2)*].

The court must make the order unless it finds that [*Fed R Civ P 37(c)(2)*; *see* [*Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 936* (Rule 37(c)(2) mandates an award of expenses unless exception applies)]:

- The request was held objectionable pursuant to *Fed R Civ P 36(a)* [*Fed R Civ P 37(c)(2)(A)*];
- The admission sought was of no substantial importance [*Fed R Civ P 37(c)(2)(B)*];
- The party failing to admit had reasonable ground to believe that the party might prevail on the matter [*Fed R Civ P 37(c)(2)(C)*]; or
- There was other good reason for the failure to admit [*Fed R Civ P 37(c)(2)(D)*].

The test is not whether a party prevailed at trial, but whether the party acted reasonably in believing that he or she might prevail [*Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 937* , citing *Fed R Civ P 37(c)*, Committee Note of 1970].

Consider--Expert's Opinion of Trial Outcome Not Reliable:

The Ninth Circuit does *not* adopt a per se rule that reliance on an expert opinion provides a reasonable ground for a party to believe he or she would prevail at trial [*Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 937*].

Example:

Reasonable expenses of a plaintiff include those incurred in the pursuit of alternate theories of liability against other defendants occasioned by the sanctioned defendant's failure to admit a request relating to causation [*see Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 939* (sanctions of $205,800 upheld)].

Cross Reference:

7 *Moore's Federal Practice, §§ 37.70 -37.74* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.61 Party May Object, Admit or Deny the Matter, or State That Matter Cannot Be Admitted or Denied.

A party who does nothing in response to a properly framed request for admission is deemed to have admitted the matter. A party who elects to respond to the request for admission may do any of the following [*Fed R Civ P 36(a)*]:

- Object to the request and set forth the basis for the objection.
- Admit the matter.
- Deny the matter.
- State that the matter cannot be admitted or denied, setting forth the reasons in detail.

Cross Reference:

Requests for admission, see *Ch. 23, Methods of Discovery, §§ 23.217 -23.258*.

Distinguish:

Fed R Civ P 36 provides no remedy if a party responding to a request for admission provides a straightforward yet unjustified denial, or a statement that is proper in form but ultimately insufficient in asserting that the party cannot either admit or deny the matter. In these situations, *Fed R Civ P 37(c)* provides post-trial relief requiring the responding party to pay the requesting party's expenses incurred in making the necessary proof at trial [*see Fed R Civ P 37(c)*, Committee Note of 1970].

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.62 Expense-Shifting Sanctions Under Rule 37(c)(2) May Be Imposed Against Party Only.

25.62[1] Sanctions Available Against Party, Not Counsel. Expense-shifting sanctions for unreasonably denying or unreasonably refusing to admit or deny a legitimate request for admission may be imposed only on parties, and not on counsel [*Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co. (8th Cir 1994) 19 F3d 431, 438 n8*].

25.62[2] Sanctions Against Attorney May Be Available From Other Sources of Authority. A court concluding that an attorney played a culpable role in a party's improper response to a request for admission must look to other sources of authority to impose sanctions against the attorney, which may include the following:

- Other provisions of *Fed R Civ P 37*.
- *Fed R Civ P 26(g)*, which authorizes sanctions for discovery certifications made in violation of *Fed R Civ P 26(g)*.
- *Fed R Civ P 11(c)*, which permits sanctions for violations of the obligation to conduct a reasonable inquiry into the law and facts.
- *28 USC § 1927*, which authorizes sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously."
- A district court's inherent authority [*see, e.g., Natural Gas Pipeline Co. v. Energy Gathering, Inc. (5th Cir 1993) 2 F3d 1397, 1410-1411 , cert. denied, 510 US 1073 (1994)*].

Cross References:

Fed R Civ P 26(g) sanctions, see *25.107 -25.112*. *Fed R Civ P 11(c)*, see Ch. 33, Rule 11 Sanctions. *28 USC § 1927*, see *Ch. 34, Other Sanction Provisions, §§ 34.03 -34.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.63 Motion for Expense-Shifting Sanctions Based on Party's Unreasonable Failure to Admit.

25.63[1] LOCAL PRACTICE: All Districts--Counsel Must Make Good-Faith Effort to Resolve Dispute Informally. The four district courts in California required counsel to make a good-faith attempt to reach an informal resolution of a discovery dispute prior to filing a discovery motion.

Cross Reference:

See *§ 25.05*.

25.63[2] Motion Is Filed After Trial Is Completed. The Federal Rules of Civil Procedure do not specify any time frame within which a motion seeking expense-shifting sanctions for a party's unreasonable failure to admit must be filed. However, *Fed R Civ P 37(c)(2)* is intended to provide post-trial relief. Filing of the motion prior to the completion of trial would therefore be inappropriate.

As a practical matter, it is necessary to complete a proceeding before a court could conclude that the moving party had proved the truth of the matter for which an admission was requested, because a court must consider all rebuttal evidence before it may determine what has been proved.

Cross Reference:

7 *Moore's Federal Practice, § 37.75* (Matthew Bender 3d ed.).

25.63[3] Counsel Must Comply With Local Procedural Rules for Motions. Local district court rules typically contain special requirements governing the preparation of papers supporting and opposing discovery motions, and the service of papers.

Cross References:

Motion procedures for sanctions under Rule 37, see *25.40[4] -[8]*. General discovery motion procedures,

see *Ch. 22, Regulation of Discovery by Stipulation or Motion, §§ 22.14 -22.34*. General motion procedures, see Ch. 26, Pretrial Motion Practice.

Motion for sanctions under Rule 37(c)(2), see 7 *Moore's Federal Practice, §§ 37.70, 37.75* (Matthew Bender 3d ed.).

Legal Topics:

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25.64 Appellate Courts Apply "Abuse of Discretion" Standard Regarding Sanction Orders Under Rule 37(c)(2).

Appellate courts apply an "abuse of discretion" standard when reviewing rulings by district courts on motions for sanctions under *Fed R Civ P 37(c)(2)* [*Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 936*]. The imposition of discovery sanctions under *Fed R Civ P 37* is reviewed for abuse of discretion [*Payne v. Exxon Corp. (9th Cir 1997) 121 F3d 503, 507*].

Cross Reference:

7 *Moore's Federal Practice, § 37.76* (Matthew Bender 3d ed.).

Legal Topics:

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25.65 CHECKLIST: Opposing Imposition of Rule 37(c)(2) Sanctions.

☐ Determine if grounds to oppose the motion for sanctions exist, including:

- ○ The unadmitted matter was not proved.
- ○ The motion is premature.
- ○ The request was objectionable pursuant to *Fed R Civ P 36(a)*.
- ○ Admission was of no substantial importance.
- ○ There was reasonable ground to believe the party would prevail on the matter.
- ○ There was other good reason for failure to admit.
- ○ The sanction requested is excessive.
- ○ The papers and procedures followed did not comply with local rules.

Authority:

Fed R Civ P 36(a), 37(c)(2)

Discussion:
See *§§ 25.66 -25.70*

☐ Prepare and serve response papers.

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, 22.14; Ch. 26, Pretrial Motion Practice, *26.37*

Legal Topics:

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25.66 Opposing Sanctions on Ground That Request Was Objectionable Under Rule 36(a).

A party seeking to avoid sanctions may overcome the presumption in favor of the imposition of sanctions by asserting that the request for admission is objectionable under *Fed R Civ P 36(a)* [*see Fed R Civ P 37(c)(2)(A)*].

Example:

Requests for admission that are irrelevant do not merit an award of expenses. In one case, the following types of requests for admission could not be the basis for a sanctions award under *Fed R Civ P 37(c)(2)(A)*: (1) requests involving an issue that was found irrelevant in a summary judgment motion; (2) requests involving a theory of liability that had been rejected by the court; and (3) requests "not substantially important to the litigation" [*Read-Rite Corp. v. Burlington Air Express, Inc. (ND Cal 1998) 183 FRD 545, 547*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMisconduct

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25.67 Opposing Sanctions on Ground That Admission Sought Was Not Substantially Important.

A party seeking to avoid sanctions under *Fed R Civ P 37(c)(2)* may overcome the presumption in favor of the imposition of sanctions by asserting that the admission sought was of no substantial importance [*see Fed R Civ P 37(c)(2)(B)*; *see, e.g., Avery Dennison Corp. v. Allendale Mut. Ins. Co. (9th Cir 2002) 310 F3d 1114, 1118*].

Courts decide whether a particular admission sought was of substantial importance on a case-by-case basis, taking into account all surrounding circumstances. Courts consider whether the propounding party was required to prove the fact that was the subject of the requested admission to prevail on a claim or defense. If the fact was not essential, directly or indirectly, to the party's success, it may not be of substantial importance [*see Washington State Dep't of Transp. v. Washington Natural Gas Co. (9th Cir 1995) 59 F3d 793, 806*].

Strategic Point--Party Served With Requests for Admission:

A party responding to requests for admission should admit to the fullest extent possible, and explain in detail why other portions of a request may not be admitted. Frank answers to the extent possible will obviate the need for sanctions under Rule 37(c)(2) [*see Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 936*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMisconduct

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25.68 Opposing Sanctions on Ground of Reasonable Belief That Party Might Prevail.

25.68[1] Party May Assert Reasonable Belief That It Might Prevail, Whether or Not It Prevailed at Trial. A party seeking to avoid sanctions under *Fed R Civ P 37(c)(2)* may overcome the presumption in favor of the imposition of sanctions by asserting that it had reasonable ground to believe that it might prevail on the matter [*see Fed R Civ P 37(c)(2)(C)*].

The test for determining whether this exception to the presumption applies is not whether a party prevailed at trial, but whether that party acted reasonably in believing that it might prevail [*Washington State Dep't of Transp. v. Washington Natural Gas Co. (9th Cir 1995) 59 F3d 793, 805* ; *see Fed R Civ P 37(c)*, Committee Note of 1970].

25.68[2] Reasonableness Is Determined by Objective Test. The test of reasonableness is objective. Courts will reject a party's attempt to invoke the exception that it believed it might prevail if the party presents insufficient evidentiary support to permit a rational jury to render a favorable verdict in that party's favor.

Examples:

This exception has been invoked successfully in the following circumstances:

- Cases involving substantially conflicting evidence [*see, e.g., Board of Dirs. v. Anden Group (ED Va 1991) 136 FRD 100, 107*].

- Good-faith arguments about how to resolve important and unsettled questions of law, or of the application of law to fact [*see, e.g., Comeaux v. Brown & Williamson Tobacco Co. (9th Cir 1990) 915 F2d 1264, 1275*].

- Complicated technical issues, particularly when there is no agreement among the experts [*see, e.g., Washington State Dep't of Transp. v. Washington Natural Gas Co. (9th Cir 1995) 59 F3d 793, 806*].

Strategic Point--Party Opposing Sanctions:

The Ninth Circuit does not adopt a per se rule that reliance on an expert opinion provides a reasonable ground for a party to believe he or she would prevail at trial [*Marchand v. Mercy Med. Ctr. (9th Cir 1994) 22 F3d 933, 937*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMisconduct

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25.69 Opposing Sanctions on Ground of Other Good Reason for Failure to Admit.

A party seeking to avoid sanctions under *Fed R Civ P 37(c)(2)* may overcome the presumption in favor of the imposition of sanctions by asserting that it had other good reason for failing to admit [*see Fed R Civ P 37(c)(2)(D)*].

Example:

Although this exception to the presumption is rarely invoked, it may be applicable when the request for admission addresses complicated technical or statistical matters that would be the subject of expert analysis, about which the responding party could not have developed a reliable position concerning the truth of the matters asserted based on readily available information, but would have had to use extraordinary efforts to gather and analyze that information [*see Fed R Civ P 37(c)*, Committee Note of 1970].

Cross Reference:

7 *Moore's Federal Practice, § 37.74* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMisconduct

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25.70 Party May Assert Lack of Proof, Unreasonableness of Amount of Sanctions Requested, or Lack of Connection Between Expenses and Objectionable Response.

Even if sanctions might be appropriate under *Fed R Civ P 37(c)(2)*, an award of expenses is limited by reasonableness. The moving party must therefore make a sufficient showing of the basis for the amount of sanctions requested, the reasonableness of the expenditures, and the justification for the expense with respect to the specific response in question.

Examples:

Only one of the defendant's responses was evasive. Plaintiff's counsel, however, attempted to recover the price of his 12-day trip to England during which he took 11 depositions. The court found the expense not reasonably related to the response in question. Rather, the evidence showed that the plaintiff had been planning to travel to England to take depositions prior to serving the defendant with the first set of requests for admission [*see Read-Rite Corp. v. Burlington Air Express, Inc. (ND Cal 1998) 183 FRD 545, 547-548*].

The defendant's recoverable expenses were limited to the expenses incurred as a result of plaintiff's and plaintiff counsel's disobedience of the court orders in question, to the exclusion of extraneous items that the defendant itemized, e.g., expenses incurred for the preparation and filing of a discovery plan, and numerous other expenditures incurred prior to the attainment of the court order [*see Toth v. Trans World Airlines, Inc. (9th Cir 1988) 862 F2d 1381, 1386* (affirming imposition of sanctions, but remanding for determination of allowable expenses)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMisconduct

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25.71 CHECKLIST: Requesting Imposition of Rule 37(d) Sanctions.

☐ Determine if grounds for motion for sanctions exist, e.g.:

- ○ Person failed to appear at deposition.
- ○ Person failed to respond to discovery request.

☐ Review local rule requirements for sanction motions.

Discussion:
See *§§ 25.05*, *25.40*

☐ If appropriate, prepare motion and serve papers, including following allegations:

- ○ The court has jurisdiction.
- ○ The moving party made a good-faith effort at a resolution of the issues.
- ○ The motion is timely.

- ○ An adequate description of the failure to comply and the sanction sought was given.
- ○ The papers and procedures followed comply with local rules.

☐ If monetary sanctions are requested, prepare documentation for the amount of sanctions requested, including:

- ○ Costs incurred by party's failure to comply with discovery requirements.
- ○ Attorney's fees.

Authority:
Fed R Civ P 37(d)

Discussion:
See *§§ 25.72 -25.75*

Form:
See *§ 25.120*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, 22.14; Ch. 26, Pretrial Motion Practice, *26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMisconduct

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25.72 Sanctions for Party's Failure to Attend Own Deposition, Serve Answers to Interrogatories, or Respond to Request for Inspection.

If a party or an officer, director, or managing agent of a party or a person designated under *Fed R Civ P 30(b)(6)*, *31(a)(4)* to testify on behalf of a party fails to fulfill any of the following discovery obligations, the court in which the action is pending on motion may make such orders in regard to the failure as are just [*Fed R Civ P 37(d)(1)(A)*]:

- To appear before the officer who is to take a deposition, after being served with a proper notice.
- To serve answers or objections to interrogatories submitted under *Fed R Civ P 33*, after proper service of the interrogatories.
- To serve a written response to a request for inspection submitted under *Fed R Civ P 34*, after proper service of the request.

Cross References:

Depositions, interrogatories, and requests for inspection, see Ch. 23, Methods of Discovery.

Grounds for motion under Rule 37(d), see 7 *Moore's Federal Practice, §§ 37.90 -37.93* (Matthew Bender 3d ed.).

Among others, the court may take any action authorized under *Fed R Civ P 37(b)(2)(A)(i)-(vi)* which include issue-preclusion, evidence-preclusion, and termination sanctions [*see Fed R Civ P 37(d)*].

Cross References:

Sanctions under *Fed R Civ P 37(b)(3)(A)(i)-(vi)* see *§§ 25.33 -25.35*; 7 Moore's Federal Practice, § 37.96 (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMisconduct

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25.73 Motion for Sanctions Under Rule 37(d).

25.73[1] Motion Based on Failure to Respond to Interrogatories or Request for Inspection Must Include Certification of Good-Faith Attempt to Obtain Response. Any motion specifying a failure to respond to interrogatories or a request for inspection must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain an answer or response without court action [*Fed R Civ P 37(d)(1)(B)*].

25.73[2] Court in Which Action Is Pending Has Jurisdiction Over Motion. A motion for sanctions under *Fed R Civ P 37(d)* must be brought in the court where the action is pending [*Fed R Civ P 37(d)(1)(A)*].

25.73[3] Motion Should Be Filed Promptly After Discovery Failure, and When Circumstances Dictate. A motion under *Fed R Civ P 37(d)* should be filed promptly after the discovery failure, and when circumstances dictate. The rule does not establish a specific time limit within which a motion for sanctions must be filed [*see Fed R Civ P 37(d)*]. The nature of the sanctions sought may affect the timing of the motion.

Examples:

If the sanctions sought would affect litigation of the merits of the action, the motion must be filed before those merits are reached. If the moving party seeks an order deeming a fact established, prohibiting another party from supporting or denying a claim or defense, or striking pleadings, the motion must be filed before the hearing or trial of those matters.

Strategic Point--Moving Party:

A party should seek relief promptly after the discovery failure and the parties' unsuccessful efforts to resolve the matter. At that time, the parties' memories will be freshest, documentary evidence is least likely to have been lost or destroyed, and intervention by the court may limit any negative ripple effects

of the discovery failure.

Cross Reference:

7 *Moore's Federal Practice, § 37.99* (Matthew Bender 3d ed.).

25.73[4] Counsel Must Comply With Local Procedural Rules for Motions. Local district court rules typically contain special requirements governing the preparation of papers supporting and opposing discovery motions, and the service of papers.

Cross References:

Motion procedures for sanctions under Rule 37, see *§§ 25.40[4] -[8]*. General discovery motion procedures, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§§ 22.14 -22.34*. General motion procedures, see Ch. 26, Pretrial Motion Practice. Form of motion, see *25.120*.

Forms of motion for sanctions under Rule 37(d), see 8 *Bender's Federal Practice Forms, Forms 37:80*-37:83 (Matthew Bender).

Motion for sanctions under Rule 37(d), see 7 *Moore's Federal Practice, §§ 37.95 -37.99* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMisconduct

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25.74 Court Must Order Expense-Shifting Sanctions Against Party or Attorney or Both for Failure to Act, Absent Substantial Justification or Other Circumstances.

In lieu of or in addition to any order, the court must require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust [*Fed R Civ P 37(d)(3)*].

Expense-shifting sanctions may be imposed against an attorney even if the attorney did not act in bad faith [*Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1171* (involving *Fed R Civ P 37(b)(2)* sanctions, and acknowledging same language as Rule 37(d))].

Distinguish:

Courts may look to other sources of authority to impose more severe sanctions against an attorney, including the following:

- *Fed R Civ P 26(g)*, which authorizes sanctions for improper discovery certifications.
- *28 USC § 1927*, which authorizes sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously."
- A district court's inherent authority [*see, e.g., Natural Gas Pipeline Co. v. Energy Gathering, Inc. (5th Cir 1993) 2 F3d 1397, 1410-1411 , cert. denied, 510 US 1073 (1994)*].

Cross Reference:

7 *Moore's Federal Practice, § 37.92* (Matthew Bender 3d ed.).

Legal Topics:

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

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25.75 Appellate Courts Apply "Abuse of Discretion" Standard Regarding Sanction Orders Under Rule 37(d).

Appellate courts apply a deferential "abuse of discretion" standard in reviewing *Fed R Civ P 37(d)* sanction awards [*Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group (9th Cir 1995) 55 F3d 463, 466*]. The imposition of discovery sanctions under *Fed R Civ P 37* is reviewed for abuse of discretion [*Payne v. Exxon Corp. (9th Cir 1997) 121 F3d 503, 507*].

Cross Reference:

Sanctions under Rule 37(d), see 7 *Moore's Federal Practice, § 37.96* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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25.76 CHECKLIST: Opposing Imposition of Rule 37(d) Sanctions.

☐ If monetary sanctions are sought, consider the following arguments:

- ○ The failure to comply with the request was substantially justified.
- ○ Other circumstances make the imposition of sanctions unjust.
- ○ The moving party did not make a good-faith attempt at a resolution of issues.
- ○ The amount requested is excessive.

☐ Prepare and serve response papers.

Authority:
Fed R Civ P 37(d)

Discussion:
See *§§ 25.79*, *25.80*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*; Ch. 26, Pretrial Motion Practice, see *§ 26.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMisconduct

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25.77 Defense Based on Objection to Discovery Must Be Supported by Protective Order Procedure.

The failure to act as described in *Fed R Civ P 37* may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by *Fed R Civ P 26(c)* [*Fed R Civ P 37(d)(2)*].

Warning:

Disagreement with the court is not an excuse for failing to comply with court orders [*see, e.g., Adriana Int'l Corp. v. Thoeren (9th Cir 1990) 913 F2d 1406, 1411 , cert. denied sub nom. Lewis & Co. v. Thoeren, 498 US 1109 (1991)*].

Cross References:

Protective orders, see *Ch. 22, Regulation of Discovery by Stipulation or Motion, §§ 22.35 -22.66*.

Pending protective order with respect to Rule 37(d), see 7 *Moore's Federal Practice, § 37.94* (Matthew Bender 3d ed.).

Strategic Point--Party Opposing Sanctions:

No motion for a protective order is necessary if the party from whom discovery is sought files a timely objection to the discovery. A party that neither objects nor seeks a protective order is vulnerable to sanctions [*see, e.g., Adriana Int'l Corp. v. Thoeren (9th Cir 1990) 913 F2d 1406, 1411 , cert. denied sub nom. Lewis & Co. v. Thoeren, 498 US 1109 (1991)* (plaintiff sanctioned with dismissal based on failure to respond to discovery requests did not object to request for production of documents until after discovery was overdue)]. The only safe course available to a party who intends to do nothing in response to a patently objectionable discovery demand is to file a motion for a protective order before the date on which a response to the discovery is due.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryProtective Orders

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25.78 Opposing Sanctions on Ground That Failure to Appear or Respond Was Substantially Justified.

25.78[1] Party May Avoid Expense-Shifting Sanctions by Showing Substantial Justification. A litigant may avoid the expense-shifting sanctions of *Fed R Civ P 37(d)* if the court finds that the failure was substantially justified [*see Fed R Civ P 37(d)(3)*].

25.78[2] Burden of Establishing Substantial Justification Is on Party Opposing Sanctions. The burden of establishing substantial justification is on the party who failed to respond to discovery pursuant to *Fed R Civ P 37(d)* [*Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group (9th Cir 1995) 55 F3d 463, 466* ; *see Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1171* (involving *Fed R Civ P 37(b)(2)* sanctions and acknowledging same language as Rule 37(d))].

25.78[3] Substantial Justification Is Determined on Case-by-Case Basis. The determination of whether there is substantial justification is case-specific. A party may likely meet its burden by showing that its failure to appear or respond was attributable entirely to factors beyond that party's control, at least when the party tried in good faith to warn its opponent that it would not be able to comply within the prescribed time frame [*see, e.g., Speidel v. Bryan (D Or 1996) 164 FRD 241, 244*].

Consider:

The focus of the substantial justification inquiry is on the original failure to respond to the discovery request, rather than on subsequent efforts by the party or the party's attorney to defend against the motion for sanctions [*see Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1171*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconduct

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25.79 Opposing Expense-Shifting Sanctions on Ground That Other Circumstances Make Imposition of Sanctions Unjust.

25.79[1] Court May Elect Not to Impose Sanctions Based on Other Circumstances. The district court may elect not to impose expense-shifting sanctions if "other circumstances make an award of expenses unjust" [*see Fed R Civ P 37(d)(3)*].

Consider:

If an attorney is subject to sanctions, *Fed R Civ P 37(d)* requires the court to consider the *attorney's* behavior, rather than that of the *client* [*see Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1172*].

25.79[2] Burden of Proof Is on Person Subject to Sanctions. The burden of demonstrating other circumstances is on the party who failed to respond to the discovery request [*see Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1171*].

Cross Reference:

7 *Moore's Federal Practice, § 37.94* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.80 Opposing Sanctions on Ground That Rule 37(d) Does Not Encompass Particular Conduct.

A party subject to sanctions under *Fed R Civ P 37(d)* may oppose the imposition of sanctions if the rule is inapplicable by its terms. The application of Rule 37(d) is limited to its literal scope [*see, e.g., Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp. (9th Cir 1992) 982 F2d 363, 368*]. The Ninth Circuit has strictly construed the language of *Fed R Civ P 37(d)* [*Estrada v. Rowland (9th Cir 1995) 69 F3d 405, 406*].

Examples:

A party who appears at his or her deposition but refuses to answer questions does not violate *Fed R Civ P 37(d)* [*Estrada v. Rowland (9th Cir 1995) 69 F3d 405, 406*]. The proper remedy for such conduct is a court order to testify under *Fed R Civ P 37(a)* [*Estrada v. Rowland (9th Cir 1995) 69 F3d 405, 406*].

Fed R Civ P 37(d) does not apply to a *nonparty* who fails to appear at his or her own deposition [*Pennwalt Corp. v. Durand-Wayland, Inc. (9th Cir 1983) 708 F2d 492, 494 n4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconduct

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A. Bringing Motion for Rule 37(f) Sanctions

3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.81

25.81 CHECKLIST: Requesting Imposition of Rule 37(f) Sanctions.

☐ Determine if grounds for sanctions exist, e.g., if a party fails to participate in the development and submission of a discovery plan.

Authority:
Fed R Civ P 37(f)

Discussion:
See *§§ 25.82 -25.86*

☐ Review local rules regarding meet-and-confer requirements and bringing sanction motions.

Discussion:
See *§§ 25.05*, *25.40*

☐ Raise the issue of noncompliance with the court.

☐ If necessary, prepare motion and serve papers.

○ Prepare documentation for the amount of sanctions requested, including:

☐ Costs incurred by party's failure to comply with discovery requirements.

☐ Attorney's fees.

Authority:
Fed R Civ P 37(f)

Discussion:
See *§ 25.86*

Form:
See *§ 25.121*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, § 22.14; Ch. 26, Pretrial Motion Practice, *§ 26.12*

Legal Topics:

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

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25.82 Party or Attorney's Failure to Participate in Discovery Plan May Result in Monetary Sanctions.

If a party or a party's attorney fails to participate in the development and submission of a proposed discovery plan as required by *Fed R Civ P 26(f)*, the court may, after opportunity for hearing, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure [*Fed R Civ P 37(f)*].

Distinguish:

Fed R Civ P 37(f) applies only to the failure to participate in good faith in the framing of a discovery plan. If the pretrial scheduling order was entered before a violation involving the discovery plan is committed, then *Fed R Civ P 37(b)(2)*, rather than *Fed R Civ P 37(f)*, applies. In that case, the disobedient party or attorney is exposed to the imposition of more severe sanctions pursuant to *Fed R Civ P 16(f)*, which governs failure to obey a pretrial or scheduling order, and *Fed R Civ P 37(b)(2)*, which governs failure to comply with a discovery order [*see United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co. (9th Cir 1988) 857 F2d 600, 602-603, n3*].

Cross References:

Sanctions under Rule 37(b)(2), see *§§ 25.33 -25.35*.

7 *Moore's Federal Practice, §§ 37.110* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMisconduct

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25.83 Parties and Attorneys Have Duty to Participate in Discovery Plan.

Except in actions exempted by local rule or court order, parties must develop a proposed discovery plan in every civil action. The proposed plan should reflect the parties' views and proposals concerning the following [*see Fed R Civ P 26(f)*]:

- What changes should be made in the timing, form, or requirement for disclosures under *Fed R Civ P 26(a)*, including a statement as to when disclosures pursuant to *Fed R Civ P 26(a)(1)* were made or will be made.

- The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues.

- Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.

- Any issues relating to claims of privilege or work product protection, including, if the parties agree on a procedure to assert such claims after production, whether to ask the court to include that agreement in an order.

- What changes should be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or by local rule, and what other limitations should be imposed.

- Any other orders that should be entered by the court under *Fed R Civ P 16(b)* and *(c)* or 26(c).

Cross References:

Rule 26(f) conferences, see Ch. 15, Rule 26(f) Conference and Initial Disclosures, §§ 15.03- 15 .14.

Duties concerning proposed discovery plan, see 7 *Moore's Federal Practice, § 37.111* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMisconduct

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25.84 Court or Party May Raise Issue of Sanctions Under Rule 37(f).

Counsel should be prepared to raise the opposing party's failure to participate in good faith under *Fed R Civ P 37(f)*. Although the court may award sanctions under this rule on its own, nothing precludes a party from raising the issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMisconduct

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25.85 Party Subject to Sanctions Must Be Afforded Opportunity to Be Heard.

A judge who is considering imposing an expense-shifting sanction for failing to participate in good faith under *Fed R Civ P 37(f)* must afford the person subject to sanctions an opportunity to be heard [*Fed R Civ P 37(f)*].

Legal Topics:

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

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25.86 Motion for Sanctions Under Rule 37(f).

25.86[1] LOCAL PRACTICE: All Districts--Counsel Must Make Good-Faith Effort to Resolve Dispute Informally. The four district courts in California require counsel to make a good-faith attempt to reach an informal resolution of a discovery dispute prior to filing a discovery motion.

Cross Reference:

See *§ 25.05*.

25.86[2] Counsel Must Comply With Local Procedural Rules for Motions. Local district court rules typically contain special requirements governing the preparation of papers supporting and opposing discovery motions, and the service of papers.

Cross References:

Motion procedures for sanctions under Rule 37, see *25.40[4] -[8]*. General discovery motion procedures, see *Ch. 22, Regulation of Discovery by Stipulation or Motion, §§ 22.14 -22.34*. General motion procedures, see Ch. 26, Pretrial Motion Practice.

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.87 Discovery Rulings Are Reviewed Under Abuse of Discretion Standard.

The Ninth Circuit reviews discovery rulings for abuse of discretion [*Mabe v. San Bernardino County (9th Cir 2001) 237 F3d 1101, 1112*]. The imposition of discovery sanctions pursuant to *Fed R Civ P 37* is reviewed for abuse of discretion [*Payne v. Exxon Corp. (9th Cir 1997) 121 F3d 503, 507* ; *Adriana Int'l Corp. v. Thoeren (9th Cir 1990) 913 F2d 1406, 1408* , *cert. denied sub nom. Lewis & Co. v. Thoeren, 498 US 1109 (1991)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMisconductCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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25.88 CHECKLIST: Opposing Imposition of Rule 37(f) Sanctions.

☐ Determine if grounds to oppose the motion for sanctions exist, such as:

- ○ There was no opportunity to be heard.
- ○ The sanction request is excessive.
- ○ The papers and procedures followed did not comply with local rules.

☐ Prepare and serve response papers.

Authority:
Fed R Civ P 37(f)

Discussion:
See *§§ 25.89*, *25.90*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, § 26.14; Ch. 26, Pretrial Motion Practice, *§ 26.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDiscoveryMisconduct

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25.89 Opposing Sanctions on Grounds of Procedural Defects.

A party subject to sanctions under *Fed R Civ P 37(f)* may raise procedural defects, such as the following:

- Lack of opportunity to be heard.
- Violation of local court rules.

Cross References:

Requirement of opportunity to be heard, see *§ 25.85*. Local court rules, see *§§ 25.05*, *25.40*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDiscoveryMisconduct

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25.90 Party May Assert That Amount of Sanctions Is Unreasonable or That Expenses Are Unrelated to Failure to Participate in Discovery Plan.

The sanctions allowable under *Fed R Civ P 37(f)* must be reasonable expenses caused by the party's failure to participate in a discovery plan. A party opposing sanctions may therefore assert that the amount of sanctions is unreasonable, or that the expenses sought are unrelated to the party's failure to act pursuant to this rule.

Legal Topics:

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

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3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.91

25.91 CHECKLIST: Requesting Imposition of Sanctions for Spoliation of Evidence.

☐ Determine if grounds for sanctions exist, e.g., if a party destroyed evidence.

☐ If appropriate, prepare motion and serve papers.

Authority:
Fed R Civ P 37(b), (d)

Discussion:
See *§§ 25.93 -25.97*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, § 22.14; Ch. 26, Pretrial Motion Practice, *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewEvidenceRelevanceSpoliation

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25.92 Options and Strategies for Requesting Imposition of Sanctions for Spoliation of Evidence.

A party concerned that certain evidence in the possession of an opposing party may be compromised or destroyed may move the court for a preservation order at the earliest opportunity during litigation [*see, e.g., Wm. T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1447*].

Strategic Point--Moving Party:

Among other advantages, this practice will establish the duty of the opposing party to preserve particular evidence, an issue that may otherwise be disputed in later sanction proceedings [*see, e.g., Wm. T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1447* (representations made by plaintiff's counsel of the existence of particular documents in defendant's possession were embodied in Preservation Order, requiring defendant to maintain them)].

Spoliation of evidence is the destruction or alteration of evidence. Although a party need not have acted in "bad faith" to be held responsible for spoliation of evidence [*see Glover v. BIC Corp. (9th Cir 1993) 6 F3d 1318, 1329*], a party must have had notice that documents were relevant or potentially relevant to litigation before the documents were destroyed for spoliation of evidence to have occurred [*United States ex rel. Aflatooni v. Kitsap Physicians Serv. (9th Cir 2002) 314 F3d 995, 1001* ; *Akiona v. United States (9th Cir 1991) 938 F2d 158, 161*].

Judge's Perspective:

Spoliation of evidence is a situation in which money sanctions may not be the appropriate remedy. If the evidence was critical or even material to proving your case, consider seeking an equitable remedy such as dismissal, judgment in your favor, or exclusion of the opponent's evidence. Be direct about the relevance of the missing evidence. Don't disparage the other side, and be ready to document your proof.

Cross Reference:

7 *Moore's Federal Practice, § 37.120* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewEvidenceRelevanceSpoliation

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25.93 Litigants Must Preserve Certain Evidence in Their Control.

While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request [*National Ass'n of Radiation Survivors v. Turnage (ND Cal 1987) 115 FRD 543, 556-557* , citing *Wm. T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443* ; *see also Zubulake v. UBS Warburg LLC (SDNY 2003) 220 FRD 212, 216*].

Example:

In a case involving a dispute between a vitamin store and a vitamin manufacturer, in which the manufacturer asserted that the store was using its products in bait-and-switch schemes and maintaining insufficient inventory of its products in the furtherance of various antitrust violations, the defendant was under a duty to preserve, at minimum, the following records: store order books, 10 to 16 weeks previous; biweekly order strips for each store, two to three months previous; store invoices, two to four weeks previous; and computer tapes containing full store-order information, four months previous [*see Wm. T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1448*].

Distinguish:

Good faith destruction of documents in the normal course of business is not spoliation. A business or government entity is not required to keep records in perpetuity, and if a party without notice of litigation or potential litigation has destroyed records in the normal course of business, such as in conformance with a document retention and storage accommodation policy that accords with any applicable regulations or laws, there is no spoliation of evidence [*State of Idaho Potato Comm'n v. G&T Terminal Packaging, Inc. (9th Cir 2005) 425 F3d 708, 720* ; *United States ex rel. Aflatooni v. Kitsap Physicians Serv. (9th Cir 2002) 314 F3d 995, 1001* ; *Akiona v. United States (9th Cir 1991) 938 F2d 158, 161*].

Cross Reference:

Preservation duties with regard to electronic evidence, see *§ 23.161*.

Legal Topics:

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

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25.94 Sanctions May Be Awarded for Spoliation of Evidence Under Inherent Powers of Court.

Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and who destroys those documents and information [*National Ass'n of Radiation Survivors v. Turnage (ND Cal 1987) 115 FRD 543, 556-557* , citing *Wm. T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443*].

Violation of a discovery rule that is rooted in the failure to preserve evidence may be sanctioned pursuant to the inherent powers of the court [*see, e.g., National Ass'n of Radiation Survivors v. Turnage (ND Cal 1987) 115 FRD 543, 556-557*].

Example:

In a case brought by military veterans against the Veterans' Administration arising from their exposure to ionizing radiation while in the military service, the defendant government agency engaged in wholesale destruction of documents relevant to the case. The district court found that the defendant's failure to institute a reasonable procedure to inform its employees of the relevant discovery requests, its failure to produce clearly responsive documents and information, and its subsequent submission of papers, pleadings, and motions based on asserted facts directly refuted by the nonproduced material, violated the requirements of *Fed R Civ P 11* and *26(g)*, and required the imposition of sanctions, for which the court employed its inherent powers [*see National Ass'n of Radiation Survivors v. Turnage (ND Cal 1987) 115 FRD 543, 556-557*].

Consider:

In the appropriate case, a district court may award sanctions for spoliation of evidence under both the inherent powers of the court and the appropriate rules of court [*see, e.g., Wm. T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1455-1456* (sanctions under inherent powers of court and *Fed R Civ P 37*)].

Cross References:

Sanctions available under court's inherent powers, see *§ 25.97*.

See also 7 *Moore's Federal Practice, § 37.120* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewEvidenceRelevanceSpoliation

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25.95 Sanctions May Be Awarded Under Rule 37 If Failure to Produce Evidence Because of Spoliation Violated Rule.

Sanctions may be awarded for spoliation of evidence if it results in the failure to produce discoverable matter that is within the purview of *Fed R Civ P 37*.

Example:

If a party brings a motion to compel production, and the court on that motion orders the responding party to produce discovery, the responding party will be in violation of *Fed R Civ P 37(b)* and subject to the sanctions of that rule if it destroys the material that it was ordered to produce, because the destruction will result in a violation of the court order [*see, e.g., Wm. T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1447*].

Distinguish:

If a party destroys documents when the omitted documents and information should have been disclosed in particular discovery responses, the omissions are sanctionable under *Fed R Civ P 26(g)*. To the extent that the documents destroyed were specifically responsive to outstanding discovery requests, sanctions are also appropriate under *Fed R Civ P 11* insofar as the destroyed documents contradicted the facts asserted in applicable pleadings, papers, or motions, and *Fed R Civ P 26(g)* insofar as particular discovery responses failed to include the documents [*National Ass'n of Radiation Survivors v. Turnage (ND Cal 1987) 115 FRD 543, 555, 559 n4*].

Strategic Point--Responding Party:

Absent exceptional circumstances, sanctions may not be imposed under the federal rules when a party fails to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system [*Fed R Civ P 37(e)*].

Legal Topics:

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

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25.96 Party That Violates Rule 37 Based on Spoliation Is Subject to Sanctions Available Under Rule.

A party that fails to preserve evidence in such a manner as to violate a federal or local rule is subject to the sanctions provided in that rule, including the most severe sanctions of default and dismissal [*see, e.g., Wm. T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1456*].

Strategic Point--Moving Party:

A party's destruction of relevant evidence permits an inference that the evidence would be unfavorable to the party [*see, e.g., Harkins Amusement Enters., Inc. v. General Cinema Corp. (DC Ariz 1990) 132 FRD 523, 524*].

Legal Topics:

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

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25.97 Sanctions Available Under Court's Inherent Powers.

25.97[1] Range of Sanctions, Including Dismissal, Are Available Under Court's Inherent Powers. A range of sanctions is available for spoliation of evidence under the court's inherent powers [*see, e.g., Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp. (9th Cir 1992) 982 F2d 363, 368* (exclusion of evidence); *see also 25.94*]. Courts are invested with inherent powers that are governed not by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases [*Chambers v. NASCO, Inc. (1991) 501 US 32, 43-49, 111 S Ct 2123, 115 L Ed2d 27*].

The following types of sanctions are examples of those imposed under this authority:

- Exclusion of evidence [*see, e.g., Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp. (9th Cir 1992) 982 F2d 363, 368*].

- Dismissal [*see, e.g.,* ; Leon v. IDX Sys. Corp. (9th Cir 2006) 464 F3d 951, 958 *Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 380*].

- An award of attorney's fees against a party or counsel who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons [Leon v. IDX Sys. Corp. (9th Cir 2006) 464 F3d 951, 961].

Cross Reference:

7 *Moore's Federal Practice, § 37.121* (Matthew Bender 3d ed.).

25.97[2] Requirements for Imposing Severe Sanctions Under Court's Inherent Powers.

25.97[2][a] Imposition of Severe Sanctions Requires Finding of Willfulness, Fault, or Bad Faith. In cases in which the drastic sanctions of dismissal or default are ordered, the range of discretion for a district court is narrowed, and the losing party's noncompliance must be due to willfulness, fault, or bad faith [Leon v. IDX Sys. Corp. (9th Cir

2006) 464 F3d 951, 958]. A finding of any of these circumstances may justify the sanction of dismissal [*Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 381*].

25.97[2][b] Imposition of Severe Sanctions Requires Consideration of Less Drastic Sanctions. Before imposing a drastic sanction such as dismissal under its inherent powers, the district court must first consider the availability of less drastic sanctions, explicitly discuss the feasibility of those less drastic sanctions, and explain why those less drastic alternatives are inappropriate [Leon v. IDX Sys. Corp. (9th Cir 2006) 464 F3d 951, 958, 960]. The consideration of less severe penalties must be a reasonable explanation of possible and meaningful alternatives [*Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 381* ; *Anderson v. Air West, Inc. (9th Cir 1976) 542 F2d 522, 525*].

25.97[2][c] Imposition of Severe Sanctions Requires Nexus Among Sanction, Misconduct, and Matters in Controversy. The most critical criterion for the imposition of a severe sanction is that the misconduct penalized must relate to matters in controversy in such a way as to interfere with the rightful decision of the case [*Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 381* ; *Fjelstad v. American Honda Motor Co. (9th Cir 1985) 762 F2d 1334, 1338*]. This factor is rooted in due process concerns [*Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee (1982) 456 US 694, 705-707, 102 S Ct 2099, 72 L Ed2d 492* ; *Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 381*]. There must be a nexus between the party's actionable conduct and the merits of the case [*Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 381* ; *Fjelstad v. American Honda Motor Co. (9th Cir 1985) 762 F2d 1334, 1342*].

25.97[2][d] Prejudice to Opposing Party Is Factor in Determining Imposition of Sanctions. The existence and degree of prejudice to the wronged party is a factor in the determination of whether to impose a severe sanction such as dismissal [*Leon v. IDX Sys. Corp. (9th Cir 2006) 464 F3d 951, 958]* . In some published cases, the Ninth Circuit has referred to this factor as optional [*see, e.g., Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 382*]; *Nursing Home Pension Fund v. Oracle Corp. (ND Cal 2008) 2008 US Dist LEXIS 66740, at *18-*20* (even assuming prejudice is required, it would be quite difficult for plaintiffs to demonstrate how they were harmed by evidence to which they do not have access); *In re Napster, Inc. Copyright Litig. (ND Cal 2006) 462 F Supp 2d 1060, 1075 n.4*].

25.97[2][e] Imposition of Severe Sanctions Requires Consideration of Public Interest and Policy. Before imposing a harsh sanction such as dismissal, the district court must consider the public interest in expeditious resolution of litigation, the court's own need to manage its dockets, and the public policy favoring disposition of cases on the merits [Leon v. IDX Sys. Corp. (9th Cir 2006) 464 F3d 951, 958].

25.97[3] Sanction Must Be Commensurate With Degree to Which Evidence Was Compromised or Destroyed. In the Ninth Circuit, the particular sanction levied under the court's inherent power depends on [*see, e.g., Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp. (9th Cir 1992) 982 F2d 363, 369*]:

- The degree to which the evidence was altered, lost, or destroyed.
- The degree of the responsible party's culpability.
- Surrounding circumstances such as the parties' previous ability to view or test that evidence prior to its spoliation.

Examples:

When evidence of tampering was equivocal at best, the charge of tampering was brought to the jury's attention, and the parties had had a chance to inspect the evidence prior to the alleged tampering, the sole sanction of a rebuttable presumption against the responsible party was proper [*Wong v. Swier (9th Cir 1959) 267 F2d 749, 759-760*].

When the plaintiff insurer destroyed an electric heater and a boat prior to filing an action against the heater

manufacturer for subrogation based on the allegation that the heater cause a fire in the boat, the proper sanction was exclusion of evidence regarding the alleged defect in the heater [*see Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp. (9th Cir 1992) 982 F2d 363, 369*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureDismissalsInvoluntary DismissalsFailures to ComplyCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewEvidenceRelevanceSpoliation

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3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.98

25.98 Rebuttable Presumption Arises Against Party Responsible for Tampering With Evidence.

When a party tampers with evidence, a rebuttable presumption arises against that party [*see Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp. (9th Cir 1992) 982 F2d 363, 369* ; *Wong v. Swier (9th Cir 1959) 267 F2d 749, 759-760*]. The inference may be overcome by evidence in the record giving a satisfactory explanation, even when actual tampering occurred [*Wong v. Swier (9th Cir 1959) 267 F2d 749, 759-760*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewEvidenceInferences & PresumptionsPresumptions

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25.99 Counsel Must Comply With Local Procedural Rules for Motions.

Local district court rules typically contain special requirements governing the preparation of papers supporting and opposing discovery motions, and the service of papers.

Cross References:

General discovery motion procedures, see *Ch. 22, Regulation of Discovery by Stipulation or Motion, §§ 22.14 -22.34*. General motion procedures, see Ch. 26, Pretrial Motion Practice.

Sanctions based on spoliation of evidence, see 7 *Moore's Federal Practice, §§ 37.120, 37.121* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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25.100 Ruling on Imposition of Sanctions Is Reviewed for Abuse of Discretion.

A district court's ruling on the imposition of spoliation sanctions is reviewed for abuse of discretion [Leon v. IDX Sys. Corp. (9th Cir 2006) 464 F3d 951, 957-958].

Cross Reference:

7 *Moore's Federal Practice, § 37.122* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMisconductCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionEvidenceRelevanceSpoliation

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3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.101

25.101 Court Order for Sanctions Should Specify Authority.

A court order for sanctions, especially for severe sanctions such as dismissal, should specify that it is based on either or both the court's inherent powers or a specified rule. An order imposing sanctions but omitting the grounds for them creates confusion if the sanctions are challenged [*see, e.g., Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 379* (parties on appeal who failed to specify whether dismissal was based on inherent power or Rule 37 caused confusion); *but see Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp. (9th Cir 1992) 982 F2d 363, 367-368* (although district court's exclusion of expert testimony was based on *Fed R Civ P 37*, court of appeals affirmed result based on court's inherent power)].

Examples:

An order of dismissal based on unclear grounds creates problems in analyzing the ruling on appeal [*see, e.g., Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 379* ("The parties generate quite a bit of confusion about what grounds the district court used to enter its dismissal against [defendant]. [Plaintiff] argues that the dismissal was entered, alternatively, under the court's inherent powers or under *Fed R Civ P 37(b)(2)(C) ...* .").

By contrast, a clear order facilitates the appellate process [*see, e.g., Anheuser-Busch, Inc. v. Natural Beverage Distribs. (ND Cal 1993) 151 FRD 346, 348 , aff'd, 69 F3d 337 (9th Cir 1995)* ("We find that the district court acted well within its discretion in dismissing [defendant]'s counterclaim pursuant to its inherent power. We therefore need not address whether dismissal was appropriate under the alternate authority of Rule 37.")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureDismissalsInvoluntary DismissalsFailures to ComplyCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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25.102 CHECKLIST: Opposing Imposition of Sanctions.

☐ Determine if grounds to oppose the motion for sanctions exist, e.g.:

- ○ The sanction requested is excessive.
- ○ The papers and procedures followed did not comply with local rules.
- ○ No duty to preserve evidence existed.
- ○ Preserving documents in requested form created undue burden.
- ○ Electronically stored information was lost as a result of the routine, good-faith operation of an electronic information system.

☐ Prepare and serve response papers.

Authority:
Fed R Civ P 37(b), (d)

Discussion:
See *§§ 25.104 -25.106*

Standard Procedure Checklists:

Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*; Ch. 26, Pretrial Motion Practice, see *§ 26.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDiscoveryMisconductEvidenceRelevanceSpoliation

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25.103 Options and Strategies for Opposing Imposition of Sanctions for Spoliation.

Counsel may avoid being subject to sanctions for spoliation by taking care to preserve all evidence or potential evidence in his or her control.

Cross Reference:

Duty to preserve evidence, see *§ 25.93*.

Strategic Point--Party Opposing Sanctions:

If a party has an arguable duty to preserve certain evidence, but has reasons to dispose of that material, the party should apply to the court for permission to destroy or discard it, rather than gamble that the destruction or discard will not result in a dispute or the imposition of sanctions [*see, e.g., Wm. T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1447* (defendant was culpable for failing to obtain permission to destroy records, among other acts of malfeasance in destroying needed evidence)].

Judge's Perspective:

If it was inadvertent, explain how it happened, suggest why other documents, etc. will serve the same purpose, and offer to make other similar evidence available if you have any. The most important issue will be to convince the judge that the destruction was not intentional. Your personal credibility will really be on the line, and past experience in that court will be especially relevant.

Cross Reference:

Preservation duties with regard to electronic evidence, see *§ 23.161*.

Legal Topics:

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

Civil ProcedureDiscoveryMisconductCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewEvidenceRelevanceSpoliation

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25.104 Party May Show No Duty to Preserve Evidence.

A party may oppose the charge of spoliation of evidence by showing that it had no duty to preserve the documents.

When appropriate, a party that destroyed potential evidence should show that he or she did not do so in response to the litigation, perhaps by indicating that the evidence was destroyed prior to litigation and before the party could have any reasonable indication that litigation would be brought relative to that evidence [*see, e.g., Akiona v. United States (9th Cir 1991) 938 F2d 158, 161 , cert. denied, 503 US 962 (1992)*].

A party should only be penalized for destroying documents if it was wrong to do so, and that requires, at a minimum, some notice that the documents are potentially relevant [*Akiona v. United States (9th Cir 1991) 938 F2d 158, 161 , cert. denied, 503 US 962 (1992)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.105 Party May Show Undue Burden in Preserving Documents in Certain Form.

A party may refute that it wrongfully destroyed documents in a certain form, by showing that it did preserve the same information in an alternate form, and that retaining the documents in the form requested created an undue burden on that party [*see Wm. T. Thompson Co. v. General Nutrition Corp. (CD Cal 1984) 593 F Supp 1443, 1446-1447*].

Strategic Point--Seek Relief From Burdensome Requests:

A party will have a stronger argument that a particular discovery request is burdensome if it seeks relief from the particular request at the earliest possible opportunity [*see, e.g., Allen v. Exxon Corp. (In re Exxon Valdez) (9th Cir 1996) 102 F3d 429, 433* (plaintiff sanctioned with dismissal argued that discovery was unduly burdensome, but "there is no record (and no claim) that they ever sought relief from any of the discovery requests")].

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.105A Party May Show Electronically Stored Information Was Lost in Routine Operations.

Absent exceptional circumstances, a court may not impose sanctions under the federal rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system [*Fed R Civ P 37(e)*].

Legal Topics:

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

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25.106 Severe Sanctions Sought Under Court's Inherent Power May Be Opposed on Grounds That Requirements for Imposition of Sanctions Are Not Met.

In opposing the imposition of severe sanctions for spoliation of evidence under the court's inherent power, a party may assert any of the following:

- The absence of willfulness, fault, or bad faith.
- The lack of nexus among the sanction, misconduct, and matters in controversy.
- The absence of prejudice to the opposing party.
- The availability of less severe sanctions.

Example:

Severe sanctions imposed pursuant to the court's inherent powers may be opposed on the ground that the court failed to consider less severe sanctions [*see, e.g., Halaco Eng'g Co. v. Costle (9th Cir 1988) 843 F2d 376, 381*].

Cross References:

Imposition of sanctions under court's inherent power, see *§ 25.97*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewEvidenceRelevanceSpoliation

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25.107 CHECKLIST: Requesting Imposition of Rule 26(g) Sanctions.

☐ Determine whether the certified discovery request, response, objection, or disclosure was made under any of the following conditions:

- ○ The document is in some way inconsistent with the Federal Rules of Civil Procedure.
- ○ The document is in some way not warranted by existing law.
- ○ The document is in some way not warranted by a good-faith argument for the extension, modification, or reversal of existing law.
- ○ The document was interposed for an improper purpose, such as:
  - ☐ Harassment.
  - ☐ Unnecessary delay.
  - ☐ Needless increase in litigation costs.
- ○ The document is unreasonably or unduly burdensome or expensive in light of the following

considerations:

- ☐ The needs of the case.
- ☐ The discovery already completed.
- ☐ The amount in controversy.
- ☐ The importance of the issues at stake.

○ Determine, if possible, whether the improper certification was made without substantial justification.

○ Follow the applicable informal dispute resolution rules.

Discussion:
See *§ 25.05*

○ If appropriate, prepare and serve the moving papers.

Authority:
Fed R Civ P 26(g)

Discussion:
See *§§ 25.108 -25.111*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*; Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

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

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25.108 Required Signatures on Disclosures, Requests, Responses, and Objections.

25.108[1] Disclosures, Requests, Responses and Objections Must Be Signed by Attorney or Unrepresented Party. Every disclosure under Rule 26(a)(1) or (a)(3), and every request, response, or objection made by a party represented by an attorney must be signed by at least one attorney of record in the attorney's individual name, along with the attorney's address, e-mail address, and telephone number. An unrepresented party must sign the disclosure, request, response, or objection and state the party's address, e-mail address, and telephone number [*Fed R Civ P 26(g)(1)*].

25.108[2] Signatures on Disclosures, Requests, Responses and Objections Constitute Certification. The signature of the attorney or party on a disclosure, request, response, or objection constitutes a certification that, to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

- Consistent with the Federal Rules of Civil Procedure and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, or for establishing new law [*Fed R Civ P 26(g)(1)(B)(i)*];

- Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation [*Fed R Civ P 26(g)(1)(B)(ii)*]; and

- Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation [[*Fed R Civ P 26(g)(1)(B)(ii)*].

25.108[3] Reasonableness of Inquiry Is Judged by Objective Standard. The signing attorney must certify that a reasonable inquiry has been made with respect to the factual and legal basis for any discovery disclosure, request or response [*Fed R Civ P 26(g)*]. The reasonableness requirement is measured by an objective standard. There is no

required showing of bad faith [*National Ass'n of Radiation Survivors v. Turnage (ND Cal 1987) 115 FRD 543, 555* , citing *Fed R Civ P 26*, Committee Note].

Example:

In the context of a corporation, a memorandum should be sent to all corporate employees requesting information regarding the existence and location of documents pertaining to particular topics relevant to the litigation [*see McCoy v. Southwest Airlines Co. (CD Cal 2002) 208 FRD 617, 621*].

Cross Reference:

6 *Moore's Federal Practice, §§ 26.150 -26.154* (Matthew Bender 3d ed.).

25.108[4] Unsigned Disclosure, Request, Response or Objection Is Stricken Unless Promptly Signed. If a request, response, or objection is not signed, it will be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection. A party is not obligated to take any action with respect to it until it is signed [*Fed R Civ P 26(g)(2)*].

Cross Reference:

6 *Moore's Federal Practice, § 26.152* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory Disclosures

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[Reserved]

25.109[Reserved]

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25.110 Sanctions Under Rule 26(g).

25.110[1] Person Who Makes Certification in Violation of Rule 26(g) Is Subject to Sanctions. If without substantial justification a certification is made in violation of *Fed R Civ P 26(g)*, the court, on motion or on its own initiative, must impose on the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction [*Fed R Civ P 26(g)(3)*].

Distinguish:

Fed R Civ P 26(g) contains sanction provisions parallel to those found in *Fed R Civ P 11*. The primary distinction is that Rule 26 applies exclusively to discovery requests and responses, while Rule 11 applies to any paper, pleading, or motion. Rule 11 is therefore reserved for those papers, pleadings, and motions for which there are no other applicable sanction provisions [*see National Ass'n of Radiation Survivors v. Turnage (ND Cal 1987) 115 FRD 543, 555* , citing *Fed R Civ P 26*, Committee Note of 1983].

Consider:

Although Rule 11 may not be used to preempt the application of Rule 26(g) to discovery responses and requests, its interpretation nonetheless guides the application of Rule 26(g) [*see National Ass'n of Radiation Survivors v. Turnage (ND Cal 1987) 115 FRD 543, 555* , citing *Fed R Civ P 26*, Committee Note of 1983].

25.110[2] Sanctions May Include Amount of Reasonable Expenses and Attorney's Fees. The sanction for a Rule 26(g) violation may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee [*Fed R Civ P 26(g)(3)*].

Legal Topics:

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

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25.111 Motion for Rule 26(g) Sanctions.

25.111[1] LOCAL PRACTICE: All Districts--Counsel Must Make Good-Faith Effort to Resolve Dispute Informally. The four district courts in California require counsel to make a good-faith attempt to reach an informal resolution of a discovery dispute prior to filing a discovery motion.

Cross Reference:

See *§ 25.05*.

25.111[2] Person Subject to Sanctions Must Be Afforded Due Process. The sanctioning process must comport with due process requirements. The kind of notice and hearing required depends on the facts of the case and the severity of the sanction being considered. In most cases, the court is aware of the circumstances, and only a brief hearing should be necessary [*see* Oregon RSA No. 6 v. *Castle Rock Cellular Ltd. P'ship (9th Cir 1996) 76 F3d 1003, 1007-1008* (notice and opportunity to be heard may be required under both Rule 26 and court's inherent powers); *Fed R Civ P 26(g)*, Committee Note of 1983].

25.111[3] Motion Should Be Filed Soon After Violation Occurs. The Federal Rules of Civil Procedure do not specify any time frame within which a motion seeking *Fed R Civ P 26(g)* sanctions must be filed.

The motion should be filed as soon as possible after it becomes clear that a certification was made in violation of *Fed R Civ P 26(g)* without substantial justification. In some cases, this determination may not be possible until the action has terminated.

25.111[4] Counsel Must Follow Procedures Applicable to Discovery Motions. A motion for sanctions under *Fed R Civ P 26(g)* must comply with procedures applicable to discovery motions generally.

Cross References:

Local court rules applicable to all discovery motions for sanctions, see *§ 25.40*. Procedures for all discovery motions, see *Ch. 22, Regulation of Discovery by Stipulation or Motion, §§ 22.14 -22.34*. General motion procedures, see Ch. 26, Pretrial Motion Practice.

Obtaining sanctions for Rule 26(g) violation, see 6 *Moore's Federal Practice, § 26.154* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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25.112 Discovery Rulings Are Reviewed Under Abuse of Discretion Standard.

The Ninth Circuit reviews discovery rulings for abuse of discretion [*Mabe v. San Bernardino County (9th Cir 2001) 237 F3d 1101, 1112*]. The Ninth Circuit uses an objective standard to determine whether a party or attorney has responded or objected to a discovery request for an improper purpose [Oregon RSA No. 6 v. *Castle Rock Cellular Ltd. P'ship (9th Cir 1996) 76 F3d 1003, 1007*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMisconductCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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25.113 CHECKLIST: Opposing Imposition of Rule 26(g) Sanctions.

☐ Determine whether the grounds asserted in the moving papers are justified under *Fed R Civ P 26(g)(1)(B)(i)*, *(ii)*, or *(iii)*.

○ If not, draft objections refuting the facts asserted in the moving papers.

○ If so, draft opposition papers explaining the substantial justification for the request, response, objection, or disclosure.

☐ Determine whether the moving party has complied with local rules concerning dispute-resolution procedures.

☐ Prepare and serve papers in opposition to the motion.

Authority:
Fed R Civ P 26(g)

Discussion:
See *§ 25.114*

Standard Procedure Checklists:
Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.14*; Ch. 26, Pretrial Motion

Practice, see *§ 26.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDiscoveryMisconduct

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25.114 Opposing Sanctions on Grounds That Certification Was Substantially Justified, and That Asserted Grounds Are Inapplicable.

To oppose a motion for *Fed R Civ P 26(g)* sanctions, a party should attempt to show that the certification was substantially justified, and argue facts showing that the asserted grounds for imposition of sanctions are inapplicable. The showing will depend on the grounds claimed by the moving party, and the specific facts of the case [*see Fed R Civ P 26(g)*].

Example:

If the moving party has asserted that a certified discovery request was unduly burdensome, the party opposing sanctions should argue facts showing that the request was appropriate given the needs of the case, the discovery had in the case, the amount in controversy, and the importance of the issues at stake in the litigation [*see Fed R Civ P 26(g)*].

Legal Topics:

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

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.115

25.115 Notice of Motion and Motion to Compel Mandatory Disclosure.

Notice of Motion and Motion to Compel Mandatory Disclosure.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff vs.	)	NOTICE OF MOTION AND MOTION
_____ [*name*],	)	TO COMPEL MANDATORY DISCLOSURE
Defendant	)	(*Fed. R. Civ. P. 26(a), 37(a)*)
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for:

[*EITHER, if requesting attorney's fees in motion to compel (Central, Eastern, and Southern Districts)*]

(1) An order pursuant to *Federal Rules of Civil Procedure, Rule 26(a)* and Rule 37(a)(3)(A), requiring _____ [*party designation and name of party against whom relief is sought*] to make the mandated disclosures as described in _____ [*specify, e.g.,* the Affidavit of John Doe, attached hereto as Exhibit A], on the ground that _____ [*state basis of motion, e.g.,* Mary Jones failed to make the necessary disclosures related to expert testimony]; and

(2) An order pursuant to *Federal Rules of Civil Procedure, Rule 37(a)(5)*, awarding to _____ [*party designation and name of moving party*] the expenses, including attorney's fees, incurred in bringing this motion.]

[*OR, if attorney's fees will be requested in separate motion (Northern District--see ND Cal Civ LR 7-8, 37-3)*]

An order pursuant to *Federal Rules of Civil Procedure, Rule 26(a)* and Rule 37(a)(3)(A), requiring _____ [*party designation and name of party against whom relief is sought*] to make the mandated disclosures as described in _____ [*specify, e.g.,* the Affidavit of John Doe, attached hereto as Exhibit A], on the ground that _____ [*state basis of motion, e.g.,* Mary Jones failed to make the necessary disclosures related to expert testimony].

[*CONTINUE*]

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name of declarant*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ (Statement *or* Stipulation),] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 37(a)

Meet and Confer Requirements Under Local Rules:
See *§ 25.05*

Additional Moving Papers Required Under Local Rules:
See *§ 25.05[2]* (Central District-Joint Stipulation); see *§ 25.05[3]* (Eastern District-Joint Statement Re Discovery Disagreement); see *§ 25.05[5][c]* (Southern District-Certificate of Compliance)

Nature of Motion:
See *25.08[1]*

Requirements Under Local Rules:
See *§ 25.10*

Northern District Format Requirements:
See *§ 25.10[3]*

Related Forms:
For responses, orders, and other forms related to motions to compel, see 8 Bender's Federal Practice Forms, Forms §§ 37:1-37:59 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to Compel

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.116

25.116 Notice of Motion and Motion to Compel Compliance With Discovery Request.

Notice of Motion and Motion to Compel Compliance with Discovery Request.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION
Plaintiff vs.	)	TO COMPEL COMPLIANCE WITH
_____ [*name*],	)	DISCOVERY REQUEST
Defendant	)	(*Fed. R. Civ. P. 26(a), 37(a)*)
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____
	)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for:

[*EITHER, if requesting attorney's fees in motion to compel (Central, Eastern, and Southern Districts)*]

(a) An order pursuant to _____ [specify federal rule authorizing method under which discovery was sought] and *Federal Rules of Civil Procedure, Rule 37(a)(3)(A)*, _____ [*specify desired relief, e.g.*, requiring plaintiff to answer certain questions propounded to plaintiff at plaintiff's deposition that plaintiff refused to answer, as described in the Affidavit of Jane Smith attached hereto as Exhibit A, and set forth in the attached Exhibit B], on the ground _____ [*state basis of motion, e.g.*, that plaintiff refused to answer these questions, all of which are material and relevant to issues herein, and answers should be required]; and

(b) An order pursuant to *Federal Rules of Civil Procedure, Rule 37(a)(5)*, awarding to _____ [*party designation and name of moving party*] the expenses, including attorney's fees, incurred in bringing this motion.

[*OR, if attorney's fees will be requested in separate motion (Northern District--see ND Cal Civ LR 7-8, 37-3)*]

An order pursuant to _____ [specify federal rule authorizing method under which discovery was sought] and *Federal Rules of Civil Procedure, Rule 37(a)(3)(B)*, _____ [*specify desired relief, e.g.*, requiring plaintiff to answer certain questions propounded to plaintiff at plaintiff's deposition that plaintiff refused to answer, as described in the Affidavit of Jane Smith attached hereto as Exhibit A, and set forth in the attached Exhibit B], on the ground _____ [*state basis of motion, e.g.*, that plaintiff refused to answer these questions, all of which are material and relevant to issues herein, and answers should be required].

[*CONTINUE*]

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ (Statement *or* Stipulation),] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 37(a)

Meet and Confer Requirements Under Local Rules:
See *§ 25.05*

Additional Moving Papers Required Under Local Rules:
See *§ 25.05[2]* (Central District-Joint Stipulation); see *§ 25.05[3]* (Eastern District-Joint Statement Re Discovery Disagreement); see *§ 25.05[5][c]* (Southern District-Certificate of Compliance)

Nature of Motion:
See *§ 25.08[2]*

Requirements Under Local Rules:
See *§ 25.10*

Northern District Format Requirements:
See *§ 25.10[3]*

Related Forms:
For responses, orders, and other forms related to motions to compel, see 8 Bender's Federal Practice Forms, Forms §§ 37:1-37:59 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureDiscoveryMotions to Compel

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.117

25.117 Notice of Motion and Motion for Sanctions for Failure to Comply With Court Order.

Notice of Motion and Motion for Sanctions for Failure to Comply With Court Order.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR
Plaintiff vs.	)	SANCTIONS
_____ [*name*],	)	FOR FAILURE TO COMPLY WITH COURT OR-
Defendant	)	DER
	)	(*Fed. R. Civ. P. 26(a), 37(b)(2)*)
	)	Date of Hearing: _____
	)	Time of Hearing: _____
		Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for:

(a) An order pursuant to Federal Rules of Civil Procedure,

[*CHOOSE ONE OF THE FOLLOWING, AS APPROPRIATE*]

Rule 37(b)(2)(A)(i), that the following facts be established as proven: _____ [*specify*],

[*OR*]

Rule 37(b)(2)(A)(ii), that _____ [*party designation and name of party against whom relief is sought*] be forbidden from offering any evidence at _____ [trial *or other proceeding at which evidence is taken*] supporting the following claims: _____ [*specify*],

[*OR*]

Rule 37(b)(2)(A)(ii), that _____ [*party designation and name of party against whom relief is sought*] be prohibited from introducing in evidence the following matters: _____ [*specify*],

[*OR*]

Rule 37(b)(2)(A)(iv), that all further proceedings on behalf of _____ [*party designation and name of party against whom relief is sought*] be stayed and that _____ [*party designation and name of party against whom relief is sought*]'s action be stricken from the trial calendar [and that the action be dismissed],

[*OR*]

Rule 37(b)(2)(A)(v), that _____ [*party designation and name of party against whom relief is sought*]'s [*complaint or other pleading seeking affirmative relief*] be dismissed,

[*OR*]

Rule 37(b)(2)(A)(vii), that _____ [*party designation and name of party against whom relief is sought*] be adjudged in contempt of this court,

[*CONTINUE*]

on the ground that _____ [*party designation and name of party against whom relief is sought*] has failed to comply with this court's order of _____ [*date*], requiring _____ [*party designation and name of party against whom relief is sought*] to _____ [*specify terms of order*]; and

(b) An order pursuant to *Federal Rules of Civil Procedure, Rule 37(b)(2)*, that _____ [*party designation and name of party against whom relief is sought*] be required to pay the expenses, including attorney's fees, incurred by _____ [*party designation and name of moving party*] as result of _____ [*party designation and name of party against whom relief is sought*]'s failure to comply with the order.

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint Stipulation,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 37(b)

Meet and Confer Requirements Under Local Rules:
See *§ 25.05*

Additional Moving Papers Required Under Local Rules:
See *§ 25.05[2]* (Central District-Joint Stipulation); see *§ 25.05[5][c]* (Southern District-Certificate of Compliance)

Local Rule Requirements:
See *§ 25.40*

Timing:
See *§ 25.40[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureDiscoveryMisconduct

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.118

25.118 Notice of Motion and Motion for Sanctions for Failure to Make Mandatory Disclosures or Failure to Supplement Discovery Responses.

Notice of Motion and Motion for Sanctions for Failure to Make Mandatory Disclosures or Failure to Supplement Discovery Responses.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*], Plaintiff vs. _____ [*name*], Defendant	Civil Action No. _____ NOTICE OF MOTION AND MOTION FOR SANCTIONS FOR _____ [FAILURE TO MAKE MANDATORY DISCLOSURES *OR* FAILURE TO SUPPLEMENT RESPONSES] (*Fed. R. Civ. P. 37(c)(1)*) Date of Hearing: _____ Time of Hearing: _____ Courtroom No. _____

_____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for:

(a) An order pursuant to *Federal Rules of Civil Procedure, Rule 37(c)(1)*, that _____ [*specify sanction sought, and party designation and name of party against whom relief is sought, e.g.,* Defendant Mary Jones be forbidden from offering any evidence at trial with respect to any of the following witnesses or information: _____ (*specify)*], on the ground that _____ [*party designation and name of party against whom relief is sought*] has failed to _____ [make mandatory disclosures *or* supplement discovery responses] as required by _____ [*Federal Rules of Civil Procedure, Rule 26(a) or Federal Rules of Civil Procedure, Rule 26(e)*] as described in the Affidavit of _____ [*name*], attached hereto as Exhibit A, and set forth in the attached Exhibit B; and

(b) An order pursuant to *Federal Rules of Civil Procedure, Rule 37(c)(1)*, that _____ [*party designation and name of party against whom relief is sought*] be required to pay the expenses, including attorney's fees, incurred by _____ [*party designation and name of moving party*] as result of the failure by _____ [*party designation and name of party against whom relief is sought*] to comply with this requirement.

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ Stipulation,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 26(a), (e), 37(c)

Meet and Confer Requirements Under Local Rules:
See *§ 25.05*

Additional Moving Papers Required Under Local Rules:
See *§ 25.05[2]* (Central District-Joint Stipulation); see *§ 25.05[5][c]* (Southern District-Certificate of Compliance)

Basis for Motion:
See *§§ 25.50 -25.53*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureDiscoveryDisclosuresSanctions

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.119

25.119 Notice of Motion and Motion for Sanctions for Unreasonable Failure to Admit Genuineness of Document or Truth of Matter.

Notice of Motion and Motion for Sanctions for Unreasonable Failure to Admit Genuineness of Document or Truth of Matter.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	Civil Action No. _____
Plaintiff vs.	NOTICE OF MOTION AND MOTION FOR SANCTIONS FOR UNREASONABLE FAILURE TO ADMIT _____
_____ [*name*],	[GENUINENESS OF DOCUMENT *OR* TRUTH OF MATTER]
Defendant	(*Fed. R. Civ. P. 26(a), 37(c)(2)*)
	Date of Hearing: _____
	Time of Hearing: _____
	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for:

(a) An order pursuant to *Federal Rules of Civil Procedure, Rule 36* and Rule 37(c)(2), that _____ [*party designation and name of party against whom relief is sought*] be required to pay the expenses, including attorney's fees, incurred by _____ [*party designation and name of moving party*] in proving the _____ [genuineness of those documents *or* truth of those matters] described in the Affidavit of _____ [*name*] attached hereto as Exhibit A, and set forth in the attached Exhibit B, on the ground that _____ [*party designation and name of party against whom relief is sought*] unreasonably failed to admit the _____ [genuineness of those documents *or* truth of those matters] as requested under *Federal Rules of Civil Procedure, Rule 36*; and

(b) An order granting _____ [*party designation and name of moving party*] such other incidental relief as may be appropriate.

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ Stipulation,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 36, 37(c)

Meet and Confer Requirements Under Local Rules:

See *§ 25.05*

Additional Moving Papers Required Under Local Rules:

See *§ 25.05[2]* (Central District-Joint Stipulation); see *§ 25.05[5][c]* (Southern District-Certificate of Compliance)

Timing:

See *§ 25.63*

Basis for Motion:

See *§§ 25.59 -25.64*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMisconduct

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.120

25.120 Notice of Motion and Motion for Sanctions for Failure to Appear or Respond.

Notice of Motion and Motion for Sanctions for Failure to Appear or Respond.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR
Plaintiff vs.	)	SANCTIONS
_____ [*name*],	)	FOR FAILURE TO _____
Defendant	)	[APPEAR *OR* RESPOND]
	)	(*Fed. R. Civ. P. 37(b)(2), 37(d)*)
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for:

(a) An order pursuant to Federal Rules of Civil Procedure,

[*CHOOSE ONE OF THE FOLLOWING, AS APPROPRIATE*]

Rule 37(b)(2)(A)(i) and Rule 37(d), that the following facts be established as proven: _____ [*specify*],

[*OR*]

Rule 37(b)(2)(A)(ii) and Rule 37(d), that _____ [*party designation and name of party against whom relief is sought*] be forbidden from offering any evidence at trial supporting the following defenses: _____ [*specify*],

[*OR*]

Rule 37(b)(2)(A)(ii) and *Federal Rules of Civil Procedure, Rule 37(d)* that _____ [*party designation and name of party against whom relief is sought*] be prohibited from introducing in evidence the following matters: _____ [*specify*],

[*OR*]

Rule 37(b)(2)(A)(vi) and *Federal Rules of Civil Procedure, Rule 37(d)* that _____ [*party designation and name of party against whom relief is sought*]'s _____ [*answer or other pleading setting forth affirmative defense*] be stricken and that judgment by default in favor of _____ [*party designation and name of moving party*] for the relief demanded in the complaint be entered,

[*CONTINUE*]

on the ground that _____ [*party designation and name of party against whom relief is sought*] has failed to _____ [*specify sanctionable failure, e.g.,* answer or object to interrogatories as described in the Affidavit of John Doe attached hereto as Exhibit A, and set forth in the attached Exhibit B]; and

(b) An order pursuant to *Federal Rules of Civil Procedure, Rule 37(d)*, that _____ [*party designation and name of party against whom relief is sought*] be required to pay the expenses, including attorney's fees, incurred by _____ [*party designation and name of moving party*] as result of _____ [*party designation and name of party against whom relief is sought*]'s failure to comply with the requested discovery.

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or*

declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint Stipulation,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 37(b), (d)

Meet and Confer Requirements Under Local Rules:
See *§ 25.05*

Additional Moving Papers Required Under Local Rules:
See *§ 25.05[2]* (Central District-Joint Stipulation); see *§ 25.05[5][c]* (Southern District-Certificate of Compliance)

Timing:
See *§ 25.73[3]*

Basis for Motion:
See *§§ 25.71 -25.75*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMisconduct

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Unit 7 Discovery
CHAPTER 25 Motions to Compel and Discovery Sanctions
X. FORMS

3-25 MB Practice Guide: Fed Pretrial Civ Proc in CA 25.121

25.121 Notice of Motion and Motion for Sanctions for Failure to Participate in Discovery Plan.

Notice of Motion and Motion for Sanctions for Failure to Participate in Discovery Plan.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff vs.	)	NOTICE OF MOTION AND MOTION FOR SANCTIONS FOR FAILURE TO PARTICIPATE IN DISCOVERY PLAN (*Fed. R. Civ. P. 26(f), 37(g)*)
_____ [*name*],	)	
Defendant	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____
	)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order pursuant to *Federal Rules of Civil Procedure, Rule 26(f)* and Rule 37(g), that _____ [*party designation and name of party against whom relief is sought*] be required to pay the expenses, including attorney's fees, incurred by _____ [*party designation and name of moving party*] as the result of _____ [*party designation and name of party against whom relief is sought*]'s failure to participate in discovery planning as described in the Affidavit of _____ [*name*] attached hereto as Exhibit A, and set forth in the attached Exhibit B, on the ground that _____ [*party designation and name of party against whom relief is sought*] failed to participate in good faith in the development and submission of a proposed discovery plan as required under *Federal Rules of Civil Procedure, Rule 26(f)*.

[*As required by local rules and/or individual judge's rules, detail any pre-motion efforts by the parties to meet and confer in good faith to resolve the discovery dispute*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] [*add, if appropriate:* the accompanying Joint _____ Stipulation,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 26(f), 37(g)

Meet and Confer Requirements Under Local Rules:
See *§ 25.05*

Additional Moving Papers Required Under Local Rules:
See *§ 25.05[2]* (Central District-Joint Stipulation); see *§ 25.05[5][c]* (Southern District-Certificate of Compliance)

Basis for Motion:

See *§§ 25.81 -25.87*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMisconduct

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice

4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.syn

§ 26.syn Synopsis to Chapter 26: Pretrial Motion Practice

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
I. STRATEGY

4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.01

26.01 Scope.

This chapter covers:

- Determining the governing procedural law of federal motion practice [*see 26.03*, *26.04*].
- Oral motions [*see 26.05 -26.07*].
- Stipulations in lieu of motions [*see 26.08*, *26.09*; *Form 26.62*].
- Ex parte applications [*see 26.10*, *26.11*].
- Preparing, filing, and serving papers for noticed motions [*see 26.12 -26.33*; *Forms 26.56 -26.59*].
- Withdrawing a motion [*see 26.34*; *Form 26.63*].
- Moving for an enlargement of time to perform a specific act [*see 26.35*; *Form 26.58*].
- Moving for reconsideration [*see 26.36*; *Form 26.61*].
- Responding to noticed motions [*see 26.37 -26.43*].
- Cross-motions or counter-motions [*see 26.44 -26.48*].
- Replying to opposition papers [*see 26.49*, *26.50*].
- Orally arguing motions [*see 26.51*, *26.53*; *Form 26.60*].
- Orders [*see 26.54*, *26.55*; *Form 26.64*].

Core Rules:

Fed R Civ P 5, 6, 7, 10, 11.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
I. STRATEGY

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26.02 Objective and Strategy.

Motion practice is a key element of federal litigation. Rarely is a federal case tried without substantial pretrial motion practice, and a judge often forms his or her opinion of the parties, their positions, and their attorney based on the motion practice, especially when substantial motions, such as those for preliminary injunctions or summary judgment, have been made.

When making a motion, counsel must weigh factors such as the odds of winning, the damage that may result by losing, and the cost/benefit analysis of the relief sought. The motion papers should reflect this analysis. As with all litigation papers, counsel should not assume that motion papers will be read from beginning to end in a single sitting. Ensure that your motion papers are succinct and well-organized.

The trend toward expedited handling of issues, by which the court renders decisions on oral presentations at a pretrial conference, or based on letter briefs submitted in advance of a pretrial conference, has changed motion practice considerably. If the assigned judge requires a pre-motion conference and is willing to accept correspondence in advance of such a conference (not all districts may use this procedure), the prospective motion proponent and opponent must realize that their communications with the court may substitute for formal motion practice.

Detailed Discussion/Forms:

1 Moore's Federal Practice, Ch. 5, Serving and Filing of Pleadings and Other Papers (Matthew Bender 3d ed.).

1 Moore's Federal Practice, Ch. 6, Computing and Extending Time; Time for Motion Papers (Matthew Bender 3d ed.).

2 Moore's Federal Practice, Ch. 7, Pleadings Allowed; Form of Motions and Other Papers (Matthew Bender 3d ed.).

2 Moore's Federal Practice, Ch. 10, Form of Pleadings (Matthew Bender 3d ed.).

2 Moore's Federal Practice, Ch. 11, Signing Pleadings, Motions, and Other Papers; Representations to

the Court; Sanctions (Matthew Bender 3d ed.).

1 Bender's Federal Practice Forms, Rule 5, Serving and Filing Pleadings and Other Papers (Matthew Bender).

1 Bender's Federal Practice Forms, Rule 6, Computing and Extending Time; Time for Motion Papers (Matthew Bender).

1 Bender's Federal Practice Forms, Rule 7, Pleadings Allowed; Form of Motions and Other Papers (Matthew Bender).

4 Bender's Federal Practice Forms, Rule 10, Form of Pleadings (Matthew Bender).

4 Bender's Federal Practice Forms, Rule 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions (Matthew Bender).

Cross References:

Ch. 5, Formatting, Serving, and Filing Papers; Ch. 22, Regulation of Discovery by Stipulation or Motion.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial MattersConferencesGeneral Overview

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
II. DETERMINING GOVERNING LAW

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26.03 CHECKLIST: Determining Governing Law.

☐ The following Federal Rules of Civil Procedure govern motion practice in general:

- ○ Rule 5 for service and filing of motions.
- ○ Rule 6 for timing of motions.
- ○ Rule 7(b) for form of motions.
- ○ Rule 11 for signing motions.

Authority:
Fed R Civ P 5, 6, 7(b)(1), 11

Discussion:
See *§ 26.04[2]*

☐ Other federal rules govern specific types of motions (e.g., motions for summary judgment), and may prescribe different time requirements than the general requirements under Rule 6.

Authority:
Fed R Civ P 6

Discussion:

See *§ 26.04[2]*

☐ Local rules govern the details of motion practice, including:

- ○ Advance notice of motions.
- ○ Timing of opposition and reply papers.
- ○ Papers required or permitted to be submitted in support of or in opposition to the motion.
- ○ Formatting requirements for motion papers.
- ○ Service and filing of papers.

Discussion:
See *§ 26.04[3]*

☐ Individual judges' rules and procedures, known as standing orders, often include provisions governing motion practice, including:

- ○ Pre-motion conference requirements.
- ○ Procedures for obtaining ex parte orders.
- ○ Availability of oral argument.
- ○ Times and days of week for motion calendars.
- ○ Courtesy copies.
- ○ Page limitations.
- ○ Guidelines as to appropriate stipulations.

Authority:
18 USC §§ 2072, *2075*; *Fed R Civ P 83(b)*

Discussion:
See *§ 26.04[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion

PracticeTime Limitations

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
II. DETERMINING GOVERNING LAW

4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.04

26.04 Rules Governing Motion Practice.

26.04[1] Motion Defined. A motion is an application to the court for an order [*Fed R Civ P 7*; *Parker v. United States (9th Cir 1997) 110 F3d 678, 682 n9*].

26.04[2] Federal Rules Govern Motion Practice. The following Federal Rules of Civil Procedure apply to motions generally:

- Rule 5 for service and filing of motions.
- Rule 6 for timing of motions.
- Rule 7(b) for form of motions.
- Rule 11 for signing motions.

In addition, specific types of motions may be regulated by the particular federal rule or statute governing the relief requested.

The substance of the motion, not its form or nomenclature, controls its disposition [*Andersen v. United States (9th Cir 2002) 298 F3d 804, 807 , cert. denied, 538 US 977 (2003)*]. Even if a party has improperly labeled a motion, courts will generally construe it as the proper type for the purpose it was made [Singleton v. University of Cal. (ND Cal 1995) 1995 US Dist LEXIS 329, at *4, n2].

Judge's Perspective:
Despite courts' efforts to construe a motion as intended, mislabeling can and often does raise questions of attorney competence. It is therefore still important to use care in all matters of motion preparation, including the labeling.

26.04[3] Local Rules Must Be Consulted. Local district court rules generally control the details of motion

practice, including:

- Advance notice of motions [*see 26.23*].
- Timing of opposition and reply papers [*see 26.41*, *26.50*].
- Papers required or permitted to be submitted in support of or in opposition to the motion [*see 26.19 -26.22*].
- Formatting requirements for motion papers [*see 26.18*].
- Service and filing of papers [*see 26.27 -26.33*].

26.04[4] Individual Judges' Rules Must Be Consulted. Judges may establish their own practical rules and procedures, provided those rules and procedures are consistent with federal law, rules adopted under *18 USC §§ 2072*, *2075*, and local rules [*see Fed R Civ P 83(b)*].

Judges' individual rules and procedures, frequently referred to as standing orders, often include provisions governing motion practice, including:

- Pre-motion conference requirements.
- Procedures for obtaining ex parte orders.
- Availability of oral argument.
- Times and days of week for motion calendars.
- Courtesy copies.
- Page limitations.
- Guidelines as to appropriate stipulations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral Overview

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
III. MAKING ORAL MOTIONS

4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.05

26.05 CHECKLIST: Making Pretrial Oral Motions.

☐ Determine whether the motion can be made orally:

○ Oral motion generally permissible if made during hearing that is officially recorded.

○ Review local rules and individual judges' rules, which may restrict availability of oral motions.

Authority:
Fed R Civ P 7(b)(1); *Atchison, Topeka & Santa Fe Ry. Co. (9th Cir 1996) 102 F3d 425, 427*

Discussion:
See *§ 26.06*, *26.07*

☐ If oral motion not available, consider alternatives such as stipulation, ex parte written motion, or noticed motion.

Discussion:
See *§§ 26.08 -26.33*

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 26 Pretrial Motion Practice
III. MAKING ORAL MOTIONS

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26.06 Before Trial, Oral Motions Are Restricted to Officially Recorded Hearings.

Oral motions have limited availability in federal pretrial civil practice. In general, motions must be made in writing, unless interposed during a hearing or trial that is officially recorded [*Fed R Civ P 7(b)(1)(A)*; *Atchison, Topeka & Santa Fe Ry. Co. (9th Cir 1996) 102 F3d 425, 427* ; *United States v. Vulpis (2d Cir 1992) 961 F2d 368, 371*].

An oral motion need not be supported by a writing [*see, e.g., Kingvision Pay-Per-View v. Lake Alice Bar (9th Cir 1999) 168 F3d 347, 350* ; *Meriwether v. Coughlin (2d Cir 1989) 879 F2d 1037, 1042*].

Distinguish:

An oral motion is to be distinguished from an oral argument, which may be available in connection with a written motion [*see § 26.53*].

Warning:

Oral motions are generally authorized by judges only in the course of a trial or in the course of pretrial proceedings, where the issues do not require briefing, there is no prejudice to the opposing party, and the opposing party consents. Counsel should never rely on being able to present an oral motion.

Judge's Perspective:

Although oral motions are permitted and are sometimes used for a motion to amend a complaint, add a party, or dismiss a party, their use is not encouraged. Some judges consider oral motions appropriate only if they arise during another proceeding.

Legal Topics:

For related research and practice materials, see the following legal topics:
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III. MAKING ORAL MOTIONS

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26.07 LOCAL PRACTICE: Restrictions on Oral Motions.

26.07[1] LOCAL PRACTICE: CD Cal Requirements. Unless otherwise provided by rule or court order, no oral motions will be recognized and every motion must be presented by notice of motion [*CD Cal Civ LR 6-1*].

26.07[2] LOCAL PRACTICE: ED Cal Requirements. Except as otherwise provided in the local rules or as ordered or allowed by the court, all motions must be noticed on the motion calendar of the assigned judge or magistrate judge [*ED Cal Civ LR 230(b)*].

26.07[3] LOCAL PRACTICE: ND Cal Requirements. All motions must be made in writing, except for motions made during the course of a trial or hearing [*ND Cal Civ LR 7-2(a)*].

26.07[4] LOCAL PRACTICE: SD Cal Requirements. All motions require moving papers [*SD Cal Civ LR 7.1(d.1)*]. When there has been an adverse appearance, a written notice of matter requiring the court's ruling is necessary, unless otherwise provided by rule or court order [*SD Cal Civ LR 7.1(e.1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & Form

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
IV. USING STIPULATIONS IN LIEU OF MOTIONS

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26.08 CHECKLIST: Using Stipulations in Lieu of Motions.

☐ Determine whether the stipulation may serve as a substitute for seeking an order from the court by way of motion.

☐ Federal Rules expressly authorize stipulations in some situations:

- ○ Amendment of pleadings under Rule 15(a).
- ○ Stipulations during pretrial conference under Rule 16.
- ○ Discovery stipulations under Rule 29.
- ○ Voluntary dismissal under Rule 41(a)(1).
- ○ Stipulations for verdicts of less than unanimous juries or juries of less than six persons under Rule 48.
- ○ Stipulations that master's findings are final under Rule 53(f)(3).
- ○ Stipulations extending time to file responsive affidavits on motion for new trial under Rule 59(c).

○ Stipulated protective orders.

☐ Consult with opposing counsel and draft written stipulation.

Authority:

Fed R Civ P 7(b)(1), *15(a)*, *16*, *29*, *41(a)(1)*, *48*, *53(f)(3)*, *59(c)*; *CD Cal Civ LR 7-1*; *ED Cal Gen LR 143*, *144*; *ND Cal Civ LR 6-1*, *7-12*; *SD Cal Civ LR 7.2*

Discussion:

See *§ 26.09*

Forms:

See *§ 26.62*, *26.63*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDismissalsVoluntary DismissalsStipulationsCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral Overview

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
IV. USING STIPULATIONS IN LIEU OF MOTIONS

4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.09

26.09 Using a Stipulation in Lieu of Motion.

26.09[1] Stipulations Under the Federal Rules. Even when not expressly authorized, a stipulation may serve as a substitute for seeking an order from the court by way of motion. Though there is no general federal rule governing stipulations, the Federal Rules expressly authorize stipulations in some situations:

- *Fed R Civ P 15(a)* (amendment of pleadings on "written consent" of adverse party).
- *Fed R Civ P 29* (permissible discovery stipulations).
- *Fed R Civ P 41(a)(1)* (voluntary dismissal on filing of signed stipulation for dismissal).
- *Fed R Civ P 48* (stipulations for verdicts of less than unanimous juries or juries of less than six persons).
- *Fed R Civ P 53(f)(3)* (parties may stipulate that master's findings are final).

Fed R Civ P 6(b) generally authorizes the court to extend the time to act, if a request is made before the original time or its extension expires. This general rule governs extending the time to file opposing affidavits on a motion for a new trial, based on written stipulation [*see Fed R Civ P 59*, Committee Note of 2009 (explaining deletion of provision of former *Fed R Civ P 59(c)*)].

In addition, the entire pretrial process contemplates stipulations. For example, *Fed R Civ P 16* concludes with the requirement that at least one attorney for each party participating in each pretrial conference have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate to be discussed [*Fed R Civ P 16(c)*].

Warning:

Most stipulations expressly mentioned in the Federal Rules of Civil Procedure must be made in writing,

or must be in writing and filed with the court [*see, e.g., Fed R Civ P 41(a)(1)* (stipulated dismissal)]. Even when a stipulation is not expressly required by a rule to be in writing, it is always the best practice to put the stipulation in writing (except, perhaps, when the stipulation is already reflected in a pretrial order). Keep in mind that judges may have standing orders governing the use of discretionary stipulations.

Cross References:

Detailed discussion of discovery stipulations, see *Ch. 22, Regulation of Discovery by Stipulation or Motion, 22.11*, *22.12*. Forms, see *26.62*, *26.63*.

Discussion of stipulations made during pretrial conferences, Ch. 16, Case Management Conferences. Discussion of discovery stipulations, see *Ch. 22, Regulation of Discovery by Stipulation or Motion, 22.11*, *22.12*.

26.09[2] LOCAL PRACTICE: Stipulations.

26.09[2][a] LOCAL PRACTICE: CD Cal Requirements. Stipulations will be recognized as binding only when made in open court, on the record at a deposition, or when filed in the proceeding. Written stipulations affecting the progress of the case must be filed with the court, be accompanied by a separate order as provided in CD Cal Civ LR 52-4.1, and will not be effective until approved by the judge, except as authorized by statutes or the Federal Rules [*CD Cal Civ LR 7-1*].

Exception:

A stipulation extending the time within which to answer or otherwise respond to the initial complaint in an action by not more than 30 days does not need to be approved by the judge but must be filed. Note that this exception applies only to stipulations regarding answers or responses to *initial* complaints--it does not apply to answers or responses to crossclaims, counterclaims, third-party complaints, or amended or supplemental pleadings [*CD Cal Civ LR 8-3*].

26.09[2][b] LOCAL PRACTICE: ED Cal Requirements. The following requirements apply in the Eastern District:

Form of stipulations. Except for stipulations entered into during the course of a deposition and set forth in the transcript, stipulations must be [*ED Cal Gen LR 143(a)*]:

- In writing, signed by all counsel or parties in propria persona who have appeared in the action and are affected by the stipulation, except as otherwise required by *Fed R Civ P 41(a)(1)* (voluntary stipulated dismissal) and filed; or
- Made in open court and noted by the courtroom deputy clerk in the minutes or by the court reporter in the notes; or
- Recited in a pretrial or other court order.

Stipulations not in conformity with these requirements will not be recognized unless necessary to prevent manifest injustice [*ED Cal Gen LR 143(a)*].

Requirement of court order. Stipulations are not effective unless approved by the Court, except as otherwise provided in by the local rules or Federal Rules of Civil, Criminal, or Appellate Procedure. A proposed order must be submitted with a written stipulation and may consist of an endorsement on the stipulation of the words, "IT IS SO

ORDERED," with spaces designated for the date and signature of the judge or magistrate judge [*ED Cal Gen LR 143(b)*].

Extensions on stipulation. Unless the filing date has been set by court order, an initial stipulation extending time for no more than 28 days to respond to a complaint, crossclaim, or counterclaim, or to respond to interrogatories, requests for admissions, or requests for production of documents may be filed without approval of the Court if the stipulation is signed on behalf of all parties who have appeared in the action and are affected by the stipulation. All other extensions of time must be approved by the court and no open extensions of time by stipulation of the parties will be recognized [*ED Cal Gen LR 144(a)*].

26.09[2][c] LOCAL PRACTICE: ND Cal Requirements. The following requirements apply in the Northern District:

Format. Every stipulation requesting judicial action must be in writing signed by all affected parties or their counsel. A proposed form of order may be submitted with the stipulation and may consist of an endorsement on the stipulation of the words "PURSUANT TO STIPULATION, IT IS SO ORDERED," with spaces designated for the date and the signature of the judge [*ND Cal Civ LR 7-12*].

Restriction on stipulations varying Case Management Conference date. Any stipulation that would vary the date of the Case Management Conference has no effect unless approved by the assigned judge before the date set for the conference [*ND Cal Civ LR 16-2(e)*].

When stipulation is permissible without court order. Parties may stipulate in writing, without a court order, to extend the time within which to answer or otherwise respond to the complaint, or to enlarge or shorten the time in matters not required to be filed or lodged with the court, provided the change will not alter the date of any event or any deadline already fixed by court order. Such a stipulation must be promptly filed pursuant to *ND Cal Civ LR 5-1 et seq*. [*ND Cal Civ LR 6-1(a)*].

When court order is necessary. A court order is required for any enlargement or shortening of time that alters an event or deadline already fixed by court order or that involves papers required to be filed or lodged with the court. A request for a court order enlarging or shortening time may be made by written stipulation pursuant to *ND Cal Civ LR 6-2* or motion pursuant to *ND Cal Civ LR 6-3*. Any stipulated request or motion that affects a hearing or proceeding on the court's calendar must be filed no later than 14 days before the scheduled event [*ND Cal Civ LR 6-1(b)*].

26.09[2][d] LOCAL PRACTICE: SD Cal Requirements. Except as otherwise provided, stipulations will be recognized as binding on the court only when approved by the judge [*SD Cal Civ LR 7.2(a)*].

A stipulation must close with the heading "ORDER." Beneath the heading, the sum and substance of that to which there has been a stipulation must appear. The document must close with blank lines for the date and the judge's signature, below which the words "Judge of the District Court" must appear. Any stipulation that extends time or provides for a continuance must contain the reason for the change of date [*SD Cal Civ LR 7.2(b)*].

At a minimum, any order page to be signed must contain the document name, case title, and name of requesting party as a header or footer [*SD Cal Civ LR 7.2(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureJudicial OfficersMastersGeneral OverviewCivil

ProcedureDiscoveryMethodsStipulationsCivil ProcedureDismissalsVoluntary DismissalsStipulations

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
V. MAKING EX PARTE APPLICATIONS

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26.10 CHECKLIST: Making Ex Parte Applications.

☐ Consider whether relief sought (extension of time, for example) can be accomplished by stipulation or noticed motion.

☐ Determine whether the relief sought can actually be provided by an ex parte order and does not need to be noticed.

☐ Determine whether immediate relief is actually necessary and if so, identify immediate danger or irreparable harm.

☐ Consult local rules to determine if notice must be given to adverse party and for other requirements for ex parte applications.

Authority:
Fed R Civ P 6(b), (c); *CD Cal Civ LR 7-19*, *7-20*; *ED Cal Gen LR 144(c)*, *(e)*; *ND Cal Civ LR 1-5(d)*, *7-10*; *SD Cal Civ LR 7.1(e.5)*, *83.3(h)*

Discussion:
See *§ 26.11*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral Overview

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V. MAKING EX PARTE APPLICATIONS

4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.11

26.11 Use Ex Parte Applications to Seek Expedited Relief.

26.11[1] Ex Parte Application Typically Proceeds Without Notice to Other Parties. An ex parte application typically involves contact with the court without the advance knowledge or contemporaneous participation of all other parties [*see, e.g., ND Cal Civ LR 1-5(d)*].

Judge's Perspective:

In general, judges do not like ex parte applications, unless the movant can show very good cause and reasonable attempts to contact the other party. Courts typically require the applicant to notify the adverse party of the application unless the applicant can justify why the adverse party should not be notified. Justifications include a good faith belief that, otherwise, evidence will be destroyed, the party will flee, or money will be placed out of reach. The judge will want to know specifically why the applicant did not notify the other party. Ex parte applications are commonly used in intellectual property piracy cases.

Consider:

A common use of ex parte applications is to change time periods for specific acts. Ex parte applications can be used to extend the time within which an act is required or allowed to be done, if the prescribed time period has not yet expired [*Fed R Civ P 6(b)(1)*; *see, e.g., ED Cal Gen LR 144(c)*]. Similarly, they can be used to shorten the time within which an act is required or allowed to be done [*see, e.g., ED Cal Gen LR 144(e)*].

26.11[2] Contents of Ex Parte Application. To some degree, the papers required for an ex parte motion will be similar to those required for a noticed motion [*see Mission Power Eng'g Co. v. Continental Cas. Co. (CD Cal 1995) 883 F Supp 488, 492 , aff'd, 103 F3d 139 (9th Cir 1996)*]. Review local rules [*see 26.11[3]*] for the requirements in each district.

The ex parte papers should show the court [*Mission Power Eng'g Co. v. Continental Cas. Co. (CD Cal 1995) 883 F Supp 488, 492 , aff'd, 103 F3d 139 (9th Cir 1996)*]:

- That the moving party's cause will be irreparably prejudiced if the underlying motion is heard

according to regular noticed motion procedures; and

- That the moving party is without fault in creating the crisis that requires ex parte relief, or that the crisis occurred as a result of excusable neglect.

Warning:

Many ex parte motions are denied, not because the underlying request is unwarranted, but because the papers do not show that bypassing the regular noticed motion procedure is necessary.

26.11[3] LOCAL PRACTICE: Ex Parte Applications.

26.11[3][a] LOCAL PRACTICE: CD Cal Requirements. An application for an ex parte order must be accompanied by a memorandum containing [*CD Cal Civ LR 7-19*]:

- If known, the name, address, telephone number, and e-mail address of counsel for the opposing party.

- The reasons for seeking an ex parte order.

- Supporting points and authorities [*see 26.20[2][a]*].

The applicant must lodge the proposed ex parte order [*CD Cal Civ LR 7-19*].

The attorney applying for the order must make a good faith effort to advise counsel for all other parties, if known, of the date, time, and substance of the proposed ex parte application and to advise the court in writing of efforts to contact other counsel and whether any other counsel, after this advice, opposes the application or has requested to be present when the application is presented to the court [*CD Cal Civ LR 7-19.1*]

If the judge to whom the application is made finds that the interest of justice requires that the ex parte application be heard without notice (which in the instance of a TRO means that the requisite showing under *Fed R Civ P 65(b)* has been made), the judge may waive the notice requirement [*CD Cal Civ LR 7-19.1*, *7-19.2*]

Any order lodged in connection with a motion or application must comply with the local rules setting forth general requirements for orders [*CD Cal Civ LR 7-20*; *see CD Cal Civ LR 52-4 et seq*. (requirements for orders)].

26.11[3][b] LOCAL PRACTICE: ED Cal Requirements. The court may, in its discretion, grant an initial extension of time ex parte on the affidavit of counsel that a stipulation extending time cannot reasonably be obtained, explaining the reasons why a stipulation cannot be obtained and the reasons why the extension is necessary. Except for one such initial extension, ex parte applications for extensions of time will not ordinarily be granted [*ED Cal Gen LR 144(c)*].

Applications to shorten time must set forth by affidavit of counsel the circumstances claimed to justify the issuance of an order shortening time. Ex parte applications to shorten time will not be granted except on affidavit of counsel showing a satisfactory explanation for the need for the issuance of such an order from other counsel or parties in the action. Stipulations for the issuance of an order shortening time require the approval of the judge or magistrate judge on whose calendar the matter is to be heard before such stipulations will be given effect. Any proposed order shortening time must include blanks for the court to designate a time and date for the hearing and for the filing of any response to the motion [*ED Cal Gen LR 144(e)*].

26.11[3][c] LOCAL PRACTICE: ND Cal Requirements. Unless otherwise ordered by the assigned judge, a

party may file an ex parte motion (a motion filed without notice to opposing party), only if a statute, federal rule, local rules, or standing order, authorizes the filing of an ex parte motion in the circumstances and the party has complied with the applicable provisions allowing the party to approach the court on an ex parte basis. The motion must include a citation to the statute, rule, or order that permits the use of an ex parte motion to obtain the relief sought [*ND Cal Civ LR 7-10*; *see* United States v. Moyer (ND Cal 2008) 2008 US Dist LEXIS 63995, at *11, *14-*15 (defendant complied with LR 7-10, even though he failed to cite *Fed R Civ P 60* and *62* as grounds for his ex parte request for stay; he "clearly and sufficiently noticed all parties" that he was proceeding under *Fed R Civ P 60*, by unequivocally requesting that court vacate prior order more than ten days after it issued, due to excusable neglect, fraud, or legal mistake)].

26.11[3][d] LOCAL PRACTICE: SD Cal Requirements. All applications to a judge for ex parte orders must be made by a party appearing in propria persona or by an attorney of the court [*SD Cal Civ LR 83.3(h.1)*].

An application for an order may not be made ex parte unless it appears by affidavit or declaration (1) that within a reasonable time before the application the party informed the opposing party or the opposing party's attorney when and where the application would be made; or (2) that the party in good faith attempted to inform the opposing party and the opposing party's attorney but was unable to do so, specifying the efforts made to inform them; or (3) that for reasons specified the party should not be required to inform the opposing party or the opposing party's attorney [*SD Cal Civ LR 83.3(h.2)*].

All applications for orders shortening time under the local rules must be submitted ex parte, be accompanied by a proposed order, and be served on all opposing parties [*SD Cal Civ LR 7.1(e.5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureJudicial OfficersJudgesGeneral Overview

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
VI. MAKING NOTICED MOTIONS

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26.12 CHECKLIST: Making Noticed Motions.

26.12[1] CHECKLIST: Preliminary Determinations.

☐ Determine whether or not to make noticed motion by weighing the following:

- ○ Benefits of prevailing on the motion vs. detriment that would result from losing the motion.
- ○ Probability of success on the motion.
- ○ Whether the relief sought can be obtained by stipulation rather than by motion.
- ○ Whether other motions have been filed, and if so, whether numerous motions will create an unfavorable impression with the judge.
- ○ The likely financial costs of making the motion.
- ○ Any preliminary procedures required by the Federal Rules, local rules, or individual judge's rules that must be followed prior to filing the motion.

☐ If making noticed motion, first review and comply with all procedural prerequisites under district court rules and individual judge's rules (e.g., "meet and confer" requirements).

Discussion:
See *§ 26.14*, *26.15*

☐ Review applicable timing requirements for filing and serving motions under Federal Rules of Civil Procedure and local district court rules (also addressed in Checklist at *26.12[3]*).

Discussion:
See *§ 26.23*

☐ If chosen motion date is important, call judge's courtroom deputy to make sure courtroom is not dark on date (e.g., because of judge's planned vacation).

26.12[2] CHECKLIST: Preparing Motion Papers.

☐ Combine motion and notice of motion in a single paper, unless local rules direct otherwise.

Authority:
Fed R Civ P 7(b)(1); *ND Cal Civ LR 7-2(b)(2)*; *SD Cal Civ LR 7.1(f.1)*

Discussion:
See *§ 26.17*

☐ Make sure that format of heading and caption comply with local rule requirements.

Authority:
Fed R Civ P 7, *10*, *84*

Discussion:
See *§ 26.18[1]*

☐ Prepare notice of motion and motion so that it provides notice to the court and to the parties of:

○ Relief sought.

○ Date and time when the motion will be heard, often referred to as the return date of the motion.

○ Where the motion will be heard.

○ The statute or rule, if any, on which the motion is predicated.

○ The papers that are submitted in support of the motion, including titles and dates of supporting papers.

Warning:
A motion must state the grounds on which it is made.

Authority:

Fed R Civ P 7(b)(1); *CD Cal Civ LR 7-4*; *ND Cal Civ LR 7-2(b)(3)*

Discussion:
See *§ 26.16*

☐ Have notice of motion and motion signed by at least one attorney of record in attorney's individual name, and include signer's address, e-mail address, and telephone number in signature block.

Authority:
Fed R Civ P 11(a)

Discussion:
See *§ 26.18[3]*

☐ Understand Rule 11 implications of signature:

○ Signature certifies that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, that document is not being presented for improper purpose and has basis in law and fact.

○ Sanctions (monetary and non-monetary) may be imposed on attorney if motion is later found to have been brought in bad faith.

Authority:
Fed R Civ P 11(b), (c)

Discussion:
See *§ 26.18[3]*

☐ Prepare memorandum of law, which should include:

○ Statement of the issues presented.

○ Statement of the facts.

○ Legal argument applying controlling law to facts.

○ Table of contents and table of authorities.

Authority:
CD Cal Civ LR 7-5; *ED Cal Civ LR 230(b)*; *ND Cal Civ LR 7-2(b)(4), 7-4(a)*; *SD Cal Civ LR 7.1(f.1)*

Discussion:
See *§ 26.20*

Warning:

Local rules may require supporting points and authorities to be included in the same document as the notice of motion and motion [*see, e.g., ND Cal Civ LR 7-2(b), 7-4*].

☐ If desired, prepare sworn affidavits or declarations under penalty of perjury in support of motion.

Authority:
28 USC § 1746; *Fed R Civ P 6(d), 43(e), 56(e), 78*; *CD Cal Civ LR 7-7, 7-8*; *ED Cal Gen LR 101, 133(g), 142*; *ED Cal Civ LR 230(h)*; *ND Cal Civ LR 7-5(a), (b)*; *SD Cal Civ LR 7.1(f.1)*

Discussion:
See *§ 26.21*

☐ Prepare other supporting documentary evidence in support of motion.

○ Supporting documents may include such items as depositions, responses to written discovery, transcripts from other proceedings, and stipulations.

○ Authenticate supporting documents by affidavit or declaration of an individual having first-hand knowledge of the documents.

○ Attach supporting documents as an exhibit to the authenticated affidavit or affidavit substitute.

○ Label with an exhibit tab.

Discussion:
See *§ 26.22*

26.12[3] CHECKLIST: Filing and Serving Motion Papers.

☐ **Timing:** Ensure that noticed motion is timely filed and served:

○ Ascertain minimal advance notice requirements under local rules, generally at least 21 days before hearing date.

○ Ascertain minimal advance notice requirements under Federal Rules, generally at least five days before hearing date, unless otherwise provided in court order or federal rule.

Warning:
Although you should be familiar with the notice period required by the Federal Rules for your specific motion, local court rules typically require a longer notice period than the Federal Rules, and are the source of the timing [*compare, e.g., Fed R Civ P 6(c)(1)* (14 days) *with CD Cal Civ LR 6-1* (28 days)]. District courts enforce the local rules as to timing requirements, not the federal rules. The importance of reviewing the local court rules in this area cannot be overstated [*see 26.23*].

○ Consult district court rules to determine when motion actually must be filed:

☐ Local district court rules typically extend notice period beyond what would be required under Federal Rules.

☐ Each district court in California has different rules in this area.

☐ If you wish to shorten or increase the notice period required under district court rules, review district court rules for applicable procedures, discussed below.

○ Apply Rule 6's calculation rules to notice period:

☐ Day on which the moving papers are served should not be included toward the minimum advance notice requirement, but the last day should be included.

☐ If the last day of the notice period falls on a Saturday, Sunday, or legal holiday, or day when the court is inaccessible due to weather or other conditions, the notice period is extended until the next court day.

☐ If the notice period is less than 11 days, intervening Saturdays, Sundays, and holidays are excluded.

☐ If service is made by any of the following methods, the time to respond is extended by three days:

○ Service by mail.

○ Service to the clerk of the court based on no known address.

○ Electronic or other means of service consented to in writing under Rule 5(b)(2)(E) or (F).

○ Consult both district court rules and individual judge's rules to determine how and when to have motion placed on court's calendar.

Authority:
Fed R Civ P 5, *6*

☐ If continuance of hearing date will be needed, consult applicable district court rules.

Authority:
CD Cal Civ LR 7-11, *7-16*; *ED Cal Gen LR 144*; *ND Cal Civ LR 6-1(a)*, *7-3*, *7-7*; *SD Cal Civ LR 7.1(g)*

Discussion:
See *§ 26.18*

☐ If seeking expedited hearing date:

- ○ Make an ex parte application for cause shown.
- ○ Consider a pre-motion conference when prompt or immediate court intervention is necessary.

Authority:
Fed R Civ P 6(c); *CD Cal Civ LR 6-1*, *7-1*, *7-11*, 52-4.1; *ED Cal Gen LR 144(e)*; *ND Cal Civ LR 6-1(b)*, *6-2*, *6-3*; *SD Cal Civ LR 7.1(e.5)*

Discussion:
See *§ 26.25*

☐ If seeking to extend or enlarge the time for a motion:

- ○ Check Federal Rules and local rules to see if extension is allowed.
- ○ Note that some time limitations may not be extended by the court:
  - ☐ Motions for judgment as a matter of law under Rule 50(b).
  - ☐ Motions to amend or expand the court's findings under Rule 52(b).
  - ☐ Motions for new trial under Rule 59(b), (d).
  - ☐ Motions to alter or amend judgments under Rule 59(e).
  - ☐ Motions for relief from judgment under Rule 60(b).
- ○ If a request to enlarge time is available and is made *prior to* the expiration of the period originally prescribed or as extended by previous order, the court may grant the request without motion or notice.
- ○ If a request to enlarge time is made *after* the expiration of the specified period:
  - ☐ Request must be by motion.
  - ☐ Motion may be granted in the court's discretion if the failure to act was the result of excusable neglect.

Authority:

Fed R Civ P 6(b); *ED Cal Gen LR 144*; *ND Cal Civ LR 6-3*

Discussion:
See *§ 26.35*

☐ Serve motion papers:

○ Serve all parties, except for parties in default for failing to appear.

Authority:
Fed R Civ P 5

Discussion:
See *§ 26.27*

○ Serve motion papers on the attorney of a represented party, unless direct service on the party is ordered by the court.

○ Serve motion papers directly on all parties not represented by counsel.

Authority:
Fed R Civ P 5(b)

Discussion:
See *§ 26.28*

○ Serve motion papers by any of the following methods:

☐ Hand delivering a copy to the person being served.

☐ Leaving a copy at the person's office with a clerk or other person in charge:

○ If there is no one in charge, leaving a copy in a conspicuous place in the office [*Fed R Civ P 5(b)(2)(B)(i)*].

○ If the office is closed or there is no office, leaving a copy at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there [*Fed R Civ P 5(b)(2)(B)(ii)*].

☐ Mailing a copy to the last known address of the person served.

☐ Leaving a copy with the clerk of the court if the person served has no known address.

☐ Delivering a copy by any other means, including electronically, as consented to in writing by the person being served.

☐ Delivering a copy through the court's transmission service with written consent of the person being served, and pursuant to local rule authorizing such service.

○ Ascertain when service will be considered complete:

☐ Service by hand delivery or delivery to person's office is effective on delivery.

☐ Service by mail is complete on mailing.

☐ Service by electronic means is complete on transmission.

Warning:

Service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served.

☐ Service by other consented means under Rule 5(b)(2)(F) is complete when the person making service delivers the copy to the agency designated to make delivery.

○ Service by any of the following methods extends the time to respond by three days:

☐ Service by mail.

☐ Service to the clerk of the court based on no known address.

☐ Electronic or other means of service consented to in writing under Rule 5(b)(2)(E) or (F).

Authority:
Fed R Civ P 5(b), 6(d)

Discussion:
See *§ 26.29*

☐ Prepare certificate of service with the court for each motion that is required to be served:

○ Include date of service.

○ Include explicit certification by the serving party that service was made.

Authority:
Fed R Civ P 5(d)

Discussion:
See *§ 26.30*

☐ Review district court's electronic filing policy, and ascertain whether motion papers will be filed electronically.

Authority:
Fed R Civ P 5(d)(3); *CD Cal Civ LR 5-4*; *ED Cal Gen LR 133*; *ND Cal Civ LR 5-4*; ND Cal Gen Order 45; *SD Cal Civ LR 5.3*

Discussion:
See *§ 26.32*

☐ File motion papers with the court, within a reasonable time after service.

Warning:
Be sure that filing complies with timing requirements under local rules, as noted above.

Authority:
Fed R Civ P 5(d)

Discussion:
See *§ 26.31*

☐ Include certificate of service with filing.

Authority:
Fed R Civ P 5(d)

Discussion:
See *§ 26.30*

☐ Ascertain and comply with requirements for courtesy copies.

○ Consult individual judge's rules.

○ If courtesy copies are to be filed, they should be filed with the clerk and contemporaneously delivered to chambers.

Discussion:
See *§ 26.33*

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.13 Options and Strategy for Noticed Motions.

Before making a noticed motion, the party seeking relief should consider the following:

- The potential benefit from prevailing on the motion
- The potential damage from not making, or from losing the motion.
- The probability of success on the motion.
- Whether the relief sought can be obtained by stipulation rather than by motion [*see 26.08*, *26.09*].
- Whether other motions have been filed, and if so, whether numerous motions will create an unfavorable impression with the judge.
- The likely financial costs of making the motion.
- Any preliminary procedures required by the Federal Rules, local rules, or individual judge's rules that must be followed prior to filing the motion.

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26.14 Moving Party Must Comply With Pre-Motion Procedures.

Before filing a motion, the party seeking relief must comply with any preliminary procedures required by the Federal Rules, local rules, or individual judge's rules.

Example:

Before filing a motion for an order compelling disclosure or discovery, the movant must in good faith confer or attempt to confer with the party not making the disclosure in an effort to secure the disclosure without court action [*see Fed R Civ P 37(a)(1)*; *CD Cal Civ LR 7-3*].

Warning:

Some judges by standing order require leave to file certain motions, such as discovery motions or motions to dismiss prior to the Case Management Conference. Check individual judge's rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.15 LOCAL PRACTICE: Preliminary "Meet and Confer" Requirements Under Local Rules.

26.15[1] LOCAL PRACTICE: CD Cal Requirements. In all cases not listed as exempt in *CD Cal Civ LR 16-12*, and except in connection with discovery motions and applications for temporary restraining orders or preliminary injunctions, counsel contemplating the filing of any motion must first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution [*CD Cal Civ LR 7-3*].

Timing:

If the proposed motion must be filed within a specified period of time under the Federal Rules (e.g., a Rule 12(b) motion within 20 days of service of summons and complaint or Rule 59(a) motion within 10 days of entry of judgment), then the conference must take place at least 5 days prior to the last day for filing the motion. Otherwise, the conference must take place at least ten days prior to the filing of the motion [*CD Cal Civ LR 7-3*].

If the parties are unable to reach a resolution that eliminates the necessity for a hearing, counsel for the moving party must include in the notice of motion a statement to the following effect: "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on _____ [*date*]" [*CD Cal Civ LR 7-3*].

Separate meet-and-confer requirements apply with respect to discovery motions [*see CD Cal Civ LR 37-1*].

Cross References:

Discussion of meet-and-confer requirements for discovery motions, see *Ch. 22, Regulation of Discovery by Stipulation or Motion, 22.17* and Ch. 25, Motions to Compel and Discovery Sanctions, *§ 25.04*.

26.15[2] LOCAL PRACTICE: ED Cal Requirements. The Eastern District local rules set forth meet-and-confer requirements for discovery motions [*see ED Cal Civ LR 251(b)*], but otherwise do not require the parties to meet and confer prior to making noticed motions.

Cross References:

Discussion of meet-and-confer requirements for discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, *§ 22.17* and Ch. 25, Motions to Compel and Discovery Sanctions, *§ 25.04*.

26.15[3] LOCAL PRACTICE: ND Cal Requirements. The Northern District local rules do not set forth meet-and-confer requirements for noticed motions. However, under the Federal Rules, motions to compel discovery or Rule 26 disclosure are subject to a meet-and-confer requirement [*see Fed R Civ P 37(a)(1)*].

Cross References:

Discussion of meet-and-confer requirements for discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.17* and Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.04*.

26.15[4] LOCAL PRACTICE: SD Cal Requirements. The Southern District local rules set forth meet-and-confer requirements for discovery motions [*see SD Cal Civ LR 26.1(a)*], but otherwise do not require the parties to meet and confer prior to making noticed motions.

Cross References:

Discussion of meet-and-confer requirements for discovery motions, see Ch. 22, Regulation of Discovery by Stipulation or Motion, see *§ 22.17* and Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.04*.

Legal Topics:

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26.16 Notice of Motion Is Essential Element of Motion Papers.

26.16[1] Notice of Motion Functions to Inform Court and Parties. The notice of motion serves to provide notice to the court and to the parties of [*Fed R Civ P 7(b)(1)*]:

- Relief sought.
- Date and time when the motion will be heard, often referred to as the "return date" of the motion.
- Where the motion will be heard.
- The statute or rule, if any, on which the motion is predicated.
- The grounds on which the motion is made.
- The papers that are submitted in support of the motion.

26.16[2] Notice of Motion Must Specify Relief Sought. A notice of motion must set forth the relief or order sought [*Fed R Civ P 7(b)(1)(C)*; *see also* Monforton v. United States (9th Cir 1995) 1995 US App LEXIS 14656, at *2-*3 (unpublished opinion; generally not citable to court under 9th Cir R 36-3)].

Warning:

The relief requested should be tailored to the facts of the motion and should not be stated too broadly or the movant will risk denial of the motion. The papers submitted in support of the motion must justify the relief.

Cross Reference:

Form, see *26.56*.

26.16[3] Motion Must State Its Grounds With Particularity. A written motion must state *with particularity* the grounds on which the motion is made [*Fed R Civ P 7(b)(1)(B)*]. Though appropriate, the motion does not need to contain a citation to a rule of civil procedure [Monforton v. United States (9th Cir 1995) 1995 US App LEXIS 14656, at *2-*3 (unpublished opinion; generally not citable to court under 9th Cir R 36-3)].

26.16[4] Individual Judges' Rules May Have Additional Requirements for Notice of Motion. Counsel must check individual judges' rules. For example, some judges will not permit oral argument of a motion unless oral argument is requested either in the notice of motion or in the opposing papers.

26.16[5] LOCAL PRACTICE: Content of Notice of Motion.

26.16[5][a] LOCAL PRACTICE: CD Cal Requirements. The notice of motion must contain a concise statement of the relief or court action the movant seeks [*CD Cal Civ LR 7-4*].

26.16[5][b] LOCAL PRACTICE: ED Cal Requirements. The ED Cal has no specific local rule on specifying the relief sought in the notice of motion.

26.16[5][c] LOCAL PRACTICE: ND Cal Requirements. The motion document must contain a concise statement, in the second paragraph, of what relief or court action the movant seeks [*ND Cal Civ LR 7-2(b)(3)*].

26.16[5][d] LOCAL PRACTICE: SD Cal Requirements. The SD Cal has no specific local rule on specifying the relief sought in the notice of motion.

Legal Topics:

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26.17 Moving Party May Combine Motion and Notice of Motion in One Paper.

26.17[1] Federal Rules Permit Combination Motion and Notice of Motion. Under the Federal Rules, the motion and notice of motion may be combined in one paper [*Fed R Civ P 7(b)(1)*].

26.17[2] LOCAL PRACTICE: Combining Motion and Notice of Motion.

26.17[2][a] LOCAL PRACTICE: CD Cal Requirements. The CD Cal has no specific local rule governing combining the motion and notice of motion.

Strategic Point:

In the Central District, the easiest way to do this is to attach the motion and notice of motion to the memorandum of law. The motion and notice of motion are numbered using Roman numerals (i, ii, iii), and the memorandum of law is numbered using Arabic numerals (1, 2, 3).

26.17[2][b] LOCAL PRACTICE: ED Cal Requirements. The ED Cal has no specific local rule governing combining the motion and notice of motion.

26.17[2][c] LOCAL PRACTICE: ND Cal Requirements. In one filed document not exceeding 25 pages, the motion must contain notice of the motion, including the date and time of the hearing. This must appear in the first paragraph [*ND Cal Civ LR 7-2(b)(2)*].

Warning:

Rule-bending motion practice is unacceptable. Do not attempt to evade the 25-page limit by filing multiple "motions" that could have been combined into one. For example, within one day of each other, a counterdefendant filed three separate "motions" challenging different causes of action in the same counterclaim. The three motions totaled 58 pages. Although the court declined to impose sanctions, the counterdefendant was cautioned not to engage in that practice again [*Burger v. Kuimelis (ND Cal 2004)*

325 F Supp2d 1026, 1030-1031].

26.17[2][d] LOCAL PRACTICE: SD Cal Requirements. Each motion or other request for ruling by the court must be accompanied by a separate motion and notice of motion, along with another separate document captioned "Memorandum of Points and Authorities in support of [the motion]." In addition, when appropriate, a separate statement of material facts must be supplied [*SD Cal Civ LR 7.1(f.1)*].

Strategic Point:

In the Southern District, the customary way to do this is to group the motion and notice of motion together in one document that is separate from other documents (e.g., points and authorities, exhibits).

Legal Topics:

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26.18 Formatting Motion Papers.

26.18[1] Motion Papers Must Be Properly Formatted. Motion papers must be formatted in the same manner as pleadings. A motion paper must contain a caption setting forth [*Fed R Civ P 7(b)(2)*, *10(a)*]:

- Name of the court.
- Title of the action.
- Docket number.
- Designation as to nature of the motion.

A heading is also required, setting forth the name of the attorney, bar number, office address, telephone number and fax, and the party being represented [*CD Cal Civ LR 11-3.8(a)*; *ED Cal Gen LR 131(a)*; *ND Cal Civ LR 3-4(a)(1)*; *SD Cal Civ LR 5.1(j.1)*].

Warning:

Consult local rules, as each district may have additional requirements, as to formatting motions and supporting papers [*see, e.g., CD Cal Civ LR 11-3*; *ED Cal Gen LR 130*, *131*; *ND Cal Civ LR 3-4*, *7-2*; *SD Cal Civ LR 5.1*, *7.1*]. For example, the Central and Northern Districts also require the attorney's e-mail address [*CD Cal Civ LR 11-3.8(a)*; *ND Cal Civ LR 3-4(a)(1)*]. The Central District requires the bar number and jurisdiction where the attorney is admitted to practice, when the attorney is a registered legal service attorney appearing pursuant to *CD Cal Civ LR 83-2.3.5* [*CD Cal Civ. LR 11-3.8(a)*].

Cross References:

Local rules on formatting motions and other papers, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.03 -5.14*. Forms, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.32 -5.43*.

26.18[2] Clerk May Not Reject Improperly Formatted Papers. The clerk may not refuse to file a motion solely because it is not presented in proper form as required by the Federal Rules or by any local rule or practice [*Fed R Civ P 5(d)(4), 83(a)(2), (b)*]. *Fed R Civ P 5(e)* mandates that the clerk accept such documents despite a technical violation [*McClellon v. Lone Star Gas Co. (5th Cir 1995) 66 F3d 98, 101* ; *Dielsi v. Falk (CD Cal 1996) 916 F Supp 985, 990*].

Judge's Perspective:

In spite of the dictates of Rule 5, courts may differ, based on local practice and local rules, on the format of papers they will accept for filing. Clerks generally are somewhat flexible as to the format of documents, but the clerk and the court nonetheless can be empowered to reject nonconforming motions [*see, e.g., CD Cal Civ LR 7-4*].

26.18[3] Motion Papers Must Contain Signature, Address, and Telephone Number. Written motions must be signed in accordance with Rule 11 [*Fed R Civ P 7(b)(3), 11*]. Under Rule 11, every written motion and other paper must be signed by at least one attorney of record in the attorney's individual name, or by the moving party personally if not represented by an attorney [*Giebelhaus v. Spindrift Yachts (9th Cir 1991) 938 F2d 962, 966*]. If applicable, the signature block must also state the signer's address, e-mail address, and telephone number [*Fed R Civ P 11(a)*].

The signature on a motion and other signed papers presented to the court certifies among other things, that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, that the document is not being presented for any improper purpose and that it has a basis in law and in fact [*Fed R Civ P 11(b)*].

Motion papers not properly signed will be stricken unless remedied as soon as called to the attention of counsel or the pro se litigant [*Fed R Civ P 11(a)*]. A violation of Rule 11 by the responsible attorney or party is sanctionable [*Fed R Civ P 11(c)*].

A district court, by local rule, may permit or require pleadings, motions, and other papers to be filed, signed, or verified by electronic means [*Fed R Civ P 5(d)(3)*].

Warning:

Consult local rules, as each district may have additional requirements, as to signatures and signature blocks [*see, e.g., CD Cal Civ LR 11-1, 83-2.5.2*; *ED Cal Gen LR 131*; *ND Cal Civ LR 3-4*; *SD Cal Civ LR 5.1(j)*]. Consult local rules regarding electronic or facsimile signatures [*see, e.g., CD Cal Civ LR 11-2*; *ED Cal Gen LR 131*; *ND Cal Civ LR 5-4*; ND Cal Gen Order 45; *SD Cal Civ LR 5.3(d)*; SD Cal Electronic Case Filing Admin Policies & Procedures Manual 2(f)].

Cross References:

Local rules on signatures and signature blocks, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.10*. Signature block forms, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.33*. Discussion of Rule 11 sanctions, see Ch. 33, Rule 11 Sanctions.

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26.19 Motion Must Be Accompanied by Supporting Papers.

26.19[1] Federal Rules Do Not Specify Papers Required in Support of Motion. The Federal Rules require notice of the hearing on the motion to be provided to all parties [*see Fed R Civ P 5(a)*], but otherwise do not specify the papers required in support of a motion. Consult local rules for the papers required to be submitted in support of a motion or opposition to a motion [*see 26.19[3]*].

In general, a party's moving papers must consist of the following:

- Notice of motion [*see 26.16*].
- Memorandum of law [*see 26.20*]
- Supporting affidavits or affidavit substitutes [*see 26.21*].
- Supporting evidence attached to the moving papers as exhibits [*see 26.22*].

26.19[2] Notice of Motion Should List Supporting Papers. The notice of motion should list the papers that are submitted in support of the motion. The list should include the title and date of the supporting papers.

Cross Reference:

Form, see *26.56*.

26.19[3] LOCAL PRACTICE: Papers Required in Support of Motion.

26.19[3][a] LOCAL PRACTICE: CD Cal Requirements. The notice of motion must be served and filed with a brief but complete memorandum in support of the motion and the points and authorities on which the moving party will rely, along with the evidence on which the moving party will rely in support of the motion [*CD Cal Civ LR 7-5*].

Warning:

The court may decline to consider any memorandum or any other paper not filed within the deadline set by order or local rule. Failure to file any paper required in support of a motion, or failure to file it within the deadline, may be deemed consent to the denial of the motion [*CD Cal Civ LR 7-12*].

26.19[3][b] LOCAL PRACTICE: ED Cal Requirements. The moving party must file with the clerk a notice of motion, motion, accompanying briefs, affidavits, if appropriate, and copies of all documentary evidence that the moving party intends to submit in support of the motion [*ED Cal Civ LR 230(b)*].

Warning:

Motions defectively noticed will not be set for hearing. On the filing of a defectively noticed motion, the clerk will immediately notify the moving party of the defective notice and of the next available dates and times for proper notice. The moving party must then file and serve a new notice of motion setting forth a proper time and date [*ED Cal Civ LR 230(b)*].

26.19[3][c] LOCAL PRACTICE: ND Cal Requirements. Except as otherwise ordered or permitted by the assigned judge or the local rules, and except for motions made during the course of a trial or hearing, all motions must be filed, served, and noticed in writing on the motion calendar of the assigned judge for hearing not less than 35 days after service of the motion [*ND Cal Civ LR 7-2(a)*].

Each motion must be accompanied by affidavits or declarations pursuant to *ND Cal Civ LR 7-5* [*ND Cal Civ LR 7-2(d)*].

Note that Northern District rules require supporting points and authorities to be included in the same document as the notice of motion and motion [*ND Cal Civ LR 7-2(b)*, *7-4*].

26.19[3][d] LOCAL PRACTICE: SD Cal Requirements. Each motion or other request for ruling by the court must be accompanied by a separate motion and notice of motion and another separate document captioned "Memorandum of Points and Authorities in support of [the motion]." Where appropriate, a separate statement of material facts must be supplied [*SD Cal Civ LR 7.1(f.1)*].

In addition to the affidavits required or permitted by *Fed R Civ P 6(d)* and *56*, copies of all documentary evidence that the movant intends to submit in support of the motion, or other request for ruling by the court, must be served and filed with the notice of motion [*SD Cal Civ LR 7.1(f.2.a)*].

Warning:

A movant's failure to file papers required under the local rules may be deemed as a waiver of the motion [*SD Cal Civ LR 7.1(f.2.b)*].

Legal Topics:

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26.20 Preparing Memorandum of Law.

26.20[1] Purpose of Memorandum of Law. The Federal Rules do not require the filing of a memorandum of law, but local rules generally do. A memorandum of law would generally include:

- Statement of the issues presented.
- Statement of the facts.
- Legal argument applying controlling law to facts.
- Table of contents and table of authorities.

26.20[2] LOCAL PRACTICE: Memorandum of Law.

26.20[2][a] LOCAL PRACTICE: CD Cal Requirements. The notice of motion must be served and filed with a brief but complete memorandum in support and the points and authorities on which the moving party may rely, along with the evidence on which the moving party will rely in support of the motion [*CD Cal Civ LR 7-5*].

26.20[2][b] LOCAL PRACTICE: ED Cal Requirements. The moving party must file with the clerk a notice of motion, motion, accompanying briefs, affidavits, if appropriate, and copies of all documentary evidence that the moving party intends to submit in support of the motion [*ED Cal Civ LR 230(b)*].

26.20[2][c] LOCAL PRACTICE: ND Cal Requirements. In one filed document not exceeding 25 pages, a motion must contain, directly following the notice of motion and a concise statement of what relief or court action the movant seeks, the points and authorities in support of the motion in compliance with *ND Cal Civ LR 7-4(a)* [*ND Cal Civ LR 7-2(b)*].

In addition to complying with the applicable provisions of *ND Cal Civ LR 3-4(a)*, a brief or memorandum of points and authorities filed in support, opposition, or reply to a motion must contain [*ND Cal Civ LR 7-4*]:

- On the first page of the space opposite the caption and below the case number, the noticed hearing date and time;
- If in excess of 10 pages, a table of contents and a table of authorities;
- A statement of the issues to be decided;
- A succinct statement of the relevant facts; and
- Argument by the party, citing pertinent authorities.

26.20[2][d] LOCAL PRACTICE: SD Cal Requirements. Each motion of other request for ruling by the court must be accompanied by a separate motion and notice of motion and another separate document captioned "Memorandum of Points and Authorities in support of [the motion]." When appropriate, a separate statement of material facts must be supplied [*SD Cal Civ LR 7.1(f.1)*].

Cross Reference:

Submitting evidence in support of motion, see *§ 26.22*.

Legal Topics:

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26.21 Preparing Supporting Affidavits or Affidavit Substitutes.

26.21[1] Purpose of Supporting Affidavits. Affidavits in support of a motion should set forth the evidence demonstrating the need for the relief sought. Affidavits, together with a supporting memorandum of law, often serve as the sole basis for the court's ruling [*see Fed R Civ P 78*].

Supporting affidavits should address each of the factors for the relief sought, and should be as detailed as possible. Every affidavit should explain the basis for the affiant's knowledge, and should give sufficient personal information to make the affiant credible as a person. It is helpful to present the information to the court in the same fashion as if the affiant were testifying on the witness stand.

Warning:

It is important that affidavits be concise, as the papers may be read hurriedly. They should be well organized, with headings and indices that will assist the court in understanding the facts justifying the relief. All relevant documents should be submitted as exhibits and exhibit tabs should be used to assist the judge in reading the papers.

26.21[2] Affidavit Substitutes. In lieu of an affidavit, which must be sworn before a notary public or other person empowered to administer oaths, a motion may be supported by an unsworn declaration, certificate, verification, or statement, subscribed as true under penalty of perjury, and dated [*Park v. Oxford Univ. (ND Cal 1997) 35 F Supp2d 1165, 1166 , aff'd without opinion, 165 F3d 917 (9th Cir 1998)*]. It should take substantially the following form [*28 USC § 1746*]:

- If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ [*date*]. _____ [*signature*]."

- If executed outside the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on

_____ [*date*]. _____ [*signature*]."

26.21[3] Affidavits May Not Be Served Separately From Motion. If a motion is supported by affidavits or affidavit substitutes, the affidavits or substitutes must be served together with the motion [*Fed R Civ P 6(c)(2)*].

26.21[4] Affidavit Requirements. Affidavits must [*see, e.g., Fed R Civ P 56(e)(1)*]:

- Be made on personal knowledge.
- Set forth facts admissible in evidence.
- Show that the affiant is competent to testify to the matters stated in the affidavit.

26.21[5] LOCAL PRACTICE: Affidavits or Affidavit Substitutes.

26.21[5][a] LOCAL PRACTICE: CD Cal Requirements. Declarations must contain only factual, evidentiary matter and must conform as far as possible to the requirements of *Fed R Civ P 56(e)* [*CD Cal Civ LR 7-7*].

Cross Reference:

Rule 56(e) requirements, see Ch. 29, Summary Judgment, see *§ 29.11[3]*.

Factual contentions involved in any motion and opposition to motions must be presented, heard, and determined on declarations and other written evidence (including documents, photographs, deposition excerpt, etc.) alone, except that the court may, in its discretion, require or allow oral examination of any declarant or any other witness [*CD Cal Civ LR 7-6*].

On motions and for orders to show cause re preliminary injunctions, motions to be relieved from default and other motions where an issue of fact is to be determined (e.g., civil contempt, but excluding motions contesting venue and personal jurisdiction), not later than 14 days prior to the hearing, a party desiring to cross-examine any declarant who is not beyond the subpoena power of the court and who is reasonably available to the party offering the declaration may serve by hand (or facsimile) and file a notice of request to cross-examine the declarant. If the party offering the declaration disputes that the declarant is within the subpoena power of the court and reasonably available to the offering party, such party must serve and file an objection to the notice of request to cross-examine not later than 11 days prior to the hearing. The offering party will be under no obligation to produce the declaration unless the court has granted the request to cross-examine by written order not later than three days prior to the hearing. No declaration of a declarant with respect to whom such a request has been granted will be considered unless such declarant is personally present and available at the hearing for such cross-examination as the court may permit. The court may, in the alternative, order that the cross-examination be done by deposition taken on two days' notice with the transcript being lodged five days prior to the hearing. The court may impose sanctions pursuant to the local rules against any party or counsel who requests the presence of any declarant without a good-faith intention to cross-examine the declarant [*CD Cal Civ LR 7-8*].

26.21[5][b] LOCAL PRACTICE: ED Cal Requirements. An affidavit includes a declaration prepared in accordance with federal law [*ED Cal Gen LR 101*; *see 28 USC § 1746*].

An affidavit submitted in support of any motion must [*ED Cal Gen LR 142(a)*]:

- Identify the affiant, the party or parties on whose behalf it is submitted, and the motion to which it pertains [*see ED Cal Gen LR 133(h)*];
- Be served on all other parties and filed with the motion, opposition, or reply to which it relates, unless accompanied by an affidavit of counsel purporting to show good cause for the separate filing of it;

and

- Identify and attach documents and exhibits offered in support of or in opposition to the motion, unless such documents and exhibits are already in the record and specifically referred to in the motion or opposition.

When deposition testimony is referenced in or appended to an affidavit, the party filing the affidavit must ensure that a courtesy hard copy of the original of the entire deposition has been submitted to the clerk for use in chambers. Alternatively, counsel may submit an electronic copy of the deposition in lieu of the courtesy paper copy to the e-mail box of the judge or magistrate judge and concurrently e-mail or otherwise transmit the deposition to all other parties [*ED Cal Gen LR 133(j)*, *142(b)*].

Factual contentions involved in pretrial motions must be initially presented and heard on affidavits, except that the court may in its discretion require or allow oral examinations of witnesses [*ED Cal Civ LR 230(h)*; *see ED Cal Gen LR 142*].

Unless otherwise permitted or required by local rule, an affidavit filed by an attorney must be submitted in electronic format [*ED Cal Gen LR 138(c)(1)*].

26.21[5][c] LOCAL PRACTICE: ND Cal Requirements. Factual contentions made in support of or in opposition to any motion must be supported by an affidavit or declaration and by appropriate references to the record. Extracts from depositions, interrogatory answers, requests for admission, and other evidentiary matters must be appropriately authenticated by an affidavit or declaration [*ND Cal Civ LR 7-5(a)*].

An affidavit or declaration may contain only facts, must conform as much as possible to the requirements of *Fed R Civ P 56(e)*, and must avoid conclusions and argument. Any statement made on information or belief must specify the basis of the statement. An affidavit or declaration not in compliance with the local rule may be stricken in whole or in part [*ND Cal Civ LR 7-5(b)*].

26.21[5][d] LOCAL PRACTICE: SD Cal Requirements. In addition to the affidavits required or permitted by *Fed R Civ P 6(c)* and *56*, copies of all documentary evidence which the movant intends to submit in support of the motion, or other request for ruling by the court, must be served and filed with the notice of motion [*SD Cal Civ LR 7.1(f.2.a)*].

Cross References:

Form of declaration, see *§ 26.57*.

Affidavit in support of or in opposition to motion, see 1 *Bender's Federal Practice Forms, Form 7:200* (Matthew Bender).

Legal Topics:

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26.22 Submitting Evidence in Support of Motion.

Documents, such as deposition transcripts, responses to written discovery, transcripts from other proceedings, stipulations, and other documentary evidence such as photographs may be submitted in support of a motion if they are authenticated by an affidavit or affidavit substitute of an individual having first-hand knowledge of the documents [*see, e.g., CD Cal Civ LR 7-6*]. The documents should be attached as an exhibit to the authenticated affidavit or affidavit substitute, and should be clearly labeled with an exhibit tab.

Facts established by supporting affidavits and documents may be supplemented with judicially noticed facts [*see Banco de Espana v. Federal Reserve Bank (SDNY 1939) 28 F Supp 958, 973 , aff'd, 114 F2d 438 (2d Cir 1940)*].

Cross References:

Discussion of affidavits, see *§ 26.21*. Formatting exhibits, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.23 Timing of Notice, Service, and Filing.

26.23[1] Minimum Five-Day Notice Requirement Under Federal Rules Has Important Exceptions. Under the Federal Rules of Civil Procedure, a written motion and notice of the hearing of the motion generally must be served at least 14 days before the hearing date [*Fed R Civ P 6(c)(1)*].

Warning:

Although you should be familiar with the notice period required by the Federal Rules for your specific motion, local court rules typically require a longer notice period than the Federal Rules, and are the source of the timing [*compare, e.g., Fed R Civ P 6(c)(1)* (14 days) *with CD Cal Civ LR 6-1* (28 days)]. District courts enforce the local rules as to timing requirements, not the federal rules. The importance of reviewing the local court rules in this area cannot be overstated.

Exception--Rule Providing Different Notice Period:

The 14-day notice period does not apply when another Federal Rule of Civil Procedure provides the applicable time period [*Fed R Civ P 6(c)(1)(B)*]. Examples include:

- Two days' notice, or shorter notice as the court may prescribe, may be given to the adverse party by a party attempting to dissolve a temporary restraining order that had been granted without notice to the moving party [*Fed R Civ P 65(b)*].

- A motion to obtain a default judgment against a party who has appeared in the action must be served on the opposing party at least seven days prior to the hearing on the motion [*Fed R Civ P 55(b)(2)*].

- A motion to compel discovery must be made on "reasonable notice" to other parties and all persons affected by the motion [*Fed R Civ P 37(a)*].

- A motion to serve supplemental pleadings must be made on "reasonable notice" and "just terms" [

Fed R Civ P 15(d)].

Exception--Court Order Providing Different Notice Period:

The 14-day period does not apply when a court order sets a different time [*Fed R Civ P 6(c)(1)(C)*].

Strategic Point:

A party may, for good cause, apply ex parte for a court order providing a different time period [*Fed R Civ P 6(c)(1)(C)*].

Exception-Local Rules Providing Different Notice Period:

Local rules generally extend the notice required for motions beyond the five days provided in Rule 6(c) [*see 26.23[2]*].

Warning:

Be sure to check local rules and individual judge's rules to ascertain the timing requirements for filing and service of motions. These requirements can vary from district to district, and from judge to judge. Also, note that computation of the notice period must take into account the Federal Rules' day-counting provisions [*see 26.23[3]*].

Cross References:

For discussion of the uncertainty stemming from the elimination of the minimum notice requirement in Rule 56(c), see 11 *Moore's Federal Practice, § 56.10[2][c] -[e]* (Matthew Bender 3d ed.).

26.23[2] LOCAL PRACTICE: Timing Rules for Noticed Motions.

26.23[2][a] LOCAL PRACTICE: CD Cal Requirements. The notice of motion must be filed with the Clerk not later than 28 days before the date set for hearing, and must be served on each of the parties electronically or, if excepted from electronic filing, either by deposit in the mail or by personal service [*CD Cal Civ LR 6-1*].

If mailed, the notice of motion must be served not later than 31 days before the Motion Day designated in the notice [*CD Cal Civ LR 6-1*].

If served personally, or electronically, the notice of motion must be served not later than 28 days before the Motion Day designated in the notice. The Court may order a shorter time [*CD Cal Civ LR 6-1*].

The clerk will place the motion on the Motion Day calendar for hearing on the day for which the motion is noticed [*CD Cal Civ LR 6-1*].

Each Monday, commencing at 10:00 a.m. is a "Motion Day" on which motions will be heard unless set for another day or hour by order of the Court. If Monday is a national holiday, any motion noticed for that day will be considered noticed for the next succeeding motion calendar of the judge before whom the motion is calendared without special order or further notice [*CD Cal Civ LR 78-1*].

Warning:

Practitioners forget that, in the Central District, while service by hand must be accomplished 21 days before the hearing date, filing is permitted 20 days before the hearing date. The usual practice is to serve and file motions on the same day, but keep in mind that it is not absolutely necessary to do so.

26.23[2][b] LOCAL PRACTICE: ED Cal Requirements. A matter must be set for hearing on the motion calendar of the judge or magistrate judge to whom the action has been assigned or before whom the action has been assigned or before whom the motion is to be heard not less than 28 days after service and filing of the motion [*ED Cal Civ LR 230(b)*].

Motions defectively noticed will be filed, but not set for hearing. The clerk will immediately notify the moving party of the defective notice and of the next available dates and times for proper notice, and the moving party must file and serve a new notice of motion setting forth a proper time and date [*ED Cal Civ LR 230(b)*].

26.23[2][c] LOCAL PRACTICE: ND Cal Requirements. Except as otherwise ordered or permitted by the assigned judge or the local rules, all motions must be filed, served, and noticed in writing on the motion calendar of the assigned judge for hearing not less than 35 days after service of the motion [*ND Cal Civ LR 7-2(a)*].

26.23[2][d] LOCAL PRACTICE: SD Cal Requirements. When there has been an adverse appearance, a written notice of matter requiring the court's ruling will be necessary, unless otherwise provided by rule or court order. All hearing dates for any motion must be obtained by the law clerk of the judge to whom the case is assigned [*SD Cal Civ LR 7.1(e.1)*].

Unless the court shortens time and except as otherwise specified in *SD Cal Civ LR 7.1(e.6)* (Social Security cases), any notice of motion, application, or notice of other matter requiring the court's ruling, plus all necessary supporting documents, will require a minimum filing date of 28 days before the date for which the matter is noticed [*SD Cal Civ LR 7.1(e.1)*].

Example:

The notice of motion and supporting documents for a motion to be heard on a Monday must be filed and served no later than the fourth Monday prior to the Monday hearing [*SD Cal Civ LR 7.1(e.1)*]. If the fourth Monday before the hearing is a holiday, however, the notice of motion and supporting documents would be due five Fridays before the hearing [*SD Cal Civ LR 7.1(e.1)*].

26.23[3] Day-Counting Rules for Computing Advance Notice Period.

26.23[3][a] Notice Period Must First Be Ascertained From Rules. Calculating the advance notice period for a noticed motion requires:

- Determining the advance notice period applicable to the specific motion by reference to the applicable federal rules, local district court rules, and individual judge's rules [*see 26.23[1], [2]*]; and

- Applying Rule 6's rules for computation of notice periods, discussed below.

26.23[3][b] Day on Which Moving Papers Served Is Not Included. In computing the advance notice requirements for motions, the day on which the moving papers are served should not be included toward the minimum advance notice requirement [*Fed R Civ P 6(a)(1)(A)*]. In computing the advance notice requirements for motions, the last day of the notice period is included, unless the last day is a Saturday, Sunday or legal holiday [*Fed R Civ P 6(a)(1)(C)*].

26.23[3][c] Notice Period Extended If Last Day Is on Weekend or Legal Holiday. If the last day of the notice period falls on a Saturday, Sunday, or legal holiday, the notice period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday [*Fed R Civ P 6(a)(1)(C)*]. Legal holidays include New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress, or by the state in which the district court is held [*Fed R Civ P 6(a)(6)*; *see CCP § 135* (judicial holidays);

Gov Code § 6700 (state holidays); *see also Dwyer v. Duffy (9th Cir 2005) 426 F3d 1041, 1044* (day after Thanksgiving is legal holiday under *Fed R Bankr P 9006*, which is modeled on *Fed R Civ P 6*)]. The "last day," for electronic filing means midnight at the court's time zone [*Fed R Civ P 6(a)(4)(A)*]. The "last day" for filing by other means is when the clerk's office is scheduled to close [*Fed R Civ P 6(a)(4)(B)*]. The "next day" is determined by continuing to count forward after the "event" (in this case, service of the complaint, or after the request for waiver was sent [*see Fed R Civ P 6(a)(5)*].

26.23[3][d] Three-Day Extension If Service by Specified Method. If service is made by any of the following methods, the time to respond is extended by three days [*Fed R Civ P 6(d)*]:

- Service by mail.
- Service to the clerk of the court based on no known address.
- Electronic or other means of service consented to in writing under Rule 5(b)(2) (E), or (F).

The three additional days are calendar days, and not business days [*see, e.g.*, I *UE AFL-CIO Pension Fund v. Herrmann (2d Cir 1993) 9 F3d 1049, 1054* , *cert. denied, 513 US 822 (1994)*].

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26.24 Moving Party Must Review Court's Requirements for Setting Motion on Calendar.

Individual judges' rules generally govern the procedure for placing the motion on the judge's calendar. Some judges may hear motions on the same day and time once each week, and do not require permission before serving and filing the motion. Other judges may require the moving party to telephone chambers to schedule the motion.

Consider:

If it is important to have the motion heard on a particular date, call the judge's courtroom deputy to make sure the courtroom is not dark on that date (e.g., because of the judge's planned vacation).

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26.25 LOCAL PRACTICE: Continuing the Hearing of a Motion.

26.25[1] LOCAL PRACTICE: CD Cal Requirements. Unless an order for continuance specifies otherwise, the entry of an order continuing the hearing of a motion automatically extends the time for filing and serving opposing papers and reply papers to 21 and 14 days, respectively, preceding the new hearing date. A stipulation to continue must provide the date the opposition and reply papers are due to be filed with the court [*CD Cal Civ LR 7-11*].

Cross References:

Requirements for stipulations in Central District, see *§ 26.09[2][a]*. Motion for extension of time, see *§ 26.35*.

26.25[2] LOCAL PRACTICE: ED Cal Requirements. All applications to the court for extensions of time must set forth the total period of extensions already obtained by the parties as to the particular matters for which the extension is sought [*ED Cal Gen LR 144(b)*].

The court may, in its discretion, grant an initial extension ex parte on the affidavit of counsel that a stipulation extending time cannot reasonably be obtained, explaining the reasons why the stipulation cannot be obtained and the reasons why the extension is necessary. Except for one initial extension, ex parte applications for extension of time will not ordinarily be granted [*ED Cal Gen LR 144(c)*].

Counsel must seek to obtain a necessary extension from the court or from other counsel or parties in the action as soon as the need for an extension becomes apparent [*ED Cal Gen LR 144(d)*].

Cross Reference:

Motion for extension of time, see *§ 26.35*.

26.25[3] LOCAL PRACTICE: ND Cal Requirements. Counsel are responsible for being informed of the hearing date on a motion [*ND Cal Civ LR 7-7(c)*].

Except for cases in which the court has issued a temporary restraining order, a party who has filed a motion may file a notice continuing the originally noticed hearing date for that motion to a later date if [*ND Cal Civ LR 7-7(a)*]:

- No opposition has been filed; and
- The notice of continuance is filed prior to the date on which the opposition is due pursuant to *ND Cal Civ LR 7-3(a)*.

After an opposition to a motion has been filed, the noticed hearing date may be continued to a subsequent date as follows [*ND Cal Civ LR 7-7(b)*]:

- When the parties affected by the motion have not previously stipulated to continue the hearing date, unless the hearing date has been specially set by the judge, the parties affected by the motion may stipulate in writing pursuant to *ND Cal Civ LR 6-1(a)* to continue the hearing date; or
- On the assigned judge's order:
  - On the court's own motion; or
  - To permit a party time to respond to summary judgment papers [*see ND Cal Civ LR 7-7(b)(2)(B)* (referencing former version of *Fed R Civ P 56* and *ND Cal Civ LR 56-1*)].

Unless the order for continuance specifies otherwise, the entry of an order continuing the hearing of a motion automatically extends the time for filing and serving opposing papers or reply papers to 21 and 14 days, respectively, preceding the new hearing date, unless the date for filing the papers has already passed prior to the date of the order for continuance [*ND Cal Civ LR 7-7(d)*].

Cross References:

Motion for extension of time, see *§ 26.35*.

26.25[4] LOCAL PRACTICE: SD Cal Requirements. Any request for continuance of a noticed matter must be made as soon as possible to the judge to whom the matter is assigned. Prior to seeking the continuance, the party must contact all opposing parties or their counsel to determine whether they would agree to the continuance [*SD Cal Civ LR 7.1(g.2)*].

Cross Reference:

Motion for extension of time, see *§ 26.35*.

Legal Topics:

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26.26 Shortening Notice Period.

26.26[1] Federal Rule Allows Court to Shorten Advance Notice Otherwise Required. The court may shorten the advance notice otherwise required for a motion. Such an order may be made on ex parte application, on a showing of good cause [*Fed R Civ P 6(c)(1)(C)*]. If the parties can reach an agreement on shortening the notice period, parties may shorten the notice period by stipulation.

Cross References:

Stipulations, see *§§ 26.08*, *26.09*. Ex parte relief, see *§§ 26.10*, *26.11*. Timing of notice, serving, and filing, see *§ 26.23*. Form, see *§ 26.59*.

26.26[2] Consider Pre-Motion Conference When Prompt or Immediate Court Intervention Is Necessary. If prompt or immediate court intervention is necessary by reason of a discovery or other procedural dispute, counsel should consider the pre-motion conference as a substitute for the motion itself. Counsel writes a letter to the court, requesting an immediate pre-motion conference, setting forth the relief needed, and the arguments and facts in support. Because the request is for a conference to be held as soon as possible, the letter induces the opposing counsel to promptly respond with the facts and arguments in opposition. Some judges prefer a request for a telephone conference. In these cases, the request can be done over the telephone, such as in the middle of a deposition.

Warning:

The court's willingness to participate in any variety of informal procedures, such as telephone conferences, should be ascertained in advance of such issues arising. For example, in the Central District, unless the judge's local rules permit such action or unless the judge has invited it in comments to counsel from the bench, do not attempt to schedule an informal conference except in emergency circumstances and only if all parties' counsel consent.

26.26[3] LOCAL PRACTICE: Shortening Notice Period.

26.26[3][a] LOCAL PRACTICE: CD Cal Requirements. Any written stipulation affecting the progress of the

case [*CD Cal Civ LR 7-1*]:

- Must be filed with the court;
- Must be accompanied by a separate order as provided in CD Cal Civ LR 52-4.1; and
- Will not be effective until approved by the judge, except as authorized by statute or the Federal Rules of Civil Procedure.

26.26[3][b] LOCAL PRACTICE: ED Cal Requirements. Key provisions of the Eastern District Rules include the following:

Counsel's affidavit required. Applications to shorten time must set forth, by counsel's affidavit, the circumstances claimed to justify the issuance of an order shortening time [*ED Cal Gen LR 144(e)*].

Ex parte applications require additional showing. Ex parte applications to shorten time will not be granted except on counsel's affidavit showing a satisfactory explanation for the need for the issuance of such an order and for the failure of counsel to obtain a stipulation for the issuance of such an order from other counsel or parties in the action [*ED Cal Gen LR 144(e)*].

Stipulations require judicial approval. Stipulations for the issuance of an order shortening time require the approval of the judge or magistrate judge on whose calendar the matter is to be heard before such stipulations will be given effect [*ED Cal Gen LR 144(e)*].

Include blanks in order. Any proposed order shortening time must include blanks for the court to designate a time and date for the hearing and for the filing of any response to the motion [*ED Cal Gen LR 144(e)*].

26.26[3][c] LOCAL PRACTICE: ND Cal Requirements. Key provisions of the Northern District Rules include the following:

When stipulation is permissible without court order. Parties may stipulate in writing, without a court order, to extend the time within which to answer or otherwise respond to the complaint, or to enlarge or shorten the time in matters not required to be filed or lodged with the court, provided the change will not alter the date of any event or any deadline already fixed by court order. The stipulation must be promptly filed pursuant to *ND Cal Civ LR 5-1 et seq*. [*ND Cal Civ LR 6-1(a)*].

When court order is required to change time. A court order is required for any enlargement or shortening of time that alters an event or deadline already fixed by court order or that involves papers required to be filed or lodged with the court (other than an initial response to the complaint). A request for a court order enlarging or shortening time may be made by written stipulation pursuant to *ND Cal Civ LR 6-2* or by motion pursuant to *ND Cal Civ LR 6-3*.

Timing:

Any stipulated request or motion that affects a hearing or proceeding on the court's calendar must be filed no later than 14 days before the scheduled event [*ND Cal Civ LR 6-1(b)*].

Format and content of stipulated request for changing time. The parties may file a stipulation, conforming to *ND Cal Civ LR 7-12*, requesting an order changing time that would affect the date of an event or deadline already fixed by court order, or that would accelerate or extend time frames set in the local rules or in the Federal Rules. The stipulated request must be accompanied by a declaration that [*ND Cal Civ LR 6-2(a)*]:

- Sets forth with particularity, the reasons for the requested enlargement or shortening of time;
- Discloses all previous time modifications in the case, whether by stipulation or court order; and
- Describes the effect the requested time modification would have on the schedule for the case.

Action by court on stipulated request. After receiving a stipulated request under *ND Cal Civ LR 6-2*, the judge may grant, deny, or modify the requested time change [*ND Cal Civ LR 6-2(b)*].

26.26[3][d] LOCAL PRACTICE: SD Cal Requirements. All applications for orders shortening time under the local rules must be submitted ex parte, be accompanied by a proposed order, and be served on all opposing parties [*SD Cal Civ LR 7.1(e.5)*].

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26.27 All Parties Except Defaulting Parties Must Be Served With Motion Papers.

All written motions, except for those to be heard ex parte, must be served on all parties to the action [*Fed R Civ P 5(a)*; *Lehman v. Kornblau (EDNY 2001) 206 FRD 345, 346-347* , *aff'd, 2003 US App LEXIS 9809 (2d Cir 2003)* , *cert. denied, 540 US 1219 (2004)* (rule does not apply to nonparties)]. Parties in default for failing to appear need not be served with motion papers [*Fed R Civ P 5(a)(2)*].

Supporting or opposing papers must be served with the written motions and must be served on each party [*Fed R Civ P 5*].

Warning:

It is imperative to consult local rules, because each district has additional requirements as to serving motions on parties [*see, e.g., CD Cal Civ LR 5-3*, *5-4*, *6-1*; *ED Cal Gen LR 135*; *ED Cal Civ LR 230*; *ND Cal Civ LR 7-1 et seq.*; *SD Cal Civ LR 5.1-7.1*].

Cross Reference:

Detailed discussion of local rules on service of papers, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.15 -5.23*.

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26.28 Serving Motion Papers on Attorney of Represented Party.

Service of motion papers must be made on the attorney of a represented party, unless direct service on the party is ordered by the court [*Fed R Civ P 5(b)(1)*]. Service must be made directly on all parties not represented by counsel [*Fed R Civ P 5(b)*; *McKinney v. Waterman S.S. Corp. (1st Cir 1991) 925 F2d 1, 5* ; *cf. Irwin v. Department of Veterans Affairs (1990) 498 US 89, 93, 111 S Ct 453, 112 L Ed2d 435* (no material difference between service received by attorney or by attorney's office)].

Warning:

Consult local rules, as each district may have additional requirements, as to serving motion papers [*see, e.g., CD Cal Civ LR 5-3-5-4*, *6-1*; *ED Cal Gen LR 135*, *ED Cal Civ LR 230*; *ND Cal Civ LR 7-1 et seq.*; *SD Cal Civ LR 5.1-7.1*].

Cross Reference:

Local rules on serving written motions, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.18*.

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26.29 Manner of Serving Motion Papers.

Service of motion papers is made by any of the following methods [*Fed R Civ P 5(b)(2)*]:

- Hand delivering a copy to the person being served [*Fed R Civ P 5(b)(2)(A)*].
- Leaving a copy at the person's office:
  - With a clerk or other person in charge, or if there is no one in charge, leaving a copy in a conspicuous place in the office [*Fed R Civ P 5(b)(2)(B)(i)*].
  - If the office is closed or there is no office, leaving a copy at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there [*Fed R Civ P 5(b)(2)(B)(ii)*].
- Mailing a copy to the last known address of the person served [*Fed R Civ P 5(b)(2)(C)*].
- Leaving a copy with the clerk of the court if the person served has no known address [*Fed R Civ P 5(b)(2)(D)*].
- Delivering a copy electronically, if consented to in writing by the person being served [*Fed R Civ P 5(b)(2)(E)*].
- Delivering a copy by any other means consented to in writing by the person being served [*Fed R Civ P 5(b)(2)(F)*].
- Delivering a copy through the court's transmission service with written consent of the person being served, and pursuant to local rule authorizing such service [*Fed R Civ P 5(b)(3)*].

Service by mail is complete on mailing [*Fed R Civ P 5(b)(2)(C)*]. Service by electronic means is complete on

transmission [*Fed R Civ P 5(b)(2)(E)*], and service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery [*Fed R Civ P 5(b)(2)(F)*]. Service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served [*Fed R Civ P 5(b)(2)(E)*].

If service is made by any of the following methods, the time to respond is extended by three days [*Fed R Civ P 6(d)*]:

- Service by mail.
- Service to the clerk of the court based on no known address.
- Electronic or other means of service consented to in writing under Rule *59(b)(2)(E)* or *(F)*.

Warning:

Consult local rules, as each district may have additional requirements, as to the manner of serving motion papers and deadlines [*see, e.g., CD Cal Civ LR 5-3*, *5-4*, *6-1*, *7-4*; *ED Cal Gen LR 135*; *ND Cal Civ LR 5-5*; *SD Cal Civ LR 5.2*, *7.1*].

Cross Reference:

Local rules on permissible methods of service of papers, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.15 -5.23*.

Legal Topics:

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26.30 Proof of Service Required.

Motions and all papers following the complaint (except for discovery and mandatory disclosure papers) that are required to be served must be filed with the court with a certificate of service. The certificate of service must be filed within a reasonable time after service [*Fed R Civ P 5(d)(1)*]. Though the Federal Rules do not provide specific requirements for the certificate of service, at a minimum the certificate should contain the following [*Fed R Civ P 5(d)*]:

- Date of service [*Bowers v. E.J. Rose Mfg. Co (9th Cir 1945) 149 F2d 612, 614 , cert. denied sub nom. Fischer v. Bowers, 326 US 753 (1945)*];
- Manner of service; and
- Certificate by the serving party that service of the pleading or paper was made.

Warning:

Consult local rules, as each district may have additional requirements, as to proof of service [*see, e.g., CD Cal Civ LR 5-3*, *5-4*, *6-1*; *ED Cal Gen LR 135*; *ND Cal Civ LR 5-6*; *SD Cal Civ LR 5.2*, *7.1*].

Cross References:

Local rules on proof of service, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.23*. Certificate of service forms used in the California federal districts, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.37*, *5.38*.

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26.31 Filing Complete When Motion Papers Timely Filed With Clerk.

Except for discovery and mandatory disclosure papers, all papers after the complaint that are required to be served on a party, must be filed with the court, along with a certificate of service, within a reasonable time after service [*Fed R Civ P 5(d)(1)*].

Warning:

Consult local rules, as each district typically specifies the deadline for filing motion papers [*see, e.g., CD Cal Civ LR 7-12*, *7-13*; *ND Cal Civ LR 7-2(a)*, *7-3(a)*; *SD Cal Civ LR 1.1(e.16)*, *7.1(e.1)*].

Cross References:

Local rules on filing motion papers with court, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.24 -5.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsGovernmentsCourtsClerks of CourtGovernmentsCourtsRule Application & Interpretation

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26.32 Filing Motions by Fax or Other Electronic Means.

Filing by facsimile or other electronic means may be allowed or required by local rule. The means of such filing must be consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with local rule constitutes a written paper [*Fed R Civ P 5(d)(3)*].

Example:

In the Northern District of California, "electronic filing" refers to the process of logging in to the court web site and completing a transaction which includes the uploading of the document comprising the filing to the court's system. Sending a document by email does not constitute an electronic filing [ND Cal Gen Order 45].

Warning:

Consult local rules, as each district typically specifies how electronic filing must be done, if allowed or required [*see, e.g., CD Cal Civ LR 5-4*; *ED Cal Gen LR 133*; *ND Cal Civ LR 5-4*; ND Cal Gen Order 45; *SD Cal Civ LR 5.3*; SD Cal Electronic Case Filing Admin Policies & Procedures Manual].

Cross References:

Electronic filing, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.29 -5.31*. Local rules on electronic signatures, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.31*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.32A LOCAL PRACTICE: Mandatory Electronic Filing in ED Cal.

In the Eastern District, electronic filing is mandatory for attorneys unless it is specifically excused by the court or by local rule [*ED Cal Gen LR 133(a)*]. In exceptional circumstances and for specific documents, an attorney may apply for permission to file paper documents [*ED Cal Gen LR 133(b)(1)*]. The application must be submitted as a stipulation [*see ED Cal Gen LR 143*], or if a stipulation cannot be obtained, as a written motion. Points and authorities are not required and no argument or hearing will normally be held. The application can also be made in scheduling conference and pretrial conference statements when the need is foreseen [*ED Cal Gen LR 133(b)(3)*]. The decision whether or not to permit paper filing is in the sole discretion of the assigned judge or magistrate judge [*ED Cal Gen LR 133(b)(1)*].

Distinguish:

Parties appearing in propria persona must file paper documents unless they have been given court permission to file electronically [*ED Cal Gen LR 133(a), (b)(2)*]. All paper filings by a party appearing in propria persona will be scanned by the clerk's office and the electronic record will become the official court record [*see ED Cal Gen LR 133(a), (b)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.32B LOCAL PRACTICE: Mandatory Electronic Filing in SD Cal.

In the Southern District, electronic filing is mandatory for attorneys unless otherwise expressly provided in the rules or as ordered by the court [SD Cal Electronic Case Filing Admin Policies & Procedures Manual (1)(b)]. An attorney may apply to the court for permission to file documents in paper form; good cause must be shown to file and serve using non-electronic filing [SD Cal Electronic Case Filing Admin Policies & Procedures Manual (1)(f)].

Distinguish:

Pro se litigants, unless otherwise authorized by the court, must file paper documents with the clerk's office which will scan and electronically file the documents. A pro se litigant may move for leave to electronically file documents [SD Cal Electronic Case Filing Admin Policies & Procedures Manual (2)(b)].

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26.33 Delivering Courtesy Copies to Assigned Judge.

26.33[1] Consult Individual Judges' Rules. Individual judges' rules must be consulted regarding courtesy copies. Some judges require courtesy copies, while others will not accept them. Counsel should want the court to have the opportunity to understand their positions at the earliest time, in advance of argument.

If the judge permits the delivery of courtesy copies, those copies should be filed with the clerk and contemporaneously delivered to chambers.

Warning:

Consult individual judges' rules, as each specifies requirements for courtesy copies, if allowed.

Cross Reference:

Importance of consulting individual judges' rules, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.24 -5.27*.

26.33[2] LOCAL PRACTICE: ED Cal Requirements. In the Eastern District, if an electronically filed document, excluding attachments or exhibits, exceeds 25 pages, counsel must provide a courtesy paper copy to chambers. A courtesy paper copy must also be provided for attachments or exhibits that total in excess of 50 pages. The courtesy paper copy must be prominently labeled as such in capital letters on its face sheet and must be mailed or otherwise sent to the appropriate courtroom deputy clerk no later than the next business day following the electronic filing [*see ED Cal Gen LR 133(f)*].

26.33[3] LOCAL PRACTICE: SD Cal Requirements. In the Southern District, if an electronically filed civil document exceeds 20 pages, including attachments and exhibits, counsel must provide a courtesy paper copy addressed to the attention of the assigned judicial officer. The next business day after the electronic filing, the courtesy copy must be either post-marked and mailed directly to the judge or hand-delivered to the clerk's office. A copy of the notice of electronic filing must precede the first page of the courtesy copy [SD Cal Electronic Case Filing Admin Policies & Procedures Manual (2)(e)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.34 LOCAL PRACTICE: Withdrawing Motion.

26.34[1] LOCAL PRACTICE: CD Cal Requirements. Any moving party who does not intend to press the motion or who intends to withdraw it before the hearing date must, not later than noon on the Tuesday preceding the hearing date, notify opposing counsel and the court clerk [*CD Cal Civ LR 7-16*].

26.34[2] LOCAL PRACTICE: ED Cal Requirements. The Eastern District has no local rule prescribing procedure for noticing the withdrawal of a motion.

26.34[3] LOCAL PRACTICE: ND Cal Requirements. Within 7 days after service of an opposition, the moving party may file and serve a notice of withdrawal of the motion. On the filing of a timely withdrawal, the motion will be taken off the calendar. Otherwise, the court may proceed to decide the motion [*ND Cal Civ LR 7-7(e)*].

26.34[4] LOCAL PRACTICE: SD Cal Requirements. Any movant who does not intend to proceed with a motion or other request for ruling by the court must notify opposing counsel and the judge before whom the matter is pending as soon as possible [*SD Cal Civ LR 7.1(g.1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.35 Making Motion for Enlargement of Time.

26.35[1] Seeking Additional Time to Act. A party may seek to enlarge time when additional time is needed for a specific act, beyond the period of time fixed by [*Fed R Civ P 6(b)*]:

- The Federal Rules of Civil Procedure.
- A notice given under the Federal Rules of Civil Procedure (e.g., a notice of motion).
- A court order.

Consider:

The procedural mechanisms available to enlarge time depend on whether the originally prescribed period has already expired [*Fed R Civ P 6(b)(1)*; *see § 26.35[2]*, *[3]*].

Exceptions:

Courts may not grant enlargements of time to make the following motions, except to the extent and under the conditions stated in the governing rules [*Fed R Civ P 6(b)(2)*]:

- Motions for judgment as a matter of law under Rule 50(b).
- Motions to amend or expand the court's findings under Rule 52(b).
- Motions for new trial under Rule 59(b), (d).
- Motions to alter or amend judgments under Rule 59(e).
- Motions for relief from judgment under Rule 60(b).

26.35[2] Request Made Prior to Expiration of Time Period. If a request to enlarge time is available and is made prior to the expiration of the period originally prescribed or as extended by previous order, the court may grant the request without motion or notice [*Fed R Civ P 6(b)(1)(A)*].

26.35[3] Request Made After Expiration of Time Period. A request to enlarge time made after the expiration of the specified period must be made by motion, and may be granted in the court's discretion if the failure to act was the result of excusable neglect [*Fed R Civ P 6(b)(1)(B)*].

The standard for excusable neglect is a four-part test that takes account of all relevant circumstances surrounding the party's omission. These include [*see Pioneer Inv. Servs. Co v. Brunswick Assocs. Ltd. P'ship (1993) 507 US 380, 395, 113 S Ct 1489, 123 L Ed2d 74*]:

- The danger of prejudice to the other party;
- The length of the delay and its potential impact on judicial proceedings;
- The reason for the delay, including whether it was in the reasonable control of the movant; and
- Whether the movant acted in good faith.

Cross Reference:

Discussion of excusable neglect standard under Rule 6(b)(2), see 1 *Moore's Federal Practice, 6.06[3]* (Matthew Bender 3d ed.).

26.35[4] LOCAL PRACTICE: Motions to Enlarge Time.

26.35[4][a] LOCAL PRACTICE: CD Cal Requirements. The CD Cal has no specific local rule governing Rule 6(b) motions for enlargement of time.

26.35[4][b] LOCAL PRACTICE: ED Cal Requirements. Unless the filing date has been set by court order, an initial stipulation extending time for no more than 30 days to respond to a complaint, crossclaim, or counterclaim, or to respond to interrogatories, requests for admissions, or requests for production of documents may be filed without approval of the Court if the stipulation is signed on behalf of all parties who have appeared in the action and are affected by the stipulation. All other extensions of time must be approved by the court and no open extensions of time by stipulation of the parties will be recognized [*ED Cal Gen LR 144(a)*].

All applications to the court for extensions of time must set forth the total period of extensions already obtained by the parties as to the particular matters for which the extension is sought [*ED Cal Gen LR 144(b)*].

The court may, in its discretion, grant an initial extension ex parte on the affidavit of counsel that a stipulation extending time cannot reasonably be obtained, explaining the reasons why a stipulation cannot be obtained and the reasons why the extension is necessary. Except for one such initial extension, ex parte applications for extension of time will not ordinarily be granted [*ED Cal Gen LR 144(c)*].

Counsel must seek to obtain a necessary extension from the court or from other counsel or parties in an action as soon as the need for an extension become apparent. Requests for court-approved extensions brought on the required filing date for the pleading or other document are viewed by the court in disfavor [*ED Cal Gen LR 144(d)*].

26.35[4][c] LOCAL PRACTICE: ND Cal Requirements. A motion to enlarge or shorten time may be no more than five pages in length and must be accompanied by a proposed order and by a declaration that [*ND Cal Civ LR 6-3(a)*]:

- Sets forth with particularity, the reasons for the requested enlargement or shortening of time;
- Describes the efforts the party has made to obtain a stipulation to the time change;
- Identifies the substantial harm or prejudice that would occur if the court did not change the time;
- If the motion is to shorten time for the court to hear a motion, the motion describes the moving party's compliance with *ND Cal Civ LR 37-1(a)*, when applicable, and describes the nature of the underlying dispute that would be addressed in the motion and briefly summarizes the position each party had taken;
- Discloses all previous time modifications in the case, whether by stipulation or court order; and
- Describes the effect the requested time modification would have on the schedule for the case.

A party filing a motion to enlarge or shorten time must deliver a copy of the motion, proposed order, and supporting declaration to all other parties on the day the motion is filed [*ND Cal Civ LR 6-3(b)*].

Unless otherwise ordered, a party who opposes a motion to enlarge or shorten time must file an opposition not to exceed 5 pages, accompanied by a declaration setting forth the basis for opposition, no later than four days after receiving the motion. The objecting party must deliver a copy of its opposition to all parties on the day the opposition is filed [*ND Cal Civ LR 6-3(c)*].

After receiving a motion to enlarge or shorten time and any opposition, the judge may grant, deny, modify the requested time change or schedule the matter for additional briefing or a hearing [*ND Cal Civ LR 6-3(d)*].

26.35[4][d] LOCAL PRACTICE: SD Cal Requirements. The SD Cal has no specific local rule governing Rule 6(b) motions for enlargement of time.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedurePretrial MattersContinuancesGovernmentsCourtsRule Application & Interpretation

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26.36 Making Motion for Reconsideration.

26.36[1] Motion Used to Correct Manifest Errors of Law or Fact. A motion for reconsideration is appropriate only in limited circumstances, such as when [*Nunes v. Ashcroft (9th Cir 2004) 375 F3d 805, 807-808* ; *Brown v. Kinross Gold, U.S.A. (D Nev 2005) 378 F Supp2d 1280, 1288*]:

- New evidence is discovered;
- There is an intervening change in the controlling law; or
- The initial decision was clearly erroneous or manifestly unjust.

A motion for reconsideration is not is not avenue to relitigate issues and arguments on which the court already has ruled [*Brown v. Kinross Gold, U.S.A. (D Nev 2005) 378 F Supp2d 1280, 1288*].

Such situations rarely arise and the motion for reconsideration should be equally rare [*Cf. Page v. Something Weird Video (CD Cal 1996) 960 F Supp 1438, 1440 n2* (plaintiff contravened local rule by repeating oral or written argument, but motion granted to correct a clear error of law)].

Leave of court may be required by local rule before any party may file a motion for reconsideration [*see, e.g.,* Mosbarger v. Superior Court Judges (ND Cal 1996) 1996 US Dist LEXIS 997, at *5].

Warning:

A motion for reconsideration is not the proper vehicle for revisiting issues that were decided. The party moving for reconsideration must show more than a disagreement with the court's decision; the court will not grant the motion unless there is a need to correct a clear error of law or prevent manifest injustice [Lerner v. Sartori (D Ariz 1999) 1999 US Dist LEXIS 16054, at *2 , *aff'd mem., 229 F3d 1158 (9th Cir 2000)*]. Violations are subject to sanctions [*see, e.g., ND Cal Civ LR 7-9(c)*].

26.36[2] LOCAL PRACTICE: Motion for Reconsideration.

26.36[2][a] LOCAL PRACTICE: CD Cal Requirements. A motion for reconsideration of the decision on any motion may be made only on the ground of [*CD Cal Civ LR 7-18*]:

- A material difference in fact or law from that presented to the court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision; or
- The emergence of new material facts or a change of law occurring after the time of such decision; or
- A manifest showing of a failure to consider material facts presented to the court before such decision.

No motion for reconsideration may in any manner repeat any oral or written argument made in support of or in opposition to the original motion [*CD Cal Civ LR 7-18*].

26.36[2][b] LOCAL PRACTICE: ED Cal Requirements. Whenever any motion has been granted or denied in whole or in part, and a subsequent motion for reconsideration is made on the same or any alleged different set of facts, counsel must present to the judge or magistrate judge to whom such subsequent motion is made an affidavit or brief, as appropriate, setting forth the material facts and circumstances surrounding each motion for which reconsideration is sought, including [*ED Cal Civ LR 230(j)*]:

- When and to what judge or magistrate judge the prior motion was made;
- What ruling, decision, or order was made on the prior motion;
- What new or different facts or circumstances are claimed to exist which did not exist or were not shown on such prior motion, or what other grounds exist for the motion; and
- Why the facts or circumstances were not shown at the time of the prior motion.

26.36[2][c] LOCAL PRACTICE: ND Cal Requirements. Before the entry of a judgment adjudicating all of the claims and the rights and liabilities of all the parties in a case, any party may make a motion before a judge requesting that the judge grant the party leave to file a motion for reconsideration of any interlocutory order made by that judge on any ground set forth in *ND Cal Civ LR 7-9(b)*. No party may notice a motion for reconsideration without first obtaining leave of court to file the motion [*ND Cal Civ LR 7-9(a)*].

A motion for leave to file a motion for reconsideration must be made in accordance with the requirements of *ND Cal Civ LR 7-9(a)*. The moving party must specifically show [*ND Cal Civ LR 7-9(b)*]:

- That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the court before entry of the interlocutory order for which reconsideration is sought. The party must also show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or
- The emergence of new material facts or a change of law occurring after the time of such order; or
- A manifest failure by the court to consider material facts or dispositive legal arguments which were presented to the court before such interlocutory order.

No motion for leave to file a motion for reconsideration may repeat any oral or written argument made by the applying party in support of or in opposition to the interlocutory order which the party now seeks to have reconsidered. Any party who violates this restriction will be subject to appropriate sanctions [*ND Cal Civ LR 7-9(c)*].

Judge's Perspective:

In general, judges do not like to see motions for reconsideration, which is one reason the local rules governing them are so stringent. Counsel should not attempt any type of end-run around compliance with the reconsideration rules.

Unless otherwise ordered by the assigned judge, no response needs to be filed and no hearing will be held concerning a motion for leave of to file a motion to reconsider. If the judge decides to order the filing of additional papers or that the matter warrants a hearing, the judge will fix an appropriate schedule [*ND Cal Civ LR 7-9(d)*].

26.36[2][d] LOCAL PRACTICE: SD Cal Requirements. Whenever any motion or any application or petition for any order or other relief has been made to any judge and has been refused in whole or in part, or has been granted conditionally or on terms, and a subsequent motion or application or petition is made for the same relief in whole or in part on the same or any alleged different state of facts, it will be the continuing duty of each party and attorney seeking such relief to present to the judge to whom any subsequent application is made an affidavit of a party or witness or certified statement of an attorney setting forth the material facts and circumstances surrounding each prior application, including inter alia [*SD Cal Civ LR 7.1(i.1)*]:

- When and to what judge the application was made;
- What ruling or decision or order was made on the application;
- What new or different facts and circumstances are claimed to exist that did not exist, or were not shown, on such prior application.

Except as may be allowed under *Rules 59* and *60 of the Federal Rules of Civil Procedure*, any motion or application for reconsideration must be filed more within 28 days after the entry of the ruling, order, or judgment sought to be reconsidered [*SD Cal Civ LR 7.1(i.2)*].

Cross Reference:

Form, see *§ 26.61*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.37 CHECKLIST: Responding to Noticed Motions.

☐ Determine whether to oppose the motion, analyzing possible grounds for opposition, including:

- ○ Procedural deficiency of the moving papers (proper notice, etc.).
- ○ Inadmissible, inadequate, or incompetent evidence in the moving papers.
- ○ Inaccurate statement of law in the moving papers.
- ○ Inaccurate or omission of statement of the facts.
- ○ Inaccurate application of the law to the facts.

☐ Check local rules for determining requirements for opposition papers, including:

- ○ Grounds for opposition.
- ○ Page limitations.
- ○ Format requirements.

- ○ Service requirements.
- ○ Time limitations for serving and filing.

☐ If not opposing the motion, consult local rules for requirements for filing a statement of nonopposition.

☐ If extension of deadline for serving or filing opposition papers is needed, consult local rules.

☐ Serve opposition papers and file with court, along with certificate of service.

Authority:
28 USC § 1291; *Fed R Civ P 5(b)*, *6(c)*, *7(b)(2)*, *10(a)*, *59(d)*; *CD Cal Civ LR 5-3-5-4*, *6-1*, *7-6*, *7-7*, *7-9*, *7-11*, *11-3*; *ED Cal Gen LR 130*, *131*, *133*, *135*, *143*, *144*; *ED Cal Civ LR 230*; *ND Cal Civ LR 3-4*, *5-5-5-6*, *7-2*, *7-3*, *7-4*, *7-7(d)*; *SD Cal Civ LR 5.1*, *7.1*

Discussion:
See *§§ 26.38*, *26.39*

☐ If not opposing the motion, consult local rules for requirements for filing a statement of nonopposition.

Authority:
CD Cal Civ LR 7-7, *7-9*; *ED Cal Civ LR 230(c)*; *ND Cal Civ LR 7-3(b)*; *SD Cal Civ LR 7.1(f.3.a)*

Discussion:
See *§ 26.39*

☐ Failure to file timely opposition papers may result in court deeming motion unopposed.

Authority:
CD Cal Civ LR 7-12, *7-13*; *ED Cal Civ LR 230(c)*; *SD Cal Civ LR 7.1(e.2)*, *7.1(f.3.c)*

Discussion:
See *§ 26.43*

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.38 Options and Strategy.

Unless you file a notice of nonopposition, counsel should file an opposition to a motion. Failure to file one of these will injure your reputation with the court.

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26.39 LOCAL PRACTICE: Contents of Responding Papers.

26.39[1] LOCAL PRACTICE: CD Cal Requirements. Each opposing party must serve on all other parties and file with the clerk either [*CD Cal Civ LR 7-9*]:

- The evidence on which the opposing party will rely in opposition to the motion and a brief but complete memorandum that must contain a statement of all the reasons in opposition to it and the points and authorities on which the opposing party will rely; or

- A written statement that the party will not oppose the motion. Evidence presented in all opposing papers must comply with the requirements of *CD Cal Civ LR 7-6*, *7-7*, *7-8*.

26.39[2] LOCAL PRACTICE: ED Cal Requirements. Opposition, if any, to the granting of the motion must be in writing and must be filed in duplicate with the clerk. Opposition must be served on opposing counsel [*ED Cal Civ LR 230(c)*].

A responding party who has no opposition to the granting of the motion must serve and file a statement to that effect, specifically designating the motion in question [*ED Cal Civ LR 230(c)*].

No party will be entitled to be heard in opposition to a motion at oral argument if opposition to the motion has not been timely filed by that party [*ED Cal Civ LR 230(c)*].

26.39[3] LOCAL PRACTICE: ND Cal Requirements. Any opposition to a motion must be served and filed. The opposition may include a proposed order, affidavits or declarations, as well as a brief or memorandum under *ND Cal Civ LR 7-4*. Pursuant to *ND Cal Civ LR 7-4(b)*, the brief or memorandum may not exceed 25 pages of text [*ND Cal Civ LR 7-3*].

If the party against whom the motion is directed does not oppose the motion, that party must file with the court a Statement of Nonopposition [*ND Cal Civ LR 7-3(b)*].

Before the noticed hearing date, counsel may bring to the court's attention a relevant judicial opinion published after the date the opposition or reply was filed by serving and filing a Statement of Recent Decision, containing a citation to and providing a copy of the new opinion--without argument. Otherwise, once a reply is filed, no additional memoranda, papers, or letters may be filed without prior court approval [*ND Cal Civ LR 7-3(d)*].

In addition to complying with the applicable provisions of *ND Cal Civ LR 3-4* (general requirements re filed papers), a brief or memorandum of points and authorities filed in support, opposition, or reply to a motion must contain [*ND Cal Civ LR 7-4(a)*]:

- On the first page of the space opposite the caption and below the case number, the noticed hearing date and time;
- If in excess of 10 pages, a table of contents and a table of authorities;
- A statement of the issues to be decided;
- A succinct statement of the relevant facts; and
- Argument by the party, citing pertinent authorities.

Unless the court expressly orders otherwise pursuant to a party's request made prior to the due date, a brief or memorandum filed with opposition papers may not exceed 25 pages of text and the reply brief or memorandum may not exceed 15 pages of text [*ND Cal Civ LR 7-4(b)*].

Cross Reference:

Discussion of memorandum of law, see *§ 26.20*.

26.39[4] LOCAL PRACTICE: SD Cal Requirements. Unless otherwise provided by rule or court order, a party opposing a motion, or other request for ruling by the court must file a written opposition. If such party chooses not to oppose the motion, the party must file a written statement that the party does not oppose the motion or other request for ruling by the court [*SD Cal Civ LR 7.1(f.3.a)*].

The opposition must contain a brief and complete statement of all reasons in opposition to the position taken by the movant, an answering memorandum of points and authorities, and copies of all documentary evidence on which the party in opposition relies [*SD Cal Civ LR 7.1(f.3.b)*].

If an opposing party fails to file the papers in the manner required by *SD Cal Civ LR 7.1(e.2)*, that failure may constitute a consent to the granting of a motion or other request for ruling by the court [*SD Cal Civ LR 7.1(f.3.c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaGovernmentsCourtsRule Application & Interpretation

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26.40 Formatting Opposition Papers.

The same basic format requirements for moving papers apply to opposition papers [*see Fed R Civ P 7(b)(2)*; *10(a)*].

Warning:

Consult local rules, as each district may have additional requirements, as to formatting motions and opposition papers [*see, e.g., CD Cal Civ LR 11-3*; *ED Cal Gen LR 130*, *131*, *133*; *ND Cal Civ LR 3-4*, *7-2(b)*; *SD Cal Civ LR 5.1*, *7.1*].

Cross References:

Format requirements for motions, see *§ 26.18*. Local rules on formatting motions and other papers, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.03 -5.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.41 Opposition Papers Must Be Timely Filed and Served.

26.41[1] Papers Must Be Filed Within Reasonable Time After Service. The Federal Rules provide that opposition to a motion must be served at least seven days before the hearing, unless the court permits them to be served at some other time [*Fed R Civ P 6(c)(2)*]. However, all the local district court rules provide that the motion papers must be served much further in advance [*see 26.23[2]*], though the deadlines may be modified by stipulated motion schedule, with the court's approval. There are many reasons for counsel to agree on the motion schedule that accommodates the needs of all counsel for sufficient time to properly address the motion.

Service of opposition papers under *Fed R Civ P 5(b)* is accomplished by a number of methods. For the manner of serving motion papers, see *26.29*.

Papers in opposition to a motion for a new trial must be filed within 28 days after service of the motion, but that period may be extended [*see Fed R Civ P 59(d)*].

26.41[2] LOCAL PRACTICE: Deadline for Serving and Filing Opposition Papers.

26.41[2][a] LOCAL PRACTICE: CD Cal Requirements. Each opposing party must serve on all other parties and file with the clerk all opposition papers or statement not opposing the motion, not later than 10 days after service of the motion in the instance of a new trial motion and not later than 21 days before the date designated for the hearing of the motion in all other instances [*CD Cal Civ LR 7-9*].

26.41[2][b] LOCAL PRACTICE: ED Cal Requirements. Opposition, if any, to the granting of the motion must be in writing and must be filed and served not less than 14 days preceding the noticed (or continued) hearing date [*ED Cal Civ LR 230(c)*].

26.41[2][c] LOCAL PRACTICE: ND Cal Requirements. Any opposition to a motion must be served and filed not less than 21 days before the hearing date [*ND Cal Civ LR 7-3(a)*].

If the party against whom the motion is directed does not oppose the motion, that party must file with the court a

Statement of Nonopposition within the time for filing and serving any opposition [*ND Cal Civ LR 7-3(b)*].

26.41[2][d] LOCAL PRACTICE: SD Cal Requirements. Except as otherwise specified in *SD Cal Civ LR 7.1(e.1)* [*see 26.23[2][d]*], each party opposing a motion, application, or order to show cause must file that opposition or statement of nonopposition with the clerk and serve the movant or the movant's attorney not later than 14 calendar days prior to the noticed hearing [*SD Cal Civ LR 7.1(e.2)*].

Example:

For a motion to be heard on a Monday, the opposition papers must be filed and served no later than two Mondays prior to the noticed hearing [*SD Cal Civ LR 7.1(e.2)*].

26.41[3] LOCAL PRACTICE: Extension of Deadline for Serving and Filing Opposition Papers.

26.41[3][a] LOCAL PRACTICE: CD Cal Requirements. Unless the order for continuance specifies otherwise, the entry of an order continuing the hearing of a motion automatically extends the time for filing and serving opposing papers and reply papers to 21 and 14 days, respectively, preceding the new hearing date. A stipulation to continue must provide the date the opposition and reply papers are due to be filed with the court [*CD Cal Civ LR 7-11*].

26.41[3][b] LOCAL PRACTICE: ED Cal Requirements. Requests for continuances of hearings on the motion calendar, on stipulation or otherwise, must be made to the judge or magistrate judge on whose calendar the matter is set, at least 7 days before the scheduled hearing date. All stipulations for continuance must be submitted for approval to the court [*ED Cal Civ LR 230(f)*; *see ED Cal Civ LR 143*, *144*].

26.41[3][c] LOCAL PRACTICE: ND Cal Requirements. Unless the order for continuance specifies otherwise, the entry of an order continuing the hearing of a motion automatically extends the time for filing and serving opposing papers or reply papers to 21 and 14 days, respectively, preceding the new hearing date, unless the date for filing the papers has already passed prior to the date of the order for continuance [*ND Cal Civ LR 7-7(d)*].

26.41[3][d] LOCAL PRACTICE: SD Cal Requirements. Any request for continuance of a noticed matter must be made as soon as possible to the judge to whom the matter is assigned. Prior to seeking such continuance, the party seeking the continuance must contact all opposing parties or their counsel to determine whether they would agree to such continuance [*SD Cal Civ LR 7.1(g.2)*].

Cross References:

Serving motions, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.15 -5.23*. Filing motions, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.24 -5.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsGovernmentsCourtsRule Application & Interpretation

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26.42 Proof of Service Is Required.

Opposition papers must be filed with the clerk of the court, together with proof of service [*Fed R Civ P 5(d)*].

Warning:

Consult local rules, as each district may have additional requirements, as to proof of service [*see, e.g., CD Cal Civ LR 5-3*, *5-4*, *6-1*; *ED Cal Gen LR 135*; *ED Cal Civ LR 230(c)*; *ND Cal Civ LR 5-6*, *7-2*; *SD Cal Civ LR 5.2*, *5.3*, *7.1*.]

Cross References:

Local rules on filing requirements, see *§§ 26.24 -26.26*. Proof of service of motions, see *§ 26.30*. Local rules on serving motions, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.18[3]*. Local rules on methods of service, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.22*. Local rules on proof of service of motions, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.23[2]*.

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26.43 Failure to Submit Timely Opposition Papers May Result in Default.

26.43[1] Court May Grant Unopposed Motion. Failure to file a timely opposition may be construed as consent to the granting of a motion or some other request [*Martinez v. Stanford (9th Cir 2003) 323 F3d 1178, 1181*]. Such a failure to submit opposition papers may result in the court granting the motion [*see Velasquez v. California (9th Cir 2003) 2003 US App LEXIS 12797, at *2* (unpublished appellate opinion; generally not citable to court under 9th Cir R 36-3); General Brands, Inc. v. S.S. Gulf Spirit (SDNY 1991) 1991 US Dist LEXIS 125, at *2]. Moreover, failure to appear at the motion hearing, either personally or through counsel, will likely result in default [*Jackson v. Sturkie (ND Cal 2003) 255 F Supp2d 1096, 1099*].

Cross References:

Responding to motions, see Ch. 8, Answers and Responsive Motions Under Rule 12. Defaults, see Ch. 27, Defaults and Motions for Relief From Default.

26.43[2] LOCAL PRACTICE: Failure to Submit Opposition Papers.

26.43[2][a] LOCAL PRACTICE: CD Cal Requirements. The court may decline to consider any memorandum or other paper not filed within the deadline set by order or local rule. The failure to file any required paper, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion [*CD Cal Civ LR 7-12*].

A party filing any document in support of, or in opposition to, any motion noticed for hearing after the time for filing it has expired, is also subject to sanctions [*CD Cal Civ LR 7-13*].

26.43[2][b] LOCAL PRACTICE: ED Cal Requirements. No party will be entitled to be heard in opposition to a motion at oral arguments if opposition to a motion has not been timely filed by that party [*ED Cal Civ LR 230(c)*].

26.43[2][c] LOCAL PRACTICE: ND Cal Requirements. The ND Cal has no specific rule governing the failure to submit opposition papers.

26.43[2][d] LOCAL PRACTICE: SD Cal Requirements. The clerk's office is directed not to file untimely

motions and responses without the consent of the judicial officer assigned to the case [*SD Cal Civ LR 7.1(e.7)*].

If the opposing party fails to file the paper in the manner required by *SD Cal Civ LR 7.1(e.2)*, that failure may constitute a consent to the granting of a motion or other request for ruling by the court *SD Cal Civ LR 7.1(f.3.c)*].

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26.44 CHECKLIST: Making Cross-Motions or Counter-Motions.

☐ In opposing a motion, decide if there is a cross-motion or counter-motion to be filed.

☐ Consult local rules and individual judges' rules to determine if cross-motion or counter-motion is allowed.

☐ Consider combining opposition with cross-motion or counter-motion.

☐ Serve cross-motion or counter-motion.

☐ File cross-motion or counter-motion.

Authority:
ED Cal Civ LR 230(e)

Discussion:
See *§§ 26.45 -26.48*

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26.45 Cross-Motion or Counter-Motion Filed in Response to Motion.

26.45[1] Cross-Motions and Counter-Motions Generally. The terms *cross-motion* and *counter-motion* are interchangeable. A cross-motion or counter-motion is a motion filed in response to a different motion, and which seeks a separate order regarding issues related to the subject matter of the original motion [Reiffin v. Microsoft Corp. (ND Cal 1998) 1998 US Dist LEXIS 10518, at *4-*6 , *rev'd and remanded on other grounds, 214 F3d 1342 (Fed Cir 2000)*].

Example:
In response to a motion for a protective order pursuant to *Fed R Civ P 26(c)*, the opposing party may elect to file a cross-motion or counter-motion for an order compelling disclosure or discovery pursuant to *Fed R Civ P 37*.

The Federal Rules do not specifically address cross-motions or counter-motions. Technically, a cross-motion or counter-motion is just another independent motion.

Warning:
Consult local rules, as well as individual judges' rules to determine whether cross-motions and counter-motions are permitted.

Judge's Perspective:
In general, cross-motions are not commonly used. Judges typically try to coordinate the briefing on the cross-motion in a rational way. Many judges disfavor cross-motions because the briefing can become very clumsy and burden the court.

Cross References:
Making noticed motions, see *§§ 26.12 -26.33*. Local rules on formatting motions, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.03 -5.14*. Filing motions, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.24 -5.28*. Responding to motions, see Ch. 8, Answers and Responsive Motions Under

Rule 12.

26.45[2] LOCAL PRACTICE: Cross-Motions and Counter-Motions.

26.45[2][a] LOCAL PRACTICE: CD Cal Requirements. The CD Cal has no specific rule governing crossclaims or counter-motions.

26.45[2][b] LOCAL PRACTICE: ED Cal Requirements. Any counter-motion or other motion that a party may desire to make that is related to the general subject matter of the original motion must be served and filed with the clerk in the manner and on the date prescribed for the filing of opposition. In the event such counter-motion or other motion is filed, the court may continue the hearing on the original and all related motions so as to give all parties reasonable opportunity to serve and file oppositions and replies to all pending motions [*ED Cal Civ LR 230(e)*].

26.45[2][c] LOCAL PRACTICE: ND Cal Requirements. The ND Cal has no specific rule governing crossclaims or counter-motions.

26.45[2][d] LOCAL PRACTICE: SD Cal Requirements. The SD Cal has no specific rule governing crossclaims or counter-motions.

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.46 Combining Opposition With Cross-Motion or Counter-Motion.

If a cross-motion or counter-motion is permitted to be filed, the cross-motion or counter-motion may also serve as opposition to the original motion provided the papers clearly state their dual purpose.

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26.47 Serving and Filing Cross-Motion or Counter-Motion.

If a cross-motion or counter-motion is permitted to be filed, the cross-motion or counter-motion should be served and filed prior to the deadline for filing opposition papers.

Cross References:

Serving motions, see *§§ 26.27 -26.30*. Filing motions, see *§§ 26.31 -26.33*.

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26.48 Seeking Enlargement of Time Within Which to Respond to Cross-Motion or Counter-Motion.

If opposition to a cross-motion or counter-motion cannot reasonably be made within the time otherwise required, an enlargement of time should be sought.

Cross References:

Seeking enlargement of time, see *§ 26.35*. Form, see *§ 26.58*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.49 CHECKLIST: Replying to Opposition Papers.

☐ Check local rules and individual judges' rules governing reply papers.

☐ Draft concise and persuasive reply brief, dealing only with the matters that warrant a reply and avoid redundancy.

Authority:
CD Cal Civ LR 7-10; *ED Cal Civ LR 230(d)*; *ND Cal Civ LR 7-3(c)*; *SD Cal Civ LR 7.1(e.3)*

Discussion:
See *§ 26.50*

☐ Check local rules governing motions for reconsideration.

☐ A motion for reconsideration may be appropriate if:

- ○ The court has patently misunderstood a party, has made a decision outside the adversarial issues presented to the court by the parties;
- ○ The court has made an error not of reasoning but of apprehension; or
- ○ There is a controlling or significant change in the law or facts since the submission

of the issue to the court.

Authority:

CD Cal Civ LR 7-18; *ED Cal Civ LR 230(j)*; *ND Cal Civ LR 7-9(a)*; *SD Cal Civ LR 7.1(i.1)*

Discussion:

See *§ 26.36*

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26.50 Reply Papers.

26.50[1] Purpose of Reply Papers. Reply papers represent an opportunity to the moving party, since it is the rare motion proponent who can anticipate every argument made by the opponent. The method by which the opponent presents opposition typically sharpens the issue, making a reply that deals with the sharpened issue a necessity. However, reply papers may only address issues raised in the moving papers. It is improper to introduce new facts or a different legal argument in the reply brief [*Lujan v. National Wildlife Fed'n (1990) 497 US 871, 894-895, 110 S Ct 3177, 111 L Ed2d 695* ; *United States ex rel. Giles v. Sardie (CD Cal 2000) 191 F Supp2d 1117, 1127*]. Generally, once reply papers are filed, no additional papers may be filed without prior court approval [Palo Alto Town & Country Vill., Inc. v. Deutsche Lufthansa AG (ND Cal 2002) 2002 US Dist LEXIS 11085, at *21 , *aff'd, (9th Cir 2004) 2004 US App LEXIS 3762*].

Strategic Point--Moving Party:

The fact that there is a body of law as to which side opens and closes to a jury demonstrates that there is an advantage to having the first and last word on any issue; a reply gives the moving party the last word. In general, a reply should always be filed, even if it is extremely short. If leave must be sought to file a reply, the request for leave should itself reflect the reply points counsel would make.

Warning:

Consult individual judges' rules to determine whether reply briefs will be accepted. Some judges permit reply papers only in limited situations.

Judge's Perspective:

Most judges want to receive a reply brief, because knowing a reply will be filed forces the moving party to really focus on the critical points in the motion. In fact, sometimes judges read the reply brief first--it generally is shorter, more concise, and therefore allows the judge to separate key points from insignificant ones.

Cross References:

Making noticed motions, see *§§ 26.12 -26.33*. Local rules on formatting motions, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.03 -5.14*. Local rules on serving motions, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.15 -5.23*. Local rules on filing motions, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.24 -5.28*. Responding to motions, see Ch. 8, Answers and Responsive Motions Under Rule 12.

26.50[2] Federal Rules Do Not Address Reply Papers. The Federal Rules do not address reply papers. If the motion opponent seeks more time than the minimum within which to oppose the motion, the motion proponent typically bargains for a schedule that includes time for service of reply papers.

26.50[3] LOCAL PRACTICE: Reply Papers.

26.50[3][a] LOCAL PRACTICE: CD Cal Requirements. A moving party may, not later than 14 days before the date designated for the hearing of the motion, serve and file a reply memorandum, and declarations or other rebuttal evidence. Absent prior written order of the court, the opposing party may not file a response to the reply [*CD Cal Civ LR 7-10*].

26.50[3][b] LOCAL PRACTICE: ED Cal Requirements. Not less than seven days preceding the date of hearing, the moving party may serve and file a reply to any opposition filed by the responding party [*ED Cal Civ LR 230(d)*].

26.50[3][c] LOCAL PRACTICE: ND Cal Requirements. Any reply to an opposition must be served and filed by the moving party not less than 14 days before the hearing date. The reply may include affidavits or declarations, as well as a supplemental brief or memorandum under *ND Cal Civ LR 7-4*. Pursuant to *ND Cal Civ LR 7-4(b)*, the reply brief or memorandum may not exceed 15 pages of text [*ND Cal Civ LR 7-3(c)*].

Before the noticed hearing date, counsel may bring to the court's attention a relevant judicial opinion published after the date the opposition or reply was filed by serving and filing a Statement of Recent Decision, containing a citation to and providing a copy of the new opinion--without argument. Otherwise, once a reply is filed, no additional memoranda, papers, or letters may be filed without prior court approval [*ND Cal Civ LR 7-3(d)*].

26.50[3][d] LOCAL PRACTICE: SD Cal Requirements. Except as otherwise specified in *SD Cal Civ LR 7.1(e.1)* [*see 26.23[2][d]*], any reply memorandum must be filed and served not later than seven days before the day for which the matter is noticed [*SD Cal Civ LR 7.1(e.3)*].

Example:

For a Monday hearing, the reply papers must be filed and served no later than by the Monday prior to the hearing. If the Monday prior to the Monday hearing is a holiday, however, then the reply papers would be due two Fridays prior to the hearing [*SD Cal Civ LR 7.1(e.3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.51 CHECKLIST: Orally Arguing Motions.

☐ Check local rules and individual judges' rules regarding oral motions.

☐ Determine whether motion would benefit from oral arguments.

☐ If available, determine if telephonic conference is preferable for oral arguments.

Authority:
Fed R Civ P 78; *CD Cal Civ LR 7-14*, *7-15*; *ED Cal Civ LR 230(g)*, *(i)*; *ND Cal Civ LR 7-6*; *SD Cal Civ LR 7.1(d)*

Discussion:
See *§ 26.53*

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26.52 Options and Strategies.

In preparing for oral argument, keep in mind that your objective is to determine if the judge intends to rule against your client and, if so, to work to change the judge's mind. Don't just repeat what is contained in your papers. Try to get the judge to engage in a dialogue. Be concise and do not waste time with grand speeches. A thoughtful, scholarly style usually works better than efforts at showmanship.

Legal Topics:

For related research and practice materials, see the following legal topics:
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26.53 Orally Arguing Noticed Motions.

26.53[1] Local Rules and Individual Judges' Rules Govern Oral Argument. The Federal Rules of Civil Procedure do not address oral argument of motions. Instead, local rules and individual judges' rules generally regulate oral argument [*see Fed R Civ P 78*]. Oral arguments may include telephonic conferencing [*see, e.g., SD Cal Civ LR 7.1(d.2)*]. District courts have wide discretion in deciding whether oral testimony is to be heard in support of a motion [*Miles v. Department of Army (9th Cir 1989) 881 F2d 777, 784*].

Consider:

Notwithstanding contrary local rules, some judges will routinely hear oral argument, and attorneys may want to argue. Check judges' individual rules first to see whether they dispense with oral argument. Even if the attorney believes that the client has won the motion on the papers, it is questionable whether arguments should be foregone. While motions may be won or lost on the papers in an ultimate sense, argument affords the platform for the judge's questions that may reflect the court's misunderstanding of some fact or position. Oral argument should not merely paraphrase the written brief, but should provide illumination where required. Additionally, argument may cause a more careful rereading of the papers.

Distinguish:

An oral argument of a noticed motion is to be distinguished from an oral motion [*see 26.06*].

Cross Reference:

Form, see *26.60*.

26.53[2] LOCAL PRACTICE: Oral Arguments.

26.53[2][a] LOCAL PRACTICE: CD Cal Requirements. Counsel for the moving party and the opposing party must be present on the hearing date and must have such familiarity with the case as to permit informed discussion and argument of the motion. Failure of any counsel to appear, unless excused by the court in advance pursuant to *CD Cal Civ LR 7-15* or otherwise, may be deemed consent to a ruling on the motion adverse to that counsel's position [*CD Cal Civ LR 7-14*].

Counsel may, with the consent of the court, waive oral argument. Counsel who have agreed to waive oral argument must advise the court clerk of such agreement by no later than noon on the fifth day preceding the hearing date. The court clerk must advise the parties by no later than noon on the court day preceding the hearing date as to whether the court has consented to the waiver of oral argument. The court may dispense with oral argument on any motion except where an oral hearing is required by statute, the Federal Rules of Civil Procedure, or the local rules of the Central District [*CD Cal Civ LR 7-15*].

26.53[2][b] LOCAL PRACTICE: ED Cal Requirements. On the call of the motion, the court will hear appropriate and reasonable oral argument. Alternatively, the motion may be submitted on the record and briefs on file if the parties stipulate to it, or if the court so orders, subject to the power of the court to reopen the matters for further briefs or oral arguments or both. Any party that believes that extended oral argument, more than 10 minutes per side or 20 minutes in the aggregate, will be required, that party must notify the courtroom deputy clerk so that the hearing may be rescheduled if deemed appropriate by the court [*ED Cal Civ LR 230(g)*].

Absent notice of intent to submit the matter on the briefs, failure to appear may be deemed withdrawal of the motion or of opposition to the motion, in the discretion of the court, or may result in the imposition of sanctions [*ED Cal Civ LR 230(i)*].

26.53[2][c] LOCAL PRACTICE: ND Cal Requirements. No oral testimony will be received in connection with any motion, unless otherwise ordered by the assigned judge [*ND Cal Civ LR 7-6*].

26.53[2][d] LOCAL PRACTICE: SD Cal Requirements. Southern District requirements include the following:

Written and Oral Argument. Motions are determined based on the moving papers referred to in the local rules and on oral argument. A judge may, in the judge's discretion, decide a motion without oral argument [*SD Cal Civ LR 7.1(d.1)*].

Argument by telephonic conference. At the discretion of the court, argument concerning a noticed motion may be conducted through the use of a telephone conference call, the call to be arranged, initiated, and paid for by the party proposing a telephonic method of oral argument. If such telephonic argument is approved by the court, the matter may be taken off the regular motion hearing calendar, and reset for a date and/or time more convenient to the court and the parties [*SD Cal Civ LR 7.1(d.2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureSummary JudgmentHearingsOral ArgumentsCivil ProcedurePretrial MattersGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
XI. ORDERS

4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.54

26.54 CHECKLIST: Orders.

☐ Check local rules and individual judge's rules regarding preparing an order, especially for:

- ○ Time limitations.
- ○ Page limitations.
- ○ Certificate of service.

☐ At minimum, proposed order should contain:

- ○ Case caption, including case number.
- ○ Title of order.
- ○ Recitation of papers considered in connection with motion (for appellate purposes).
- ○ Factual findings, if required.
- ○ Statement of specific relief granted.

○ Name and space for signature of judge.

Authority:
Fed R Civ P 58; *CD Cal Civ LR 52-4*, 52-4.1, *58-10*; *ED Cal Gen LR 137(a)*; *ND Cal Civ LR 7-2(c)*, *7-11*, *7-12*

Discussion:
See *§ 26.55*

Form:
See *§ 26.64*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
XI. ORDERS

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26.55 Preparing Party May Be Required to Prepare Order.

26.55[1] Local Rules or Individual Judge's Rules May Require Prevailing Party to Prepare Order. An "order" is any directive by the court other than a judgment, including oral and telephonic as well as written directives, including those transmitted by electronic means [*see, e.g., ED Cal Gen LR 101*].

Local district court rules or individual judges' rules may require the prevailing party to prepare a proposed order in accordance with the court's ruling.

26.55[2] Contents of Order. The Federal Rules are silent as to the required contents of an order. In the absence of any local district court rule, the order should include the following:

- Case caption, including case number.
- Title of order.
- Recitation of papers considered in connection with motion (for appellate purposes).
- Factual findings, if required.
- Statement of specific relief granted.
- Name and signature of judge.

26.55[3] LOCAL PRACTICE: Orders.

26.55[3][a] LOCAL PRACTICE: CD Cal Requirements. Each order must be prepared by the attorney directed to do so by the court. The order must comply with the requirements of *CD Cal Civ LR 58-10*. Within five days of the ruling, the attorney preparing the order must serve it on all parties and lodge it with the clerk [*CD Cal Civ LR 52-4*; *see also CD Cal Civ LR 58-10* (signature line for judge)].

A separate order must be electronically filed with any stipulation, application, motion or request of the parties requiring an order of the court. The pertinent elements requested in the stipulation must be set forth in the order [CD Cal Civ LR 52-4.1].

26.55[3][b] LOCAL PRACTICE: ED Cal Requirements. Prevailing party submits proposed order. Subject to *Fed R Civ P 58*, and unless the court otherwise directs or permits, whenever the court makes an oral order (except intermediate orders in the courts of a hearing), the prevailing party must serve on all other parties and lodge a proposed written order embodying all provisions of the orally announced order. Unless all counsel have approved the order as to form, counsel preparing the order must serve it on all other parties and wait seven days before lodging the proposed order with the court. Counsel submitting a proposed order to the court must provide a certificate reflecting service and expiration of the five days [*ED Cal Gen LR 137(a)*].

Counsel not preparing the order must have seven days after service of a copy of the proposed order within which to apply to the court for correction or modification of the proposed order to reflect accurately the ruling of the court or to submit an alternative order. If the proposed order is approved by the court, it must be signed and filed [*ED Cal Gen LR 137(a)*].

Electronically lodged proposed orders. Proposed orders submitted electronically are to be submitted through the district's Case Management/Electronic Case Filing (CM/ECF) system. In addition to electronically filing the proposed order in.pdf format, a separate proposed order in Word or Word Perfect format must be e-mailed to the e-mail box of the assigned judge or magistrate judge. The electronic submission effects service on all parties unless counsel has not consented to electronic service or the party is appearing in propria persona. Unless the proposed order is contained in a stipulation, a proposed order submitted electronically cannot be combined with a motion or request [*ED Cal Gen LR 137(b)*].

Service. Copies of all written orders signed and filed by the court, conventionally or electronically, whether drafted by counsel or by the court, must be served forthwith by the clerk on all counsel who have appeared in the action. A certificate of service by the clerk must accompany the order as served and must be attached to the order as filed [*ED Cal Gen LR 137(f)*].

26.55[3][c] LOCAL PRACTICE: ND Cal Requirements. Unless excused by the judge who will hear the motion, each motion must be accompanied by a proposed order [*ND Cal Civ LR 7-2(c)*].

A motion for an order concerning a miscellaneous administrative matter may not exceed five pages, must set forth specifically the action requested and the reasons supporting the motion, and must be accompanied by a proposed order or by either a stipulation under *ND Cal Civ LR 7-12* or by a declaration that explains why a stipulation could not be obtained. The moving party must deliver the motion and all attachments to all other parties on the same day as the attachment is filed [*ND Cal Civ LR 7-11(a)*].

Any opposition to, or support for, a Motion for Administrative Relief may not exceed five pages, must set forth succinctly the reasons, must be accompanied by a proposed order, and must be filed no later than four days after the motion has been filed. The opposition or support and all attachments to it must be delivered to all other parties the same day it is filed [*ND Cal Civ LR 7-11(b)*]. Unless otherwise ordered, the motion is deemed submitted for immediate determination without hearing on the day after the opposition is due [*ND Cal Civ LR 7-11(c)*].

26.55[3][d] LOCAL PRACTICE: SD Cal Requirements. Effective August 31, 2009, former SD Cal Civ LR 52-1, governing findings of fact, conclusions of law, orders and judgments, was repealed [*see* SD Cal Gen Order 575].

Cross References:

Serving orders, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.15 -5.23*. Form of order, see *§ 26.64*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.56

26.56 Notice of Motion and Motion--General Form.

Notice of Motion and Motion--General Form.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	NOTICE OF MOTION
_____ [*name*],	)	Date of Hearing: _____
Defendant	)	Time of Hearing: _____
	)	Courtroom No. _____
	)	

Notice of Motion

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that _____ [*name of moving party*] will make this motion on for hearing before this court on _____ [*date*], at_____[*time, e.g.,* 10:00 a.m.], or as soon thereafter as the matter can be heard, in Courtroom No._____of the United States Courthouse located at _____ [*street address, city, and state*].

Relief Sought

_____ [*Name of moving party*], _____ [plaintiff *or* defendant], moves the court for an order _____ [*describe relief sought, e.g.,* dismissing the Complaint].

Grounds for Relief

The grounds for this motion are that _____ [*specifically state all grounds on which motion is based, e.g.,* the Complaint fails to state a claim on which relief may be granted because it seeks a monetary judgment against a Department of the state government of the State of California and, as explained in the attached Memorandum of Points and Authorities in support of the motion, the *Eleventh Amendment* precludes federal courts from rendering any monetary judgment against State governments or even entertaining suits for monetary relief against State governments].

Record Supporting Motion

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]
Dated: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys for _____

[*Attach together with any supporting affidavits or declarations and exhibits to those affidavits or declarations*]

[*Attach certificate of service*]

NOTES.

Authority:
Fed R Civ P 5, *7(b)*, *10*; *CD Cal Civ LR 7-4*; *ED Cal Civ LR 230(b)*; *ND Cal Civ LR 7-2(b)*; *SD Cal Civ LR 7.1(f)*

Prerequisite to Motion:
See *§§ 26.14*, *26.15*

Content of Notice of Motion:
See *§ 26.16*

Combining Motion and Notice of Motion in One Paper:
See *§§ 26.15[5]*, *26.17*

Formatting Motion Papers:
See *§ 26.18*

Supporting Papers and Evidence:
See *§§ 26.19 -26.22*

Timing of Notice, Service, and Filing:

See *§ 26.23*

Service and Filing:
See *§§ 26.27 -26.33*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormGovernmentsCourtsRule Application & Interpretation

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4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.57

26.57 Declaration in Support of or in Opposition to Motion--General Form.

Declaration in Support of or in Opposition to Motion--General Form.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	DECLARATION IN
_____ [*name*],	)	_____ [SUPPORT OF *OR*
Defendant	)	OPPOSITION] TO MOTION
	)	FOR _____
	)	

DECLARATION OF _____ [*NAME*]

I, _____ [*name of declarant*], declare:

1. My name is _____ [*name of declarant*]. I am over 18 years of age. I reside at _____ [*street address*] in _____ [*city, state*]. I am fully competent to make this Declaration and I have personal knowledge of the facts stated in this Declaration. To my knowledge, all of the facts stated in this Declaration are true and correct.

2. I am _____ [*status in case, e.g.,* the plaintiff *or* a defendant *or* the attorney for third-party defendant _____ (*name*) *or* an independent witness *or* an expert in _____ (*field of expertise*) hired by the attorney for _____ (*name of party*)] in this matter. I make this Declaration in _____ [support of *or* opposition to] the Motion for _____ [*describe motion, e.g.,* an Order of Dismissal pursuant to Rule 12(b)(6)].

3. _____ [*First factual statement, e.g.,* Attached to this Declaration as Exhibits "1," "2," and "3" are true and correct copies of a "Settlement Agreement," a "Release of Liability," and a negotiable "Draft" in the amount of $ 150,000.]

4. _____ [*Second factual statement, e.g.,* The originals of the documents referred to in Paragraph 2 were signed by me and by the Plaintiff in this matter in my presence.]

5. _____ [*Third factual statement, e.g.,* At the time of the signing, one _____ (*name*), an Attorney-at-Law, was present. _____ (He *or* She) negotiated the settlement reflected in the documents referred to in Paragraph 2. In my presence, I heard _____ (him *or* her) explain to the Plaintiff in this matter that if the Plaintiff signed the documents and cashed the Draft, the Plaintiff would be forever barred from any suit in connection with _____ (*describe transaction that is subject of suit*).]

6. _____ [*Fourth factual statement, e.g.,* I have been informed by _____ (*name*) of the _____ (*name*) Bank that the Draft referred to in Paragraph 2 was presented by the Plaintiff and that the Plaintiff was paid on this Draft and that my account charged with the full amount of the Draft.]

[*Continue with all relevant factual statements*]

[*Alternative One. If executed inside of the United States, or any territory, possession, or commonwealth of the United States*]

I declare under penalty of perjury that the foregoing Declaration is true and correct. I have executed this Declaration on _____ [*date*], at _____ [*city, state*].

[*Alternative Two. If executed outside of the United States*]

I declare under penalty of perjury under the laws of the United States that the foregoing Declaration is true and correct. I have executed this declaration on _____ [*date*], at _____ [*city, state*].

_____ [*signature of declarant*]

_____ [*typed name*]

NOTES.

Authority:

28 USC § 1746; *Fed R Civ P 7(b)*, *10*; *CD Cal Civ LR 7-7*; *ED Cal Gen LR 142(a)*; *ND Cal Civ LR 7-5*; *SD Cal Civ LR 7.1(f.1)*

Drafting Affidavits or Affidavit Substitutes:

See *§ 26.21*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaGovernmentsCourtsRule Application & Interpretation

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
XII. FORMS

4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.58

26.58 Notice of Motion and Motion to Enlarge Period to Do Act Made Before Expiration of Period.

Notice of Motion and Motion to Enlarge Period to Do Act Made Before Expiration of Period.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	NOTICE OF MOTION AND MOTION TO EN-
vs.	)	LARGE PERIOD OF TIME
_____ [*name*],	)	*Fed R Civ P 6(b)*
Defendant	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], will move this court to extend the time to _____ [*specify act for which extra time needed, e.g.,* exchange the reports of its expert witness] from _____ [*current date*] to _____ [*date desired*].

The extra time is needed because _____ [*specify reason, e.g.,* plaintiff's main expert has been ill and unable to consult with plaintiff's counsel on the report until yesterday. It is now apparent that the report may not be completed until after the time specified for the exchange].

[*Optional provision. Stipulation sought before motion made*]

Prior to the making of this motion, counsel for _____ [*name of moving party*] attempted to secure a stipulation to the extension of time sought, but counsel for _____ [*name of other party*] refused to stipulate to an extension of time.

[*Optional provision. Motion sought ex parte but informal notice given*]

Prior to presenting this request to the court, counsel for _____ [*name of moving party*] telephoned counsel for _____ [*name of other party*] and informed _____ [him *or* her] that this motion would be presented to the court on _____ [*date*] at _____ [*time*].

There have been no previous extensions of time obtained from _____ [*name of other party*] or granted by the court.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 6(b); *ED Cal Gen LR 144*; *ND Cal Civ LR 6-3*

Motions for Enlargement of Time:
See *§ 26.35*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsGovernmentsCourtsRule Application & Interpretation

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4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.59

26.59 Application and Order Shortening Time for Service of Motion.

Application and Order Shortening Time for Service of Motion.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	APPLICATION AND
_____ [*name*],	)	ORDER SHORTENING
Defendant	)	TIME FOR SERVICE
	)	OF MOTION
	)	

Application for Order

_____ [*Name of moving party*], _____ [plaintiff *or* defendant], desires to file a motion for _____ [*specify motion for which shortened service requested, e.g.,* amendment of the complaint in this action]. A copy of the proposed motion is attached to this application for an Order Shortening Time. _____ [*Name of moving party*] desires that the motion be heard on _____ [*date desired for motion hearing*], in order that _____ [*reason why motion should be heard at particular time, e.g.,* it may be heard at the same time as _____ (*name*)'s motion to intervene *or* before the deadline for pretrial motions set by the court's scheduling order].

It is impossible to give the full amount of written notice required by _____ [*authority that sets amount of notice required, e.g., Rule 6(d) of the Federal Rules of Civil Procedure or Local Rule*] for this motion to be heard on _____ [*date desired for motion hearing*]. As explained in the attached Affidavit of _____ [*name*], _____ [*name of moving party*] was _____ [unable *or* was unaware of the need] to make this motion at an earlier time.

Service of this motion by _____ [*specify type of service contemplated, e.g.,* personal delivery on the attorney for _____ (*name*)] no later than _____ [*time, e.g.,* 4:00 p.m.] on _____ [*date*] will be reasonable and fair notice of this motion.
Dated: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys for _____

ORDER SHORTENING TIME

Good cause appearing,

IT IS ORDERED that _____ [*name of moving party*]'s Motion _____ [*describe motion, e.g.,* to Amend the Complaint] may be served by means of _____ [*method of service authorized, e.g.,* personal delivery to the offices of counsel for _____ (*name of opposing party*)] no later than _____ [*time, e.g.,* 4:00 p.m.] on _____ [*date*].

A copy of this Order Shortening Time must be served along with the Motion.

_____ [*Name of responding party*] will have until _____ [*time, e.g.,* 5:00 p.m.] on _____ [*date*] to serve and file a response to the Motion.
Dated: _____

_____

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:

Fed R Civ P 6(c); *CD Cal Civ LR 7-1*; *ED Cal Gen LR 144(e)*; *ND Cal Civ LR 6-1*, *6-2*; *SD Cal Civ LR 7.1(e.5)*

Shortening Notice Period:

See *§ 26.26*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsGovernmentsCourtsRule Application & Interpretation

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
XII. FORMS

4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.60

26.60 Request for Oral Argument on Motion.

Request for Oral Argument on Motion.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	REQUEST FOR
_____ [*name*],	)	ORAL ARGUMENT
Defendant	)	
	)	
	)	

Nature of Request

_____ [*Name of moving party*], _____ [plaintiff *or* defendant], submits this written request for oral argument on the Motion _____ [*type of motion, e.g.,* to Dismiss the Complaint for failure to state a claim for relief] currently scheduled to be submitted to the court on _____ [*date of "submission" or last permissible brief*]. This written request is being submitted _____ [with the motion *or* with _____ (*name of moving party*)'s opposition to the motion].

_____ [*Name of moving party*] further moves that oral argument be set _____ [*specify when oral argument to be set, e.g.,* on _____ (*date*) at _____ (*time*) *or* on the date that the motion would otherwise be submitted *or* on a date mutually agreement between the parties and certified by the clerk as convenient to the court].

Grounds for Request

The grounds for this Request are that _____ [*specifically state all grounds on which motion is based, e.g.,*

1. Oral argument will permit the parties to argue the factual circumstances surrounding this case and this motion to a greater extent than possible given the court's 10-page limit on briefs that may be filed in support of and in opposition to motions.

2. Extensive affidavits have been filed in support of and in opposition to the motion, but the significance of all the facts that have been put before the court cannot possibly be fully explained in 10-page briefs.

3. At the time that plaintiff and defendant jointly filed for permission to file briefs in excess of the page limit, this court denied the motion with the suggestion that any of the parties could make a motion like the present one for oral argument on the motion].

Notice of Ex parte Request

Counsel for _____ [*name of opposing party*] has been informed that this ex parte request for oral argument would be presented to this court on _____ [*date*] at _____ [*time*] or thereabouts.

[*Alternative One. Opposing counsel will or will not oppose request*]

Counsel for _____ [*name of opposing party*] states that _____ [he *or* she] _____ [will *or* will not] oppose this request.

[*Alternative Two. Opposing counsel joins in request*]

Counsel for _____ [*name of opposing party*] has authorized the author of this request to represent to the court that _____ [he *or* she] joins in the request for oral argument.

Supporting Papers

This Request is based on the pleadings and papers on file in this action, including all of the papers and affidavits filed in connection with the currently pending Motion for _____, on this written Request, and on whatever argument and evidence may be presented to the Court in connection with this Request.
Dated: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys for _____

NOTES.

Authority:
Fed R Civ P 78; *CD Cal Civ LR 7-14*, *7-15*; *ED Cal Civ LR 230(g)*, *(i)*; *ND Cal Civ LR 7-6*; *SD Cal Civ LR 7.1(d)*

Oral Arguments:
See *§§ 26.51*, *26.53*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial MattersGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.61

26.61 Notice of Motion and Motion for Reargument or Reconsideration.

Notice of Motion and Motion for Reargument or Reconsideration.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	NOTICE OF MOTION
vs.	)	AND MOTION FOR
_____ [*name*],	)	RECONSIDERATION
Defendant	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____
	)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order permitting reargument on the motion _____ [*describe relief sought, e.g.,* to compel production of documents] that this court considered and _____ [granted *or* denied] on _____ [*date*].

The grounds for this motion are that:

1. _____ [*Specifically state first ground that was not and could not have been presented on prior consideration of motion, e.g.,* The author of the documents in question has just returned from Europe and John Smith is now in a position to present an affidavit from the author that will show beyond question that the documents were commissioned by an attorney for use in connection with this litigation and that these documents had no connection with or legitimate use in the business of John Smith.]

2. _____ [*Specifically state second ground that was not and could not have been presented on prior consideration of motion, e.g.,* Since the motion was briefed, the Ninth Circuit Court of Appeals has decided a case directly on point that resolves the issue on this motion in a manner contrary to the decision of this court. A copy of the slip opinion is attached to the Affidavit of Tom Doe.]

[*Continue with any other grounds that support both reconsideration of court's initial determination and that support court determination of substance of motion in favor of party seeking reconsideration*]

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service*.]

NOTES.

Authority:
CD Cal Civ LR 7-18; *ED Cal Civ LR 230(j)*; *ND Cal Civ LR 7-9*; *SD Cal Civ LR 7.1(i)*

Motions for Reconsideration:
See *§ 26.36*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial MattersGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.62

26.62 Stipulation--General Form.

Stipulation--General Form.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	
vs.	)	Civil Action No. _____
_____ [*name*],	)	STIPULATION
Defendant	)	
	)	
	)	

STIPULATION TO _____ [*describe subject, e.g.*, EXTEND TIME TO ANSWER]

By the signatures of their counsel to this Stipulation, the parties to this action agree and stipulate that _____ [*describe exact stipulation of the parties, e.g.,* Defendant _____ (*name of defendant*) will have until _____ (*date*) to answer the Complaint in this matter, but this stipulation does not extend the time to serve or file any motion under Rule 12, which is waived unless made in the time that Defendant _____ (*name of defendant*) would have had to answer but for this stipulation].

Dated: _____

For Plaintiff _____ [*name of plaintiff*]

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys for _____

For Defendant _____ [*name of defendant*]

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys for _____

[*Optional provision. Use if court approval required or desired*]

Court Order

SO ORDERED.
Dated: _____

_____

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:

Fed R Civ P 15(a), *29*, *41(a)(1)*, *48*, 53(f)(3), *59(c)*; *CD Cal Civ LR 7-1*, *8-3*; *ED Cal Civ LR 143*, *144(a)*; *ND Cal Civ LR 6-1*, *7-12*; *SD Cal Civ LR 7.2(c)*

Stipulations in Lieu of Motions:

See *§§ 26.08*, *26.09*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial MattersGeneral Overview

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26.63 Stipulation Withdrawing Motion.

Stipulation Withdrawing Motion.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	STIPULATION
_____ [*name*],	)	WITHDRAWING
Defendant	)	MOTION
	)	
	)	

STIPULATION TO WITHDRAW MOTION

By the signatures of their counsel to this Stipulation, the parties to this action agree and stipulate that:

1. The motion for _____ [*type of motion, e.g.*, summary judgment] filed by _____ [*name of moving party*] on _____ [*date of filing*] and currently set for hearing on _____ [*date of hearing*] is withdrawn and that the hearing may be dropped from the court's calendar.

2. _____ [*Add, if desired, exact agreement that eliminates need for determination of motion:* In lieu of the order sought by this motion, the parties have agreed that plaintiff will voluntarily dismiss its common-law fraud complaint and will proceed in this action solely on the basis of the claimed statutory violations set out in the complaint. An amended complaint reflecting the changes described in this stipulation will be filed no later than _____ (*date*) and the answer to the original complaint in this matter will be deemed the answer to the amended complaint.]

3. The parties have secured the permission of the Court, in advance of the Stipulation, to drop the motion from the Court's calendar. The parties acknowledge that the Court has conditioned its permission to drop the pending motion by the representation of both parties to the Court that the motion will not be renewed or refiled, and that all matters in dispute in the dropped motion have been fully and finally settled.

SO STIPULATED:

Dated: _____

For Plaintiff _____ [*name of plaintiff*]

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys for _____

For Defendant _____ [*name of defendant*]

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorneys for _____

[*Optional provision. Use if court approval required or desired*]

Court Order

SO ORDERED.
Dated: _____

_____

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:
Fed R Civ P 15(a), *29*, *41(a)(1)*, *48*, 53(f)(3), *59(c)*; *CD Cal Civ LR 7-1*, *7-16*, *8-3*; *ED Cal Civ LR 143*, *144(a)*; *ND Cal Civ LR 6-1*, *7-7(e)*, *7-12*; *SD Cal Civ LR 7.1(g.1)*, *7.2(c)*

Stipulations in Lieu of Motions:
See *§ 26.08*, *26.09*

Withdrawing Motions:
See *§ 26.34*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial MattersGeneral Overview

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Unit 8 Motion Practice
CHAPTER 26 Pretrial Motion Practice
XII. FORMS

4-26 MB Practice Guide: Fed Pretrial Civ Proc in CA 26.64

26.64 Order Granting or Denying Motion--General Form.

Order Granting or Denying Motion--General Form.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	ORDER _____ [GRANTING
_____ [*name*],	)	*OR* DENYING] MOTION FOR
Defendant	)	_____
	)	
	)	

This matter came on for hearing on _____ [*date*], on _____ [plaintiff *or* defendant] _____ [*name of party*]'s duly-noticed motion for _____ [*type of motion, e.g.*, dismissal on the grounds that the complaint in this action fails to state a claim on which relief may be granted]. [*Add if motion was decided after oral argument:* _____ (*Name of attorney*) of the firm of _____ (*name of plaintiff law firm*) appeared and argued in support of the motion. _____ (*name of attorney*) of the firm of _____ (*name of defense firm*) appeared and argued in opposition to the motion.] The court has read the papers submitted in support of and in opposition to the motion, and considered the arguments of counsel and the authorities cited to the court.

The court has concluded that _____ [*general nature of conclusion, e.g.*, the Complaint does not and cannot be amended to state a claim on which relief may be granted] on the grounds that _____ [*brief summary of grounds for ruling, e.g.*, it seeks a monetary from a Department of the State government of the State of California, and this type of action is completely barred by the *Eleventh Amendment to the United States Constitution*]. Therefore,

IT IS ORDERED THAT:

1. The motion of _____ [plaintiff *or* defendant] _____ [*name of moving party*] is _____ [GRANTED *or* DENIED].

2. _____ [*First consequence of grant or denial, e.g.*, The case will be dismissed and _____ (*name of moving party*) is ordered to prepare a written form of judgment of dismissal *or* The case will proceed to trial as scheduled].

3. _____ [*Second consequence of grant or denial, e.g.*, Defendant will be awarded costs of suit *or* _____ (*name*) will be precluded from testifying as an expert witness in this matter].

[*Continue stating all consequences of grant or denial of motion*]

[*Optional provision. Use if Rule 11 sanctions might flow from decision on motion*]

4. _____ [*Name of party or attorney or both*] will appear and show cause on _____ [*date*] why sanctions should not be imposed on _____ [him *or* her *or* it *or* them] pursuant to *Rule 11 of the Federal Rules of Civil Procedure* for having filed a _____ [frivolous *or* legally meritless *or* factually insupportable] _____ [complaint *or* motion *or* opposition to this motion].

a. _____ [*Name of party or attorney or both*] will have until _____ [*date*] to file papers with this court showing each and every reason that _____ [he *or* she *or* it *or* they] reasonably believed that the _____ [complaint *or* motion *or* opposition] had _____ [arguable legal merit *or* evidentiary support *or* a purpose other than the creation of unnecessary delay or increased expense].

b. The sanction to be applied, if any, will be determined following the hearing on _____ [*date*].

[*Continue with form as follows*]

Dated: _____

_____

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:

Fed R Civ P 58; *CD Cal Civ LR 52-4*, 52-4.1, *58-10*; *ED Cal Gen LR 137(a)*; *ND Cal Civ LR 7-2(c)*, *7-11*, *7-12*

Orders:

See *§ 26.54*, *26.55*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial MattersGeneral Overview

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Unit 8 Motion Practice
CHAPTER 27 Defaults and Motions for Relief From Default

4-27 MB Practice Guide: Fed Pretrial Civ Proc in CA 27.syn

§ 27.syn Synopsis to Chapter 27: Defaults and Motions for Relief From Default

27.01 Scope.

27.02 Objective and Strategy.

27.02[1] Reviewing Definitions.

27.02[1][a] "Default" and "Defaulting Party."

27.02[1][b] "Entry of Default."

27.02[1][c] "Default Judgment."

27.02[2] Default Judgments Are Disfavored.

27.02[3] Relationship Between Entry of Default and Default Judgment: Two-Step Process.

27.02[3][a] Default Has No Effect Until Entered.

27.02[3][b] Entry of Default Is Prerequisite to Default Judgment.

27.02[4] Distinguish Default As Sanction.

27.03 CHECKLIST: Obtaining Entry of Default and Default Judgment.

27.04 Failure to Respond to Pleading Results in Default.

27.04[1] Party Must Timely Respond or Defend.

27.04[2] Answer or Reply May Be Sufficient Response.

27.04[3] Motion to Dismiss or for Summary Judgment Constitutes Defending.

27.05 Obtaining Entry of Default by Clerk.

27.05[1] LOCAL PRACTICE: SD Cal Requirements--Clerk Will Enter Default.

27.05[2] Applicant Must Show Defaulting Party Failed to Plead or Defend.

27.05[3] No Specific Form Is Required for Entry of Default.

27.05[4] Notification of Defaulting Party Is Not Required.

27.05[5] Clerk Will Enter Default on Proper Application.

27.06 Effects of Entry of Default.

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27.06[2] Adversary Does Not Admit Amount of Damages.

27.06[3] Default Is Waiver of Most Affirmative Defenses.

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27.07 Clerk May Enter Default Judgment Under Particular Circumstances.

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27.08 Plaintiff Must Apply for Entry of Default Judgment by Clerk.

27.08[1] Submit Application and Supporting Material.

27.08[2] LOCAL PRACTICE: CD Cal Requirements--Declaration Must Accompany Application.

27.08[3] LOCAL PRACTICE: SD Cal Requirements--Apply Within 30 Days After Entry of Default.

27.08[4] Notice to Defaulting Party Is Not Required.

27.08[5] Clerk Will Enter Judgment on Proper Application.

27.08[6] LOCAL PRACTICE: CD Cal Requirements--Attorney's Fees.

27.09 Obtaining Entry of Default Judgment by Court.

27.09[1] Submit Application and Supporting Papers.

27.09[2] LOCAL PRACTICE: CD Cal Requirements--Declaration Must Accompany Application.

27.09[3] LOCAL PRACTICE: SD Cal Requirements--Apply Within 30 Days.

27.09[4] No Notice Is Required to Defaulting Party Who Has Not Appeared.

27.09[5] Provide Notice to Parties That Have Appeared.

27.09[6] LOCAL PRACTICE: CD Cal Requirements--Notice of Submission of Claim of Unliquidated Damages.

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27.10 Court May Order Hearing.

27.10[1] Court's Discretion.

27.10[2] Evidentiary Hearing on Damages May Be Required.

27.10[3] LOCAL PRACTICE: CD Cal Requirements--Proving Damages by Declarations.

27.10[4] Hearing Generally Is Not Required to Establish Liability.

27.10[5] Court May Use Jury.

27.10[6] Defaulting Party May Participate in Hearing.

27.11 Court Has Discretion to Grant or Deny Default Judgment.

27.12 Factors Considered by Court.

27.13 Damages and Other Relief Are Limited to Demand in Pleadings.

27.14 Defaulting Party's Financial Condition Cannot Be Considered.

27.15 LOCAL PRACTICE: CD Cal Requirements--Attorney's Fee Schedule.

27.16 Special Requirements Exist for Particular Defaulting Parties.

27.16[1] Minors or Incompetents.

27.16[2] Members of Military.

27.16[3] United States.

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27.17 Effect of Entry of Default Judgment.

27.17[1] Default Judgment Is Final Judgment.

27.17[2] Default Judgment Has Claim-Preclusive Effect.

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27.18 CHECKLIST: Obtaining Relief From Default.

27.19 Moving to Set Aside Default.

27.19[1] Recognize That Default Is Disfavored.

27.19[2] Argue That Entry of Default Was Improper.

27.19[3] Good Cause to Set Aside Default Must Exist.

27.19[4] Bring Motion Within Reasonable Time.

27.19[5] LOCAL PRACTICE: CD Cal Requirements--Cross-Examination of Declarant.

27.19[6] Prepare for Imposition of Conditions.

27.20 Opposing Application for Default Judgment.

27.20[1] Defaulting Party's Argument.

27.20[2] Opposing Amount of Damages Claimed.

27.20[3] Contesting Liability of Certain Government Defendants.

27.20[3][a] United States.

27.20[3][b] Foreign Government.

27.21 Grounds for Vacating Default Judgment.

27.21[1] Mistake, Inadvertence, Surprise, or Excusable Neglect.

27.21[2] Void Judgment.

27.21[3] Extraordinary Circumstances.

27.21[4] Fraud.

27.21[5] Defaulting Party's Active Military Status.

27.22 Moving to Vacate Default Judgment.

27.22[1] File Timely Motion.

27.22[1][a] Motion Generally Must Be Filed Within Reasonable Time.

27.22[1][b] Motion Based on Excusable Neglect Must Be Filed Within One Year.

27.22[1][c] No Time Limit for Motion Based on Void Judgment.

27.22[1][d] Ninety-Day Limit for Motion by Former Member of Military.

27.22[2] Motion Must Set Forth Grounds for Relief.

27.22[3] Defaulting Party Has Burden of Proof.

27.22[4] Court May Impose Conditions in Setting Aside Default Judgment.

27.23 Application to Clerk for Entry of Default.

27.24 Declaration in Support of Application to Clerk for Entry of Default.

27.25 Application to Clerk for Entry of Default Judgment.

27.26 Declaration in Support of Application to Clerk for Entry of Default Judgment.

27.27 Default Judgment Entered by Clerk.

27.28 Notice of Application and Application for Entry of Default Judgment by Court.

27.29 Declaration in Support of Application to Court for Entry of Default Judgment by Court.

27.30 Declaration Regarding Military Status of Defaulting Party.

27.31 Default Judgment Entered by Court.

27.32 Notice of Appearance.

27.33 Notice of Motion and Motion to Set Aside Default.

27.34 Notice of Motion and Motion to Set Aside Default Judgment.

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Unit 8 Motion Practice
CHAPTER 27 Defaults and Motions for Relief From Default
I. STRATEGY

4-27 MB Practice Guide: Fed Pretrial Civ Proc in CA 27.01

27.01 Scope.

This chapter covers:

- Nature and effect of default [*see 27.04*, *27.06*].
- Obtaining entry of default [*see 27.05*; *Forms: 27.23*, *27.24*].
- Obtaining entry of default judgment [*see 27.07 -27.09*; *Forms: 27.26 -27.31*].
- Moving to set aside default [*see 27.19*; *Form: 27.33*].
- Opposing entry of default judgment [*see 27.20*].
- Moving to vacate default judgment [*see 27.21*, *27.22*; *Form: 27.34*].

Core Rules:
Fed R Civ P 54(c), *55*, *60(b)*.

Detailed Discussion/Forms:
10 Bender's Federal Practice Forms, Rule 55, Default; Default Judgment (Matthew Bender).

11 Bender's Federal Practice Forms, Rule 60, Relief From a Judgment or Order (Matthew Bender).

10 Moore's Federal Practice, Ch. 54, Judgment; Costs; Ch. 55, Default; Default Judgment (Matthew Bender 3d ed.).

12 Moore's Federal Practice, Ch. 60, Relief From a Judgment or Order (Matthew Bender 3d ed.).

Legal Topics:

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

Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From Default

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Unit 8 Motion Practice
CHAPTER 27 Defaults and Motions for Relief From Default
I. STRATEGY

4-27 MB Practice Guide: Fed Pretrial Civ Proc in CA 27.02

27.02 Objective and Strategy.

27.02[1] Reviewing Definitions.

27.02[1][a] "Default" and "Defaulting Party." Generally, a party is in "default" if it has failed to plead or otherwise respond in timely fashion to a pleading seeking affirmative relief against the party [*see Fed R Civ P 55(a)*]. In this chapter, unless the context indicates otherwise, a party that is in default is called the "defaulting party." For ease of reference, the party asserting a claim against the defaulting party is called the "plaintiff." However, in any given case the party asserting a claim against the defaulting party might actually be a defendant who filed a counterclaim, crossclaim, or third-party complaint.

Example--Failure to Respond to Complaint:

If a summons and complaint have been served on a defendant, who then fails to respond to the complaint within the allotted time [*see Fed R Civ P 12(a), (b)*], the defendant is in default.

Examples--Failure to Respond to Other Pleadings:

Although most defaults arise from the failure to respond to complaints, a default may also occur from a failure to respond to other pleadings demanding affirmative relief, such as a counterclaim, a crossclaim or a third-party complaint. For example, a plaintiff may be in default for failing to respond to a counterclaim [*see Fed R Civ P 13*].

27.02[1][b] "Entry of Default." "Entry of default" occurs when the clerk of the court enters a party's default on the clerk's record of the case [*Fed R Civ P 55(a)*]. To secure the entry of default, the plaintiff typically applies to the clerk [*see Fed R Civ P 55(a)*].

Cross Reference:

Entry of Default, see 10 Moore's Federal Practice, *§ 55.11* (Matthew Bender 3d ed.).

27.02[1][c] "Default Judgment." A "default judgment," or "judgment by default," is a final judgment against the defaulting party [*see Fed R Civ P 55(b)*], entered by the clerk of the court or the assigned judge [*Fed R Civ P 55(b)(1)*,

(2)].

Cross References:

Criteria for determining whether to apply to the clerk or to the court for entry of a default judgment, see *§ 27.07*.

Procedure for applying for entry of a default judgment, see *§ 27.08* and *27.09*; forms, see *§§ 27.27 -27.29*.

27.02[2] Default Judgments Are Disfavored. Default judgments are generally disfavored, and whenever it is reasonably possible, cases should be decided on their merits [*In re Hammer (9th Cir 1991) 940 F2d 524, 525*]. For this reason, counsel should be sure that taking a default judgment against an opponent is the best way to proceed under the circumstances.

Applying the general terms of *Fed R Civ P 60(b)* to default judgments, the Ninth Circuit has emphasized that default judgments are appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits. If there has been no merits decision, appropriate exercise of district court discretion under Rule 60(b) requires that the finality interest should give way fairly readily, to further the competing interest in reaching the merits of a dispute [*TCI Group Life Ins. Plan v. Knoebber (9th Cir 2001) 244 F3d 691, 695-696*].

Judge's Perspective:

Winning by default can be fast and cheap. But there is always the risk that the judgment will be set aside and you will have to start over. Time will have been lost, and you may lose credibility with the court.

Cross Reference:

Court's discretion, see 10 Moore's Federal Practice, *§ 55.20[2]* (Matthew Bender 3d ed.).

27.02[3] Relationship Between Entry of Default and Default Judgment: Two-Step Process.

27.02[3][a] Default Has No Effect Until Entered. A party's default has no legal effect until an adversary takes action to secure entry of the default or to obtain a default judgment [*see Fed R Civ P 55(a), (b)*].

Because a default has no effect until entered, a defaulting party may still file and serve pleadings and motion papers until the default has been entered [*see Hudson v. North Carolina (SD W Va 1994) 158 FRD 78, 80*].

Warning:

If a responsive pleading or motion is filed on the same day as an application for entry of default, default may nevertheless be entered if the application for entry of default was filed first [*see McManus v. American States Ins. Co. (CD Cal 2000) 201 FRD 493, 499*].

27.02[3][b] Entry of Default Is Prerequisite to Default Judgment. Entry of default is a prerequisite to obtaining a default judgment [Original San Francisco Toymakers, Inc. v. Trendmasters, Inc. (ND Cal 2003) 2003 US Dist LEXIS 18557, at *12 ; *see Fed R Civ P 55(a), (b)*].

27.02[4] Distinguish Default As Sanction. A party's misconduct during the litigation may justify the entry of default as a sanction [*Fed R Civ P 16(f), 37(b)(2)(A)(vi)*]. In addition, courts have inherent equitable powers to enter default judgments for failure to prosecute, contempt of court, or abusive litigation practices [*Yusov v. Yusuf (9th Cir 1989) 892 F2d 784, 787* ; *TeleVideo Sys., Inc. v. Heidenthal (9th Cir 1987) 826 F2d 915, 917-918*].

Cross References:

Default as sanction for discovery conduct, see Ch. 25, Motions to Compel and Discovery Sanctions, see *§ 25.34*. Court's inherent authority to impose sanctions, see Ch. 34, Other Sanction Provisions, see *§§ 34.16 -34.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory CounterclaimsCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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Unit 8 Motion Practice
CHAPTER 27 Defaults and Motions for Relief From Default
II. OBTAINING ENTRY OF DEFAULT AND DEFAULT JUDGMENT

4-27 MB Practice Guide: Fed Pretrial Civ Proc in CA 27.03

27.03 CHECKLIST: Obtaining Entry of Default and Default Judgment.

☐ Determine whether adverse party is in default by failing to plead or otherwise respond in timely fashion to pleading seeking affirmative relief.

○ Review pleadings to determine whether claim for affirmative relief has been asserted against adverse party in any of following:

☐ Complaint or amended complaint.

☐ Third-party complaint or amended third-party complaint.

☐ Counterclaim or amended counterclaim.

☐ Crossclaim or amended crossclaim.

○ If any pleading asserts claim for affirmative relief against adverse party, either:

☐ Review proof of service to ascertain date on which that pleading was served on adverse party.

☐ If pleading is complaint or third-party complaint, verify that service of process was waived by adverse party.

○ Review office file and court clerk's docket to determine whether adverse party has served responsive pleading or motion within applicable time limit, including any extensions of time ordered by court.

○ If adverse party has timely served responsive pleading or motion, determine whether court has found adverse party in default as sanction for misconduct in litigation.

Authority:
Fed R Civ P 4(d), 12(a), 16(f), 37(b)(2)(A)(vi), 55(a), 81(c)

Discussion:
See *§ 27.04*

☐ If adverse party is in default, prepare written application to clerk for entry of default, including following:

○ Affidavit or declaration setting forth following:

☐ That defaulting party was properly served with pleading seeking affirmative relief.

☐ That defaulting party has failed to serve or file responsive pleading or motion.

☐ That applicable time for serving responsive pleading or motion, including any extensions, has expired.

○ Exhibits supporting application, such as:

☐ Copy of pleading seeking affirmative relief that was served on defaulting party.

☐ Copy of proof of service.

☐ Copies of any court orders extending time to respond.

Authority:
Fed R Civ P 55(a)

Discussion:
See *§ 27.05*

Forms:
See *§ 27.23, 27.24*

☐ File application for entry of default.

☐ Contact clerk's office to verify that default has been entered.

Authority:
Fed R Civ P 55(a)

Discussion:
See *§ 27.05*

☐ If pleading against defaulting party also asserts claims against other party that has not defaulted, consider whether application for judgment against defaulting party should be delayed until adjudication of remaining party's liability.

○ Consider that if judgment against the defaulting party would be logically inconsistent with possible judgment in favor of other defending party, court will not enter default judgment until after liability of other defending party has been determined.

○ Consider that even if liability of defaulting party is independent of liability of nondefaulting party, court has discretion to defer action on application for default judgment to avoid risk of inconsistent damages determinations.

Authority:
Fed R Civ P 55(b)(2)

Discussion:
See *§ 27.16[5]*

☐ Determine whether to apply to clerk or to court for entry of default judgment.

○ Clerk can enter default judgment only if:

☐ Claim against defaulting party is for sum certain or sum that can by computation be made certain.

☐ Default resulted from failure to appear, as opposed to misconduct during litigation.

☐ Defaulting party is not minor or incompetent person.

☐ Defaulting party is not currently serving in armed forces.

☐ Defaulting party is not United States or its officer or agency.

☐ When claim is asserted against multiple parties, all have defaulted.

○ If clerk has authority to enter default judgment, or if existence of clerk's authority is not clear, consider requesting that court enter judgment, so as to minimize possibility that judgment will eventually

be set aside.

Authority:
Fed R Civ P 54(b), 55(b), (d), (e); 50 USC app § 521

Discussion:
See *§ 27.08*

☐ If applying to clerk for entry of default judgment, prepare written application, including following:

○ Supporting affidavits and declarations establishing all of following:

☐ When and against which party default was entered.

☐ Identification of pleading to which default was entered.

☐ Default was entered for failure to appear.

☐ Defaulting party is not minor or incompetent person.

☐ Defaulting party is not United States or its agency or officer.

☐ Defaulting party is not in military service.

☐ Defaulting party is not foreign state or political subdivision, agency, or instrumentality of foreign state.

☐ Amount due, which cannot exceed amount prayed for in pleading to which default was entered.

☐ Itemization of costs claimed.

○ Proposed form of judgment.

Authority:
28 USC § 1608(e); 50 USC app § 521; Fed R Civ P 54(c), (d), 55(b), (d); CD Cal Civ LR 55-1

Discussion:
See *§ 27.08*

Forms:
See *§§ 27.25 -27.27*

☐ File application and supporting documents with clerk, complying with any local rules that specify time for filing

application.

○ Consider providing defaulting party with notice of application, even though notice is not required, so as to minimize possibility that judgment will eventually be set aside.

Authority:
Fed R Civ P 55(b)(1); *SD Cal Civ LR 55.1*

Discussion:
See *§ 27.08*

☐ If applying to court for entry of default judgment, prepare written application, including following:

○ Supporting affidavits and declarations establishing all of following:

☐ When and against which party default was entered.

☐ Identification of pleading to which default was entered.

☐ Whether defaulting party is minor or incompetent person.

☐ Whether defaulting party is United States agency or officer.

☐ Either (1) defaulting party is not in military service, (2) defaulting party is in military service, or (3) plaintiff is unable to determine whether defaulting party is in military service.

☐ Whether defaulting party is foreign state or political subdivision, agency, or instrumentality of foreign state.

☐ Existence of facts underlying equitable factors that weigh in favor of entry of default judgment.

☐ Explanation of amount of damages claimed, which cannot exceed amount prayed for in pleading to which default was entered.

☐ Itemization of costs and any attorney's fees claimed.

☐ That notice has been served on the defaulting party, if required.

○ Memorandum of law explaining that equities weigh in favor of granting default judgment, considering such factors as:

☐ Possibility of prejudice to plaintiff if default judgment is denied.

☐ Substantive merits of claim against defaulting party, including whether defaulting party has meritorious defense.

☐ Sufficiency of pleading asserting claim against defaulting party.

☐ Sum of money at stake in action.

☐ Possibility of dispute concerning material facts.

☐ Whether default was willful or was due to excusable neglect.

☐ Whether default was technical or de minimis.

☐ Strong public policy favoring decisions on merits.

○ Proposed form of judgment.

Authority:
50 USC app § 521; *Fed R Civ P 54(c)*, *55(b)(2)*, *(d)*; *CD Cal Civ LR 55-1*

Discussion:
See *§ 27.09*

Form:
See *§§ 27.28 -27.31*

☐ File application and supporting documents with clerk, complying with any local rules that specify time for filing application.

○ Serve notice of application.

☐ If defaulting party or defaulting party's representative has appeared in action, provide defaulting party with written notice of application at least seven days before hearing on application, and file proof of service.

☐ If defaulting party is minor or incompetent person, follow standard noticed motion procedure, providing notice of application to defaulting party's guardian or other representative.

☐ Even if service of notice of application is not required, consider providing defaulting party with notice, so as to minimize possibility that judgment will eventually be

set aside.

Authority:
Fed R Civ P 55(b)(2); *SD Cal Civ LR 55.1*

Discussion:
See *§ 27.09*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ Prepare for and attend hearing on application to court for entry of default judgment.

○ Prepare to present evidence establishing damages, which may not exceed amount demanded in pleading.

○ Prepare to present evidence establishing liability if either:

☐ Defaulting party is United States or its agency or officer.

☐ Defaulting party is foreign state or political subdivision, agency, or instrumentality of foreign state.

☐ Court exercises its discretion to require proof of liability.

○ Prepare to present evidence on other issues as required by court.

Authority:
28 USC § 1608(e); *Fed R Civ P 55(b)(2), (d)*

Discussion:
See *§ 27.10*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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27.04 Failure to Respond to Pleading Results in Default.

27.04[1] Party Must Timely Respond or Defend. A party is in default when it does not timely plead or otherwise defend, as provided by the Federal Rules of Civil Procedure, in response to a pleading that seeks affirmative relief against the defaulting party [*Fed R Civ P 55(a)*].

If a party responds to an initial pleading but does not timely respond to an amended pleading, it will be in default [*see Fed R Civ P 15(a), 55(a)*].

Cross References:

Answers, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§§ 8.06 -8.13*.

Motions to dismiss, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§§ 8.14 -8.22*.

Time for responding to complaint, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.05*.

27.04[2] Answer or Reply May Be Sufficient Response. Required responsive pleadings are an answer to a complaint, counterclaim, crossclaim, or third-party complaint; the court may also order a reply to an answer [*Fed R Civ P 7(a)*].

27.04[3] Motion to Dismiss or for Summary Judgment Constitutes Defending. To "otherwise defend," so as to avoid being in default, a party may bring a motion to dismiss under *Fed R Civ P 12(b)* or a motion for summary judgment under *Fed R Civ P 56* [*Rashidi v. Albright (D Nev 1993) 818 F Supp 1354, 1356 , aff'd, (9th Cir 1994) 39 F3d 1188*].

Examples--Motions Under Rule 12:

Motions that constitute "otherwise defending" include the following:

- A motion to dismiss on grounds of lack of subject-matter jurisdiction, lack of personal jurisdiction, improper venue, insufficiency of process, insufficiency of service of process, failure to state a claim on which relief can be granted, or failure to join a party under *Fed R Civ P 19* [*Fed R Civ P 12(b)*].

- A motion for a more definite statement [*Fed R Civ P 12(e)*].

- A motion to strike [*Fed R Civ P 12(f)*].

Example--Insufficient Response:

Actions other than motions to dismiss or for summary judgment may not be sufficient to avoid default. For example, filing a notice of appearance will not prevent the entry of default against the party [*Eitel v. McCool (9th Cir 1986) 782 F2d 1470, 1471*].

Cross References:

Motions for summary judgment, see Ch. 29, Summary Judgment. Motions to dismiss, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§§ 8.14 -8.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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27.05 Obtaining Entry of Default by Clerk.

27.05[1] LOCAL PRACTICE: SD Cal Requirements--Clerk Will Enter Default. If an answer, or motion to dismiss, is not filed within the original or extended time, the clerk will enter a default and serve notice of the default on the parties. If plaintiff fails to move for default judgment within 30 days, the clerk will promptly prepare an order for filing by the assigned judge directing the plaintiff to show cause why the complaint should not be dismissed without prejudice [*SD Cal Civ LR 77.2(d)*].

27.05[2] Applicant Must Show Defaulting Party Failed to Plead or Defend. In applying for entry of default by the clerk, a party must show the clerk, by affidavit or otherwise, that the defaulting party has failed to plead or otherwise defend in accordance with the Federal Rules of Civil Procedure [*Fed R Civ P 55(a)*].

Default may be entered if no responsive pleading or motion was filed before the filing of the application for entry of default, even if a late responsive pleading or motion is filed later the same day [*see McManus v. American States Ins. Co. (CD Cal 2000) 201 FRD 493, 499*]. On the other hand, because a default has no effect until it is entered, a defaulting party may still file and serve pleadings and motion papers until the default has been entered [*see Hudson v. North Carolina (SD W Va 1994) 158 FRD 78, 80*].

27.05[3] No Specific Form Is Required for Entry of Default. No specific form or content is required for an application for entry of default, other than that the defaulting party's failure to plead to otherwise defend must be shown "by affidavit or otherwise" [*Fed R Civ P 55(a)*]. The plaintiff should file a written application requesting entry of default, accompanied by the following:

- An affidavit or declaration [*see 28 USC § 1746*] of a person with actual knowledge setting forth the following facts:
  - The defaulting party was properly served with the complaint or other pleading seeking affirmative relief.

- The defaulting party has failed to serve or file a responsive pleading or motion.
- The applicable time for serving a responsive pleading or motion, including any extensions, has expired.

- The following exhibits:
  - A copy of the pleading seeking affirmative relief that was served on the defaulting party.
  - A copy of the proof of service.
  - Copies of any court orders extending the time to respond.

Cross Reference:

Time limits for filing responsive pleadings and motions, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.05*.

Strategic Point--Plaintiff:

If the case is one in which the clerk is authorized to enter a default judgment [*see Fed R Civ P 55(b)(1)*], the plaintiff should consider preparing and filing an application for a default judgment concurrently with the application for entry of default. This may reduce the time and cost of obtaining the desired relief.

Cross References:

Form of application for the entry of a default, see *§ 27.23*. Discussion of when the clerk may enter a default judgment, see *§ 27.07*. Form of application for the entry of a default judgment by the clerk, see *§ 27.25*.

27.05[4] Notification of Defaulting Party Is Not Required. There is no requirement that the plaintiff notify the defaulting party of the application for entry of default [*see Fed R Civ P 55(a)*; *Hawaii Carpenters' Trust Funds v. Stone (9th Cir 1986) 794 F2d 508, 512*].

Strategic Point--Plaintiff:

If there has been contact with the defaulting party or the attorney for the defaulting party, such as discussions regarding settlement or an extension of time to plead, counsel for the plaintiff should consider providing notice of the application for entry of default. The default may be less vulnerable to being set aside if the defaulting party had notice of the application.

Judge's Perspective:

Notice should always be given. Many judges will ask about it. Failure to give notice may make it easier to have the default set aside later.

27.05[5] Clerk Will Enter Default on Proper Application. If the application for entry of default makes the required showing, the clerk must enter the default into the clerk's record of the case [*Fed R Civ P 55(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsCourtsClerks of CourtGovernmentsCourtsRule Application & Interpretation

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27.06 Effects of Entry of Default.

27.06[1] Adversary Admits Allegations Regarding Liability. Once a default has been entered, the allegations in the plaintiff's pleading regarding liability are deemed admitted by the defaulting party, who will not be permitted to introduce evidence to controvert those allegations [*Fed R Civ P 8(d)*; *Geddes v. United Fin. Group (9th Cir 1977) 559 F2d 557, 560*].

Exceptions:

If the defaulting party is the United States or an officer or agency of the United States, a default judgment may not be entered unless the plaintiff adduces evidence establishing liability [*see Fed R Civ P 55(e)*]. Similarly, the plaintiff must adduce evidence of liability if the defaulting party is foreign state or a political subdivision, agency, or instrumentality of a foreign state [*28 USC § 1608(e)*].

Distinguish:

On a motion for default judgment, the defaulting party will not be precluded from challenging the legal sufficiency of the adverse party's allegations, and a default judgment will be denied if those allegations are insufficient to state a claim [*Cripps v. Life Ins. Co. of N. Am. (9th Cir 1992) 980 F2d 1261, 1267* ; *Alan Neuman Prods., Inc. v. Albright (9th Cir 1988) 862 F2d 1388, 1392-1393*].

27.06[2] Adversary Does Not Admit Amount of Damages. The entry of a default does not constitute an admission of damages, which must be proved when the plaintiff seeks a default judgment [*Fed R Civ P 8(b)(6), 55(b)(2)*; *Geddes v. United Fin. Group (9th Cir 1977) 559 F2d 557, 560*].

27.06[3] Default Is Waiver of Most Affirmative Defenses. Once a default has been entered, the default is treated as a waiver of affirmative defenses, such as comparative fault [*see Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp. (2d Cir 1992) 973 F2d 155, 158-159*].

27.06[4] Default Is Waiver of Compulsory Counterclaims. Once a default has been entered, the defaulting party is precluded from raising, in the present action or in a future action, any claim that is so closely connected to the claim against the defaulting party that it constitutes a compulsory counterclaim [*see Greyhound Exhibitgroup, Inc. v.*

E.L.U.L. Realty Corp. (2d Cir 1992) 973 F2d 155, 159-160].

27.06[5] Entry of Default is Not Final Order. The entry of a default is an interlocutory event that is not appealable [*Hawaii Carpenters' Trust Funds v. Stone (9th Cir 1986) 794 F2d 508, 512*]. A party may not obtain direct appellate review of the entry of default; rather, the party must first file a motion in the trial court to set aside the default [*Investors Thrift v. Lam (In re Lam) (9th Cir 1999) 192 F3d 1309, 1311* ; *see Fed R Civ P 55(c)*].

Cross Reference:

Motions to set aside default, see *§ 27.19*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsFederal GovernmentClaims By & Against

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27.07 Clerk May Enter Default Judgment Under Particular Circumstances.

27.07[1] Claim Is for Sum Certain. The clerk may enter a default judgment against the defaulting party on application by the plaintiff when the claim against the defaulting party is for a sum certain or a sum that can by computation be made certain [*Fed R Civ P 55(b)(1)*; *see 27.06[2]*; *Combs v. Coal & Mineral Mgmt. Servs., Inc. (DDC 1984) 105 FRD 472, 474* (claim is for a sum certain or an amount that can be made certain if the claimed damages are liquidated or if they can be determined by a simple computation that does not require the clerk to exercise any discretion)]. No doubt can exist as to the exact amount the plaintiff is entitled to as a result of the defendant's default [*Franchise Holding II, LLC v. Huntington Restaurants Group, Inc. (9th Cir 2004) 375 F3d 922, 928-929* (claim was for sum certain when plaintiff presented clerk with documents setting forth formula and figures necessary to compute amount despite defendant's dispute of those figures)].

27.07[2] Party Failed to Appear. The clerk may enter a default judgment against the defaulting party on application by the plaintiff when the default resulted from the defaulting party's "failure to appear," as opposed to misconduct during the litigation [*Fed R Civ P 55(b)(1)*; *see 27.06[3]*; *Franchise Holding II, LLC v. Huntington Restaurants Group, Inc. (9th Cir 2004) 375 F3d 922, 927-928* ; *Eitel v. McCool (9th Cir 1986) 782 F2d 1470, 1471* ("appearance" consists of filing a responsive pleading or motion, filing a notice of appearance, or otherwise making a formal appearance)].

27.07[3] Defaulting Party Is Not Minor, Incompetent, or Military Personnel. The clerk may enter a default judgment against the defaulting party on application by the plaintiff when the defaulting party is not a minor [*see Hutton v. Fisher (3d Cir 1966) 359 F2d 913, 915*] or an incompetent person [*Fed R Civ P 55(b)(1)*], or when the defaulting party is not currently serving in the military [*see 50 USC app § 521*].

27.07[4] Defaulting Party Is Not Government. The clerk may enter a default judgment against the defaulting party on application by the plaintiff when the defaulting party is not the United States or an officer or agency of the United States [*see Fed R Civ P 55(d)*] or the defaulting party is not a foreign state or a political subdivision, agency, or instrumentality of a foreign state [*see 28 USC § 1608(e)*].

27.07[5] All Defendants Have Defaulted in Multi-Defendant Case. The clerk may enter a default judgment

against the defaulting party on application by the plaintiff when, if there are multiple defendants, all of the defendants are in default [*see Fed R Civ P 54(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsCourtsClerks of CourtGovernmentsCourtsRule Application & Interpretation

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27.08 Plaintiff Must Apply for Entry of Default Judgment by Clerk.

27.08[1] Submit Application and Supporting Material. To obtain the entry of a default judgment by the clerk [*see Fed R Civ P 55(b)(1)*], the plaintiff should submit the following to the clerk:

- An application for entry of a default judgment.
- A proposed form of judgment.
- Supporting affidavits and declarations, including:
  - An affidavit or declaration identifying the defaulting party and the pleading to which default was entered, and establishing the date of entry of default and the fact that the default was entered for a failure to appear [*see Fed R Civ P 55(b)(1)*].
  - A statement of the amount due, which cannot exceed the amount prayed for in the plaintiff's pleading [*see Fed R Civ P 54(c), 55(d)*].
  - An affidavit or declaration showing that the defaulting party is not in the military service [*50 USC app § 521*].
  - An affidavit or declaration showing that the defaulting party is not a minor or incompetent person [*see Fed R Civ P 55(b)(2)*].
  - An affidavit or declaration showing that the defaulting party is not the United States or an agency or officer of the United States [*see Fed R Civ P 55(d)*].

- An affidavit or declaration showing that the defaulting party is not a foreign state or a political subdivision, agency, or instrumentality of a foreign state [*see 28 USC § 1608(e)*].

- An itemization of the costs claimed [*see Fed R Civ P 54(d), 55(b)(1)*].

Strategic Point--Plaintiff:

If there is any question regarding the clerk's authority to enter a default judgment, it is preferable to apply directly to the court for entry of the default judgment. A court, having considered and granted a default judgment, can be expected to be less willing to vacate its own prior order than to vacate a default judgment entered by the clerk.

The plaintiff should consider filing the application for a default judgment concurrently with the application for entry of default. This may reduce the time and cost of obtaining the desired relief.

Warning:

The amount of the default judgment cannot exceed the amount prayed for in the plaintiff's pleading [*see Fed R Civ P 54(c)*].

Cross Reference:

Forms for the entry of a default judgment by the clerk, see *§§ 27.23 -27.25*.

27.08[2] LOCAL PRACTICE: CD Cal Requirements--Declaration Must Accompany Application. An application to the clerk for a default judgment must be accompanied by a declaration that includes all of the following [*CD Cal Civ LR 55-1*; *see Philip Morris USA v. Castworld Prods., Inc. (CD Cal 2003) 219 FRD 494, 498*]:

- When and against which party the default was entered.

- The identification of the pleading to which the default was entered.

- A statement that the defaulting party is not an infant or incompetent person.

- A statement that the Servicemembers Civil Relief Act; *see 50 USC App § 521 et seq.*) does not apply.

Warning:

The Central District of California has stated that *Fed R Civ P 55(b)(2)* and *CD Cal Civ LR 55-1* provide that notice is required to be given if the party appeared in the action, and that this information must be set forth in the application for default judgment [*see Philip Morris USA v. Castworld Prods., Inc. (CD Cal 2003) 219 FRD 494, 498*].

27.08[3] LOCAL PRACTICE: SD Cal Requirements--Apply Within 30 Days After Entry of Default. The plaintiff must apply for a default judgment within 30 days after the entry of default. Failure to meet this deadline will result in the issuance of an order to show cause why the pleading against the defaulting party should not be dismissed [*SD Cal Civ LR 55.1*].

27.08[4] Notice to Defaulting Party Is Not Required. A party applying to the clerk for a default judgment need

not give notice of the application to the defaulting party, because notice need not be given to parties that have not appeared [*see Fed R Civ P 55(b)(1)*; *Dow Chem. Pac. Ltd. v. Rascator Maritime, S.A. (2d Cir 1986) 782 F2d 329, 336* ; *Walker & Zanger (West Coast) Ltd. v. Stone Design, S.A. (CD Cal 1997) 4 F Supp2d 931, 935*].

Strategic Point--Plaintiff:

Counsel should consider giving notice of the application for a default judgment to the defaulting party, even though it is not required [*see Taylor Made Golf Co. v. Carsten Sports, Ltd. (SD Cal 1997) 175 FRD 658, 661*]. The default judgment may be less vulnerable to being set aside if the defaulting party had notice of the application.

Distinguish:

The Central District of California has stated that that *Fed R Civ P 55(b)(2)* and *CD Cal Civ LR 55-1* provide that notice is required to be given if the party appeared in the action [*see Philip Morris USA v. Castworld Prods., Inc. (CD Cal 2003) 219 FRD 494, 498 n2*]. The Southern District has no such requirement.

27.08[5] Clerk Will Enter Judgment on Proper Application. On submission of a proper application and supporting documents, the clerk will enter judgment for principal, interest, and costs [*Fed R Civ P 55(b)(1)*; *SD Cal Civ LR 77.2*; *see 28 USC §§ 1920, 1923(a)*].

27.08[6] LOCAL PRACTICE: CD Cal Requirements--Attorney's Fees. If a promissory note, contract, or statute applicable to the claim on which a default judgment is entered provides for the recovery of reasonable attorney's fees, the fees may be included in the judgment entered by the clerk, since the precise amount of fees is calculated according to a schedule established by local court rule [*see CD Cal Civ LR 55-3*]. An attorney claiming a fee in excess of the schedule may file a written request at the time of entry of the default judgment to have the attorney's fee fixed by the court [*CD Cal Civ LR 55-3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsCourtsClerks of CourtGovernmentsCourtsRule Application & Interpretation

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27.09 Obtaining Entry of Default Judgment by Court.

27.09[1] Submit Application and Supporting Papers. To obtain the entry of a default judgment by the court [*see Fed R Civ P 55(b)(2)*], the plaintiff should submit the following:

- An application for entry of a default judgment.
- A proposed form of judgment.
- Supporting affidavits and declarations, including:
  - An affidavit or declaration identifying the defaulting party and the pleading to which default was entered, and establishing the date of entry of default [*see Fed R Civ P 55(a)*].
  - A statement of the amount due, which cannot exceed the amount prayed for in the plaintiff's pleading [*see Fed R Civ P 54(c)*].
  - An affidavit or declaration showing that either (1) the defaulting party is not in military service, (2) the defaulting party is in military service, or (3) the plaintiff is unable to determine whether the defaulting party is in military service [*50 USC app § 521(b)(1)*].
  - An affidavit or declaration indicating whether the defaulting party is a minor or incompetent person [*see Fed R Civ P 55(b)(2)*].
  - An affidavit or declaration indicating whether the defaulting party is an agency or officer of the United States [*see Fed R Civ P 55(d)*].

- An affidavit or declaration indicating whether the defaulting party is a foreign state or a political subdivision, agency, or instrumentality of a foreign state [*see 28 USC § 1608(e)*].

- Affidavits or declarations establishing the existence of facts underlying equitable factors that weigh in favor of the entry of a default judgment.

- An itemization of the costs and any attorney's fees claimed [*see Fed R Civ P 54(d), 55(b)(2)*].

- An affidavit or declaration establishing that notice has been served on the defaulting party, if required [*see Fed R Civ P 55(b)(2)*].

Warning:

The failure to file an affidavit or declaration concerning the defaulting party's military status does not affect the jurisdiction of the court, and any decision rendered by the court on the merits is voidable, not void [*see 50 USC app § 521(b); Scheidegg v. Department of Air Force (DNH 1989) 715 F Supp 11, 14* ; *Sarfaty v. Sarfaty (ED Pa 1982) 534 F Supp 701, 704*].

27.09[2] LOCAL PRACTICE: CD Cal Requirements--Declaration Must Accompany Application. An application for a default judgment must be accompanied by a declaration that includes all of the following [*CD Cal Civ LR 55-1*; *see Philip Morris USA v. Castworld Prods., Inc. (CD Cal 2003) 219 FRD 494, 498*]:

- When and against which party the default was entered.

- The identification of the pleading to which the default was entered.

- Whether the defaulting party is an infant or incompetent person, and if so, whether that person is represented by a general guardian, committee, conservator, or other representative [*see Fed R Civ P 55(b)(2)*].

- That the Soldiers' and Sailors' Civil Relief Act of 1940 (now known as the Servicemembers Civil Relief Act; *see 50 USC App § 501 et seq.*) does not apply.

- That notice has been served on the defaulting party, if required [*see Fed R Civ P 55(b)(2)*].

27.09[3] LOCAL PRACTICE: SD Cal Requirements--Apply Within 30 Days. The plaintiff must apply for a default judgment within 30 days after the entry of default. Failure to meet this deadline will result in the issuance of an order to show cause why the pleading against the defaulting party should not be dismissed [*SD Cal Civ LR 55.1*].

27.09[4] No Notice Is Required to Defaulting Party Who Has Not Appeared. A defaulting party that has not appeared in the action generally need not be given notice of the application for a default judgment, because notice is required to be given only to parties that have appeared [*see Fed R Civ P 55(b)(2); Walker & Zanger (West Coast) Ltd. v. Stone Design, S.A. (CD Cal 1997) 4 F Supp2d 931, 935*].

Distinguish:

If the defaulting party is a minor or incompetent person, his or her representative must appear in the case

and must therefore receive notice of the application for a default judgment [*Fed R Civ P 55(b)(2)*]. If the defaulting party is a member of the military, the court may not enter a default judgment without first appointing an attorney, who presumably will appear in the action and be entitled to receive notice of the application for a default judgment [*50 USC app § 521(b)(2)*; *Fed R Civ P 55(b)(2)*].

Strategic Point--Plaintiff:

Counsel should consider giving notice of the application for a default judgment to the defaulting party, even if notice is not required [*see Taylor Made Golf Co. v. Carsten Sports, Ltd. (SD Cal 1997) 175 FRD 658, 661*]. The default judgment may be less vulnerable to being set aside if the defaulting party had notice of the application.

27.09[5] Provide Notice to Parties That Have Appeared. A party that has appeared in the action must be served with written notice of the application for a default judgment at least seven days before the hearing on the application [*Fed R Civ P 55(b)(2)*; *see Philip Morris USA v. Castworld Prods., Inc. (CD Cal 2003) 219 FRD 494, 498*].

A defaulting party's informal act may constitute a sufficient "appearance" in the action to entitle the party to receive notice of the application for default judgment, even though it may not constitute an "appearance" for other purposes [*H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe (DC Cir 1970) 432 F2d 689, 691*]. To constitute an "appearance," a defendant's informal act must at least respond in some way to the plaintiff's claim and give a clear indication that the defendant intends to pursue a defense [*Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc. (9th Cir 1988) 840 F2d 685, 689-690*].

Warning:

Failure to provide the required notice to a party that has appeared is a serious procedural irregularity that usually will result in denial or vacatur of the default judgment [*Wilson v. Moore & Assocs., Inc. (9th Cir 1977) 564 F2d 366, 369*].

Cross Reference:

Notice requirements, see 10 Moore's Federal Practice, *§ 55.21* (Matthew Bender 3d ed.).

Examples--Informal "Appearance" Triggering Notice:

The following kinds of informal conduct have been found to constitute an "appearance" sufficient to entitle the defaulting party to receive notice of the application for default judgment:

- Mailing a motion to dismiss to opposing counsel, even though the motion was not accepted for filing by the court clerk [*see Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n (5th Cir 1989) 874 F2d 274, 276*].

- Retaining counsel who began settlement negotiations and showed plaintiff's counsel (but did not file or serve) a motion for more time to plead [*see Muniz v. Vidal (1st Cir 1984) 739 F2d 699, 700-701*].

- Making an appearance in a closely related case, such as when a bankruptcy trustee actively litigates in the underlying bankruptcy case an issue that is also material in an adversary proceeding brought in the bankruptcy court [*Civic Ctr. Square, Inc. v. Ford (In re Roxford Foods, Inc.) (9th Cir 1993) 12 F3d 875, 881*].

Examples--Informal "Appearances" Insufficient to Trigger Notice:

The following kinds of conduct have been found insufficient to constitute an appearance:

- A statement, made by the president of the defendant corporation the day after service of the complaint, that the matter would be referred to the defendant's attorney, because the letter does not indicate an intent to defend [*Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc. (9th Cir 1988) 840 F2d 685, 689-690*].

- Correspondence from the defendant corporation's president to the plaintiff's attorney, because there were no settlement negotiations and the correspondence provided the defendant with actual, unqualified notice that a delay in formally answering the complaint would result in default [*Wilson v. Moore & Assocs., Inc. (9th Cir 1977) 564 F2d 366, 369*].

- A letter written to the plaintiff, without notifying the court, asserting the defendant's position that the court lacked jurisdiction to hear the action, because the defendant never appeared before the court or expressed an intention to defend the lawsuit [*Walker & Zanger (West Coast) Ltd. v. Stone Design S.A. (CD Cal 1997) 4 F Supp2d 931, 935*].

- A motion for an extension of time to respond to the complaint, if the motion does not manifest a clear purpose to defend the action, such as by reserving the option of asserting an affirmative defense based on insufficiency of service [*Benny v. Pipes (9th Cir 1986) 799 F2d 489, 492-493*].

27.09[6] LOCAL PRACTICE: CD Cal Requirements--Notice of Submission of Claim of Unliquidated Damages. If the amount claimed in an application for a default judgment is unliquidated, the applicant may submit declarations to prove the amount of damages, notice must be given to the defaulting party of the amount requested, and the defaulting party may submit opposing declarations on the amount of damages [*CD Cal Civ LR 55-2*].

27.09[7] LOCAL PRACTICE: CD Cal Requirements--Separate Document Required. A proposed default judgment must be submitted as a separate document in compliance with *Fed R Civ P 58* [*CD Cal Civ LR 58-11*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsCourtsRule Application & Interpretation

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27.10 Court May Order Hearing.

27.10[1] Court's Discretion. The court has discretion to order a hearing or reference to take an accounting, determine damages, establish the truth of any averment by evidence, or investigate any other matter, if the court deems it necessary to enter a requested default judgment or to carry it into effect [*Fed R Civ P 55(b)(2)*].

Before entering a default judgment, the court has an affirmative duty to determine that it has jurisdiction over both the subject matter and the parties. Thus, the court has discretion to conduct a hearing to resolve any doubt about whether it has jurisdiction to enter a judgment against the defaulting party [*Tuli v. Republic of Iraq (9th Cir 1999) 172 F3d 707, 712-713*].

Cross Reference:

Court's discretion, see 10 Moore's Federal Practice, *§ 55.20[2]* (Matthew Bender 3d ed.).

27.10[2] Evidentiary Hearing on Damages May Be Required. If the damages cannot be computed and are not liquidated, they ordinarily must be established by the plaintiff in an evidentiary hearing [*Fed R Civ P 55(b)(2)*; *see Adriana Int'l Corp. v. Thoeren (9th Cir 1990) 913 F2d 1406, 1414* ; *see also Geddes v. United Fin. Group (9th Cir 1977) 559 F2d 557, 560*].

Depending on the circumstances, the court may accept proof of damages that only approximates the actual damages. For example, in a trademark infringement case, a relaxed standard of proof may be applied when the measure of damages is based on the amount of profits of a defaulting defendant that is not cooperating in the damages determination [*Taylor Made Golf Co. v. Carsten Sports, Ltd. (SD Cal 1997) 175 FRD 658, 663*].

Exception:

If there is a basis in the record for the calculation of damages, an evidentiary hearing need not be held [*Davis v. Fendler (9th Cir 1981) 650 F2d 1154, 1161-1162* ; *see CD Cal Civ LR 55-2*].

Strategic Point--Plaintiff:

Even under circumstances in which a reasonably approximate damages award is appropriate, the court will insist that the plaintiff produce evidence to support the award. For example, if lost profits are an element of damages, the plaintiff must produce competent factual evidence in support of the requested award; personal opinions unsupported by specific evidence will not suffice [*see* Original San Francisco Toymakers, Inc. v. Trendmasters, Inc. (ND Cal 2003) 2003 US Dist LEXIS 18557, at *19].

Cross Reference:

Establishing damages, see 10 Moore's Federal Practice, *§ 55.22* (Matthew Bender 3d ed.).

27.10[3] LOCAL PRACTICE: CD Cal Requirements--Proving Damages by Declarations. If the amount claimed in an application for a default judgment is unliquidated, the applicant may submit evidence of the amount of damages by declarations. Notice must be given to the defaulting party of the amount requested, and the defaulting party may submit opposing declarations on the amount of damages [*CD Cal Civ LR 55-2*].

27.10[4] Hearing Generally Is Not Required to Establish Liability. Once a default has been entered, the allegations in the plaintiff's pleading regarding liability generally are deemed admitted by the defaulting party, and the plaintiff need not prove liability in order to obtain a default judgment [*Fed R Civ P 8(b)(6)*; *Geddes v. United Fin. Group (9th Cir 1977) 559 F2d 557, 560*].

Warning--Court's Discretion:

The court has discretion to require the plaintiff to submit proof on liability issues [*Fed R Civ P 55(b)(2)*; *see TeleVideo Sys., Inc. v. Heidenthal (9th Cir 1987) 826 F2d 915, 917-918*].

Exception--United States As Defendant:

If the defaulting party is the United States or its officer or agency, the court may not enter a default judgment until the plaintiff has established a claim or right to relief (i.e., liability) by evidence satisfactory to the court [*Fed R Civ P 55(e)*]. This rule does not prevent the court from entering a default judgment as a sanction for litigation misconduct once the plaintiff has presented a prima facie case [*Giampaoli v. Califano (9th Cir 1980) 628 F2d 1190, 1193-1196*].

Exception--Foreign State As Defendant:

The plaintiff must adduce evidence of liability if the defaulting party is foreign state or a political subdivision, agency, or instrumentality of a foreign state [*28 USC § 1608(e)*].

27.10[5] Court May Use Jury. Because the Seventh-Amendment right to trial by jury does not encompass the determination of damages in connection with a default judgment [*Adriana Int'l Corp. v. Thoeren (9th Cir 1990) 913 F2d 1406, 1414* ; *Henry v. Sneiders (9th Cir 1974) 490 F2d 315, 318*], a jury will be used in connection with the determination of damages only if a statute confers a right to jury trial for the particular claim involved or if the court exercises its discretion to impanel a jury [*see Fed R Civ P 55(b)(2)*; *see also Coleman v. Smith (7th Cir 1987) 814 F2d 1142, 1145*].

Strategic Point--Plaintiff:

The plaintiff should consider requesting that the court exercise its discretion to impanel a jury. A jury may be more receptive to damages claims in certain kinds of cases, such as personal-injury cases or cases involving claims for punitive damages.

27.10[6] Defaulting Party May Participate in Hearing. The defaulting party is entitled to present evidence and be heard at the hearing on the amount of damages [*see, e.g., Sony Corp. v. Elm State Elecs., Inc. (2d Cir 1986) 800 F2d 317, 321*].

Distinguish:

Although the defaulting party may contest damages, it may not use a damages hearing to raise issues of liability. Therefore, the defaulting party cannot argue that damages should be reduced because of the comparative negligence of the plaintiff, and it cannot dispute proximate cause, if the plaintiff's pleading properly alleges negligence and proximate cause [*Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp. (2d Cir 1992) 973 F2d 155, 159*]. Similarly, although the defaulting party may attempt to prove mitigation of damages, it may not seek a setoff of damages by alleging a matter that would establish a compulsory counterclaim [*Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp. (2d Cir 1992) 973 F2d 155, 159-160*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureRemediesDamagesGeneral OverviewEvidenceProcedural ConsiderationsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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27.11 Court Has Discretion to Grant or Deny Default Judgment.

The existence of a default does not compel the district court to enter a default judgment [*see Draper v. Coombs (9th Cir 1986) 792 F2d 915, 924-925*]. Rather, an application for a default judgment is left to the sound discretion of the district court [*Alan Neuman Prods., Inc. v. Albright (9th Cir 1988) 862 F2d 1388, 1392* ; *see Philip Morris USA v. Castworld Prods., Inc. (CD Cal 2003) 219 FRD 494, 498* (defendant's default does not automatically entitle a plaintiff to a court ordered judgment)].

Applying the general terms of *Fed R Civ P 60(b)* to default judgments, the Ninth Circuit has emphasized that they are appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits. If there has been no merits decision, appropriate exercise of district court discretion under Rule 60(b) requires that the finality interest should give way fairly readily, to further the competing interest in reaching the merits of a dispute [*TCI Group Life Ins. Plan v. Knoebber (9th Cir 2001) 244 F3d 691, 695-696*].

Judge's Perspective:

Default judgments are generally disfavored, and whenever reasonably possible, a case should be decided on its merits [*see Pena v. Seguros La Comercial, S.A. (9th Cir 1985) 770 F2d 811, 814*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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27.12 Factors Considered by Court.

The factors considered by a court in ruling on an application for a default judgment include the following [*Eitel v. McCool (9th Cir 1986) 782 F2d 1470, 1471-1472* ; *see* Lasheen v. Loomis Co. (ED Cal 2008) 2008 US Dist LEXIS 56032, at *9-*15]:

- The possibility of prejudice to the plaintiff if a default judgment is denied.
- The substantive merits of the claim against the defaulting party.
- The sufficiency of the complaint or other pleading asserting the claim against the defaulting party.
- The sum of money at stake in the action.
- The possibility of a dispute concerning material facts.
- Whether the default was the result of excusable neglect.
- Whether the default was technical or de minimis [*see Draper v. Coombs (9th Cir 1986) 792 F2d 915, 924-925*].
- The strong public policy favoring decisions on the merits.

Example--De Minimis Default:
The court may deny a default judgment if the default is de minimis, such as when the defaulting party's answer is filed on the same day as a motion for a default judgment [*see Draper v. Coombs (9th Cir 1986) 792 F2d 915, 924-925*].

Example--Excusable Neglect:
If a defaulting defendant reasonably believed that the case had been settled prior to the deadline for filing an answer to the complaint, the court is within its discretion to deny a default judgment based on an answer filed soon after the settlement agreement was dissolved. In such a case, the defaulting party's

failure to answer within the deadline is the result of excusable neglect [*Eitel v. McCool (9th Cir 1986) 782 F2d 1470, 1472*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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27.13 Damages and Other Relief Are Limited to Demand in Pleadings.

If the court grants a default judgment, the judgment may not be different in kind from, or exceed in amount, what was prayed for in the plaintiff's demand for judgment [*Fed R Civ P 54(c)*; *see Philip Morris USA v. Castworld Prods., Inc. (CD Cal 2003) 219 FRD 494, 501* (in granting motion for default judgment in trademark infringement action, plaintiff awarded statutory damages, injunctive relief, attorney's fees and costs; court noted that these remedies "d[id] not differ from the relief prayed for in the complaint")]. The court may award punitive damages if such an award is demanded in the plaintiff's pleading and is supported by the evidence [*see Action S.A. v. Marc Rich & Co. (2d Cir 1991) 951 F2d 504, 509*].

In an appropriate case, the court may grant a judgment that reasonably approximates the actual damages, even if the proof of damages is not precise. For example, in a trademark infringement case, a relaxed standard of proof may be applied when the measure of damages is based on the amount of profits of a defaulting defendant that is not cooperating in the damages determination [*Taylor Made Golf Co. v. Carsten Sports, Ltd. (SD Cal 1997) 175 FRD 658, 663*].

Warning:

Even if the defaulting party appears and participates in the damages hearing, the plaintiff should not attempt to prove damages that differ from the amount demanded in the pleading, or that are based on a different claim from what was alleged in the pleading, unless the plaintiff is willing to have the court set aside the default. Generally, the court will not allow an amendment of the claims asserted in the pleading without reopening the case to give the defendant an opportunity to respond to the new matter [*see Fong v. United States (9th Cir 1960) 300 F2d 400, 406, 413*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27.14 Defaulting Party's Financial Condition Cannot Be Considered.

In determining the amount of a default judgment, the court may not consider evidence of the defaulting party's financial condition [*Geddes v. United Fin. Group (9th Cir 1977) 559 F2d 557, 560*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureRemediesDamagesGeneral OverviewEvidenceRelevanceGeneral Overview

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27.15 LOCAL PRACTICE: CD Cal Requirements--Attorney's Fee Schedule.

If a promissory note, contract, or statute applicable to the claim on which a default judgment is entered provides for the recovery of reasonable attorney's fees, the fees are to be calculated according to a schedule established by local court rule [*see CD Cal Civ LR 55-3*]. An attorney claiming a fee in excess of the schedule may file a written request at the time of entry of the default judgment to have the attorney's fee fixed by the court [*CD Cal Civ LR 55-3*; *see Philip Morris USA v. Castworld Prods., Inc. (CD Cal 2003) 219 FRD 494, 502* (granting motion for default judgment in trademark infringement action, attorney's fees awarded because trademark infringement found to be "deliberate and willful" under section 1117(a) of the Lanham Act)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesDamagesGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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27.16 Special Requirements Exist for Particular Defaulting Parties.

27.16[1] Minors or Incompetents. A court may not grant a default judgment against a minor or incompetent person unless the person is represented in the action by a general guardian, committee, conservator, or other similar representative who has appeared in the action [*Fed R Civ P 55(b)(2)*].

Warning:

An incompetent person need not have been formally adjudged incompetent to be protected against the entry of a default judgment while unrepresented. If the court has information that a party is incompetent, the court may not enter a default judgment against that party without first appointing a guardian ad litem, who must receive notice of the application for a default judgment [*see Zaro v. Strauss (5th Cir 1948) 167 F2d 218, 220*].

27.16[2] Members of Military. Unless an affidavit or declaration is filed showing that the defaulting party is not a member of the military, if the defaulting party is not already represented by an attorney, the court may not grant a default judgment until the court has appointed an attorney to represent the defaulting party and protect his or her interest [*see 50 USC app § 521*].

The court may require, as a condition of granting a default judgment against a defaulting party who might be a member of the military, that the plaintiff post a bond conditioned to indemnify the defaulting party, if in the military, against any loss or damage that he or she may suffer by reason of the judgment if the judgment is eventually set aside in whole or in part [*50 USC app § 521(b)(3)*].

The court may render any order or judgment that it finds necessary to protect the rights of a defaulting party who is a member of the military [*50 USC app § 521(b)(3)*].

27.16[3] United States. Although liability for purposes of a default judgment is usually established if the plaintiff's pleading states a claim, if the defaulting party is the United States or an officer or agency of the United States, the plaintiff must establish its claim by evidence satisfactory to the court [*Fed R Civ P 55(d)*].

27.16[4] Foreign State. If the defaulting party is a foreign state or a political subdivision, agency, or instrumentality of a foreign state, the plaintiff must establish its claim by evidence satisfactory to the court [*28 USC § 1608(e)*].

27.16[5] Multi-Defendant Case. If all defendants have defaulted, a default judgment against all of them may be obtained in accordance with the procedures applicable when there is only one defendant [*see Fed R Civ P 55(b)*].

If there are multiple defendants, but only some of them have defaulted, the court may award a default judgment against the defaulting parties only on an express determination that there is no just reason for delay and on an express direction for the entry of the judgment [*Fed R Civ P 54(b)*]. In deciding whether there is reason for delay, the court will consider whether a judgment against the defaulting defendants would be inconsistent with an eventual judgment in favor of the other defendants [*see Frow v. De La Vega (1872) 82 US 552, 554, 21 L Ed 60* ; *Shanghai Automation Instrument Co. v. Kuei (ND Cal 2001) 194 F Supp2d 995, 1005-1010*].

Warning:

If the theory of recovery is such that the defaulting defendant cannot be liable unless a nondefaulting defendant is liable, a default judgment will not be entered until after the liability of the nondefaulting defendant has been determined [*Frow v. De La Vega (1872) 82 US 552, 554, 21 L Ed 60*]. Thus, whenever a judgment against the defaulting defendant would be logically inconsistent with a possible judgment in favor of a nondefaulting defendant, a default judgment will not be entered until after the liability of the nondefaulting defendant has been determined [*Frow v. De La Vega (1872) 82 US 552, 554, 21 L Ed 60* ; *Nielson v. Chang (9th Cir 2001) 253 F3d 520, 532*].

Examples:

A decision on an application for a default judgment should be deferred in the following situations:

- If multiple defendants are alleged to be jointly (but not severally) liable, and one defendant defaults, then that defendant's default may be entered--barring that defendant from contesting liability--but a decision on an application for a default judgment will be deferred until after the liability of the nondefaulting defendants has been determined. If the nondefaulting defendants are later found not liable, then to ensure consistency the court will not enter judgment against the defaulting defendant. If the nondefaulting defendants are later found liable, then the court will enter judgment against the defaulting defendants as well [*Frow v. De La Vega (1872) 82 US 552, 554, 21 L Ed 60* ; *Nielson v. Chang (9th Cir 2001) 253 F3d 520, 532-533*].

- If a defaulting corporate defendant is alleged to be the "alter ego" of a nondefaulting individual defendant such that the individual defendant would be vicariously liable for a judgment against the corporation, and if the suit asserts the same claims against both defendants, a default judgment should not be entered against the corporation. In such a situation, a default judgment against the corporation would be inconsistent with an eventual judgment in favor of the individual defendant [*see Harrell v. DCS Equip. Leasing Corp. (5th Cir 1992) 951 F2d 1453, 1459*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsFederal GovernmentClaims By & AgainstMilitary & Veterans LawServicemembersGeneral Overview

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27.17 Effect of Entry of Default Judgment.

27.17[1] Default Judgment Is Final Judgment. A default judgment is a final, appealable judgment [*Recreational Props., Inc. v. Southwest Mortgage (5th Cir 1986) 804 F2d 311, 313*].

Warning:

Even though a default judgment is a final judgment, the party against whom the judgment was entered may not appeal to obtain relief from the judgment on the basis of insufficient service unless that party has first made a motion to the trial court to set aside the default judgment [*Consorzio Del Prosciutto di Parma v. Domain Name Clearing Co. (9th Cir 2003) 346 F3d 1193, 1195* ; *see Fed R Civ P 55(c), 60(b)*].

Cross Reference:

Grounds and procedures for obtaining relief from a default judgment, see *§ 27.21* and *27.22*.

27.17[2] Default Judgment Has Claim-Preclusive Effect. Even though the defaulting party is precluded from contesting liability, a default judgment is considered a final judgment on the merits for purposes of the claim-preclusion (res judicata) doctrine [*Riehle v. Margolies (1929) 279 US 218, 225, 49 S Ct 310, 73 L Ed 669*].

27.17[3] Default Judgment Lacks Issue-Preclusive Effect. Because liability issues ordinarily are not actually litigated in a case of default, a default judgment does not preclude litigation of those issues in a subsequent case [*In re Gottheiner (9th Cir 1983) 703 F2d 1136, 1139-1140* ; *see Klingman v. Levinson (7th Cir 1987) 831 F2d 1292, 1296*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureAppealsReviewabilityPreservation for Review

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27.18 CHECKLIST: Obtaining Relief From Default.

☐ Immediately on learning that client is alleged to be in default, file notice of appearance, so as to be entitled to receive notice of further proceedings in case.

Authority:
Fed R Civ P 55(b)(2)

Discussion:
See *§ 27.04*

Form:
See *§ 27.32*

☐ If default (but not default judgment) has been entered, determine whether grounds exist to set aside default, based on following:

○ Improper entry of default, because prerequisites for entry of default were not satisfied, for example:

☐ Because of defective service of pleading on party against whom default was entered.

☐ Party against whom default was entered had in fact served or filed timely responsive pleading or motion.

○ Good cause exists to set aside default, considering:

☐ Defaulting party has meritorious defense.

☐ Plaintiff would suffer minimal or no prejudice from setting aside of default.

☐ Defaulting party was not culpable in allowing default to occur.

Authority:
Fed R Civ P 55(c)

Discussion:
See *§ 27.19*

☐ Prepare written motion to set aside default.

○ Specify circumstances constituting good cause to set aside default.

○ File motion within reasonable time.

○ Follow standard noticed motion procedure.

Authority:
Fed R Civ P 55(c)

Discussion:
See *§ 27.19*

Form:
See *§ 27.33*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ If application for default judgment is pending, determine whether grounds exist to oppose entry of default judgment.

○ Consider whether following factors weigh against entry of default judgment:

☐ Lack of prejudice to plaintiff if default judgment is denied.

☐ Substantive merits of the claim against the defaulting party.

☐ Sufficiency of the complaint or other pleading asserting claim against defaulting

party.

☐ Sum of money at stake in action.

☐ Possibility of dispute concerning material facts.

☐ Whether default was result of excusable neglect.

☐ Whether default was technical or de minimis.

☐ Strong public policy favoring decisions on merits.

○ Consider whether amount of damages sought by plaintiff is supported by evidence.

○ Consider whether evidence supports plaintiff's allegations regarding liability, if defaulting party is any of following:

☐ United States or officer or agency of United States.

☐ Foreign state or political subdivision, agency, or instrumentality of foreign state.

○ If claim against defaulting party is joined with other claims against nondefaulting parties, consider whether circumstances weigh in favor of denying or delaying default judgment until after liability of nondefaulting parties is determined.

Authority:

28 USC § 1608(e); *Fed R Civ P 55(b)(2), (d)*

Discussion:

See *§ 27.20*

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.37*

☐ If default judgment has been entered, determine whether grounds exist to vacate default judgment.

○ Consider whether default was result of excusable neglect, in light of following factors:

☐ Culpability of defaulting party's conduct.

☐ Existence of meritorious defense.

☐ Possible prejudice to plaintiff if default judgment is set aside.

○ Consider whether default judgment is void, based on any of following circumstances:

☐ Lack of subject-matter jurisdiction.

☐ Lack of personal jurisdiction over defaulting party.

☐ Insufficient service of process.

☐ Defaulting party's lack of actual notice of claim.

☐ Plaintiff's failure to give required notice of application for entry of default judgment.

○ Consider whether other grounds for relief from default judgment exist, such as:

☐ Mistake, surprise, inadvertence.

☐ Extraordinary circumstances.

☐ Fraud.

☐ Defaulting party's active military status.

Authority:
50 USC app § 521; *Fed R Civ P 55(c), 60(b)*

Discussion:
See *§ 27.21*

☐ If default judgment has been entered, move to set aside default judgment.

○ Prepare written motion establishing grounds for relief from default judgment.

○ File motion in timely manner, based on following:

☐ Generally, motion must be filed within reasonable time after entry of default judgment.

☐ If ground for motion is mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, or other misconduct of adverse party,

reasonable time may not exceed one year after entry of default judgment.

☐ If ground for motion is defaulting party's active military service when default judgment was entered, motion must be filed within 90 days after termination of defaulting party's service.

☐ Motion to set aside void judgment is not subject to any time limit.

○ Follow standard noticed motion procedure.

Authority:
50 USC app § 521; *Fed R Civ P 55(c)*, *60(b)*

Discussion:
See *§ 27.22*

Form:
See *§ 27.34*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial JudgmentsDefaultRelief From Default

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27.19 Moving to Set Aside Default.

27.19[1] Recognize That Default Is Disfavored. In exercising its discretion on a motion to set aside a default, the court will resolve any doubts in favor of granting the motion, based on the general preference for resolving cases on their merits [*McManus v. American States Ins. Co. (CD Cal 2000) 201 FRD 493, 499-500*].

27.19[2] Argue That Entry of Default Was Improper. The court may set aside a default if the pleading on which default was entered was not properly served on the party against whom default was entered, or if that party did in fact serve a timely responsive pleading or motion [*see Fed R Civ P 55(a)*].

Cross Reference:

Deadlines for responding to pleadings, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.05*.

27.19[3] Good Cause to Set Aside Default Must Exist. The court may set aside a default for "good cause" [*Fed R Civ P 55(c)*]. In determining whether "good cause" exists, the court will consider the following [*Mendoza v. Wight Vineyard Mgmt. (9th Cir 1986) 783 F2d 941, 946*]:

- Whether the defaulting party has a meritorious defense.
- Prejudice that would be suffered by the plaintiff if the default is set aside.
- The defaulting party's culpability in allowing the default to occur.

The court may deny the motion based on any one factor [*Franchise Holding II, LLC v. Huntington Restaurants Group, Inc. (9th Cir 2004) 375 F3d 922, 926*]. The "good cause" standard for setting aside the entry of default is the same as the "excusable neglect" standard for setting aside a default judgment [*see Fed R Civ P 50(c), 60(b)(1); Franchise Holding II, LLC v. Huntington Restaurants Group, Inc. (9th Cir 2004) 375 F3d 922, 926 ; TCI Group Life Ins. Plan v. Knoebber (9th Cir 2001) 244 F3d 691, 696*].

Example:

Good cause did not exist for setting an entry of default when defense counsel blamed the failure to timely file an answer on the installation of a new computer system in his office which caused data, including the office calendar and filing deadlines, to be lost. The court concluded that the failure to timely file an answer was culpable conduct, and noted that counsel (1) failed to provide satisfactory explanations for, among other things, why he had no back up or copies; and (2) ignored communications from plaintiff's counsel advising him the deadline had passed and offering a two-day extension. Defendants also failed to demonstrate a potentially meritorious defense [*Cohen v Murphey (ND Cal 2004) 222 FRD 416, 417-418*].

Cross Reference:

Good cause standard, see 10 *Moore's Federal Practice, § 55.50[1][a]* (Matthew Bender 3d ed.).

27.19[4] Bring Motion Within Reasonable Time. A motion to set aside the entry of default, under *Fed R Civ P 55(c)*, must be brought within a reasonable time [*Dow Chem. Pac. Ltd. v. Rascator Maritime, S.A. (2d Cir 1986) 782 F2d 329, 336*].

Warning:

If the defaulting party files a late responsive pleading, the court may treat the filing as a motion to set aside the default [*McMillen v. J.C. Penney Co. (D Nev 2002) 205 FRD 557, 558*].

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*

27.19[5] LOCAL PRACTICE: CD Cal Requirements--Cross-Examination of Declarant. On motions to be relieved from default and other motions for which an issue of fact is to be determined, not later than 14 days before the hearing, a party desiring to cross-examine any declarant who is not beyond the subpoena power of the court and who is reasonably available to the party offering the declaration may serve by hand (or facsimile) and file a notice of request to cross-examine the declarant... . The court may, in the alternative, order that the cross-examination be done by deposition taken on two days' notice with the transcript being lodged five days before the hearing [*CD Cal Civ LR 7-8*]

27.19[6] Prepare for Imposition of Conditions. In granting a motion to set aside a default, the court may require the defaulting party to post security for costs or for the amount of the eventual judgment [*Powerserve Int'l, Inc. v. Lavi (2d Cir 2001) 239 F3d 508, 514-516* ; *see Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec (9th Cir 1988) 854 F2d 1538, 1546-1547*]. The court may also require the defaulting party to pay reasonable expenses incurred by the plaintiff in securing the default and in opposing the motion to set aside the default [*see Coon v. Grenier (1st Cir 1989) 867 F2d 73, 79*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial JudgmentsDefaultRelief From Default

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CHAPTER 27 Defaults and Motions for Relief From Default
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27.20 Opposing Application for Default Judgment.

27.20[1] Defaulting Party's Argument. The defaulting party can argue that the court should exercise its discretion and refuse to grant the application for a default judgment. The existence of a default does not compel the district court to enter a default judgment [*see Draper v. Coombs (9th Cir 1986) 792 F2d 915, 924-925*]. Moreover, default judgments are generally disfavored, and whenever reasonably possible, a case should be decided on its merits [*see Pena v. Seguros La Comercial, S.A. (9th Cir 1985) 770 F2d 811, 814*].

The factors considered by a court in ruling on an application for a default judgment include the following [*Eitel v. McCool (9th Cir 1986) 782 F2d 1470, 1471-1472*]:

- The possibility of prejudice to the plaintiff if a default judgment is denied.
- The substantive merits of the claim against the defaulting party.
- The sufficiency of the complaint or other pleading asserting the claim against the defaulting party.
- The sum of money at stake in the action.
- The possibility of a dispute concerning material facts.
- Whether the default was the result of excusable neglect.
- Whether the default was technical or de minimis [*see Draper v. Coombs (9th Cir 1986) 792 F2d 915, 924-925*].
- The strong public policy favoring decisions on the merits.

27.20[2] Opposing Amount of Damages Claimed. Even if the defaulting party lacks a basis to oppose, or elects not to oppose, a default judgment, the defaulting party may contest the amount of unliquidated damages claimed by the

plaintiff [*see Fed R Civ P 55(b)(2)*; *CD Cal Civ LR 55-2*].

Cross Reference:

Damages limited to demand in pleadings, see *§ 27.13*.

27.20[3] Contesting Liability of Certain Government Defendants.

27.20[3][a] United States. Although a defaulting party generally is barred from contesting liability [*see Fed R Civ P 8(b)(6)*], if the defaulting party is the United States or an officer or agency of the United States, the plaintiff must establish its claim by evidence satisfactory to the court [*Fed R Civ P 55(d)*]. In such a case, the defaulting defendant may contest liability as if the default had not occurred.

27.20[3][b] Foreign Government. Although a defaulting party generally is barred from contesting liability [*see Fed R Civ P 8(b)(6)*], if the defaulting party is a foreign state or a political subdivision, agency, or instrumentality of a foreign state, the plaintiff must establish its claim by evidence satisfactory to the court [*28 USC § 1608(e)*]. In such a case, the defaulting defendant may contest liability as if the default had not occurred.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial JudgmentsDefaultRelief From Default

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27.21 Grounds for Vacating Default Judgment.

27.21[1] Mistake, Inadvertence, Surprise, or Excusable Neglect. The district court may relieve a party from a judgment or order for reason of "mistake, inadvertence, surprise, or excusable neglect," provided that the party moves for relief not more than a year after the judgment was entered [*Fed R Civ P 60(b)*; *TCI Group Life Ins. Plan v. Knoebber (9th Cir 2001) 244 F3d 691, 696-697*].

A showing of lack of culpability sufficient to meet the *Fed R Civ P 55(c)* "good cause" standard for setting aside default is ordinarily sufficient also to demonstrate the "excusable neglect" or "mistake" criteria under *Fed R Civ P 60(b)(1)*. There is therefore no reason to require that those 60(b)(1) criteria be established separately [*Meadows v. Dominican Republic (9th Cir 1987) 817 F2d 517, 521*]. That is, if a defendant's conduct was not "culpable," then the failure to respond to a lawsuit is ordinarily "excusable," and in the interests of substantial justice, the better course may well be to vacate the default judgment and decide the case on the merits [*see American Alliance Ins. Co. v. Eagle Ins. Co. (2d Cir 1996) 92 F3d 57, 61*]. If, however, the defendant presents no meritorious defense, then nothing but pointless delay can result from reopening the judgment [*see Hawaii Carpenters' Trust Funds v. Stone (9th Cir 1986) 794 F2d 508, 513*]. Similarly, if reopening the judgment would actually prejudice the plaintiff who has diligently pursued the claim, then the interest in finality should prevail [*TCI Group Life Ins. Plan v. Knoebber (9th Cir 2001) 244 F3d 691, 696-697*].

Whether a party's neglect is excusable is essentially an equitable determination based on all relevant circumstances, including (1) the danger of prejudice to the adverse party; (2) the length of any delay caused by the neglect and its effect on the proceedings; (3) the reason for the neglect, including whether it was within the reasonable control of the moving party; and (4) whether the moving party acted in good faith [*Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship (1993) 507 US 380, 394-396, 113 S Ct 1489, 123 L Ed2d 74*].

Cross Reference:

Discussion of mistake, inadvertence, surprise, and excusable neglect, see 12 Moore's Federal Practice, *§ 60.41* (Matthew Bender 3d ed.)

Examples--Excusable Neglect:

A negligent or intentional failure to respond to a pleading may be deemed excusable if the defaulting party offers a credible, good-faith explanation negating any intention to take advantage of the adverse party, interfere with judicial decisionmaking, or otherwise manipulate the legal process [*TCI Group Life Ins. Plan v. Knoebber (9th Cir 2001) 244 F3d 691, 697-698*]. For example, excusable neglect has been found in the following circumstances:

- In an intra-family lawsuit over the proceeds of life insurance, a widow's failure to file a responsive pleading was excusable neglect, because the widow was unfamiliar with legal matters, was distraught because of the recent death of her spouse, was in a psychiatrist's care for severe depression, was taking several strong psychoactive medications, and was in the process of selling her home and moving herself and her two children to another state [*TCI Group Life Ins. Plan v. Knoebber (9th Cir 2001) 244 F3d 691, 697-699*].

- A failure to respond to a complaint because the defendants believed the court lacked subject-matter jurisdiction under the Foreign Sovereign Immunities Act [*see 28 USC §§ 1330*, 1601 et seq.] was excusable neglect. The defendants' conduct was not culpable because it did not hinder judicial proceedings as to which subject matter jurisdiction was unchallenged [*Gregorian v. Izvestia (9th Cir 1989) 871 F2d 1515, 1522*].

- A failure to respond to a complaint because the defendant was leaving the country for medical treatment was found to be excusable neglect, because the defendant's default was for understandable reasons and was in no way designed to obtain a strategic advantage in the litigation [*Falk v. Allen (9th Cir 1984) 739 F2d 461, 464* (per curiam)].

- That the defaulting party's attorney suffered from an incapacitating mental condition was found sufficient to excuse a default [*Tri-Continental Leasing Corp. v. Zimmerman (ND Cal 1980) 485 F Supp 495, 497*].

Examples--Neglect Not Excusable:

A negligent or intentional failure to respond to a pleading may be deemed culpable or inexcusable if there is no explanation of the default that is inconsistent with a devious, deliberate, willful, or bad-faith failure to respond, especially if the defendant was sophisticated or experienced enough to understand the legal process [*TCI Group Life Ins. Plan v. Knoebber (9th Cir 2001) 244 F3d 691, 698-699*]. For example, inexcusable conduct has been found in the following circumstances:

- Defendant's conduct was culpable because defendant provided the opposing party with an incorrect address, precluding normal service of process, and because defendant failed to secure replacement counsel, as required by local rules, even though defendant had clear notice of the need to obtain counsel [*Employee Painters' Trust v. Ethan Enters., Inc. (9th Cir 2007) 480 F3d 993, 1000*].

- The defendants' conduct in allowing a default was culpable because they ignored the summons and complaint despite frequent consultations with their lawyers during the time for filing an answer, and because they filed false affidavits claiming they had not been served [*Kingvision Pay-Per-View Ltd. v. Lake Alice Bar (9th Cir 1999) 168 F3d 347, 350*].

- A defendant insurance company's conduct was culpable because it had provided its customers and state regulators with an incorrect address, precluding service of process on the company [*Pena v. Seguros La Comercial, S.A. (9th Cir 1985) 770 F2d 811, 815*].

- A defendant's conduct was found culpable, because the defendant did not admit who he was and refused to accept service from the process server and then retained counsel to check the court's docket for a return of service [*Alan Neuman Prods., Inc. v. Albright (9th Cir 1988) 862 F2d 1388, 1390*].

- A defendant corporation's failure to respond to a complaint was not excusable, even though the complaint had been lost by a commercial courier that was supposed to deliver it from the defendant's agent to the defendant's claims office, because the defendant had taken no steps to establish minimum internal procedural safeguards to ensure receipt of the complaint, and when the complaint was not delivered, the defendant never attempted to obtain another copy of it [*Rogers v. Hartford Life & Accident Ins. Co. (5th Cir 1999) 167 F3d 933, 938-939*].

- The conduct of foreign defendants in defaulting was found culpable because they were aware of the relevant law, were fully informed of the legal consequences of failing to respond, and were sufficiently sophisticated to protect their interests [*Meadows v. Dominican Republic (9th Cir 1987) 817 F2d 517, 522*].

- The conduct of a foreign defendant was found culpable because it demonstrated that it was sufficiently sophisticated and familiar with the U.S. legal process by retaining local counsel to protect its interests in other matters [*Richmark Corp. v. Timber Falling Consultants, Inc. (9th Cir 1991) 937 F2d 1444, 1449*].

- That the defaulting party's attorney was busy generally will not excuse the attorney's neglect in allowing the default to occur. The Supreme Court has stated that "[i]n assessing the culpability of respondents' counsel, we give little weight to the fact that counsel was experiencing upheaval in his law practice" at the time of the filing deadline [*Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship (1993) 507 US 380, 398, 113 S Ct 1489, 123 L Ed2d 74*].

- A pro se litigant's default was not excusable neglect, because she had had adequate time before her response was due to retain counsel or file a request for an extension of time to respond, both of which were within her abilities, and because she consistently ignored court orders and hearing dates up to the moment the default judgment was entered [*Jones v. Phipps (7th Cir 1994) 39 F3d 158, 163-164*].

Cross Reference:

Challenging default judgment, see 10 Moore's Federal Practice, *§ 55.50[2]* (Matthew Bender 3d ed.).

27.21[2] Void Judgment. A default judgment may be set aside if it is void, that is, if the rendering court lacked jurisdiction of the subject matter or of the parties, or if it acted in manner inconsistent with due process of law [*Fed R Civ P 60(b)(4)*; *see O'Rourke Bros. v. Nesbitt Burns, Inc. (7th Cir 2000) 201 F3d 948, 951*].

Distinguish:

A void judgment is not synonymous with an erroneous judgment. Even gross errors do not render a judgment void [*O'Rourke Bros. v. Nesbitt Burns, Inc. (7th Cir 2000) 201 F3d 948, 951*]. Rather, a judgment is void if the rendering court was without power to enter it [*United States v. Walker (1983) 109 US 258, 266, 3 S Ct 277, 27 L Ed 927*].

Examples:

A default judgment is void if one of the following circumstances exists:

- The district court lacked subject-matter jurisdiction [*United States v. Forma (2d Cir 1994) 42 F3d 759, 762*].

- The district court lacked personal jurisdiction over the defaulting party [*Veeck v. Commodity Enters., Inc. (9th Cir 1973) 487 F2d 423, 426*].

- Proper service of the summons and complaint on the defendant was not made [*Peralta v. Heights Med. Ctr., Inc. (1988) 485 US 80, 85-87, 108 S Ct 896, 99 L Ed2d 75* ; *Mason v. Genisco Tech. Corp. (9th Cir 1991) 960 F2d 849, 851*]; *see SEC v. Internet Solutions for Business Inc. (9th Cir 2007) 509 F3d 1161, 1165* ("signed return of service constitutes prima facie evidence of valid service which can be overcome only by strong and convincing evidence")].

- The defendant never received actual notice of the action before the answer was due [*Peralta v. Heights Med. Ctr., Inc. (1988) 485 US 80, 85-87, 108 S Ct 896, 99 L Ed2d 75* ; *Walker & Zanger (West Coast) Ltd. v. Stone Design S.A. (CD Cal 1997) 4 F Supp2d 931, 934*].

- The defendant was not provided with notice of the application for a default judgment, if required [*see Fed R Civ P 55(b)(2)*; *see also Walker & Zanger (West Coast) Ltd. v. Stone Design S.A. (CD Cal 1997) 4 F Supp2d 931, 934*].

Warning:

The issues of improper service and lack of personal jurisdiction will be waived if the defendant appears to contest the amount of damages at the hearing on the application for a default judgment, unless the defendant expressly reserves those issues [*see Jackson v. Heiser (9th Cir 1940) 111 F2d 310, 312-313* ; *Trustees of Cent. Laborers' Welfare Fund v. Lowery (7th Cir 1991) 924 F2d 731, 733-734*].

Cross Reference:

Void judgments, see 12 Moore's Federal Practice, *§ 60.44* (Matthew Bender 3d ed.).

27.21[3] Extraordinary Circumstances. In addition to several specific grounds for relief, a court may grant relief from a judgment for "any other reason that justifies relief" [*Fed R Civ P 60(b)(6)*]. This provision has been held to apply only if there are reasons for relief *other* than those set out in the more specific clauses of *Fed R Civ P 60(b)*, and only if the asserted ground for relief amounts to "extraordinary circumstances" [*see Liljeberg v. Health Servs. Acquisition Corp. (1988) 486 US 847, 863-864, n11, 108 S Ct 2194, 100 L Ed2d 855* ; *Klapprott v. United States (1949) 335 US 601, 604-609, 69 S Ct 384, 93 L Ed 266*].

Relief under *Fed R Civ P 60(b)(6)* requires both an injury to the defaulting party and circumstances beyond that party's control that prevented the proper prosecution or defense of the action [*United States v. Washington (9th Cir 2005) 394 F3d 1152, 1157* ; *see, e.g., Harvest v. Castro (9th Cir 2008) 531 F3d 737, 749* (state was not entitled to relief under *Fed R Civ P 60(b)(6)*, allowing it more time to retry petitioner, because state failed to demonstrate that there were any "circumstances beyond its control," and state's counsel acknowledged that his error was "professionally inexcusable")].

Example--Extreme Misconduct by Attorney:

Ordinarily, a party will be bound by the negligent acts or omissions of his or her counsel. However, the Ninth Circuit has held that an attorney's *extreme negligence* or *egregious misconduct* may constitute extraordinary circumstances warranting relief from default under *Fed R Civ P 60(b)(6)* [*Community Dental Servs. v. Tani (9th Cir 2002) 282 F3d 1164, 1168-1170*]. In one case, for example, a default judgment was entered after the defendant's attorney had "virtually abandoned" the defendant by failing to proceed with the defense. Specifically, the attorney had failed to sign a stipulation offered by the plaintiff

to extend the time to file an answer, filed the answer late, failed to serve a copy of the answer on the plaintiff despite a direct court order to do so, failed to attend various proceedings in the case, and falsely told the defendant that the case was proceeding properly. The Ninth Circuit held that, considering all the circumstances, the attorney's gross negligence entitled the defendant to relief from the default judgment [*Community Dental Servs. v. Tani (9th Cir 2002) 282 F3d 1164, 1171-1172*].

27.21[4] Fraud. The court has discretion to vacate a default judgment that was entered through the fraud, misrepresentation, or other misconduct of an opposing party [*Fed R Civ P 60(b)(3)*].

27.21[5] Defaulting Party's Active Military Status. Under the Servicemembers Civil Relief Act, a judgment rendered against a defaulting party while he or she is in the military service, or within 60 days after he or she leaves the service, must be reopened on application of the defaulting party or his or her representative if both of the following circumstances exist [*50 USC app § 521(g)(1)*]:

- The defaulting party was materially affected by reason of the military service in making a defense to the action; and

- The defaulting party has a meritorious or legal defense to the action or some part of it.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExtraordinary CircumstancesCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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27.22 Moving to Vacate Default Judgment.

27.22[1] File Timely Motion.

27.22[1][a] Motion Generally Must Be Filed Within Reasonable Time. A motion to set aside a default judgment generally must be brought within a reasonable time [*Fed R Civ P 55(c), 60(b)*].

27.22[1][b] Motion Based on Excusable Neglect Must Be Filed Within One Year. The "reasonable time" within which the motion must be made cannot exceed one year after the entry of the default judgment if the ground for setting aside the judgment is excusable neglect or the related grounds of mistake, surprise, and inadvertence [*Fed R Civ P 60(b)*].

Warning:

Even if a motion to set aside a default judgment based on excusable neglect is filed within one year after the entry of judgment, the motion may still be deemed untimely if the delay in making the motion was unreasonable [*see, e.g., White v. American Airlines, Inc. (10th Cir 1990) 915 F2d 1414, 1425*].

27.22[1][c] No Time Limit for Motion Based on Void Judgment. A motion to set aside a default judgment because it is void may be brought at any time [*Meadows v. Dominican Republic (9th Cir 1987) 817 F2d 517, 521*].

Cross Reference:

Void judgment, see *§ 27.21[2]*.

27.22[1][d] Ninety-Day Limit for Motion by Former Member of Military. If the motion to set aside the default judgment is made under the Servicemembers Civil Relief Act, based on the defaulting party's status in the military service when the judgment was entered, the motion must be brought not later than 90 days after the termination of the defaulting party's service [*50 USC app § 521(g)(2)*].

Cross Reference:

Grounds for setting aside a default judgment under the Servicemembers Civil Relief Act, see *§ 27.21[5]*.

27.22[2] Motion Must Set Forth Grounds for Relief. A motion to set aside a default judgment should assert and document the applicable grounds for relief [*see Fed R Civ P 60(b)*]. The motion should include an application to set aside the entry of default under *Fed R Civ P 55(c)*.

Cross Reference:

Form, see *27.34*.

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*.

Warning:

Because some defenses (personal jurisdiction, improper venue, insufficient process, or insufficient service) may be waived if not asserted at the first opportunity [*see Fed R Civ P 12(h)(1)*], a motion to set aside a default judgment generally should assert all of the applicable defenses that the defaulting party has against the plaintiff's claim for relief [*see Fed R Civ P 12(g)* (motion to dismiss under Rule 12 may be joined with any other motion); *American Ass'n of Naturopathic Physicians v. Hayhurst (9th Cir 2000) 227 F3d 1104, 1107* (party who by motion invites court to pass on threshold defense should bring forward all the Rule 12(h)(1) defenses he then has and thus allow the court to do a reasonably complete job); *see* Ch. 8, Answers and Responsive Motions Under Rule 12, *§ 8.15[3]*].

27.22[3] Defaulting Party Has Burden of Proof. The defaulting party has the burden of proving the existence of conditions that justify setting aside the default judgment [*Cassidy v. Tenorio (9th Cir 1988) 856 F2d 1412, 1415*]. However, the burden on a party seeking to vacate a default judgment is not extraordinarily heavy [*TCI Group Life Ins. Plan v. Knoebber (9th Cir 2001) 244 F3d 691, 700*].

The court's discretion in deciding a motion to set aside a default judgment is guided by three general considerations [*Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc. (9th Cir 1988) 840 F2d 685, 690*]:

- Since *Fed R Civ P 60(b)* is remedial in nature, it must be liberally applied.
- Default judgments are generally disfavored, and cases should be decided on their merits.
- If a party seeks timely relief from a default judgment and has a meritorious defense, any doubt should be resolved in favor of granting the motion to set aside the default judgment.

27.22[4] Court May Impose Conditions in Setting Aside Default Judgment. In granting relief from a default judgment, the court may impose "just terms" [*Fed R Civ P 60(b)*].

Examples:

In granting a motion to set aside a default judgment, the court may require the defaulting party to post security for costs or for the amount of the eventual judgment [*Powerserve Int'l, Inc. v. Lavi (2d Cir 2001) 239 F3d 508, 514-516* ; *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec (9th Cir 1988) 854 F2d 1538, 1546-1547*]. The court may also require the defaulting party to pay reasonable expenses incurred by the plaintiff in securing the default and in opposing the motion to set aside the default judgment [*Coon v. Grenier (1st Cir 1989) 867 F2d 73, 79*].

Strategic Point--Plaintiff:

If the defaulting party seeks to set aside the default judgment, the plaintiff may have a sensitive decision to make, depending on the circumstances of the case. If the default is not obviously willful and not egregious, and if the plaintiff cannot show specific prejudice, it may be counterproductive to resist reinstating the action. In such a case the default probably will be set aside [*see Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc. (9th Cir 1988) 840 F2d 685, 690*], and resistance may cause the court to perceive the plaintiff as seeking an unfair or disproportionate benefit. On the other hand, the plaintiff should consider seeking terms and conditions for the setting aside of the default that are fair and justified under the circumstances.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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27.23 Application to Clerk for Entry of Default.

Application to Clerk for Entry of Default.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	APPLICATION FOR ENTRY OF DEFAULT
	)	
	)	

To the Clerk of the United States District Court for the _____ District of California:

_____ [*Identify party, e.g.,* Plaintiff John Smith] requests that the Clerk enter the default of

_____ [*identify defaulting party, e.g.,* Defendant Mary Jones] for failure to plead or otherwise defend in a timely manner as provided by *Rule 55 of the Federal Rules of Civil Procedure*.

This request is based on the attached _____ [affidavit *or* declaration] of _____ [*name*], which shows the following:

(1) The _____ [*e.g.,* Defendant] was served with the _____ [*e.g.,* summons and complaint] pursuant to *Rule 4(c) of the Federal Rules of Civil Procedure* on _____ [*date*], as evidenced by the proof of service on file with this court.

(2) The _____ [*e.g.,* Defendant] has failed to plead or otherwise respond to the _____ [*e.g.,* complaint].

(3) The applicable time limit for responding has expired.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*e.g.,* Plaintiff John Smith]

NOTES.

Authority:
Fed R Civ P 55(a)

Grounds for Entry of Default by Clerk:
See *§ 27.04*

Application for Entry of Default by Clerk:
See *§ 27.05*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsCourtsClerks of Court

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27.24 Declaration in Support of Application to Clerk for Entry of Default.

Declaration in Support of Application to Clerk for Entry of Default.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	DECLARATION IN SUPPORT OF APPLICATION
	)	FOR ENTRY OF DEFAULT
	)	

I, _____ [*name of declarant*], declare as follows:

1. I am _____ [*e.g.*, the Plaintiff *or* the attorney for the Plaintiff] in this action.

2. On _____ [*date of service*], _____ [*defaulting party's status and name, e.g.,* Defendant Mary Jones] was properly served with the _____ [*e.g.,* summons and complaint] in this action in accordance with *Rule 4(c) of the Federal Rules of Civil Procedure*, as evidenced by the proof of service on file with this court, a true and correct copy of which is attached to this declaration.

3. _____ [*e.g.,* Defendant Mary Jones] has failed to serve or file a pleading or otherwise respond to the _____ [*e.g.,* complaint].

4. The applicable time limit for responding to the _____ [*e.g.,* complaint] has expired, as follows: _____ [*Set forth facts showing that applicable time limit under Fed R Civ P 12(a), as extended by agreement of the parties or by court order under Fed R Civ P 6(b), has expired, e.g.,* Under *Rule 12(a) of the Federal Rules of Civil Procedure*, Defendant Mary Jones was required to plead or otherwise respond to the complaint by June 1, 2004, but has failed to do so. The time to plead or otherwise respond to the complaint has not been extended by any agreement of the parties or any order of the Court].

I declare under penalty of perjury [*if executed outside United States or its territories, add:* under the laws of the United States of America] that the foregoing is true and correct.

Executed on _____ [*date*]

_____ [*signature of declarant*]

_____ [*typed or printed name of declarant*]

NOTES.

Authority:
28 USC § 1746; *Fed R Civ P 55(a)*

Grounds for Entry of Default by Clerk:
See *§ 27.04*

Application for Entry of Default by Clerk:
See *§ 27.05*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsCourtsClerks of Court

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4-27 MB Practice Guide: Fed Pretrial Civ Proc in CA 27.25

27.25 Application to Clerk for Entry of Default Judgment.

Application to Clerk for Entry of Default Judgment.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	APPLICATION FOR ENTRY OF DEFAULT
	)	JUDGMENT
	)	

To the Clerk of the United States District Court for the _____ District of California:

_____ [*Identify party, e.g.*, Plaintiff John Smith] requests the entry of a default judgment against

_____ [*identify defaulting party, e.g.,* Defendant Mary Jones], pursuant to *Rule 55(b)(1) of the Federal Rules of Civil Procedure*, in the amount of $_____.

In support of this request, _____ [*e.g.,* the Plaintiff] has attached the following:

_____ [Affidavit(s) *or* Declaration(s)] of _____ [*name(s)*] showing the following:

(1) That a default was entered against _____ [*e.g.,* the Defendant] on _____ [*date*].

(2) _____ [*e.g.,* The Plaintiff's] claim against _____ [*e.g.,* the Defendant] is for a sum certain or a sum that can by computation be made certain.

(3) _____ [*e.g.,* The Defendant] is not a minor or an incompetent person.

(4) _____ [*e.g.,* The Defendant] is not currently serving in the military.

(5) _____ [*e.g.,* The Defendant] is not an officer or agency of the United States.

(6) _____ [*e.g.,* The Defendant] is not Defaulting party is not a foreign state or a political subdivision, agency, or instrumentality of a foreign state.

(7) The amount of judgment to be entered, which is the principal amount due and owing to _____ [*e.g.,* the Plaintiff], plus interest and costs that have been or will necessarily be incurred in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*e.g.,* Plaintiff John Smith]

NOTES.

Authority:
Fed R Civ P 55(b)(1)

When Clerk Is Authorized to Enter Default Judgment:
See *§ 27.07*

Application for Entry of Default Judgment by Clerk:
See *§ 27.08*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsCourtsClerks of Court

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4-27 MB Practice Guide: Fed Pretrial Civ Proc in CA 27.26

27.26 Declaration in Support of Application to Clerk for Entry of Default Judgment.

Declaration in Support of Application to Clerk for Entry of Default Judgment.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	DECLARATION IN SUPPORT OF APPLICATION
	)	FOR
	)	ENTRY OF DEFAULT JUDGMENT

I, _____ [*name of declarant*], declare as follows:

1. I am _____ [*e.g.*, the Plaintiff *or* the attorney for the Plaintiff] in this action.

2. A default has been entered against _____ [*defaulting party's status and name, e.g.,* Defendant Mary Jones] for failure to appear in this action by responding to the _____ [*e.g.,* complaint] after being properly served. The default was entered by the Clerk on _____ [*date*].

3. _____ [*e.g.,* Defendant Mary Jones] is not a minor or an incompetent person.

4. _____ [*e.g.,* Defendant Mary Jones] is not currently in the military service [*if appropriate, add:*, as further evidenced by the attached Declaration Regarding Military Status of Defaulting Party], and therefore the Servicemembers Civil Relief Act does not apply.

5. _____ [*e.g.,* Defendant Mary Jones] is not an officer or agency of the United States.

6. _____ [*e.g.,* Defendant Mary Jones] is not a foreign state or a political subdivision, agency, or instrumentality of a foreign state.

7. As stated in the _____ [*e.g.,* complaint], _____ [*e.g.,* Defendant Mary Jones] owes _____ [me *or* the Plaintiff] $_____, itemized as follows:

[*Specify principal amount, reflecting any credits for payments received, plus interest and costs, e.g.:*]

Principal amount due:	$$_____
Less credits for payments made:	
1. Payment of _____ [*date*]	$_____
2. Payment of _____ [*date*]	$_____
3. Payment of _____ [*date*]	$
Total amount of payments:	$_____
For a net principal amount due of:	$_____
Plus accrued interest at a per diem rate of _____ [*rate*] per cent for _____ [*number of days*] from the due date of _____ [*date*] to the present date of _____ [*date*]:	$_____
plus $_____ /day from the present date until entry of judgment.	
Plus costs and taxable disbursements:	
1. Filing fee:	$_____
2. Cost of process server:	$_____
3. Motion fees/entry of default	$_____
4. Motion fees/this motion	$
Total costs and disbursements:	$_____
Total amount of judgment to be entered:	$_____

8. The amounts described above are justly due and now owing, and no part has been paid except as set forth above.

I declare under penalty of perjury [*if executed outside United States or its territories, add:* under the laws of the United States of America] that the foregoing is true and correct.

Executed on _____ [*date*]

_____ [*signature of declarant*]

_____ [*typed or printed name of declarant*]

NOTES.

Authority:
28 USC §§ 1608(e), *1746*; *50 USC app § 521*; *Fed R Civ P 55(b)(1)*; *CD Cal Civ LR 55-1*

When Clerk Is Authorized to Enter Default Judgment:
See *§ 27.07*

Application for Entry of Default Judgment by Clerk:
See *§ 27.08*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsCourtsClerks of Court

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27.27 Default Judgment Entered by Clerk.

Default Judgment Entered by Clerk.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	DEFAULT JUDGMENT
	)	
	)	

On _____ [*date*], _____ [*party seeking default judgment, e.g.,* Plaintiff John Smith] applied for a default judgment against _____ [*defaulting party, e.g.,* Defendant Mary Jones].

Based on the application and the accompanying _____ [*specify, e.g.,* affidavits *or* declarations], it appears that:

1. _____ [*Defaulting party, e.g.,* Defendant Mary Jones] has failed to appear in this action by timely pleading or responding to, or otherwise defending against, the _____ [*e.g.,* the complaint] in this

action after being properly served with that _____ [*e.g.*, complaint]. Accordingly, default was entered against _____ [*defaulting party, e.g.,* Defendant Mary Jones] under *Rule 55(a) of the Federal Rules of Civil Procedure* on _____ [*date*].

2. _____ [*Defaulting party, e.g.,* Defendant Mary Jones] is not a minor, an incompetent person, or a current member of the military service.

3. _____ [*Defaulting party, e.g.,* Defendant Mary Jones] is not a foreign state or a political subdivision, agency, or instrumentality of a foreign state.

4. _____ [*Defaulting party, e.g.,* Defendant Mary Jones] is indebted to _____ [*party seeking default judgment, e.g.,* Plaintiff John Smith] for the principal sum of $_____ [*principal amount due*] based on _____ [*identify basis for claim of sum certain or for computation of amount due, e.g.,* the promissory note referred to in the complaint].

THEREFORE, judgment is hereby entered under *Rule 55(b)(1) of the Federal Rules of Civil Procedure* against _____ [*defaulting party, e.g.,* Defendant Mary Jones] in the principal amount of $_____, along with prejudgment interest in the amount of $_____, accruing from _____ [*date principal first became due*] at the annual rate of _____ [*specify legal or contractual rate of prejudgment interest*] percent, and costs in the amount of $_____ [*amount of costs taxed by* clerk], for a total judgment of $_____.

IT IS SO ORDERED.

_____ [*date*]

_____ [*signature of clerk*]

_____ [*typed or printed name of clerk*]

Clerk of the Court

NOTES.

Authority:
28 USC § 1608(e); *50 USC app § 521*; *Fed R Civ P 55(b)(1)*; *CD Cal Civ LR 58-11*

Clerk's Power to Enter Default Judgment:
See *§ 27.07*

Applying to Clerk for Entry of Default Judgment:
See *§ 27.08*

Form of Application to Clerk for Entry of Default Judgment:
See *§ 27.23*

Form of Default Judgment Entered by Court:
See *§ 27.31*

Legal Topics:

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

Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsCourtsClerks of Court

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27.28 Notice of Application and Application for Entry of Default Judgment by Court.

Notice of Application and Application for Entry of Default Judgment.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF APPLICATION AND APPLICATION
_____ [*name*],	)	FOR ENTRY OF DEFAULT JUDGMENT
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will apply to this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for a default judgment, pursuant to *Rule 55(b)(2) of the Federal Rules of Civil Procedure*, against _____ [*e.g.,* Defendant Mary Jones].

At the hearing, _____ [*e.g.,* the Plaintiff] will show the following:

[*If defaulting party failed to appear*]

1. _____ [*e.g.,* The Defendant] failed to appear in this action.

[*OR, if defaulting party has appeared*]

1. _____ [*e.g.,* The Defendant] has been served with notice of this application on _____ [*date*] by _____ [*specify method of service*], as required by *Rule 55(b)(2) of the Federal Rules of Civil Procedure*, as shown by the attached proof of service.

[*CONTINUE*]

2. Default has been entered against _____ [*e.g.,* the Defendant] on _____ [*date*] for failure to respond to _____ [*e.g.,* the complaint].

3. _____ [*e.g.,* The Plaintiff] is entitled to a judgment in the amount of $ _____, as detailed in the attached _____ [affidavits(s) *or* declaration(s)].

4. _____ [*e.g.,* The Defendant is currently serving in the military *or* The Defendant is not currently serving in the military *or* The Plaintiff cannot determine whether the Defendant is currently serving in the military].

[*If appropriate, add*]

5. _____ [*e.g.,* The Defendant] is not a minor or an incompetent person.

6. _____ [*e.g.,* The Defendant] is not an officer or agency of the United States.

7. _____ [*e.g.,* The Defendant] is not foreign state or a political subdivision, agency, or instrumentality of a foreign state.

[*CONTINUE*]

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

This application is based on this Notice of Application and Application, the accompanying _____

[affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.

[*If required by local rule (e.g., ND Cal Civ LR 7-4), include supporting points and authorities in the same document as the notice of application and application; otherwise, present points and authorities in a separate memorandum*.]

Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 55(b)(2)

Contents of Application:
See *§ 27.09*

Notice Requirements:
See *§ 27.09*

Hearing on Application:
See *§ 27.10*

Court's Ruling on Application:
See *§§ 27.11 -27.13*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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27.29 Declaration in Support of Application to Court for Entry of Default Judgment by Court.

Declaration in Support of Application to Court for Entry of Default Judgment.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	DECLARATION IN SUPPORT OF APPLICATION
	)	TO COURT FOR ENTRY OF DEFAULT JUDG-
	)	MENT

I, _____ [*name of declarant*], declare as follows:

1. I am _____ [*e.g.*, the Plaintiff *or* the attorney for the Plaintiff] in this action.

2. A default has been entered against _____ [*defaulting party's status and name, e.g.,* Defendant Mary Jones] for failure to plead to or otherwise defend against the _____ [*e.g.,* complaint] after being properly served. The default was entered by the Clerk on _____ [*date*].

[*If defaulting party failed to appear*]

3. _____ [*e.g.,* The Defendant] failed to appear in this action.

[*OR, if defaulting party or defaulting party's representative has appeared*]

3. _____ [*e.g.,* The Defendant] has been served with notice of the accompanying Application for Default Judgment on _____ [*date*] by _____ [*specify method of service*], as required by *Rule 55(b)(2) of the Federal Rules of Civil Procedure*, as shown by the attached proof of service.

[*CONTINUE*]

[*Indicate whether defaulting party is minor or incompetent person, e.g.:*]

4. _____ [*e.g.,* Defendant Mary Jones] is not a minor or an incompetent person.

[*Indicate whether defaulting party is in military service, e.g.:*]

5. _____ [*e.g.,* Defendant Mary Jones] is not currently in the military service [*if appropriate, add:*, as further evidenced by the attached Declaration Regarding Military Status of Defaulting Party], and therefore the Servicemembers Civil Relief Act does not apply.

[*Indicate whether defaulting party is officer or agency of United States, e.g.:*]

6. _____ [*e.g.,* Defendant Mary Jones] is not an officer or agency of the United States.

[*Indicate whether defaulting party is foreign state or related entity, e.g.:*]

7. _____ [*e.g.,* Defendant Mary Jones] is not a foreign state or a political subdivision, agency, or instrumentality of a foreign state.

[*CONTINUE*]

8. As stated in the _____ [*e.g.,* complaint], _____ [*e.g.,* Defendant Mary Jones] owes _____ [me *or* the Plaintiff] $_____, itemized as follows: _____ [*specify principal amount, reflecting any credits for payments received, plus prejudgment interest if appropriate*].

9. The amounts described above are justly due and now owing, and no part has been paid except as set forth above.

10. To date _____ [I have *or* the Plaintiff has] incurred costs of suit in the amount of $ _____, itemized as follows: _____ [*specify*] [*if appropriate, add:*, plus attorney's fees in the amount of $_____, itemized as follows: _____ (*specify*)].

I declare under penalty of perjury [*if executed outside United States or its territories, add:* under the laws of the United States of America] that the foregoing is true and correct.

Executed on _____ [*date*]

_____ [*signature of declarant*]

_____ [*typed or printed name of declarant*]

NOTES.

Authority:
28 USC § 1746; *Fed R Civ P 55(b)(2)*; *CD Cal Civ LR 55-1*

Contents of Application:
See *§ 27.09*

Notice Requirements:
See *§ 27.09*

Hearing on Application:
See *§ 27.10*

Court's Ruling on Application:
See *§§ 27.11 -27.13*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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27.30 Declaration Regarding Military Status of Defaulting Party.

Declaration Regarding Military Status of Defaulting Party.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	DECLARATION REGARDING MILITARY
	)	STATUS OF DEFAULTING PARTY
	)	

I, _____ [*name of declarant*], declare as follows:

1. I am _____ [*e.g.*, the attorney for the Plaintiff] in this action. I am making this declaration pursuant

to the requirements of the Servicemembers Civil Relief Act.

[*Choose one of the following, as appropriate*.]

2. _____ [*Defaulting party's status and name, e.g.,* Defendant ABC Enterprises] is a legal entity, specifically a _____ [*identify type of entity, e.g.,* a corporation, rather than a natural person, and therefore is not a member of the military service.

[*OR*]

2. Following an investigation that included _____ [*set forth steps taken to investigate defendant's military* status], I have determined that, to the best of my knowledge, _____ [*defaulting party's status and name, e.g.,* Defendant Mary Jones] is not in the military service.

[*OR*]

2. Following an investigation that included _____ [*set forth steps taken to investigate defendant's military* status], I am unable to determine whether _____ [*defaulting party's status and name, e.g.,* Defendant Mary Jones] is in the military service. [*Add if desired:* I therefore request that the Court appoint an attorney to represent _____ [*e.g.,* the Defendant], as required by the Servicemembers Civil Relief Act.

[*OR*]

2. Following an investigation that included _____ [*set forth steps taken to investigate defendant's military* status], I have determined that _____ [*defaulting party's status and name, e.g.,* Defendant Mary Jones] is currently serving in _____ [*specify branch of military service, e.g.,* the United States Navy] and is not represented by counsel. I therefore request that the Court appoint an attorney to represent _____ [*e.g.,* the Defendant], as required by the Servicemembers Civil Relief Act.

[*CONTINUE*]

I declare under penalty of perjury [*if executed outside United States or its territories, add:* under the laws of the United States of America] that the foregoing is true and correct

Executed on _____ [*date*]

_____ [*signature of declarant*]

_____ [*typed or printed name of declarant*]

NOTES.

Authority:
28 USC § 1746; *50 USC app § 521*

Contents of Application for Entry of Default Judgment:

See *§ 27.09*

Special Requirements for Default Judgment Against Member of Military:

See *§ 27.16[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsMilitary & Veterans LawServicemembersGeneral Overview

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4-27 MB Practice Guide: Fed Pretrial Civ Proc in CA 27.31

27.31 Default Judgment Entered by Court.

Default Judgment Entered by Court.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	DEFAULT JUDGMENT
	)	
	)	

On _____ [*date of hearing or other consideration of application for default judgment*], the Court considered the application of _____ [*party seeking default judgment, e.g.,* Plaintiff John Smith] for a default judgment against _____ [*defaulting party, e.g.,* Defendant Mary Jones] under *Rule 55(b)(2) of the Federal Rules of Civil Procedure*.

After considering the papers submitted in support of [*if applicable, add:* and in opposition to] the application, and the papers on file in this action, [*if hearing was held, add:* as well as the evidence offered at the hearing on the application], the Court finds as follows:

1. _____ [*Defaulting party, e.g.,* Defendant Mary Jones] has failed to appear in this action by timely pleading or responding to, or otherwise defending against, the _____ [*e.g.,* the complaint] in this action after being properly served with that _____ [*e.g.,* complaint]. Accordingly, the clerk entered default against _____ [*defaulting party, e.g.,* Defendant Mary Jones] under *Rule 55(a) of the Federal Rules of Civil Procedure* on _____ [*date*].

[*Choose one of the following, as appropriate*]

2. _____ [*Defaulting party, e.g.,* Defendant Mary Jones] is not a minor, an incompetent person, or a current member of the military service.

[*OR*]

2. _____ [*Defaulting party, e.g.,* Defendant Mary Jones] is _____ [a minor *or* an incompetent person *or* a current member of the military service] and was represented in this action by _____ [name of guardian, representative, or attorney], who was served with _____ [*e.g.,* the complaint] in this action and with notice of this application [*if hearing was held, add:* and of the hearing on the application].

[*CONTINUE*]

3. _____ [*Defaulting party, e.g.,* Defendant Mary Jones] is liable to _____ [*party seeking default judgment, e.g.,* Plaintiff John Smith] for damages in the amount of $ _____.

THEREFORE, it is ordered that judgment be entered under *Rule 55(b)(2) of the Federal Rules of Civil Procedure* against _____ [*defaulting party, e.g.,* Defendant Mary Jones] as follows:

_____ [*state terms of judgment, e.g.,* That Plaintiff John Smith recover from Defendant Mary Jones the sum of $_____, together with costs in the amount of $_____, and attorney's fees in the amount of $_____, for a total judgment of $ _____].

IT IS SO ORDERED.

_____ [*date*]

_____ [*signature of Judge*]

_____ [*typed or printed name of Judge*]

United States District Judge

NOTES.

Authority:

Fed R Civ P 55(b)(2); *CD Cal Civ LR 58-11*

Applying to Court for Entry of Default Judgment:

See *§ 27.09*

Form of Default Judgment Entered by Clerk:
See *§ 27.27*

Form of Application to Court for Entry of Default Judgment:
See *§ 27.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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27.32 Notice of Appearance.

Notice of Appearance.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	NOTICE OF APPEARANCE BY ATTORNEY FOR
	)	_____ [DEFENDANT *or* THIRD-PARTY DEFENDANT]
	)	

NOTICE IS HEREBY GIVEN that I have been retained by, and hereby appear for, _____ [*identify party, e.g.*, Defendant Mary Jones] in this action.

_____ [*date*]

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*e.g.*, Defendant Mary Jones]

NOTES.

Authority:
Fed R Civ P 55(b)(2)

Effect of Appearance by Defaulting Party:
See *§ 27.09[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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27.33 Notice of Motion and Motion to Set Aside Default.

Notice of Motion and Motion to Set Aside Default.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION TO SET
_____ [*name*],	)	ASIDE DEFAULT
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for the following:

(A) pursuant to *Rule 55(c) of the Federal Rules of Civil Procedure*, an order setting aside the default entered in this action on _____ [*date*] against _____ [*moving party, e.g.,* Defendant Mary Jones], on the grounds that _____ [*specify, e.g.,* entry of default was improper because Defendant was never served with the complaint in this action *or* there is good cause to set aside the default, in that the Defendant's default was the result of excusable neglect, the Defendant has a meritorious defense, and setting aside the default would not prejudice the Plaintiff]; and

(B) an order granting further relief as may be appropriate.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 55(c)

Local Practice--Clerk Can Sign Order:
ND Cal Civ LR 77-2(b); *SD Cal Civ LR 77.2(b)*

Grounds for Granting Motion:

See *§ 27.19[2],[3]*

Time for Making Motion:

See *§ 27.19[4]*

Supporting Memorandum and Affidavits:

See 10 *Bender's Federal Practice Forms, Forms 55:41-55:43*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial JudgmentsDefaultRelief From Default

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27.34 Notice of Motion and Motion to Set Aside Default Judgment.

Notice of Motion and Motion to Set Aside Default Judgment.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION TO SET
_____ [*name*],	)	ASIDE DEFAULT JUDGMENT
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for the following:

(A) pursuant to *Rules 55(c)* and *60(b) of the Federal Rules of Civil Procedure*, an order setting aside the default judgment entered in this action on _____ [*date*] against _____ [*moving party, e.g.,* Defendant Mary Jones], on the grounds that _____ [*specify, e.g.,* the default judgment is void because the court lacks subject-matter jurisdiction over this action *or* the Defendant's default was the result of excusable neglect, the Defendant has a meritorious defense, and setting aside the default would not prejudice the Plaintiff]; and

(B) an order granting further relief as may be appropriate.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 55(c), 60(b)

Grounds for Granting Motion:
See *§ 27.21*

Time for Making Motion:
See *§ 27.22[1]*

Contents of Motion:
See *§ 27.22[2]*

Court's Ruling on Motion:
See *§ 27.22[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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Unit 8 Motion Practice
CHAPTER 28 Dismissal for Delay in Bringing to Trial

4-28 MB Practice Guide: Fed Pretrial Civ Proc in CA 28.syn

§ 28.syn Synopsis to Chapter 28: Dismissal for Delay in Bringing to Trial

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28.32 Dismissal Order for Failure to Comply With Order.

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Unit 8 Motion Practice
CHAPTER 28 Dismissal for Delay in Bringing to Trial
I. STRATEGY

4-28 MB Practice Guide: Fed Pretrial Civ Proc in CA 28.01

28.01 Scope.

This chapter covers:

- Involuntary dismissals under Rule 41(b) [*see 28.05 -28.14*; *Forms: 28.30 -28.32*].
- Effect of involuntary dismissals [*see 28.15*].
- Appellate review of dismissals [*see 28.16*].
- Opposition to involuntary dismissals [*see 28.18 -28.28*].

Core Rule:
Fed R Civ P 41(b).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute

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Unit 8 Motion Practice
CHAPTER 28 Dismissal for Delay in Bringing to Trial
I. STRATEGY

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28.02 Objective and Strategy.

Counsel should consult local rules regarding dismissal of actions. In the Central District, civil suits pending for an unreasonable amount of time without action may be dismissed. In the Southern District, actions or proceedings pending for more than six months without action may be dismissed [*see 28.05[1], [2]*].

Because a dismissal with prejudice is a severe sanction, the moving party should describe in detail how the plaintiff has failed to satisfy its obligations and has prejudiced the other parties. A moving party arguing that plaintiff has unreasonably delayed the action should show how the delay has resulted in actual prejudice. Additionally, the motion to dismiss is more likely to be granted if the plaintiff has engaged in a pattern of improper conduct, especially if the plaintiff has violated previous court orders. Otherwise, the moving party should consider lesser sanctions, such as attorney's fees [*see 28.07*].

The moving party should ensure that the dismissal order specifically states whether dismissal is with or without prejudice to avoid any confusion [*see 28.15[5], [6]*].

To avoid dismissal, plaintiff's counsel should emphasize that the plaintiff will be damaged by not being allowed to remedy the harm caused to the defendant; the plaintiff's conduct was not improper, was an isolated instance, or was caused by circumstances outside the plaintiff's control; the conduct was the fault of the plaintiff's counsel; or the defendant has not been prejudiced. When appropriate, consider agreeing to a lesser sanction or asking that the dismissal be without prejudice [*see 28.18*].

Plaintiff may also argue that the court did not provide notice or warning of an imminent dismissal, although an express warning is not required following a noticed motion [*see 28.23*].

Counsel for the plaintiff should consider reporting discovery disputes or delays to the court, regardless of any agreement of the parties. Otherwise, the court might dismiss the action sua sponte irrespective of any agreement [*see 28.08*].

Detailed Discussion/Forms:

8 Moore's Federal Practice, Ch. 41, Dismissal of Actions (Matthew Bender 3d ed.).

9 Bender's Federal Practice Forms, Rule 41, Dismissal of Actions (Matthew Bender).

Cross Reference:

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsHearingsCivil ProcedureDismissalsInvoluntary DismissalsMotionsCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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28.03 CHECKLIST: Obtaining Involuntary Dismissal.

☐ Consider moving for involuntary dismissal of claimant's action or claim based on claimant's failure to [*Fed R Civ P 41(b), (c)*]:

- ○ Prosecute the case.
- ○ Comply with Federal Rules of Civil Procedure.
- ○ Comply with court orders.

☐ Include in motion for involuntary dismissal:

- ○ A request for order dismissing claimant's action or claim pursuant to Rule 41(b).
- ○ A clear statement of ground for dismissal.
- ○ A statement that claimant was on notice that failure would result in dismissal, if accurate.
- ○ An explanation of relevant factors supporting dismissal, such as:
  - ☐ Public interest favors expeditious resolution of litigation.

☐ Balancing court's interest in managing docket with claimant's interest in receiving due process tips in favor of dismissal.

☐ Plaintiff's conduct has prejudiced defendant.

☐ Sanctions less drastic than dismissal would be ineffective.

○ Supporting authority.

Authority:

Fed R Civ P 41(b), (c)

Discussion:

See *§§ 28.05 -28.14*

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Forms:

see *§§ 28.30 -28.32*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ComplyCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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28.04 Involuntary Dismissal Under Rule 41(b).

28.04[1] When Defendant May Move for Dismissal. A defendant may move for dismissal of an action or of any claim against the defendant if the plaintiff [*Fed R Civ P 41(b)*]:

- Fails to prosecute.
- Fails to comply with the Federal Rules of Civil Procedure.
- Fails to comply with an order of the court.

In ruling on the motion to dismiss, the court will balance the interests of efficient docket management with the public policy of deciding cases on their merits [*Mann v. Lewis (8th Cir 1997) 108 F3d 145, 147* ; Campbell v. Apt. Inv. & Mgmt. Co. (ND Cal 2008) 2008 US Dist LEXIS 70227, at *4].

Cross Reference:

Factors considered in dismissal, see *§ 28.13*.

28.04[2] When Dismissal Constitutes Adjudication on Merits. Unless the court in its order for dismissal otherwise specifies, a dismissal under *Fed R Civ P 41(b)* and any dismissal not provided for in *Fed R Civ P 41* operates as an adjudication on the merits, except for a dismissal for [*Fed R Civ P 41(b)*; *see Semtek Int'l Inc. v. Lockheed Martin Corp. (2001) 531 US 497, 501, 121 S Ct 1021, 149 L Ed2d 32*]:

- Lack of jurisdiction [*see 28.04[3]*].
- Improper venue.
- Failure to join a party under *Fed R Civ P 19*.

The preclusive effect of judgments rendered by a federal court hearing a state law claim (diversity or supplemental jurisdiction) is governed by federal common law. With respect to some questions, such as the effect of a dismissal on statute of limitations grounds, the content of federal common law will be borrowed from the law of the state in which the federal court sits [*see Semtek Int'l Inc. v. Lockheed Martin Corp. (2001) 531 US 497, 508-509, 121 S Ct 1021, 149 L Ed2d 32* ; 18 *Moore's Federal Practice, § 130.02* (Matthew Bender 3d ed.)]. Under California law, a dismissal on limitations grounds is not a dismissal on the merits [*Ritchey v. Upjohn Drug Co. (9th Cir 1998) 139 F3d 1313, 1319*].

"Adjudication on the merits" applies to dismissals based on other rules, such as *Fed R Civ P 12(b)* [*see Stewart v. U.S. Bancorp (9th Cir 2002) 297 F3d 953, 956-957*].

Cross References:

Failure to join party under *Fed R Civ P 19*, see Ch. 4, Determining Parties to Action, see *§§ 4.41 -4.51*. Voluntary dismissal under *Fed R Civ P 41(a)*, see Ch. 30, Voluntary Dismissal. Dismissal under *Fed R Civ P 12(b)*, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§§ 8.14 -8.22*.

28.04[3] "Lack of Jurisdiction" Exception Interpreted Broadly. The Supreme Court has read broadly *Fed R Civ P 41(b)*'s "lack of jurisdiction" exception to involuntary dismissals constituting an adjudication on the merits, giving the concept of jurisdiction meaning beyond its traditional personal and subject matter usages. The exception encompasses dismissals based on a plaintiff's failure to comply with a precondition requisite to the court's determining the merits of the substantive claim [*Costello v. United States (1961) 365 US 265, 285, 81 S Ct 534, 5 L Ed2d 551* ; *see Stewart v. U.S. Bancorp (9th Cir 2002) 297 F3d 953, 956-957* (applying provision of Rule 41(b) to dismissal under *Fed R Civ P 12(b)*)].

Example:

The government's denaturalization complaint was dismissed because of its failure to attach an affidavit of good cause. Because the affidavit was a precondition to the court's ability to go forward on the merits, the dismissal was deemed to be for "lack of jurisdiction" and without prejudice [*see Costello v. United States (1961) 365 US 265, 285, 81 S Ct 534, 5 L Ed2d 551* ; *see also Stewart v. U.S. Bancorp (9th Cir 2002) 297 F3d 953, 956-957* (discussing *Costello*, and applying provision of Rule 41(b) to dismissal under *Fed R Civ P 12(b)*)].

Cross Reference:

Effect of dismissal, see *§ 28.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ComplyCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotionsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral Overview

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Unit 8 Motion Practice
CHAPTER 28 Dismissal for Delay in Bringing to Trial
II. SEEKING INVOLUNTARY DISMISSAL

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28.05 LOCAL PRACTICE: Involuntary Dismissal Under Rule 41(b).

28.05[1] LOCAL PRACTICE: CD Cal Requirements--Dismissal of Actions. In the Central District of California, civil suits that have been pending for an unreasonable period of time without any action having been taken may, after notice, be dismissed for want of prosecution [*CD Cal Civ LR 41-1*].

If any action dismissed under *CD Cal Civ LR 41-1* is reinstated, the court may impose such sanctions as it deems just and reasonable [*CD Cal Civ LR 41-3*].

If any action dismissed under *CD Cal Civ LR 41-1* is refiled as a new action, the party filing the later action must comply with the requirements of *CD Cal Civ LR 83-1.2.2* [*CD Cal Civ LR 41-4*; *see CD Cal Civ LR 83-1.2.2* (requirements for refiling actions)].

If a party, without notice to the court, fails to appear at the noticed call of any action or proceeding, the matter is subject to dismissal for want of prosecution [*CD Cal Civ LR 41-5*].

A party proceeding pro se must keep the court and opposing parties apprised of the party's current address and telephone number, if any, and e-mail address, if any. If mail directed by the clerk to a pro se plaintiff's address of record is returned undeliverable by the Postal Service and if, within 15 days of the service date, the plaintiff fails to notify, in writing, the court and opposing parties of his or her current address, the court may dismiss the action with or without prejudice for want of prosecution [*CD Cal Civ LR 41-6*].

28.05[2] LOCAL PRACTICE: SD Cal Requirements--Dismissal for Want of Prosecution and Failure to Comply With Local Rules. Actions or proceedings pending in the District Court for the Southern District of California for more than six months, without any proceeding or discovery having been taken during this period, may, after notice, be dismissed by the court for want of prosecution, at the calling of a calendar prepared for that purpose by the clerk [*SD Cal Civ LR 41.1(a)*].

Failure to comply with the provisions of the local rules for the Southern District of California may also be grounds for dismissal under *SD Cal Civ LR 41.1* [*SD Cal Civ LR 41.1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteGovernmentsCourtsRule Application & Interpretation

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II. SEEKING INVOLUNTARY DISMISSAL

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28.06 Party Opposing Counterclaim, Crossclaim, or Third-Party Claim May Move for Dismissal.

The provisions of *Fed R Civ P 41* apply to the dismissal of any counterclaim, crossclaim, or third-party claim [*Fed R Civ P 41(c)*].

Cross Reference:

Discussion of Rule 41's applicability to counterclaims, crossclaims, and third-party claims, see 8 Moore's Federal Practice, *§ 41.60* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedureDismissalsGeneral Overview

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CHAPTER 28 Dismissal for Delay in Bringing to Trial
II. SEEKING INVOLUNTARY DISMISSAL

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28.07 Procedure for Dismissal Motion.

Rule 41 does not set forth any particular procedure for a defendant's motion for dismissal [*see Fed R Civ P 41(b)*].

Cross References:

Motion procedure generally, including local rules, see Ch. 26, Pretrial Motion Practice.

The moving party should clearly state the ground for dismissal. A motion is inappropriate if the moving party offers no theory, argument, supporting authority, or evidence to augment a motion, beyond merely stating that it is made under Rule 41(b). If the court's presumed basis is not what defendant intended, then defendant's lack of clarity in articulating a cognizable basis is equally problematic. Either way, the failure to adequately support the motion in this context is fatal [*see Florens Container v. Cho Yang Shipping (ND Cal 2002) 245 F Supp2d 1086, 1089* (denying motions to dismiss and transfer venue brought alternatively)].

A hearing to determine the necessity of the dismissal and the credibility of the plaintiff's explanation is generally held [*see Colon v. Mack (2d Cir 1995) 56 F3d 5, 7*], depending on the particular judge.

Cross Reference:

Procedure for involuntary dismissal, see 8 Moore's Federal Practice, *§ 41.50[6]* (Matthew Bender 3d ed.).

Strategic Point--Moving Party:

Because a dismissal with prejudice is a severe sanction, the moving party should marshal as much evidence as possible concerning the plaintiff's conduct that has led to the motion. The moving party should describe all of the various ways the plaintiff has failed to satisfy its obligations (e.g., ignoring statutory or court imposed deadlines, failing to attend hearings, not opposing motions, not providing discovery or witnesses for depositions) and has prejudiced the other parties (e.g., losing the opportunity to obtain testimony because a witness died before the plaintiff would make the witness available for a deposition, causing other parties to incur fees to force the plaintiff's compliance with deadlines, wasting

the time of other parties' executives who appeared for depositions that the plaintiff noticed but then failed to attend). The motion to dismiss is more likely to be granted if the court understands that the plaintiff has engaged in a pattern of improper or dilatory conduct, especially if the plaintiff has violated previous court orders, and if the other parties have been prejudiced by this conduct. If the motion is based merely on one or two instances of misconduct or one missed deadline, the court is less likely to dismiss the case. In that situation, the moving party has a greater chance of success if it moves for some kind of lesser sanctions, such as its attorney's fees for having to force the plaintiff's compliance.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Unit 8 Motion Practice
CHAPTER 28 Dismissal for Delay in Bringing to Trial
II. SEEKING INVOLUNTARY DISMISSAL

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28.08 Court May Dismiss Action Sua Sponte.

A court may sua sponte dismiss an action under *Fed R Civ P 41(b)* [*see, e.g., Moore v. United States (ND Cal 2000) 193 FRD 647, 652-653*]. The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an inherent power, governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs to achieve the orderly and expeditious disposition of cases [*see Link v. Wabash R.R. Co. (1962) 370 US 626, 630-631, n4, 82 S Ct 1386, 8 L Ed2d 734* ; *Henderson v. Duncan (9th Cir 1986) 779 F2d 1421, 1423*].

A sua sponte dismissal may be vulnerable to reversal if the court does not first consider less drastic alternatives and/or give the plaintiff a warning and an opportunity to rectify its conduct [*see, e.g., Oliva v. Sullivan (9th Cir 1992) 958 F2d 272, 274*]. However, the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing does not necessarily render a sua sponte dismissal void [*Link v. Wabash R.R. Co. (1962) 370 US 626, 632, 82 S Ct 1386, 8 L Ed2d 734*].

Warning--Plaintiff:

Regardless of the desirability of resolving discovery disputes and delays via agreement of the parties, counsel for the plaintiff should consider reporting discovery issues to the court. Otherwise, the court might dismiss the action sua sponte irrespective of any agreement.

Cross References:

Warning factor, see *§ 28.13[2]*. Less drastic alternatives, see *§ 28.13[7]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsAppellate ReviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute

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28.09 Dismissal for Failure to Prosecute.

Federal actions must be prosecuted with reasonable diligence [*Television Signal Corp. v. City & County of San Francisco (ND Cal 2000) 193 FRD 645, 647*]. The failure to prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of a showing of actual prejudice to the defendant from the failure [*Morris v. Morgan Stanley & Co. (9th Cir 1991) 942 F2d 648, 651*].

In dismissing a case for lack of prosecution, the court must find unreasonable delay [*In re Eisen (9th Cir 1994) 31 F3d 1447, 1451* ; *see* Campbell v. Apt. Inv. & Mgmt. Co. (ND Cal 2008) 2008 US Dist LEXIS 70227, at *3-*4 (plaintiffs failed to respond to discovery, provided no explanation for failure, did not participate in settlement, did not communicate with their own counsel, and generally refused to participate in any meaningful way)]. Financial difficulties do not excuse a plaintiff's delay [*In re Eisen (9th Cir 1994) 31 F3d 1447, 1451-1452*].

Example:

In an adversarial bankruptcy proceeding, the trustee who filed the proceeding took no action for four years. The trustee's excuse for the delay was based on insufficient funds to proceed with discovery, and the assertion that his attorney was on a contingency basis and thus was unable or unwilling to advance the costs of discovery. The court of appeals held that financial difficulties do not excuse a plaintiff's delay [*see In re Eisen (9th Cir 1994) 31 F3d 1447, 1451-1452, 1456*].

Willful delay in serving a complaint is a particularly serious failure to prosecute [*see Television Signal Corp. v. City & County of San Francisco (ND Cal 2000) 193 FRD 645, 647* (granting dismissal *without* prejudice, however, under *Fed R Civ P 4(m)* [timeliness of service of summons and complaint], and denying motion to dismiss under *Fed R Civ P 41(b)*); *see Fed R Civ P 4(m)*].

A reviewing court will give deference to the district court to decide what is unreasonable because it is in the best position to determine what period of delay can be endured before its docket becomes unmanageable [*In re Eisen (9th Cir 1994) 31 F3d 1447, 1451*].

Cross References:

Service of summons and complaint, see Ch. 7, Service of Summons. Further discussion of dismissal for

failure to prosecute, see 8 Moore's Federal Practice, *§ 41.51* (Matthew Bender 3d ed.).

Defendant's claim, in opposing dismissal, that delay was reasonable, see *§ 28.21*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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28.10 Dismissal for Failure to Amend Complaint After Dismissal With Leave to amend.

If a plaintiff fails to amend the complaint after the district judge dismisses the complaint with leave to amend, the resulting dismissal is typically considered a dismissal for failing to comply with a court order rather than for failing to prosecute the claim [*see Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 986-987, n4*]. Dismissal under Rule 41(b) for failure to comply with a court order is appropriate only when the plaintiff has done nothing in response to a dismissal with leave to amend. When the plaintiff chooses not to amend, and clearly communicates that choice to the court, a Rule 41(b) dismissal is inappropriate because there has been no disobedience [*see Edwards v. Marin Park, Inc. (9th Cir 2004) 356 F3d 1058, 1065*].

Strategic Point--Plaintiff:

The plaintiff has the right simply to allow the complaint to be dismissed [*see Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 986-987, n4*]. If the plaintiff wishes to expedite the case by choosing not to amend, that election should be clearly communicated to the district court. The district court should then enter a final judgment dismissing the claim with prejudice under Rule 12(b)(6), not Rule 41(b). This is important because of the differing standards on review: the Ninth Circuit reviews a Rule 41(b) dismissal for abuse of discretion, whereas a Rule 12(b)(6) dismissal is reviewed de novo [*see Edwards v. Marin Park, Inc. (9th Cir 2004) 356 F3d 1058, 1065*].

Distinguish:

A plaintiff's failure to file an amended complaint is not disobedience of a court order dismissing a complaint with leave to amend if the original dismissal was erroneous [*see Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 992-993* (upholding dismissal of complaint under *Fed R Civ P 9(b)*)].

Example:

Following the judge's tentative ruling to grant the defendants' motion to dismiss, plaintiffs and defendants stipulated to allow plaintiffs 60 days to amend. The judge agreed to the stipulation, and the clerk relayed the information to the parties. Although the judge's minute order dismissing the complaint with 60 days' leave to amend was entered in the clerk's civil minutes, no written order ever issued.

Plaintiffs never filed an amended complaint. The court of appeals concluded that the minute order, under the circumstances of this case, was an "order" within the meaning of *Fed R Civ P 41(b)*, and plaintiffs' noncompliance with the order gave the district court judge the discretion to dismiss the complaint. Because the plaintiffs were aware of the requirements of the court's minute order, the order unequivocally gave the litigants notice of the requirements of the court's order. Furthermore, because of plaintiffs' consent to the tentative ruling, the judge was not obligated to provide them with the reason for the dismissal [*see Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 986-989, n2* , n7].

Cross Reference:

Dismissal for failure to comply with court order, see 8 Moore's Federal Practice, *§ 41.52* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsAppellate ReviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to Comply

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28.11 Dismissal for Failure to Comply With Rules Regarding Pleading Requirements.

A district court may dismiss a complaint under *Fed R Civ P 41(b)* based on a plaintiff's failure to file a short and plain complaint stating the court's basis for jurisdiction and the basis for relief as required by *Fed R Civ P 8(a)* [*Moore v. United States (ND Cal 2000) 193 FRD 647, 651*].

Cross Reference:

Pleading requirements under Rule 8, see Ch. 6, Drafting the Summons and Complaint, see *§§ 6.03 -6.17*.

Example:

The district court sua sponte dismissed, with leave to amend, the initial complaint and first amended complaint, because the plaintiff's pleadings were too vague. The court then dismissed with prejudice the second amended complaint because the plaintiff failed in three opportunities to cure the deficiencies and set forth a short and plain statement of the claims alleged, thereby failing to obey the court's orders to do so [*see Moore v. United States (ND Cal 2000) 193 FRD 647, 652-653*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureDismissalsInvoluntary DismissalsFailures to Comply

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28.12 Rule 41(b) Applies to Class Actions.

Rule 41 applies to dismissal of class actions [*see, e.g., Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 986-989, n2, n7*].

Cross Reference:

Involuntary dismissal of class actions, see 5 Moore's Federal Practice, *§ 23.64[2][d]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureDismissalsGeneral Overview

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28.13 Factors Considered in Dismissal As Sanction.

28.13[1] Five Factors Considered. To dismiss a case as a sanction, the district court must consider five factors [*Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 990-992* ; *Television Signal Corp. v City & County of San Francisco (ND Cal 2000) 193 FRD 645, 647*]:

- The public's interest in expeditious resolution of litigation [*see, e.g., In re Eisen (9th Cir 1994) 31 F3d 1447, 1452*];
- The court's need to manage its docket [*see, e.g., In re Eisen (9th Cir 1994) 31 F3d 1447, 1452*];
- The risk of prejudice to the defendants [*see, e.g., In re Eisen (9th Cir 1994) 31 F3d 1447, 1452-1453*];
- The public policy favoring disposition of cases on their merits [*see, e.g., In re Eisen (9th Cir 1994) 31 F3d 1447, 1454*]; and
- The availability of less drastic alternatives [*see, e.g., McHenry v. Renne (9th Cir 1996) 84 F3d 1172, 1178-1179*].

The court of appeals may affirm a dismissal when at least four factors support dismissal, or when at least three factors strongly support dismissal [*Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 990-992* . Although it is preferred, it is not required that the district court make explicit findings to show that it has considered these factors [*Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 990-992* ; *In re Eisen (9th Cir 1994) 31 F3d 1447, 1451*]. The appellate court may review the record independently to determine if the district court has abused its discretion [*Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 990-992*].

Example:

In a habeas corpus petition proceeding, three factors weighed in favor of dismissal (expeditious resolution, docket management, prejudice), and two factors weighed against dismissal (court failed to

weigh alternatives, public policy favoring disposition on merits). The court of appeals stated it was a "close case," but affirmed dismissal because the district court did not abuse its discretion [*see Pagtalunan v. Galaza (9th Cir 2002) 291 F3d 639, 643 , cert. denied, 538 US 909 (2003)*].

Consider--Factors Regarding Court-Imposed Deadline:

The dispositive factors to be considered in determining whether to dismiss a plaintiff's case as a sanction for violating a court-imposed deadline are usually prejudice and the availability of less drastic sanctions [*see Pagtalunan v. Galaza (9th Cir 2002) 291 F3d 639, 644 , cert. denied, 538 US 909 (2003)* (Schroeder, C.J, dissenting opinion, citing *Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 991-992*)].

28.13[2] Prior Warning.

28.13[2][a] Prior Warning Is Considered. Before dismissing a complaint, a district court may be required to warn the plaintiff of an imminent dismissal, depending on the circumstances, such as whether counsel is on notice that the case will be dismissed [*see, e.g., Oliva v. Sullivan (9th Cir 1992) 958 F2d 272, 274*].

28.13[2][b] Prior Warning May Be Required for Sua Sponte Dismissal. A sua sponte dismissal may be vulnerable to reversal if the court does not first consider less drastic alternatives and/or give the plaintiff a warning and an opportunity to rectify its conduct [*see, e.g., Oliva v. Sullivan (9th Cir 1992) 958 F2d 272, 274*].

However, the absence of notice concerning the possibility of dismissal or the failure to hold an adversary hearing does not necessarily render a sua sponte dismissal void. Not every order entered without notice and a preliminary adversary hearing offends due process [*Link v. Wabash R.R. Co. (1962) 370 US 626, 632, 82 S Ct 1386, 8 L Ed2d 734* (circumstances justified dispensing with the necessity for advance notice and hearing)].

Example:

The appellate court reversed a district court's sua sponte dismissal of a case because it failed to warn the plaintiff before dismissal: The dismissal order indicated that the district judge was primarily concerned with the time the case had been on the docket and the inconvenience of rescheduling his calendar. While these are legitimate concerns, they do not relieve the district judge of the obligation to warn the plaintiff that dismissal is imminent [*see Hamilton v. Neptune Orient Lines, Ltd. (9th Cir 1987) 811 F2d 498, 500* (also failing to consider alternative sanctions)].

28.13[2][c] Express Warning Not Required for Dismissal Following Motion. An express warning regarding the possibility of dismissal is not required when dismissal follows a noticed motion under *Fed R Civ P 41(b)* [*see, e.g., In re Eisen (9th Cir 1994) 31 F3d 1447, 1455-1456* ; *Morris v. Morgan Stanley & Co. (9th Cir 1991) 942 F2d 648, 652*].

28.13[3] Public's Interest in Expeditious Resolution. The public's interest in expeditious resolution of litigation favors dismissal [*Pagtalunan v. Galaza (9th Cir 2002) 291 F3d 639, 642 , cert. denied, 538 US 909 (2003)* ; *Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 990*].

28.13[4] Court's Need to Manage Docket. The trial judge is in the best position to determine whether the delay in a particular case interferes with docket management, and the public interest [*Pagtalunan v. Galaza (9th Cir 2002) 291 F3d 639, 642 , cert. denied, 538 US 909 (2003)*]. A reviewing court also gives deference to the district court in determining when its docket may become unmanageable [*In re Eisen (9th Cir 1994) 31 F3d 1447, 1452*].

The court's need to manage its docket is usually reviewed in conjunction with the public's interest in expeditious resolution of litigation to determine if there is unreasonable delay [*see In re Eisen (9th Cir 1994) 31 F3d 1447, 1452*].

Cross Reference:

Discussion of alleviating calendar congestion, see 8 Moore's Federal Practice, *§ 41.51[3][h]* (Matthew Bender 3d ed.).

28.13[5] Risk of Prejudice to Defendant.

28.13[5][a] Prejudice Results From Impairment of Defendant's Ability to Proceed or Threatened Interference. To prove prejudice, a defendant must establish that plaintiff's actions impaired defendant's ability to proceed to trial or threatened to interfere with the rightful decision of the case [*Pagtalunan v. Galaza (9th Cir 2002) 291 F3d 639, 642* , *cert. denied, 538 US 909 (2003)* ; *Malone v. USPS (9th Cir 1987) 833 F2d 128, 131*].

Prejudice usually takes two forms:

- Loss of evidence.
- Loss of memory by a witness.

A district court in the exercise of its discretion should consider whether these losses have occurred and, if so, whether they are significant because not every loss, and particularly not every loss of memory, will prejudice the defense of a case. Whether the prejudice is significant will depend on whether the plaintiff's actions impair the defendant's ability to go to trial or threaten to interfere with the rightful decision of the case [*In re Eisen (9th Cir 1994) 31 F3d 1447, 1453*].

Example:

In an adversarial bankruptcy proceeding, the trustee who filed the proceeding took no action to prosecute for four years. The defendant showed actual prejudice based on the following facts: (1) during the pendency of the actions, the defendant trustee could not sell the property that was the subject of the dispute, preventing him from closing that bankruptcy; (2) courts presume injury because witnesses move away and then memories fade, evidenced in this case by the death of one of the beneficiaries; and (3) the delay prevented the bankruptcy court from giving the debtor immediate relief [*see In re Eisen (9th Cir 1994) 31 F3d 1447, 1453-1454*].

28.13[5][b] Failure to Prosecute Alone Justifies Dismissal. When considering prejudice to the defendant, the failure to prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of a showing of actual prejudice to the defendant from the failure [*In re Eisen (9th Cir 1994) 31 F3d 1447, 1452-1453*].

28.13[5][c] Unreasonable Delay Results in Rebuttable Presumption of Prejudice. The law presumes injury from unreasonable delay. However, this presumption of prejudice is rebuttable [*In re Eisen (9th Cir 1994) 31 F3d 1447, 1452-1453*].

Strategic Point--Defendant:

The defendant can optimize the chances for dismissal by showing that the defendant was tangibly prejudiced by the delay.

28.13[5][d] Burden of Production Shifts to Defendant Following Plaintiff's Excuse. When a plaintiff's excuse for its delay is not frivolous, the burden of production shifts to the defendant to show some actual prejudice. If the defendant does so, the plaintiff must then persuade the court that the claims of prejudice are either illusory or relatively insignificant when compared to the force of the excuse. At that point, the court must exercise its discretion by weighing the relevant factors of time, excuse, and prejudice [*In re Eisen (9th Cir 1994) 31 F3d 1447, 1453*].

28.13[5][e] Dismissal Reviewed for Both Prejudice and Delay. The court of appeals considers prejudice and delay together to determine whether there has been sufficient delay or prejudice to justify a dismissal of the plaintiff's

case [*In re Eisen (9th Cir 1994) 31 F3d 1447, 1453*].

28.13[6] Importance of Disposition on Merits. In determining whether dismissal is warranted, courts weigh the public policy favoring disposition of cases on their merits (and therefore disfavoring dismissal) against the plaintiff's delay and the prejudice suffered by the defendant (favoring dismissal) [*see In re Eisen (9th Cir 1994) 31 F3d 1447, 1454* ; *see also Pagtalunan v. Galaza (9th Cir 2002) 291 F3d 639, 643 , cert. denied, 538 US 909 (2003)*].

Distinguish:

Although the strength or weakness of the plaintiff's case may be a factor in determining the harshness of dismissal in a particular case, the appellate court should not closely scrutinize the merits of an action when reviewing an order of dismissal. Even if the plaintiff has an obviously strong case, dismissal would be appropriate if the plaintiff has clearly ignored its responsibilities to the court in prosecuting the action, thus prejudicing the defendant [*see In re Eisen (9th Cir 1994) 31 F3d 1447, 1454*].

In cases implicating important public policy concerns, the court should weigh the public interest in the case and the preference for disposing of cases on their merits prior to granting dismissal [*Dahl v. City of Huntington Beach (9th Cir 1996) 84 F3d 363, 366* (case brought under *42 USC § 1983*)].

28.13[7] Less Drastic Alternatives.

28.13[7][a] Court Should Consider Alternatives. Although a district court is not required to examine every conceivable sanction (see *28.13[7][b]*), it should explore meaningful alternatives to dismissal. A sua sponte dismissal will be vulnerable to reversal if the court does not first consider less drastic alternatives or give the plaintiff a warning and an opportunity to rectify its conduct [*see, e.g., Oliva v. Sullivan (9th Cir 1992) 958 F2d 272, 274* ; *Hamilton v. Neptune Orient Lines, Ltd. (9th Cir 1987) 811 F2d 498, 500* (judge's understandable pique at calendar delay did not excuse his failure to consider alternative sanctions)].

Example:

In a case in which the court's sua sponte dismissal of a complaint resulted primarily from the attorneys' failure to complete discovery and lack of attorney-client cooperation, the district court might better have imposed the defense witness costs on the plaintiff or his attorneys to cure any prejudice the defendant might have suffered from the delay [*see Hamilton v. Neptune Orient Lines, Ltd. (9th Cir 1987) 811 F2d 498, 500*].

Cross References:

Availability of lesser sanctions, see 8 Moore's Federal Practice, *§ 41.51[3][i]* (Matthew Bender 3d ed.).

Opposition to motion based on availability of less drastic alternatives, see *§ 28.22[1]*.

28.13[7][b] Court Need Not Exhaust All Alternatives. The district judge should first consider less drastic alternatives, but need not exhaust them all before finally dismissing a case [*McHenry v. Renne (9th Cir 1996) 84 F3d 1172, 1178-1179*]. There is no requirement that every single alternate remedy be examined by the court before the sanction of dismissal is appropriate. The reasonable exploration of possible and meaningful alternatives is all that is required [*Morris v. Morgan Stanley & Co. (9th Cir 1991) 942 F2d 648, 652*].

Example:

In a case in which the complaint was dismissed under *Fed R Civ P 12(e)* (motion for more definite statement) and *Fed R Civ P 41* (for violation of *Fed R Civ P 8*, regarding rules of pleading), the district court judge had used less drastic alternatives, including permitting plaintiffs to replead twice. He considered the less drastic alternative of allowing plaintiffs to replead again, but decided based on plaintiffs' violation of his previous orders that repleading would be futile [*see McHenry v. Renne (9th*

Cir 1996) 84 F3d 1172, 1178-1179].

28.13[7][c] Pursuit of Alternatives Prior to Disobedience of Court Order Is Insufficient. The Ninth Circuit has rejected a line of cases implicitly accepting the pursuit of less drastic alternatives prior to disobedience of a court's order as satisfying the requirement that the district court explore the availability of less drastic alternatives before ordering dismissal [*see Pagtalunan v. Galaza (9th Cir 2002) 291 F3d 639, 643, n4* , *cert. denied, 538 US 909 (2003)* , citing *Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 992*].

28.13[7][d] Explicit Discussion of Alternatives Is Not Necessarily Required. Explicit discussion by the district court of the feasibility of alternatives to dismissal is preferred in the Ninth Circuit. Nevertheless, under "egregious circumstances," such as a willful violation of a pretrial order, explicit discussion is not necessary for an order of dismissal to be upheld [*Malone v. USPS (9th Cir 1987) 833 F2d 128, 133* ; *see also In re Eisen (9th Cir 1994) 31 F3d 1447, 1454-1455* (four-year delay considered egregious)].

28.13[8] Dismissal Is Extreme Penalty.

28.13[8][a] Dismissal Is Appropriate Only in Extreme Circumstances. Dismissal is the most severe penalty, and is authorized only in extreme circumstances [*Dahl v. City of Huntington Beach (9th Cir 1996) 84 F3d 363, 367* (failure to pay sanctions and uncivil conduct by counsel not enough to warrant dismissal)].

Cross References:

Discussion of dismissal as drastic measure, see 8 Moore's Federal Practice, *§ 41.50[3]* (Matthew Bender 3d ed.).

Discussion of court's need to consider less drastic alternatives, see *§ 28.13[7]*.

28.13[8][b] Harshness of Dismissal With Prejudice Is Directly Proportionate to Likelihood of Plaintiff's Success. The harshness of a dismissal with prejudice is directly proportionate to the likelihood that plaintiff would prevail if permitted to go forward to trial. Because harshness is a key consideration in the district judge's exercise of discretion, the court may consider the strength of a plaintiff's case before determining whether dismissal with prejudice is appropriate [*McHenry v. Renne (9th Cir 1996) 84 F3d 1172, 1179*].

Example:

In a case in which the complaint was dismissed pursuant to *Fed R Civ P 12(e)* (motion for more definite statement regarding vague, ambiguous pleading) and *Fed R Civ P 41* (for violation of *Fed R Civ P 8* regarding rules of pleading), the district judge, considering the strength of the plaintiffs' case, determined that much of the complaint failed to state claims on which relief could be granted, or would be barred by statutes of limitation and immunities. Dismissal with prejudice was not too harsh because if the complaint were not dismissed under Rule 8, most of it would be dismissed anyway without ever reaching the merits [*see McHenry v. Renne (9th Cir 1996) 84 F3d 1172, 1179*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsAppellate Review

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28.14 Dismissal May Result Whether Delay Is Caused by Attorney or Client or Both.

If attorney and client blame each other for delays occasioned by one or both, some sanction is required. The appellate court will support trial judges who impose substantial sanctions on a lawyer who contributes to a default, and will affirm a dismissal if a proper warning is left unheeded [*see Hamilton v. Neptune Orient Lines, Ltd. (9th Cir 1987) 811 F2d 498, 500* (reversing sua sponte dismissal with no warning or discussion of alternatives); *see also Link v. Wabash R.R. Co. (1962) 370 US 626, 633-634, n10, 82 S Ct 1386, 8 L Ed2d 734* (no merit to contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes unjust penalty on client; clients have been held to be bound by their counsels' inaction when consequences have been serious)].

Dismissal has been upheld on the basis that the plaintiff voluntarily chose the attorney as the plaintiff's representative in the action, and may not now avoid the consequences of the acts or omissions of this freely selected agent [*see Link v. Wabash R.R. Co. (1962) 370 US 626, 633-634, n10, 82 S Ct 1386, 8 L Ed2d 734*].

One of the factors considered in determining the appropriateness of dismissal with prejudice is whether it would unfairly penalize the plaintiff for the conduct of plaintiff's counsel. Although a party may be penalized for the actions of that party's counsel, the degree of a plaintiff's personal responsibility for malfeasance is relevant to the propriety of dismissal [*see, e.g., Dahl v. City of Huntington Beach (9th Cir 1996) 84 F3d 363, 366-367* (inappropriate to impose dismissal, and in effect entire penalty, on clients for recalcitrant behavior by their counsel and opposing counsel)].

Example:

A case brought under *42 USC § 1983* was dismissed under *Fed R Civ P 16(f)* (regarding disobedience of scheduling order) and *Fed R Civ P 41(b)* on the following grounds: (1) plaintiff's attorney failed to pay sanctions in the manner prescribed by the court; (2) one attorney failed to pay sanctions altogether; and (3) both parties failed to file a timely joint exhibit and witness list. Dismissal was improper because (1) public policy strongly favored resolution of the dispute on the merits; (2) dismissal severely penalized only one of two parties guilty of discovery abuse; and (3) dismissal severely penalized plaintiffs for their counsels' bad behavior [*see Dahl v. City of Huntington Beach (9th Cir 1996) 84 F3d 363, 366-367*].

Cross Reference:

Discussion of plaintiff's responsibility for counsel's conduct, see 8 Moore's Federal Practice, *§*

41.51[3][g] (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsAppellate ReviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureSanctionsGeneral Overview

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28.15 Effect of Dismissal.

28.15[1] Dismissal Operates As Adjudication on Merits. Unless otherwise specified in the court order for dismissal, a dismissal--other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under *Fed R Civ P 19*--operates as an adjudication on the merits [*Fed R Civ P 41(b)*].

Cross References:

§ 28.04[2], 8 Moore's Federal Practice, *§ 41.50[7][a]* (Matthew Bender 3d ed.).

28.15[2] Judgment on Merits Not Necessarily Entitled to Claim-Preclusive Effect. A judgment on the merits is not necessarily a judgment entitled to claim-preclusive effect. The phrase "adjudication on the merits" does not bear that meaning in *Fed R Civ P 41(b)*. Rule 41(b) sets forth nothing more than a default rule for determining the import of a dismissal.

Rule 41(b)'s use of the term "adjudication on the merits" refers to a dismissal "with prejudice," which the Supreme Court interpreted to mean that the plaintiff is barred from returning later, to the same court, with the same underlying claim [*see Semtek Int'l Inc. v. Lockheed Martin Corp. (2001) 531 US 497, 505, 121 S Ct 1021, 149 L Ed2d 32*]. Such a bar against refiling in the same court is a necessary condition, but not a sufficient one, for claim-preclusive effect in other courts. Therefore, the claim-preclusive effect of a dismissal is determined not by whether the dismissal would be characterized as "on the merits" under Rule 41(b), but rather by whether the dismissal meets the conditions for claim preclusion under applicable law [*see Semtek Int'l Inc. v. Lockheed Martin Corp. (2001) 531 US 497, 501-505, 121 S Ct 1021, 149 L Ed2d 32*].

Cross Reference:

Discussion of when dismissal is "on the merits" for preclusion purposes, see 18 Moore's Federal Practice, *§ 131.30[3]* (Matthew Bender 3d ed.).

Discussion of claim preclusion under California law, see 43 California Forms of Pleading and Practice, Ch. 491, Res Judicata (Matthew Bender).

28.15[3] Claim-Preclusive Effect of Federal-Court Judgment in Federal-Question Case Determined by Supreme Court. States cannot give a federal-court judgment in a federal-question case whatever claim-preclusive effect they would give their own judgments, but must accord them the effect that the Supreme Court prescribes. Even when states are allowed to give federal judgments (notably, judgments in diversity cases) no more than the effect accorded to state judgments, that disposition is by direction of the Supreme Court, which has the last word on the claim-preclusive effect of *all* federal judgments [*Semtek Int'l Inc. v. Lockheed Martin Corp. (2001) 531 US 497, 507, 121 S Ct 1021, 149 L Ed2d 32* (emphasis in original); *see Houben v. Telular Corp. (7th Cir 2002) 309 F3d 1028, 1034*].

28.15[4] Federal Common Law Governs Claim-Preclusive Effect of Dismissal by Federal Court Sitting in Diversity. Federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity [*Semtek Int'l Inc. v. Lockheed Martin Corp. (2001) 531 US 497, 508, 121 S Ct 1021, 149 L Ed2d 32*]. Federal common law adopts the claim-preclusive rule of the state where the federal court is sitting, because there is no need for national uniformity in this set of cases [*Semtek Int'l Inc. v. Lockheed Martin Corp. (2001) 531 US 497, 508-509, 121 S Ct 1021, 149 L Ed2d 32* ; *see Houben v. Telular Corp. (7th Cir 2002) 309 F3d 1028, 1034*]. However, an exception exists when state law is incompatible with federal interests [*see Semtek Int'l Inc. v. Lockheed Martin Corp. (2001) 531 US 497, 509, 121 S Ct 1021, 149 L Ed2d 32* ; *see Houben v. Telular Corp. (7th Cir 2002) 309 F3d 1028, 1034*].

Cross References:

See 18 Moore's Federal Practice, *§§ 130.01*, 130.30, 131.21; Ch. 133, Intersystem Preclusion (Matthew Bender 3d ed.).

Claim preclusion under California law, see 43 California Forms of Pleading and Practice, Ch. 491, Res Judicata (Matthew Bender).

28.15[5] LOCAL PRACTICE: CD Cal Requirements--Effect of Dismissal. Unless the court provides otherwise, any dismissal pursuant to *CD Cal Civ LR 41-1* will be without prejudice [*CD Cal Civ LR 41-2*].

Consider:

Because there is inconsistency between the federal and local rules, ensuring that the dismissal order specifically states whether dismissal is with or without prejudice will eliminate confusion.

28.15[6] LOCAL PRACTICE: SD Cal Requirements--Effect of Dismissal. A dismissal for want of prosecution will be without prejudice, unless otherwise ordered [*SD Cal Civ LR 41.1(a)*].

Consider:

Because there is inconsistency between the federal and local rules, ensuring that the dismissal order specifically states whether dismissal is with or without prejudice will eliminate confusion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral Overview

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II. SEEKING INVOLUNTARY DISMISSAL

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28.16 Dismissal of Complaint Reviewed for Abuse of Discretion.

The district court's dismissal of a complaint is reviewed for abuse of discretion [*Pagtalunan v. Galaza (9th Cir 2002) 291 F3d 639, 640* , *cert. denied, 538 US 909 (2003)* (dismissal for failure to comply with order requiring submission of pleading within designated time); *Yourish v. California Amplifier (9th Cir 1999) 191 F3d 983, 986* (failure to obey court order, based on violation of *Fed R Civ P 9(b)*)]. The trial court's exercise of discretion should not be disturbed unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached on a weighing of the relevant facts [*Pagtalunan v. Galaza (9th Cir 2002) 291 F3d 639, 640-641* , *cert. denied, 538 US 909 (2003)* ; *Morris v. Morgan Stanley & Co. (9th Cir 1991) 942 F2d 648, 652*].

In determining whether an abuse of discretion has occurred, the court of appeals considers the following factors [*Hamilton v. Neptune Orient Lines, Ltd. (9th Cir 1987) 811 F2d 498, 500*]:

- The plaintiff's diligence.
- The trial court's need to manage its docket.
- The danger of prejudice to the party suffering the delay [*see In re Eisen (9th Cir 1994) 31 F3d 1447, 1452-1453*].
- The availability of alternate sanctions.
- The existence of a warning to the party occasioning the delay.

Cross Reference:

Appellate review of involuntary dismissals, see 8 Moore's Federal Practice, *§ 41.53* (Matthew Bender 3d ed.).

Legal Topics:

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

Civil ProcedureDismissalsInvoluntary DismissalsAppellate ReviewCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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28.17 CHECKLIST: Opposing Involuntary Dismissal.

☐ Determine grounds for opposing dismissal, including:

○ Motion is improperly brought, or fails to state grounds for dismissal.

○ Plaintiff did not violate a court order; or has a reasonable explanation for its conduct that warrants a lesser penalty.

○ Plaintiff did not delay prosecution, or did not delay prosecution unreasonably.

○ The relevant factors weigh against dismissal.

○ The malfeasance was either wholly or in part the fault of defendant and/or defendant's counsel.

○ The relative fault of plaintiff is relatively slight compared to plaintiff's attorney and/or opposing parties or counsel.

○ Plaintiff is pro se, and held to a lower standard of compliance with pleading requirements.

○ Dismissal is being considered too early in proceedings under the circumstances.

- Dismissal is a harsh sanction, appropriate only in the most extreme circumstances, and not appropriate in this case.

Authority:

Fed R Civ P 41(b), (c)

Discussion:

See *§§ 28.18 -28.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

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28.18 Options and Strategies for Opposing Involuntary Dismissal.

Courts will be reluctant to dismiss a case unless the plaintiff's conduct has been egregious. To avoid dismissal, emphasize that the plaintiff will be damaged by not being allowed to remedy the harm caused by the defendant; the plaintiff's conduct was not improper, was an isolated instance, or was caused by circumstances outside the plaintiff's control; the conduct was the fault of the plaintiff's counsel and so the plaintiff should not be punished; the plaintiff had no warning that the case was in danger of being dismissed; and the defendant has not been prejudiced in any way by the conduct. Specific facts supported by detailed declarations and other evidence is more convincing to a court than general statements in the opposing papers. If it appears that the court is seriously considering dismissal, consider agreeing to a lesser sanction or asking that the dismissal be without prejudice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without PrejudiceCivil ProcedureSanctionsGeneral Overview

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28.19 Motion Fails to State Grounds for Dismissal or Is Otherwise Insufficient.

Plaintiff may oppose a motion to dismiss if defendant has failed to articulate cognizable grounds for the motion [*see, e.g., Florens Container v. Cho Yang Shipping (ND Cal 2002) 245 F Supp2d 1086, 1089* (failure to specify basis for motion to dismiss)].

Cross Reference:

List of grounds for opposing motion to dismiss, see *§ 28.17*. Motion procedures generally, see Ch. 26, Pretrial Motion Practice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsMotions

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28.20 Plaintiff Did Not Violate Rule or Court Order, or Should Not Be Harshly Penalized.

If the defendant brings a motion for dismissal based on the violation of an order, the plaintiff may oppose it on the ground that the plaintiff did not violate the order specified in the motion [*see, e.g., Idema v. Dreamworks, Inc. (CD Cal 2001) 162 F Supp2d 1129, 1138 n15, 1188* (denying motion for dismissal with prejudice because dismissal without prejudice was appropriate based on motion to dismiss under *Fed R Civ P 12(b)* for violation of *Fed R Civ P 15(a)*, regarding amendments to pleadings)]. The plaintiff should provide the court with a full explanation of the circumstances, or alternatively should indicate that violation of the order did not occur.

Cross References:

Alternatives to dismissal, see *§ 28.22*. Pro se litigants, see *§ 28.26*. Harshness of dismissal, see *§ 28.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDismissalsInvoluntary DismissalsFailures to ComplyCivil ProcedureSanctionsGeneral Overview

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28.21 Delay Was Reasonable or Justified.

In dismissing a case for lack of prosecution, the court must find unreasonable delay [*In re Eisen (9th Cir 1994) 31 F3d 1447, 1451-1452*]. A plaintiff faced with dismissal because of delay in prosecuting the case must establish a sufficient reason for the delay, and should set forth all pertinent facts on that issue. This approach may be particularly successful early in the proceedings [*see, e.g., Tolbert v. Leighton (9th Cir 1980) 623 F2d 585, 587*].

Examples:

In an adversarial bankruptcy case, the trustee who filed the proceeding took no action to prosecute for four years. When faced with dismissal, that trustee could have remedied the situation by presenting to the court a reason for his conduct that outweighed the prejudice to the opposing trustee's bankruptcy estate [*see In re Eisen (9th Cir 1994) 31 F3d 1447, 1455*].

In a personal injury case originally filed in state court, the appellate court reversed the dismissal, stating: When a delay has not been unreasonable, when the defendant has suffered no actual prejudice, or when the plaintiff has cured the lapse in state court and been diligent in prosecuting his action following removal, the policy in favor of deciding cases on their merits should prevail over those favoring dismissal [*see Nealey v. Transportacion Maritima Mexicana, S.A. (9th Cir 1980) 662 F2d 1275, 1284*].

Cross Reference:

Unreasonable delay factor, see *§ 28.09*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute

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28.22 Less Drastic Alternatives.

The court should consider less drastic alternative sanctions for plaintiff's conduct before dismissing a complaint under *Fed R Civ P 41(b)* [*see, e.g., McHenry v. Renne (9th Cir 1996) 84 F3d 1172, 1178-1179*]. When appropriate, the plaintiff should raise the court's failure to consider less drastic alternatives, particularly when the court sua sponte dismisses a case without any prior indication [*see In re Eisen (9th Cir 1994) 31 F3d 1447, 1455*].

Example:

The court of appeals reversed a dismissal because the district court sua sponte dismissed the case without considering alternative sanctions or giving a warning. Nothing in the record demonstrated that counsel was on notice that the case would be dismissed. Moreover, the facts were not so egregious as to obviate the need for explicit discussion of alternatives [*see Oliva v. Sullivan (9th Cir 1992) 958 F2d 272, 274*].

Strategic Point--Plaintiff:

In response to a motion for dismissal, suggest a reasonable alternative to dismissal [*see, e.g., Mir v. Fosburg (9th Cir 1983) 706 F2d 916* (requesting in opposition papers that district court impose discovery and trial schedule that will lead expeditiously to hearing on the merits)]. If the court issues an order to show cause why the case should not be dismissed, the plaintiff can argue that the court must first consider less drastic measures. If the court simply dismisses the case without any opportunity for the plaintiff to submit papers or be heard, the plaintiff could file a motion for reconsideration and make the less drastic alternatives argument.

Cross Reference:

Alternate sanctions factor, see *§ 28.13[7]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureSanctionsGeneral Overview

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28.23 Prior Warning.

A plaintiff opposing dismissal should consider whether the court has provided any notice of the dismissal. Before dismissing a complaint under *Fed R Civ P 41(b)*, a district court may be required, under the circumstances, to warn the plaintiff of an imminent dismissal [*see, e.g., Oliva v. Sullivan (9th Cir 1992) 958 F2d 272, 274*]. In particular, a sua sponte dismissal will be vulnerable to reversal if the court does not first consider less drastic alternatives and/or give the plaintiff a warning and time in which to rectify its conduct [*see, e.g., Oliva v. Sullivan (9th Cir 1992) 958 F2d 272, 274*].

Distinguish:

An express warning regarding the possibility of dismissal is not required when dismissal follows a noticed motion under *Fed R Civ P 41(b)* [*see, e.g., In re Eisen (9th Cir 1994) 31 F3d 1447, 1455-1456* ; *Morris v. Morgan Stanley & Co. (9th Cir 1991) 942 F2d 648, 652*].

Cross Reference:

Warning factor, see *§ 28.13[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsAppellate Review

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28.24 Defendant or Opposing Counsel Contributed to Malfeasance.

If appropriate, the plaintiff may redirect the blame for the malfeasance in question to the defendant, and argue that dismissal is therefore unwarranted under the relevant factors. This may arise, for example, if the delay involves a discovery dispute, and both parties' counsel, as well as opposing parties, prevented its resolution. If the malfeasance in question was jointly caused by both parties' counsel, then plaintiff may argue that dismissal penalizes only one party, and is therefore too harsh a sanction [*see, e.g., Dahl v. City of Huntington Beach (9th Cir 1996) 84 F3d 363, 366-367*].

Cross Reference:

Relevant factors, see *§ 28.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureSanctionsGeneral Overview

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28.25 Degree of Plaintiff's Personal Responsibility for Malfeasance Is Relatively Slight.

Although a party may be penalized for the actions of its counsel, the degree of a plaintiff's personal responsibility for malfeasance is relevant to the propriety of dismissal [*see, e.g., Dahl v. City of Huntington Beach (9th Cir 1996) 84 F3d 363, 366-367*].

Examples:

Dismissal is not proper solely on the ground that counsel failed to pay a monetary sanction imposed against counsel [*Dahl v. City of Huntington Beach (9th Cir 1996) 84 F3d 363, 367*].

It is an abuse of discretion to dismiss a case for failure to prosecute when (1) the only evidence of dilatoriness is the failure of plaintiff's attorney to attend a pretrial conference; (2) the court has not warned that failure to attend will create a risk of dismissal; and (3) the case is still "young" [*see Tolbert v. Leighton (9th Cir 1980) 623 F2d 585, 587*].

Cross Reference:

See *§ 28.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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28.26 Pro Se Litigants.

28.26[1] Inartful Pleadings of Pro Se Litigant Liberally Construed. Federal courts must construe liberally the "inartful pleading" of pro se litigants [*Boag v. MacDougall (1982) 454 US 364, 365, 102 S Ct 700, 70 L Ed2d 551* (per curiam)]. Allegations of a pro se litigant's complaint, however inartfully pleaded, are held to less stringent standards than formal pleadings drafted by lawyers [*Hughes v. Rowe (1980) 449 US 5, 9, 101 S Ct 173, 66 L Ed2d 163*]. This principle is particularly important in civil rights cases, especially with respect to an incarcerated pro se litigant [*Eldridge v. Block (9th Cir 1987) 832 F2d 1132, 1137*].

The Ninth Circuit recognizes that "the important goals served by lenient treatment of pro se litigants must necessarily yield to prejudice suffered by the courts and other parties" [*Vongrabe v. Sprint PCS (SD Cal 2004) 312 F Supp2d 1313, 1319*].

A pro se plaintiff may oppose dismissal on the ground that any deficiency in pleadings can be cured by a deadline extension in which to file amended or supplemental pleadings, and that because plaintiff is not an attorney, he or she is entitled to more leeway than a party represented by counsel for this purpose [*see Eldridge v. Block (9th Cir 1987) 832 F2d 1132, 1137-1138*].

28.26[2] LOCAL PRACTICE: CD Cal Requirements--Pro Se Party's Address and Telephone Number Required. A party proceeding pro se must keep the court and opposing parties apprised of the party's current address and telephone number, if any, and e-mail address, if any. If mail directed by the clerk to a pro se plaintiff's address of record is returned undeliverable by the Postal Service and if, within 15 days of the service date, the plaintiff fails to notify, in writing, the court and opposing parties of his or her current address, the court may dismiss the action with or without prejudice for want of prosecution [*CD Cal Civ LR 41-6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationPleading StandardsCivil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

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28.27 Dismissal Considered Too Early in Proceedings.

When appropriate, a plaintiff may raise the point that the case is still "young," and that, in light of all relevant factors, dismissal is inappropriately harsh at that time [*see, e.g., Raiford v. Pounds (9th Cir 1981) 640 F2d 944, 945* ; *Tolbert v. Leighton (9th Cir 1980) 623 F2d 585, 587*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

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28.28 Dismissal Is Excessively Harsh.

As the most severe penalty, dismissal is authorized only in extreme circumstances [*Dahl v. City of Huntington Beach (9th Cir 1996) 84 F3d 363, 367* ; *Raiford v. Pounds (9th Cir 1981) 640 F2d 944, 945*]. A party may oppose a motion for dismissal on the ground that dismissal is too harsh a sanction [*see, e.g., Television Signal Corp. v. City & County of San Francisco (ND Cal 2000) 193 FRD 645, 647* ("strong sanction of involuntary dismissal is too harsh" after considering all factors; dismissal without prejudice for violation of *Fed R Civ P 4(m)* (timeliness of service of summons and complaint) is more appropriate)].

Example:

It is an abuse of discretion to dismiss a case for failure to prosecute when (1) the only evidence of dilatoriness is the failure of plaintiff's attorney to attend a pretrial conference; (2) the court has not warned that failure to attend will create a risk of dismissal; and (3) the case is still "young" [*see Tolbert v. Leighton (9th Cir 1980) 623 F2d 585, 587*].

Strategic Point--Plaintiff:

In response to a motion for dismissal, suggest a reasonable alternative to dismissal [*see, e.g., Mir v. Fosburg (9th Cir 1983) 706 F2d 916* (requesting in opposition papers that district court impose discovery and trial schedule that will lead expeditiously to hearing on the merits)].

Cross References:

Alternatives to dismissal, see *§ 28.13[7]*, *28.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureSanctionsGeneral Overview

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28.29 Factors Insufficient to Oppose Dismissal.

The following factors are not sufficient reason to avoid dismissal when other factors support dismissal:

- The plaintiff is an innocent party who will be made to suffer for the errors of counsel [*see, e.g., Hamilton v. Neptune Orient Lines, Ltd. (9th Cir 1987) 811 F2d 498, 500* ("Regardless of where the blame should lie, we will not enter the business of resurrecting lawsuits gone astray because of ruptures in the attorney-client relation"; *but see Dahl v. City of Huntington Beach (9th Cir 1996) 84 F3d 363, 366-367* (failure of attorney to pay sanctions not ground for dismissal); *see also 28.14*, *28.24*].

- Financial difficulties caused the plaintiff's delay [*see In re Eisen (9th Cir 1994) 31 F3d 1447, 1451-1452*].

Example--Inadequate Excuse for Delay:

In a habeas corpus petition proceeding in which the court of appeals upheld a second dismissal with prejudice for want of prosecution, the petitioner claimed that his delay in timely filing a first amended petition was due to his inability to obtain counsel. However, the substance of the petitioner's motion was already completed, and he merely needed to transfer the substance from the wrong forms to the correct forms that were provided by the court, and to delete "et al." from the caption. Arguably, no attorney was even needed. Additionally, the petitioner offered no clear explanations of actions he took during the relevant time periods. Under the circumstances, the petitioner inexcusably delayed prosecution [*see Pagtalunan v. Galaza (9th Cir 2002) 291 F3d 639, 643 , cert. denied, 538 US 909 (2003)* (district court explicitly warned of dismissal with prejudice if petitioner failed to file timely amended petition)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

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28.30 Notice of Motion and Motion to Dismiss for Failure to Prosecute, or Failure to Comply With Court Order or Federal Rules.

Notice of Motion to Dismiss for Failure to Prosecute, or Failure to Comply With Court Order or Federal Rules.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR DIS-
_____ [*name*],	)	MISSAL
Defendant	)	(*Fed R Civ P 41(b)*)
	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order under *Federal Rules of Civil Procedure, Rule 41(b)* _____ [*state with particularity any other legal basis for motion, including any applicable local rules*]:

(1) Dismissing this action with prejudice [and with costs to defendant] on the ground that [*either* plaintiff has failed to prosecute the action with due diligence *or* plaintiff has failed to comply with the order of this court, dated _____, requiring plaintiff to _____ (*set forth order*) *or* plaintiff has failed to comply with Fed R Civ P _____ (*set forth rule violated by plaintiff and facts showing failure to comply with rule*)]; and

(2) granting _____ [*moving party*] such other relief as may be appropriate.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 41(b), (c)

Motion for Dismissal:
See *§ 28.07*

Related Forms of Order:
See *§§ 28.31*, *28.32*

Related Forms of Motion:
See 9 *Bender's Federal Practice Forms, Forms 41:50*, *41:52*, *41:54*, *41:55*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureDismissalsInvoluntary DismissalsFailures to ComplyCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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28.31 Dismissal Order for Failure to Prosecute.

Dismissal Order for Failure to Prosecute.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	DISMISSAL WITH PREJUDICE
Defendant	)	(*Fed R Civ P 41(b)*)
	)	
	)	

On _____ [*date*], _____ [*name of moving party*], _____ [*party designation, e.g.,* Defendant], moved the Court to dismiss _____ [the action *or* the Counterclaim *or* the Crossclaim of _____ (*name*) *or as appropriate*] pursuant to *Rule 41(b) of the Federal Rules of Civil Procedure*. The moving party claimed that there has been a continuous and substantial failure to prosecute this _____ [action *or* claim] and that dismissal with prejudice was the appropriate remedy.

The court has heard the arguments of counsel, considered the papers filed in favor and in opposition to the motion, and reviewed the authorities cited by the parties. The court has separately filed findings that there has been a continuous and

prejudicial failure to prosecute, and concludes that no lesser remedy is an appropriate response to this failure. Therefore,

IT IS ORDERED that

1. The motion to dismiss is GRANTED;

2. This _____ [action *or* Counterclaim *or as appropriate*] is fully and finally dismissed, with prejudice [*add, if entire action dismissed*; and

3. Defendant is awarded costs of suit pursuant to *Rule 54(d)(1) of the Federal Rules of Civil Procedure*].
Dated: _____

_____ [*signature*]

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:
Fed R Civ P 41(b), (c)

Related Form of Motion:
See *§ 28.30*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute

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4-28 MB Practice Guide: Fed Pretrial Civ Proc in CA 28.32

28.32 Dismissal Order for Failure to Comply With Order.

Dismissal Order for Failure to Comply With Order.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	DISMISSAL WITH PREJUDICE
Defendant	)	(*Fed R Civ P 41(b)*)
	)	
	)	

On _____ [*date*], _____ [*name of moving party*], _____ [*party designation, e.g.,* Defendant], moved the Court to dismiss the action pursuant to *Rule 41(b) of the Federal Rules of Civil Procedure*. The moving party claimed that there had been a deliberate and prejudicial failure on the part of _____ [*name of opposing party*] to comply with this court's orders and, in particular, with this court's order of _____ [*date*].

The court has heard the arguments of counsel, considered the papers filed in favor and in opposition to the motion, and reviewed the authorities cited by the parties. The court has separately filed findings that there has been an intentional,

prejudicial, [and contumacious] failure to comply with this court's order of _____ [*date*], and concludes that no lesser remedy is an appropriate response to this failure. Therefore,

IT IS ORDERED that

1. The motion to dismiss is GRANTED;

2. This action is fully and finally dismissed, with prejudice;

3. Defendant is awarded costs of suit pursuant to *Rule 54(d)(1) of the Federal Rules of Civil Procedure* [*add if contempt proceedings are contemplated or pending for failure to comply with order*; and

4. This court retains jurisdiction over this matter for the purpose for finding that [counsel for] _____ [*name of opposing party*] is guilty of contempt for failing to comply with this court's order and issuing an appropriate order in response to any contempt finding.
Dated: _____

_____ [*signature*]

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:
Fed R Civ P 41(b), (c)

Related Form of Motion:
See *§ 28.30*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to Comply

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Unit 8 Motion Practice
Special Alert to Chapter 29

4- MB Practice Guide: Fed Pretrial Civ Proc in CA Scope

Scope

Editor's Note: The following proposed amendment to Rule 56 will take effect on December 1, 2010, barring any Congressional action. Set forth below is a comparison of the amended rule with the rule as it appeared before the amendment. New matter is underlined; matter to be omitted is lined through. Asterisks indicate unaffected material. The explanatory Advisory Committee Note is also set forth below.

Rule 56. Summary Judgment

The material within the following brackets is overstruck in the original. [**(a)**] The material within the following brackets is overstruck in the original. [**By a Claiming Party.**] The material within the following brackets is overstruck in the original. [A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.]

The material within the following brackets is overstruck in the original. [**(b)**] The material within the following brackets is overstruck in the original. [**By a Defending Party.**] The material within the following brackets is overstruck in the original. [A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.]

The material within the following brackets is overstruck in the original. [**(c)**] The material within the following brackets is overstruck in the original. [**Time for a Motion, Response, and Reply; Proceedings.**]

The material within the following brackets is overstruck in the original. [**(1)**] The material within the following brackets is overstruck in the original. [These times apply unless a different time is set by local rule or the court orders otherwise:]

The material within the following brackets is overstruck in the original. [**(A)**] The material within the following brackets is overstruck in the original. [a party may move for summary judgment at any time until 30 days after the close of all discovery;]

The material within the following brackets is overstruck in the original. [**(B)**] The material within the following brackets is overstruck in the original. [a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and]

The material within the following brackets is overstruck in the original. [**(C)**] The material within the following brackets is overstruck in the original. [the movant may file a reply within 14 days after the response is served.]

The material within the following brackets is overstruck in the original. [**(2)**] The material within the following brackets is overstruck in the original. [The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.]

The material within the following brackets is overstruck in the original. [**(d)**] The material within the following brackets is overstruck in the original. [**Case Not Fully Adjudicated on the Motion.**]

The material within the following brackets is overstruck in the original. [**(1)**] ***The material within the following brackets is overstruck in the original. [Establishing Facts.]*** The material within the following brackets is overstruck in the original. [If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts--including items of damages or other relief--are not genuinely at issue. The facts so specified must be treated as established in the action.]

The material within the following brackets is overstruck in the original. [**(2)**] ***The material within the following brackets is overstruck in the original. [Establishing Liability.]*** The material within the following brackets is overstruck in the original. [An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.]

The material within the following brackets is overstruck in the original. [**(e)**] The material within the following brackets is overstruck in the original. [**Affidavits; Further Testimony.**]

The material within the following brackets is overstruck in the original. [**(1)**] ***The material within the following brackets is overstruck in the original. [In General.]*** The material within the following brackets is overstruck in the original. [A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.]

The material within the following brackets is overstruck in the original. [**(2)**] ***The material within the following brackets is overstruck in the original. [Opposing Party's Obligation to Respond.]*** The material within the following brackets is overstruck in the original. [When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.]

The material within the following brackets is overstruck in the original. [**(f)**] The material within the following brackets is overstruck in the original. [**When Affidavits Are Unavailable.**] The material within the following brackets is overstruck in the original. [If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:]

The material within the following brackets is overstruck in the original. [**(1)**] The material within the following brackets is overstruck in the original. [deny the motion;]

The material within the following brackets is overstruck in the original. [**(2)**] The material within the following brackets is overstruck in the original. [order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or]

The material within the following brackets is overstruck in the original. [**(3)**] The material within the following brackets is overstruck in the original. [issue any other just order.]

The material within the following brackets is overstruck in the original. [**(g)**] The material within the following brackets is overstruck in the original. [**Affidavit Submitted in Bad Faith.**] The material within the following brackets is overstruck in the original. [If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the

court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.]

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) ***Supporting Factual Positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) ***Objection That a Fact Is Not Supported by Admissible Evidence.*** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) ***Materials Not Cited.*** The court need consider only the cited materials, but it may consider other materials in the record.

(4) ***Affidavits or Declarations.*** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Committee Note of 2010

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases.

Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word--genuine "issue" becomes genuine "dispute." "Dispute" better reflects the focus of a summary-judgment determination. As explained below, "shall" also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase "partial summary judgment" to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

"Shall" is restored to express the direction to grant summary judgment. The word "shall" in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace "shall" with "should" as part of the Style Project, acting under a convention that prohibited any use of "shall." Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions--"must" or "should"--is suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986) ("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co*., 334 U.S. 249 * * * (1948))," with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the

burden of proof at trial."). Eliminating "shall" created an unacceptable risk of changing the summary-judgment standard. Restoring "shall" avoids the unintended consequences of any other word.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court's discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) are superseded. Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules.

Subdivision (c)(1) addresses the ways to support an assertion that a fact can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Subdivision (c)(1)(A) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support its fact positions. Materials that are not yet in the record--including materials referred to in an affidavit or declaration--must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Pointing to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2) provides that a party may object that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(3) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties.

Subdivision (c)(4) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or

omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Subdivision (d). Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) may seek an order deferring the time to respond to the summary-judgment motion.

Subdivision (e). Subdivision (e) addresses questions that arise when a party fails to support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c). As explained below, summary judgment cannot be granted by default even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials--including the facts considered undisputed under subdivision (e)(2)--show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts--both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply--it must determine the legal consequences of these facts and permissible inferences from them.

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant a motion on legal or factual grounds not raised by the parties; or consider summary judgment on its own. In many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion. Once that duty is

discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

Subdivision (h). Subdivision (h) carries forward former subdivision (g) with three changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. *See* Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2, 2007). In addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to respond. Finally, authority to impose other appropriate sanctions also is recognized.

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Unit 8 Motion Practice
CHAPTER 29 Summary Judgment

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§ 29.syn Synopsis to Chapter 29: Summary Judgment

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29.08 Draft and Attach Brief or Memorandum of Points and Authorities in Support of Motion.

29.08[1] Draft Brief or Memorandum of Points and Authorities Supporting Motion.

29.08[2] LOCAL PRACTICE: Brief or Memorandum Requirements.

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29.09[1] Draft Statement of Undisputed, Uncontroverted, or Material Facts If Required.

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29.10 Draft and Attach Proposed Judgment or Order As Required.

29.10[1] Draft Proposed Judgment or Order.

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29.10[3] Properly Format Proposed Judgment or Order.

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29.11[1] Affidavits Supporting Motion Are Permissible but Not Required.

29.11[2] Movant May Attach Declaration in Lieu of Affidavit.

29.11[3] Supporting Affidavits Must Meet Requirements of Rule 56(e).

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29.12 Attach Other Evidence Supporting Summary Judgment Motion.

29.12[1] Attach Evidence Supporting Summary Judgment.

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29.12[4] Types of Evidence Court May Consider.

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29.13 Timely Serve and File Motion.

29.13[1] Timely Serve Motion on Opposing Party.

29.13[2] Timely File Motion With Court.

29.13[2][a] Movant Must File Motion Within Reasonable Time After Service.

29.13[2][b] Counsel May Be Required to Confer Before Filing Motion.

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29.13[3][a] LOCAL PRACTICE: ED Cal Requirements.

29.13[3][b] LOCAL PRACTICE: ND Cal Requirements.

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29.14 CHECKLISTS: Responding to Motion for Summary Judgment.

29.14[1] CHECKLIST: Preparing Opposition to Summary Judgment Motion.

29.14[2] CHECKLIST: Preparing Objections to Movant's Evidence.

29.14[3] CHECKLIST: Moving for Continuance to Permit Further Discovery.

29.14[4] CHECKLIST: Filing and Serving Opposition Papers.

29.15 Options and Strategy.

29.16 Draft Opposition to Summary Judgment Motion.

29.16[1] Properly Supported Motion Shifts Burden to Nonmovant to Go Beyond Pleadings in Opposing Summary Judgment.

29.16[2] Opposition Papers Should Include Evidentiary Materials Beyond Pleadings.

29.16[3] Materials Establishing Genuine Issue of Fact Must Appear in Both Opposition and Court File.

29.16[4] LOCAL PRACTICE: Opposition Requirements May Vary.

29.16[4][a] LOCAL PRACTICE: CD Cal Requirements.

29.16[4][b] LOCAL PRACTICE: ED Cal Requirements.

29.16[4][c] LOCAL PRACTICE: ND Cal Requirements.

29.16[4][d] LOCAL PRACTICE: SD Cal Requirements.

29.16[5] Draft and Attach Statement of Genuine Issues or Disputed or Controverted Facts As Required.

29.16[5][a] Draft Statement When Permitted or Required.

29.16[5][b] LOCAL PRACTICE: CD Cal Requirements.

29.16[5][c] LOCAL PRACTICE: ED Cal Requirements.

29.16[5][d] LOCAL PRACTICE: ND Cal Requirements.

29.16[5][e] LOCAL PRACTICE: SD Cal Requirements.

29.16[6] Draft and Attach Memorandum of Points and Authorities As Required or Desired.

29.16[7] Draft and Attach Proposed Order If Desired.

29.16[8] Request Oral Argument If Desired.

29.17 Compile and Attach Evidence in Opposition to Motion.

29.17[1] Opposition Evidence Must Set Forth Specific Facts Showing Genuine Issue for Trial.

29.17[2] Opposition Evidence Must Be Admissible.

29.17[3] Draft and Attach Opposing Affidavits.

29.17[3][a] Draft and Attach Affidavits or Declarations in Opposition to Motion.

29.17[3][b] Rules Governing Supporting Affidavits Apply to Affidavits Opposing Motion.

29.17[3][c] Nonmovant May Not Rely on Its Own Conclusory or Sham Statements in Affidavit to Create Issue of Material Fact.

29.17[3][d] Court May Grant Continuance If Affidavit Indicates Nonmovant Lacks Facts to Oppose Motion.

29.17[4] Attach Other Evidence Opposing Motion.

29.18 Draft and Attach Objections to Movant's Evidence.

29.19 Move for Continuance to Permit Further Discovery.

29.19[1] Move for Continuance for Further Discovery.

29.19[2] Motion Must Identify Information Sought and Show Its Existence.

29.19[3] Timely File and Serve Motion for Continuance Before Summary Judgment Hearing.

29.19[4] Show That Evidence Sought Exists and Would Prevent Summary Judgment.

29.19[5] Trial Court's Determination of Motion Is Reviewed for Abuse of Discretion.

29.20 Properly File and Serve Opposition Papers.

29.20[1] Timely File Opposition Papers With Court.

29.20[1][a] Opposing Party Has 21 Days From Service of Motion to File Response to Motion.

29.20[1][b] LOCAL PRACTICE: CD Cal Requirements.

29.20[1][c] LOCAL PRACTICE: ED Cal Requirements.

29.20[1][d] LOCAL PRACTICE: ND Cal Requirements.

29.20[1][e] LOCAL PRACTICE: SD Cal Requirements.

29.20[2] Properly Serve and File Opposition Papers.

29.21 CHECKLIST: Preparing Reply to Opposition to Motion for Summary Judgment.

29.22 Options and Strategy.

29.23 Movant May Reply to Opposition Papers.

29.23[1] Draft, Serve, and File Reply to Opposition If Desired.

29.23[2] LOCAL PRACTICE: CD Cal Requirements.

29.23[3] LOCAL PRACTICE: ED Cal Requirements.

29.23[4] LOCAL PRACTICE: ND Cal Requirements.

29.23[5] LOCAL PRACTICE: SD Cal Requirements.

29.24 Reply Generally Should Not Present New Material.

29.25 Reply May Include Objections to Nonmovant's Evidence in Opposing Motion.

29.26 CHECKLISTS: Court Determination of Motions for Summary Judgment.

29.26[1] CHECKLIST: Determining Motions for Summary Judgment.

29.26[2] CHECKLIST: Challenging Court's Determination of Motion for Summary Judgment in Trial Court.

29.27 Options and Strategy.

29.28 Court May Hold Hearing on Motion.

29.28[1] Trial Court May Hold Oral Hearing Before Deciding Motion.

29.28[2] Hearing May Include Taking Oral Testimony in Limited Circumstances.

29.28[3] Rule 56 Does Not Require Hearing Before Determination of Motion.

29.28[4] District Court May Not Preclude Requests for Oral Argument or Deny Nonmovant's Request for Hearing Unless It Denies Motion.

29.29 General Standards Governing Trial Court's Determination of Motion.

29.29[1] Court Must Properly Apply Burdens of Proof on Motion and at Trial.

29.29[1][a] Moving Party Bears Initial Burden of Proof, Which Varies Depending on Which Party Has Burden of Proof at Trial.

29.29[1][b] If Movant Meets Initial Burden on Motion, Burden Shifts to Nonmovant to Present Specific Facts Showing Genuine Issue for Trial.

29.29[2] Court Must Determine Whether Case Presents Genuine Issue of Material Fact for Trial.

29.29[3] Applicable Substantive Law Defines Materiality of Fact Issues.

29.29[4] Court May Only Consider Admissible Evidence in Ruling on a Motion for Summary Judgment.

29.29[5] Court Must View Evidence in Light Most Favorable to Nonmovant, and Must Draw Reasonable Inferences in Nonmovant's Favor.

29.29[5][a] Court Must View Evidence in Light Most Favorable to Nonmovant.

29.29[5][b] Court Must Draw All Reasonable Inferences in Nonmovant's Favor.

29.30 Court Must Review Cross-Motions for Summary Judgment Separately.

29.31 Court May Issue Order Granting Summary Adjudication.

29.31[1] Court May Grant Summary Adjudication on Portion of Case.

29.31[2] Areas in Which Summary Adjudication Is Available.

29.31[3] Cases Not Fully Adjudicated on Motion May Be Tried on Remaining Issues.

29.31[4] Normally, Summary Adjudication May Not Be Appealed Immediately.

29.32 Court Granting Summary Judgment Must Enter Separate Judgment.

29.32[1] Court Must Enter Judgment.

29.32[2] Court Is Not Required to Make Findings of Fact and Conclusions of Law.

29.33 Denial of Summary Judgment Motion Ordinarily Is Nonappealable Interlocutory Order.

29.34 Parties May Challenge Ruling on Summary Judgment Motion in Trial Court.

29.34[1] Movant May Renew Summary Judgment Motion After Denial.

29.34[2] Either Party May Seek Reconsideration of Ruling on Summary Judgment Motion.

29.34[2][a] Party May Move for Reconsideration Under Rule 59(e) or Rule 60(b).

29.34[2][b] Rule 59(e) Motion Must Be Based on New Evidence, Clear Error, or Change in Law.

29.34[2][c] Rule 60(b) Motion Must Be Based on Mistake, Surprise, Excusable Neglect, New Evidence, Fraud, Void Judgment, or Other Reason Justifying Relief.

29.34[2][d] Motion for Reconsideration Must Be Brought at Proper Time.

29.34[2][e] Timely Motion for Reconsideration May Toll Time for Appeal.

29.34[2][f] District Court May Consider Rule 60(b) Motion Despite Appeal.

29.35 CHECKLIST: Obtaining Appellate Review of Grant or Denial of Summary Judgment.

29.36 Options and Strategy.

29.37 File Notice of Appeal From Summary Judgment As Required by Appellate Rules.

29.37[1] Appellate Court Must Have Jurisdiction Over District Court Decision.

29.37[1][a] Appellate Court Has Jurisdiction Over All Final Decisions of District Courts.

29.37[1][b] Summary Adjudication Generally Results in Nonappealable Interlocutory Order.

29.37[1][c] Order Denying Summary Judgment Generally Is Not Final Appealable Order.

29.37[1][d] Order Denying Summary Judgment May Be Reviewed After Trial on Merits If District Court Would Have Been Required to Grant Motion But for Error of Law.

29.37[2] Timely File Notice of Appeal to Avoid Waiver.

29.37[3] Party May Not Raise New Issues on Appeal to Obtain Reversal of Trial Court's Summary Judgment Determination.

29.38 Appellate Review of Summary Judgment Determination Is Not Deferential.

29.38[1] Appellate Court Reviews Summary Judgment Order De Novo Using Same Standard Used by Trial Court.

29.38[2] Appellate Court Must Determine If There Are Genuine Issues of Material Fact and Whether District Court Correctly Applied Relevant Substantive Law.

29.38[3] Appellate Court May Affirm Grant of Motion on Any Ground Supported in Record.

29.38[4] Appellate Court Reviews Trial Court's Evidentiary Rulings in Summary Judgment Context for Abuse of Discretion.

29.38[5] Appellate Court Reviews Trial Court's Rulings on Motions to Reconsider on Abuse of Discretion Standard.

29.39 Appellate Court May Remand Case If Trial Court Fails to Make Reasons for Granting Summary Judgment Clear on Record.

29.40 Notice of Motion and Motion for Summary Judgment.

29.41 Notice of Motion and Motion for Summary Adjudication.

29.42 Memorandum of Points and Authorities in Support of Motion for Summary Judgment.

29.43 Statement of Undisputed or Uncontroverted Facts.

29.44 Affidavit in Support of Motion for Summary Judgment.

29.45 Proposed Order Granting Motion for Summary Judgment.

29.46 Affidavit in Opposition to Motion for Summary Judgment.

29.47 Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment.

29.48 Statement of Genuine Issues or Controverted or Disputed Facts.

29.49 Proposed Order Denying Motion for Summary Judgment.

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Unit 8 Motion Practice
CHAPTER 29 Summary Judgment
I. STRATEGY

4-29 MB Practice Guide: Fed Pretrial Civ Proc in CA 29.01

29.01 Scope.

This chapter contains discussion of and forms for use in making and responding to motions for summary judgment in California's federal district courts. It includes:

- Motions for summary judgment [*see 29.03 -29.13*; *Forms: 29.40*, *29.41*].
- Memorandums of points and authorities in support of motions for summary judgment [*see 29.08*; *Form: 29.42*].
- Statements of undisputed, uncontroverted, or material facts [*see 29.09*; *Form: 29.43*].
- Affidavits or declarations in support of motions for summary judgment [*see 29.11*; *Form: 29.44*].
- Other evidence in support of motions for summary judgment [*see 29.12*].
- Oppositions to motions for summary judgment [*see 29.14 -29.20*; *Forms: 29.46 -29.49*].
- Statements of genuine issues or disputed or controverted facts [*see 29.16*; *Form: 29.48*].
- Memorandums of points and authorities opposing motions for summary judgment [*see 29.16*; *Form: 29.47*].
- Other evidence in opposition to motions for summary judgment [*see 29.17*].
- Affidavits opposing motions for summary judgment [*see 29.17[3]*; *Form: 29.46*].
- Objections to movant's evidence in support of motion for summary judgment [*see 29.18*].
- Motions for continuance to permit further discovery [*see 29.19*].

- Replies to opposition to motions for summary judgment [*see 29.21 -29.25*].
- Court determination of motions for summary judgment [*see 29.26 -29.34*; *Forms: 29.45*, *29.49*].
- Appellate review of trial court action on motions for summary judgment [*see 29.35 -29.39*].

Core Rules:
Fed R Civ P 7, *10*, *11*, *56*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentStandardsGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsGeneral Overview

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Unit 8 Motion Practice
CHAPTER 29 Summary Judgment
I. STRATEGY

4-29 MB Practice Guide: Fed Pretrial Civ Proc in CA 29.02

29.02 Objective and Strategy.

A party seeking relief in federal court, or a party against whom relief is sought, may move for summary judgment in that party's favor [*see Fed R Civ P 56(a), (b)*]. A moving party may also seek an order granting a "partial summary judgment," or summary adjudication, of a portion of the claims or relief sought [*see Fed R Civ P 56(a), (b), (d)*]. In essence, the filing of a summary judgment motion requires the trial court to decide if the evidence presents sufficient disagreement to require submission to a jury, or is so one-sided that one party must prevail as a matter of law [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 251-252, 106 S Ct 2505, 91 L Ed2d 202*]. The court must grant the motion if the movant establishes through pleadings and other material on file that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law [*see Fed R Civ P 56(c)*].

Thus, the purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court [*Northwest Motorcycle Ass'n v. United States Dep't of Agric. (9th Cir 1994) 18 F3d 1468, 1471* ; *see Lobster v. Sierra Pac. Power Co. (D Nev 1998) 12 F Supp2d 1105, 1108*]. Summary judgment assists trial courts in isolating and disposing of factually unsupported claims or defenses [*Celotex Corp. v. Catrett (1986) 477 US 317, 323-324, 106 S Ct 2548, 91 L Ed2d 265*]. As such, summary judgment is an integral part of the federal rules designed to secure the just, speedy, and inexpensive determination of every action [*Celotex Corp. v. Catrett (1986) 477 US 317, 327, 106 S Ct 2548, 91 L Ed2d 265* ; *Independent Ink, Inc. v. Trident, Inc. (CD Cal 2002) 210 F Supp2d 1155, 1161*].

A grant of summary judgment is a final adjudication on the merits [*Rand v. Rowland (9th Cir 1998) 154 F3d 952, 957* , *cert. denied, 527 US 1035 (1999)*]. An adverse party may appeal a summary judgment just as it might appeal a final judgment following trial [*see 28 USC § 1291*; *Jackson v. S.I. Hayakawa (9th Cir 1979) 605 F2d 1121, 1125 n3* , *cert. denied, 445 US 952 (1982)* (summary judgment is judgment on merits for res judicata purposes)].

A court may grant summary adjudication on specific issues without granting summary judgment as to the entire claim for relief to narrow the issues for trial [*Sebastian Int'l, Inc. v. Russolillo (CD Cal 2001) 151 F Supp2d 1215, 1217* ; *First Nat'l Ins. Co. v. FDIC (SD Cal 1997) 977 F Supp 1051, 1055*], eliminating useless facts and issues over which there is no controversy that would tend to confuse and complicate a lawsuit [*Lies v. Farrell Lines, Inc. (9th Cir 1981) 641 F2d 765, 769* ; *Peliculas y Videos Internacionales, S.A. de C.V. v. Harriscope of Los Angeles, Inc. (CD Cal 2004) 302 F Supp2d 1131, 1133*].

In contrast to a full summary judgment, a summary adjudication order determining liability but not remedies, or disposing of fewer than all claims, is generally not a final appealable order [*Idaho Watersheds Project v. Hahn (9th Cir 2002) 307 F3d 815, 824*]. A summary adjudication may be appealed prior to the final judgment in the entire case only if the losing party can invoke the provisions of Rule 54(b) to secure a separate, final judgment [*see Fed R Civ P 54(b)*] or, perhaps, in an extremely rare case, if the district court will certify the case for a discretionary interlocutory appeal under Section 1292(b) [*see 28 USC § 1292(b)*].

Detailed Discussion/Forms:

11 Moore's Federal Practice, Ch. 56, Summary Judgment (Matthew Bender 3d ed.).

2 Moore's Federal Practice, Ch. 7, Pleadings Allowed; Form of Motions (Matthew Bender 3d ed.).

2 Moore's Manual: Federal Practice and Procedure, Ch. 17, Summary Judgment (Matthew Bender).

1 Moore's Manual: Federal Practice and Procedure, Ch. 9, Pleadings and Motions in General (Matthew Bender).

Cross References:

Counterclaims and crossclaims, see Ch. 11, Counterclaims, Crossclaims, and Replies. Third-party actions, see Ch. 12, Third-Party Actions. Intervention, see Ch. 14, Intervention. Motion practice generally, see Ch. 26, Pretrial Motion Practice. Format, filing, and service of motion papers, see Ch. 5, Formatting, Serving, and Filing Papers.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewAppealabilityCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentPartial Summary JudgmentsCivil ProcedureSummary JudgmentStandardsGeneral Overview

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29.03 CHECKLISTS: Preparing Motion for Summary Judgment and Supporting Papers.

29.03[1] CHECKLIST: Determine Propriety of Summary Judgment Motion.

☐ If appropriate, consider moving for partial summary judgment on:

- ○ Issues representing less than whole case;
- ○ Issue of liability alone; or
- ○ Less than full relief requested.

☐ Consider whether:

- ○ Case is appropriate for summary judgment by determining whether:
  - ☐ Case presents dispositive question of law.
  - ☐ Nonmovant cannot prove essential element of its case on which it has burden of proof at trial.
  - ☐ Nonmovant's evidence fails to meet applicable evidentiary standard, so that reasonable trier of fact could not return verdict for nonmovant.
- ○ Case is ripe for summary judgment.

- ○ Estimated length of trial or amount in controversy justify summary judgment process.
- ○ Parties would benefit more from engaging in serious settlement discussions.
- ○ Motion for summary adjudication would avoid trial of significant portion of case.
- ○ Filing motion or affidavit is groundless or in bad faith, which may subject movant to sanctions.
- ○ Movant can meet initial burden of proof on motion.

Authority:
28 USC § 1291; *Fed R Civ P 11*, *56*

Discussion:
See *§ 29.04*, *29.05*

29.03[2] CHECKLIST: Prepare Written Summary Judgment Motion.

☐ Include in motion papers:

- ○ Notice of motion specifying date, time, and location of hearing on motion.
- ○ Motion specifying which party seeks summary judgment, claims involved in motion, and legal and factual grounds for motion.
- ○ Supporting affidavits, if any.
- ○ Proposed order granting summary judgment as requested by movant.
- ○ Proof of service.

☐ Fulfill writing requirement by filing:

- ○ Written notice of hearing on motion.
- ○ Combined notice of motion and motion setting forth required contents (better practice).

☐ At minimum, set forth in motion:

- ○ Grounds for motion, including:

- ☐ Theories on which movant proceeds;
- ☐ List of pleadings and papers on which movant relies; and
- ☐ Statement that movant makes motion pursuant to Rule 56.

○ Relief or order sought.

○ Request for or waiver of oral argument on motion as desired.

☐ Fulfill additional requirements imposed by local rule:

○ **Central District:** Prepare, file, and serve:

- ☐ Notice of motion for summary judgment;
- ☐ Proposed statement of uncontroverted facts and conclusions of law;
- ☐ Memorandum of points and authorities supporting motion;
- ☐ Any evidence supporting motion; and
- ☐ Proposed judgment, or proposed order if movant seeks summary adjudication.

○ **Eastern District:** Prepare for filing:

- ☐ Motion for summary judgment;
- ☐ Notice of motion;
- ☐ Statement of undisputed facts, or joint statement;
- ☐ Copies of all evidentiary documents cited in moving papers;
- ☐ Supporting affidavits, if any; and
- ☐ Proof of service of motion papers.

○ **Northern District:** Prepare for filing:

- ☐ Notice of motion and motion;
- ☐ Statement of relief or action sought by movant;
- ☐ Points and authorities in support of motion;
- ☐ Proposed order; and
- ☐ Any supporting affidavits or declarations.

○ **Southern District:** Prepare for filing:

- ☐ Motion for summary judgment;
- ☐ Separate notice of motion;
- ☐ Separate memorandum of points and authorities in support of motion;
- ☐ Copies of all documentary evidence movant intends to submit in support of motion;
- ☐ Separate statement of material facts if desired; and
- ☐ Any supporting affidavits.

☐ Properly format motion, following:

○ Rules applicable to formatting pleadings generally.

○ Applicable local rules.

Authority:
Fed R Civ P 7(b), 11, 56(a), (c), (e); CD Cal Civ LR 7-4, 7-5, 56-1, 56-4; ED Cal Civ LR 230(g), 260(c); ND Cal Civ LR 7-2(b)-(d), 7-5; SD Cal Civ LR 7.1(d.1), (f.1), (f.2.a)

Discussion:
See *§§ 29.07[1] -[6]*

Forms:
See *§ 29.40, 29.41*

☐ Draft and attach proposed judgment or order as required, e.g.:

- ○ **Central District:** Serve and file proposed judgment or order with notice of motion.
- ○ **Northern District:** Attach proposed order to motion unless excused by judge hearing motion.

☐ Properly format proposed judgment or order.

Authority:
Fed R Civ P 7(b), *56*; *CD Cal Civ LR 56-1*, *56-4*; *ND Cal Civ LR 7-2(c)*

Discussion:
See *§ 29.10*

Form:
See *§ 29.45*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

29.03[3] CHECKLIST: Prepare Supporting Motion Papers.

☐ Draft and attach affidavits to support factual contentions in motion. Prepare supporting motion papers.

☐ Ensure that supporting affidavits:

- ○ Are made on personal knowledge;
- ○ Set forth specific facts that would be admissible in evidence; and
- ○ Affirmatively show that affiant is competent to testify to matters in affidavit.

☐ Attach declaration in lieu of affidavit if it meets:

- ○ Content and format requirements of federal law.
- ○ Affidavit requirements of Rule 56(e).

☐ Attach affidavit to motion for filing with court and service on opponent.

☐ Attach to affidavit sworn or certified copies of all documents referred to in the affidavit.

☐ Avoid making affidavits in bad faith or for delay.

Authority:
28 USC § 1746; *Fed R Civ P 7(b)*, *56(a)*, *(b)*, *(e)*; *Fed R Evid 601*, *602*, *703*; *CD Cal Civ LR 7-6*, *7-7*; *ED Cal Gen LR 101*; *ED Cal Civ LR 260(a)*; *SD Cal Civ LR 7.1(f.2.a)*

Discussion:
See *§ 29.11*

Form:
See *§ 29.44*

☐ Draft and attach brief or memorandum of points and authorities supporting motion as required by local rule:

- ○ **Northern District:** Include memorandum of points and authorities in body of motion.
- ○ **Southern District:** Attach separate memorandum of points and authorities to motion.
- ○ **Central District:** Serve and file separate memorandum and points and authorities in support of motion.
- ○ **Eastern District:** File accompanying brief with notice of motion and motion.

☐ Set forth in brief or memorandum:

- ○ Issues or grounds on which summary judgment is sought.
- ○ Brief procedural history of case, including:
  - ☐ Filing date;
  - ☐ Claims presented;
  - ☐ Discovery undertaken or attempted;
  - ☐ Any dispositive motions filed in case and disposition of those motions; and
  - ☐ Listing of any other motions pending.
- ○ A statement of facts relevant to the issues to be decided in the case.
- ○ Concise legal argument on the grounds supporting summary judgment, with cites to relevant authority.

☐ Properly format supporting memoranda and briefs by following:

○ Rules applicable to formatting briefs and memoranda generally.

○ Applicable local rules.

Authority:
Fed R Civ P 7(b), *56*; *CD Cal Civ LR 7-5(a)*; *ED Cal Civ LR 230(b)*; *ND Cal Civ LR 7-2(b)(4)*, *7-4*; *SD Cal Civ LR 7.1(f.1)*, *(f.2)*

Discussion:
See *§ 29.08*

Form:
See *§ 29.42*

☐ Draft and attach statement of undisputed, uncontroverted, or material facts supporting motion as required by local rules.

○ **Central District:**

☐ Lodge and serve proposed statement of uncontroverted facts and conclusions of law with notice of motion.

☐ Set forth material facts as to which movant contends there is no genuine issue.

○ **Eastern District:**

☐ Attach statement of undisputed facts to motion.

☐ If an interested party, file joint statement of stipulated facts.

☐ Enumerate material facts relied on and cite to pleadings or evidence relied on to establish that fact.

○ **Southern District:** Supply separate statement of material facts with motion.

○ **Northern District:**

☐ Submit separate or joint statement of undisputed facts only if required by assigned judge.

☐ If judge orders submission of joint statement, confer and submit with other parties

joint statement on or before date set by judge.

☐ If nonmovant refuses to join in statement, file motion with separate declaration of counsel explaining why parties are not filing joint statement.

☐ Properly format statement:

○ Follow rules applicable to motion papers generally.

○ Quote particular evidence relied on when appropriate.

○ Cite to exact location of evidence in record by using page, paragraph, and line cites when possible.

○ Attach admissible excerpts to accompanying affidavit or declaration.

Authority:
Fed R Civ P 7(b), *56*; *CD Cal Civ LR 56-1*; *ED Cal Civ LR 260*; *ND Cal Civ LR 56-1*; *SD Cal Civ LR 7.1(f.1)*

Discussion:
See *§ 29.09*

Form:
See *§ 29.43*

☐ Attach evidence supporting summary judgment motion to:

○ Inform court of basis for motion; and

○ Identify portions of record supporting assertion of no triable issue of fact.

☐ Determine initial burden of proof on motion, depending on burden of persuasion at trial:

○ If moving party bears burden of persuasion at trial, support motion with credible evidence showing no genuine issue of material fact.

○ If nonmoving party has burden of persuasion at trial, either:

☐ Submit affirmative evidence negating essential element of nonmoving party's claim; or

☐ Demonstrate that nonmovant's evidence is insufficient to establish essential

element of nonmovant's claim.

☐ Ensure that evidence contained in attached material is:

- ○ Based on personal knowledge.
- ○ Based on specific facts that are admissible in evidence.
- ○ Properly authenticated.

☐ Consider use in motion of:

- ○ Pleadings.
- ○ Depositions.

☐ Authenticate by identifying names of deponent and action, and including reporter's certification that it is true record of deponent's testimony.

☐ If attaching deposition excerpt to motion, attach cover page of deposition and reporter's certification.

☐ If possible, submit complete deposition with relevant portions highlighted.

☐ File important depositions with court clerk.

- ○ Answers to interrogatories.
- ○ Admissions on file.
- ○ Affidavits, if any.
- ○ Documents obtained through discovery.

Authority:
Fed R Civ P 30(f)(1), (2), 56(c), (e); Fed R Evid 901, 902

Discussion:
See *§ 29.12*

Form:
See *§ 29.44*

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*

29.03[4] CHECKLIST: Timely File and Serve Summary Judgment Motion.

☐ Timely assert motion for summary judgment:

○ Any time until 30 days after close of discovery.

Authority:
Fed R Civ P 56(a), (b), (c), *(f)*

Discussion:
See *§§ 29.06[1] -[3]*

☐ Timely serve summary judgment motion on opposing party.

○ Comply with any time rules in local rules or court order.

○ If default provisions of *Fed R Civ P 6* apply, serve notice of motion at least 14 days before hearing.

☐ Add three days for service by mail, electronic, or alternate means of delivery.

☐ Include certificate of service with moving papers filed with court.

○ If appropriate, request that trial court enlarge *Fed R Civ P 6*'s 14-day period:

☐ For good cause shown on request by party within original 14-day period.

☐ On showing of excusable neglect when party seeking extension brings motion after expiration of 14-day period.

○ File with certificate of service.

Authority:
Fed R Civ P 5(b)(2)(C), 6(b)-(d)

Discussion:
See *§ 29.06*

☐ Timely file summary judgment motion with trial court.

○ Determine if deadline is set by trial court in case management order.

- File motion with court within reasonable time after service.
- File motion papers with court clerk.

☐ Follow applicable local rule requirements:

- **Northern District:** File and notice motion for hearing no less than 35 days after service of motion.
- **Southern District:** File motion no less than 28 days before the date for which matter is noticed for hearing.
- **Eastern District:** Courts set motion hearing no less than 28 days after movant serves and files motion.
- **Central District:** Confer with opposing party before serving and filing summary judgment motion.

☐ If appropriate, seek conference before filing motion even when not required.

Consider:

A conference, even if not required, can resolve matters that would otherwise take up space in the motion, and may foster settlement. Unless the shock of receiving a summary judgment motion is central to a particular litigation strategy, a prefiling conference generally does not put the movant at much of a disadvantage. A few extra days for opposing counsel to anticipate the motion often fails to outweigh the potential benefits of the conference.

Authority:

Fed R Civ P 5(d), 56(c); *CD Cal Civ LR 7-3*; *ND Cal Civ LR 7-2*; *SD Cal Civ LR 7.1(e.1)*; *ED Cal Civ LR 230(b)*

Discussion:

See *§ 29.13*

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
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Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
Kendall, Seeborg, Shartsis, Smith

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Unit 8 Motion Practice
CHAPTER 29 Summary Judgment
II. PREPARING MOTION FOR SUMMARY JUDGMENT

4-29 MB Practice Guide: Fed Pretrial Civ Proc in CA 29.04

29.04 Options and Strategy.

29.04[1] Either Party May Move for Summary Judgment. A party seeking to recover on a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment may move for a summary judgment in the party's favor on all or any part of the claim [*see Fed R Civ P 56(a)*]. Similarly, a party defending against such a claim or declaratory judgment may move for a summary judgment in his or her favor [*see Fed R Civ P 56(b)*]. Thus, either the plaintiff or the defendant may move for summary judgment [*Nissan Fire & Marine Ins. Co. v. Fritz Cos. (9th Cir 2000) 210 F3d 1099, 1102*].

29.04[2] Advantages of Summary Judgment Process. Perhaps the most important advantage of filing a summary judgment motion is the potential for avoiding the time and expense of litigation [*see Rand v. Rowland (9th Cir 1998) 154 F3d 952, 957 , cert. denied, 527 US 1035 (1999)* (summary judgment results in final adjudication)]. Even when a trial court grants summary adjudication on less than all the claims or relief requested, the movant succeeds in disposing of some of the claims or relief requested [*see Fed R Civ P 56(d)*].

In addition, filing a summary judgment motion may require the nonmovant to mount a paper trial at an early stage in the proceedings, often before significant discovery has been conducted. Thus, the motion may provide the movant with a preview of the nonmovant's case or with previously undisclosed evidence. A party who does not succeed on a summary judgment motion may, nevertheless, succeed in alerting the opposing party or the judge to weaknesses in its opponent's case, which may ultimately lead to settlement or to a favorable final judgment.

29.04[3] Disadvantages of Summary Judgment Process. Though parties considering filing a summary judgment motion often consider the potential savings involved in avoiding litigation, they may fail to balance those savings against the expense of preparing summary judgment materials. Preparation of motions, briefs, affidavits or declarations, and other summary judgment papers may require significant time and expense for both parties. The process may be especially onerous for plaintiffs, who may lack the financial resources of some defendants. Counsel must also balance the costs of bringing a summary judgment motion with the likelihood of success. The traditional view of summary judgment is that it is a "drastic remedy" and should not be granted unless the moving party is clearly entitled to it [*see, e.g., Ness v. Marshall (3d Cir 1981) 660 F2d 517, 519*]. On the other hand, courts will not hesitate to grant a properly supported motion for summary judgment [*see Celotex Corp. v. Catrett (1986) 477 US 317, 327, 106 S Ct 2548, 91 L*

Ed2d 265 (summary judgment is not "disfavored procedural shortcut")].

The effect of the summary judgment process on settlement is unpredictable. Parties facing a potential ruling on a summary judgment motion may be spurred to take settlement negotiations to a more serious level. In other cases, the fact that a summary judgment motion has been prepared and is pending may lower the possibility of pretrial settlement. In these cases, movants may be reluctant to engage in serious settlement discussions until after a ruling on the motion.

For those who win (and for the court with a congested calendar), summary judgment is a powerful tool, not merely for weeding out totally meritless claims, but also for disposing of cases that may have some merit and a fatal flaw as well. The value of the summary judgment process must also be evaluated in terms of summary adjudication, which can be a powerful case management tool, "whittling down" cases only to those claims that are truly in dispute and only those parties truly interested in the matter. There are substantial risks and disadvantages for those who lose summary judgment motions, however. A party opposing summary judgment who loses the motion may lose his or her day in court altogether, or may have to try the case with substantial claims resolved against him or her. A moving party who loses a motion for summary judgment:

- May be out a considerable amount of money spent in preparing the motion;
- May have revealed more of the strategy for the case than was intended or was desirable;
- May be in a weaker negotiating posture, now that opponents know that the movant cannot resolve certain contentions as a matter of law; and
- May have irritated the judge with a meritless motion (or received sanctions for a frivolous motion).

Cross References:

Discussion of summary adjudication, see *§§ 29.05[5]*, *29.31*. Discussion of continuance to seek discovery, see *§§ 29.17[3][d]*, *29.19*. Discussion of settlement generally, see Ch. 31, Settlement Agreements and Offers of Judgment.

29.04[4] Consider Client Consultation or Approval. Counsel considering a summary judgment motion should usually consult with and seek approval from the client. A summary judgment motion can be expensive and can alter the nature of the litigation; counsel should discuss estimated costs of the summary judgment motion, the likely outcome, the reasons for bringing the motion, and any potential drawbacks or adverse consequences.

Cross Reference:

Client consultation for summary judgment motion, see 11 Moore's Federal Practice, *§ 56.32[2]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentPartial Summary Judgments

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29.05 Determine Whether Summary Judgment Motion Is Appropriate.

29.05[1] Criteria for Deciding Whether to File Motion. A party contemplating filing a summary judgment motion should consider whether:

- The case is appropriate for summary judgment. Summary judgment is appropriate when the case presents a dispositive question of law [*City & County of San Francisco v. United States (9th Cir 1997) 130 F3d 873, 877*]; the nonmovant cannot prove an essential element of its case for which it has the burden of proof at trial [*Cleveland v. Policy Mgmt. Sys. Corp. (1999) 526 US 795, 805-806, 119 S Ct 1597, 143 L Ed2d 966*]; or the nonmovant's evidence fails to meet the applicable evidentiary standard, so that a reasonable trier of fact could not return a verdict in its favor [*see Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 249, 106 S Ct 2505, 91 L Ed2d 202*].

- The case is ripe for summary judgment. Motions filed before the parties conclude discovery may be premature, in that it is likely that the nonmovant will respond by initiating discovery to challenge the movant's case [*see Fed R Civ P 56(f)*]. As a practical matter, it is often counterproductive for the movant to disclose strategies and evidence before this discovery is taken.

- The estimated length of trial and the amount in controversy justifies the summary judgment process. The time and expense of the summary judgment process may not be justified if the case can be tried in a week or less, or involves a relatively small amount in controversy.

- The parties would benefit more from engaging in serious settlement discussions.

- A successful summary adjudication motion would avoid trial of a significant portion of the case. Parties should resist filing motions for summary adjudication of less than the complete case unless a successful motion would significantly reduce the time and expense of trying the remaining issues or claims.

Judge's Perspective:

It is important to know the assigned judge's views and attitudes to motions for full and partial summary judgment. The parties can learn these views by looking at the judge's past performance. However, the best method for learning the judge's views may be to bring up the topic at case management or status conferences. At case management and status conferences, parties should suggest and explore what issues might be appropriate for resolution on motion for summary judgment. If the judge is a strong proponent of these motions, the judge might suggest or explore issues appropriately resolved on summary judgment. Discussing these matters, and being prepared to discuss these matters, at case management and status conferences permits the judge to order tiered or phased discovery to address discrete issues first, in order to see if summary disposition can then be utilized.

Cross References:

Further discussion of when summary judgment is appropriate, see *§ 29.05[2]*.

See also, 11 Moore's Federal Practice, *§ 56.32* (Matthew Bender 3d ed.).

29.05[2] Summary Judgment Is Appropriate When There Are No Genuine Issues of Material Fact. Summary judgment is appropriate if the record, read in the light most favorable to the nonmoving party, demonstrates the absence of a genuine issue of material fact [*Celotex Corp., v. Catrett (1986) 477 US 317, 322, 106 S Ct 2548, 91 L Ed2d 265* ; *National Am. Ins. Co. of Cal. v. Certain Underwriters at Lloyd's London (9th Cir 1996) 93 F3d 529, 533*]. The rule does not require that there be an absolute absence of any factual dispute between the parties. Rather, there must be no *genuine* issue of *material* fact [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 247-248, 106 S Ct 2505, 91 L Ed2d 202* ; *Hanon v. Dataproducts Corp. (9th Cir 1992) 976 F2d 497, 500*].

A fact is "material" if it is necessary to prove or defend against a claim [*National Am. Ins. Co. of Cal. v. Certain Underwriters at Lloyd's London (9th Cir 1996) 93 F3d 529, 533*]. Courts determine whether a fact is material by looking to the governing substantive law. If the fact may affect the outcome of the case, it is material [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 248, 106 S Ct 2505, 91 L Ed2d 202*].

An issue or dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 248, 106 S Ct 2505, 91 L Ed2d 202* ; *Hanon v. Dataproducts Corp. (9th Cir 1992) 976 F2d 497, 500*]. If the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp. (1986) 475 US 574, 587, 106 S Ct 1348, 89 L Ed2d 538* ; *Hanon v. Dataproducts Corp. (9th Cir 1992) 976 F2d 497, 500*].

Cross Reference:

Discussion of "genuine issues of material fact," see *§ 29.29[2]*.

29.05[3] Movant Must Be Entitled to Judgment As Matter of Law. A party seeking a summary judgment must establish that he or she is entitled to judgment as a matter of law [*see Fed R Civ P 56(c)*; *Celotex Corp. v. Catrett (1986) 477 US 317, 322, 106 S Ct 2548, 91 L Ed2d 265*]. A party is entitled to summary judgment as a matter of law if there is no genuine issue as to any material fact [*see Fed R Civ P 56(c)*; *Celotex Corp. v. Catrett (1986) 477 US 317, 325, 106 S Ct 2548, 91 L Ed2d 265*].

Cross Reference:

Discussion of meaning of "genuine issue of material fact," see *§ 29.05[2]*.

29.05[4] Moving Party Bears Initial Burden of Proof on Motion. The party seeking summary judgment bears the initial burden of production on the motion [*Celotex Corp. v. Catrett (1986) 477 US 317, 325, 106 S Ct 2548, 91 L Ed2d 265*]. To meet this burden, the moving party generally must make a showing that there is no genuine issue as to

any material fact and that the movant is entitled to judgment as a matter of law [*see Fed R Civ P 56(c)(2)*]. When the movant makes a properly supported motion, the nonmoving party may not rest on allegations or denials in its pleading. Rather, the nonmovant must respond with affidavits or other evidence setting forth specific facts showing a genuine issue for trial. If the nonmovant does not so respond, the court should enter summary judgment against the nonmovant if appropriate [*see Fed R Civ P 56(e)(2)*].

Cross References:

Further discussion of burden of proof on motion, see *29.29[1]*. Discussion of evidence appropriately used to support motion, see *§ 29.12*.

Discussion of burdens of production and persuasion on summary judgment, see 11 Moore's Federal Practice, *§ 56.13* (Matthew Bender 3d ed.).

29.05[5] Summary Adjudication May Be Available. A party may move for summary judgment on a portion of an action rather than the action as a whole [*see Fed R Civ P 56(a), (b)*]. Courts may issue an order granting summary adjudication on issues representing less than the whole case; on the issue of liability alone, even when there is a genuine issue as to the amount of damages; or on less than the full relief requested [*see Fed R Civ P 56(c), (d)*]. Summary adjudications typically result in interlocutory orders rather than in final judgments. Such orders generally are not appealable before entry of a final judgment in the case [*Williamson v. UNUM Life Ins. Co. of Am. (9th Cir 1998) 160 F3d 1247, 1250* ; *see 28 USC § 1291* (federal appellate courts have jurisdiction in appeals from all final decisions of district courts)].

Cross References:

Further discussion of summary adjudication, see *§ 29.31*. Form of motion for summary adjudication, see *§ 29.41*.

29.05[6] Court May Sanction Filing of Groundless Motion or Bad-Faith Affidavit. The trial court may impose sanctions on an attorney, firm, or party filing a motion for summary judgment for an improper purpose, such as to harass, to cause unnecessary delay, or to increase the cost of litigation needlessly [*see Fed R Civ P 11(b), (c)*]. Such sanctions may also be applied to an attorney, firm, or party filing papers in opposition to the summary judgment motion [*see Fed R Civ P 11(a)-(c)*]. Similarly, any party presenting an affidavit in bad faith or solely for the purpose of delay may, on motion by the offended party, be found guilty of contempt and ordered to pay the opposing party's attorney fees and expenses [*see Fed R Civ P 56(g)*].

Cross References:

Discussion of sanctions for filing of groundless motions generally, see Ch. 33, Rule 11 Sanctions; Ch. 34, Other Sanction Provisions; Ch. 35, Contempt.

Discussion of sanctions for frivolous summary judgment motions, see 11 Moore's Federal Practice, *§ 56.33* (Matthew Bender 3d ed.).

29.05[7] Distinguish Between Summary Judgment and Other Dispositive Motions.

29.05[7][a] Distinguish Motions to Dismiss for Lack of Subject Matter Jurisdiction. Lack of subject matter jurisdiction may be asserted in a motion to dismiss before a response to a plaintiff's complaint is filed [*see Fed R Civ P 12(b)(1)*]. But because lack of subject matter jurisdiction cannot be waived, it may be raised by a party or by the court at any time [*see Fed R Civ P 12(h)*]. In contrast, motions for summary judgment must be asserted before trial [*see Fed R Civ P 56(c)(1)(A)* (general rule is that motions for summary judgment may be asserted until 30 days after the close of all discovery)].

Ordinarily, a court is free to hear evidence regarding jurisdiction and to rule on the issue prior to trial. In such circumstances, the standard applicable to summary judgment motions does not apply. No presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts does not preclude the trial court from evaluating and ruling on the jurisdictional claims [*Augustine v. United States (9th Cir 1983) 704 F2d 1074, 1077* ; *Ricotta v. California (SD Cal 1998) 4 F Supp2d 961, 972 , aff'd mem., 173 F3d 861 (9th Cir 1999) , cert. denied, 528 US 864 (1999)*]. This changes when the jurisdictional question depends on resolution of factual issues going to the merits. In that case, the court is bound by the summary judgment standard in deciding the motion to dismiss, because resolution of jurisdictional facts is akin to a decision on the merits [*Thornhill Publ'g Co. v. General Tel. & Elecs. Corp. (9th Cir 1979) 594 F2d 730, 733-735* ; *Noel v. United States (ND Cal 1995) 893 F Supp 1410, 1417*].

Unlike summary judgment, successful motions under Rule 12(b)(1) usually result in dismissal of the claim without prejudice [*see, e.g., Freeman v. Oakland Unified Sch. Dist. (9th Cir 1999) 179 F3d 846, 847*]. A court lacking subject matter jurisdiction does not have the power to grant summary judgment or any other motion on the merits [*California Save Our Streams Council, Inc. v. Yeutter (9th Cir 1989) 887 F2d 908, 913*].

Cross References:

Discussion of Rule 12(b)(1) motions generally, see Ch. 8, Answers and Responsive Motions Under Rule 12, 8 .17.

Distinction between summary judgment motion and motion for lack of subject matter jurisdiction, see 11 Moore's Federal Practice, *§ 56.30[2]* (Matthew Bender 3d ed.).

29.05[7][b] Distinguish Motions to Dismiss for Lack of Personal Jurisdiction or Improper Venue. A motion to dismiss for lack of personal jurisdiction challenges the court's authority to command the defendant's personal obedience or to impose obligations on the defendant that are enforceable by other courts [*see Fed R Civ P 12(b)(2)*; *Burnham v. Superior Court (1990) 495 US 604, 609-610, 110 S Ct 2105, 109 L Ed2d 631*].

Unlike summary judgment, which results in a final adjudication on the merits [*Rand v. Rowland (9th Cir 1998) 154 F3d 952, 957 , cert. denied, 527 US 1035 (1999)*], a successful motion to dismiss for lack of personal jurisdiction or improper venue usually results in dismissal of the claim without prejudice [*see, e.g., Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V. (9th Cir 1997) 114 F3d 848, 850* (dismissal for improper venue is not on merits and does not preclude re-filing in forum where venue is proper)]. Thus, courts may permit the nonmovant to proceed with the case by correcting defective service, joining or dropping parties, amending the complaint, or re-filing the litigation in a different forum [*see, e.g., Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V. (9th Cir 1997) 114 F3d 848, 851*].

Trap:

A party filing a motion for summary judgment before filing a motion to dismiss for improper venue tacitly admits that the court has personal jurisdiction, that venue is properly laid there, and that the court should dispose of the case on its merits. Accordingly, a movant who files a summary judgment motion before, rather than in the alternative with, a motion to dismiss for improper venue waives its venue objections [*Misch v. Zee Enters., Inc. (9th Cir 1989) 879 F2d 628, 631-632*].

Cross References:

Discussion of Rule 12(b) motions generally, see Ch. 8, Answers and Responsive Motions Under Rule 12, 8 .14 et seq. Discussion of motions for voluntary dismissal, see Ch. 30, Voluntary Dismissal. Discussion of motions to dismiss for improper venue, see Ch. 2, Determining Forum (Jurisdiction and Venue), see *§ 2.58*.

Distinction between summary judgment motion and motion for lack of personal jurisdiction, see 11

Moore's Federal Practice, *§ 56.30[2]* (Matthew Bender 3d ed.).

29.05[7][c] Distinguish Motions to Strike. A party may move to strike an insufficient defense or redundant, immaterial, impertinent, or scandalous matter from any pleading [*see Fed R Civ P 12(f)*]. Motions to strike may be used to make trial of the action less complicated, or to streamline resolution of the action [*Hart v. Baca (CD Cal 2001) 204 FRD 456, 457*]. In that sense, they are similar to motions for summary adjudication.

However, a motion to strike does not challenge the merits of the matter or claim at issue. Moreover, when granted, the pleader is generally given leave to amend [*see, e.g., Silva v. M/V First Lady (SD Cal 1998) 28 F Supp2d 581, 582*]. In contrast, a motion for summary adjudication may challenge the merits of particular claims, defenses, or requests for relief [*see Fed R Civ P 56(a), (b), (d)*]. A summary adjudication results in dismissal of a claim, defense, or request for relief with prejudice [*see, e.g., Fontana v. Haskin (9th Cir 2001) 262 F3d 871, 876*].

Cross Reference:

Discussion of Rule 12(f) motions to strike generally, see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.26*.

29.05[7][d] Distinguish Motions to Dismiss for Failure to State Claim. A motion to dismiss a complaint for failure to state a claim on which relief can be granted challenges the sufficiency of the opponent's pleadings [*see Fed R Civ P 12(b)(6)*]. A party generally asserts Rule 12(b)(6) motions before filing an answer to the plaintiff's complaint. Although there are no limits on the earliest date a party may move for summary judgment [*see Fed R Civ P 56(c)(1)(A)*], a party usually files a summary judgment motion after participating in at least some discovery in the case [*see Fed R Civ P 56(c)(1)*, Committee Note of 2009; *Celotex Corp. v. Catrett (1986) 477 US 317, 326, 106 S Ct 2548, 91 L Ed2d 265*].

In ruling on a Rule 12(b)(6) motion, courts must accept as true the well-pleaded allegations in the complaint or answer [*see Lujan v. National Wildlife Fed'n (1990) 497 US 871, 890, 110 S Ct 3177, 111 L Ed2d 695*]. Accordingly, a Rule 12(b)(6) motion is not an appropriate method for challenging unsupported claims or defenses. In contrast, a party may appropriately challenge unsupported claims through a summary judgment motion [*see Fed R Civ P 56(c), (e)*].

In addition, in ruling on a Rule 12(b)(6) motion, the trial court generally may not consider material beyond the pleadings [*Lee v. City of Los Angeles (9th Cir 2001) 250 F3d 668, 688-689*]. If a party presents matters outside the pleadings that the court does not exclude, the court must treat the motion as one for summary judgment [*see Fed R Civ P 12(b), 56*]. Thus, a summary judgment motion is the only pretrial motion that permits the court to consider evidence outside the pleadings in deciding the merits of the case.

Dismissals under Rule 12(b)(6) generally are without prejudice [*see Balistreri v. Pacifica Police Dep't (9th Cir 1988) 901 F2d 696, 701*]. In contrast, a summary judgment is with prejudice [*Wyatt v. Terhune (9th Cir 2003) 315 F3d 1108, 1119-1120 , cert. denied sub nom. Alameida v. Wyatt, 540 US 810 (2003)*]. Thus, a complaint dismissed under Rule 12(b)(6) can usually be amended, while a summary judgment is a final adjudication on the merits [*Rand v. Rowland (9th Cir 1998) 154 F3d 952, 957 , cert. denied, 527 US 1035 (1999)*].

Cross References:

Discussion of motions to dismiss under Rule 12(b)(6), see Ch. 8, Answers and Responsive Motions Under Rule 12, see *§ 8.21*.

Distinction between summary judgment motion and motion to dismiss for failure to state a claim, see 11 Moore's Federal Practice, *§ 56.30[3]* (Matthew Bender 3d ed.).

29.05[7][e] Distinguish Motions for Judgment on Pleadings. A party may move for judgment on the pleadings

after the pleadings are closed [*see Fed R Civ P 12(c)*]. Thus, unlike motions for summary judgment, a motion for judgment on the pleadings may not be served prior to the filing of an answer [*see Fed R Civ P 12(c)*, *Fed R Civ P 56*]. The standard applicable to Rule 12(b)(6) motions also applies to Rule 12(c) motions [*Dworkin v. Hustler Magazine (9th Cir 1989) 867 F2d 1188, 1192* ; *Gutierrez v. RWD Techs., Inc. (ED Cal 2003) 279 F Supp2d 1223, 1224* (citing **Moore's)**].

A motion for judgment on the pleadings generally may not be based on matters outside the pleadings. If a party presents matters outside the pleadings that the court does not exclude, the motion for judgment on the pleadings is converted into a Rule 56 summary judgment motion [*Fed R Civ P 12(c)*; *Qwest Communications Corp. v. City of Berkeley (ND Cal 2002) 208 FRD 288, 291*].

When granting a motion for judgment on the pleadings, the court may grant leave to amend. The court may also dismiss a claim for relief rather than grant judgment on the pleadings [*Carmen v. San Francisco Unified Sch. Dist. (ND Cal 1997) 982 F Supp 1396, 1401* , *aff'd on other grounds*, *237 F3d 1026 (9th Cir 2001)* ; *Moran v. Peralta Cmty. Coll. Dist. (ND Cal 1993) 825 F Supp 891, 893*]. In contrast, summary judgment is with prejudice, and results in a final adjudication on the merits [*see Wyatt v. Terhune (9th Cir 2003) 315 F3d 1108, 1119-1120* , *cert. denied sub nom. Alameida v. Wyatt, 540 US 810 (2003)* (prejudice); *Rand v. Rowland (9th Cir 1998) 154 F3d 952, 957* , *cert. denied*, *527 US 1035 (1999)* (final adjudication on merits)].

Cross References:

Discussion of standard governing Rule 12(b)(6) motion, and conversion of motion to summary judgment motion, see *§ 29.05[7][d]*.

Discussion of motions for judgment on pleadings generally, see Ch. 8, Answers and Responsive Motions Under Rule 12, 8 .27 et seq.

Distinction between summary judgment motion and motion for judgment on the pleadings, see 11 Moore's Federal Practice, *§ 56.30[5]* (Matthew Bender 3d ed.).

29.05[7][f] Distinguish Motions for Judgment As Matter of Law. A court must grant a motion for judgment as a matter of law after a party has been fully heard at trial on an issue, if there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue [*Reeves v. Sanderson Plumbing Prods., Inc. (2000) 530 US 133, 149, 120 S Ct 2097, 147 L Ed2d 105* ; *see Fed R Civ P 50(a)*]. This standard mirrors the standard governing summary judgment motions, and the inquiry under each is the same [*Reeves v. Sanderson Plumbing Prods., Inc. (2000) 530 US 133, 150, 120 S Ct 2097, 147 L Ed2d 105*].

However, the motions must be made at different times in the proceedings. Parties generally assert summary judgment motions before trial [*see Fed R Civ P 56(c)*]. Motions for judgment as a matter of law generally must be made after trial has begun, but before the case is submitted to the jury [*see Fed R Civ P 50(a)(2)*].

Example:

Just before trial was scheduled to begin, defendants filed a motion for judgment as a matter of law under Rule 50, including only limited evidentiary support. The district court permitted the plaintiff to file a response and he did so, including no evidence. On the first day scheduled for trial, the court heard argument on the motion and granted it. The Ninth Circuit ruled that granting a motion for judgment as a matter of law at the outset of trial, before the presentation of any evidence, was inappropriate [*McSherry v. City of Long Beach (9th Cir 2005) 423 F3d 1015, 1019-1022*].

Accordingly, the record available to the court in deciding the motions differs. Courts determine a summary judgment motion based on the pleadings and evidence assembled before trial [*see Fed R Civ P 56(c)(2)*]. Courts determine

motions for judgment as a matter of law based on evidence admitted at trial [*see Fed R Civ P 50(a)(1)*].

Cross References:

Discussion of motions for judgment as matter of law, see 9 Moore's Federal Practice, Ch. 50, Judgment as Matter of Law in Jury Trials; Related Motion for a New Trial; Conditional Ruling. Distinction between summary judgment motion and motion for judgment as a matter of law, see 11 Moore's Federal Practice, *§ 56.30[7]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten Motions

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Unit 8 Motion Practice
CHAPTER 29 Summary Judgment
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29.06 Timely Assert Motion for Summary Judgment.

29.06[1] Either Party May Move for Summary Judgment at Any Time Until 30 Days After Close of Discovery. Either party may move for summary judgment "at any time" until 30 days after the close of all discovery [*Fed R Civ P 56(c)(1)(A)*]. In fact, a plaintiff may move for summary judgment as early as the commencement of the action. However, if the motion seems premature, the court has the power to extend the time to respond [*see Fed R Civ P 56(c)(1)*, Committee Note of 2009]. Further, when an opposing party objects to a motion as premature, the court may defer ruling on the motion and may grant a continuance to permit further discovery [*see Fed R Civ. P 56(f)(2)*]. In addition, if a plaintiff or other "claiming party's" motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is extended from the normal 21 days after the motion is served to 21 days after the responsive pleading would otherwise be due [*Fed R Civ P 56(c)(1)(B)*; *Fed R Civ P 56*, Committee Note of 2009].

Warning:

The timing provisions of Rule 56(c) will not apply if "a different time is set by local rule or the court orders otherwise" [*Fed R Civ P 56(c)(1)*]. In fact, it is not unusual for courts to issue scheduling orders under Rule 16(b) that set a general deadline for all motions and specific deadlines for important "dispositive" motions such as motions for summary judgment [*see* 3 *Moore's Federal Practice, § 16.13[1][b]* (Matthew Bender 3d ed.)]. Local rules are also useful when local docket practices are incompatible with general Rule 56 timing provisions.

Cross References:

Seeking continuance to conduct further discovery, see *§ 29.19*. Discussion of counterclaims and crossclaims generally, see Ch. 11, Counterclaims, Crossclaims, and Replies.

Discussion of Rule 56 timing, see 11 *Moore's Federal Practice, § 56.10[1]* (Matthew Bender 3d ed.)]. Discussion of time for defendant to make motion, 11 *Moore's Federal Practice, § 56.10[2]* (Matthew Bender 3d ed.)].

29.06[2] [Reserved].

29.06[3] Most Effective Time to Make Motion Depends on Circumstances of Case. The most effective time to make a motion for summary judgment depends on the circumstances of the case. For example, when the issue presented is one of law requiring little discovery, the moving party may assert the motion early to avoid unnecessary time and expense in connection with the action. In contrast, if the issues presented involve questions of fact or mixed questions of law and fact requiring discovery, it may be counterproductive to seek summary judgment before the issues have been narrowed and the record developed [*see, e.g.,* Okinawa Dugong v. Rumsfeld (ND Cal 2005) 2005 US Dist LEXIS 3123 (denying pre-discovery defense motion for summary judgment)].

Strategic Point--Nonmoving Party:

When a party files a summary judgment motion early in the litigation, before the opposing party has a realistic opportunity to pursue discovery relating to its theory of the case, the district court may grant a continuance to permit the party to obtain affidavits, take depositions, or conduct discovery [*Burlington N. Santa Fe Ry. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation (9th Cir 2003) 323 F3d 767, 773* ; *see Fed R Civ P 56(f)*]. Further, if the motion seems premature, the court has the power to extend the time to respond [*see Fed R Civ P 56(c)(1)*, Committee Note of 2009].

Consider:

Moving for summary judgment before the issues have been narrowed may increase the risk that a grant of summary judgment will be reversed on appeal based on inadequacy of discovery on the crucial issues [*see, e.g., Burlington N. Santa Fe Ry. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation (9th Cir 2003) 323 F3d 767, 773-774* (vacating summary judgment and ordering discovery when movant brought motion less than one month after filing suit and no discovery had taken place)].

Cross References:

Discussion of motions for continuance to conduct discovery related to motion for summary judgment, see *§ 29.19*. Discussion of discovery generally, see Ch. 21, Discovery Strategy and Planning, and Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentTime Limitations

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
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Unit 8 Motion Practice
CHAPTER 29 Summary Judgment
II. PREPARING MOTION FOR SUMMARY JUDGMENT

4-29 MB Practice Guide: Fed Pretrial Civ Proc in CA 29.07

29.07 Prepare Required Motion Papers.

29.07[1] Motion Must Be in Writing. In the Ninth Circuit, oral motions for summary judgment are neither authorized nor recognized [*Cool Fuel, Inc. v. Connett (9th Cir 1982) 685 F2d 309, 311*]. A party seeking summary judgment typically must file a written motion with the court [*see Fed R Civ P 56(c)*; *Fed R Civ P 7(b)(1)*]. The movant may meet the writing requirement by filing a written notice of the hearing of the motion [*see Fed R Civ P 7(b)(1)(A)*].

Strategic Point--Moving Party:

Appellate courts have, on occasion, "rescued" movants who failed to file written motions for summary judgment by noting the district court's power to enter summary judgment *sua sponte* against a moving party, provided that the losing party has had a full and fair opportunity to ventilate the issues involved in the matter [*Gospel Missions of Am. v. City of Los Angeles (9th Cir 2003) 328 F3d 548, 553* , *cert. denied*, *540 US 948 (2003)*]. However, the Ninth Circuit has taken a very strict view of when a district court has the ability to grant summary judgment *sua sponte* [*see Verizon Del., Inc. v. Covad Communs. Co. (9th Cir 2004) 377 F3d 1081, 1092* ("Before a court makes a sua sponte grant of summary judgment, 'a litigant must be given reasonable notice that the sufficiency of his or her claim will be in issue.' " *Buckingham v. United States (9th Cir 1993) 998 F2d 735, 742* . When the court dismissed Covad's counterclaims, Verizon had not yet responded to Covad's counterclaims. Nothing in the record suggests that Covad had reasonable notice that the sufficiency of its counterclaims would be in issue. The district court erred by entering a sua sponte grant of summary judgment on Covad's counterclaims")]. Notice need not be explicit. "A party is 'fairly appraised' that the court will in fact be deciding a summary judgment motion if that party submits matters outside the pleadings to the judge and invites consideration of them" [*United States v. 14.02 Acres (9th Cir 2008) 530 F3d 883, 894* , quoting *In re Rothery (9th Cir 2008) 143 F3d 546, 549* (defendant met this condition by submitting two declarations outside the pleadings in support of his opposition to government's motion and he had fair opportunity to contest issues decided in motion)]. However, the safest practice is for a party seeking summary judgment to file and serve a written motion.

Cross References:

Form of notice of motion and motion for summary judgment, see *§ 29.40*. Discussion of motion practice in general, see Ch. 26, Pretrial Motion Practice.

29.07[2] Typical Papers to Be Filed. Typically, a party asserting a motion for summary judgment files the following motion papers with the district court clerk's office [*see Fed R Civ P 7(b)(1), 56(a), (c), (e)*]:

- A notice of motion specifying the date, time, and location of the hearing on the motion;
- A motion specifying which party seeks summary judgment, the claims involved in the motion, and the legal and factual grounds for the motion;
- Any supporting affidavits; and
- A proposed order granting summary judgment as requested by the moving party.

Local rules may impose additional or different requirements on the materials to be filed [*see, e.g., CD Cal Civ LR 56-1* (moving party must lodge statement of uncontroverted facts and conclusions of law and proposed judgment)]. Therefore, counsel must become familiar with and must adhere to the local rules applicable in the district where the case involved is filed.

Cross References:

Discussion of local practice requirements on summary judgment motion papers to be filed, see *§ 29.07[3]*. Discussion of use of declarations in support of summary judgment motions in lieu of affidavits, see *§ 29.11[2]*.

Discussion of motion practice generally, see Ch. 26, Pretrial Motion Practice. Discussion of filing motion papers generally, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.03* et seq.

29.07[3] LOCAL PRACTICE: Papers to Be Filed May Vary.

29.07[3][a] LOCAL PRACTICE: CD Cal Requirements. The Central District requires that a party seeking summary judgment serve and file with the court [*see CD Cal Civ LR 7-5, 56-1*]:

- A notice of motion for summary judgment;
- A memorandum of points and authorities in support of the motion;
- A proposed statement of uncontroverted facts and conclusions of law;
- Any evidence on which the moving party will rely in support of the motion; and
- A proposed judgment.

Exception--Summary Adjudication:

If the movant seeks a partial summary judgment under *Fed R Civ P 56(d)*, the moving party must submit a proposed order rather than a proposed judgment [*see CD Cal Civ LR 56-4*].

Cross Reference:

Discussion of summary adjudication, see *§ 29.31*.

29.07[3][b] LOCAL PRACTICE: ED Cal Requirements. In the Eastern District, a party seeking summary judgment must file [*see ED Cal Civ LR 230(b), 260(a)*]:

- A motion for summary judgment;
- A notice of motion;
- A "statement of undisputed facts";
- Copies of all evidentiary documents cited in the moving papers; and
- Supporting affidavits, if appropriate.

However, entire depositions are not to be filed through the Case Management/Electronic Case Files (CM/ECF) docketing and filing system. If the motion for summary judgment refers to a deposition, the attorney must ensure that a courtesy hard copy of the original of the entire deposition so relied on has been submitted to the clerk for use in chambers on or before the filing of the motion. Alternatively, an electronic copy in lieu of the courtesy paper copy may be submitted by email to the judge or magistrate judge and concurrently emailed, or otherwise transmitted, to all other parties [*ED Cal Gen LR 133(j)*; see *ED Cal Civ LR 250.1(a), ED Cal Civ LR 260(e)*].

In lieu of, or in addition to, a statement of undisputed facts, the parties may file a joint stipulation setting forth a statement of stipulated facts to which all the interested parties agree [*see ED Cal Civ LR 260(c)*].

29.07[3][c] LOCAL PRACTICE: ND Cal Requirements. In the Northern District, the moving party must file [*see ND Cal Civ LR 7-2(b)-(d)*]:

- A notice of motion and motion;
- A statement of the relief or action sought by the moving party;
- Points and authorities in support of the motion;
- A proposed order; and
- Any supporting affidavits or declarations.

The movant need not file a separate statement of undisputed facts or a joint statement of undisputed facts unless required by the judge [*see ND Cal Civ LR 56-1(a)*]. If the judge does order a joint statement of undisputed facts, the parties must confer and submit a joint statement on or before the date set by the judge. The court may impose sanctions for failing to file a joint statement of undisputed facts [*see ND Cal Civ LR 56-1(b)*].

29.07[3][d] LOCAL PRACTICE: SD Cal Requirements. No specific local rules govern summary judgment motions in the Southern District. Rather, the parties must adhere to federal and local rules governing motion practice generally [*see Fed R Civ P 7(b)*; *SD Cal Civ LR 7.1*]. Thus, a movant in the Southern District must submit [*see SD Cal Civ LR 7.1(f.1), (f.2.a)*]:

- A motion for summary judgment;
- A separate notice of motion;

- A separate memorandum of points and authorities in support of the motion; and
- Copies of all documentary evidence the movant intends to submit in support of the motion.

Warning:

A movant's failure to file any papers required under *SD Cal Civ LR 7.1* may be deemed a waiver of the motion [*see SD Cal Civ LR 7.1(f.2.b)*].

If appropriate, the moving party may also submit a separate statement of material facts [*see SD Cal Civ LR 7.1(f.1)*], and any supporting affidavits [*see SD Cal Civ LR 7.1(f.2.a)*, *Fed R Civ P 56(c)*].

Cross Reference:

Discussion of motion practice in Southern District generally, see Ch. 5, Formatting, Serving, and Filing Papers.

29.07[4] Motion Must Contain Grounds for Motion and Relief Sought. At a minimum, a motion for summary judgment must state with particularity the grounds for the motion, and the relief sought [*see Fed R Civ P 7(b)(1)*]. A motion for summary judgment is made "with particularity" when it [*California Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp. (ED Cal 2003) 298 F Supp2d 930, 938*]:

- States the theory on which the movant proceeds;
- Lists the pleadings and papers on which the movant relies; and
- States that the movant makes the motion pursuant to Rule 56 authorizing summary judgment.

Local rules may impose additional content requirements. Therefore, counsel should become familiar with and should adhere to local rules in the district in which the case is filed.

Cross References:

Discussion of local rules pertaining to summary judgment filing requirements, see *§ 29.07[3]*.
Discussion of drafting motion papers generally, see Ch. 5, Formatting, Serving, and Filing Papers.

29.07[5] Request or Waive Oral Argument As Desired. Trial courts are empowered to determine summary judgment motions without holding an oral hearing [*see Fed R Civ P 78*, *83*]. In addition, district courts may provide by local rule that a party desiring oral argument on a motion for summary judgment must request oral argument or risk waiver [*Mahon v. Credit Bureau of Placer County Inc. (9th Cir 1999) 171 F3d 1197, 1200* ; *see Fed R Civ P 78*, *83*]. For example, trial courts in the Eastern District will permit oral argument on a summary judgment motion if requested by a party or if ordered by the court [*see ED Cal Civ LR 230(g)*].

When local rules require that a party request oral argument, the court may deem the absence of such a request as a waiver of oral argument [*Jasinski v. Showboat Operating Co. (9th Cir 1981) 644 F2d 1277, 1280* ; *Mahon v. Credit Bureau of Placer County Inc. (9th Cir 1999) 171 F3d 1197, 1200*]. Local rules may also provide a procedure for waiving oral argument [*see, e.g., CD Cal Civ LR 7-15*].

Strategic Point:

Consult the rules in the relevant district to determine whether the court automatically provides a hearing on the summary judgment motion or whether counsel must specifically request a hearing. However, the

safest practice is to request a hearing in the motion or opposition papers. Because summary judgment motions are dispositive, counsel should request oral argument on the motion in most cases.

Consider:

One way to make the request is to include the statement: "Oral Argument Requested" on the title page of the motion or opposition, under the date and time for the hearing on the motion.

Cross References:

Further discussion of hearing on motion, see *§ 29.28*. Discussion of requests for oral argument and hearings on motions generally, see Ch. 26, Pretrial Motion Practice, see *§ 26.51* et seq.

29.07[6] Properly Format Motion. The rules applicable to formatting of pleadings generally also apply to motions for summary judgment [*see Fed R Civ P 7(b)(2)*]. For example, a motion for summary judgment must contain a caption, and must be signed in accordance with *Fed R Civ P 11* [*see Fed R Civ P 7(b)(2)*]. Local rules may impose additional format requirements [*see, e.g., CD Cal Civ LR 7-4* (required contents of notice of motion)]. Therefore, counsel must become familiar with and must adhere to the local rules in the district in which the case is filed.

Cross References:

Form of notice of motion and motion for summary judgment, see *§ 29.40*. Discussion of motion formatting generally, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.03* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentNotices

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Unit 8 Motion Practice
CHAPTER 29 Summary Judgment
II. PREPARING MOTION FOR SUMMARY JUDGMENT

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29.08 Draft and Attach Brief or Memorandum of Points and Authorities in Support of Motion.

29.08[1] Draft Brief or Memorandum of Points and Authorities Supporting Motion. Though not explicitly required by the Federal Rules of Civil Procedure [*see Fed R Civ P 56*], local rules in California require moving parties to file a brief or memorandum of points and authorities in support of the motion [*see, e.g.,* ND Cal Civ LR *7-2(b)(4)*]. Counsel must therefore become familiar with and follow local rules in the district in which the case is filed.

In general, a brief or memorandum in support of a summary judgment motion should contain the following:

- The issues or grounds on which the party seeks summary judgment.
- A brief procedural history of the case, including the filing date; the claims presented; discovery undertaken or attempted; any dispositive motions filed in the case and the disposition of those motions; and a list of any other motions pending.
- A statement of facts relevant to the issues to be decided in the case.
- Concise legal argument on the grounds supporting summary judgment, including cites to relevant authority and to specific evidence supporting the argument.

Strategic Point--Moving Party:

Counsel should not overstate or exaggerate the evidence supporting the motion and risk losing credibility with the judge. Counsel also should acknowledge facts favoring the opponent, while demonstrating that those facts do not preclude a grant of summary judgment. Counsel should not misstate the law, although counsel has more leeway in stretching legal arguments than in misstating facts [*see Golden Eagle Distrib. Corp. v. Burroughs Corp. (9th Cir 1986) 801 F2d 1531, 1539*].

Cross References:

Discussion of local requirements regarding briefs and memoranda of points and authorities in support of motions, see *§ 29.08[2]*. Form of memorandum of points and authorities in support of motion, see *§ 29.42*.

Discussion of briefs and memoranda supporting motions generally, see Ch. 26, Pretrial Motion Practice, see *§ 26.20*.

Discussion of memorandum of law in support of summary judgment motion, see 11 Moore's Federal Practice, *§ 56.10[4][d]* (Matthew Bender 3d ed.).

29.08[2] LOCAL PRACTICE: Brief or Memorandum Requirements.

29.08[2][a] LOCAL PRACTICE: CD Cal Requirements. No specific rules govern summary judgment motions in the Central District. However, the district has promulgated rules governing motions generally [*see CD Cal Civ LR 7-5*]. A moving party must serve and file with the notice of motion a brief but complete supporting memorandum, and the points and authorities on which the moving party relies [*see CD Cal Civ LR 7-5(a)*].

29.08[2][b] LOCAL PRACTICE: ED Cal Requirements. A moving party must file accompanying briefs with the court clerk along with the notice of motion and motion for summary judgment [*see ED Cal Civ LR 230(b)*].

29.08[2][c] LOCAL PRACTICE: ND Cal Requirements. In the Northern District, motions for summary judgment must be noticed as required by the rules regarding motions generally [*see ND Cal Civ LR 7-2*]. Thus, movants must include points and authorities supporting the summary judgment motion in the motion itself [*see ND Cal Civ LR 7-2(b)(4)*]. The district has also promulgated specific rules regarding the content and length of the points and authorities [*see ND Cal Civ LR 7-4*].

Cross Reference:

Discussion of Northern District requirements regarding content and length of memoranda of points and authorities, see *§ 29.08[3]*.

29.08[2][d] LOCAL PRACTICE: SD Cal Requirements. No specific rules govern summary judgment motions in the Southern District. However, the district has promulgated rules governing motions generally. These rules require that movants file a supporting separate memorandum of points and authorities with each motion [*see SD Cal Civ LR 7.1(f.1)*]. Failure to file the required papers may be deemed a waiver of the motion [*see SD Cal Civ LR 7.1(f.2.b)*].

Cross References:

Further discussion of Southern District motion requirements generally, see Ch. 26, Pretrial Motion Practice; Ch. 5, Formatting, Serving, and Filing Papers.

29.08[3] Properly Format Memorandum or Brief. The rules applicable to formatting of motion papers generally also apply to memoranda and briefs supporting motions for summary judgment [*see Fed R Civ P 7(b)*]. Local rules may also impose format requirements [*see, e.g., ND Cal Civ LR 7-4* (form and contents of memorandum of points and authorities)]. Counsel must therefore become familiar with and must adhere to the local rules in the district in which the case is filed.

Example:

Unless the court orders otherwise, a brief or memorandum filed in the Northern District must not exceed 25 pages of text [*see ND Cal Civ LR 7-4(b)*]. Such briefs or memoranda must contain the following [*see ND Cal Civ LR 7-4(a)*]:

- On the first page, in the space opposite the caption and below the case number, the noticed hearing date and time;
- A table of contents and a table of authorities if the brief or memorandum exceeds 10 pages;
- A statement of the issues to be decided;
- A succinct statement of the relevant facts; and
- Argument by the party with cites to pertinent authorities.

Cross Reference:

Discussion of formatting of memorandum or brief in support of motions generally, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.03* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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II. PREPARING MOTION FOR SUMMARY JUDGMENT

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29.09 Draft and Attach Statement of Undisputed, Uncontroverted, or Material Facts When Required.

29.09[1] Draft Statement of Undisputed, Uncontroverted, or Material Facts If Required. Though not explicitly required by the Federal Rules of Civil Procedure [*see Fed R Civ P 56*], all California local districts other than the Northern District automatically require a party filing a motion for summary judgment to file an accompanying statement of undisputed, uncontroverted, or material facts [*see, e.g., CD Cal Civ LR 56-1*; *ND Cal Civ LR 56-1(a)*]. When required, such statements must be considered by the district court in making its decision on the motion for summary judgment [*see, e.g., CD Cal Civ LR 56-3* (court consideration of statement and opposition in determining motion)].

In general, these statements list the material facts relied on by the moving party in support of the motion. The statements also cite the portion of the pleadings, affidavits, depositions, interrogatory answers, admissions, or other evidence relied on to establish the specific fact [*see ED Cal Civ LR 260(a)*].

Warning:

When a party referring to evidence in a statement fails to cite locator information that is sufficient to enable the court to find the material, the trial court may exclude the evidence involved [*see Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 774-775* (failure to cite page and line numbers of deposition)].

Strategic Point--Moving Party:

In drafting a statement of undisputed, uncontroverted, or material facts, counsel should assist the trial court in finding and verifying the facts by:

- Quoting the particular evidence relied on when appropriate;

- Citing the exact location of the evidence in the record by using page, paragraph, and line cites when possible; and

- Attaching admissible excerpts to an accompanying affidavit or declaration.

Strategic Point--Joint Statements:

Courts will appreciate joint or stipulated statements of undisputed facts whenever the parties can make them. Courts will find these particularly helpful in complicated commercial cases in which there may be a lot of technical information, such as patent or contract disputes.

Joint statements are easiest when the central issue is based on a contract, in that all parties should be able to agree on the language of the contract and on the circumstances of formation. If opposing counsel is recalcitrant, however, attempting to obtain a joint statement can be very time-consuming.

Cross References:

Discussion of local requirements regarding statements of fact, see *§ 29.09[2]*. Form of statement of undisputed, uncontroverted, or material fact, see *§ 29.43*.

29.09[2] LOCAL PRACTICE: Statement Requirements May Vary.

29.09[2][a] LOCAL PRACTICE: CD Cal Requirements. A moving party in the Central District must lodge and serve a proposed "Statement of Uncontroverted Facts and Conclusions of Law" with each notice of motion for summary judgment. The proposed statement must set forth the material facts as to which the moving party contends there is no genuine issue [*CD Cal Civ LR 56-1*].

Cross Reference:

Form of statement, see *§ 29.43*.

29.09[2][b] LOCAL PRACTICE: ED Cal Requirements. Each motion for summary judgment or summary adjudication must be accompanied by a "Statement of Undisputed Facts" [*see ED Cal Civ LR 260(a)*].

Instead of filing a separate statement, interested parties may jointly file a statement of stipulated facts to which those parties agree. The stipulating parties may state that they enter into their stipulations only for the purposes of the motion for summary judgment, and that they do not intend the joint stipulation to be otherwise binding [*see ED Cal Civ LR 260(c)*].

A statement of undisputed facts must discretely enumerate each of the specific material facts relied on in support of the motion. The statement also must cite to the particular portion of any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied on to establish the specific fact [*see ED Cal Civ LR 260(a)*].

Cross Reference:

Form of statement, see *§ 29.43*.

29.09[2][c] LOCAL PRACTICE: ND Cal Requirements. Unless required by the assigned judge, the moving party must not submit either a separate or a joint statement of undisputed facts [*see ND Cal Civ LR 56-1(a)*].

Consider:

Filing a statement without a court order may lead to an order striking the statement on motion by the

opposing party.

If the judge orders submission of a joint statement of undisputed facts, the parties must confer and submit a joint statement on or before the date set by the judge. If the nonmoving party refuses to join in the statement, the court must permit the moving party to file the motion along with a separate declaration of counsel explaining why the parties are not filing a joint statement. The judge has discretion to impose sanctions for failure to file a joint statement [*see ND Cal Civ LR 56-1(b)*].

29.09[2][d] LOCAL PRACTICE: SD Cal Requirements. When appropriate, a moving party in the Southern District must supply a separate statement of material facts with the motion [*see SD Cal Civ LR 7.1(f.1)*].

29.09[3] Properly Format Statement. The rules applicable to formatting of motion papers generally also apply to statements of uncontroverted, undisputed, or material supporting motions for summary judgment [*see Fed R Civ P 7(b)*]. Local rules may also impose format requirements [*see, e.g., ED Cal Civ LR 260(a)*]. Counsel should therefore become familiar with and should adhere to the local rules in the district in which the case is filed.

Cross References:

Form of statement of undisputed, uncontroverted, or material fact, see *§ 29.43*. Discussion of formatting papers supporting motions generally, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.03* et seq.

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29.10 Draft and Attach Proposed Judgment or Order As Required.

29.10[1] Draft Proposed Judgment or Order. Though not explicitly required by the Federal Rules of Civil Procedure [*see Fed R Civ P 56*, *7(b)*], several districts in California require a party filing a motion for summary judgment to file with the motion a proposed judgment or order for the court's use in ruling on the motion [*see , e.g., CD Cal Civ LR 56-1*, *56-4*]. Counsel must therefore become familiar with and must adhere to the local rules in the district in which there case is filed.

Cross References:

Discussion of local rule requirements regarding attaching proposed orders or judgments, see *§ 29.10[2]*.
Form of proposed order, see *§ 29.45*.

29.10[2] LOCAL PRACTICE: Proposed Judgment or Order Requirements.

29.10[2][a] LOCAL PRACTICE: CD Cal Requirements. A moving party in the Central District must serve and file a proposed judgment with each notice of motion for summary judgment [*see CD Cal Civ LR 56-1*]. A movant seeking summary adjudication on a portion of the case or relief sought must submit a proposed order instead of a proposed judgment [*see CD Cal Civ LR 56-4*].

29.10[2][b] LOCAL PRACTICE: ND Cal Requirements. All summary judgment motions filed in the Northern District must be accompanied by a proposed order unless excused by the judge hearing the motion [*see ND Cal Civ LR 7-2(c)*].

29.10[3] Properly Format Proposed Judgment or Order. The rules applicable to formatting of motion papers generally also apply to proposed judgments or orders supporting motions for summary judgment [*see Fed R Civ P 7(b)*].

Judge's Perspective:

When the rules do not require the submission of a proposed order, counsel should determine the court's preferences in these matters. Some judges strongly prefer that counsel do *not* submit proposed orders and

rarely refer to counsel's proposals in drafting their orders. Other judges are quite receptive to and appreciative of suggestions by counsel in the form of proposed orders, including proposed findings. These not only assist the court in drafting the order, but preparing the proposed order helps focus counsel's attention on precisely what relief is as stake and what facts and evidence are and are not disputed on the motion.

Whenever proposed orders are submitted, they should be submitted in a format that makes them truly useful to the court. For example, in e-filing cases in the Northern District, proposed orders are e-mailed to chambers in Microsoft Word or WordPerfect format, so the judge can modify the proposed order easily and conveniently to his or her liking. In other courts, it is also possible to submit proposed orders in easily modifiable form, such as with an additional copy being submitted on disk. Once again, the judge's preferences should be sought out and followed in these matters.

Cross Reference:

Form of proposed order, see *§ 29.45*.

Legal Topics:

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Unit 8 Motion Practice
CHAPTER 29 Summary Judgment
II. PREPARING MOTION FOR SUMMARY JUDGMENT

4-29 MB Practice Guide: Fed Pretrial Civ Proc in CA 29.11

29.11 Draft and Attach Supporting Affidavits.

29.11[1] Affidavits Supporting Motion Are Permissible but Not Required. A moving party may provide evidence supporting a summary judgment motion by attaching sworn affidavits [*see Fed R Civ P 56(c)*]. However, there is no express or implied requirement that a moving party support its summary judgment motion with affidavits or other similar materials to negate the opponent's claims [*Celotex Corp. v. Catrett (1986) 477 US 317, 323, 106 S Ct 2548, 91 L Ed2d 265* ; *Sibbald v. Johnson (SD Cal 2003) 294 F Supp2d 1173, 1175*]. Indeed, when the nonmoving party bears the burden of proof at trial on a dispositive issue, the movant may properly support the motion by relying only on the pleadings, depositions, answers to interrogatories, and admissions on file [*Celotex Corp. v. Catrett (1986) 477 US 317, 324, 106 S Ct 2548, 91 L Ed2d 265*].

Exception:

When the movant makes factual contentions in the motion for summary judgment, those contentions must be supported by an affidavit or declaration and by appropriate references to the record [*Republic W. Ins. Co. v. Fireman's Fund Ins. Co. (ND Cal 2003) 241 F Supp2d 1090, 1095* ; *see ND Cal Civ LR 7-5(a)*].

Cross Reference:

Use of declaration in lieu of affidavit, see *§ 29.11[2]*.

29.11[2] Movant May Attach Declaration in Lieu of Affidavit. In lieu of an affidavit, a summary judgment motion may be supported by an unsworn declaration [*Jack v. Trans World Airlines, Inc. (ND Cal 1994) 854 F Supp 654, 658* ; *see 28 USC § 1746*; *ED Cal Gen LR 101* (for purposes of local rules, "affidavit" includes declaration prepared in accordance with *28 USC § 1746*)]. Indeed, some federal district courts in California require parties to support their summary judgment papers with declarations rather than affidavits [*see CD Cal Civ LR 7-6, 7-7*]. However, to be valid, declarations must meet the content and format requirements of federal law [*see 28 USC § 1746*]. They must also meet the summary judgment requirements imposed on affidavits [*see Fed R Civ P 56(e)*; *United States v. Ritchie (9th Cir 2003) 342 F3d 903, 909* (court considering conversion of Rule 12(b)(6) motion to summary judgment motion could not consider declaration in support of summary judgment because it was not based on personal

knowledge under *Fed R Civ P 56(e)*)].

Cross References:

Discussion of content of affidavits and declarations, see *§§ 29.11[3] -[7]*. Discussion of affidavits and declarations generally, see Ch. 26, Pretrial Motion Practice, see *§ 26.21*.

29.11[3] Supporting Affidavits Must Meet Requirements of Rule 56(e). Affidavits in support of a motion for summary judgment must [*see Fed R Civ P 56(e)*]:

- Be made on personal knowledge;
- Set forth facts that would be admissible in evidence; and
- Affirmatively show that the affiant is competent to testify to the matters stated in the affidavit.

In addition, if the affidavit refers to any papers or to parts of papers, the moving party must attach or must serve sworn or certified copies of all the papers with the affidavit [*see Fed R Civ P 56(e)*].

The trial court may strike or to refuse to consider affidavits not complying with Rule 56(e) [*see Sheet Metal Workers' Int'l Ass'n Local Union No. 359 v. Madison Indus., Inc. (9th Cir 1996) 84 F3d 1186, 1193* (trial court's striking of affidavit for failing to comply with *Fed R Civ P 56(e)* reviewed for abuse of discretion); *School Dist. No. 1J v. AC&S, Inc. (9th Cir 1993) 5 F3d 1255, 1262 , cert. denied, 512 US 1236 (1994)* (court did not abuse its discretion is refusing to consider affidavit due to failure to comply with *Fed R Civ P 56(e)*)]. Generally, formal defects in a summary judgment affidavit are waived absent an objection or motion to strike [*Pfingston v. Ronan Eng'g Co. (9th Cir 2002) 284 F3d 999, 1003* ; *Scharf v. United States Attorney Gen. (9th Cir 1979) 597 F2d 1240, 1243*].

Cross References:

Discussion of use of declarations in support of summary judgment motions in lieu of affidavits, see *§ 29.11[2]*. Discussion of opposing affidavit requirements, see *§ 29.17[3]*. Discussion of drafting and formatting of affidavits generally, see Ch. 26, Pretrial Motion Practice, see *§ 26.21*.

29.11[4] Affidavit Must Be Based on Personal Knowledge. If the moving party attaches a supporting affidavit, the affidavit must be made on personal knowledge [*see Fed R Civ P 56(e)*]. Without this foundation, the affiant's allegations are inadmissible at trial [*Norita v. Commonwealth of the N. Mariana Islands (9th Cir 2003) 331 F3d 690, 697* ; *see Fed R Evid 602* (witness may not testify to matter unless evidence is introduced sufficient to support finding that witness has personal knowledge of matter)].

Whether the affiant meets the personal knowledge requirement may be inferred from the contents of the affidavit itself [*Barthelemy v. Air Lines Pilots Ass'n (9th Cir 1990) 897 F2d 999, 1018*]. For example, an affiant's personal knowledge reasonably can be inferred from his or her position and from the nature of his or her personal participation in the matters sworn to in the affidavit [*see Barthelemy v. Air Lines Pilots Ass'n (9th Cir 1990) 897 F2d 999, 1018*]. If the affidavit make clear that the affiant relies on information from others rather than firsthand participation or experience, the court may properly refuse to consider the affidavit [*see Block v. City of Los Angeles (9th Cir 2001) 253 F3d 410, 419* (court properly refused to consider affidavit when contents indicated affiant relied on information from others who were unsworn or whose sources of information were unclear)].

Distinguish--Expert Opinion:

The personal knowledge requirement does not negate an expert witness's right under *Fed R Evid 703* to form an opinion based on data made known to the expert that is not within his or her personal knowledge, or that is not admissible in evidence [*Doe v. Cutter Biological, Inc. (9th Cir 1992) 971 F2d*

375, 385]. However, the expert's affidavit must back up these opinions with specific facts [*see United States v. Various Slot Machs. (9th Cir 1981) 658 F2d 697, 700*].

An affidavit based on "information and belief" does not comply with Rule 56(e) [*Independent Ink, Inc. v. Trident, Inc. (CD Cal 2002) 210 F Supp2d 1155, 1162* ; *see Bank Melli Iran v. Pahlavi (9th Cir 1995) 58 F3d 1406, 1412* , *cert. denied, 516 US 989 (1995)* (declaration in opposition to summary judgment motion)]. Similarly, assertions in affidavits prefaced by "I understand" or "I believe" do not comply with Rule 56(e) [*Cermetek, Inc. v. Butler Avpak, Inc. (9th Cir 1978) 573 F2d 1370, 1377* ; *see Mickelsen v. Albertson's, Inc. (D Idaho 2002) 226 F Supp2d 1238, 1241-1242* (use of "I believe")].

29.11[5] Affidavit Must Contain Specific Admissible Facts. A trial court may consider only admissible evidence in ruling on a motion for summary judgment [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 773* ; *see Fed R Civ P 56(e)*]. Affidavits in support of a motion for summary judgment should not merely restate conclusory allegations from the pleadings, but must set forth specific facts that would be admissible in evidence [*see Fed R Civ P 56(e)*; *Lujan v. National Wildlife Fed'n (1990) 497 US 871, 888-889, 110 S Ct 3177, 111 L Ed2d 695* (object of *Fed R Civ P 56(e)* is not to replace conclusory allegations of complaint or answer with conclusory allegations of affidavit)].

In general, courts may not consider unsworn affidavits in support of summary judgment motions, because they would not be admissible as evidence [*see Fed R Civ P 56(e)*; *Hollingsworth Solderless Terminal Co. v. Turley (9th Cir 1980) 622 F2d 1324, 1335 n9* ; *Republic W. Ins. Co. v. Fireman's Fund Ins. Co. (ND Cal 2003) 241 F Supp2d 1090, 1095*]. However, an unsworn declaration that is made under penalty of perjury made in accordance with the requirements of *28 USC § 1746* is an always acceptable substitute for formal, sworn affidavits [*see 28 USC § 1746*]. Whether formal affidavits or declarations under penalty of perjury are used is often a matter of local practice. In California district courts, it is quite normal for parties to submit declarations under penalty of perjury rather than sworn affidavits.

Distinguish:

At the summary judgment stage, the court does not focus on the admissibility of the affidavit or declaration in terms of its form. Rather, it focuses on the admissibility of its contents [*Fraser v. Goodale (9th Cir 2003) 342 F3d 1032, 1036* , *cert. denied sub nom. United States Bancorp v. Fraser, 541 US 937 (2004)*]. Thus, although the facts underlying an affidavit or declaration must be admissible in evidence, the affidavit or declaration itself need not be in a form that would be admissible at trial [*see Hughes v United States (9th Cir 1992) 953 F2d 531, 543*].

Material that has been deemed improper under *Fed R Civ P 56(e)* when included in a summary judgment affidavit or declaration includes:

- Hearsay [*see, e.g., Self-Insurance Inst. of Am., Inc. v. Software & Info. Indus. Ass'n (CD Cal 2000) 208 F Supp2d 1058, 1067* (opinions or impressions of state of mind of another person are inadmissible hearsay); *but see Orsini v. O/S Seabrooke O.N. (9th Cir 2001) 247 F3d 953, 960* (statements by other crew members recited in injured seaman's affidavit in Jones Act suit were not inadmissible hearsay because statements were relevant to seaman's state of mind)];

- Conclusory allegations not supported by facts [*see, e.g., Reiffin v. Microsoft Corp. (ND Cal 2003) 270 F Supp2d 1132, 1145-1146* (legal conclusions)];

- Allegations of ultimate facts [*see Hansen v. United States (9th Cir 1993) 7 F3d 137, 138* ; *River Colony Estates Gen. P'ship v. Bayview Fin. Trading Group, Inc. (SD Cal 2003) 287 F Supp2d 1213, 1220*]; and

- Speculatory statements [*see Seagate Tech., Inc. v. St. Paul Fire & Marine Ins. Co. (ND Cal 1998)*

11 F Supp2d 1150, 1153].

Cross Reference:

Discussion of use of declarations in support of summary judgment motions in lieu of affidavits, see *§ 29.11[2]*.

29.11[6] Affidavit Must Show Affiant Is Competent to Testify to Matters in Affidavit. An affidavit supporting a motion for summary judgment must affirmatively show that the affiant is competent to testify to the matters stated in the affidavit [*see Fed R Civ P 56(e)*]. The court may infer competence to testify from the affidavit itself. For instance, affiants' competence reasonably may be inferred from their position and the nature of their participation in the matters on which they swear [*see Barthelemy v. Air Lines Pilots Ass'n (9th Cir 1990) 897 F2d 999, 1018*].

Warning:

Counsel should exercise caution in attaching affidavits in support of a client's motion for summary judgment. Attorney affidavits also must meet the requirements of *Fed R Civ P 56(e)* [*see, e.g., Inamed Corp. v. Kuzmak (CD Cal 2002) 275 F Supp2d 1100, 1116-1117 , aff'd mem., 2003 US App LEXIS 9535 (Fed Cir 2003)*]. Accordingly, such affidavits are insufficient unless based on personal knowledge on which the attorney is competent to testify [*see Fed R Civ P 56(e)*]. Typically, attorneys have personal knowledge only of matters occurring immediately before or during litigation. They are not competent to testify on matters occurring before becoming involved with the case. Moreover, an attorney may not acquire personal knowledge based on hearsay from clients or others [*see, e.g., Sea-Land Serv., Inc. v. Atlantic Pac. Int'l, Inc. (D Haw 1999) 61 F Supp2d 1102, 1110* (court disregarded information taken from website and inserted in counsel's summary judgment affidavit because counsel lacked personal knowledge of matters, which were impermissible hearsay)]. Attorney affidavits or declarations have other, practical risks. For example, attorneys must take care to avoid waiving attorney-client privilege or work product in statements made in affidavits or declarations.

29.11[7] Attach, File, and Serve Sworn or Certified Copies of All Papers Referred to in Affidavit. Attach for filing and serve with the affidavit sworn or certified copies of all papers referred to in the affidavit [*see Fed R Civ P 56(e)*]. The trial court may exclude an affidavit that cites documentary evidence as a source of a factual contention without attaching the document [*see School Dist. No. 1J v. AC&S, Inc. (9th Cir 1993) 5 F3d 1255, 1262 , cert. denied, 512 US 1236 (1994)*]. Local rules also may require copies of documentary evidence submitted in support of the motion to be served and filed with the motion or notice of motion [*see, e.g., SD Cal Civ LR 7.1(f.2.a)*; *ED Cal Civ LR 260(a)* (filing required)].

Warning:

Though papers attached to motions for summary judgment need not be in a form that is admissible in evidence [*Celotex Corp. v. Catrett (1986) 477 US 317, 324, 106 S Ct 2548, 91 L Ed2d 265* ; *Curnow v. Ridgecrest Police (9th Cir 1991) 952 F2d 321, 323 , cert. denied, 506 US 972 (1992)*], the evidence contained in the papers must be admissible for the court to properly consider the papers in determining the summary judgment motion [*see Fed R Civ P 56(e)*].

Cross References:

Admissibility requirements in connection with evidence submitted in support of motion, see *§ 29.12[3]*.

Discussion of supporting materials introduced by or affixed to affidavit, see 11 Moore's Federal Practice, *§ 56.10[4][c]* (Matthew Bender 3d ed.).

29.11[8] Affidavits Made in Bad Faith or for Delay Are Subject to Sanction. If it appears to the court that a

party has presented an affidavit under *Fed R Civ P 56* in bad faith or solely for the purpose of delay, the court must order sanctions against the party employing the offending affidavit. The court may order the guilty party to pay reasonable expenses incurred by the other party as a result of filing the affidavit, including reasonable attorney fees. The court may also adjudge an offending party or attorney guilty of contempt and require them to pay damages [*see Fed R Civ P 56*]. In addition to, or in lieu of, imposing monetary sanctions, the court may order the offending affidavit stricken [*see, e.g., Langlois v. Deja Vu, Inc. (WD Wash 1997) 984 F Supp 1327, 1339, n7* (trial court struck offending affidavit in large part but refused to order costs and fees because it could not conclude that counsel intentionally made inaccuracies or that affidavit was made solely to delay proceedings)].

29.11[9] Properly Format Affidavit or Declaration. The rules applicable to formatting of motion papers generally also apply to affidavits supporting motions for summary judgment [*see Fed R Civ P 7(b)*]. To be valid, a declaration must be made in a dated writing in substantially the form set forth in *28 USC § 1746*. It also must be signed by the declarant, who must declare under penalty of perjury that its contents are true [*see 28 USC § 1746*].

Cross References:

Discussion of affidavits and declarations generally, see Ch. 26, Pretrial Motion Practice, see *§ 26.21*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsAffidavits

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California
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II. PREPARING MOTION FOR SUMMARY JUDGMENT

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29.12 Attach Other Evidence Supporting Summary Judgment Motion.

29.12[1] Attach Evidence Supporting Summary Judgment. To meet its initial burden of showing it is entitled to summary judgment, the moving party must inform the district court of the basis for its motion, and must identify the portions of the record supporting the assertion that there is no triable issue of fact [*Celotex Corp. v. Catrett (1986) 477 US 317, 323, 106 S Ct 2548, 91 L Ed2d 265* ; *see Fed R Civ P 56(c)(2)*]. In making this showing, the movant may rely on the following evidence, which the court must consider in determining whether there is a genuine issue of material fact [*see Fed R Civ P 56(c)(2)*]:

- Pleadings;
- Depositions;
- Answers to interrogatories;
- Admissions on file; and
- Affidavits, if any.

Omitted from this list is documentary evidence obtained through discovery. Nevertheless, courts routinely consider such documents in determining summary judgment motions [*see, e.g., Fraser v. Goodale (9th Cir 2003) 342 F3d 1032, 1036 , cert. denied sub nom. United States Bancorp v. Fraser, 541 US 937 (2004)* (trial court could properly consider diary attached to nonmoving party's deposition); *Los Angeles News Serv. v. CBS Broad., Inc. (9th Cir 2002) 305 F3d 924, 935 , amended by* 313 F3d 1093 (2002) (per curiam) (trial court could properly consider videotape in support of summary judgment motion); *Snead v. Metropolitan Prop. & Cas. Ins. Co. (9th Cir 2001) 237 F3d 1080, 1089 , cert. denied, 534 US 888 (2001)* (court considered physicians' notes and letters in determining summary judgment motion in discrimination suit based on disability)].

Strategic Point--Movant:

Consider compiling a "chambers copy" of the portions of the record filed with the motion that counsel wants the judge to review in determining the summary judgment motion, especially when the evidence filed with the motion is voluminous. The chambers copy is separate from the official copy of the evidence filed with the motion. The chambers copy should include a table of contents and index tabs to assist the court in locating the documents referred to in the motion. It should also contain locator information assisting the judge in finding the document in the official court records.

Cross References:

Discussion of general admissibility requirements for evidence supporting summary judgment motion, see *§ 29.12[3].*

Discussion of discovery documents relevant to summary judgment motion, see 11 Moore's Federal Practice, *§ 56.10[4][c][iii]* (Matthew Bender 3d ed.).

29.12[2] Required Evidentiary Showing on Motion Depends on Burden of Persuasion at Trial. Rule 56 imposes a burden of production on the moving party. This requires an initial showing that the moving party is entitled to summary judgment [*see Celotex Corp. v. Catrett (1986) 477 US 317, 323, 106 S Ct 2548, 91 L Ed2d 265* ; *Nissan Fire & Marine Ins. Co. v. Fritz Cos. (9th Cir 2000) 210 F3d 1099, 1102*]. The manner in which the moving party may make this showing depends on which party bears the burden of persuasion at trial on the challenged claim [*see Celotex Corp. v. Catrett (1986) 477 US 317, 327, 106 S Ct 2548, 91 L Ed2d 265* (Brennan, J., dissenting)].

If the moving party bears the burden of persuasion at trial, that party must support its motion with credible evidence showing there is no genuine issue of material fact and that it is entitled to judgment as a matter of law [*see Fed R Civ P 56(c)(2)*; *Wilborn v. Ashcroft (SD Cal 2002) 222 F Supp 2d 1192, 1197 , aff'd mem., 2003 US App LEXIS 15117 (9th Cir 2003)* ; *Nixon-Egli Equip. Co. v. John A. Alexander Co. (CD Cal 1996) 949 F Supp 1435, 1441*].

In contrast, if the *nonmoving* party has the burden of persuasion at trial on a dispositive issue, the moving party may satisfy its initial burden on the motion in one of two ways. The moving party may either (1) submit affirmative evidence negating an essential element of the nonmoving party's claim; or (2) demonstrate that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim [*Nissan Fire & Marine Ins. Co. v. Fritz Cos. (9th Cir 2000) 210 F3d 1099, 1102*]. If the nonmoving party is unable to muster sufficient evidence to make out its claim, trial would be useless, and the moving party is entitled to summary judgment as a matter of law [*see Celotex Corp. v. Catrett (1986) 477 US 317, 322, 327, 106 S Ct 2548, 91 L Ed2d 265*].

Cross References:

Discussion of court's application of burden of proof, see *29.29[1].*

Discussion of burdens of production and persuasion on summary judgment motion, see 11 Moore's Federal Practice, *§ 56.13* (Matthew Bender 3d ed.).

29.12[3] Evidence Must Be Admissible. In ruling on a motion for summary judgment, trial courts may consider only admissible evidence [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 773* ; *see Fed R Civ P 56(e)*]. Thus, supporting evidence attached to a summary judgment motion must be admissible before the court may consider it [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 773*].

Distinguish:

At the summary judgment stage, the trial court does not focus on the admissibility of the *form* in which

the evidence is offered. Instead, the court focuses on the admissibility of its *contents*. If the contents of the evidence offered could be presented in an admissible form at trial, the court may consider the evidence in determining the summary judgment motion [*see Fraser v. Goodale (9th Cir 2003) 342 F3d 1032, 1036-1037 , cert. denied sub nom. United States Bancorp v. Fraser, 541 US 937 (2004)* (plaintiff's diary)].

As part of the admissibility requirement, evidence must be based on personal knowledge and must set forth facts that are otherwise admissible in evidence [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 773-774* ; *see Fed R Civ P 56(e)*]. In addition, such evidence must be properly authenticated [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 774* ; *see Fed R Evid 901*, *902*]. The trial court may not consider unauthenticated documents in ruling on motions for summary judgment [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 773* ; *see Fed R Civ P 56(e)*; *Fed R Evid 901*, *902*]. A party may satisfy the authentication requirement with evidence sufficient to support a finding that the matter in question is what its proponent claims [*Fed R Evid 901(a)*]. This foundation need not be established through personal knowledge, but may be established in any matter permitted by the Federal Rules of Evidence [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 774 n8* ; *see Fed R Evid 901(b)* (methods of authentication); *Fed R Evid 902* (self-authenticating documents need no extrinsic foundation)].

Example:

Documents authenticated through personal knowledge must be authenticated by a person through whom they could be admitted into evidence [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 773-774*]. This can be accomplished by attaching the documents to an affidavit or declaration meeting the requirements of *Fed R Civ P 56(e)*. The affiant or declarant must be a person through whom the exhibits could be admitted into evidence, such as a witness who wrote, signed, or used the document, or who saw others do so [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 773-774* ; *see Fed R Evid 901(b)(1)*].

Strategic Point--Opposing Party:

On receiving the motion papers, carefully review the evidence relied on by the movant. File and serve written objections to any evidence that is inadmissible, is not properly authenticated, or would otherwise be improperly considered in ruling on the motion. During the hearing on the motion, request and obtain the court's ruling on each objection.

Cross References:

Discussion of authentication requirement and depositions, see *§ 29.12[4][b]*. Discussion of requirements imposed on affidavits under *Fed R Civ P 56(e)*, see *§ 29.11[3]*. Discussion of objections to movant's evidence, see *§ 29.18*. Discussion of hearing on motion, see *§ 29.28*.

Further discussion of admissibility requirement, see 11 Moore's Federal Practice, *§ 56.14[1][d]* (Matthew Bender 3d ed.).

29.12[4] Types of Evidence Court May Consider.

29.12[4][a] Attach Pleadings As Relevant. Pleadings are included in the list of materials the trial court must consider in determining whether to grant a summary judgment motion [*see Fed R Civ P 56(c)(2)*]. However, pleadings generally are not "proof" for summary judgment purposes [*see McGuire v. CBS, Inc. (9th Cir 1968) 399 F2d 902, 906* (*Fed R Civ P 56(e)* precludes using pleadings as evidence of probative value to create issue for trial); *Benson v. Long Term Disability Income Plan for Employees of Xerox (CD Cal 1999) 108 F Supp2d 1074, 1079 n2 , aff'd mem., 242 F3d 380 (9th Cir 2000)* (allegations in complaint are not evidence and cannot defeat summary judgment motion)]. Rather, the pleadings serve as a basis for framing the issues in the case. However, a statement in a complaint, which is a

judicial admission binding on the plaintiff [*see American Title Ins. Co. v. Lacelaw Corp. (9th Cir 1988) 861 F2d 224, 226*], can be used by the defendant to establish the lack of a material issue of fact [*see, e.g., Matthews v. Xerox Corp. (SD Cal 2004) 319 F Supp2d 1166, 1171-1173*].

Distinguish:

A verified complaint may be used as an opposing affidavit under *Fed R Civ P 56*. However, to function as an opposing affidavit, the verified complaint must be based on personal knowledge and must set forth specific facts admissible in evidence [*Schroeder v. McDonald (9th Cir 1995) 55 F3d 454, 460* ; *see Fed R Civ P 56(e)*].

Cross Reference:

Further discussion of use of verified complaint as affidavit in opposition to motion for summary judgment, see *§ 29.17[3][b]*.

29.12[4][b] Attach Deposition or Excerpts As Relevant. Sworn deposition testimony may be used by a party in moving for summary judgment. The court considers such testimony as an affidavit under *Fed R Civ P 56(e)*. A movant may use deposition testimony to support its summary judgment motion if it is made on personal knowledge and sets forth facts that are admissible in evidence [*Gulf USA Corp. v. Federal Ins. Co. (9th Cir 2001) 259 F3d 1049, 1056* ; *see Fed R Civ P 56(e)*]. Deposition testimony taken in a separate proceeding may also be considered if it meets these requirements [*Gulf USA Corp. v. Federal Ins. Co. (9th Cir 2001) 259 F3d 1049, 1056*].

A party may authenticate a deposition or a deposition extract in a motion for summary judgment by identifying the names of the deponent and of the action and including the reporter's certification that the deposition is a true record of the testimony of the deponent [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 774* ; *see Fed R Evid 901(b)*; *Fed R Civ P 56(e), 30(f)(1)*]. If the movant attaches a deposition excerpt to the motion, authentication may be accomplished by attaching the cover page of the deposition and the reporter's certification [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 774*].

Warning:

It is not sufficient for a party merely to submit an affidavit from counsel identifying the names of the deponent, the reporter, and the action, with a statement that the deposition is a true and correct copy. Such an affidavit lacks foundation even if the affiant-counsel was present at the deposition [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 774*].

Drawback:

A party who designates and appends a portion of a deposition to a summary judgment motion should be aware that the court may consider only the attached portion in ruling on the motion. The court may not consider the remainder of the transcript unless it is also filed with the motion [*see Carmen v. San Francisco Unified Sch. Dist. (9th Cir 2001) 237 F3d 1026, 1029-1031* (district court is not required to comb through complete record in considering motion for summary judgment)]. Furthermore, a deposition that is not filed with the trial court may not be considered part of the record in any subsequent appeal [*see Barcamerica Int'l USA Trust v. Tyfield Imps., Inc. (9th Cir 2002) 289 F3d 589, 594* (though movant filed portions of depositions with summary judgment motion, portion to which nonmovant objected was merely "lodged" with trial court and was not part of appellate record)].

Strategic Point:

Rather than submit a heavily excerpted deposition that does not provide the court with the context of the statements, submit the complete deposition with relevant portions highlighted. In addition, file important

depositions with the court clerk. If counsel provides a "chambers copy" of the transcript, it could contain only the relevant portions, noting that the full transcript is already filed with the clerk. The edited "chambers copy" would save the judge from having to search a voluminous transcript.

Cross Reference:

Using deposition evidence in summary judgment motion, see 11 Moore's Federal Practice, *§ 56.14[2][a]* (Matthew Bender 3d ed.).

29.12[4][c] Attach Answers to Interrogatories As Relevant. A movant may attach answers to interrogatories to a motion for summary judgment to show there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law [*see*]. As with depositions and other evidence submitted in support of a summary judgment motion, interrogatory answers must be appropriately authenticated by an affidavit or declaration *see* [*Fed R Civ P 56(e)(1)*; *Republic W. Ins. Co. v. Fireman's Fund Ins. Co. (ND Cal 2003) 241 F Supp2d 1090, 1095-1096* ; *see Fed R Civ P 56(e)*].

Cross Reference:

Using interrogatories in summary judgment motion, see 11 Moore's Federal Practice, *§ 56.14[2][b]* (Matthew Bender 3d ed.).

29.12[4][d] Attach Admissions on File As Relevant. A movant may attach to a motion for summary judgment any admissions on file with the court to show there is no genuine issue as to a material fact and that summary judgment is proper as a matter of law [*see Fed R Civ P 56(e)(1)*]. As with depositions and other evidence submitted in support of a summary judgment motion, admissions must be appropriately authenticated by an affidavit or declaration [*see Fed R Civ P 56(e)(1)*; *Republic W. Ins. Co. v. Fireman's Fund Ins. Co. (ND Cal 2003) 241 F Supp2d 1090, 1095-1096*].

Strategic Point:

A motion for summary judgment may rely on default admissions resulting from the opponent's failure to answer requests for admission. No prior motion to establish the admissions is necessary because *Fed R Civ P 36* is "self-executing" [*see Switchmusic.com, Inc. v. U.S. Music Corp. (CD Cal 2006) 416 F Supp2d 812, 817* ; *Cook v. Allstate Ins. Co. (CD Cal 2004) 337 F Supp2d 1206, 1210*].

Cross Reference:

Discussion of using admissions in summary judgment motion, see 11 Moore's Federal Practice, *§ 56.14[2][d]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsAffidavitsCivil ProcedureSummary JudgmentSupporting MaterialsDiscovery Materials

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29.13 Timely Serve and File Motion.

29.13[1] Timely Serve Motion on Opposing Party. Before its amendment in December 2009, Rule 56(c) specifically required 10 days' notice for any summary judgment. The post-2009 version of Rule 56 eliminates any reference to minimum notice of summary judgment motions and replaces the pre-2009 minimum notice provisions with specific deadlines for responding to summary judgment motions [*see Fed R Civ P 56(c)(1)*]. Therefore, the direct basis for court rulings that minimum notice is required for a valid summary judgment has disappeared. The only authority remaining in the Federal Rules of Civil Procedure regarding minimum notice of summary judgment motions is:

- The default provisions of *Fed R Civ P 6*, which state that, in the absence of a local rule or court order to the contrary, a party making a written motion must serve notice of that motion at least 14 days before the hearing [*Fed R Civ P 6(c)(1)*]. Three days must be added to the 14-day time period if the moving party serves the motion or notice of motion by mail, serves the court clerk, or perfects service by electronic or another delivery method [*see Fed R Civ P 6(d), 5(b)(2)(C)-(F)*]. A certificate of service must be included in the papers filed with the court [*see Fed R Civ P 5(d)(1)*]. The district court has discretion to enlarge the 14-day period, for good cause shown, on request by a party made before the original 14-day period has expired. The court may also enlarge the 14-day period after its expiration, on a motion showing excusable neglect [see *Fed R Civ P 6(b)(1)*].

- The provisions of *Fed R Civ P 12(d)*, which require a court to convert a Rule 12 motion to a summary judgment motion whenever a party to the motion presents matter outside of the pleading to the court and the court decides not to exclude considering it [*Fed R Civ P 12(d)*]. In these circumstances, the court must give the parties some kind of minimum notice before converting the motion and ruling on it as if it were a summary judgment motion. The court must give the parties "a reasonable opportunity to present all the material that is pertinent to the motion" [*Fed R Civ P 12(d)*].

Warning:

In practice, California district courts may require a longer period in their local rules. It is critical to comply with those rules, as well as the judge's standing orders.

Cross References:

Timing of summary judgment motions, see *§ 29.06*. Further discussion of serving motions papers generally, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.18*. Discussion of motion practice in general, see Ch. 26, Pretrial Motion Practice, see *§ 26.12* et seq.

Cross Reference:

Discussion of computing time to serve motions generally, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.18[3]*.

29.13[2] Timely File Motion With Court.

29.13[2][a] Movant Must File Motion Within Reasonable Time After Service. A party serving a motion or notice of motion for summary judgment on an opposing party also must file the motion or notice, and supporting papers and documents, with the court within a reasonable time after service [*see Fed R Civ P 5(d)(1)*]. The movant must also file with the court a certificate of service [*see Fed R Civ P 5(d)(1)*]. In general, filing with the court is accomplished by filing the motion papers with the court clerk [*see Fed R Civ P 5(e)*].

Consider:

The deadline for filing motions for summary judgment may be set by the district court in a case management order [*see, e.g., Fredenburg v. Contra Costa County Dep't of Health Servs. (9th Cir 1999) 172 F3d 1176, 1180, n5*]. Counsel should therefore take notice of and abide by any deadline in the case management order.

Cross Reference:

Discussion of filing motions generally, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.25*.

29.13[2][b] Counsel May Be Required to Confer Before Filing Motion. In some district courts, counsel must confer with the opposing party before serving and filing a motion for summary judgment. Counsel should therefore become familiar with and should follow the local rules in the relevant district. Conferring in advance of filing a summary judgment motion is always good practice, even when not required. It may eliminate the need for a motion on some issues or, at the very least, lead to a stipulation as to which facts are and are not disputed.

Example:

In the Central District, counsel contemplating filing a motion for summary judgment must first contact opposing counsel to discuss the substance of the contemplated motion and any potential resolution. The conference must take place at least ten days before the movant files the motion. If the parties fail to reach a resolution eliminating a need for the motion, counsel for the movant must include in the notice of motion a statement that the motion follows a conference of counsel, and the date on which the conference took place [*see CD Cal Civ LR 7-3*].

29.13[3] LOCAL PRACTICE: Additional Service and Filing Requirements.

29.13[3][a] LOCAL PRACTICE: ED Cal Requirements. In the Eastern District, a motion for summary judgment will be set for hearing on the motion calendar no less than 28 days after the movant serves and files the motion [*ED Cal Civ LR 230(b)*].

Cross Reference:

Discussion of time for filing motions generally, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.18[3]*.

29.13[3][b] LOCAL PRACTICE: ND Cal Requirements. Typically, a motion for summary judgment in the Northern District must be filed, served, and noticed for hearing on the motion calendar of the assigned judge no less than 35 days after service of the motion [*see* ND Cal Civ LR *7-2(a)*].

29.13[3][c] LOCAL PRACTICE: SD Cal Requirements. A moving party in the Southern District generally must file a notice of motion and all supporting documents at least 28 days before the date for which the matter is noticed for hearing [*see SD Cal Civ LR 7.1(e.1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentTime LimitationsGovernmentsCourtsRule Application & Interpretation

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29.14 CHECKLISTS: Responding to Motion for Summary Judgment.

29.14[1] CHECKLIST: Preparing Opposition to Summary Judgment Motion.

☐ Draft opposition to motion for summary judgment.

○ When properly supported motion shifts burden to nonmovant to go beyond pleadings in opposing summary judgment, respond with affidavits or other evidence setting forth specific facts showing genuine issue for trial.

○ Include in opposition papers evidentiary materials, such as:

☐ Pleadings;

☐ Depositions;

☐ Answers to interrogatories;

☐ Admissions on file; and

☐ Any affidavits.

○ Submit evidence of sufficient caliber or quantity to allow rational trier of fact to produce a verdict in nonmovant's favor.

- Ensure that material establishing genuine issue of fact appears in both opposition to motion and in district court file.

- Focus court's attention on specific admissible facts in pleadings and other evidentiary records demonstrating genuine issue of material fact by:

  - [ ] Filing statement of genuine, disputed, or controverted facts with court, if permitted, with cites to documentary sources for facts.

  - [ ] Attaching sworn or certified copies of documents referred to in opposition.

  - [ ] Ensuring documents referred to in opposition are filed with court as part of record.

- [ ] For typical opposition papers, consider including:

  - Affidavits, declarations, and other evidence in opposition to motion;

  - Brief or memorandum of points and authorities in opposition;

  - Any objections to movant's evidence;

  - Proposed order denying summary judgment; and

  - Motion for continuance to conduct further discovery if appropriate.

- [ ] Serve and file according to applicable local rules:

  - **Central District:**

    - [ ] Evidence on which opposing party relies in opposing motion;

    - [ ] Brief, but complete, memorandum containing reasons for opposing motion, and points and authorities on which nonmovant relies; and

    - [ ] Statement of genuine issues setting forth material facts to be litigated.

  - **Eastern District:**

    - [ ] Response to movant's statement of undisputed facts;

- ☐ Separate statement of disputed facts;
- ☐ Brief or memorandum of points and authorities;
- ☐ Proposed order; and
- ☐ Any evidence in opposition to motion.

○ **Northern District:**

- ☐ Affidavits or declarations in opposition to motion;
- ☐ Brief or memorandum; and
- ☐ Proposed order.
- ☐ Statements of disputed fact only if required by assigned judge.

○ **Southern District:**

- ☐ Brief, but complete, statement of reasons in opposition to motion;
- ☐ Answering memorandum of points and authorities; and
- ☐ Copies of all documentary evidence on which nonmovant relies.

☐ Request oral argument or hearing on motion if desired by indicating request on title page of opposition papers.

Authority:
Fed R Civ P 56(c), (e), (f); *CD Cal Civ LR 7-9, 56-2*; *ED Cal Civ LR 230(c), (g)*, 260(b); *ND Cal Civ LR 7-3(a), 7-4*; *SD Cal Civ LR 7.1(d.1), (f.3.c)*

Discussion:
See *§§ 29.16[1] -[4], [8]*

Forms:
See *§§ 29.46 -29.49*

☐ Draft and attach statement of genuine issues, or statement of disputed or controverted facts, as required by local rule.

○ **Central District:** Serve and file "Statement of Genuine Issues" with opposing papers that:

☐ Is contained in separate document;

☐ Concisely sets forth all material facts nonmovant contends are genuine issues necessitating litigation; and

☐ Responds to and controverts movant's factual statements with admissible evidence filed with opposition to motion.

○ **Eastern District:**

☐ Reproduce facts listed in movant's statement of undisputed facts;

☐ Admit any undisputed facts; and

☐ Deny any disputed facts, and include citation to particular evidence relied on in support of denial.

☐ If desired, file concise "Statement of Disputed Facts" including all additional material facts about which nonmovant contends there is genuine issue precluding summary judgment or adjudication, with sources in record.

☐ File with court all evidentiary documents cited in opposition to motion.

○ **Northern District:** Submit separate or joint statements of undisputed facts only if required by assigned judge.

○ **Southern District:** File and serve statement of reasons in opposition to motion.

Authority:
CD Cal Civ LR 56-2, *56-3*, *56-4*; *ED Cal Civ LR 260(b)*; *ND Cal Civ LR 56-1*; *SD Cal Civ LR 7.1(f.3.b)*

Discussion:
See *§ 29.16[5]*

Forms:
See *§ 29.48*

☐ Draft and attach brief or memorandum of points and authorities, as required by local rule.

○ **Central District:** File and serve memorandum or brief in opposition (mandatory).

○ **Other districts:** File and serve memorandum or brief in opposition (optional).

☐ Properly format brief or memorandum:

- ○ Follow rules applicable to opposition papers generally.
- ○ Consult local rules for additional requirements.

Authority:
Fed R Civ P 7(b), *56*; *CD Cal Civ LR 7-9*; *ND Cal Civ LR 7-4*

Discussion:
See *§ 29.16[6]*

Forms:
See *§ 29.47*

☐ Determine whether to draft and attach proposed order.

Authority:
Fed R Civ P 7(b), *56*; *ND Cal Civ LR 7-4*

Discussion:
See *§ 29.16[7]*

Forms:
See *§ 29.49*

☐ Compile and attach admissible evidence in opposition to motion demonstrating that:

- ○ Fact in contention is material, in that it may affect outcome of suit under governing law; and
- ○ Dispute is genuine, in that reasonable jury considering evidence could return verdict for nonmoving party.

☐ Draft and attach affidavits or declarations in opposition to motion that:

- ○ Are made on personal knowledge;
- ○ Set forth facts that would be admissible in evidence; and
- ○ Affirmatively show affiant is competent to testify to matters stated in affidavit.

☐ Attach for service sworn or certified copies of all papers referred to in affidavit.

☐ Seek continuance or other just order when lacking facts to oppose motion.

○ Submit affidavits indicating why movant cannot present facts essential to justify opposition to summary judgment motion; or

○ As a safer alternative, make timely motion for continuance, identifying relevant information sought and basis for believing information sought actually exists.

☐ Attach other evidence opposing motion, including:

○ Pleadings;

○ Depositions;

○ Answers to interrogatories;

○ Admissions on file; and

○ Documentary evidence obtained through discovery.

Authority:
28 USC § 1746; *Fed R Civ P 56(c), (e), (f)*; *Fed R Evid 101*

Discussion:
See *§ 29.17*

Form:
See *§ 29.46*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

29.14[2] CHECKLIST: Preparing Objections to Movant's Evidence.

☐ File written objections to admissibility of movant's evidence submitted in support of summary judgment motion, or motion to strike evidence if time permits.

☐ Include in written objections:

○ Specific ground for objection;

○ Location of evidence objected to, including page and line numbers when possible, in movant's documents or in court's records; and

○ Brief argument supporting each objection, with citation of relevant authority.

☐ Object to evidence submitted in support of summary judgment:

○ Preferably before hearing on motion.

○ At hearing if unavoidable, but ask court for permission to file memorandum supporting objection after hearing.

Authority:
Fed R Evid 103(a)(1); *SD Cal Civ LR 7.1(e.1)*

Discussion:
See *§ 29.18*

29.14[3] CHECKLIST: Moving for Continuance to Permit Further Discovery.

☐ Make timely motion for continuance:

○ Pointing to specific information that would be revealed by further discovery;

○ Showing that evidence sought actually exists;

○ Explaining relevance of evidence to case;

○ Explaining how discovery of evidence would counter summary judgment motion; and

○ Detailing nonmovant's efforts to pursue discovery diligently before seeking continuance.

☐ Set forth facts supporting motion in accompanying affidavit.

☐ Timely file and serve motion for continuance before summary judgment hearing, as directed by rules governing filing and service of motions generally.

☐ Satisfy movant's burden by offering sufficient facts showing that evidence sought exists and that it would prevent summary judgment.

Authority:
Fed R Civ P 5, 6, 56(f)

Discussion:
See *§ 29.19*

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*

29.14[4] CHECKLIST: Filing and Serving Opposition Papers.

☐ Timely file opposition papers with court as required by applicable local rules.

○ **Central District:** File and serve opposition no less than 14 days before date designated for hearing of motion.

○ **Eastern District:** File opposition with court clerk no less than 14 days preceding noticed or continued hearing date.

○ **Northern District:** Serve and file opposition no less than 21 days before hearing date.

○ **Southern District:** Serve and file opposition no later than 14 calendar days prior to noticed hearing.

☐ Properly serve opposition papers on opposing party.

○ Serve opposition materials on moving party prior to hearing on motion.

○ Serve opposition materials in manner dictated by federal rules generally.

☐ Properly file opposition papers with court.

○ File within reasonable time after service.

○ File with court by filing opposition papers with court clerk.

○ File certificate of service with court.

☐ Consult local rules for additional service or filing requirements.

Authority:
Fed R Civ P 5(b), (d)(1), 56(c), (f); *CD Cal Civ LR 7-9, 7-13, 83-7*; *ED Cal Civ LR 230(c)*; *ND Cal Civ LR 7-2, 7-3*; *SD Cal Civ LR 7.1(e.2), (e.4)*

Discussion:
See *§ 29.20*

Legal Topics:

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

Civil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentOppositionSupporting MaterialsGovernmentsCourtsRule Application & Interpretation

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Unit 8 Motion Practice
CHAPTER 29 Summary Judgment
III. RESPONDING TO MOTION FOR SUMMARY JUDGMENT

4-29 MB Practice Guide: Fed Pretrial Civ Proc in CA 29.15

29.15 Options and Strategy.

When a moving party properly supports a motion for summary judgment, the nonmoving party must go beyond the pleadings to designate specific facts showing there is a genuine issue for trial [*Celotex Corp. v. Catrett (1986) 477 US 317, 322-324, 106 S Ct 2548, 91 L Ed2d 265* ; *see Fed R Civ P 56(e)(2)*]. A nonmovant must respond to the summary judgment motion by filing with the court a written opposition to the motion. Opposition papers may include a brief or memorandum of points and authorities, a statement of genuine issues or of disputed or controverted facts, and documentary evidence supporting the opposition to the motion [*see Fed R Civ P 56(c), (e)*].

To avoid summary judgment, the evidence presented by the nonmovant must be such that a reasonable trier of fact could return a verdict in the nonmovant's favor [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 248-249, 106 S Ct 2505, 91 L Ed2d 202* ; *FTC v. Stefanchik (9th Cir 2009) 559 F3d 924, 929]* . A nonmovant's "bald assertions or a mere scintilla of evidence" are both insufficient to withstand summary judgment [*FTC v. Stefanchik (9th Cir 2009) 559 F3d 924, 929]* . The nonmovant may rely on evidence such as depositions, answers to interrogatories, admissions on file, and any affidavits [*see Fed R Civ P 56(c)(2)*]. The evidence submitted must be of a quality that could be admissible at trial [*Fraser v. Goodale (9th Cir 2003) 342 F3d 1032, 1036 , cert. denied sub nom. United States Bancorp v. Fraser, 541 US 937 (2004)*].

Though not required by the Federal Rules of Civil Procedure, local rules in two of the four districts in California require the nonmovant to file a statement of genuine issues or of disputed or controverted facts [*see, e.g., CD Cal Civ LR 56-2*; *ED Cal Civ LR 260(b)*]. Such statements are an important tool in the opposing party's arsenal. A thorough, well-supported statement of genuine issues, or of disputed or controverted facts, will assist the nonmoving party in making the required showing that the case presents genuine issues of material fact requiring litigation [*see CD Cal Civ LR 56-2*].

Opposition papers may also include the nonmovant's objections to the evidence relied on by the movant in support of the motion. In addition, if the nonmovant lacks sufficient information to respond to the summary judgment motion, the nonmovant may request a continuance to permit further discovery before the court rules on the motion [*see Fed R Civ P 56(f)(2)*].

Warning:

Because of the complexity of the summary judgment rule, combined with the lack of legal sophistication of pro se prisoners, a trial court must provide prisoners with notice in ordinary, understandable language of their rights and obligations under Rule 56. The court must inform pro se prisoners of their right to file counter-affidavits or other responsive evidentiary materials, and must alert them that failure to do so may result in entry of summary judgment against them [*Wyatt v. Terhune (9th Cir 2003) 315 F3d 1108, 1114* & n6, *cert. denied sub nom. Alameida v. Wyatt, 540 US 810 (2003)*].

Cross References:

Discussion of drafting opposition papers, see *§ 29.16*. Discussion of objecting to movant's evidence, see *§ 29.18*. Discussion of motions for continuance to permit further discovery, see *§ 29.19*. Forms for use in opposing summary judgment motion, see *§§ 29.46 -29.49*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofNonmovantsCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionSupporting Materials

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CHAPTER 29 Summary Judgment
III. RESPONDING TO MOTION FOR SUMMARY JUDGMENT

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29.16 Draft Opposition to Summary Judgment Motion.

29.16[1] Properly Supported Motion Shifts Burden to Nonmovant to Go Beyond Pleadings in Opposing Summary Judgment. Once a moving party properly supports a summary judgment motion with affidavits and evidence, the nonmovant may no longer rest on the allegations or denials in its pleadings. Instead, the nonmovant must respond with affidavits or other evidence setting forth specific facts showing that a genuine issue for trial exists [*Fed R Civ P 56(e)(2)*; *see Celotex Corp. v. Catrett (1986) 477 US 317, 323-324, 106 S Ct 2548, 91 L Ed2d 265* ; *Fairbank v. Wunderman Cato Johnson (9th Cir 2000) 212 F3d 528, 531*]. If the nonmovant fails to make this showing, the court should grant summary judgment if appropriate [*Fed R Civ P 56(e)(2)*].

Strategic Point--Opposing Party:

To survive summary judgment, the nonmoving party must produce evidence of sufficient caliber or quantity to allow a rational trier of fact to produce a verdict in its favor [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 254, 106 S Ct 2505, 91 L Ed2d 202*]. No genuine factual issue exists for trial when a nonmoving party rests on mere allegations or denials, or merely shows some metaphysical doubt [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp. (1986) 475 US 574, 586, 106 S Ct 1348, 89 L Ed2d 538*]. Although all reasonable inferences that may be drawn from the facts must be drawn in favor of the opposing party [*see 29.29[5][b]*], inferences "are not drawn out of the air:" the opposing party must produce the factual predicate from which an inference may be drawn [*E. J. Gallo Winery v. Andina Licores S.A. (ED Cal 2006) 440 F Supp2d 1115, 1124-1125*].

Warning:

The only ground on which a party may resist a summary judgment motion, and on which a court must deny the motion, is that the movant has failed to meet its burden of demonstrating the absence of triable issues of fact. A court may not grant summary judgment merely because there is no opposition, even when the failure to oppose violates a local rule [*Martinez v. Stanford (9th Cir 2003) 323 F3d 1178, 1182* (construing *SD Cal Civ LR 7.1(f.3.c)*)]. Similarly, a nonmovant's failure to timely file opposition

papers does not justify entry of summary judgment without regard to whether genuine issues of material fact exist [*see Cusano v. Klein (9th Cir 2001) 264 F3d 936, 950*].

Cross References:

Discussion of evidence on which opposition may rely, see *§ 29.16[2]*. Discussion of time for filing opposition, see *§ 29.20[1]*.

Discussion of nonmovant's burden, see 11 Moore's Federal Practice, *§ 56.13[2]* (Matthew Bender 3d ed.).

29.16[2] Opposition Papers Should Include Evidentiary Materials Beyond Pleadings. In opposing a properly supported motion, a nonmovant may use any of the evidentiary materials listed in *Fed R Civ P 56(c)(2)*, except the pleadings alone [*Celotex Corp. v. Catrett (1986) 477 US 317, 324, 106 S Ct 2548, 91 L Ed2d 265*]. Thus, typical opposition papers may include:

- Affidavits, declarations, and other evidence in opposition to the motion;
- A brief or memorandum of points and authorities in opposition;
- Any objections to the movant's evidence;
- A proposed order; and
- A Rule 56(f) motion for continuance to conduct further discovery if appropriate.

Local rules may impose additional requirements, such as the filing of a statement of genuine, disputed, or controverted facts [*see, e.g., CD Cal Civ LR 56-2* (statement of genuine issues)]. Counsel must therefore become familiar with the local rules in the relevant district.

Cross References:

Discussion of local requirements on opposition to summary judgment, see *§ 29.16[4]*. Discussion of statements of genuine, disputed, or controverted facts, see *§ 29.16[5]*. Discussion of attaching evidence in opposition to summary judgment motion, see *§ 29.17*. Discussion of motion for continuance for further discovery, see *§ 29.19*.

Discussion of evidence in opposition to motion for summary judgment, see 11 Moore's Federal Practice, *§ 56.13[4]* (Matthew Bender 3d ed.).

29.16[3] Materials Establishing Genuine Issue of Fact Must Appear in Both Opposition and Court File. Though there is a split among the circuits on this issue, trial courts in the Ninth Circuit do not have an obligation to search the entire case file for evidence establishing a genuine issue of fact [*compare Bias v. Moynihan (9th Cir 2007) 508 F3d 1212, 1219* (court "does not have a duty to search for evidence that would create a factual dispute"), *with Stepanischen v. Merchants Despatch Transp. Corp. (1st Cir 1983) 722 F2d 922, 930* (declining to relieve court of duty to search record; encouraging adoption of local rules to reduce burden of such searches)]. Rather, the trial court may limit its review to the documents submitted for purposes of summary judgment, and to those parts of the record specifically referenced in the summary judgment papers [*Carmen v. San Francisco Unified Sch. Dist. (9th Cir 2001) 237 F3d 1026, 1030*]. This is true even when the non-moving party is proceeding in pro se [*see Bias v. Moynihan (9th Cir 2007) 508 F3d 1212, 1219* (affirming summary judgment for defendants where pro se plaintiff "failed to present any evidence in opposition" and expressly rejecting pro se litigant's argument that district court "should have searched the entire record to discover whether there was any evidence [to] support[] her claims" because she was proceeding

without counsel)]. Accordingly, whatever establishes a genuine issue of fact must appear in both the district court file and in the party's opposition to the motion [*Carmen v. San Francisco Unified Sch. Dist. (9th Cir 2001) 237 F3d 1026, 1029*].

Exception:

When confronted with simultaneous cross-motions for summary judgment, district courts do have an independent duty to review each cross-motion and its supporting evidence to evaluate whether an issue of fact remains precluding summary judgment [*Fair Hous. Council of Riverside County, Inc. v. Riverside Two (9th Cir 2001) 249 F3d 1132, 1136-1137*].

Strategic Point--Opposing Party:

Opposition papers must focus the court's attention on specific, admissible facts in the pleadings and other evidentiary records that demonstrate a genuine issue of material fact. One way to accomplish this, as permitted under local rules, is to file a statement of genuine, disputed, or controverted facts with the court, with cites to the documentary sources for those facts. Also attach to opposition papers sworn or certified copies of the documents referred to in the opposition. Make sure those documents are filed with the court as part of the record.

Cross References:

Discussion of statements of genuine, disputed, or controverted facts, see *§ 29.16[5]*. Discussion of evidence in opposition to summary judgment motion, see *§ 29.17*. Discussion of court consideration of cross-motions for summary judgment, see *§ 29.30*.

29.16[4] LOCAL PRACTICE: Opposition Requirements May Vary.

29.16[4][a] LOCAL PRACTICE: CD Cal Requirements. A nonmovant opposing a summary judgment motion in the Central District must serve and file [*see CD Cal Civ LR 7-9*; *CD Cal Civ LR 56-2*]:

- The evidence on which the opposing party relies in opposing the motion;
- A brief but complete memorandum with the party's reasons for opposing the motion, and the points and authorities on which the nonmovant relies; and
- A statement of genuine issues setting forth material facts to be litigated.

A nonmovant choosing not to oppose the motion must file a written statement to that effect [*see CD Cal Civ LR 7-9*].

Cross References:

Discussion of time for filing and service of opposition, see *§ 29.20[1]*. Discussion of memorandum in opposition to motion, see *§ 29.16[6]*. Discussion of evidence in opposition to motion, see *§ 29.17*. Discussion of statement of genuine issues or disputed or controverted facts, see *§ 29.16[5]*.

29.16[4][b] LOCAL PRACTICE: ED Cal Requirements. A party opposing summary judgment in the Eastern District must file and serve [*see ED Cal Civ LR 230(c), 260(b)*]:

- A response to the movant's statement of undisputed facts;
- A separate statement of disputed facts;

- A brief or memorandum of points and authorities;
- A proposed order; and
- Any evidence in opposition to the motion.

However, entire depositions are not to be filed through the Case Management/Electronic Case Files (CM/ECF) docketing and filing system. If the opposition refers to a deposition, the attorney must ensure that a courtesy hard copy of the original of the entire deposition so relied on has been submitted to the clerk for use in chambers on or before the filing of the opposition. Alternatively, an electronic copy in lieu of the courtesy paper copy may be submitted by email to the judge or magistrate judge and concurrently emailed, or otherwise transmitted, to all other parties [*ED Cal Gen LR 133(j)*; *ED Cal Civ LR 260(b)*].

In the alternative, a party not opposing the motion must serve and file a statement to that effect [*see ED Cal Civ LR 230(c)*].

Cross References:

Discussion of statement of disputed facts, see *§ 29.16[5]*. Discussion of time for filing and service of opposition, see *§ 29.20[1]*. Discussion of brief or memorandum in opposition to motion, see *§ 29.16[6]*. Discussion of evidence in opposition to motion, see *§ 29.17*.

29.16[4][c] LOCAL PRACTICE: ND Cal Requirements. Opposition to summary judgment motions in the Northern District may include [*see* ND Cal Civ LR *7-3(a)*]:

- Affidavits or declarations in opposition to the motion;
- A brief or memorandum under *ND Cal Civ LR 7-4*; and
- A proposed order.

The Northern District prohibits the filing of statements of disputed fact unless required by the assigned judge [*see ND Cal Civ LR 56-1(a)*]. A nonmovant who does not oppose the motion must file a statement of nonopposition with the court within the time for filing and serving an opposition [*see ND Cal Civ LR 7-3(b)*].

Cross References:

Discussion of time for filing and service of opposition, see *§ 29.20[1]*. Discussion of memorandum or brief in opposition to motion, see *§ 29.16[6]*. Discussion of proposed order, see *29.16[7]*. Discussion of affidavits or declarations in opposition to motion, see *§ 29.17[3]*.

29.16[4][d] LOCAL PRACTICE: SD Cal Requirements. No specific rules govern oppositions to summary judgment motions in the Southern District. However, the district has promulgated rules governing oppositions to motions generally [*see SD Cal Civ LR 7.1(f.3)*]. Thus, a party opposing a motion in the Southern District must file a written opposition including [*see SD Cal Civ LR 7.1(f.3.a)*, *(f.3.b)*]:

- A brief, complete statement of all reasons in opposition to the motion;
- An answering memorandum of points and authorities; and
- Copies of all documentary evidence on which the nonmovant relies.

A nonmovant choosing not to oppose the motion must file a written statement to that effect [*see SD Cal Civ LR 7.1(f.3.a)*].

Warning:

The Southern District permits district courts to construe an opposing party's failure to file opposition papers within 14 calendar days before the hearing on a motion as consent to granting of the motion [see *SD Cal Civ LR 7.1(f.3.c)*]. However, the Ninth Circuit has rejected application of this rule in granting summary judgment solely because of a nonmovant's failure to timely file an opposition to the motion. Local rules do not excuse a moving party's affirmative duty to demonstrate entitlement to summary judgment as a matter of law [*Martinez v. Stanford (9th Cir 2003) 323 F3d 1178, 1182*].

Cross References:

Discussion of time for filing and service of opposition, see *§ 29.20[1]*. Discussion of memorandum in opposition to motion, see *§ 29.16[6]*. Discussion of evidence in opposition to motion, see *§ 29.17*.

29.16[5] Draft and Attach Statement of Genuine Issues or Disputed or Controverted Facts As Required.

29.16[5][a] Draft Statement When Permitted or Required. Though not required by the Federal Rules of Civil Procedure, local rules in two California federal districts require a party opposing a summary judgment motion to file and serve a statement of genuine issues, or of disputed or controverted facts, in response to the movant's statement of undisputed facts [*see, e.g., CD Cal Civ LR 56-2*; *ED Cal Civ LR 260(b)*].

Strategic Point--Opposing Party:

A well-drafted and supported statement of genuine issues or of disputed or controverted facts is essential in making the required showing that the case presents genuine issues of material fact requiring litigation [*see CD Cal Civ LR 56-2*]. Thus, carefully craft a statement that:

- Responds to each factual allegation in the movant's statement of undisputed or uncontroverted facts by admitting or denying the facts as stated by the movant, with explanations of any partial denials or admissions;
- Sets forth in detail any additional material facts in dispute; and
- Provides the court with necessary citations to the evidentiary record supporting those factual contentions.

Also ensure that sworn or certified copies of all documents and other paper evidence relied on in the statement are attached to the opposition papers, and that sworn or certified copies of the documents are filed with the court as part of the court's record of the case.

Cross Reference:

Local requirements regarding statements of disputed or genuine facts, see *§ 29.16[5][b]* et seq.

29.16[5][b] LOCAL PRACTICE: CD Cal Requirements. Any party opposing a summary judgment motion in the Central District must serve and file with the opposing papers a "Statement of Genuine Issues." The statement must be contained in a separate document, and must concisely set forth all material facts the nonmovant contends are genuine

issues necessitating litigation [*see CD Cal Civ LR 56-2*]. These requirements also apply to oppositions to motions for summary adjudication [*see CD Cal Civ LR 56-4*].

In determining the summary judgment motion, the trial court will assume the material facts are as claimed and adequately supported by the moving party, except to the extent that the nonmovant (1) includes the material facts in its statement of genuine issues; and (2) controverts the facts set forth in the movant's statement by declaration or other written evidence filed with the opposition to the motion [*see CD Cal Civ LR 56-3*]. Accordingly, the nonmovant's statement must contain a response to each of the movant's factual statements, and must cite admissible evidence disputing the movant's factual statements. Failure to do so may result in the court's adoption of the facts as stated in the movant's statement of uncontroverted facts [*see CD Cal Civ LR 56-3*; *Federal Ins. Co. v. Burlington N. & Santa Fe Ry. Co. (CD Cal 2003) 270 F Supp2d 1183, 1186-1187* ; *but see Cook v. Allstate Ins. Co. (CD Cal 2004) 337 F Supp2d 1206, 1211-1212* (although local rule should be followed, failure to submit statement of genuine issues as required by local rule not fatal because Federal Rules of Civil Procedure require only submission of affidavits)].

Cross References:

Discussion of movant's statement of uncontroverted facts, see *§ 29.16[5]*. Form of statement of genuine issues, see *§ 29.48*.

29.16[5][c] LOCAL PRACTICE: ED Cal Requirements. A party opposing a motion for summary judgment or summary adjudication in the Eastern District must [*see ED Cal Civ LR 260(b)*]:

- Reproduce the facts listed in the movant's statement of undisputed facts;
- Admit any undisputed facts; and
- Deny any facts it disputes, and include a citation to the particular portion of any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied on in support of the denial.

In addition, a nonmovant may file a concise "Statement of Disputed Facts," including the source in the record for the disputed facts, and all additional material facts as to which the nonmovant contends there is a genuine issue precluding summary judgment or adjudication. The nonmovant also is responsible for filing with the court all evidentiary documents cited in the opposition papers [*see ED Cal Civ LR 260(b)*].

However, entire depositions are not to be filed through the Case Management/Electronic Case Files (CM/ECF) docketing and filing system. If the opposition refers to a deposition, the attorney must ensure that a courtesy hard copy of the original of the entire deposition so relied on has been submitted to the clerk for use in chambers on or before the filing of the opposition. Alternatively, an electronic copy in lieu of the courtesy paper copy may be submitted by email to the judge or magistrate judge and concurrently emailed, or otherwise transmitted, to all other parties [*ED Cal Gen LR 133(j)*; *ED Cal Civ LR 260(b)*].

Cross References:

Discussion of movant's statement of uncontroverted facts, see *§ 29.16[5]*. Form of statement of disputed facts, see *§ 29.48*.

29.16[5][d] LOCAL PRACTICE: ND Cal Requirements. In the Northern District, the parties may not submit separate or joint statements of undisputed facts unless required by the judge [*see ND Cal Civ LR 56-1*]. It appears that this prohibition applies as well to a nonmovant's statement of disputed facts. Discussion of what facts are and are not disputed must be addressed as part of the brief.

Cross References:

Discussion of movant's statement of undisputed facts, see *§ 29.16[5]*. Form of statement of disputed facts, see *§ 29.48*.

29.16[5][e] LOCAL PRACTICE: SD Cal Requirements. The Southern District has not promulgated specific rules regarding opposition to summary judgment. However, the district does require a nonmovant to file and serve a statement of reasons in opposition to motions in general, which may serve a purpose similar to a statement of disputed or genuine fact [*see SD Cal Civ LR 7.1(f.3.b)*].

Cross Reference:

Further discussion of opposing motions in Southern District generally, see Ch. 26, Pretrial Motion Practice, see *§ 26.39[4]*.

29.16[6] Draft and Attach Memorandum of Points and Authorities As Required or Desired. Though not explicitly required by the Federal Rules of Civil Procedure [*see Fed R Civ P 56*], local rules in California may require or permit nonmovants to file a brief or memorandum of points and authorities opposing a summary judgment motion. Among the four California federal districts, only the Central District requires the filing or service of memorandum or brief in opposition [*see CD Cal Civ LR 7-9*].

Example--Central District:

No specific local rules require memoranda of points and authorities in response to summary judgment motions in the Central District. However, the district's general rules regarding opposition to motions require nonmovants opposing motions to serve and file a memorandum stating the basis for opposing the motion, with points and authorities on which the opposing party relies [*see CD Cal Civ LR 7-9*].

The rules applicable to content and formatting of motion papers generally also apply to memoranda and briefs supporting motions for summary judgment [*see Fed R Civ P 7(b)*]. In addition, local rules may also impose additional requirements [*see , e.g., ND Cal Civ LR 7-4*]. Therefore, counsel must become familiar with and must adhere to the local rules in the district in which the case is filed.

Cross References:

Form of memorandum in opposition to motion, see *§ 29.47*. Further discussion of requirements for opposition briefs or memoranda generally, see Ch. 26, Pretrial Motion Practice, see *§ 26.37*.

29.16[7] Draft and Attach Proposed Order If Desired. Neither the Federal Rules of Civil Procedure nor local rules require nonmovants to include in the opposition papers a proposed order [*see Fed R Civ P 7(b), 56*]. However, at least one district permits the inclusion of a proposed order in the opposition papers [*see ND Cal Civ LR 7-3*].

Cross References:

Discussion of attaching proposed judgment or order to motion papers, see *§ 29.10*. Form of proposed order denying motion for summary judgment, see *§ 29.49*.

29.16[8] Request Oral Argument If Desired. District courts may provide by local rule that a party desiring oral argument on a motion for summary judgment must request such argument [*Mahon v. Credit Bureau of Placer County Inc. (9th Cir 1999) 171 F3d 1197, 1200* ; *see, e.g., ED Cal Civ LR 230(g)* (oral argument on summary judgment motion permitted if requested by party or ordered by court)].

If a nonmovant requests oral argument, the trial court should not grant summary judgment motions without first holding a hearing [*Dredge Corp. v. Penny (9th Cir 1964) 338 F2d 456, 460-461* ; *Partridge v. Reich (9th Cir 1998) 141 F3d 920, 926*]. However, failure to conduct a hearing is reversible error only if there is a showing of prejudice [*Partridge v. Reich (9th Cir 1998) 141 F3d 920, 926*].

Cross References:

Further discussion of hearing on motion, see *§ 29.28*. Discussion of requests for oral argument on motions generally, see Ch. 26, Pretrial Motion Practice, see *§ 26.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofNonmovantsCivil ProcedureSummary JudgmentOppositionSupporting Materials

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29.17 Compile and Attach Evidence in Opposition to Motion.

29.17[1] Opposition Evidence Must Set Forth Specific Facts Showing Genuine Issue for Trial. The evidence tendered by the nonmovant must demonstrate that [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 248-249, 106 S Ct 2505, 91 L Ed2d 202* ; *Capizzi v. County of Placer (ED Cal 2001) 135 F Supp2d 1105, 1108*]:

- The fact in contention is material, in that it may affect the outcome of the suit under governing law; and

- The dispute is genuine, in that a reasonable jury considering the evidence could return a verdict for the nonmoving party.

To show the existence of a genuine issue, the nonmovant must present some evidence establishing each element of the claims on which the nonmovant bears the burden of proof at trial. In addition, the nonmovant must produce at least some significant probative evidence tending to support its pleadings [*Smolen v. Deloitte, Haskins & Sells (9th Cir 1990) 921 F2d 959, 963*]. A mere scintilla of evidence supporting the opposing party's position is insufficient. There must be evidence on which a jury could reasonably find for the opposing party [*see Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 252, 106 S Ct 2505, 91 L Ed2d 202*]. Merely questioning the credibility of a witness for the moving party is insufficient to create an issue of fact [*see, e.g., Bodett v. Coxcom, Inc. (9th Cir 2004) 366 F3d 736, 740 n3*].

Cross Reference:

Discussion of nonmovant's burden, see 11 *Moore's Federal Practice, § 56.13[2]* (Matthew Bender 3d ed.).

29.17[2] Opposition Evidence Must Be Admissible. The trial court may only consider admissible evidence in ruling on a motion for summary judgment [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 773* ; *see Fed R Civ P 56(e)*]. Thus, evidence opposing summary judgment must be admissible under the rules governing admission of evidence [*Hal Roach Studios, Inc. v. Richard Feiner & Co. (9th Cir 1989) 896 F2d 1542, 1550* ; *see Fed R Evid 101* (Federal Rules of Evidence apply in all proceedings before United States courts)]. Although a nonmovant need not

produce evidence in a form that would be admissible at trial, the evidence itself must be admissible for the court to consider it in deciding the motion [*see Fed R Civ P 56(e)*; *Celotex Corp. v. Catrett (1986) 477 US 317, 324, 106 S Ct 2548, 91 L Ed2d 265* ; *Curnow v. Ridgecrest Police (9th Cir 1991) 952 F2d 321, 323* , *cert. denied*, *506 US 972 (1992)*].

Cross Reference:

Discussion of court determination of motion based on admissible evidence, see *§ 29.29[4]*.

29.17[3] Draft and Attach Opposing Affidavits.

29.17[3][a] Draft and Attach Affidavits or Declarations in Opposition to Motion. A party opposing a summary judgment motion may attach affidavits or declarations in opposition to the motion [*see 28 USC § 1746*; *Fed R Civ P 56(e)(1)*]. Affidavits or declarations are not required if the opposition raises only legal arguments; but that is rarely the case. In most cases, the relevance of legal arguments depends on establishing the facts of the case. Similarly, affidavits or declarations might not be required if it is clear that the moving party failed to establish even a prima facie case for granting summary judgment. But pointing that out without reference to factual contentions might be impossibly difficult. Any factual contention raised in an opposition to the motion *must* be supported by an affidavit or declaration [*see, e.g., ND Cal Civ LR 7-5(a)*].

Cross Reference:

Discussion of affidavit requirement to support opposition to summary judgment motion, see 11 Moore's Federal Practice, *§ 56.10[8][c]* (Matthew Bender 3d ed.).

29.17[3][b] Rules Governing Supporting Affidavits Apply to Affidavits Opposing Motion. The rules applicable to affidavits supporting motions for summary judgment apply with equal force to affidavits submitted in opposition to summary judgment. Thus, opposing affidavits or declarations must [*see Fed R Civ P 56(e)(1)*]:

- Be made on personal knowledge;
- Set forth facts that would be admissible in evidence; and
- Affirmatively show that the affiant is competent to testify to the matters stated in the affidavit.

Example:

A plaintiff's verified complaint may be considered as an affidavit in opposition to summary judgment if it is based on personal knowledge and sets forth specific facts admissible in evidence [*Lopez v. Smith (9th Cir 2000) 203 F3d 1122, 1132 n14*].

In addition, the nonmovant must attach to and serve with the affidavits sworn or certified copies of all papers referred to in the affidavit [*see Fed R Civ P 56(e)(1)*].

Consider:

When a party opposing summary judgment fails to comply with the formalities of *Fed R Civ P 56(e)*, the court has discretion to deal leniently with the deficiency [School Dist. No. 1J v. *AC&S, Inc. (9th Cir 1993) 5 F3d 1255, 1261* ; *Reiffin v. Microsoft Corp. (ND Cal 2003) 270 F Supp2d 1132, 1144*]. However, the leniency does not stretch so far that Rule 56(e) becomes meaningless [*Reiffin v. Microsoft Corp. (ND Cal 2003) 270 F Supp2d 1132, 1144)*].

Most courts tend to be more lenient toward unsophisticated parties and less experienced attorneys, and particularly with pro se parties. They are inclined, generally, to be stricter with experienced attorneys

representing sophisticated clients. Courts tend to be least lenient with parties or attorneys who have a record of ignoring procedural rules.

Cross Reference:

Further discussion of affidavit requirements, see *§ 29.11*.

29.17[3][c] Nonmovant May Not Rely on Its Own Conclusory or Sham Statements in Affidavit to Create Issue of Material Fact. A nonmoving party who relies only on its own affidavits to oppose a summary judgment motion cannot create an issue of material fact by making conclusory allegations unsupported by factual data in the affidavit [*Hansen v. United States (9th Cir 1993) 7 F3d 137, 138*].

Similarly, a party may not create a genuine issue of fact sufficient to survive summary judgment by filing an affidavit flatly contradicting the party's earlier sworn testimony [*Cleveland v. Policy Mgmt. Sys. Corp. (1999) 526 US 795, 806, 119 S Ct 1597, 143 L Ed2d 966* ; *see Kennedy v. Allied Mut. Ins. Co. (9th Cir 1991) 952 F2d 262, 266*]. When faced with such statements, the trial court should require an explanation of any apparent inconsistency [*see Cleveland v. Policy Mgmt. Sys. Corp. (1999) 526 US 795, 807, 119 S Ct 1597, 143 L Ed2d 966*]. The court may refuse to consider the affidavit if, after a hearing on the issue, it finds the affidavit is "sham" testimony that flatly contradicts earlier testimony in an attempt to create an issue of fact and avoid summary judgment [*Kennedy v. Allied Mut. Ins. Co. (9th Cir 1991) 952 F2d 262, 266-267*].

Distinguish:

A nonmoving party is not precluded from elaborating on, explaining, or clarifying prior testimony elicited by opposing counsel on deposition. Minor inconsistencies resulting from an honest discrepancy, a mistake, or newly discovered evidence do not afford a basis for excluding an opposition affidavit [*Messick v. Horizon Indus. Inc. (9th Cir 1995) 62 F3d 1227, 1231*].

Cross Reference:

Further discussion of affidavit requirements, see *§ 29.11*.

29.17[3][d] Court May Grant Continuance If Affidavit Indicates Nonmovant Lacks Facts to Oppose Motion. When it appears from the nonmovant's affidavits that the party cannot present facts essential to opposing the summary judgment motion, the court may deny the motion [*Fed R Civ P 56(f)(1)*], or may order a continuance to permit affidavits to be obtained, depositions to be taken, or other discovery to be had [*Fed R Civ P 56(f)(2)*]. The court may make other just orders [*Fed R Civ P 56(f)(3)*]. To invoke *Fed R Civ P 56(f)*, the nonmovant must submit affidavits indicating why the nonmovant cannot then present facts essential to justify opposing the summary judgment motion [*see Carpenter v. Universal Star Shipping, S.A. (9th Cir 1991) 924 F2d 1539, 1547 , cert. denied, 506 US 955 (1992)*]. The party seeking a continuance must also demonstrate due diligence in pursuing discovery before the summary judgment motion [*Pfingston v. Ronan Eng'g Co. (9th Cir 2002) 284 F3d 999, 1005*].

Consider:

The safer practice is to make a timely motion for a continuance identifying the relevant information sought and the basis for believing the information sought actually exists [*see, e.g., Chance v. Pac-Tel Teletrac Inc. (9th Cir 2001) 242 F3d 1151, 1161*].

Cross References:

Further discussion of motions for continuance to permit further discovery prior to ruling on motion, see *§ 29.19*.

See also 11 Moore's Federal Practice, *§ 56.10[8]* (Matthew Bender 3d ed.).

29.17[4] Attach Other Evidence Opposing Motion. In addition to affidavits, a nonmoving party may submit with the opposition papers pleadings, depositions, answers to interrogatories, and admissions on file [*see Fed R Civ P 56(e)(1)*]. The nonmovant may also attach for the court's consideration other documentary evidence obtained through discovery [*see, e.g., Fraser v. Goodale (9th Cir 2003) 342 F3d 1032, 1036 , cert. denied sub nom. United States Bancorp v. Fraser, 541 US 937 (2004)* (diary attached to nonmoving party's deposition)].

Cross Reference:

Further discussion of evidence parties may rely on in supporting or opposing summary judgment motion, see *§ 29.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofNonmovantsCivil ProcedureSummary JudgmentOppositionSupporting MaterialsCivil ProcedureSummary JudgmentStandardsGeneral Overview

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29.18 Draft and Attach Objections to Movant's Evidence.

A trial court may only consider admissible evidence in ruling on a motion for summary judgment [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 773* ; *see Fed R Civ P 56(e)*]. A party objecting to evidence must file written objections or a motion to strike the evidence as part of its opposition papers [*see Pfingston v. Ronan Eng'g Co. (9th Cir 2002) 284 F3d 999, 1003*]. Failure to object or to move to strike the evidence may result in waiver of the evidentiary defects [*see FDIC v. New Hampshire Ins. Co. (9th Cir 1991) 953 F2d 478, 484*].

Strategic Point--Opposing Party:

Either moving to strike or objecting to the evidence preserves objections to inadmissible evidence offered by the moving party in supporting a summary judgment motion [*see Pfingston v. Ronan Eng'g Co. (9th Cir 2002) 284 F3d 999, 1003*]. However, filing objections with the opposition to the motion may be more practical than filing a motion to strike, because a motion to strike may require several weeks' notice before the court may hear the motion [*see, e.g., SD Cal Civ LR 7.1(e.1)* (motion requiring court's ruling requires minimum filing date of 28 days before the date for which matter is noticed)]. Counsel may object to evidence submitted in support of summary judgment before or at a hearing on the motion. However, the safest approach is to make written objections before the hearing by including them with the opposition papers. This permits the court to review the objections before the hearing, and preserves objections for appeal. However, counsel must consult each judge's standing orders. Some judges might impose a meet and confer requirement before the filing of objections. Counsel making an oral objection at the hearing should consider asking the court for permission to file a memorandum supporting the objection after the hearing.

Written objections should contain the following [*see Fed R Evid 103(a)(1)*]:

- The specific ground for the objection;

- The location, in the movant's documents or in the court's records, of the evidence objected to, including page and line numbers when possible; and

- A brief argument supporting each objection, with citation of relevant authority.

Strategic Point--Opposing Party:

On summary judgment, evidentiary objections to improper foundation or authentication are clearly supported by Ninth Circuit precedent, as are hearsay objections [Burch v. Regents of the Univ. of Cal. (ED Cal 2006) 433 F Supp2d 1110, 1120-1122]. However, counsel should bear in mind that "routinely rais[ing] every objection imaginable" may alienate the court [Burch v. Regents of the Univ. of Cal. (ED Cal 2006) 433 F Supp2d 1110, 1119, 1122]. For example, objections to evidence on the ground that it is irrelevant, speculative, and/or argumentative, or that it constitutes an improper legal conclusion may be superfluous in the summary judgment context. Likewise, objections as to form may be misguided [*see* Burch v. Regents of the Univ. of Cal. (ED Cal 2006) 433 F Supp2d 1110, 1119].

Cross Reference:

Discussion of hearing on objections or motion to strike, see *§ 29.28[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections

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29.19 Move for Continuance to Permit Further Discovery.

29.19[1] Move for Continuance for Further Discovery. When it appears from a nonmoving party's affidavits that the nonmovant cannot present facts essential to opposing a summary judgment motion, the court may order a continuance to permit further discovery, or may make other orders as just [*see Fed R Civ P 56(f)(2)*]. Thus, *Fed R Civ P 56(f)* provides a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence [*United States ex rel. Aflatooni v. Kitsap Physicians Serv. (9th Cir 2002) 314 F3d 995, 1000*]. A party who requires further discovery before the court rules on a summary judgment motion must make a timely application for a continuance under *Fed R Civ P 56(f)* [Employers Teamsters Local Nos. 175 & *505 Pension Trust Fund v. Clorox Co. (9th Cir 2004) 353 F3d 1125, 1129*].

Strategic Point:

When a moving party files a summary judgment motion early in the litigation, before the opposing party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant a Rule 56(f) motion fairly freely [*Burlington N. Santa Fe Ry. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation (9th Cir 2003) 323 F3d 767, 773-774* (vacating summary judgment and ordering discovery when movant brought summary judgment motion less than month after filing suit, no discovery had taken place, and court noted possible existence of documentation or witness testimony dispositive of pivotal question in suit)].

Cross Reference:

Discussion of continuance for further discovery, see 11 Moore's Federal Practice, *§ 56.10[8]* (Matthew Bender 3d ed.).

29.19[2] Motion Must Identify Information Sought and Show Its Existence. To prevail under *Fed R Civ P 56(f)*, a party opposing a motion for summary judgment must make a timely application specifically identifying relevant information, and the basis for believing that the information sought actually exists [*Employers Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co. (9th Cir 2004) 353 F3d 1125, 1129* ; *VISA Int'l Serv. Ass'n v. Bankcard*

Holders of Am. (9th Cir 1986) 784 F2d 1472, 1475]. The motion will be denied if it appears that it is only "generically relevant" [*see, e.g., Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp. (9th Cir 2008) 525 F3d 822, 827* (plaintiff failed to show how evidence was "essential" to oppose summary judgment)], or that its basis is merely speculation [*see, e.g., In re Deep Vein Thrombosis (ND Cal 2005) 356 F Supp2d 1055, 1065* (two sentences in on-line magazine article did not support contention that airplane manufacturer controlled entire production of passenger seats)]. The facts supporting the motion must be set forth in an accompanying affidavit [*United States ex rel. Afflatooni v. Kitsap Physicians Serv. (9th Cir 2002) 314 F3d 995, 1000* ; *Cook v. Allstate Ins. Co. (CD Cal 2004) 337 F Supp2d 1206, 1209*].

Strategic Point--Party Seeking Discovery:

To be successful, the motion for continuance and accompanying affidavits and proof must [*see* Employers Teamsters Local Nos. 175 & *505 Pension Trust Fund v. Clorox Co. (9th Cir 2004) 353 F3d 1125, 1129* ; *United States ex rel. Afflatooni v. Kitsap Physicians Serv. (9th Cir 2002) 314 F3d 995, 1000*]:

- Point to specific information that would be revealed by further discovery;
- Make a showing that the evidence actually exists;
- Explain the relevance of the evidence to the case;
- Explain how discovery of the evidence would counter the movant's summary judgment motion; and
- Detail the nonmovant's efforts to diligently pursue discovery before seeking the continuance.

Cross Reference:

Discussion of motion practice generally, see Ch. 26, Pretrial Motion Practice.

29.19[3] Timely File and Serve Motion for Continuance Before Summary Judgment Hearing. A Rule 56(f) motion must be brought before the summary judgment hearing [*United States ex rel. Afflatooni v. Kitsap Physicians Serv. (9th Cir 2002) 314 F3d 995, 1000*]. File the motion with the court and serve the motion on the opposing party as directed by the rules governing filing and service of motions generally [*see Fed R Civ P 5, 6*]. Failure to comply with this requirement is a proper ground for denying relief [*United States ex rel. Afflatooni v. Kitsap Physicians Serv. (9th Cir 2002) 314 F3d 995, 1000*].

Cross Reference:

Discussion of filing and service of motions generally, see Ch. 5, Formatting, Serving, and Filing Papers.

29.19[4] Show That Evidence Sought Exists and Would Prevent Summary Judgment. The burden is on the party seeking additional discovery to proffer sufficient facts showing that the evidence sought exists and that it would prevent summary judgment [*Employers Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co. (9th Cir 2004) 353 F3d 1125, 1129-1130* ; *Chance v. Pac-Tel Teletrac Inc. (9th Cir 2001) 242 F3d 1151, 1161 n6*].

Consider--Detailed Showing Is Critical:

To show the existence of the evidence sought, the motion and proffered facts should list and describe the specific information sought, and should indicate, if possible, where the evidence is located or may be found. A nonmovant seeking a continuance must also explain in detail how discovery of the specified

evidence would counter the defendants' summary judgment motion.

Example:

In an action brought by the Cheyenne Arapaho Tribes to quiet title to land originally designated as part of the reservation and later set apart as a military installation, the district court did not abuse its discretion in denying the Tribes' request for jurisdictional discovery to oppose dismissal on the ground that the claim was barred by the statute of limitation. Although the Tribes identified documents suggesting that the army intended to continue using the land for military purposes, they failed to specify how the requested discovery would alter the court's determination that the statute of limitations had long since run and extinguished their claim [*Cheyenne Arapaho Tribes of Oklahoma v. US (9th Cir 2009) 558 F3d 592, 596-597]* .

29.19[5] Trial Court's Determination of Motion Is Reviewed for Abuse of Discretion. District courts have wide latitude in controlling discovery. An appellate court will not overturn lower court rulings in the absence of a clear abuse of discretion [*United States ex rel. Afflatooni v. Kitsap Physicians Serv. (9th Cir 2002) 314 F3d 995, 1000*]. Appellate courts review the district court's decision on a Rule 56(f) motion for continuance on an abuse of discretion standard [*United States Cellular Inv. Co. of Los Angeles v. GTE Mobilnet, Inc. (9th Cir 2002) 281 F3d 929, 934*]. A district court denial of further discovery is not an abuse of discretion if the party seeking a continuance has failed to diligently pursue discovery in the past, or if that party fails to show how the information sought would preclude summary judgment [*Employers Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co. (9th Cir 2004) 353 F3d 1125, 1129* ; *Cook v. Allstate Ins. Co. (CD Cal 2004) 337 F Supp2d 1206, 1209*].

Example--Diligence:

A court might abuse its discretion in denying a motion for continuance if the party seeking the continuance had outstanding discovery requests with the cutoff date for discovery several months away. In contrast, when the trial court has already postponed ruling on the summary judgment motion for over a year to give the nonmovant time to obtain discovery, yet the nonmovant failed to do so, an appellate court may properly conclude there was a lack of diligence precluding a finding that the district court abused its discretion [*see Nidds v. Schindler Elevator Corp. (9th Cir 1996) 113 F3d 912, 921 , cert. denied, 522 US 950 (1997)*].

Cross Reference:

Further discussion of review of trial court rulings on summary judgment and accompanying motions, see *§ 29.38*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentHearingsGeneral OverviewCivil ProcedureSummary JudgmentOppositionMotions for Additional DiscoveryCivil ProcedureSummary JudgmentTime Limitations

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29.20 Properly File and Serve Opposition Papers.

29.20[1] Timely File Opposition Papers With Court.

29.20[1][a] Opposing Party Has 21 Days From Service of Motion to File Response to Motion. Unless a local rule or court order provides otherwise, a party opposing a motion for summary judgment must file its response to the summary judgment motion within 21 days after being served with the motion [*Fed R Civ P 56(c)(1)(B)*]. There is one exception: if a summary judgment motion is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is within 21 days after the motion is served, or 21 days after the responsive pleading is due, whichever is later [*Fed R Civ P 56(c)(1)(B)*; *see Fed R Civ P 56*, Committee Note of 2009].

Warning:

The Rule 56(c)(1)(B) deadline for responding to a summary judgment motion is only a default provision. The rule expressly authorizes local rules and court orders to set different deadlines for filing a response [*Fed R Civ P 56(c)(1)* ("These times apply unless a different time is set by local rule or the court orders otherwise")].

Strategic Point--Opposing Party:

To avoid the possibility of sanctions for late filing or service of opposition papers, counsel should make every effort to meet the deadlines imposed by the local rules in the district in which the case is filed.

Warning:

Parties are not permitted to file late affidavits in support of opposition to a motion for summary judgment without invoking *Fed R Civ P 56(f)* and indicating why they cannot timely file the required affidavits [*Carpenter v. Universal Star Shipping, S.A. (9th Cir 1991) 924 F2d 1539, 1547 , cert. denied, 506 US 955 (1992)*]. Reliance on the Federal Rules to contravene local rules or even a judge's standing orders is always risky and, even when permitted by law, will not be viewed with favor by the judge from whom

one is seeking a favorable ruling.

Cross References:

Discussion of motions for continuance under *Fed R Civ P 56(f)*, see *§ 29.19*.

Discussion of time for filing papers opposing summary judgment, see 11 Moore's Federal Practice, *§ 56.10[3]* (Matthew Bender 3d ed.).

29.20[1][b] LOCAL PRACTICE: CD Cal Requirements. A party opposing a summary judgment motion must file and serve its opposition to the motion in the Central District no less than 21 days before the date designated for the hearing of the motion [*see CD Cal Civ LR 7-9*]. The court may sanction a party filing an opposition to a motion noticed for hearing after the time for filing has expired [*see CD Cal Civ LR 7-13*, *83-7*].

29.20[1][c] LOCAL PRACTICE: ED Cal Requirements. An opposition to a motion must be filed with the court clerk no less than 14 days preceding the noticed or continued hearing date. Additional time must be added for service by mail or by other means [*see ED Cal Civ LR 230(c)*].

29.20[1][d] LOCAL PRACTICE: ND Cal Requirements. In general, the opposition to a motion in the Northern District must be served and filed no less than 21 days before the hearing date [*see ND Cal Civ LR 7-3(a)*].

29.20[1][e] LOCAL PRACTICE: SD Cal Requirements. In general, each party opposing a motion in the Southern District must file its opposition or statement of nonopposition with the clerk and must serve the movant or the movant's attorney no later than 14 *calendar* days prior to the noticed hearing [*SD Cal Civ LR 7.1(e.2)*]. Service of opposition papers by mail increases the amount of time required for service by three days [*see SD Cal Civ LR 7.1(e.4)*].

29.20[2] Properly Serve and File Opposition Papers. Service should be accomplished in the manner dictated by *Fed R Civ P 5(b)*.

In general, a party opposing a motion must file opposition papers with the court within a reasonable time after service on the movant and any other parties [*see Fed R Civ P 5(d)*]. The nonmovant must also file with the court a certificate of service [*see Fed R Civ P 5(d)*]. Filing with the court generally is accomplished by filing the opposition papers with the court clerk [*see Fed R Civ P 5(d)(2)*].

Local rules may impose additional service or filing requirements. Counsel must, therefore, become familiar with and adhere to the rules in the district in which the case is located.

Cross References:

Discussion of papers opposing summary judgment, see 11 Moore's Federal Practice, *§ 56.10[3][b]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionSupporting MaterialsCivil ProcedureSummary JudgmentTime LimitationsGovernmentsCourtsRule Application & Interpretation

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Unit 8 Motion Practice
CHAPTER 29 Summary Judgment
IV. REPLYING TO OPPOSITION

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29.21 CHECKLIST: Preparing Reply to Opposition to Motion for Summary Judgment.

☐ Draft reply to opposition to motion for summary judgment if desired, in accordance with *Fed R Civ P 56(c)(1)(C)*, unless a local rule or court order provides otherwise.

- ○ **Central District:** Serve and file reply memorandum and declarations or other rebuttal evidence in response to nonmovant's opposition papers.
- ○ **Eastern District:** Movant may serve and file reply to any opposition filed by responding party.
- ○ **Northern District:** Serve and file reply to opposition papers, including affidavits or declarations, and supplemental brief or memorandum.
- ○ **Southern District:** Serve and file reply memorandum in response to opposition by nonmovant.

☐ Include new material that could have been raised in moving papers only under limited circumstances, such as in response to potentially dispositive argument by nonmovant.

☐ File written objections to opposing party's evidence (or motion to strike evidence) to preserve objections, containing:

- Specific ground for objection;
- Cites to location of evidence in opposing party's documents or in court records;
- Brief argument supporting each objection; and
- Citation of relevant authority.

☐ Timely serve and file reply.

- Follow federal rules governing computation of time generally.
- Follow applicable local rules:
  - ☐ **Central District:**
    - File and serve reply no later than seven calendar days before date set for hearing motion.
    - Include Saturdays, Sundays, and holidays in calculating deadline for filing reply.

☐ **Eastern District:** Serve and file reply to any opposition filed by responding party no less than seven days preceding hearing on motion.

☐ **Northern District:** Serve and file reply no less than 14 days before hearing date for motion.

☐ **Southern District:** File and serve reply memorandum no later than seven days before date noticed for hearing.

☐ Respond to reply only if ordered to do so by trial court.

- **Central District:** File response to reply only if court issues prior written order.
- **Northern District:**
  - ☐ Once movant files reply, no additional memoranda, papers, or letters may be filed without court's approval.
  - ☐ Before noticed hearing date, counsel may serve and file statement of recent decision citing and providing copies of relevant judicial opinions published after filing of opposition or reply.

Authority:

Fed R Civ P 6, *56(e)*; *Fed R Evid 103(a)(1)*; *CD Cal Civ LR 7-10*; *ED Cal Civ LR 230(d)*; *ND Cal Civ LR 7-3*, *7-4*; *SD Cal Civ LR 7.1(e.3)*, *(h)*

Discussion:

See *§§ 29.23 -29.25*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentTime LimitationsEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsGovernmentsCourtsRule Application & Interpretation

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29.22 Options and Strategy.

Unless a local rule or court order provides otherwise, the movant may file a reply within 14 days after the response is served [*Fed R Civ P 56(c)(1)(C)*]. While an opposing party has an "obligation" to respond to a motion for summary judgment that is "properly made and supported" [*see Fed R Civ P 56(e)(2)*], the rule provides an opportunity to file a reply to a response, but sets out no obligation to do so or consequences for failing to do so [*see Fed R Civ P 56*]. Local rules in California federal districts also permit movants to file a reply brief or memorandum in response to the nonmoving party's opposition to a summary judgment motion [*see, e.g., CD Cal Civ LR 7-10*; *ED Cal Civ LR 230(d)*]. The movant's goal in filing a reply brief is to convince the court that no material issue of genuine fact exists for trial, notwithstanding the nonmovant's attempts to suggest otherwise in its opposition. The reply brief should address each of the arguments raised in the opposition. The reply may also include objections to the evidence asserted by the nonmovant in support of the opposition.

The contents of the reply depend largely on what is contained in the opposition to the motion. For example, if the nonmovant files an opposition to the movant's statement of undisputed facts, the reply should respond to each of the opposition points, with an explanation of how the opposition is incorrect on each point. If the opposing party files his or her own statement of disputed facts, the reply brief should respond by identifying how each fact listed is not relevant or material to a genuine issue in the case. If the opposition files evidence that is inadmissible, include with the reply papers objections to the evidence or a motion to strike [*see Pfingston v. Ronan Eng'g Co. (9th Cir 2002) 284 F3d 999, 1003*].

Strategic Point--Moving Party:

Even though filing reply papers is permissive, the moving party should almost always take advantage of the opportunity to respond to the nonmoving party's arguments and evidence by filing a reply.

Cross References:

Local rules governing filing of replies, see *§ 29.23*. Discussion of replies generally, see Ch. 26, Pretrial Motion Practice, see *§ 26.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofMovantsCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsGovernmentsCourtsRule Application & Interpretation

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29.23 Movant May Reply to Opposition Papers.

29.23[1] Draft, Serve, and File Reply to Opposition If Desired. *Fed R Civ P 56(c)(1)(C)* permits a moving part to file a reply to the nonmovant's opposition to the summary judgment motion. Unless a local rule or court order provides otherwise, the movant may file a reply within 14 days after the response is served [*Fed R Civ P 56(c)(1)(C)*].

Local rules in all California federal districts also permit a moving party to serve and file a reply to the nonmovant's opposition to the summary judgment motion [*see, e.g., ED Cal Civ LR 230(d)*]. Local rules may also impose specific requirements regarding the content and format of replies, and the time within which they must be served and filed [*see, e.g., ND Cal Civ LR 7-3(c)*]. Federal rules governing computation of time generally also apply in computing the time within which to file and serve a reply [*see Fed R Civ P 6*].

Strategic Point--Moving Party:

To facilitate the reply to a nonmovant's statement of undisputed facts, counsel may wish to employ a three-column format. The first column lists the undisputed facts set forth in the movant's original statement of undisputed facts. The second column lays out the points made in the opposition. The third column should demonstrate how each issue or fact remains undisputed, and should cite to the evidence in the record.

In general, a nonmovant may not respond to a reply brief or memorandum unless ordered to do so by the trial court [*see, e.g., CD Cal Civ LR 7-10*].

Cross References:

Local rules governing filing of replies, see *§§ 29.23[2] -[5]*. Discussion of replies generally, see Ch. 26, Pretrial Motion Practice, see *§ 26.50*.

29.23[2] LOCAL PRACTICE: CD Cal Requirements. A moving party may serve and file a reply memorandum and declarations or other rebuttal evidence in response to the nonmovant's opposition papers. A movant must file and

serve the reply no later than 14 days before the date designated for the hearing of the motion [*see CD Cal Civ LR 7-10*].

Unless the court issues a prior written order otherwise, the opposing party may not file a response to the reply [*see CD Cal Civ LR 7-10*].

29.23[3] LOCAL PRACTICE: ED Cal Requirements. No less than seven days preceding the date of the hearing, the moving party may serve and file a reply to any opposition filed by a responding party [*see ED Cal Civ LR 230(d)*].

29.23[4] LOCAL PRACTICE: ND Cal Requirements. A moving party may serve and file a reply to opposition papers in the Northern District. The reply may include affidavits or declarations, and a supplemental brief or memorandum under *ND Cal Civ LR 7-4*. However, the reply brief or memorandum may not exceed 15 pages of text. The movant must serve and file the reply no less than 14 days before the hearing date [*see ND Cal Civ LR 7-3(c)*].

Generally, once the movant files a reply, no additional memoranda, papers, or letters may be filed without the trial court's approval. However, before the noticed hearing date, counsel may serve and file a Statement of Recent Decision citing and providing a copy of any relevant judicial opinions published since the filing of the opposition or reply [*see ND Cal Civ LR 7-3(d)*].

29.23[5] LOCAL PRACTICE: SD Cal Requirements. The Southern District permits a moving party to file and serve a reply memorandum in response to the opposition by the nonmovant. In general, the movant must file and serve a reply memorandum no later than seven days before the date for which the matter is noticed for hearing [*see SD Cal Civ LR 7.1(e.3)*].

Example:

For a Monday hearing, reply papers must be filed and served no later than the Monday a week prior to the hearing. If the Monday prior to the Monday hearing is a holiday, reply papers would be due *two* Fridays prior to the hearing [*see SD Cal Civ LR 7.1(e.3)*].

Reply memorandums may not exceed 10 pages in length without leave of court [*see SD Cal Civ LR 7.1(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawCivil ProcedureSummary JudgmentTime LimitationsGovernmentsCourtsRule Application & Interpretation

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29.24 Reply Generally Should Not Present New Material.

In general, a reply brief or memorandum should not contain new issues, evidence, or argument that the movant could have raised in its moving papers. A trial court may properly strike new material included in a reply that the movant did not include in its original statement of facts [*see, e.g., Chale v. Allstate Life Ins. Co. (9th Cir 2003) 353 F3d 742, 750*]. The court has discretion to consider issues newly raised in a reply [*see, e.g., Glenn K. Jackson Inc. v. Roe (9th Cir 2001) 273 F3d 1192, 1202*]. However, the court should not consider new evidence presented in a reply without giving the nonmovant an opportunity to respond [*Provenz v. Miller (9th Cir 1996) 102 F3d 1478, 1483 , cert. denied, 522 US 808 (1997)*].

Exception:

A trial court does not abuse its discretion when it considers new information raised for the first time in a reply brief in response to a potentially dispositive argument by the nonmovant, especially when denying the movant the opportunity to counter the argument would effectively strip the movant of the right to counter the nonmovant's opposition to the summary judgment motion [*see El Pollo Loco, Inc. v. Hashim (9th Cir 2003) 316 F3d 1032, 1040*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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29.25 Reply May Include Objections to Nonmovant's Evidence in Opposing Motion.

A reply may include the moving party's objections, if any, to the admissibility of evidence submitted by the nonmoving party in opposition to the summary judgment motion [*see, e.g., Fraser v. Goodale (9th Cir 2003) 342 F3d 1032, 1036* , *cert. denied sub nom. United States Bancorp v. Fraser, 541 US 937 (2004)*]. A trial court may only consider admissible evidence in ruling on a motion for summary judgment [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 773* ; *see Fed R Civ P 56(e)*]. A moving party objecting to a nonmovant's evidence should file written objections or a motion to strike the evidence [*Pfingston v. Ronan Eng'g Co. (9th Cir 2002) 284 F3d 999, 1003*]. Failure to object or to move to strike the evidence may result in waiver of evidentiary defects [*see FDIC v. New Hampshire Ins. Co. (9th Cir 1991) 953 F2d 478, 484*].

Written objections to evidence relied on by the nonmovant should contain the following [*see Fed R Evid 103(a)(1)*]:

- The specific ground for the objection;
- The location, in the movant's documents or in the court's records, of the evidence objected to, including page and line numbers when possible; and
- A brief argument supporting each objection, with citation of relevant authority.

Cross Reference:

Further discussion of objecting to evidence in connection with summary judgment, see *§ 29.18*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections

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29.26 CHECKLISTS: Court Determination of Motions for Summary Judgment.

29.26[1] CHECKLIST: Determining Motions for Summary Judgment.

☐ Trial court may hold hearing before determining summary judgment motion.

○ Trial courts may issue local rules permitting determination of motions without oral hearing, on brief written statements of reasons in support and opposition.

☐ All California federal districts permit trial courts to determine motions without oral argument.

☐ Trial courts in these districts have discretion to decide whether oral argument would be of material assistance in determining summary judgment motions.

○ Trial court may not prevent party from requesting oral argument, or deny request for oral argument by party opposing motion unless court denies motion.

☐ If court orders hearing on summary judgment motion, it may permit brief oral argument by counsel for parties.

○ Court may question counsel.

○ Rather than repeat facts or argument presented in briefs or memoranda, counsel should highlight main points and evidence.

○ Counsel may object to evidence relied on by other party in making or opposing motion.

○ Trial court may take oral testimony on summary judgment motion.

Authority:
Fed R Civ P 1, *43(c)*, 56(c)(2), *78*, *83*; *CD Cal Civ LR 7-15*; *ED Cal Civ LR 230(g)*; *ND Cal Civ LR 7-1(b)*, *7-6*; *SD Cal Civ LR 7.1(d.1)*

Discussion:
See *§ 29.27*, *29.28*

☐ Court must properly apply burdens of proof on motion and at trial.

○ Moving party bears initial burden of proof on motion to show absence of any genuine issue of material fact.

○ Showing required to meet initial burden depends on which party has burden of proof at trial.

☐ If moving party does not have burden of proof at trial, present evidence negating essential element of nonmovant's claim, or demonstrating that nonmovant cannot meet its burden at trial.

☐ If moving party has burden of proof at trial, establish all essential elements of claim or defense to warrant summary judgment in its favor.

○ If movant meets initial burden on motion, burden shifts to nonmovant to present specific facts showing genuine issue of material fact for trial.

Authority:
Fed R Civ P 56(c), *(e)*

Discussion:
See *§ 29.29[1]*

☐ Court may only consider admissible evidence in ruling on motion.

☐ In determining whether case presents questions of material fact under applicable substantive law, court must view evidence in light most favorable to nonmoving party by:

○ Believing evidence of opposing party.

○ Drawing all reasonable inferences that may be drawn from facts before court in favor of opposing party.

Authority:
Fed R Civ P 56(c), *(e)*; *Fed R Evid 101*

Discussion:
See *§§ 29.29[2] -[5]*

Form:
See *§ 29.45*

☐ Court must evaluate each cross-motion for summary judgment separately to determine if nonmovant presents genuine issues of material fact for trial.

○ If parties filing cross-motions agree that all underlying material facts are reflected in written record, trial judge may convert cross-motions into submission of case for trial on written record, and may decide factual issues.

Authority:
Chevron USA, Inc. v. Cayetano (9th Cir 2000) 224 F3d 1030, 1038 n6 , cert. denied, 532 US 942 (2001)

Discussion:
See *§ 29.30*

☐ Court may issue order granting summary adjudication on portion of case.

☐ Trial court may grant summary adjudication on:

○ Issues representing less than whole case.

○ The issue of liability alone, even when there is genuine issue as to amount of damages.

○ Less than full relief requested.

☐ Case not fully adjudicated on motion may be tried on remaining issues.

○ At hearing on motion, court must examine pleadings and evidence before it, and may interrogate counsel.

○ Court must issue order specifying facts appearing without substantial controversy, including extent to which damages or other relief is not in controversy.

☐ Order must deem facts specified as established on trial of action.

☐ Order may direct further proceedings in action as are just.

☐ Court must then conduct trial accordingly.

☐ In general, summary adjudications are interlocutory orders not appealable before entry of final judgment in case.

Authority:
28 USC § 1291; *Fed R Civ P 56(a)-(d)*

Discussion:
See *§ 29.31*

☐ Court granting summary judgment must enter separate judgment.

○ Counsel should check with court clerk to ensure trial judge signs and enters separate judgment.

○ Counsel may request that court enter separate judgment.

☐ Moving party typically should submit to court and serve on nonmovant proposed judgment consistent with court's order.

○ Court may require parties to agree on proposed judgment to be submitted.

○ If parties cannot agree, court may require nonmovant to file and serve written opposition to proposed judgment.

Authority:
28 USC § 1291; *Fed R Civ P 56(c)(1)(B)*, *(d)*, *58*, *79(a)*; *Fed R App P 4(a)(7)(B)*

Discussion:
See *§ 29.32[1]*

☐ Court must state reasons for granting summary judgment somewhere in record if:

○ Underlying holdings would otherwise be ambiguous or unascertainable; or

○ Movant presents multiple grounds for summary judgment, and reasons for court's decision are not otherwise clear from record.

☐ Reviewing court may vacate summary judgment and remand for statement of reasons if movant presents multiple grounds for summary judgment, and reasons for court's decision are unclear.

Authority:
Fed R Civ P 52(a)(3)

Discussion:
See *§ 29.32[2]*

☐ Denial of summary judgment motion ordinarily is nonappealable interlocutory order.

☐ On denying summary judgment, court generally must issue order specifying facts appearing without substantial controversy to narrow issues for trial.

Authority:
28 USC § 1292; *Fed R Civ P 56(d)*; *ND Cal Civ LR 56-2*

Discussion:
See *§ 29.33*

29.26[2] CHECKLIST: Challenging Court's Determination of Motion for Summary Judgment in Trial Court.

☐ Consider renewing summary judgment motion despite initial denial by showing:

- ○ Different set of facts; or
- ○ Some other reason justifying renewal of motion, e.g.:
  - ☐ Intervening change in controlling law;
  - ☐ The availability of new evidence or an expanded factual record; or
  - ☐ The need to correct clear error or prevent manifest injustice.

Discussion:
See *§ 29.34[1]*

☐ Consider seeking reconsideration of ruling on summary judgment motion under either:

- ○ Rule 59(e) (motion to alter or amend judgment); or
- ○ Rule 60(b) (motion seeking relief from final judgment, order, or proceeding); or
- ○ Both rules.

☐ Consult applicable local rules for additional requirements, including:

- ○ Requirement that parties obtain leave of court before filing motion for reconsideration.
- ○ Rules governing form and content of motions for leave to file motion for reconsideration.
- ○ Rules governing bases on which motions for reconsideration may be brought.

Authority:

Fed R Civ P 56(g), *59(e)*, *60(b)*; *Fed R App P 4*; *CD Cal Civ LR 7-18*; *ND Cal Civ LR 7-9(a)*, *(b)*

Discussion:

See *§ 29.34[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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V. COURT DETERMINATION OF MOTION FOR SUMMARY JUDGMENT

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29.27 Options and Strategy.

Summary judgment procedure, an integral part of the Federal Rules of Civil Procedure, facilitates the just, speedy, and inexpensive determination of every action [*Celotex Corp. v. Catrett (1986) 477 US 317, 327, 106 S Ct 2548, 91 L Ed2d 265* ; *TransWorld Airlines, Inc. v. American Coupon Exch., Inc. (9th Cir 1990) 913 F2d 676, 684* ; *see Fed R Civ P 1*]. For example, when the ultimate facts in dispute are destined for decision by the court rather than by a jury, the court and the parties should not go through the motions of a trial if the court will eventually decide the case on the same record [*TransWorld Airlines, Inc. v. American Coupon Exch., Inc. (9th Cir 1990) 913 F2d 676, 684* ; *Chevron USA, Inc. v. Cayetano (9th Cir 2000) 224 F3d 1030, 1038 n6 , cert. denied, 532 US 942 (2001)*].

However, courts must not rush to dispose summarily of cases unless it is clear that more complete factual development could not possibly alter the outcome, and that the credibility of the witnesses statements or testimony is not at issue. This is of special concern in novel, complex, or otherwise difficult cases of public importance. Even when the expense of further proceedings is great and the moving party's case seems likely to succeed, speculation about the facts must not take the place of investigation, proof, and direct observation [*TransWorld Airlines, Inc. v. American Coupon Exch., Inc. (9th Cir 1990) 913 F2d 676, 684-685* ; *Chevron USA, Inc. v. Cayetano (9th Cir 2000) 224 F3d 1030, 1038 n6 , cert. denied, 532 US 942 (2001)*].

Trial courts may hold a hearing on the summary judgment motion before determining the motion. However, courts are empowered to determine motions without an oral hearing [*see Fed R Civ P 78, 83; see, e.g., CD Cal Civ LR 7-15*]. In the absence of an objection or request for oral argument by the nonmoving party, oral argument may be waived [*see Mahon v. Credit Bureau of Placer County Inc. (9th Cir 1999) 171 F3d 1197, 1200*]. Though a district court may not preclude a party from requesting oral argument or deny a request for oral argument by a nonmovant unless the court denies the motion, a court's failure to grant a hearing on a summary judgment motion does not constitute reversible error absent a showing of prejudice [*Partridge v. Reich (9th Cir 1998) 141 F3d 920, 926*].

The key inquiry for the trial court in deciding a summary judgment motion is whether the case presents a genuine issue of material fact for trial [*see Fed R Civ P 56(c)(2); Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 248-250, 106 S Ct 2505, 91 L Ed2d 202*]. The court must grant summary judgment when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact, and the moving party is entitled to summary judgment as a matter of law [*Arpin v. Santa Clara Valley Transp. Agency (9th Cir 2001) 261 F3d 912, 919* ;

see Fed R Civ P 56(c)(2)]. In determining whether a given factual dispute requires submission to a jury so that summary judgment would be improper, the trial court must be guided by the substantive evidentiary standards applicable in the case [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 255, 106 S Ct 2505, 91 L Ed2d 202*]. In ruling on a summary judgment motion, the court may only consider evidence that would be admissible at trial [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 773* ; *see Fed R Civ P 56(e)(1)*].

Cross Reference:

Discussion of Supreme Court's 1986 "trilogy" of summary judgment decisions and the increased availability of summary judgment, see 11 *Moore's Federal Practice, § 56.03* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentHearingsGeneral OverviewCivil ProcedureSummary JudgmentHearingsOral ArgumentsCivil ProcedureSummary JudgmentStandardsGeneral Overview

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V. COURT DETERMINATION OF MOTION FOR SUMMARY JUDGMENT

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29.28 Court May Hold Hearing on Motion.

29.28[1] Trial Court May Hold Oral Hearing Before Deciding Motion. The trial court may hold a hearing on the summary judgment motion before determining the motion. However, a hearing is not always required. Trial courts are empowered to issue local rules permitting determination of motions without oral hearing, on brief written statements of reasons in support and opposition [*see Fed R Civ P 78, 83*].

If the court does order a hearing on the motion, it may permit brief oral argument by counsel for the parties [*see, e.g., ED Cal Civ LR 230(g)* (party must notify court clerk if party believes extended oral argument of more than 10 minutes per side is required)]. During the hearing, the court may question counsel about the motion, opposition, briefs or memoranda, and the evidence supporting or opposing summary judgment.

Strategic Point:

During oral argument on the motion, rather than repeat facts or argument presented in the brief or memorandum, counsel should concentrate on highlighting the main points, and the evidence--or lack of evidence--in the record supporting those points, and on responding to the court's questions.

Counsel wishing to object to evidence relied on by the opposing party in making or opposing the motion may do so at the hearing on the motion [*see, e.g., Strand v. General Elec. Co. (D Haw 1996) 945 F Supp 1334, 1342-1343* & n5]. If counsel has not filed and served written objections or a motion to strike the evidence prior to the hearing, failure to object at the hearing may result in waiver of the objections to the evidence [*see FDIC v. New Hampshire Ins. Co. (9th Cir 1991) 953 F2d 478, 484* (waiver occurred when movant failed to object to evidence submitted in opposition to summary judgment motion until oral argument on appeal)].

Cross References:

Discussion of requesting oral argument on motion, see *§ 29.07[5]*. Discussion of determination of motion without hearing, see *§ 29.28[3]*. Discussion of hearings on motions generally, see Ch. 26, Pretrial

Motion Practice, see *§ 26.53*.

Discussion of hearings on summary judgment motion, see 11 Moore's Federal Practice, *§ 56.15* (Matthew Bender 3d ed.).

29.28[2] Hearing May Include Taking Oral Testimony in Limited Circumstances. District courts have discretion to take oral testimony on a summary judgment motion under *Fed R Civ P 43(c)*. However, courts must do so sparingly and with great care. In addition, taking oral testimony on a summary judgment motion may not lead to a finding on a genuinely disputed fact, but only to a determination as to which facts are not genuinely disputed [*Thompson v. Mahre (9th Cir 1997) 110 F3d 716, 720 , cert. denied, 522 US 967 (1997)*].

Local rules may impose additional constraints on oral testimony in connection with the court's determination of a summary judgment motion. For example, the Northern District provides that no oral testimony will be received in connection with any motion, unless otherwise ordered by the assigned judge [*see ND Cal Civ LR 7-6*].

29.28[3] Rule 56 Does Not Require Hearing Before Determination of Motion. Trial courts are empowered to issue local rules permitting determination of motions without oral hearing, on brief written statements of reasons in support and opposition [*see Fed R Civ P 78, 83*]. All California federal districts have promulgated local rules permitting trial courts to determine motions without oral argument [*see CD Cal Civ LR 7-15*; *ED Cal Civ LR 230(g)*; *ND Cal Civ LR 7-1(b)*; *SD Cal Civ LR 7.1(d.1)*]. Trial courts in these districts have discretion to decide whether oral argument would be of material assistance in deciding summary judgment motions, and to hold such hearings accordingly [*see, e.g., UMG Recordings, Inc. v. Sinnott (ED Cal 2004) 300 F Supp2d 993, 996 n3* ; *Nichols v. Unum Life Ins. Co. of Am. (ND Cal 2003) 287 F Supp2d 1088, 1089*].

When a local rule permits the district court to order a summary judgment motion submitted without oral argument, in the absence of objection or request for oral argument, oral argument is waived [*see Mahon v. Credit Bureau of Placer County Inc. (9th Cir 1999) 171 F3d 1197, 1200* (construing former ED Cal Civ LR 78-230(h) *now ED Cal Civ LR 230(g)*)]. District courts also may provide by rule that a party desiring oral argument on a motion for summary judgment must request it, and that, in the absence of such a request, the court may deem oral argument waived [*see Dredge Corp. v. Penny (9th Cir 1964) 338 F2d 456, 461-462* (construing former *Fed R Civ P 56(c)*, Fed R Civ P *78*, and *Fed R Civ P 83*); *Mahon v. Credit Bureau of Placer County Inc. (9th Cir 1999) 171 F3d 1197, 1200*]. However, even when waiver occurs, a district court may abuse its discretion if it refuses to hear oral argument when a party would suffer unfair prejudice as a result [*Mahon v. Credit Bureau of Placer County Inc. (9th Cir 1999) 171 F3d 1197, 1200*].

Cross References:

Discussion of requesting oral argument on motion, see *§ 29.07[5]*. Discussion of hearings on motions generally, see Ch. 26, Pretrial Motion Practice, see *§ 26.53*.

29.28[4] District Court May Not Preclude Requests for Oral Argument or Deny Nonmovant's Request for Hearing Unless It Denies Motion. A district court may not, by rule or otherwise, preclude a party from requesting oral argument, nor may the court deny a request for oral argument by a party opposing the motion, unless the court denies the motion [*Dredge Corp. v. Penny (9th Cir 1964) 338 F2d 456, 461-462* ; *Jasinski v. Showboat Operating Co. (9th Cir 1981) 644 F2d 1277, 1280*]. However, the scope of this holding is not absolute [*Houston v. Bryan (9th Cir 1984) 725 F2d 516, 517*]. Accordingly, though a trial court technically errs by not granting a nonmovant's request for oral argument before granting the summary judgment motion, the court's failure to grant an oral hearing on a summary judgment motion under such circumstances does not constitute reversible error absent a showing of prejudice [*Partridge v. Reich (9th Cir 1998) 141 F3d 920, 926*].

No prejudice results in refusing to grant oral argument if a party has an adequate opportunity to provide the trial court with evidence and a memorandum of law, because any error may be rectified by an appeal of the summary judgment [

Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp. (9th Cir 1991) 933 F2d 724, 729 , cert. denied, 503 US 920 (1992)]. Thus, a district court may decide a summary judgment motion without oral argument if the parties have the opportunity to submit their papers to the court [*Partridge v. Reich (9th Cir 1998) 141 F3d 920, 926*].

Cross Reference:

Discussion of hearings on motions generally, see Ch. 26, Pretrial Motion Practice, see *§ 26.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentHearingsGeneral OverviewCivil ProcedureSummary JudgmentHearingsOral ArgumentsEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsGovernmentsCourtsRule Application & Interpretation

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Unit 8 Motion Practice
CHAPTER 29 Summary Judgment
V. COURT DETERMINATION OF MOTION FOR SUMMARY JUDGMENT

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29.29 General Standards Governing Trial Court's Determination of Motion.

29.29[1] Court Must Properly Apply Burdens of Proof on Motion and at Trial.

29.29[1][a] Moving Party Bears Initial Burden of Proof, Which Varies Depending on Which Party Has Burden of Proof at Trial. The initial burden on summary judgment rests on the moving party to show the absence of any genuine issue of material fact [*Celotex Corp. v. Catrett (1986) 477 US 317, 323, 106 S Ct 2548, 91 L Ed2d 265*]. However, the showing required to meet that initial burden depends on which party has the burden of proof at trial. If the moving party does not have the burden of proof at trial, it carries its initial burden of proof on the motion either by (1) presenting evidence negating an essential element of the nonmoving party's claim, or (2) demonstrating that the nonmovant cannot meet its burden of proving an element of a claim or defense at trial [*Celotex Corp. v. Catrett (1986) 477 US 317, 323, 106 S Ct 2548, 91 L Ed2d 265* ; *Nissan Fire & Marine Ins. Co. v. Fritz Cos. (9th Cir 2000) 210 F3d 1099, 1106*].

In contrast, if the moving party bears the ultimate burden of proof at trial, that party must establish all the essential elements of his or her claim or defense to warrant summary judgment in its favor [*Celotex Corp. v. Catrett (1986) 477 US 317, 323, 106 S Ct 2548, 91 L Ed2d 265* ; *Hendrickson v. Amazon.Com, Inc. (CD Cal 2003) 298 F Supp2d 914, 915*]. Thus, when the moving party has the burden of proof at trial--as does a plaintiff on a claim for relief, or the defendant on an affirmative defense--the moving party must make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party [*Center for Biological Diversity v. Abraham (ND Cal 2002) 218 F Supp2d 1143, 1153*]. This means that the moving party must establish all the essential elements of the claim or defense to warrant judgment as a matter of law in that party's favor [*Pecarovich v. Allstate Ins. Co. (CD Cal 2003) 272 F Supp2d 981, 985*].

Example:

A defendant asserting an affirmative defense on a vicarious liability claim must establish all elements of that defense to prevail on its motion for summary judgment [*see Hendrickson v. Amazon.com, Inc. (CD Cal 2003) 298 F Supp2d 914, 915*].

For summary judgment to be granted, the moving party must meet its burden regardless of whether any opposition is

filed [*see Fed R Civ P 56(e)*; *Atlantic Mut. Ins. Co. v. Yasutomi Warehousing & Distrib., Inc. (CD Cal 2004) 326 F Supp2d 1123, 1126*].

29.29[1][b] If Movant Meets Initial Burden on Motion, Burden Shifts to Nonmovant to Present Specific Facts Showing Genuine Issue for Trial. If the moving party meets its initial burden, the nonmoving party must then set forth, by affidavit or as otherwise provided in *Fed R Civ P 56(e)*, specific facts showing that there is a genuine issue for trial [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 250, 106 S Ct 2505, 91 L Ed2d 202* ; *Bias v. Moynihan (9th Cir 2007) 508 F3d 1212, 1218* (to avoid summary judgment, non-moving party is "required to present significant, probative evidence tending to support h[is] allegations")]. If the nonmovant presents specific evidentiary facts, the court must determine if the evidence presented by the nonmovant raises genuine issues of material fact that must be determined at trial [*see Willis v. Ritter (SD Cal 2008) 2008 US Dist LEXIS 23905, at *17-*18]* . If the nonmovant fails to respond with specific facts showing a genuine issue for trial after adequate time for discovery, the court must grant the motion for summary judgment [*see Fed R Civ P 56(e)*; *Celotex Corp. v. Catrett (1986) 477 US 317, 323, 106 S Ct 2548, 91 L Ed2d 265*].

Cross References:

Discussion of genuine issue of material facts standard, see *§ 29.29[2]*.

Discussion of shifting of burden to nonmovant, see 11 Moore's Federal Practice, *§ 56.13[2]* (Matthew Bender 3d ed.).

29.29[2] Court Must Determine Whether Case Presents Genuine Issue of Material Fact for Trial. The key inquiry for the trial court in deciding a summary judgment motion is whether the case presents a genuine issue of material fact for trial [*see Fed R Civ P 56(c)(2)*; *Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 248-250, 106 S Ct 2505, 91 L Ed2d 202*]. The court must grant summary judgment when, viewing the facts in the light most favorable to the nonmoving party (1) there is no genuine issue of material fact, and (2) the moving party is entitled to summary judgment as a matter of law [*Arpin v. Santa Clara Valley Transp. Agency (9th Cir 2001) 261 F3d 912, 919* ; *see Fed R Civ P 56(c)(2)*]. However, summary judgment is not appropriate when, although the facts are undisputed, contradictory inferences may reasonably be drawn from those undisputed facts [*Braxton-Secret v. A.H. Robins Co. (9th Cir 1985) 769 F2d 528, 531*].

Distinguish:

The "genuine issue as to any material fact" standard required by *Fed R Civ P 56(c)(2)* applies in all actions. However, certain types of cases may present special issues for the court to consider. For example, summary judgment is rarely granted in negligence cases because the issue of whether the defendant acted reasonably is ordinarily a question for the trier of fact [*Christensen v. Georgia-Pac. Corp. (9th Cir 2002) 279 F3d 807, 813*]. Similarly, summary judgment is granted sparingly in complex antitrust cases, because they typically present factual issues such as the reasonableness of restraints, predatory price-fixing, motive, and intent [*see Poller v. CBS (1962) 368 US 464, 473, 82 S Ct 486, 491, 7 L Ed2d 458* ; *American Ad Mgmt., Inc. v. GTE Corp. (9th Cir 1996) 92 F3d 781, 788*] and is generally disfavored in trademark disputes because of their intensely factual nature, particularly with respect to likelihood of confusion [*KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc. (9th Cir 2005) 408 F3d 596, 602, 608*].

A dispute is "genuine" only if a jury applying the substantive law's evidentiary standard could reasonably find for either the plaintiff or the defendant [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 255, 106 S Ct 2505, 91 L Ed2d 202* ; *River Colony Estates Gen. P'ship v. Bayview Fin. Trading Group, Inc. (SD Cal 2003) 287 F Supp2d 1213, 1220*]. The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient [*Arpin v. Santa Clara Valley Transp. Agency (9th Cir 2001) 261 F3d 912, 919*]. When the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial [*Matsushita Elec. Indus.*

Co. v. Zenith Radio Corp. (1986) 475 US 574, 586-587, 106 S Ct 1348, 89 L Ed2d 538 ; *UMG Recordings, Inc. v. Sinnott (ED Cal 2004) 300 F Supp2d 993, 997*].

A material issue of fact is a question that a jury must answer to determine the rights of the parties under the applicable substantive law [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 248, 106 S Ct 2505, 91 L Ed2d 202* ; *River Colony Estates Gen. P'ship v. Bayview Fin. Trading Group, Inc. (SD Cal 2003) 287 F Supp2d 1213, 1220*]. Only disputes over facts that may affect the outcome of the suit under governing law properly preclude entry of summary judgment [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 248, 106 S Ct 2505, 91 L Ed2d 202* ; *Chevron USA, Inc. v. Cayetano (9th Cir 2000) 224 F3d 1030, 1039 , cert. denied, 532 US 942 (2001)*]. Factual disputes that are irrelevant or unnecessary do not count in determining whether to grant the motion [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 248, 106 S Ct 2505, 91 L Ed2d 202*].

Cross References:

Discussion of impact of substantive evidentiary standard in deciding motion, see *§ 29.29[3]*.

Discussion of "genuine issue as to any material fact" requirement, see 11 Moore's Federal Practice, *§ 56.11* (Matthew Bender 3d ed.).

29.29[3] Applicable Substantive Law Defines Materiality of Fact Issues. In determining whether a given factual dispute requires submission to a jury so that summary judgment would be improper, the trial court must be guided by the substantive evidentiary standards applicable in the case [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 255, 106 S Ct 2505, 91 L Ed2d 202*]. The inquiry involved in ruling on a motion for summary judgment necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 252, 106 S Ct 2505, 91 L Ed2d 202*]. Accordingly, the judge must decide whether a reasonable jury, measuring the evidence presented on the motion against the substantive evidentiary standard applicable at trial, could find for the nonmoving party [*see Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 254, 106 S Ct 2505, 91 L Ed2d 202*].

Examples:

If a defendant in a typical, preponderance-of-the-evidence civil case moves for summary judgment based on the lack of proof of a material fact, the judge must ask whether a reasonable jury could find by a preponderance of the evidence that the plaintiff is entitled to a verdict based on the evidence presented. In a case in which the *First Amendment* mandates a clear-and-convincing evidentiary standard, the trial judge must consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity [*see Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 252, 106 S Ct 2505, 91 L Ed2d 202*].

Cross Reference:

Discussion of "materiality," see 11 Moore's Federal Practice, *§ 56.11[4]* (Matthew Bender 3d ed.).

29.29[4] Court May Only Consider Admissible Evidence in Ruling on a Motion for Summary Judgment. In ruling on a summary judgment motion, the court may consider the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits in the case [*see Fed R Civ P 56(c)(2)*]. Courts also routinely consider other types of evidence obtained through discovery in ruling on summary judgment motions [*see, e.g., Fraser v. Goodale (9th Cir 2003) 342 F3d 1032, 1036 , cert. denied sub nom. United States Bancorp v. Fraser, 541 US 937 (2004)* (trial court could properly consider diary attached to nonmoving party's deposition); *Los Angeles News Serv. v. CBS Broad., Inc. (9th Cir 2002) 305 F3d 924, 935 , amended by* 313 F3d 1093 (2002) (per curiam) (trial court could properly consider videotape in support of summary judgment motion)].

However, in ruling on the motion, the trial court may only consider admissible evidence [*Orr v. Bank of Am., NT & SA*

(9th Cir 2002) 285 F3d 764, 773 ; *see Fed R Civ P 56(e)*]. The standards governing admissibility are those set forth in the Federal Rules of Evidence [*Orr v. Bank of Am., NT & SA (9th Cir 2002) 285 F3d 764, 773* ; *see also Fed R Evid 101* (Federal Rules of Evidence apply in all proceedings before United States courts)].

Nevertheless, at the summary judgment stage, the court does not focus on the admissibility of the form in which the evidence is presented. Instead, the court focuses on the admissibility of its contents. It is sufficient if the contents of the evidence would be admissible at trial, even if the form in which the evidence is offered may be inadmissible [*Fraser v. Goodale (9th Cir 2003) 342 F3d 1032, 1036* , *cert. denied sub nom. United States Bancorp v. Fraser, 541 US 937 (2004)*]. If the contents of the evidence could be presented in an admissible form at trial, the court may consider the contents of that evidence in determining the summary judgment motion [*Fraser v. Goodale (9th Cir 2003) 342 F3d 1032, 1037* , *cert. denied sub nom. United States Bancorp v. Fraser, 541 US 937 (2004)*].

Cross Reference:

Further discussion of evidence court may consider on summary judgment motions generally, see *§ 29.12*.

29.29[5] Court Must View Evidence in Light Most Favorable to Nonmovant, and Must Draw Reasonable Inferences in Nonmovant's Favor.

29.29[5][a] Court Must View Evidence in Light Most Favorable to Nonmovant. In determining whether a case presents any questions of material fact under the applicable substantive law, the trial court must view the evidence in the light most favorable to the nonmoving party [*see Citizens for Better Forestry v. USDA (9th Cir 2003) 341 F3d 961, 969* (standard of appellate review of trial court's summary judgment determination is same as trial court's standard in determining motion)]. This requires the trial court to believe the evidence of the opposing party, and to draw all reasonable inferences that may be drawn from the facts before the court in favor of the opposing party [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 255, 106 S Ct 2505, 91 L Ed2d 202* ; *UMG Recordings, Inc. v. Sinnott (ED Cal 2004) 300 F Supp2d 993, 997*].

Accordingly, when considering a summary judgment motion, the judge does not weigh conflicting evidence with respect to a disputed material fact. Nor does the judge make credibility determinations with respect to statements made in affidavits, answers to interrogatories, admissions, or depositions. These determinations are within the province of the factfinder at trial [*Dominguez-Curry v. Nevada Transp. Dep't (9th Cir 2005) 424 F3d 1027, 1035-1036* ; *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n (9th Cir 1987) 809 F2d 626, 630*].

If the nonmovant produces direct evidence of a material fact, the court may not assess the credibility of this evidence, nor weigh it against any conflicting evidence presented by the movant [*T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n (9th Cir 1987) 809 F2d 626, 631*]. The nonmoving party's evidence must be taken as true. Even when direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the nonmovant's evidence with respect to that fact [*T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n (9th Cir 1987) 809 F2d 626, 631* ; *Leslie v. Grupo ICA (9th Cir 1999) 198 F3d 1152, 1158*].

Distinguish:

A Rule 36 admission trumps conflicting evidence on a summary judgment motion [*Cook v. Allstate Ins. Co. (CD Cal 2004) 337 F Supp2d 1206, 1214* (quoting **Moore's**)].

Cross References:

Further discussion of drawing reasonable inferences in favor of nonmovant, see *§ 29.29[5][b]*.

Discussion of judicial avoidance of factfinding and credibility determinations, see 11 Moore's Federal Practice, § 56.11[5] (Matthew Bender 3d ed.).

29.29[5][b] Court Must Draw All Reasonable Inferences in Nonmovant's Favor. In ruling on a motion for summary judgment, the trial court must believe the nonmoving party's evidence, and must draw all reasonable inferences in the nonmovant's favor [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 255, 106 S Ct 2505, 91 L Ed2d 202*]. In drawing inferences in the light most favorable to the nonmoving party, the court may draw inferences from underlying facts not in dispute, such as background or contextual facts. The court may also draw inferences from underlying facts on which there is conflicting direct evidence, but on which the judge must assume may be resolved at trial in favor of the nonmoving party [*T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n (9th Cir 1987) 809 F2d 626, 631*].

However, assuming the existence of the underlying facts, the court may not draw an inference as to another material fact in favor of the nonmoving party unless it is reasonable in view of other undisputed background or contextual facts. In addition, the court must not draw such inferences unless they are otherwise permissible under the governing substantive law. This inquiry ensures that a genuine issue of material fact exists for the factfinder to resolve at trial [*T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n (9th Cir 1987) 809 F2d 626, 632*].

Consider:

If the motion is denied because material questions of fact remain, further discovery may resolve those issues [*see, e.g.,* Okinawa Dugong v. Rumsfeld (ND Cal 2005) 2005 US Dist LEXIS 3123 (denying pre-discovery defense motion for summary judgment)].

Cross References:

Further discussion of witness credibility in ruling on summary judgment motions, see *§ 29.29[5][a]*.
Further discussion of fact finding in ruling on summary judgment motions, see *§ 29.29[5][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofMovantsCivil ProcedureSummary JudgmentBurdens of Production & ProofNonmovants

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29.30 Court Must Review Cross-Motions for Summary Judgment Separately.

The mere fact that both parties file cross-motions for summary judgment does not necessarily mean there are no disputed issues of material fact. Nor does it necessarily permit the judge to render judgment in favor of one side or the other [*Starsky v. Williams (9th Cir 1975) 512 F2d 109, 112* (citing **Moore's** *); Buckley v. Gomez (SD Cal 1997) 36 F Supp2d 1216, 1220* , *aff'd mem.*, *168 F3d 498 (9th Cir 1999)*]. In ruling on cross-motions for summary judgment, the court must evaluate each motion separately to determine if the nonmovant presents genuine issues of material fact for trial [*see ACLU of Nev. v. City of Las Vegas (9th Cir 2003) 333 F3d 1092, 1097* , *cert. denied*, *540 US 1110 (2004)* ; *Buckley v. Gomez (SD Cal 1997) 36 F Supp2d 1216, 1220* , *aff'd mem.*, *168 F3d 498 (9th Cir 1999)*].

Consider:

If the parties filing cross-motions agree that all underlying material facts are reflected in the written record, the trial judge may decide factual issues and essentially convert the cross-motions for summary judgment into submission of the case for trial on the written record [*see Chevron USA, Inc. v. Cayetano (9th Cir 2000) 224 F3d 1030, 1038 n6* , *cert. denied*, *532 US 942 (2001)* ; *Starsky v. Williams (9th Cir 1975) 512 F2d 109, 111* (suggesting circumstances were unique to case)]. However, such fact-finding is not appropriate on an undeveloped factual record [*Chevron USA, Inc. v. Cayetano (9th Cir 2000) 224 F3d 1030, 1038 n6* , *cert. denied*, *532 US 942 (2001)*]. Accordingly, the trial court should exercise great caution when considering converting cross-motions into submission of the case for trial on the written record. Parties who object to this procedure should make there objections clear. This conversion procedure is, in practice, very rare. It will work best when there is a single dispositive issue, such as the statute of limitations or the interpretation of a contract clause. Its also crucial that both sides concede that there are no material issues of fact that are disputed on the dispositive issue, and that adequate notice of the conversion has been given.

Even when a nonmovant does not file a cross-motion for summary judgment, the court may, at least theoretically, grant summary judgment for the nonmoving party *sua sponte*. This may happen only if it is apparent from the record that there is no genuine issue of material fact, that the moving party has had a full opportunity to ventilate the issue, and that the nonmovant is entitled to judgment as a matter of law [*Stoll v. Runyon (9th Cir 1999) 165 F3d 1238, 1243, n1* ; *Superior Eng'g & Elecs. Co. v. Sanders (9th Cir 1987) 833 F2d 823, 825*]. The Ninth Circuit has taken a very strict view of when a district court has the ability to grant summary judgment *sua sponte* [*see Verizon Del., Inc. v. Covad*

Communs. Co. (9th Cir 2004) 377 F3d 1081, 1092 ("Before a court makes a *sua sponte* grant of summary judgment, 'a litigant must be given reasonable notice that the sufficiency of his or her claim will be in issue.' *Buckingham v. United States (9th Cir 1993) 998 F2d 735, 742* . When the court dismissed Covad's counterclaims, Verizon had not yet responded to Covad's counterclaims. Nothing in the record suggests that Covad had reasonable notice that the sufficiency of its counterclaims would be in issue. The district court erred by entering a *sua sponte* grant of summary judgment on Covad's counterclaims")].

Cross Reference:

Discussion of cross-motions for summary judgment, see 11 Moore's Federal Practice, *§ 56.10[6]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentCross-MotionsCivil ProcedureSummary JudgmentStandardsGeneral Overview

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29.31 Court May Issue Order Granting Summary Adjudication.

29.31[1] Court May Grant Summary Adjudication on Portion of Case. A trial court may grant summary judgment on a part of an action rather than the action as a whole. The court may also grant a partial summary judgment while denying a summary judgment motion on the case as a whole [*see Fed R Civ P 56(d)(1)*]. Because such orders generally are not final judgments disposing of all the issues in the case, the phrase "partial summary judgment" is a misnomer [*Lies v. Farrell Lines, Inc. (9th Cir 1981) 641 F2d 765, 769 n3* (citing **Moore's** *); Allstate Ins. Co. v. Madan (CD Cal 1995) 889 F Supp 374, 379*]. Thus, courts often refer to such partial orders as "summary adjudications" [*see, e.g., Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery (9th Cir 1998) 150 F3d 1042, 1048-1049*].

Cross References:

Discussion of procedure for trying remaining issues, see *§ 29.31[3]*. Discussion of appealability of summary adjudication orders, see *§ 29.37[1][b]*. Form of motion for summary adjudication, see *§ 29.41*.

General discussion of summary adjudication, see 11 Moore's Federal Practice, *§ 56.40* (Matthew Bender 3d ed.).

29.31[2] Areas in Which Summary Adjudication Is Available. A trial court may grant summary adjudication on:

- Issues representing less than the whole case [*see Fed R Civ P 56(d)*];
- The issue of liability alone, even when there is a genuine issue as to the amount of damages [*Fed R Civ P 56(d)(2)*]; or
- Less than the full relief requested [*see Fed R Civ P 56(d)*].

Despite the language of *Fed R Civ P 56(a)* and *(b)*, there appears to be uncertainty in the Ninth Circuit on the question

of whether a party may move for summary adjudication on less than a whole claim [*see Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc. (CD Cal 2001) 178 F Supp2d 1099, 1122-1123* (recognizing conflict between districts); *California Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp. (ED Cal 2003) 298 F Supp2d 930, 939* (though *Fed R Civ P 56(c)* allows interlocutory judgment on question of liability, *Fed R Civ P 56(d)* does not authorize entry of judgment on part of claim or granting of partial relief)]. It also appears that there is a split among the federal circuit courts on the question of whether a party may move for summary adjudication on less than a whole claim [*compare, e.g., Barker v. Norman (5th Cir 1981) 651 F2d 1107, 1123* (summary judgment may be proper on some causes of action or issues in multi-cause or multi-issue case but not as to others) *with SEC v. Thrasher (SDNY 2001) 152 F Supp2d 291, 295-296* (party is not entitled to partial summary judgment on nondispositive fact issues that are elements of claims rather than claims themselves; issue of liability is only nondeterminative issue that may be disposed of on summary judgment)].

Consider--Multi-Claim, Multi-Party Cases:

Even if summary adjudication is limited to entire claims, it still has a vital role in multi-claim cases. Furthermore, summary adjudication may deal with entire claims as to particular parties in multi-party cases. In these cases, courts will look to see distinct and separable claims that can be resolved without leading to duplicative efforts.

Cross Reference:

Discussion of summary adjudication in federal circuit courts of appeal, see 11 Moore's Federal Practice, *§ 56.40[1]* (Matthew Bender 3d ed.).

29.31[3] Cases Not Fully Adjudicated on Motion May Be Tried on Remaining Issues. In ruling on a summary judgment motion or a motion for summary adjudication, if the court does not render a judgment on the whole case or for all the relief requested, so that trial is necessary, the court may hold a hearing to ascertain which material facts exist without substantial controversy and which are actually controverted in good faith. At the hearing on the motion, the court must examine the pleadings and the evidence before it, and also may interrogate counsel [*see Fed R Civ P 56(d)(1)*].

Thereafter, the court must issue an order specifying the facts appearing without substantial controversy, including the extent to which damages or other relief is not in controversy. The order must deem facts so specified as established on trial of the action, and may direct any further proceedings in the action as just. The court must then conduct the trial accordingly [*see Fed R Civ P 56(d)(1)*].

29.31[4] Normally, Summary Adjudication May Not Be Appealed Immediately. In general, summary adjudications under *Fed R Civ P 56* are interlocutory orders rather than final judgments. Thus, they typically are not appealable before entry of a final judgment in the case [*Williamson v. UNUM Life Ins. Co. of Am. (9th Cir 1998) 160 F3d 1247, 1250* ; *see 28 USC § 1291* (federal appellate courts have jurisdiction in appeals from all final decisions of district courts)]. However, there are exceptions [*see, e.g., Southwest Marine, Inc. v. Danzig (9th Cir 2000) 217 F3d 1128, 1135* , *cert. denied, 532 US 1007 (2001)* (specific statute authorizes interlocutory appeal); *California v. Campbell (9th Cir 1998) 138 F3d 772, 777* , *cert. denied, 525 US 822 (1998)* (decision is conclusive in that it resolves important questions separate from merits that are unreviewable on appeal from final judgment)].

There are two possible exceptions to the rule that summary adjudications are not appealable immediately:

- **Separate Rule 54(b) Final Judgment.** If the case involves multiple claims for relief or multiple parties, and if a summary adjudication fully disposes of a single claim or disposes of all claims as to one of several parties, the court has discretion to enter a separate final judgment on the summary adjudication. A court may direct the entry of a separate, final judgment as to one or more (but fewer than all) of the claims or parties, if the court expressly determines that there is "no just reason for delay." If

the court does not make the express determination and if the court does not expressly direct entry of a separate, final judgment, the summary adjudication remains unappealable. The summary adjudication does not terminate the action as to any of the claims or parties, and is subject to revision at any time before entry of a final judgment that *does* resolve *all* all of the claims and the rights and liabilities of *all* of the parties [*Fed R Civ P 54(b)*].

Warning:

The Ninth Circuit has opined that in a routine case when the facts on all claims and issues entirely overlap and successive appeals are essentially inevitable, a district court should not enter a final judgment under Rule 54(b) on a summary adjudication: this will only lead to the duplication of proceedings and overall delay in the final disposition of the case [*Wood v. GCC Bend, LLC (9th Cir 2005) 422 F3d 873, 883* (routine employment discrimination action)].

- **Discretionary 1292(b) Interlocutory Appeal.** A summary adjudication is like any other nonappealable interlocutory order. If the district judge who makes the ruling is of the opinion that: (1) the "order involves a controlling question of law as to which there is substantial ground for difference of opinion" and (2) an immediate appeal "may materially advance the ultimate termination of the litigation," the district judge may certify that opinion in writing. If the losing party who desires an immediate appeal of the summary adjudication obtains the written certification just described, he or she may apply to the appropriate United States Court of Appeals for permission to appeal. The application must be made within 10 days of the district court's order, and the Court of Appeals has discretion as to whether it will permit or refuse the appeal [*28 USC § 1292(b)*].

Cross References:

Further discussion of appealability of summary adjudication order, see *§ 29.37[1][b]*. Discussion of separate Rule 54(b) final judgments for orders disposing of some claims or some parties, see 10 Moore's Federal Practice, § 54.10 et seq. (Matthew Bender 3d ed.). Discussion of discretionary interlocutory appeals under Section 1292(b), see 19 Moore's Federal Practice, *§ 203.30* et seq. (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewAppealabilityCivil ProcedureSummary JudgmentPartial Summary Judgments

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Unit 8 Motion Practice
CHAPTER 29 Summary Judgment
V. COURT DETERMINATION OF MOTION FOR SUMMARY JUDGMENT

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29.32 Court Granting Summary Judgment Must Enter Separate Judgment.

29.32[1] Court Must Enter Judgment. A trial court's order granting a summary judgment motion is not a judgment. Only when the judgment is set forth in a separate document and properly entered on the civil docket by the court clerk is there an entry of judgment that tells the parties they may appeal [*see Fed R Civ P 58, 79(a); Radio TV Espanola S.A. v. New World Entm't, Ltd. (9th Cir 1999) 183 F3d 922, 930*]. The separate document requirement exists so the parties will know exactly when the judgment has been entered and when they must begin preparing post-verdict motions or an appeal [*Casey v. Albertson's Inc. (9th Cir 2004) 362 F3d 1254, 1257-1258 , cert. denied, 543 US 870 (2004)* ; *but see Fed R App P 4(a)(7)(B)* (failure to set forth judgment or order in separate document under *Fed R Civ P 58(a)* does not affect validity of appeal from that judgment or order)].

Consider:

Satisfaction of the "separate document rule" is not a prerequisite to appeal of an order granting summary judgment even when the court fails to enter a separate judgment [*see Casey v. Albertson's Inc. (9th Cir 2004) 362 F3d 1254, 1258 , cert. denied, 543 US 870 (2004)*]. A ruling is final for purposes of *28 USC § 1291* if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter. Moreover, parties may be deemed to waive the separate document requirement by not objecting to the taking of an appeal in the absence of a separate judgment [*see Casey v. Albertson's Inc. (9th Cir 2004) 362 F3d 1254, 1258 , cert. denied, 543 US 870 (2004)*].

Typically, a trial court granting summary judgment requires the moving party to submit to the court and to serve on the nonmovant a proposed judgment consistent with the court's order. The court may require the parties to agree on the proposed judgment to be submitted. If they cannot, the court may require that the nonmovant file and serve a written opposition to the proposed judgment within a certain date after the court signs the order. It may also require the movant to submit a reply after being served with the opposition [*see, e.g., Gibson v. County of Riverside (CD Cal 2002) 181 F Supp2d 1057, 1099*].

Strategic Point--Moving Party:

Submit a proposed judgment to the court with the moving papers, or provide the court with the proposed judgment at the hearing on the motion. In addition, check with the court clerk to ensure that the judge has signed and entered a separate judgment in the action. If necessary, request that the court enter a separate judgment [*see Fed R Civ P 58(d)*].

Cross References:

Form of order granting summary judgment motion, see *§ 29.45*. Appeal from grant of summary judgment, see *§ 29.37*.

Further discussion of entry of judgment, see 12 Moore's Federal Practice, Ch. 58, Entry of Judgment (Matthew Bender 3d ed.).

29.32[2] Court Is Not Required to Make Findings of Fact and Conclusions of Law. In general, the district court need not make findings of fact and conclusions of law when deciding a summary judgment motion [*Couveau v. American Airlines, Inc. (9th Cir 2000) 218 F3d 1078, 1081 n3* (per curiam); *see Fed R Civ P 52(a)*]. However, when its underlying holdings would otherwise be ambiguous or unascertainable, the court does have the burden of stating its reasons for granting summary judgment somewhere in the record [*Couveau v. American Airlines, Inc. (9th Cir 2000) 218 F3d 1078, 1081 n3* (per curiam)]. Indeed, when a movant presents multiple grounds for summary judgment, and the reasons for the district court's decision are not otherwise clear from the record, a reviewing court may vacate a summary judgment and remand for a statement of reasons [*Couveau v. American Airlines, Inc. (9th Cir 2000) 218 F3d 1078, 1081* (per curiam)].

Consider:

If the case presents multiple grounds for summary judgment, or the reasons for the district court's decision may not be clear from the record, counsel should draft a proposed judgment or order that includes a concise statement of the reasons for granting summary judgment.

Cross Reference:

Form of order granting summary judgment motion, see *§ 29.45*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewAppealabilityCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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29.33 Denial of Summary Judgment Motion Ordinarily Is Nonappealable Interlocutory Order.

Ordinarily, a trial court order denying a motion for summary judgment is interlocutory in nature. Such orders generally are not appealable until a final judgment is entered in the case [*Demshki v. Monteith (9th Cir 2001) 255 F3d 986, 988*].

Exception:

Courts do permit interlocutory appeals under limited circumstances, including interlocutory appeals permitted by statute [*see, e.g., 28 USC § 1292*], or when the court denies a motion for summary judgment or summary adjudication based on the defense of qualified immunity [*see, e.g., Rodis v. City & County of San Francisco (9th Cir 2009) 558 F3d 964, 968]* .

On denying summary judgment of the case as a whole, the court must, if practicable, issue an order specifying any facts that appear without substantial controversy, in order to narrow the issues for trial [*see Fed R Civ P 56(d)*]. Similarly, on denial of a motion for summary adjudication on particular claims or defenses, a party may request that the court find particular facts to be established without controversy [*see Williams v. Sinclair (9th Cir 1975) 529 F2d 1383, 1390* , *cert. denied, 426 US 936 (1976)*]. The obligation imposed on the court to specify the uncontroverted material facts is technically compulsory [*Department of Toxic Substances Control v. Interstate Non-Ferrous Corp. (ED Cal 2000) 99 F Supp2d 1123, 1125* ; *see Fed R Civ P 56(d)*]. However, a court may decline to do so if it finds the requirement impracticable [*see Chiron Corp. v. Genentech, Inc. (ED Cal 2002) 268 F Supp2d 1139, 1148 n6* ; *see also Department of Toxic Substances Control v. Interstate Non-Ferrous Corp. (ED Cal 2000) 99 F Supp2d 1123, 1125* (court may decline if it determines identifying indisputable facts would not materially expedite adjudicative process)].

Strategic Point:

If the court denies the motion for summary judgment, consider requesting that the court include such findings in its order. However, before doing so, the party requesting the findings must be certain that it knows enough at the summary judgment stage about all of the facts it wants and does not want established at trial.

Warning:

Local rules may provide that statements by the court in an order denying summary judgment or summary adjudication do not constitute issues deemed established for purposes of trial unless the court so specifies [*see, e.g., ND Cal Civ LR 56-2*]. Counsel should therefore become familiar with the local rules in the relevant district, and should be prepared to request that the court explicitly state that it deems its statements to constitute issues deemed established for purposes of trial.

Cross References:

Discussion of appeal of court orders on motion for summary judgment or adjudication generally, see *§§ 29.37 -29.39*. Discussion of renewing motion for summary judgment, see *§ 29.34[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewAppealabilityCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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29.34 Parties May Challenge Ruling on Summary Judgment Motion in Trial Court.

29.34[1] Movant May Renew Summary Judgment Motion After Denial. An order denying summary judgment is an interlocutory decree [*Nightlife Partners, Ltd. v. City of Beverly Hills (CD Cal 2004) 304 F Supp2d 1208, 1214-1215*]. A denial is not res judicata or "law of the case" precluding renewal [*Advanced Semiconductor Materials Am., Inc. v. Applied Materials, Inc. (ND Cal 1996) 922 F Supp 1439, 1442*]. Accordingly, a moving party may renew a motion for summary judgment, notwithstanding denial of an earlier motion, by showing a different set of facts or some other reason justifying renewal of the motion [*Advanced Semiconductor Materials Am., Inc. v. Applied Materials, Inc. (ND Cal 1996) 922 F Supp 1439, 1442* ; *see Nightlife Partners, Ltd. v. City of Beverly Hills (CD Cal 2004) 304 F Supp2d 1208, 1214-1215*].

A renewed or successive summary judgment motion is especially appropriate if one of the following grounds is present [*Nightlife Partners, Ltd. v. City of Beverly Hills (CD Cal 2004) 304 F Supp2d 1208, 1215*]:

- An intervening change in controlling law;
- The availability of new evidence or an expanded factual record; or
- The need to correct a clear error or prevent manifest injustice.

29.34[2] Either Party May Seek Reconsideration of Ruling on Summary Judgment Motion.

29.34[2][a] Party May Move for Reconsideration Under Rule 59(e) or Rule 60(b). A party may appropriately bring a motion for reconsideration of summary judgment under either *Fed R Civ P 59(e)* or *60(b)* [*Hinton v. NMI Pac. Enters. (9th Cir 1993) 5 F3d 391, 395* , *cert. denied*, *511 US 1083 (1994)*]. A Rule 59(e) motion is a motion to alter or amend the judgment. A Rule 60(b) motion seeks relief from a final judgment, order, or proceeding [*School Dist. No. 1J v. AC&S, Inc. (9th Cir 1993) 5 F3d 1255, 1262* , *cert. denied*, *512 US 1236 (1994)*]. Generally, a post-order motion requesting a substantive change in an order, as opposed to a clerical change, is considered a Rule 59(e) motion, if filed within 28 days of entry. Otherwise it is considered a Rule 60(b) motion [*Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp. (9th Cir 2001) 248 F3d 892, 898-899* ; *see, e.g.*, United States v. Moyer (ND Cal 2008) 2008 US Dist

LEXIS 63995, at *13-*14].

Consider:

A party seeking reconsideration may file a motion invoking both rules [*see, e.g., Lolli v. County of Orange (9th Cir 2003) 351 F3d 410, 414*]. Counsel should consider doing so if the facts support a motion to reconsider under both rules.

Warning:

Local rules impose additional requirements on motions for reconsideration. For example, the Northern District requires parties to obtain leave of court before filing a motion for reconsideration [*see ND Cal Civ LR 7-9(a)*], and has promulgated rules governing the form and content of motions for leave to file a motion for reconsideration [*see ND Cal Civ LR 7-9(b)*]. The Central District also has strict rules governing the bases on which motions for reconsideration may be brought [see *CD Cal Civ LR 7-18*]. Counsel must, therefore, become familiar with and adhere to the local rules in the district in which the case is filed.

Many counsel feel that a Rule 59 motion is a "red flag" to the court that one's reconsideration motion seeks extremely rare relief, and that a Rule 60 motion has a similar stigma. These counsel recommend that motions for reconsideration be based *solely* on the local rules governing such motions.

Cross References:

Discussion of Rule 59(e) motion, see *§ 29.34[2][b]*. Discussion of Rule 60(b) motion, see *§ 29.34[2][c]*. Discussion of time to file motion for reconsideration, see *§ 29.34[2][d]*.

Further discussion of Rule 59, see 12 Moore's Federal Practice, Ch. 59, New Trial; Altering or Amending a Judgment (Matthew Bender 3d ed.). Further discussion of Rule 60, see 12 Moore's Federal Practice, Ch. 60, Relief From a Judgment or Order (Matthew Bender 3d ed.).

29.34[2][b] Rule 59(e) Motion Must Be Based on New Evidence, Clear Error, or Change in Law. A motion for reconsideration may be brought under *Fed R Civ P 59(e)* [*Backlund v. Barnhart (9th Cir 1985) 778 F2d 1386, 1388*]. However, Rule 59(e) offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources [*Carroll v. Nakatani (9th Cir 2003) 342 F3d 934, 945* (citing **Moore's**)]. Thus, a Rule 59(e) motion for reconsideration should not be granted absent the following highly unusual circumstances [*see Duarte v. Bardales (9th Cir 2008) 526 F3d 563, 567]* :

- The moving party presents the court with newly discovered evidence;
- The trial court committed clear error; or
- There is an intervening change in the controlling law.

Example:

The district court abused its discretion by entering final judgments and by refusing to vacate the final judgments under *Fed R Civ P 59(e)* and *60(b)(6)*, in a class action brought by participants in an employee stock ownership plan, because a genuine issue of material fact about whether defendants breached their fiduciary duty under ERISA precluded summary judgment [*Pilkington v. Cardinal Health, Inc. (In re Syncor ERISA Litig.) (9th Cir 2008) 516 F3d 1095, 1102-1103]* .

Accordingly, a Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation [*United Nat'l Ins. Co. v. Spectrum Worldwide, Inc. (9th Cir*

2009) 555 F3d 772, 780-781] . The trial court may properly refuse to consider evidence that was available prior to the court's initial ruling on the summary judgment motion [*see Novato Fire Prot. Dist. v. United States (9th Cir 1999) 181 F3d 1135, 1142, n6 , cert. denied, 529 US 1129 (2000)*]. Moreover, a motion relying on the same facts or arguments relied on by an earlier motion denied by the court may be treated as a "bad faith" motion justifying an award of sanctions [*see Fed R Civ P 56(g)*].

Cross References:

Discussion of time to file motion for reconsideration, see *§ 29.34[2][d]*.

Complete discussion of Rule 59(e) motions for reconsideration generally, see 12 Moore's Federal Practice, Ch. 59, New Trial; Altering or Amending a Judgment (Matthew Bender 3d ed.).

29.34[2][c] Rule 60(b) Motion Must Be Based on Mistake, Surprise, Excusable Neglect, New Evidence, Fraud, Void Judgment, or Other Reason Justifying Relief. A party may file a motion for reconsideration under *Fed R Civ P 60(b)*. However, to obtain reconsideration under Rule 60(b), the moving party must show [*Backlund v. Barnhart (9th Cir 1985) 778 F2d 1386, 1388* ; *see Fed R Civ P 60(b)(1)-(6)*]:

- Mistake, surprise, or excusable neglect;
- Newly discovered evidence;
- Fraud or other misconduct;
- A void judgment;
- A satisfied or discharged judgment; or
- Any other reason justifying relief from operation of judgment.

Relief under the "any other reason" provision of Rule 60(b)(6) may be granted only when extraordinary circumstances prevent a party from taking timely action to prevent or correct an erroneous judgment. Though the timeliness of a Rule 60(b)(6) motion depends on the facts of each case, a party seeking reconsideration on this basis generally may not obtain relief if the party has ignored normal legal recourses. Thus, a trial court normally will not grant Rule 60(b)(6) relief unless the moving party shows both injury and that circumstances beyond its control prevented timely action to protect its interests [*United States v. Alpine Land & Reservoir Co. (9th Cir 1993) 984 F2d 1047, 1049 , cert. denied, 510 US 813 (1993)*].

Example:

An attorney's gross negligence may constitute "extraordinary circumstances" sufficient to warrant relief under Rule 60(b)(6) [*see Community Dental Servs. v. Tani (9th Cir 2002) 282 F3d 1164, 1169* (involving Rule 60(b)(6) motion for reconsideration of default judgment)].

Cross References:

Discussion of time to file motion for reconsideration, see *§ 29.34[2][d]*.

Complete discussion of Rule 60(b) motions for reconsideration generally, see 12 Moore's Federal Practice, Ch. 60, Relief from a Judgment or Order (Matthew Bender 3d ed.).

29.34[2][d] Motion for Reconsideration Must Be Brought at Proper Time. To be timely, a Rule 59(e) motion for reconsideration must be filed within 28 days after entry of the judgment at issue [*Feldman v. Allstate Ins. Co. (9th*

Cir 2003) 322 F3d 660, 665 , cert. denied, 540 US 875 (2003) ; *see Fed R Civ P 59(e)*]. A Rule 60(b) motion to reconsider must be brought within a reasonable time. For motions brought based on mistake, newly discovered evidence, or fraud under Rule 60(b)(1)-(3), the motion must be made within a reasonable time, not to exceed one year after entry of judgment [*see Fed R Civ P 60(b)*].

In determining whether a motion brought under Rule 60(b)(4)-(6) is filed within a reasonable time, the court may consider factors such as the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied on, and the prejudice to the parties [*see Ashford v. Steuart (9th Cir 1981) 657 F2d 1053, 1055* (motion for reconsideration of denial of leave to proceed in forma pauperis)].

Distinguish:

Generally, a post-order motion requesting a substantive change in an order, as opposed to a clerical change, is considered a Rule 59(e) motion, if filed within 28 days of entry. Otherwise it is considered a Rule 60(b) motion [*Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp. (9th Cir 2001) 248 F3d 892, 898-899* ; *see, e.g.*, United States v. Moyer (ND Cal 2008) 2008 US Dist LEXIS 63995, at *13-*14].

Cross Reference:

Discussion of effect on appeal of timely filing of motion for reconsideration, see *§ 29.34[2][e]*.

29.34[2][e] Timely Motion for Reconsideration May Toll Time for Appeal. A summary judgment cannot be disturbed after expiration of the 30-day time for appeal [*see Fed R App P 4(a)(1)*]. However, filing a timely motion for reconsideration under Rule 59(e) tolls the time for filing a notice of appeal until the district court rules on the motion [*Feldman v. Allstate Ins. Co. (9th Cir 2003) 322 F3d 660, 665 , cert. denied, 540 US 875 (2003)* ; *see Fed R App P 4(a)(4)(A)(iv)*].

In contrast, a motion for reconsideration under Rule 60(b) does not affect the finality of a judgment or suspend its operation [*see Fed R Civ P 60(b)*]. Thus, filing a motion for reconsideration under *Fed R Civ P 60(b)* does not toll the 30-day period for filing an appeal [*Backlund v. Barnhart (9th Cir 1985) 778 F2d 1386, 1388*].

Distinguish:

A motion for reconsideration brought under both *Fed R Civ P 59(e)* and *60(b)* does toll the 30-day period for appealing a summary judgment order [*see Lolli v. County of Orange (9th Cir 2003) 351 F3d 410, 414* ; *Fed R App P 4*].

Cross References:

Discussion of time to file Rule 59(e) motions, see *§ 29.34[2][d]*.

Discussion of Rule 59(e) motions for reconsideration generally, see 12 Moore's Federal Practice, Ch. 59, New Trial; Altering or Amending a Judgment. Discussion of Rule 60(b) motions for reconsideration generally, see 12 Moore's Federal Practice, Ch. 60, Relief from a Judgment or Order (Matthew Bender 3d ed.).

29.34[2][f] District Court May Consider Rule 60(b) Motion Despite Appeal. Timely notice of appeal generally will divest a court of jurisdiction over an action, including divesting the district court of the power to hear a Rule 60(b) motion [*see Lewis v. Alexander (6th Cir 1993) 987 F2d 392, 394]* .

Cross Reference:

Discussion of appellate jurisdiction generally, see 19 Moore's Federal Practice, Ch. 201, Appellate Jurisdiction in the Federal System (Matthew Bender 3d ed.).

However, if a timely Rule 60(b) motion is made for relief that the district court lacks authority to grant because of an appeal that has been docketed and is pending, the district court may [*Fed R Civ P 62.1(a)*]:

- Defer consideration of the motion;
- Deny the motion; or
- State either that it would grant the motion if the court of appeals remands for that purpose, or that the motion raises a substantial issue.

If the district court states that it would grant the motion or that the motion raises a substantial issue, the movant must promptly notify the clerk of the court of appeals [*Fed R Civ P 62.1(b)*; *Fed R App P 12.1(a)*]. In such a case, the court of appeals may remand for further proceedings, but it retains jurisdiction unless it expressly dismisses the appeal [*Fed R App P 12.1(b)*]. The district court may decide the motion if the court of appeals remands for that purpose [*Fed R Civ P 62.1(b)*]. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the clerk of the court of appeals when the district court has decided the motion on remand [*Fed R App P 12.1(b)*].

Cross Reference:

Discussion of Rule 62.1 generally, see 12 Moore's Federal Practice, Ch. 60, Relief from a Judgment or Order, Ch. 62.1, Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentStandardsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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29.35 CHECKLIST: Obtaining Appellate Review of Grant or Denial of Summary Judgment.

☐ File notice of appeal from summary judgment as required by appellate rules.

○ Confirm that judgment is final and appellate court has jurisdiction over district court decision:

☐ Trial court must grant and enter judgment as required under federal rules; and

☐ Decision must dispose of all claims against all parties.

Authority:
28 USC §§ 1291, 1292(a)(3), (b); Fed R Civ P 58, 79(a)

Discussion:
See *§ 29.37[1]*

☐ Timely file notice of appeal to avoid waiver.

○ File notice of appeal with district clerk within 30 days after trial court enters judgment or order appealed from.

○ Confirm that:

☐ Trial court has set forth judgment in document separate from order granting motion; and

☐ Trial court clerk has properly entered judgment on civil docket.

Authority:
Fed R Civ P 58(a), 59(e), 79(a); Fed R App P 4(a)(1)(A) , (4)(A)(iv) , (7)(B)

Discussion:
See *§ 29.37[2]*

☐ Address request for appellate relief to appropriate standard of review, noting that:

○ Appellate court generally reviews summary judgment order de novo using same standard used by trial court.

○ Appellate court must determine, viewing evidence in light most favorable to nonmovant, whether:

☐ There are any genuine issues of material fact; and

☐ District court correctly applied relevant substantive law.

○ Appellate court may affirm grant of motion on any ground supported in record, including a ground not relied on by district court.

○ Appellate court reviews trial court's evidentiary rulings in summary judgment context for abuse of discretion.

○ Appellate court reviews trial court's rulings on motions for reconsideration on abuse of discretion standard.

☐ Appellate court may remand case if trial court fails to make reasons for granting summary judgment clear on record.

Authority:
Fed R Evid 103(a)

Discussion:
See *§§ 29.38, 29.39*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewGeneral OverviewCivil ProcedureSummary JudgmentAppellate

ReviewAppealabilityCivil ProcedureSummary JudgmentTime LimitationsCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

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29.36 Options and Strategy.

In general, federal courts of appeals have jurisdiction over appeals from all final decisions of the federal district courts [*see 28 USC § 1291*]. A trial court's *grant* of a summary judgment motion is a final decision for purposes of appeal once the trial court enters judgment as required by the federal rules, providing the judgment disposes of all claims against all parties [*see 28 USC § 1291*; *Fed R Civ P 58, 79(a)*]. Ordinarily, counsel must file a notice of appeal with the district clerk within 30 days after the trial court enters the summary judgment or order appealed from, or appeal is waived [*see Fed R App P 4(a)(1)(A)*].

Appellate review of trial court decisions on summary judgment is not deferential: Appeals courts typically review a grant of summary judgment de novo [*Welles v. Turner Entertainment Co. (9th Cir 2007) 503 F3d 728, 733]* . Viewing the evidence in the light most favorable to the nonmoving party, the appellate court determines whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law [*San Jose Christian Coll. v. City of Morgan Hill (9th Cir 2004) 360 F3d 1024, 1029-1030*]. An appeals court may affirm a grant of summary judgment on any ground supported by the record, even one not relied on by the district court [*United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall (9th Cir 2004) 355 F3d 1140, 1144*].

In contrast to an order granting summary judgment, summary adjudication orders, orders granting partial summary judgment and generally are not appealable final orders [*Williamson v. UNUM Life Ins. Co. of Am. (9th Cir 1998) 160 F3d 1247, 1250*]. If all of the claims against one of several parties have been resolved by the courts order, or if a separable claim has been entirely disposed by the courts order, it is possible for the district court to enter a separate, appealable judgment for the affected claims or parties under Rule 54(b). The matter is totally in the discretion of the district court. The district court may expressly determine that "there is no just reason for delay" in entering a final judgment as to the affected claims or parties, and may expressly direct the entry of a separate final judgment as to these matters [*Fed R Civ P 54(b)*]. If the court does so, there will be a final judgment from which to appeal. If the court does not do so, appeal must wait until the final judgment in the case as a whole.

A party adversely impacted by a summary adjudication order may attempt to obtain review of the trial court's orders by voluntarily dismissing the remaining claims without prejudice. This is not advisable. Voluntarily dismissing the remaining claims without prejudice does not necessarily render the summary adjudication order appealable. If the appellate court finds evidence that a party is attempting to manipulate appellate jurisdiction by manufacturing finality, it

may refuse to hear the case [*see, e.g., Adonican v. City of Los Angeles (9th Cir 2002) 297 F3d 1106, 1107*].

In contrast to any order granting a summary judgment, an order denying a motion for summary judgment is completely interlocutory and not appealable [*see Pacific Union Conference of Seventh-Day Adventists v. Marshall (1977) 434 US 1305, 1306, 98 S Ct 2, 54 L Ed2d 17*]. Unlike a summary adjudication order that *does* completely dispose of some claims or all of the claims against some parties, there is no basis for the court to enter a separate Rule 54(b) final judgment in the case [*see Fed R Civ P 54(b)*]. An interlocutory order denying summary judgment might be the subject of a discretionary appeal, however. Any interlocutory order may be immediately appealable if the district court certifies that (1) "the order involves a controlling question of law as to which there is substantial ground for difference of opinion," and that (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." If the certification is obtained, the losing party may apply to the court of appeals within 10 days of the order, and the court of appeals may, in its discretion, agree to hear the interlocutory appeal [*28 USC § 1292(b)*]. Furthermore, although it is highly unlikely in connection with most orders denying summary judgment, a party may attempt to secure an immediate appeal by invoking the "collateral order" doctrine. Appellate courts will entertain an appeal from an interlocutory order that conclusively determines an issue in the trial court if that order resolves an important question of law that is independent of the subject matter of the litigation and that is also effectively unreviewable on appeal [*see, e.g., Demshki v. Monteith (9th Cir 2001) 255 F3d 986, 988*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewAppealabilityCivil ProcedureSummary JudgmentAppellate ReviewStandards of ReviewCivil ProcedureSummary JudgmentTime Limitations

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29.37 File Notice of Appeal From Summary Judgment As Required by Appellate Rules.

29.37[1] Appellate Court Must Have Jurisdiction Over District Court Decision.

29.37[1][a] Appellate Court Has Jurisdiction Over All Final Decisions of District Courts. In general, federal courts of appeals have jurisdiction of appeals from all final decisions of the federal district courts [*see 28 USC § 1291*]. For purposes of appellate jurisdiction, a final judgment is a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment [*Williamson v. UNUM Life Ins. Co. of Am. (9th Cir 1998) 160 F3d 1247, 1250*]. When a trial court grants a motion for summary judgment and enters judgment as required under the federal rules, the judgment is a final decision for purposes of appeal, providing it disposes of all claims against all parties [*see 28 USC § 1291*; *Fed R Civ P 58*, *79(a)*].

In contrast, orders granting partial summary judgment generally are not appealable final orders because they do not dispose of all claims and do not end the litigation on the merits [*Williamson v. UNUM Life Ins. Co. of Am. (9th Cir 1998) 160 F3d 1247, 1250*]. Similarly, an order denying summary judgment generally is a nonappealable interlocutory decree [*see Pacific Union Conference of Seventh-Day Adventists v. Marshall (1977) 434 US 1305, 1306, 98 S Ct 2, 54 L Ed2d 17* ; *Nightlife Partners, Ltd. v. City of Beverly Hills (CD Cal 2004) 304 F Supp2d 1208, 1214-1215*].

Cross References:

Discussion of appeal of summary adjudication, see *§ 29.37[1][b]*. Discussion of appeal of order denying summary judgment, see *§ 29.37[1][c]*.

29.37[1][b] Summary Adjudication Generally Results in Nonappealable Interlocutory Order. Ordinarily, summary adjudications under *Fed R Civ P 56* are interlocutory orders rather than final judgments. As such, they are not appealable before entry of a final judgment in the case [*Williamson v. UNUM Life Ins. Co. of Am. (9th Cir 1998) 160 F3d 1247, 1250* ; *see 28 USC § 1291* (federal appellate courts have jurisdiction in appeals from all final decisions of district courts)]. A final judgment is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment [*Catlin v. United States (1945) 324 US 229, 233, 65 S Ct 631, 89 L Ed 911* ; *California v. Campbell (9th Cir 1998) 138 F3d 772, 776* , *cert. denied*, *525 US 822 (1998)*].

Examples:

An order that determines liability but not damages is not a final decision, nor is an order adjudicating less than all claims [*California v. Campbell (9th Cir 1998) 138 F3d 772, 776 , cert. denied, 525 US 822 (1998)*].

Exceptions:

Interlocutory appeal of a summary adjudication order may be appropriate under special circumstances, including when:

- **Separate Rule 54(b) final judgment entered.** If the case involves multiple claims for relief or multiple parties, and if a summary adjudication fully disposes of a single claim or disposes of all claims as to one of several parties, the court has discretion to enter a separate final judgment on the summary adjudication. A court may direct the entry of a separate, final judgment as to one or more (but fewer than all) of the claims or parties if the court expressly determines that there is "no just reason for delay." If the court does not make the express determination and if the court does not expressly direct entry of a separate final judgment, the summary adjudication order remains unappealable. It does not terminate the action as to any of the claims or parties, and is subject to revision at any time before entry of a final judgment that *does* resolve *all* of the claims and the rights and liabilities of *all* of the parties [*Fed R Civ P 54(b)*].

- **District judge certifies order for discretionary 1292(b) interlocutory appeal.** A summary adjudication is like any other nonappealable interlocutory order. If the district judge who makes the ruling is of the opinion that: (1) the "order involves a controlling question of law as to which there is substantial ground for difference of opinion," and (2) an immediate appeal "may materially advance the ultimate termination of the litigation," the district judge may certify that opinion in writing. If the losing party who desires an immediate appeal of the summary adjudication obtains the written certification just described, he or she may apply to the appropriate United States Court of Appeals for permission to appeal. The application must be made within 10 days of the district court's order, and the Court of Appeals has discretion as to whether it will permit or refuse the appeal [*28 USC § 1292(b)*].

- **Specific statute authorizes appeal.** The losing party may bring an immediate interlocutory appeal of a summary adjudication order when a specific statute authorizes an interlocutory appeal [*see, e.g., Southwest Marine, Inc. v. Danzig (9th Cir 2000) 217 F3d 1128, 1135 , cert. denied, 532 US 1007 (2001)* (involving interlocutory appeal under *28 USC § 1292(a)(3)*)].

- **Collateral order doctrine supports interlocutory appeal.** The losing party may immediately appeal a summary adjudication order when the order conclusively resolves important questions: (1) that are separate from the merits, *and* (2) that are effectively unreviewable on appeal from a final judgment in the underlying action [*Swint v. Chambers County Comm'n (1995) 514 US 35, 42, 115 S Ct 1203, 131 L Ed2d 60* ; *California ex rel. Cal. Dep't of Toxic Substances Control v. Campbell (9th Cir 1998) 138 F3d 772, 777 , cert. denied, 525 US 822 (1998)*].

Cross References:

Further discussion of appealability of summary adjudication order, see *§ 29.31[4]*.

Discussion of separate Rule 54(b) final judgments for orders disposing of some claims or some parties, see 10 Moore's Federal Practice, § 54.10 et seq. Discussion of discretionary interlocutory appeals under Section 1292(b), see 19 Moore's Federal Practice, *§ 203.30* et seq. (Matthew Bender 3d ed.).

Warning:

A party adversely impacted by a summary adjudication order does not necessarily render the order appealable by voluntarily dismissing the remaining claims without prejudice. Though dismissal without prejudice can be a final, appealable order, there must not be evidence that one or both of the parties attempted to manipulate appellate jurisdiction by artificially manufacturing finality [*James v. Price Stern Sloan, Inc. (9th Cir 2002) 283 F3d 1064, 1066* ; *see, e.g., Adonican v. City of Los Angeles (9th Cir 2002) 297 F3d 1106, 1107* (parties entered into agreement that plaintiff would voluntarily dismiss her remaining claims after order granting partial summary judgment, but would have option to re-file dismissed claims within 30 days after appellate court decision on partial summary judgment)].

29.37[1][c] Order Denying Summary Judgment Generally Is Not Final Appealable Order. Parties may not appeal district court orders before the entry of a final judgment [*California ex rel. Cal. Dep't of Toxic Substances Control v. Campbell (9th Cir 1998) 138 F3d 784, 786 , cert. denied, 525 US 874 (1998)* ; *see 28 USC § 1291*]. Thus, a litigant generally may not appeal an interlocutory order denying summary judgment [*Demshki v. Monteith (9th Cir 2001) 255 F3d 986, 988* ; *see 28 USC § 1291*].

However, an order denying a summary judgment motion may be immediately appealable if the district court certifies that the order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation [*see 28 USC § 1292(b)*]. In addition, appellate courts will entertain an appeal from an interlocutory order that (1) conclusively determines the issue in the trial court, (2) resolves an important question independent of the subject matter of the litigation, and (3) is effectively unreviewable on appeal from a final judgment [*Demshki v. Monteith (9th Cir 2001) 255 F3d 986, 988*].

Examples:

An interlocutory order denying summary judgment on the basis of *Eleventh Amendment* immunity has been held reviewable, since the central benefit of *Eleventh Amendment*--the right not to stand trial--is effectively lost if the case erroneously proceeds to trial [*Demshki v. Monteith (9th Cir 2001) 255 F3d 986, 988*]. Similarly, denial of a defendant's motion for summary judgment on the grounds of qualified immunity is reviewable to the extent the order turns on an issue of law [*Mitchell v. Forsyth (1985) 472 US 511, 527, 105 S Ct 2806, 86 L Ed2d 411* ; *Kennedy v. City of Ridgefield (9th Cir 2006) 439 F3d 1055, 1060*].

29.37[1][d] Order Denying Summary Judgment May Be Reviewed After Trial on Merits If District Court Would Have Been Required to Grant Motion But for Error of Law. While generally appellate review of the denial of a summary judgment motion is not available after a full trial on the merits, that general rule does not apply when the district court made an error of law in denying the motion and, if that error had not been made, the district court would have been required to grant the motion [*Banuelos v. Constr. Laborers' Trust Funds for S. Cal. (9th Cir 2004) 382 F3d 897, 902* ; *Pavon v. Swift Transp. Co., Inc. (9th Cir 1999) 192 F3d 902, 906*].

29.37[2] Timely File Notice of Appeal to Avoid Waiver. In general, a notice of appeal must be filed with the district clerk within 30 days after the trial court enters the judgment or order appealed from [*Fed R App P 4(a)(1)(A)*]. After expiration of the 30-day time for appeal, a summary judgment cannot be disturbed [*see Fed R App P 4(a)(1)*].

Exceptions:

Filing a timely motion for reconsideration under *Fed R Civ P 59(e)* tolls the time for filing a notice of appeal on a grant of summary judgment until the district court rules on the motion for reconsideration [*Feldman v. Allstate Ins. Co. (9th Cir 2003) 322 F3d 660, 665 , cert. denied, 540 US 875 (2003)* ; *see Fed R App P 4(a)(4)(A)(iv)*]. However, filing a *premature* post-judgment motion under *Fed R Civ P 59* does not accelerate the deadline for a notice of appeal before a separate judgment has been entered [*see ABF Capital Corp. v. Osley (9th Cir 2005) 414 F3d 1061, 1064-1065*].

The district court may extend the time to file a notice of appeal for up to 30 days if the motion is made within 30 days after the time for appeal has expired and the moving party shows excusable neglect or good cause [*Fed R App P 4(a)(5)*]; *see Mendez v. Knowles (9th Cir 2009) 556 F3d 757, 764-767* (habeas petitioner was entitled to extension on grounds of excusable neglect; petitioner acted in good faith, delay was only one day, and respondent conceded it would not be prejudiced)].

For purposes of filing a timely notice of appeal, a trial court enters judgment on an order granting a summary judgment when [*Radio TV Espanola S.A. v. New World Entm't, Ltd. (9th Cir 1999) 183 F3d 922, 930* ; *see Fed R Civ P 58, 79(a)*]:

- The court has set forth the judgment in a document separate from the order granting the motion; and
- The court clerk has properly entered the judgment on the civil docket.

However, a trial court's failure to set forth a judgment or order in a separate document under *Fed R Civ P 58(a)* does not affect the validity of an appeal from that judgment or order [*see Fed R App P 4(a)(7)(B)*]. Satisfaction of the "separate document rule" is not a prerequisite to appeal of an order granting summary judgment [*see Casey v. Albertson's Inc. (9th Cir 2004) 362 F3d 1254, 1258 , cert. denied, 543 US 870 (2004)*].

Cross Reference:

Discussion of motions for reconsideration, see *§ 29.34[2]*.

29.37[3] Party May Not Raise New Issues on Appeal to Obtain Reversal of Trial Court's Summary Judgment Determination. The parties may not raise new issues on appeal to secure a reversal of a lower court's summary judgment determination. Issues not raised by the parties for initial consideration by the trial court are waived [*see BankAmerica Pension Plan v. McMath (9th Cir 2000) 206 F3d 821, 825 , cert. denied sub nom. McMath v. Montgomery, 531 US 952 (2000)*]. Similarly, a party may not revisit on appeal theories that it raised but abandoned at summary judgment in the district court [*USA Petroleum Co. v. Atlantic Richfield Co. (9th Cir 1994) 13 F3d 1276, 1284*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewAppealabilityCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

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29.38 Appellate Review of Summary Judgment Determination Is Not Deferential.

29.38[1] Appellate Court Reviews Summary Judgment Order De Novo Using Same Standard Used by Trial Court. In general, appellate courts review a grant of summary judgment de novo, using the same standard applied by the trial court. The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law [*San Jose Christian Coll. v. City of Morgan Hill (9th Cir 2004) 360 F3d 1024, 1029-1030*].

De novo review means the court must consider the matter anew, as if it had not been heard before, and as if no decision previously had been rendered. However, the only issues before the court for review are questions of law [*see Ness v. Commissioner (9th Cir 1992) 954 F2d 1495, 1497* (nonsummary judgment case)].

Exception:

In some instances, the appeals court must apply a different standard in reviewing a trial court's determination of a summary judgment motion. For example, when the trial court has granted summary judgment on the basis of a laches defense, the appeals court reviews the trial court's application of the laches doctrine to the facts for abuse of discretion, while it reviews other aspects of the district court's decision, such as whether the trial court inappropriately resolved any disputed material facts in reaching its decision, under the de novo standard that traditionally governs summary judgment review [*In re Beaty (9th Cir 2002) 306 F3d 914, 921*].

Cross Reference:

Discussion of appellate court's standard of review for summary judgment order, see 11 Moore's Federal Practice, *§ 56.41[3][a]* (Matthew Bender 3d ed.).

29.38[2] Appellate Court Must Determine If There Are Genuine Issues of Material Fact and Whether District Court Correctly Applied Relevant Substantive Law. In reviewing the trial court's decision, the appeals court must determine whether there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law [*Universal Health Servs., Inc. v. Thompson (9th Cir 2004) 363 F3d 1013, 1019*]. In making

this determination, the appeals court must not weigh the evidence or determine the truth of the matter. Rather, the court must only determine whether the case presents a genuine issue for trial [Southern Cal. Painters & Allied Trade Dist. Council No. 36 v. *Best Interiors, Inc. (9th Cir 2004) 359 F3d 1127, 1130*].

Cross References:

Further discussion of meaning of genuine issues of material fact, see *§ 29.29[2]*. Discussion of importance of applicable substantive law, see *§ 29.29[3]*.

29.38[3] Appellate Court May Affirm Grant of Motion on Any Ground Supported in Record. The appellate court may affirm a grant of summary judgment on any ground supported by the record, including a ground not relied on by the district court [*United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall (9th Cir 2004) 355 F3d 1140, 1145*]. Thus, in reviewing an order granting summary judgment, an appeals court is not limited to a consideration of the grounds on which the district court decided the issue. If the district court's order can be sustained on any ground supported by the record that was before the district court at the time of the ruling, the appellate court is obliged to affirm the district court [*Jewel Cos., Inc. v. Pay Less Drug Stores Northwest, Inc. (9th Cir 1984) 741 F2d 1555, 1564-1565*].

Cross Reference:

11 Moore's Federal Practice, *§ 56.41[3][b]* (Matthew Bender 3d ed.).

29.38[4] Appellate Court Reviews Trial Court's Evidentiary Rulings in Summary Judgment Context for Abuse of Discretion. A trial court's evidentiary rulings in determining a summary judgment motion are reviewed for abuse of discretion [*General Elec. Co. v. Joiner (1997) 522 US 136, 142, 118 S Ct 512, 139 L Ed2d 508* ; *Sea-Land Serv., Inc. v. Lozen Int'l, LLC. (9th Cir 2002) 285 F3d 808, 813*]. The fact that a trial court's ruling on admissibility of evidence is "outcome determinative" for purposes of granting summary judgment does not compel a finding that the trial court's ruling should be subjected to a more searching standard of review [*General Elec. Co. v. Joiner (1997) 522 US 136, 143, 118 S Ct 512, 139 L Ed2d 508*]. Even when a district court has abused its discretion, reversal is appropriate only when the court's error is prejudicial [*Sea-Land Serv., Inc. v. Lozen Int'l, LLC. (9th Cir 2002) 285 F3d 808, 813* ; *see Fed R Evid 103(a)*].

Cross Reference:

11 Moore's Federal Practice, *§ 56.41[3][d]* (Matthew Bender 3d ed.).

29.38[5] Appellate Court Reviews Trial Court's Rulings on Motions to Reconsider on Abuse of Discretion Standard. An appeals court reviews for abuse of discretion a district court's denial of a motion to reconsider an order granting summary judgment [School Dist. No. 1J v. *AC&S, Inc. (9th Cir 1993) 5 F3d 1255, 1262* , *cert. denied*, *512 US 1236 (1994)* ; *Leslie v. Grupo ICA (9th Cir 1999) 198 F3d 1152, 1157*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewStandards of ReviewCivil ProcedureAppealsStandards of ReviewDe Novo Review

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29.39 Appellate Court May Remand Case If Trial Court Fails to Make Reasons for Granting Summary Judgment Clear on Record.

When a movant presents multiple grounds for summary judgment, and the reasons for the district court's decision are not otherwise clear from the record, a reviewing court may vacate a summary judgment and remand for a statement of reasons [*Couveau v. American Airlines, Inc. (9th Cir 2000) 218 F3d 1078, 1081* (per curiam)].

Cross Reference:

11 Moore's Federal Practice, *§ 56.41[3][e]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewGeneral OverviewCivil ProcedureAppealsRemands

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29.40 Notice of Motion and Motion for Summary Judgment.

Notice of Motion and Motion for Summary Judgment.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	DEFENDANT'S NOTICE OF MOTION AND MO-
_____ [*name*],	)	TION FOR SUMMARY JUDGMENT
Defendant	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*], at _____ [*time*], or as soon thereafter as counsel can be heard, in Room _____ of the United States Court House, located at _____ [*address*], Defendant _____ [*name*], through counsel, will and does request that this Court grant Defendant's motion for summary judgment dismissing _____ [*specify, e.g.,* all counts of the Plaintiff's Complaint].

Defendant files this motion for summary judgment pursuant to _____ [*authority, e.g., Federal Rules of Civil Procedure 56(b)*], on the ground that: _____ [*specify bases for summary judgment*]. Accordingly, the Plaintiff's case presents no genuine issue as to any material fact. Summary judgment is warranted as a matter of law.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, _____ [*specify evidence and other material submitted in support of motion*] and any other matters Defendant may present to this Court at the hearing on this motion.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 7(b), 11, 56

Discussion:
See *§ 29.05, 29.07*

Timing:
See *§ 29.13*

Format Requirements:

See *§ 29.07[6]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentNotices

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29.41 Notice of Motion and Motion for Summary Adjudication.

Notice of Motion and Motion for Summary Adjudication.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	PLAINTIFF'S NOTICE OF MOTION
vs.	)	AND MOTION FOR SUMMARY
_____ [*name*],	)	ADJUDICATION
Defendant	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____
	)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*], at _____ [*time*], or as soon thereafter as counsel can be heard, in Room _____ of the United States Court House, located at _____ [*address*], Plaintiff _____ [*name*], through counsel, will and does request that this Court grant Plaintiff's motion for summary adjudication on _____ [*specify portion of case on which movant seeks summary adjudication*].

Plaintiff files this motion for summary adjudication pursuant to _____ [*specify authority, e.g., Federal Rules of Civil Procedure Rule 56(a)* and Central District of California Civil Local Rule 56-1], on the ground that there is no genuine issue as to any material fact, and that Plaintiff is entitled to summary adjudication as a matter of law, in that: _____ [*specify bases for summary adjudication*].

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

Plaintiff's motion is based on this Notice of Motion and Motion, _____ [*specify evidence and other material submitted in support of motion, e.g.,* the pleadings and other papers filed in this action, the Plaintiff's Memorandum of Points and Authorities, the attached declarations of John Smith and Jean Smith, the proposed Statement of Uncontroverted Facts and Conclusions of law, the May 21, 2004 deposition of Defendant Mary Jones, and any others matters that Plaintiff may present to the Court at the time of the hearing on this motion.]
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service.*]

NOTES.

Authority:
Fed R Civ P 7(b), 11, 56(a), (d)

Discussion:
See *§ 29.05[5], 29.07*

Format Requirements:
See *§ 29.07[6]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentNotices

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29.42 Memorandum of Points and Authorities in Support of Motion for Summary Judgment.

Memorandum of Points and Authorities in Support of Motion for Summary Judgment.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORIT-
_____ [*name*],	)	IES IN SUPPORT OF MOTION FOR SUMMARY
Defendant	)	JUDGMENT
	)	Date of Hearing: _____
	)	Time of Hearing: _____
		Courtroom No. _____

I. INTRODUCTION

[*Describe background of case and summarize reasons why summary judgment is appropriate*.]

II. STATEMENT OF FACTS

[*Set forth concise statement of facts relevant to motion*.]

III. ARGUMENT

[*Set forth argument in support of summary judgment, with cites to relevant authority*.]

IV. CONCLUSION

[*Summarize argument and requested relief*.]

Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 7(b), *56(a)*; *CD Cal Civ LR 7-5(a)*; *ED Cal Civ LR 230(b)*; *ND Cal Civ LR 7-2(b)(4)*, *7-4*

Discussion:
See *§ 29.08*

Format Requirements:
See *§ 29.08[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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29.43 Statement of Undisputed or Uncontroverted Facts.

Statement of Undisputed or Uncontroverted Facts.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	NO. _____
Plaintiff	)	DEFENDANT'S (PROPOSED)
vs.	)	STATEMENT OF _____
_____ [*name*],	)	[UNCONTROVERTED FACTS AND CONCLU-
Defendant	)	SIONS OF LAW *OR SPECIFY TITLE REQUIRED*
	)	*UNDER LOCAL RULES*]
	)	Date of Hearing: _____
	)	Time of Hearing: _____
		Courtroom No. _____

After considering the papers supporting and opposing Defendant's motion for summary judgment, and the oral argument of counsel, the Court determines that the following facts have been established as uncontroverted:

_____ [UNCONTROVERTED *or* UNDISPUTED] FACTS

[*Set forth undisputed facts in separately numbered paragraphs or in dual column format, with citation to record where facts may be found by page and line number when possible*.]

Based on the above _____ [Uncontroverted *or* Undisputed] Facts, the Court makes the following conclusions of law:

CONCLUSIONS OF LAW

[*Set forth legal conclusions in separately numbered paragraphs, with citation to authority as necessary*.]

Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 7(b), *56(a)*; *ED Cal Civ LR 260(a)*; but see *ND Cal Civ LR 56-1*

Discussion:
See *§ 29.09*

Format Requirements:
See *§ 29.09[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsGeneral Overview

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29.44 Affidavit in Support of Motion for Summary Judgment.

Affidavit in Support of Motion for Summary Judgment.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	NO. _____
vs.	)	_____ [*AFFIANT'S*]
_____ [*name*],	)	AFFIDAVIT IN SUPPORT OF
Defendant	)	DEFENDANT'S MOTION FOR
	)	SUMMARY JUDGMENT
	)	

_____ [*Name of affiant*], being duly sworn, deposes and states:

1. I am _____ [*set forth facts showing affiant's capacity to testify about matters set forth*].

2. I have personal knowledge of the matters stated in this affidavit as a result of _____ [*describe basis for affiant's personal knowledge of facts in affidavit*].

3. _____ [*Set forth factual matters to which affiant has personal knowledge as relevant to motion for summary judgment in separately numbered paragraphs as necessary*].

_____ [*signature of affiant*]

_____ [*typed name of affiant*]

Sworn to and subscribed before me on _____ [*date*].

_____

Notary Public

My commission expires _____ [*date*].

NOTES.

Authority:
28 USC § 1746; *Fed R Civ P 56(e)(1)*; *CD Cal Civ LR 7-6*, *7-7*; *ED Cal Gen LR 101*; *ED Cal Civ LR 260(a)*; *SD Cal Civ LR 7.1(f.2.a)*

Discussion:
See *§ 29.11*

Format Requirements:
See *§ 29.11[9]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsAffidavits

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CHAPTER 29 Summary Judgment
VII. FORMS
A. By Moving Party

4-29 MB Practice Guide: Fed Pretrial Civ Proc in CA 29.45

29.45 Proposed Order Granting Motion for Summary Judgment.

Proposed Order Granting Motion for Summary Judgment.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	NO. _____
vs.	)	_____ [*MOVANT'S*] PROPOSED
_____ [*name*],	)	ORDER GRANTING SUMMARY
Defendant	)	_____ [JUDGMENT *OR* ADJU-
	)	DICATION]
	)	Date of Hearing: _____
		Time of Hearing: _____
		Courtroom No. _____

This is a _____ [*type of action, e.g.,* suit for damage to real property] brought by Plaintiff _____ [*name*] against Defendant _____ [*name*]. Defendant moves the Court for summary _____ [judgment *or* adjudication] pursuant to *Federal Rule of Civil Procedure 56*. The Court reviewed the moving and the opposition papers _____ [*add, if applicable:* and, on _____ (*date*), held a hearing on the motion]. Based on the submissions and the arguments, Defendant's

motion for summary _____ [judgment *or* adjudication] is GRANTED.

I. PROCEDURAL BACKGROUND

[*Set forth procedural background of action as relevant to motion in separate, numbered paragraphs, with cites to record as necessary*.]

II. LEGAL STANDARD

[*Set forth applicable legal standard, e.g.:*]

The Court renders summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law [*Fed R Civ P 56(c)(2)*]. A fact is "material" if, according to the underlying substantive law, it is relevant to an element of a claim or a defense and its existence might affect the outcome of the suit [*T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n (9th Cir 1987) 809 F2d 626, 630*].

The moving party bears the initial burden of establishing that there is no genuine issue of material fact [*Celotex Corp. v. Catrett (1986) 477 US 317, 323, 106 S Ct 2548, 91 L Ed2d 265*]. The burden on the moving party may be discharged by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case [*Celotex Corp. v. Catrett (1986) 477 US 317, 325, 106 S Ct 2548, 91 L Ed2d 265*]. If the moving party has properly supported its motion, the burden shifts to the nonmoving party, who may not rest on the mere allegations plead. Rather, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial [*Fed R Civ P 56(e)*], proffering more than a mere scintilla of evidence [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 251, 106 S Ct 2505, 91 L Ed2d 202*], and showing more than some metaphysical doubt as to the material facts [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp. (1986) 475 US 574, 586, 106 S Ct 1348, 89 L Ed2d 538*].

There is no issue for trial unless sufficient evidence in favor of the nonmoving party would allow a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, the court may grant summary judgment [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 249-250, 106 S Ct 2505, 91 L Ed2d 202*]. The court's ultimate inquiry is whether a rational, reasonable jury might return a verdict in the nonmoving party's favor based on the specific facts set forth combined with the undisputed, background, and contextual facts [*T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n (9th Cir 1987) 809 F2d 626, 631*].

The Court does not make findings of fact at this stage. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial; in other words, whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party [*Anderson v. Liberty Lobby, Inc. (1986) 477 US 242, 250, 106 S Ct 2505, 91 L Ed2d 202*] Consequently, the Court draws all inferences in the light most favorable to the nonmoving party and presumes that the nonmoving party's evidence is true. If the nonmoving party adduces direct evidence of a fact, the Court does not weigh it against the moving party's conflicting evidence, but rather submits it to the trier of fact for resolution [*Eisenberg v. Insurance Co. of N. Am. (9th Cir 1987) 815 F2d 1285, 1289*]. Conversely, on summary judgment the Court decides pure questions of law, such as the interpretation of an unambiguous contract [*City of Santa Clara v. Watkins (9th Cir 1993) 984 F2d 1008, 1012* , *cert. denied sub nom. City of Palo Alto v. O'Leary, 510 US 1041 (1994)*].

III. ANALYSIS

[*Apply legal standards to facts in case, with each issue treated in separately-numbered paragraphs*.]

IV. CONCLUSION

For the reasons set forth above, Plaintiff's motion for summary _____ [judgment *or* adjudication] is GRANTED.

IT IS SO ORDERED.
Dated: _____

.....
.....

_____

U.S. DISTRICT COURT JUDGE

NOTES.

Authority:
Fed R Civ P 7(b), *56*; *CD Cal Civ LR 56-1*, *56-4*; *ND Cal Civ LR 7-2(c)*

Discussion:
See *§ 29.10*

Format Requirements:
See *§ 29.10[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsGeneral Overview

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29.46 Affidavit in Opposition to Motion for Summary Judgment.

Affidavit in Opposition to Motion for Summary Judgment.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]

_____ [*name*],	)	
Plaintiff	)	NO. _____
vs.	)	_____ [*AFFIANT'S*]
_____ [*name*],	)	AFFIDAVIT IN OPPOSITION TO
Defendant	)	MOTION FOR
	)	SUMMARY JUDGMENT
	)	

_____ [*Name of affiant*], being duly sworn, deposes and states:

1. I am _____ [*set forth facts showing affiant's capacity to testify about matters set forth*].

2. I have personal knowledge of the matters stated in this affidavit as a result of _____ [*describe basis for affiant's personal knowledge of facts in affidavit*].

3. _____ [*Set forth factual matters to which affiant has personal knowledge as relevant to motion for summary judgment in separately numbered paragraphs as necessary*].

_____

[*Signature of affiant*]

[*Typed name of affiant*]

Sworn to and subscribed before me on _____ [*date*].

_____

Notary Public

My commission expires _____ [*date*].

NOTES.

Authority:
28 USC § 1746; *Fed R Civ P 56(e)*

Discussion:
See *§ 29.17[3]*

Timing:
See *§ 29.20[4]*

Format Requirements:
See *§ 29.11[9]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionSupporting Materials

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VII. FORMS
B. By Nonmoving Party

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29.47 Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment.

Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	NO. _____
vs.	)	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
_____ [*name*],	)	
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
		Courtroom No. _____

I. INTRODUCTION

[*Describe background of case and summarize reasons why summary judgment is inappropriate*.]

II. STATEMENT OF FACTS

[*Set forth concise statement of facts relevant to motion and opposition*.]

III. ARGUMENT

[*Set forth argument in opposition to summary judgment, with cites to relevant authority*.]

IV. CONCLUSION

[*Summarize argument opposing summary judgment and set forth relief requested*.]

Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 7(b), *56*; *CD Cal Civ LR 7-9*; *ND Cal Civ LR 7-4*

Discussion:
See *§ 29.16[6]*

Format Requirements:
See *§ 29.08[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionMemoranda in Opposition

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4-29 MB Practice Guide: Fed Pretrial Civ Proc in CA 29.48

29.48 Statement of Genuine Issues or Controverted or Disputed Facts.

Statement of Genuine Issues or Controverted or Disputed Facts.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	NO. _____
vs.	)	_____ [*NONMOVANT'S*] STATE-
_____ [*name*],	)	MENT OF _____ [GENUINE IS-
Defendant	)	SUES *OR* DISPUTED FACTS *OR* CONTROVER-
	)	TED FACTS]
	)	Date of Hearing: _____
		Time of Hearing: _____
		Courtroom No. _____

Pursuant to Local Civil Rule _____, _____ [*nonmovant*] submits this Statement of _____ [Genuine Issues *or* Disputed Facts *or* Controverted Facts] in response to _____ [*movant's*] Statement of _____ [Genuine Issues *or* Undisputed Facts *or* Uncontroverted Facts] filed on _____ [*date*].

RESPONSES

_____ [*Nonmovant*] responds to the respective numbered paragraphs of _____ [*movant's*] Statement of _____ [Genuine Issues *or* Undisputed Facts *or* Uncontroverted Facts] as follows:

[*Set forth nonmovant's response to each paragraph in movant's statement, e.g.,*]

1. Undisputed.

2. Disputed. _____ [*Nonmovant*] oversaw and directed all leasing activities from _____ [his *or* her] office at _____ [*address*]. *See* _____ [*name of evidence*], Page _____, Line _____.

3. Undisputed.

4. Disputed to the extent that _____ [*specify*]. _____ [*Deponent's*] Deposition, Page _____, Line _____.

5. Admitted to the extent that _____ [*specify*]. _____ [*Declarant's*] Declaration of _____ [*date*], Page _____, Paragraph _____. Disputed to the extent that _____ [*specify*]. _____ [*Affiant's*] Affidavit, Page _____, Paragraph _____.

[*Continue as necessary*.]

_____ [*NONMOVANT'S*] STATEMENT OF
ADDITIONAL MATERIAL FACTS

[*Set forth nonmovant's statement of additional disputed facts in separately numbered paragraphs, with cites to record*.]

Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 7(b), *56*; *CD Cal Civ LR 56-2*, *56-4*; *ED Cal Civ LR 260(b)*; *ND Cal Civ LR 56-1*

Discussion:
See *§ 29.16[5]*

Format Requirements:
See *§ 29.09[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionSupporting Materials

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B. By Nonmoving Party

4-29 MB Practice Guide: Fed Pretrial Civ Proc in CA 29.49

29.49 Proposed Order Denying Motion for Summary Judgment.

Proposed Order Denying Motion for Summary Judgment.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	NO. _____
vs.	)	_____ [*NONMOVANT'S*] PROPOSED ORDER DENYING SUMMARY
_____ [*name*],	)	_____ [JUDGMENT *OR* ADJUDICATION]
Defendant	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

This is a _____ [*type of action, e.g.,* suit for damage to real property] brought by Plaintiff _____ [*name*] against Defendant _____ [*name*]. Defendant moves the Court for summary _____ [judgment *or* adjudication] pursuant to *Federal Rule of Civil Procedure 56*. The Court reviewed the moving and the opposition papers _____ [*add, if applicable:* and, on _____ (*date*), held a hearing on the motion]. Based on the submissions and the arguments,

Defendant's motion for summary _____ [judgment *or* adjudication] is DENIED.

I. PROCEDURAL BACKGROUND

[*Set forth procedural background of action as relevant to motion and opposition in separate, numbered paragraphs, with cites to record as necessary*.]

II. LEGAL STANDARD

[*Legal standards applicable to case, see 29.45*]

III. ANALYSIS

[*Apply legal standards to facts in case, with each issue treated in separately-numbered paragraphs*.]

IV. CONCLUSION

For the reasons set forth above, Defendant's motion for summary _____ [judgment *or* adjudication] is DENIED.

IT IS SO ORDERED.
Dated: _____.

_____

U.S. DISTRICT COURT JUDGE

NOTES.

Authority:
Fed R Civ P 7(b), 56

Discussion:
See *§ 29.16[7]*

Format Requirements:
See *§ 29.10[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionSupporting Materials

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Unit 8 Motion Practice
CHAPTER 30 Voluntary Dismissal

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§ 30.syn Synopsis to Chapter 30: Voluntary Dismissal

30.01 Scope.

30.02 Objective and Strategy.

30.03 CHECKLISTS.

30.03[1] CHECKLIST: Obtaining Voluntary Dismissal by Filing Notice of Dismissal.

30.03[2] CHECKLIST: Obtaining Voluntary Dismissal by Filing Stipulation of Voluntary Dismissal.

30.04 Options and Strategies for Voluntarily Dismissing Action Without Court Order.

30.05 Voluntary Dismissal by Notice of Dismissal or Stipulation.

30.06 Plaintiff's Right to Dismiss Voluntarily Is Absolute.

30.07 Plaintiff May Dismiss Action Against Some or All Defendants.

30.08 Dismissal Is Without Prejudice Unless Otherwise Stated; "Two Dismissal Rule."

30.09 Rule 41 Applies to Counterclaim, Crossclaim, or Third-Party Claim.

30.10 Notice of Voluntary Dismissal.

30.10[1] Filing, Not Merely Service, Is Required.

30.10[2] When to File Notice of Dismissal.

30.11 Effect of Voluntary Dismissal.

30.11[1] Dismissal Is Effective on Filing.

30.11[2] Court Loses Discretion to Act.

30.11[3] Filing Automatically Terminates Action Without Prejudice As to Defendants Who Are Subject of Notice.

30.12 Drafting Stipulation of Voluntary Dismissal.

30.12[1] When to Use Stipulation.

30.12[2] Content, Execution of Stipulation.

30.12[3] Stipulation of Voluntary Dismissal Must Be Filed.

30.12[4] Stipulation Connected to Settlement May Incorporate Settlement Terms.

30.13 Appellate Review Following Notice of Dismissal.

30.13[1] Parties May Appeal Final Decisions.

30.13[2] Voluntary Dismissal Without Prejudice Is Ordinarily Not Final Judgment.

30.13[3] Whether Dismissal Is Final Appealable Judgment Depends on Its Effect.

30.13[4] Plaintiff May Usually Appeal From Voluntary Dismissal With Prejudice.

30.14 CHECKLIST: Obtaining Voluntary Dismissal by Court Order.

30.15 Options and Strategies for Voluntarily Dismissing Action When Dismissal by Notice or Stipulation Is Unavailable.

30.16 Court May Order Payment of Costs of Previously Dismissed Action.

30.17 Court Order for Dismissal Is Required If Dismissal by Notice or Stipulation Is Unavailable.

30.18 Terms and Conditions of Dismissal.

30.18[1] Court May Order Dismissal on Terms and Conditions Proper or Necessary to Avoid Prejudice.

30.18[2] Recovery of Costs As Condition of Dismissal.

30.19 If Counterclaim Is Pleaded Prior to Service of Motion to Dismiss, Defendant May Object to Dismissal of Action Pending Adjudication of Counterclaim.

30.20 Dismissal Pursuant to Court Order Is Without Prejudice Unless Otherwise Specified.

30.21 Rule 41 Applies to Counterclaim, Crossclaim, or Third-Party Claim.

30.22 Motion for Voluntary Dismissal.

30.22[1] Motion Is Addressed to Court's Sound Discretion.

30.22[2] Motion Should Be Granted Unless Defendant Will Suffer Some Plain Legal Prejudice.

30.22[3] Factors for Determining Existence of Legal Prejudice.

30.22[4] Factors Not Creating Plain Legal Prejudice.

30.23 Court May Order Payment of Costs of Previously Dismissed Action.

30.24 Court May Not Circumvent Limitation Regarding Request for Jury Trial Under Rule 39 by Dismissing Case Under Rule 41(a)(2).

30.25 Review of Order for Voluntary Dismissal.

30.26 Order on Motion for Voluntary Dismissal Is Reviewed for Abuse of Discretion.

30.27 Notice of Voluntary Dismissal.

30.28 Stipulation of Voluntary Dismissal.

30.29 Notice of Motion and Motion for Voluntary Dismissal.

30.30 Order of Dismissal.

30.31 Local District Court Forms.

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Unit 8 Motion Practice
CHAPTER 30 Voluntary Dismissal
I. STRATEGY

4-30 MB Practice Guide: Fed Pretrial Civ Proc in CA 30.01

30.01 Scope.

This chapter covers:

- Notice of voluntary dismissal without court order [*see 30.05*, *30.13*; *Form: 30.27*].
- Stipulation of voluntary dismissal without court order [*see 30.05*, *30.09*, *30.12*, *30.13*; *Form: 30.28*].
- Motion for voluntary dismissal by court order [*see 30.17 -30.26*; *Forms: 30.29*, *30.30*].

Core Rule:
Fed R Civ P 41.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsNoticesGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsStipulations

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Unit 8 Motion Practice
CHAPTER 30 Voluntary Dismissal
I. STRATEGY

4-30 MB Practice Guide: Fed Pretrial Civ Proc in CA 30.02

30.02 Objective and Strategy.

Voluntary dismissal is appropriate when, for a variety of reasons including strategic or tactical reasons, a plaintiff wants to dismiss his or her claim or claims, or wants to dismiss a party or parties from the action. Because voluntary dismissal is without prejudice, a plaintiff may choose to voluntarily dismiss when wishing to replead a claim in a different forum. In addition, voluntary dismissal prevents an adjudication on the merits, and thus the plaintiff avoids the possibility of an adverse result and being bound by that result in future cases under the doctrine of res judicata. Voluntary dismissal is also appropriate if the parties have settled the claim or claims.

Detailed Discussion/Forms:

8 Moore's Federal Practice, Ch. 41, Dismissal of Actions (Matthew Bender 3d ed.).

9 Bender's Federal Practice Forms, Rule 41, Dismissal of Actions (Matthew Bender).

Cross Reference:

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsNoticesDismissals Without PrejudiceCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral Overview

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Unit 8 Motion Practice
CHAPTER 30 Voluntary Dismissal
II. VOLUNTARY DISMISSAL WITHOUT COURT ORDER

4-30 MB Practice Guide: Fed Pretrial Civ Proc in CA 30.03

30.03 CHECKLISTS.

30.03[1] CHECKLIST: Obtaining Voluntary Dismissal by Filing Notice of Dismissal.

☐ Determine whether plaintiff wishes to dismiss claim, in light of consequences of dismissal.

☐ Confirm that plaintiff has not dismissed action based on or including same claim in any court on prior occasion.

☐ File notice of dismissal with the clerk before:

- ○ Defendant serves an answer or motion for summary judgment.
- ○ Service of a responsive pleading to a counterclaim, crossclaim, or third-party claim or, if no responsive pleading will be filed, before introduction of evidence at the trial or a hearing.

☐ Include in notice of voluntary dismissal a statement that:

- ○ The claimant dismisses the action or party.
- ○ The dismissal is without prejudice, unless there is reason to dismiss with prejudice.

☐ Serve a copy of the notice of voluntary dismissal on all parties.

Authority:
Fed R Civ P 41(a)(1)

Discussion:
See *§§ 30.05 -30.11*, *30.15*, *30.16*

Form:
See *§ 30.27*

30.03[2] CHECKLIST: Obtaining Voluntary Dismissal by Filing Stipulation of Voluntary Dismissal.

☐ File a stipulation of voluntary dismissal, signed by all parties appearing in the action, with the court clerk.

☐ Include in the stipulation:

- ○ A statement that the parties stipulate to a voluntary dismissal of the action or party.
- ○ A statement that the dismissal is without prejudice, unless there is a valid reason to dismiss with prejudice.
- ○ Incorporation of the settlement terms, if the dismissal is in conjunction with a settlement.
- ○ Provisions concerning costs, fees, or other conditions.

Authority:
Fed R Civ P 41

Discussion:
See *§§ 30.05*, *30.09*, *30.12 -30.16*

Form:
See *§ 30.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsNoticesDismissals Without Prejudice

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CHAPTER 30 Voluntary Dismissal
II. VOLUNTARY DISMISSAL WITHOUT COURT ORDER

4-30 MB Practice Guide: Fed Pretrial Civ Proc in CA 30.04

30.04 Options and Strategies for Voluntarily Dismissing Action Without Court Order.

A party may voluntary dismiss an action without prejudice for a variety of reasons, including:

- To correct defects that could harm the plaintiff's action. For example, a party may wish to gather more evidence to support the claims, or redraft the pleadings before filing.

- To forum shop in order to defeat or preserve federal diversity jurisdiction, or to sue in a forum where the laws are more advantageous to plaintiff.

- For strategic purposes. For example, a party may want to delay discovery or a trial, refile the complaint to include a jury demand, or eliminate a defendant to facilitate settlement.

- A plaintiff who fears that he or she may be at risk for Rule 11 sanctions or a suit for abuse of process or malicious prosecution may want to voluntarily dismiss the case.

A party may also want to seek a voluntary dismissal with prejudice when:

- The case lacks merit.

- The plaintiff is unable to pursue litigation for financial or other reasons.

- The defendant is judgment-proof.

Cross Reference:

Reasons for dismissing action, see 8 Moore's Federal Practice, *§ 41.11*. Purposes and uses of voluntary dismissal, see 8 Moore's Federal Practice, *§§ 41.10 -41.13*. Methods of voluntary dismissal, see 8 Moore's Federal Practice, *§§ 41.20*, *41.21*. Voluntary dismissals without court order, see 8 Moore's Federal Practice, *§§ 41.30 -41.34* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsNoticesDismissals Without Prejudice

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CHAPTER 30 Voluntary Dismissal
II. VOLUNTARY DISMISSAL WITHOUT COURT ORDER

4-30 MB Practice Guide: Fed Pretrial Civ Proc in CA 30.05

30.05 Voluntary Dismissal by Notice of Dismissal or Stipulation.

Subject to the provisions of *Fed R Civ P 23(e)*, 23.1(c), 23.2, and 66, and any statute of the United States, a plaintiff may dismiss an action without order of court by filing [*Fed R Civ P 41(a)(1)(A)*]:

- A notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment, whichever first occurs; or

- A stipulation of dismissal signed by all parties who have appeared in the action.

Certain actions, such as class actions, may not be dismissed without court approval. For further discussion of these actions, see *30.15*.

The provisions of *Fed R Civ P 41* control over inconsistent state law [*see Harvey's Wagon Wheel, Inc. v. Van Blitter (9th Cir 1992) 959 F2d 153, 155*].

Cross References:

When to file notice of dismissal, see *§ 30.11[1]*. Absolute nature of dismissal right, see *§ 30.06*. Notice of dismissal, see *§ 30.10*.

Rule controls over inconsistent state law, see 8 Moore's Federal Practice, *§ 41.02* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsNoticesDismissals Without PrejudiceCivil ProcedureDismissalsVoluntary DismissalsStipulations

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CHAPTER 30 Voluntary Dismissal
II. VOLUNTARY DISMISSAL WITHOUT COURT ORDER

4-30 MB Practice Guide: Fed Pretrial Civ Proc in CA 30.06

30.06 Plaintiff's Right to Dismiss Voluntarily Is Absolute.

The plaintiff's right to file a notice of dismissal is absolute only when the defendant has not yet served an answer or a summary judgment motion. Once the plaintiff files the voluntary dismissal, the defendant has no recourse and the court lacks jurisdiction to act in any manner [*see Commercial Space Mgmt. Co. v. Boeing Co. (9th Cir 1999) 193 F3d 1074, 1078-1080*].

Warning:

A plaintiff's right to file a notice of dismissal is absolute when the defendant has not yet served an answer or a *summary judgment motion*. It is important to keep in mind that when Rule 12(b)(6) motions to dismiss are supported by materials that are outside the pleadings, the court will treat the motion to dismiss as a *motion for summary judgment* [*see Fed R Civ P 12(b)*]. Therefore, until the court converts the motion from a motion to dismiss to a motion for summary judgment, a plaintiff may still file a notice of dismissal pursuant to *Fed R Civ P 41(a)(1)* [*see Swedberg v. Marotzke (9th Cir 2003) 339 F3d 1139, 1146*].

Cross Reference:

Absolute nature of voluntary dismissal right, see 8 Moore's Federal Practice, *§ 41.33[2]*. For a discussion of motions to dismiss that are converted to summary judgment motions, see 2 Moore's Federal Practice, *§ 12.34[3]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsNoticesDismissals Without Prejudice

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II. VOLUNTARY DISMISSAL WITHOUT COURT ORDER

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30.07 Plaintiff May Dismiss Action Against Some or All Defendants.

Rule 41(a)(1) provides that "the plaintiff may dismiss an action," but does not provide that fewer than all claims or all defendants may be dismissed. However, the plaintiff may choose to dismiss some or all of the defendants through a Rule 41(a)(1) notice [*Fed R Civ P 41(a)(1)*; *see Wilson v. City of San Jose (9th Cir 1997) 111 F3d 688, 692* ; *Concha v. London (9th Cir 1995) 62 F3d 1493, 1506* , *cert. dismissed, 517 US 1183 (1996)*].

While Rule 41(a)(1) allows the dismissal of *all* claims against any one or more defendants, the plaintiff cannot use Rule 41(a)(1) to voluntarily withdraw individual claims against a defendant remaining in the case. Withdrawals of individual claims against a defendant remaining in the case are governed by Rule 15 [*see General Signal Corp. v. MCI Telecomms. Corp. (9th Cir 1995) 66 F3d 1500, 1513* ; *Ethridge v. Harbor House Rest. (9th Cir 1988) 861 F2d 1389, 1392*].

Cross Reference:

For discussion of amending pleadings under Rule 15, see Ch. 9, Amending and Supplementing Pleadings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsNoticesDismissals Without Prejudice

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30.08 Dismissal Is Without Prejudice Unless Otherwise Stated; "Two Dismissal Rule."

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim [*Fed R Civ P 41(a)(1)(B)*; *see, e.g., Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp. (9th Cir 1991) 933 F2d 724, 726-728*]. This "two dismissal rule" means that a notice of dismissal operates as an adjudication on the merits if the plaintiff has previously dismissed an action based on or including the same claim [*Fed R Civ P 41(a)(1)*].

Thus, unless otherwise stated, the dismissal is ordinarily without prejudice to the plaintiff's right to commence another action for the same cause against the same defendants [*Concha v. London (9th Cir 1995) 62 F3d 1493, 1506* , *cert. dismissed, 517 US 1183 (1996)*].

Distinguish:

The "two dismissal rule" rule applies only to *notices* of voluntary dismissal, not to *stipulations* of voluntary dismissal [*see Fed R Civ P 41(a)(1)(A)*] and not to dismissals by court order under Fed R Civ P 41(a)(2) [*see* Estate of Migliaccio v. Midland Nat'l Life Ins. Co. (CD Cal 2006) 436 F Supp2d 1095, 1101-1103 (citing **Moore's**)].

The preclusive effect of the second dismissal, if any, is for determination in a subsequently filed action that implicates the "two dismissal" rule [*Commercial Space Mgmt. Co. v. Boeing Co. (9th Cir 1999) 193 F3d 1074, 1079-1080*]. This holding is based on the absolute right of the plaintiff to dismiss an action and the absence of any remaining court role once the dismissal notice is filed [*see Commercial Space Mgmt. Co. v. Boeing Co. (9th Cir 1999) 193 F3d 1074, 1078-1080*].

Claims twice dismissed by a plaintiff may be barred under the "two dismissal rule" even if the defendants named in the third action were not named in the earlier actions; the defendants need only be "substantially the same" as those against whom claims were twice dismissed in order to claim benefit of Rule 41(a) res judicata [*see Abreu v. Ramirez (CD Cal 2003) 284 F Supp2d 1250, 1255*].

Cross References:

Detailed discussion of "two dismissal rule," see 8 Moore's Federal Practice, *§ 41.33[7]* (Matthew Bender 3d ed.).

Plaintiff's absolute right of dismissal, see *§ 30.06*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsNoticesDismissals Without PrejudiceCivil ProcedureDismissalsVoluntary DismissalsNoticesTwo-Dismissal RuleCivil ProcedureDismissalsVoluntary DismissalsStipulations

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30.09 Rule 41 Applies to Counterclaim, Crossclaim, or Third-Party Claim.

The provisions of *Fed R Civ P 41* apply to the dismissal of any counterclaim, crossclaim, or third-party claim [*Fed R Civ P 41(c)*].

A voluntary dismissal by the claimant alone must be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing [*Fed R Civ P 41(c)*].

Cross References:

Form of notice of dismissal of counterclaim, see 9 *Bender's Federal Practice Forms, Form 41:60* (Matthew Bender).

Dismissals regarding counterclaims, crossclaims, and third-party claims, see 8 Moore's Federal Practice, *§ 41.60* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedureDismissalsVoluntary DismissalsGeneral Overview

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30.10 Notice of Voluntary Dismissal.

30.10[1] Filing, Not Merely Service, Is Required. A plaintiff must file a notice of dismissal for the dismissal to be effective. Mere service is not sufficient [*see Fed R Civ P 41(a)(1)(A)*; *Wilson v. City of San Jose (9th Cir 1997) 111 F3d 688, 693*]. Service is also unnecessary. Notice to the defendants is not required to effectuate the dismissal [*see Diamond v. United States (5th Cir 1959) 267 F2d 23, 25* , *cert. denied*, *361 US 834 (1959)* ; *see also Wilson v. City of San Jose (9th Cir 1997) 111 F3d 688, 692 n5* (requirement to "serve" notice of dismissal was changed to "file" in 1948)]. However, it makes sense to serve defendants as a common courtesy.

If the defendant has been served with the complaint, the plaintiff should serve the defendant with a notice of voluntary dismissal. Although service is not required to effectuate the dismissal, Rule 5(a) requires that once a party has been served, any paper filed in court must be served on that party [*Fed R Civ P 5(a)*]. Service may also avoid a collateral motion by the defendant for costs, attorney's fees, or other relief for the plaintiff's failure to serve a notice of dismissal if those costs or fees could have been avoided.

30.10[2] When to File Notice of Dismissal. The plaintiff enjoys an absolute right to file a notice of dismissal at any time before the defendant has served an answer or a motion for summary judgment, whichever comes first [*see Fed R Civ P 41(a)(1)(A)(i)*; *see also Concha v. London (9th Cir 1995) 62 F3d 1493, 1506* , *cert. dismissed, 517 US 1183 (1996)*].

Distinguish:

To dismiss the action, the plaintiff must file a notice of dismissal with the court before the defendant serves an answer or motion for summary judgment [*Wilson v. City of San Jose (9th Cir 1997) 111 F3d 688, 692*]. By serving an answer or summary judgment motion, the defendant extinguishes the plaintiff's right to dismiss; the mere filing of the answer or summary judgment motion does not prevent the plaintiff from dismissing [*see Lockary v. Kayfetz (9th Cir 1990) 917 F2d 1150, 1157* ; *see also Esquivel v. Arau (CD Cal 1996) 913 F Supp 1382, 1386* (motion to dismiss under *Fed R Civ P 12* is not answer or, unless accompanied by proper affidavits, motion for summary judgment)].

Similarly, a claimant who has asserted a counterclaim, crossclaim, or third-party claim may file a notice of dismissal at

any time before a responsive pleading is served, or, if there is no responsive pleading, at any time before the introduction of evidence at the trial or hearing [*see Fed R Civ P 41(a)(1), (c)*].

Strategic Point--Plaintiff and Defendant:

If a case is transferred prior to the service of an answer or motion for summary judgment by the defendant, the plaintiff should file a notice of dismissal in the transferor court before the case is filed in the transferee court. During the time between entry of the transfer order and the receipt of the case file in the transferee court, the transferor court remains the forum in which pleadings may be filed. If the rule were otherwise, a plaintiff would have no forum in which to file a notice of dismissal between the time that the transfer order is entered and the date on which the papers are received by the transferor court. Conversely, during this same time, a defendant could foreclose the plaintiff from dismissing the action simply by serving an answer [*see Wilson v. City of San Jose (9th Cir 1997) 111 F3d 688, 692-694*].

Cross References:

Absolute nature of right to dismiss, see *§ 30.06*.

Discussion of procedure for notice of dismissal, see 8 Moore's Federal Practice, *§ 41.33[5]*. Discussion of dismissal of counterclaims, crossclaims, and third-party claims, see 8 Moore's Federal Practice, *§ 41.60* (Matthew Bender 3d ed.).

A plaintiff who wishes to dismiss an action after the defendant has answered or moved for summary judgment must seek a court order [*Fed R Civ P 41(a)(2)*].

Cross Reference:

Voluntary dismissal by court order, see *§ 30.14* et seq.

Legal Topics:

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

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30.11 Effect of Voluntary Dismissal.

30.11[1] Dismissal Is Effective on Filing. A dismissal by the plaintiff without court order is effective on filing. No court order is required [*see Fed R Civ P 41(a)(1)*; *Commercial Space Mgmt. Co. v. Boeing Co. (9th Cir 1999) 193 F3d 1074, 1077* ; *Wilson v. City of San Jose (9th Cir 1997) 111 F3d 688, 692*]. The voluntary dismissal is self-executing, meaning that it is effective at the moment the notice is filed with the clerk [*Commercial Space Mgmt. Co. v. Boeing Co. (9th Cir 1999) 193 F3d 1074, 1077 n4*].

30.11[2] Court Loses Discretion to Act. The proper filing of a notice to dismiss an action leaves no role for the court to play [*Commercial Space Mgmt. Co. v. Boeing Co. (9th Cir 1999) 193 F3d 1074, 1077* ; *American Soccer Co. v. Score Am. First (9th Cir 1999) 187 F3d 1108, 1110*]. The court therefore has no discretion to exercise once a *Fed R Civ P 41(a)(1)* dismissal is filed [*Commercial Space Mgmt. Co. v. Boeing Co. (9th Cir 1999) 193 F3d 1074, 1077*].

Exception:

The court retains jurisdiction over collateral matters, such as sanctions and attorney's fees [*see, e.g., Cooter & Gell v. Hartmarx Corp. (1990) 496 US 384, 396, 110 S Ct 2447, 110 L Ed2d 359* ; *Greenberg v. Sala (9th Cir 1987) 822 F2d 882, 885* ; Frances Kenny Family Trust v. World Sav. Bank FSB (ND Cal 2005) 2005 US Dist LEXIS 2403 (joint and several award against plaintiffs and their attorney of $77,000 in fees and costs after entry of judgment)].

Cross Reference:

Detailed discussion of effect of filing notice of dismissal, see 8 Moore's Federal Practice, *§ 41.33[6]* (Matthew Bender 3d ed.).

30.11[3] Filing Automatically Terminates Action Without Prejudice As to Defendants Who Are Subject of Notice. Filing a notice of voluntary dismissal automatically terminates the action as to the defendants who are the subjects of the notice. Unless otherwise stated, the plaintiff may commence another action for the same cause against the same defendants. The dismissal leaves the parties as though no action had been brought [*Wilson v. City of San Jose (9th Cir 1997) 111 F3d 688, 692* ; *Concha v. London (9th Cir 1995) 62 F3d 1493, 1506* , *cert. dismissed, 517 US 1183 (1996)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsNoticesGeneral Overview

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30.12 Drafting Stipulation of Voluntary Dismissal.

30.12[1] When to Use Stipulation. A plaintiff may use a stipulation of voluntary dismissal in several situations. It is most commonly used in connection with a settlement. It is also used when the plaintiff cannot dismiss by a mere notice, and the defendants are willing to stipulate to dismissal. Finally, it is used when the time for filing a notice of dismissal has lapsed. For example, either the defendant has filed an answer or motion for summary judgment, or--with respect to a counterclaim, crossclaim, or third-party claim--a responsive pleading has been served, or evidence has already been introduced at the trial or hearing. Unlike a notice to dismiss under subdivision (i) of Rule 41(a)(1), parties may stipulate to dismiss an action under subdivision (ii) at any time [*see Fed R Civ P 41(a)(1)(A)(ii)*]. A stipulation of dismissal must be signed by all plaintiffs and all defendants who have appeared in the action [*see Fed R Civ P 41(a)(1)(A)(ii)*].

Cross Reference:

Time to file notice of dismissal, see *§ 30.10[2]*.

30.12[2] Content, Execution of Stipulation. A stipulation of dismissal must be signed by all parties who have appeared in the action [*see Fed R Civ P 41(a)(1)(A)(ii)*]. It must also state unequivocally that the parties have agreed to a dismissal [*see Vuitton et Fils, S.A., v. J. Young Enters., Inc. (9th Cir 1979) 609 F2d 1335, 1337* (in case of ambiguity, court should solicit clarification from parties)].

Consider:

In multi-party litigation, the parties may stipulate to dismiss some, but fewer than all, of the defendants [McNamara v. Edwards (9th Cir 1993) 1993 US App LEXIS 27233, at *1-*2 (unpublished opinion; generally not citable to court under 9th Cir R 36-3)]. Note that a stipulation that purports to dismiss the entire action without the consent of all parties may be deemed ineffective [*Alholm v. American Steamship Co. (D Minn. 1996) 167 FRD 75, 79*]. In that case, if one or more defendants refuse to stipulate to dismissal, the plaintiff should resort to a motion to dismiss.

A stipulation for dismissal should recite whether it is with or without prejudice, and whether the parties are to bear their

own costs and attorney's fees, unless there is no agreement on the issue [*see Intermedics, Inc. v. Ventritex, Inc. (ND Cal 1991) 775 F Supp 1269, 1288-1290*]

Cross References:

Form and content of stipulation, see 8 Moore's Federal Practice, *§ 41.34[4]* (Matthew Bender 3d ed.).
Effect of stipulation, see 8 Moore's Federal Practice, *§ 41.34[6]* (Matthew Bender 3d ed.).

30.12[3] Stipulation of Voluntary Dismissal Must Be Filed. A stipulation of dismissal is not self-executing, meaning that the stipulation must be filed with the court in order to effectuate the dismissal.

Exception:

An oral stipulation in open court may effectuate the dismissal [*see Fed R Civ P 41(a)(1)(A)(ii)*; *see also* Coleman v. Barnhart (ND Cal 2003) 2003 US Dist LEXIS 20480, at *14 n2 (stating that although the parties' dismissal stipulation was signed by the parties and not the judge, the stipulation "had the legal force of a voluntary dismissal without the signature of a judge")].

Cross Reference:

Procedure for dismissal by stipulation, see 8 Moore's Federal Practice, *§ 41.34[5]* (Matthew Bender 3d ed.).

30.12[4] Stipulation Connected to Settlement May Incorporate Settlement Terms. A district court has no power to enforce a settlement agreement that is only stated in the record and recited in a stipulation and order of dismissal executed by the parties and the court. Unless the terms of the settlement are terms of the court order itself, or unless the order expressly provides that the court retains jurisdiction over the settlement agreement, the court does not have jurisdiction to enforce the settlement. Although the parties may stipulate to the court's reserving jurisdiction, the district court must issue an order specifically retaining jurisdiction, which it may be willing to do only under certain circumstances or for a specific period of time. Accordingly, a party seeking dismissal in connection with a settlement should include a statement in the stipulation incorporating the terms of the settlement, and ensure that the order of dismissal incorporates the terms of the settlement or expressly retains jurisdiction over its terms [*see Kokkonen v. Guardian Life Ins. Co. of Am. (1994) 511 US 375, 381-382, 114 S Ct 1673, 128 L Ed2d 391*].

Cross Reference:

See 8 Moore's Federal Practice, *§§ 41.34*, *41.60* (Matthew Bender 3d ed.).

Legal Topics:

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

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30.13 Appellate Review Following Notice of Dismissal.

30.13[1] Parties May Appeal Final Decisions. Parties may appeal final decisions of the district courts [*see 28 USC § 1291*; *see also Duke Energy Trading & Mktg., L.L.C. v. Davis (9th Cir 2001) 267 F3d 1042, 1048 , cert. denied, 535 US 1112 (2002)*].

30.13[2] Voluntary Dismissal Without Prejudice Is Ordinarily Not Final Judgment. A voluntary dismissal without prejudice is ordinarily not a final judgment from which the plaintiff may appeal [*see Concha v. London (9th Cir 1995) 62 F3d 1493, 1507 , cert. dismissed, 517 US 1183 (1996)*].

30.13[3] Whether Dismissal Is Final Appealable Judgment Depends on Its Effect. Whether a dismissal following a notice of dismissal constitutes a final judgment for purposes of appellate jurisdiction under *28 USC § 1291* depends on the effect of the dismissal in the case [*see, e.g., Duke Energy Trading & Mktg., L.L.C. v. Davis (9th Cir 2001) 267 F3d 1042, 1048-1049 , cert. denied, 535 US 1112 (2002)*].

Example:

In a case brought by an energy supplier against the governor of California and a public utility, the governor filed a motion to dismiss on sovereign immunity grounds and, in the alternative, moved for summary judgment. The codefendant utility did not file an answer or move for summary judgment. The district court dismissed the claims against the governor on sovereign immunity grounds. The plaintiff then filed a notice of dismissal without prejudice pursuant to *Fed R Civ P 41(a)(1)* with respect to claims against the codefendant and filed a timely appeal. The governor contended that the court of appeals lacked appellate jurisdiction because the district court's dismissal of the claims against him was not a final judgment, in that claims against the codefendant remained at that time. The court of appeals stated that Rule 41(a)(1) grants plaintiffs an absolute right to dismiss without prejudice claims against one or more defendants. Because the plaintiff's exercise of its right to dismiss the codefendant left nothing for the court to do but execute the judgment. The district court's judgment constituted a final decision for purposes of *28 USC § 1291* [*see Duke Energy Trading & Mktg., L.L.C. v. Davis (9th Cir 2001) 267 F3d 1042, 1048-1049 , cert. denied, 535 US 1112 (2002)*].

The court of appeals may analyze the effect of the voluntary dismissal in determining whether it should be treated as a dismissal with or without prejudice, for purposes of establishing appealability. The wording on the notice of dismissal or related documents is therefore not necessarily determinative [*see, e.g., Concha v. London (9th Cir 1995) 62 F3d 1493, 1508-1509 , cert. dismissed, 517 US 1183 (1996)*].

Example:

After the dismissal of plaintiffs' state-law claims in federal court, the plaintiffs filed a new complaint in state court. When the defendants removed that action to federal court and the district court refused to remand, the plaintiffs filed a notice purporting to dismiss the action without prejudice. The district court subsequently entered an order dismissing with prejudice as to some of the defendants. The plaintiffs then sought to challenge the district court's refusal to remand the second complaint. The court of appeals concluded that the action should be treated as having been dismissed *with prejudice* as to all defendants and it therefore had jurisdiction over the appeal. The court concluded that the plaintiffs' notice of voluntary dismissal under Rule 41(a)(1) purported to dismiss the entire action without prejudice. On appeal, plaintiffs maintained that their complaint was indeed dismissed without prejudice as to all defendants. If correct, plaintiffs would not be limited in their ability to bring another suit for the same cause; and there would consequently be no final judgment from which to appeal. The appellate court would therefore have no jurisdiction to consider the plaintiffs' challenge to the district court's order denying their motion to remand. However, the plaintiffs' notice under Rule 41(a)(1) was intended to permit them to appeal the underlying order they considered determinative. Before the district court ruled on the plaintiffs' motion to remand, the parties entered into stipulations providing that, if the motion were denied, the plaintiffs would dismiss their complaint "with plaintiffs preserving any and all appeal rights in the state action." This stipulation made clear that the parties intended to afford plaintiffs the right to appeal the denial of the motion to remand. Protecting the plaintiffs' right to appeal could only be accomplished through a dismissal with prejudice. Moreover, under the facts, the plaintiffs would have nothing to gain by filing a voluntary dismissal without prejudice. The appellate court stated that all the parties intended the dismissal to permit an appeal; and therefore treated the Rule 41(a)(1) notice as a dismissal with prejudice, concluding it had jurisdiction to consider the denial of plaintiffs' motion to remand [*see Concha v. London (9th Cir 1995) 62 F3d 1493, 1497, 1506-1509 , cert. dismissed, 517 US 1183 (1996)*].

Consider:

In determining whether a plaintiff may appeal from a voluntary dismissal under Rule 41(a)(1), the appellate court looks to cases that have considered the appealability of voluntary dismissals pursuant to *Fed R Civ P 41(a)(2)* [*see Concha v. London (9th Cir 1995) 62 F3d 1493, 1507 , cert. dismissed, 517 US 1183 (1996)*].

30.13[4] Plaintiff May Usually Appeal From Voluntary Dismissal With Prejudice. A voluntary dismissal with prejudice, even one based on an agreed or stipulated judgment, operates as an adjudication on the merits [McMahon v. Pier 39 Ltd. P'ship (ND Cal 2003) 2003 US Dist LEXIS 22178, at *10]. The appealability of a voluntary dismissal ordinarily depends on whether the action was dismissed with or without prejudice. The plaintiff may appeal a voluntary dismissal only when it is with prejudice to its right to commence another action for the same cause or it is otherwise subject to prejudicial terms or conditions [*Concha v. London (9th Cir 1995) 62 F3d 1493, 1507 , cert. dismissed, 517 US 1183 (1996)* (not discussing dismissals designed to facilitate appellate review of jurisdictional or procedural rulings that do not bar filings in other courts or refilings in district court)].

A voluntary dismissal without prejudice is not adverse to the plaintiff's interests. The plaintiff is free to seek an adjudication of the same issue at another time in the same or another forum. The converse is true with respect to a voluntary dismissal with prejudice. By obtaining such a dismissal, the plaintiff submits to a judgment that serves to bar its claims forever [*Concha v. London (9th Cir 1995) 62 F3d 1493, 1507 , cert. dismissed, 517 US 1183 (1996)* (also

discussing practical reasons for the distinction); *see also Classic Auto Refinishing, Inc. v. Marino (9th Cir 1999) 181 F3d 1142, 1144*].

Consider:

A dismissal with prejudice is appealable, whether voluntary or involuntary [*Concha v. London (9th Cir 1995) 62 F3d 1493, 1507* , *cert. dismissed, 517 US 1183 (1996)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsAppellate ReviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

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30.14 CHECKLIST: Obtaining Voluntary Dismissal by Court Order.

☐ If voluntary dismissal is sought, determine whether circumstances of case require that dismissal be obtained through court order, e.g.:

- ○ One defendant has already filed an answer or a motion for summary judgment, and plaintiff is unable to obtain a stipulation of dismissal from all parties.
- ○ Claimant seeks to dismiss a counterclaim, crossclaim, or third-party claim, but responsive pleading has been served, or evidence has already been introduced at the trial or hearing, and claimant is unable to obtain a stipulation of dismissal from all parties.
- ○ Action is of a type that may not be dismissed without court order, e.g.,:
  - ☐ Class actions.
  - ☐ Actions in which receiver has been appointed.
  - ☐ Shareholder derivative suits.
  - ☐ Actions for which court approval is required pursuant to federal statute.

☐ If court order is required for voluntary dismissal:

- ○ Use noticed motion procedure to obtain court order.
- ○ State unequivocally in moving papers that dismissal is sought without prejudice.
- ○ Be prepared to oppose defense arguments that dismissal will result in legal prejudice.

☐ Note that court may condition voluntary dismissal without prejudice on payment of costs.

Authority:
Fed R Civ P 23, *23.1*, *23.2*, *41*, *66*

Discussion:
See *§§ 30.15 -30.26*

Forms:
See *§§ 30.29*, *30.30*

Standard Procedure Checklist:

Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsDerivative ActionsVoluntary DismissalsCivil ProcedureClass ActionsVoluntary DismissalsCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersConditionsCivil ProcedureRemediesReceivershipsReceiversAppointments

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30.15 Options and Strategies for Voluntarily Dismissing Action When Dismissal by Notice or Stipulation Is Unavailable.

When dismissal by notice or stipulation is unavailable, a plaintiff may wish to dismiss the action by court order. The plaintiff must obtain court approval to dismiss after service of an answer or summary judgment motion. The court exercises its discretion in determining whether to allow dismissal, and considers factors including whether dismissal is appropriate at all, whether the dismissal should be with or without prejudice, and whether any terms or conditions should be imposed on the dismissal.

The following types of actions may not be voluntarily discontinued without court approval:

- Class actions [*see Fed R Civ P 23(e), 41(a)(1); see, e.g., Bader v. Electronics for Imaging, Inc. (ND Cal 2000) 195 FRD 659, 661-663* (court granted motion by class action plaintiffs for voluntary dismissal under *Fed R Civ P 41(a)(2)*)].

- Actions in which a receiver has been appointed [*Fed R Civ P 41(a)(1), 66*].

- Shareholder derivative actions [*see Fed R Civ P 23.1*] and actions related to unincorporated associations [*Fed R Civ P 23.2*].

- Actions in which court approval is required pursuant to federal statute [*see Fed R Civ P 41(a)(1)*].

Cross Reference:

8 *Moore's Federal Practice, § 41.32* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsDerivative ActionsVoluntary DismissalsCivil ProcedureClass ActionsVoluntary DismissalsCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without PrejudiceCivil ProcedureRemediesReceivershipsGeneral Overview

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30.16 Court May Order Payment of Costs of Previously Dismissed Action.

If a plaintiff who has once dismissed an action in any court commences an action based on or including the same claim against the same defendant, the court may make an order for the payment of costs of the action previously dismissed and may stay the proceedings in the action until the plaintiff has complied with that order [*Fed R Civ P 41(d)*]. Costs may be imposed when the plaintiff has brought a second identical, or nearly identical, claim and has requested identical, or nearly identical, relief [*see Esquivel v. Arau (CD Cal 1996) 913 F Supp 1382, 1387*].

Although neither is mandatory, federal courts enjoy broad discretion to order stays and payment of costs [*Fed R Civ P 41(d)*; *Esquivel v. Arau (CD Cal 1996) 913 F Supp 1382, 1386*]. Thus, before filing a second action following a voluntary dismissal, counsel should consider whether the court is likely to order payment of costs incurred by defendant in defending the first action.

Strategic Point--Defendant:

Rule 41(d) is intended to serve as a deterrent to forum shopping and vexatious litigation [*see Esquivel v. Arau (CD Cal 1996) 913 F Supp 1382, 1386*].

Example:

The district court for the Central District of California has rejected a restrictive reading of Rule 41(d) to exclude the imposition of fees in cases in which a plaintiff files the second action immediately before a *Fed R Civ P 41(a)(1)* voluntary dismissal. In this case, the plaintiff clearly initiated the California action only because she planned soon thereafter to dismiss the existing action in the Southern District of New York, which she did only three weeks later. The court refused to "create a gaping loophole to Rule 41(d) that would effectively vitiate its impact in these circumstances," noting also that the plaintiff in this case did not argue that the Court should do so [*see Esquivel v. Arau (CD Cal 1996) 913 F Supp 1382, 1387*].

Rule 41(d) does not require a showing of subjective bad faith [*Esquivel v. Arau (CD Cal 1996) 913 F Supp 1382, 1388* (awarding costs when plaintiff failed to present persuasive explanation for course of litigation, and defendants incurred needless expenditures as a result)].

A defendant is entitled to recover only costs for work that is not useful in continuing litigation between the parties [*Esquivel v. Arau (CD Cal 1996) 913 F Supp 1382, 1388* , citing *Koch v. Hankins (9th Cir 1993) 8 F3d 650, 652* (involving costs and fees under *Fed R Civ P 41(a)(2)*)]. Because the purpose of an award of costs as a condition of a Rule 41(a)(2) voluntary dismissal without prejudice is the same as that of an award of costs under Rule 41(d), once dismissal has already occurred and the second litigation is commenced, the same standard for the type of costs awarded should apply [*see Esquivel v. Arau (CD Cal 1996) 913 F Supp 1382, 1388*].

Consider--Attorney's Fees:

The District Court for the Central District of California has also allowed the recovery of attorney's fees under Rule 41(d) [*see Esquivel v. Arau (CD Cal 1996) 913 F Supp 1382, 1388-1392* (court noted dearth of case law or analytical discussion, but awarded total of $21,000 in costs and attorney's fees when plaintiff requested $55,000)].

Cross References:

Forms of payment of costs of previously dismissed action, see 9 *Bender's Federal Practice Forms, Forms 41:70- 41:81* (Matthew Bender).

Costs of previously dismissed action, see 8 Moore's Federal Practice, *§ 41.70* (Matthew Bender 3d ed.).
Costs and fees under Rule 41(a)(2), see § 30.18.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without PrejudiceCivil ProcedureDismissalsVoluntary DismissalsNoticesDismissals Without PrejudiceCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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30.17 Court Order for Dismissal Is Required If Dismissal by Notice or Stipulation Is Unavailable.

Except as provided in *Fed R Civ P 41(a)(1)*, the plaintiff may not seek voluntary dismissal except upon order of the court and upon the terms and conditions the court deems proper [*Fed R Civ P 41(a)(2)*; *see Esquivel v. Arau (CD Cal 1996) 913 F Supp 1382, 1386 n5*].

The plaintiff must seek a court order in the following circumstances [*see Fed R Civ P 41(a)*]:

- The plaintiff seeks to dismiss the action, but one defendant has already filed an answer or a motion for summary judgment, and the plaintiff is unable to obtain a stipulation of dismissal from all parties.

- The claimant seeks to dismiss a counterclaim, crossclaim, or third-party claim, but a responsive pleading has been served, or evidence has already been introduced at the trial or hearing, and the claimant is unable to obtain a stipulation of dismissal from all parties.

- The action is of a type that may not be dismissed without court order.

Once the defendant files an answer or a motion for summary judgment, the plaintiff may no longer voluntarily dismiss without a court order under Rule 41(a)(1), but must file a motion for voluntary dismissal under Rule 41(a)(2) [*see Fed R Civ P 41(a)*].

Distinguish:

Unlike a Rule 41(a)(1) notice of dismissal, a Rule 41(a)(2) motion requires court approval [*see Fed R Civ P 41(a)*; *Wilson v. City of San Jose (9th Cir 1997) 111 F3d 688, 692* ; *Concha v. London (9th Cir 1995) 62 F3d 1493, 1506 , cert. dismissed, 517 US 1183 (1996)*].

Cross Reference:

Voluntary dismissal by court order, see 8 Moore's Federal Practice, *§ 41.40* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without Prejudice

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4-30 MB Practice Guide: Fed Pretrial Civ Proc in CA 30.18

30.18 Terms and Conditions of Dismissal.

30.18[1] Court May Order Dismissal on Terms and Conditions Proper or Necessary to Avoid Prejudice. The dismissal may be conditioned on terms that are proper or necessary to avoid prejudice to the defendant [*see Fed R Civ P 41(a)(2)*; *United States v. Berg (ED Cal 1999) 190 FRD 539, 543* ; *Koch v. Hankins (9th Cir 1993) 8 F3d 650, 652*].

The plaintiff has a reasonable period of time within which either to refuse the conditional voluntary dismissal by withdrawing the motion for dismissal or to accept the dismissal despite the imposition of conditions [Beard v. Sheet Metal Workers Union, Local 150 *(9th Cir 1990) 908 F2d 474, 476* (remanding to give plaintiff opportunity to choose)].

Cross Reference:

See *§ 30.08*.

A court-ordered dismissal under Rule 41(a)(2) must dismiss *all* claims against any one or more defendants and cannot be used to dismiss individual claims against a defendant remaining in the case [Hells Canyon Pres. Council v. United States Forest Serv. (9th Cir 2005) 403 F3d 683, 688].

30.18[2] Recovery of Costs As Condition of Dismissal. A district court may condition a dismissal under *Fed R Civ P 41(a)(2)* on the payment of costs [*see, e.g., Koch v. Hankins (9th Cir 1993) 8 F3d 650, 652*].

The awarding of costs applies to voluntary dismissals without prejudice. The purpose of awarding costs on a voluntary dismissal without prejudice is to compensate the defendant for the unnecessary expense that the plaintiff's litigation has caused the defendant. The defendant may have to defend again at a later time, and incur duplicative legal expenses. By contrast, costs and fees are not appropriate when a plaintiff obtains a voluntary dismissal with prejudice, because in that case the defendant may not be made to defend again [*see Esquivel v. Arau (CD Cal 1996) 913 F Supp 1382, 1388 n10* (discussing costs under *Fed R Civ P 41(d)*, and analogizing both standards)].

A defendant is entitled to recover, as a condition of dismissal, only costs or attorney's fees for work that is not useful in continuing litigation between the parties [*Koch v. Hankins (9th Cir 1993) 8 F3d 650, 652*]. If the district court decides

it should condition dismissal on the payment of costs and attorney's fees, the defendants should be awarded attorney's fees only for work that cannot be used in any future litigation of the claims [*see Westlands Water Dist. v. United States Dep't of Interior (9th Cir 1996) 100 F3d 94, 97*].

Example:

If a plaintiff is granted a voluntary dismissal without prejudice to pursue a related action against the defendant in another forum, the defendant is not entitled to reimbursement of costs and legal fees incurred in preparing work product that may be useful in the continuing litigation. In that case, the district court must make a finding as to the amount of recoverable costs by differentiating between work product that was rendered useless because of the dismissal, and that which might be of use in the continuing litigation [*Koch v. Hankins (9th Cir 1993) 8 F3d 650, 652*].

Cross Reference:

Form, see *§ 30.30*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersConditions

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30.19 If Counterclaim Is Pleaded Prior to Service of Motion to Dismiss, Defendant May Object to Dismissal of Action Pending Adjudication of Counterclaim.

If a counterclaim has been pleaded by a defendant prior to the service on the defendant of the plaintiff's motion to dismiss, the action may not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court [*Fed R Civ P 41(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral Overview

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30.20 Dismissal Pursuant to Court Order Is Without Prejudice Unless Otherwise Specified.

A suit may be dismissed with or without prejudice [*see Fed R Civ P 41(a)(2)*; *see, e.g., United States v. Berg (ED Cal 1999) 190 FRD 539, 543*]. Unless otherwise specified in the order, a dismissal under Rule 41(a)(2) is without prejudice [*Fed R Civ P 41(a)(2)*; *see Bader v. Electronics for Imaging, Inc. (ND Cal 2000) 195 FRD 659, 663*].

In this limited sense, the rule has a "default position," but this default position applies to the interpretation of a silent order, not to the district court's discretionary decision in the first instance [*Hargis v. Foster (9th Cir 2002) 312 F3d 404, 407*].

Warning--Inadvertent Acquiescence to Dismissal With Prejudice:

If the plaintiff files a motion for voluntary dismissal, it should state clearly and unequivocally that it seeks dismissal without prejudice. If the motion for voluntary dismissal is silent with respect to whether the dismissal is requested with or without prejudice, the court may make its own determination in that regard, dismissing with prejudice when the plaintiff wishes otherwise. That is, the "default position" of dismissal without prejudice does not apply unless the court makes *no* determination of its own accord on that issue [*see Hargis v. Foster (9th Cir 2002) 312 F3d 404, 407*]. In addition, if a motion for voluntary dismissal lacks unequivocal language, a court of appeal may conclude that the dismissal is with prejudice even though the parties may have stipulated that it was without prejudice [*see Concha v. London (9th Cir 1995) 62 F3d 1493, 1508-1509 , cert. dismissed, 517 US 1183 (1996)*].

Example:

Plaintiff moved for voluntary dismissal without specifying a dismissal with or without prejudice. If the court had remained silent on this point, the dismissal would have been without prejudice. Instead, the court dismissed the claims with prejudice. Because the motion did not preclude this determination, the appellate court found that the district court had not abused its discretion [*see Hargis v. Foster (9th Cir 2002) 312 F3d 404, 407*].

Legal Topics:

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

Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals With PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without Prejudice

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30.21 Rule 41 Applies to Counterclaim, Crossclaim, or Third-Party Claim.

The provisions of *Fed R Civ P 41* apply to the dismissal of any counterclaim, crossclaim, or third-party claim [*Fed R Civ P 41(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedureDismissalsVoluntary DismissalsGeneral Overview

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4-30 MB Practice Guide: Fed Pretrial Civ Proc in CA 30.22

30.22 Motion for Voluntary Dismissal.

30.22[1] Motion Is Addressed to Court's Sound Discretion. A motion for voluntary dismissal under *Fed R Civ P 41(a)(2)* is addressed to the district court's sound discretion [*Westlands Water Dist. v. United States Dep't of Interior (9th Cir 1996) 100 F3d 94, 96* ; *United States v. Berg (ED Cal 1999) 190 FRD 539, 543*]. The court's order will not be disturbed unless the court has abused its discretion [*Westlands Water Dist. v. United States Dep't of Interior (9th Cir 1996) 100 F3d 94, 96*].

30.22[2] Motion Should Be Granted Unless Defendant Will Suffer Some Plain Legal Prejudice. A motion for voluntary dismissal should be granted unless the defendant shows it will suffer some plain legal prejudice as a result [*Westlands Water Dist. v. United States Dep't of Interior (9th Cir 1996) 100 F3d 94, 96* , citing *Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1169* ; *United States v. Berg (ED Cal 1999) 190 FRD 539, 543*].

Cross Reference:

Motion procedures, see Ch. 26, Pretrial Motion Practice.

30.22[3] Factors for Determining Existence of Legal Prejudice. Plain legal prejudice may be shown when actual legal rights are threatened or when monetary or other burdens appear to be extreme or unreasonable [*United States v. Berg (ED Cal 1999) 190 FRD 539, 543*]. Legal prejudice is prejudice to some legal interest, claim, or argument [*Westlands Water Dist. v. United States Dep't of Interior (9th Cir 1996) 100 F3d 94, 97*].

Factors to consider in determining legal prejudice include [*see Westlands Water Dist. v. United States Dep't of Interior (9th Cir 1996) 100 F3d 94, 97* ; *United States v. Berg (ED Cal 1999) 190 FRD 539, 543*]:

- The defendant's effort and expense involved in preparing for trial.
- Excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action.
- Insufficient explanation of the need for dismissal.

- The fact that summary judgment has been filed by the defendant.

- Whether dismissal without prejudice would result in the loss of a federal forum, the right to a jury trial, or a statute-of-limitations defense.

The prejudice resulting from uncertainty over title to land is also a valid consideration [*United States v. Berg (ED Cal 1999) 190 FRD 539, 543*].

Example:

A district court properly identified legal prejudice when the dismissal of a party would have rendered the remaining parties unable to conduct sufficient discovery to untangle complex fraud claims and adequately defend themselves against charges of fraud [*see Hyde & Drath v. Baker (9th Cir 1994) 24 F3d 1162, 1169* ; *see also Westlands Water Dist. v. United States Dep't of Interior (9th Cir 1996) 100 F3d 94, 96*]

30.22[4] Factors Not Creating Plain Legal Prejudice. Plain legal prejudice does not occur when the defendant merely faces the threat of a second lawsuit or a tactical disadvantage [*United States v. Berg (ED Cal 1999) 190 FRD 539, 543* ; *see Smith v. Lenches (9th Cir 2001) 263 F3d 972, 976* (plain legal prejudice does not result from plaintiff's tactical advantage); *Westlands Water Dist. v. United States Dep't of Interior (9th Cir 1996) 100 F3d 94, 96* (threat of future litigation that causes uncertainty is insufficient to establish plain legal prejudice); *Bader v. Electronics for Imaging, Inc. (ND Cal 2000) 195 FRD 659, 661*].

Uncertainty because a dispute remains unresolved is not legal prejudice [*Westlands Water Dist. v. United States Dep't of Interior (9th Cir 1996) 100 F3d 94, 97*].

Example:

A defendant was held not to have suffered legal prejudice as a result of a voluntary dismissal when he had made only an initial appearance in the case, and appeared to have engaged in only minimal effort and expense to defend the case. Although he had recently retained counsel, there had been no recent filings [*see United States v. Berg (ED Cal 1999) 190 FRD 539, 543*].

Plain legal prejudice does not result merely because the defendant will be inconvenienced by having to defend in another forum [*see Smith v. Lenches (9th Cir 2001) 263 F3d 972, 976*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotions

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30.23 Court May Order Payment of Costs of Previously Dismissed Action.

If a plaintiff who has previously dismissed an action in any court commences an action based on or including the same claim against the same defendant, the court may order the payment of costs of the action previously dismissed and stay the proceedings in the action until the plaintiff has complied with the order [*Fed R Civ P 41(d)*].

Cross Reference:

See *§ 30.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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30.24 Court May Not Circumvent Limitation Regarding Request for Jury Trial Under Rule 39 by Dismissing Case Under Rule 41(a)(2).

A district court may not employ the broad discretion granted in *Fed R Civ P 41* to accomplish indirectly what cannot be accomplished directly under *Fed R Civ P 39(b)*. In the Ninth Circuit, the district court is not permitted under Rule 39(b) to excuse an inadvertent failure to request a jury trial. Further, a district court may not circumvent the explicit limitation on its power under Rule 39(b) by dismissing a case pursuant to *Fed R Civ P 41(a)(2)* [*Russ v. Standard Ins. Co. (9th Cir 1997) 120 F3d 988, 990* (agreeing with Second, Third, and Tenth Circuits, including *Noonan v. Cunard S.S. Co. (2d Cir 1967) 375 F2d 69, 72)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureTrialsJury TrialsJury Demands

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30.25 Review of Order for Voluntary Dismissal.

Although the procedure for obtaining a voluntary dismissal under *Fed R Civ P 41(a)(1)* is different from the procedure for obtaining voluntary dismissal under *Fed R Civ P 41(a)(2)*, the rules regarding appealability are generally the same [*see Concha v. London (9th Cir 1995) 62 F3d 1493, 1506 , cert. dismissed, 517 US 1183 (1996)*]. The plaintiff might appeal a voluntary dismissal in order to obtain appellate review of other orders in the case preceding the dismissal that might be determinative of their claims and that could not otherwise be reviewed, such as rulings on pretrial discovery.

A voluntary dismissal *with prejudice* under Rule 41(a)(1) has the same effect as a voluntary dismissal *with prejudice* under Rule 41(a)(2). By the same token, a voluntary dismissal *without prejudice* under Rule 41(a)(1) has the same effect as a voluntary dismissal *without prejudice* under Rule 41(a)(2) [*see Concha v. London (9th Cir 1995) 62 F3d 1493, 1506-1507 , cert. dismissed, 517 US 1183 (1996)*].

Cross Reference:

See *§ 30.13*.

Consider--Mootness:

If parties stipulate to dismiss so that they can take their dispute to an appellate court, the parties fully expect and intend to continue their litigation in that forum. Hence, there is still an actual, ongoing dispute and the case has not lost its quality as a present, live controversy. In that situation, the voluntary dismissal does not moot the case [*see Oregon Bureau of Labor & Indus. ex rel. Richardson v. U.S. W. Communications, Inc. (9th Cir 2002) 288 F3d 414, 416-417* (involving stipulation for voluntary dismissal with prejudice under *Fed R Civ P 41(a)(2)*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsAppellate ReviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral Overview

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4-30 MB Practice Guide: Fed Pretrial Civ Proc in CA 30.26

30.26 Order on Motion for Voluntary Dismissal Is Reviewed for Abuse of Discretion.

A court's order on a motion for voluntary dismissal under Rule 41(a)(2) is addressed to the district court's sound discretion. The court's order will not be disturbed unless court has abused its discretion [*Westlands Water Dist. v. United States Dep't of Interior (9th Cir 1996) 100 F3d 94, 96*]. The district court's determination of the terms and conditions of dismissal under *Fed R Civ P 41(a)(2)* is reviewed for abuse of discretion [*Koch v. Hankins (9th Cir 1993) 8 F3d 650, 652*].

The district court abuses its discretion when it bases its decision on an erroneous view of the law, or a clearly erroneous assessment of the facts [*Westlands Water Dist. v. United States Dep't of Interior (9th Cir 1996) 100 F3d 94, 96*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsAppellate ReviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotionsCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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30.27 Notice of Voluntary Dismissal.

Notice of Voluntary Dismissal.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	NOTICE OF DISMISSAL
	)	*Fed. R. Civ. P. 41(a)(1)*
	)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to *Federal Rules of Civil Procedure, Rule 41(a)(1)*, Plaintiff

_____ [*name*] dismisses this action, in its entirety, without prejudice.

Defendant _____ [*name*] _____ [has *or* has not] been served with process, and has not filed an answer or motion for summary judgment. Plaintiff has not dismissed any other action based on or including the same claim or claims as those presented in this action.

_____ [*date*]

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for Plaintiff _____ [*name of Plaintiff*]

NOTES.

Authority:
Fed R Civ P 41(a)(1)

Filing of Notice:
See *§ 30.10[1]*

Timing of Notice:
See *§ 30.10[2]*

Form of Motion to Strike Notice of Dismissal:
See 9 *Bender's Federal Practice Forms, Form 41.3*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsNoticesDismissals Without Prejudice

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4-30 MB Practice Guide: Fed Pretrial Civ Proc in CA 30.28

30.28 Stipulation of Voluntary Dismissal.

Stipulation of Voluntary Dismissal.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	STIPULATION OF DISMISSAL
	)	(*Fed R Civ P 41(a)(1)*)
	)	

IT IS HEREBY STIPULATED AND AGREED, pursuant to *Federal Rules of Civil Procedure, Rule 41(a)(1)*, by and between Plaintiff _____ [*name of Plaintiff*] and all Defendants who have appeared in this action, as follows:

1. This action was commenced on _____ [*date*].

2. The action is not a class action; a receiver has not been appointed; and the action is not governed by any statute of the United States that requires an order of the court for dismissal.

3. This action is hereby dismissed, in its entirety, without prejudice.

_____ [*date*]

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*name and designation of party*]

[*Repeat signature block, as appropriate*]

NOTES.

Authority:
Fed R Civ P 41(a)(1)

Stipulation for Voluntary Dismissal: See *§ 30.12*

Related Forms of Stipulated Dismissal: See *9 Bender's Federal Practice Forms, 41:10-41:14* (Matthew Bender)

Legal Topics:

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

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4-30 MB Practice Guide: Fed Pretrial Civ Proc in CA 30.29

30.29 Notice of Motion and Motion for Voluntary Dismissal.

Notice of Motion and Motion for Voluntary Dismissal.
_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR VOL-
_____ [*name*],	)	UNTARY DISMISSAL
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for an order pursuant to *Federal Rules of Civil Procedure, Rule 41(a)(2)* _____ [*state with particularity any other legal basis for motion, including any applicable local rules*]:

(a) Dismissing this action in its entirely; and

(b) Granting Plaintiff _____ [*name*] such other relief as may be appropriate.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 41(a)(2)

Motion for Voluntary Dismissal:
See *§ 30.22*

Related Motion Forms:
See 9 *Bender's Federal Practice Forms, Forms see §§ 41:20-41:23* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotions

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30.30 Order of Dismissal.

Conditional Order of Dismissal Based on Payment of Costs.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	ORDER DISMISSING ACTION
Defendant	)	(*Fed. R. Civ. P. 41(a)(2)*)
	)	
	)	

_____ [*Name of moving party*], _____ [*party designation, e.g.,* Plaintiff], filed a motion to dismiss this action without prejudice. The court has reviewed the papers submitted in favor of and opposed to the motion, and considered the arguments made by and authorities cited by counsel. Being so informed,

IT IS ORDERED that:

1. The motion to dismiss without prejudice is GRANTED.

2. Within _____ [*number*] days of the date on which this order is signed, _____ [*name of moving party*] pays to _____ [*name of opposing party*] the sum of $ _____ for costs, fees, and other expenses incurred in this action.
Dated: _____

_____ [*signature*]

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:
Fed R Civ P 41(a)(2), (d)

Related Motion:
See *§ 30.29*

Related Forms of Orders:
See 9 *Bender's Federal Practice Forms, Forms 41:41, 41:42* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without Prejudice

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Unit 8 Motion Practice
CHAPTER 30 Voluntary Dismissal
IV. FORMS

4-30 MB Practice Guide: Fed Pretrial Civ Proc in CA 30.31

30.31 Local District Court Forms.

Local district court forms relating to matters addressed in this chapter are listed below.

Central District

Dismissal of Parties Designated by a Fictitious Name (CV-5)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Notice of Dismissal Pursuant to F.R.Civ.P. 41(a) or (c) (CV-9)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Cross Reference:

Automated HotDocs(R) and PDF versions of these forms may be accessed and filled in from the online version of this publication, and are also available at www.LexisOne.com/forms.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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Unit 9 Ending the Case Before Trial
CHAPTER 31 Settlement Agreements and Offers of Judgment *

4-31 MB Practice Guide: Fed Pretrial Civ Proc in CA 31.syn

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Unit 9 Ending the Case Before Trial
CHAPTER 31 Settlement Agreements and Offers of Judgment *
I. STRATEGY

4-31 MB Practice Guide: Fed Pretrial Civ Proc in CA 31.01

31.01 Scope.

This chapter covers:

- Preparation for settlement and settlement conferences, including required steps designed to lead to settlement prescribed by the local rules in all the districts [*see 31.03 -31.12*].

- Offers of judgment and responses to offers of judgment under Rule 68 [*see 31.13 -31.32*].

- Drafting settlement agreements, including the different types of settlements available and potential issues as to their validity [*see 31.33 -31.40*].

- Approaches for enforcing settlement agreements as well as how to oppose enforcement [*see 31.41 -31.47*].

- Forms for making and responding to offers of judgment [*see 31.48*, *31.49*].

Core Rules:
Fed R Civ P 16, *68*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsOffers of JudgmentRejectionsCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral Overview

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CHAPTER 31 Settlement Agreements and Offers of Judgment *
I. STRATEGY

4-31 MB Practice Guide: Fed Pretrial Civ Proc in CA 31.02

31.02 Objective and Strategy.

Settlement negotiations and any resultant settlement terms are key to effective representation of a client. Very few actions proceed to trial. Moreover, with the increasing backlog in the federal courts, the districts have developed mandatory procedures for encouraging settlement between parties.

Approaches to preparing for settlement will, of course, differ for each party. Counsel for plaintiff will wish to develop the case to maximize the risk to the defendant and highlight all damages, including those that may be less obvious. Counsel for the defendant will seek to develop the facts and theories that will most undercut the plaintiff's case.

A settlement valuation assessment should be maintained from the outset. That assessment should be regularly reviewed as the case progresses so that the risks to one's client are minimized. Attorneys should not simply permit their clients to assume that their most favorable view of the case will prevail, because those clients may not settle at opportune times and may become embittered when an eventual settlement or judgment is not what they expected.

The local rules in each of the districts require some sort of early procedure aimed at a settlement-oriented assessment of the case. Often they permit further procedures at the request of the parties. Counsel should takeadvantage of these procedures, and of *Fed R Civ P 68*'s provision for Offers of Judgment, to achieve early resolution of the case.

Detailed Discussion/Forms:

13 Moore's Federal Practice, Ch. 68, Offer of Judgment (Matthew Bender 3d ed.)

11 Bender's Federal Practice Forms, Rule 68, Offer of Judgment (Matthew Bender)

Cross Reference:

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

Legal Topics:

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

Civil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewLegal EthicsClient RelationsEffective Representation

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Unit 9 Ending the Case Before Trial
CHAPTER 31 Settlement Agreements and Offers of Judgment *
II. PREPARING FOR SETTLEMENT AND SETTLEMENT CONFERENCES

4-31 MB Practice Guide: Fed Pretrial Civ Proc in CA 31.03

31.03 CHECKLIST: Preparing for Settlement.

☐ Consider benefits of settlement:

- ○ Certainty.
- ○ Expeditious resolution.
- ○ Availability of a "bar order."

☐ Consider types of settlement procedures:

- ○ Direct negotiations between parties.
- ○ Negotiations with a nonjudicial third party as intermediary.
- ○ Negotiations with a judicial officer other than the trial judge as intermediary.
- ○ Negotiations before trial judge.

☐ Evaluate use of trial judge as settlement officer:

○ Review advantages and disadvantages:

☐ Advantage: Trial judge will be most familiar with case and better able to facilitate settlement.

☐ Disadvantage: Trial judge will be made familiar with facts or assertions not evidence in the proceeding.

○ Review local rules to determine whether assigned judge may serve as settlement officer.

Authority:
CD Cal Civ LR 16-15; *ED Cal Civ LR 240*, *270*; *SD Cal Civ LR 16.3(a)*

Discussion:
See *§ 31.08[5]*

☐ Review mandatory settlement procedures available in district court.

Authority:
CD Cal Civ LR 16-2.9, *16-15*, *16-15.2*, *16-15.5*; *ED Cal Civ LR 270*, *271*, *281*; *ND Cal Civ LR 16-8*, *16-10*; *SD Cal Civ LR 16.1*, *16.3*

Discussion:
See *§ 31.07*

☐ Prepare for settlement meeting:

○ Be able to articulate:

☐ Issues in controversy.

☐ Facts surrounding disputed issues.

☐ Law applicable to facts and issues in controversy.

☐ Client's objectives.

☐ Objectives of opposing party and counsel.

☐ Monetary value of case.

○ Understand client objectives:

☐ Minimum needs.

- [ ] Ideal goals.

- ○ Prepare client for settlement by providing an assessment of:
  - [ ] Likelihood of success at trial.
  - [ ] Amount of damages likely to be awarded.
  - [ ] Time and expense likely to be incurred if no settlement takes place.
  - [ ] Physical and emotional toll on client.
  - [ ] Likely difficulties in enforcing a judgment against the opponent.
  - [ ] Likelihood of an appeal by opponent.
- ○ Understand opponent's objectives.
- ○ Value the case, including:
  - [ ] Present economic damages.
  - [ ] Future damages.
  - [ ] Non-monetary damages and to what extent the case includes such damages.
  - [ ] Economic cost of protracted litigation.
  - [ ] Whether the plaintiff or defendant will be viewed as sympathetic.
  - [ ] Venue in which the case will be heard, and whether the venue is favorable to client's type of case.
  - [ ] Defendant's ability to pay or comply with judgment.
  - [ ] Ability and expertise of the attorneys involved.

- [ ] Comply with ethical duties:

- ○ Obtain client's authority to settle.
- ○ Communicate offers and demands to client.
- ○ Refrain from communicating with represented parties.
- ○ Avoid conflicts of interest in settlement negotiations.

Authority:
Evans v. Jeff D. (1986) 475 US 717, 728 n14, 106 S Ct 1531, 89 L Ed2d 747 ; *Wien Air Alaska, Inc. v. Bachner (9th Cir 1988) 865 F2d 1106, 1110* ; *Inamed Corp. v. Kuzmak (CD Cal 2002) 275 F Supp2d 1100, 1119* ; ABA Model Rules of Prof Conduct 1.2(a); Cal Rules Prof Conduct, Rules 2-100, 3-300, 3-510(A)

Discussion:
See *§§ 31.09*, *31.10*

☐ Maintain confidentiality of settlement negotiations:

- ○ Seek a written agreement specifying confidentiality.
- ○ Be familiar with local rules on settlement confidentiality.

Authority:
CD Cal Civ LR 16-14; *ED Cal Civ LR 240*, *270*

Discussion:
See *§ 31.11*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewLegal EthicsClient RelationsConfidentiality of InformationLegal EthicsClient RelationsConflicts of InterestLegal EthicsClient RelationsEffective RepresentationLegal EthicsProfessional ConductOpposing Counsel & Parties

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CHAPTER 31 Settlement Agreements and Offers of Judgment *
II. PREPARING FOR SETTLEMENT AND SETTLEMENT CONFERENCES

4-31 MB Practice Guide: Fed Pretrial Civ Proc in CA 31.04

31.04 Options and Strategy.

Federal courts favor settlement before trial [*see Fed R Civ P 16(c)*, Committee Note of 1993; *Fed R Evid 408*, Committee Note of 1975]. Litigation settlements offer parties and their counsel relief from the burdens and uncertainties inherent in trial [*Franklin v. Kaypro Corp. (9th Cir 1989) 884 F2d 1222, 1225 , cert. denied sub nom. Franklin v. Peat Marwick Main & Co., 498 US 890 (1990)*].

Most judges do not stay discovery or other pretrial proceedings based on the pendency of settlement discussions--the litigation itself can provide a powerful motivation for settlement [Manual for Complex Litigation 4th, § 13.12]. Counsel should generally approach settlement and litigation simultaneously. Nonetheless, in view of the advantages of settlement over trial, parties should plan and schedule both discovery and pretrial motions so that the prospects of settlement can be made as clear as early in the litigation as possible. In other words, if the depositions of specific witnesses are taken early, or if certain issues are resolved by means of pretrial motion at an early stage in the litigation, the parties may be able to assess settlement prospects more realistically. Because all California district courts require either mandatory settlement procedures or court-annexed ADR procedures, the parties can expect court assistance in identifying and scheduling relevant discovery and pretrial motions.

Backed up with the ability to follow through, the following litigation techniques may lead to productive settlement discussions [*see* Manual for Complex Litigation 4th, § 13.13 (2004)]:

- Ask for a firm trial date;
- Seriously evaluate and consider all potential forms of ADR in addition to formal, court-sponsors settlement conferences, particularly use of mediators;
- After exhaustion of other ADR procedures, or in lieu of them, ask for settlement conference, usually before a separate judge;
- Consider the exchange of settlement conference statements and offers with other parties in advance of the conference;

- Make sure that parties, not just counsel, participate in settlement discussions;
- Make sure that insurance carriers who may provide coverage are involved;
- If experts have been identified, consider if the presence of experts would be useful at the conference; and
- Ask for severance and early trial of issues that could lead to resolution of the entire matter.

Preparing for Settlement Discussion Using Online Resources:

Many resources are available online for researching recent verdicts and settlements that can help you propose a reasonable demand for damages or assess your opponent's demand. The nature of the injury and other factual patterns can guide you to online resources featuring both California or national recovery profiles. For example, helpful resources at *lexis.com* include:

- Legal tab> Area of Law--By Topic> Litigation Practice and Procedure> Find Briefs, Motions, Pleadings & Jury Verdicts> Jury Verdicts and Settlements, Combined
  - Sample Search: To find examples of federal verdicts or settlements in a products liability action involving injuries from a "rollover" accident, try this search: *court (united states or u.s.) and product liability and rollover or roll over*
  - Sample Search: To find examples of federal court verdicts or settlements in a wrongful death action based on misdiagnosis, try this TOPIC segment search: *court(united states or u.s.) and topic (wrongful death and misdiagnos! or diagnos!)*
- Legal tab> Area of Law--By Topic> Litigation Practice and Procedure> Find Briefs, Motions, Pleadings & Jury Verdicts> Jury Verdicts & Experts> What's It Worth? A Guide to Personal Injury Awards and Settlements. (Select "Continue With Your Search.")
  - Sample Search: For a national perspective in helping to assess the damages demand for, *e.g.*, an ankle injury, try an INJURY segment search, such as: *injury (brok! or fractur! /2 ankle)*.

Legal Topics:

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

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II. PREPARING FOR SETTLEMENT AND SETTLEMENT CONFERENCES

4-31 MB Practice Guide: Fed Pretrial Civ Proc in CA 31.05

31.05 Parties Should Consider Advantages and Incentives of Settlement at Early Stage of Litigation.

31.05[1] Settlement Provides Certainty. In litigation, the adverse consequences of a potential defeat provide the parties with an incentive to settle in advance of trial, because settlement provides certainty [*Delta Air Lines, Inc. v. August (1981) 450 US 346, 352, 101 S Ct 1146, 67 L Ed2d 287*].

31.05[2] Settlement Offers Expeditious Resolution. Trial courts have a natural desire to clear court dockets of complex litigation in as expeditious a manner as possible [*Franklin v. Kaypro Corp. (9th Cir 1989) 884 F2d 1222, 1225 , cert. denied sub nom. Franklin v. Peat Marwick Main & Co., 498 US 890 (1990)*].

31.05[3] "Bar Order" Can Shield Defendants from Additional Liability. A "bar order" is another incentive for settlement in complex litigation. A "bar order" will prohibit contribution from settling defendants of any amount in excess of their proportionate share of fault or liability as determined by the trier of fact. Use of a "bar order" is permissible in the Ninth Circuit, so long as the Court instructs the jury to determine the percent of culpability of settling and nonsettling defendants without mention or reference to any settlement agreement or bar order [*see Franklin v. Kaypro Corp. (9th Cir 1989) 884 F2d 1222, 1231 , cert. denied sub nom. Franklin v. Peat Marwick Main & Co., 498 US 890 (1990)*].

Legal Topics:

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

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II. PREPARING FOR SETTLEMENT AND SETTLEMENT CONFERENCES

4-31 MB Practice Guide: Fed Pretrial Civ Proc in CA 31.06

31.06 Parties Must Consider Mandatory Settlement Procedures Utilized by Court.

31.06[1] Court Backlogs Necessitate Mandatory Procedures. Because of the serious case backlog in the federal court system, judicial intervention in the settlement process is considered a necessity. Federal courts have joined in the general movement seeking methods other than litigation for resolving disputes. As a result, a party filing suit in federal court today will be asked to consider settlement through either mandatory settlement procedures or some form of court-annexed alternative dispute resolution ("ADR").

Cross Reference:

Discussion of alternative dispute resolution in the Ninth Circuit, see Ch. 32, Court Annexed ADR.

31.06[2] All District Courts Require Mandatory Settlement Procedures or Court-Annexed Alternative Dispute Resolution. California district courts require either mandatory settlement conferences or steps toward Alternative Dispute Resolution as a means of early resolution of disputes.

Cross Reference:

Discussion of mandatory dispute resolution procedures, see *§ 31.07*.

31.06[3] Failure to Participate May Be Partial Basis for Default Judgment. A plaintiff may seek default judgment against a defendant that has failed to plead or otherwise defend an action [*Fed R Civ P 55(a)*]. At least one California District Court has found that failure to attend a mandatory settlement conference, along with the failure to otherwise participate in litigation, can be grounds for issuing a default judgment [Original San Francisco Toymakers, Inc. v. Trendmasters, Inc. (ND Cal 2003) 2003 US Dist LEXIS 18557, at *14].

Warning:

In addition, sanctions may be imposed for failure to comply with a settlement conference order made pursuant to *Fed R Civ P 16(f)* [*see, e.g., Pitman v. Brinker Int'l, Inc. (D Ariz 2003) 216 FRD 481, 487* (attorney's fees and costs awarded to plaintiff for defendants' noncompliance with Rule 16 settlement conference order)].

Cross Reference:

Requesting default judgment, see Ch. 27, Defaults and Motions for Relief From Default, see *§§ 27.03 -27.17*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorDiscourtesies

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Unit 9 Ending the Case Before Trial
CHAPTER 31 Settlement Agreements and Offers of Judgment *
II. PREPARING FOR SETTLEMENT AND SETTLEMENT CONFERENCES

4-31 MB Practice Guide: Fed Pretrial Civ Proc in CA 31.07

31.07 LOCAL PRACTICE: Mandatory Settlement Procedures and Conferences.

31.07[1] LOCAL PRACTICE: CD Cal Requirements--Mandatory Settlement Procedures.

31.07[1][a] Settlement Procedure Required. Local Rule 16-15.1 makes settlement proceedings mandatory [*CD Cal Civ LR 16-15.1*].

Timing:

The parties must file a Notice of Settlement Procedure Selection signed by counsel for both sides no later than 14 days after the entry of the *Fed R Civ P 16(b)* scheduling order [*CD Cal Civ LR 16-15.2*].

31.07[1][b] Parties Must Select Settlement Procedure or Submit to Court-Ordered Procedure. Local Rule 16-15.4 provides a series of suggested settlement procedures that the court may order the parties to participate in if they do not choose a settlement procedure and file a timely Notice of Settlement Procedure Selection [*CD Cal Civ LR 16-15.4*].

31.07[1][c] Settlement Procedures Require Presence of Parties, Counsel Expected to Try Case. Regardless of the settlement procedure selected, and unless otherwise ordered or excused by the trial judge or the settlement officer, the settlement proceeding must include:

- *In camera* presentation of a confidential written statement of the case to the settlement officer [*CD Cal Civ LR 16-15.5(a)*].
- Appearance by a party or a person with full authority to settle the case [*CD Cal Civ LR 16-15.5(b)*].
- Appearance by the attorney expected to try the case [*CD Cal Civ LR 16-15.5(c)*].

Timing:

The parties must have participated in the settlement procedures selected by the court no later than 45

days before the final Pretrial Conference, unless otherwise ordered by the court [*CD Cal Civ LR 16-15.2*].

As I recall, from writing a few chapters for a CA practice guide, last year, I can use the word "Consider" (as one step below "warning."

Consider:

Each party must have made a thorough analysis of the case before the settlement proceeding and must be fully prepared to discuss all economic and non-economic factors relevant to a full and final settlement [*CD Cal Civ LR 16-15.5(d)*].

Warning:

If the parties do not select an alternative settlement procedure, the trial judge may participate in facilitating settlement [*see CD Cal Civ LR 16-15*].

31.07[1][d] Counsel Must Exhaust All Possibilities of Settlement Before Trial. Counsel for the parties must meet before the pretrial conference and must "exhaust all possibilities of settlement" [*CD Cal Civ LR 16-2.9*].

31.07[2] LOCAL PRACTICE: ED Cal Requirements--Mandatory Settlement Conference.

31.07[2][a] Mandatory Settlement Conference Required. A settlement conference must be held in all actions unless the court orders otherwise on objection of a party or for other good cause shown [*ED Cal Civ LR 270(a)*]. Counsel must notify the court when the settlement conference is set if the litigation is unusual or complex and if there is a need to provide additional time or make other special arrangements to ensure that the settlement conference will be meaningful [*ED Cal Civ LR 270(a)*]. The judge or magistrate judge assigned to try the action will not conduct the settlement conference unless all parties affirmatively so request and waive in writing any claim of disqualification on that basis [*ED Cal Civ LR 270(b)*; *see ED Cal Civ LR 240(a)(16)*].

Cross References:

Discussion of the Eastern District's Voluntary Dispute Resolution Program, assigned on agreement of all parties under *ED Cal Civ LR 271*, see Ch. 32, Court Annexed ADR.

Potential issues arising from Trial Judge's dual role, see *§ 31.08[4]*.

31.07[2][b] Person Capable of Resolution Generally Must Attend; Special Requirements When United States Is a Party. When the United States is not a party, counsel must be accompanied at the Settlement Conference by a person capable of disposition of the action or must be authorized to settle the matter at the Settlement Conference on any terms [*ED Cal Civ LR 270(f)(1)*].

When the United States is a party, the attorney for the United States must obtain the approval of the United States Attorney to compromise any matter within the authority delegated to the United States Attorney by rule or regulation of the Attorney General. If this delegated authority is limited by the opposition of another federal agency, a responsible and knowledgeable representative of that agency must attend the conference [*ED Cal Civ LR 270(f)(2)*].

Further requirements apply in cases in which the approval of officials of the Department of Justice in Washington, D.C., is required [*see ED Cal Civ LR 270(f)*].

31.07[2][c] Pretrial Statement on Settlement Possibilities Required. The parties must file a pretrial statement that covers, among other things, whether settlement negotiations between the parties, or a court settlement conference under *ED Cal Civ LR 270*, or both would be helpful [*ED Cal Civ LR 281(b)(16)*].

31.07[3] LOCAL PRACTICE: ND Cal Requirements--Mandatory ADR. Parties must confer regarding the possibility of settlement. In cases assigned to the ADR Multi-Option Program, unless otherwise ordered, counsel and client must serve and file an ADR Certification. Separate certifications may be filed by each party [*ND Cal Civ LR 16-8(b)*]. To file the necessary certification, counsel and client must have [*ND Cal Civ LR 16-8(b)*]:

- Read the Northern District's handbook entitled "Dispute Resolution Procedures in the Northern District of California";
- Discussed the available dispute resolution procedures; and
- Considered whether their case might benefit from any of the available dispute resolution options.

In cases assigned to the ADR Multi-Option Program, unless otherwise ordered, counsel must also file either a "Stipulation and [Proposed] Order Selecting ADR Process" or a "Notice of Need for ADR Phone Conference" on a court-established form [*ND Cal Civ LR16-8(c)*]. The judge will enter a Case Management Order that may address deadlines for the commencement and completion of any ADR processes [*ND Cal Civ LR 16-10(b)*, *16-10(b)(1)*]. If the judge sets subsequent Case Management Conferences, the parties must address whether using some form of ADR would be appropriate in the Joint Case Management Statement required before each subsequent conference [*ND Cal Civ LR 16-10(d)*].

Cross Reference:

Discussion of the Northern District's ADR Procedures, see Ch. 32, Court Annexed ADR.

31.07[4] LOCAL PRACTICE: SD Cal Requirements--Mandatory Early Neutral Evaluation and Settlement Conferences.

31.07[4][a] Court Requires Mandatory Early Neutral Evaluation. A mandatory Early Neutral Evaluation (ENE) conference for counsel and the parties takes place within 45 days of the filing of an answer, before the assigned judicial officer supervising discovery [*SD Cal Civ LR 16.1(c.1)*]. This appearance must be made with the authority to discuss and enter into settlement [*SD Cal Civ LR 16.1(c.1)*]. Attendance may be excused only for good cause shown and by permission of the court [*SD Cal Civ LR 16.1(c.1.c)*].

Timing:

An ENE conference may take place at the request of a party before the filing of an answer if the judicial officer deems such a conference appropriate [*SD Cal Civ LR 16.1(c.1)*]. The request must be in writing and sent to the parties and counsel for the parties whose addresses are known to the requesting counsel [*SD Cal Civ LR 16.1(c.1)*].

Cross Reference:

Rule against communicating with represented parties, see *§ 31.08[3]*.

31.07[4][b] Judicial Officer May Require Additional Steps If No Settlement. If no settlement is reached at the ENE conference, the judicial officer may (1) refer cases the officer believes would benefit and those in which the parties agree to a non-binding arbitration or mediation to occur within 45 days, or (2) hold a case management conference within 30 days [*SD Cal Civ LR 16.1(c.2.a)*, *(c.2.b)*].

31.07[4][c] Court May Order Post-Verdict Mandatory Settlement Conference. A post-verdict Mandatory Settlement Conference may be ordered by the trial judge after the entry of a verdict by a court or jury [*SD Cal Civ LR 16.3(g)*].

31.07[4][d] Court May Order Non-Binding Mini-Trial or Summary Jury Trial. A district or magistrate judge may order a non-binding mini-trial or summary jury trial when the judge finds, after a hearing, that the potential judgment does not exceed $250,000, and that the use of this procedure will probably resolve the case [*SD Cal Civ LR 16.3(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionSummary Jury TrialsCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral Overview

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31.08 Options for Third-Party Facilitation of Settlement.

31.08[1] Parties May Seek Settlement With No Intermediary. Before pursuing more formal procedures involving intermediaries, the parties may wish to engage in settlement negotiations on their own. Such procedures avoid the potential expense of a third party mediator.

Warning:

While not permitted to prove the existence or amount of liability, efforts to settle may be introduced by opposing counsel for other purposes [*see Fed R Evid 408*].

Cross Reference:

Discussion of admissibility of settlement discussions, see *§ 31.12*.

31.08[2] Parties May Choose Nonjudicial Mediator. If an intermediary for settlement purposes is required, counsel can select a nonjudicial third party or judge other than the trial judge. Two districts now provide explicitly for nonjudicial settlement officers [*see CD Cal Civ LR 16-15.4* (Settlement Procedure No. 2), *ND Cal ADR LR 2-5*]. In the Northern District of California, for example, the nonjudicial mediator may be either an individual privately selected and compensated by the parties or a lawyer/mediator from the court's panel who conducts at least the initial mediation session free of charge [*ND Cal ADR LR 2-5*, *6-3(b)*].

Cross Reference:

Discussion of the issues raised by the trial judge acting as settlement officer, see *§ 31.08[4]*.

31.08[3] Trial Judge May Serve As Settlement Officer. The trial judge may, with the parties' consent, act as the settlement officer as well; although some judges will not agree to do so even when the parties consent. The advantage to such a procedure is that the judge will be familiar with the case and thus can facilitate settlement discussions.

Cross References:

Disadvantages of this procedure, see *§ 31.08[4]*. Discussion of the treatment of trial judges as settlement officers under the local rules, see *§ 31.08[5]*.

31.08[4] Potential Issues Arising From Trial Judge's Dual Role. In non-jury trials, district judges rarely participate in settlement discussions. Occasionally, however, if a party requests, some district judges may consent to serve as settlement officer if all of the other parties consent to such involvement. In this event, the parties will have a difficult choice. Before giving or withholding consent, each party must explore how comfortable they will be with involving the judge in settlement negotiations if those negotiations fail and the case must be tried. Even if the case will be tried with a jury, the decision involves weighing the potential dangers of allowing the district judge to hear and participate in settlement negotiations against potential awkwardness in withholding consent. Most attorneys and judges believe that it is preferable to have the court appoint a magistrate judge or another district judge to conduct the settlement conference. On the other hand, these judicial officers rarely have all of the time that may be needed for the settlement process. Given the number of highly skilled attorneys and former judges serving as neutrals, many lawyers prefer a nonjudicial mediator if the parties are truly serious about settling.

Drawbacks:

One primary disadvantage to the trial judge's acting as a settlement officer are that she or he will be introduced to the parties' confidential thought processes about the case, and may become familiar with evidence that may not be introduced at trial. A second disadvantage is that the judge may form opinions about the merits of the case based on ex parte communications with the opposing party or counsel. Finally, a party must monitor negotiation strategy in a way that would not occur with a different settlement officer. A party runs the risk of being perceived by the judge as "unreasonable" in connection with positions taken in settlement negotiations. The party is left to wonder if the judge has or will arrive at such a perception, and whether this perception might adversely influence the judge in pretrial rulings and at trial.

31.08[5] LOCAL PRACTICE: Role of Trial Judge in Settlement.

31.08[5][a] LOCAL PRACTICE: CD Cal Requirements. Unless the parties choose one of several optional settlement procedures, "the judge assigned to preside over the civil case (the trial judge) may participate in facilitating settlement" [*CD Cal Civ LR 16-15*].

31.08[5][b] LOCAL PRACTICE: ED Cal Requirements. Unless all parties affirmatively request that the judge or magistrate judge assigned to the case or to try the action participate in the conference and waive in writing any claim of disqualification on that basis, "the assigned Judge or Magistrate Judge shall not conduct the settlement conference" [*ED Cal Civ LR 270(b)*; *see ED Cal Civ LR 240(a)(16)*]. The local rules further provide for the filing of a status conference statement that may include the prospects for settlement, "provided ... that ... counsel shall specify whether they will stipulate to the trial Judge or Magistrate Judge acting as settlement Judge and waive any disqualification by virtue thereof" [*ED Cal Civ LR 240(a)(16)*].

31.08[5][c] LOCAL PRACTICE: ND Cal Requirements. On written stipulation of the parties, the assigned judge, in the exercise of his or her discretion, may conduct a settlement conference [*ND Cal ADR LR 7-2*].

31.08[5][d] LOCAL PRACTICE: SD Cal Requirements. The judge conducting the settlement conference will be disqualified from trying the case unless all the parties agree to waive the restriction [*SD Cal Civ LR 16.3(c)*].

Cross Reference:

Discussion of the difference between the ENE and Settlement Conference procedures in the Southern District, see *§ 31.07[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewGovernmentsCourtsJudges

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31.09 Preparation for Settlement Discussions Must Be Thorough.

31.09[1] Items for Consideration. As with the rest of the litigation process, success in settling a case requires extensive preparation. Settlement discussions are most likely to be productive after theparties have identified the legal issues and obtained and evaluated the critical evidence on those issues. Therefore, prior to settlement discussions counsel must research, understand, and be able to articulate:

- Issues in controversy.
- Facts surrounding the controverted issues.
- Law applicable to the facts and issues in controversy.
- Client's objectives and priorities [*see 31.09[2], [3]*].
- Objectives of the opposing party and opposing counsel [*see 31.09[4]*].
- Monetary value of the case.
- Any obstacles to settlement, such as historical animosity between the parties or counsel.

Careful selection of the person who will conduct settlement conferences or mediation sessions is very important. It is in all parties' interest to agree on and request a specific judge or magistrate judge, or a particular neutral, to assure that they will get the combination of skills, time, and commitment necessary for success. The parties' confidence in the settlement officer or mediator substantially increases the chances of meaningful preparation for and success resulting from the settlement discussions. During the selection or after the court selects the settlement officer or nonjudicial mediator, counsel should consult with others who have had experience in settlement conferences or mediation sessions with this judge or mediator.

31.09[2] Understanding Client Objectives. Counsel should understand the client's objectives, for example:

- At a minimum, what must the client obtain to settle the case?
- Ideally, what would the client wish to achieve in settling the case?

Money--rather than principle--usually matters most to clients, but clients may have non-monetary goals as well. For example, a client alleging gender-based discrimination may be willing to accept a smaller monetary settlement in exchange for the ability to publicize the fact and terms of the settlement.

Be prepared to look for innovative solutions such as structured pay-outs, payment in kind, future commercial relations, concessions, apologies, admissions, establishment of training and recruitment programs, or correction of a defect. Be wary of hidden personal goals that will interfere with settlement. Revenge and spite do not promote compromise.

For example, in an environmental action, non-monetary objectives may dominate, and counsel should look for creative ways to use monetary settlements (paid to neutral third entities) to achieve environmental compliance or improvements.

31.09[3] Injecting Reality Into Client Expectations. Counsel must be prepared to inject reality into client objectives. Unrealistic expectations prevent wise settlements. Before engaging in settlement discussions, provide the client with an honest assessment of:

- The likelihood of success at trial.
- The amount of damages likely to be awarded.
- The time and expenses likely to be incurred if the case settles later or goes to trial.
- The physical and emotional toll litigation may exact on the client.
- The amount of the client's time or, in the case of corporate clients, the amount of the client's executives' time, consumed by litigation.
- The difficulties of enforcing a judgment against the opposing party or parties.
- The likelihood of an appeal by the opposing party if the client prevails at trial or on summary judgment.

Counsel must also prepare the client for the settlement process itself. In particular, counsel needs to educate the client as to various negotiations strategies that may shape offers presented to the client or reactions to the offers presented by the client. The client needs to understand the importance of not abandoning the settlement process through over-reaction when obstacles appear.

31.09[4] Understanding Opponent's Objectives. Understanding an opposing party's thoughts and feelings regarding a case may be as important as analyzing the legal issues. The opposing party's real objectives in the litigation may not always be what they seem on the face of the pleadings, or from what opposing counsel says. Neitherthe opponent nor opposing counsel may not have thought through every need the opponent has in connection with the case, even some needs that may be crucial to a resolution of the matter.

Accordingly, counsel should be alert for indications of the real objectives of the opposing party in initiating or defending against litigation. The potential for a successful settlement increases when at least some of the objectives of all the parties are met by the terms of a proposed settlement. Furthermore, a proposed settlement may be presented more

convincingly when the proponent is in a position to fully explain all of the advantages of the proposed settlement to the opponent.

31.09[5] Valuing the Case. After evaluating the facts, issues, litigation history, and law applicable to the case, counsel must--except in cases involving primarily injunctive relief--determine its monetary value. Although every case is unique, some general factors to be considered in attempting to place monetary value on the claims at issue include:

- Present economic damages suffered by the plaintiff, including:
  - Lost income.
  - Medical or other bills.
  - Lost profits.
  - Replacement costs.
  - Interest.
- Future damages reasonably certain to be incurred by the plaintiff, including the present value of future damages.
- Non-monetary damages such as pain and suffering, or loss of goodwill, incurred by the plaintiff.
- Whether the plaintiff will be seen as sympathetic by the court or jury.
- Whether money damages will compensate the plaintiffs at all (e.g., in a suit for injunctive relief).
- Any possible set-offs that may apply, by way of counterclaims, mitigation, or otherwise.
- The economic cost to the plaintiff of protracted litigation.
- The defendant's ability to pay, both actual and apparent.
- Availability of insurance.
- Case venue: Whether in an area known to be "liberal" or "conservative" in terms of awards.
- The reputation, ability, and expertise of the attorneys in the case.

For insight into the potential value of the case, review cases reported in jury verdict reporters with similar fact patterns (remaining aware that the value of jury verdicts can be reduced directly or indirectly by the trial judge or on appeal). Examples of such reporters include the Association of Trial Lawyers of America *ATLA Record,* LRP's *Jury Verdict and Settlement Summaries,* and Shepard's *Verdicts, Settlements, and Tactics*. Counsel should also consider discussing the case discreetly (client confidences and privileged communications must be preserved) with attorneys experienced in the type of litigation involved to get an idea of how those attorneys would value the case.

These factors should be continually reviewed as the case progresses. Discovery results and motion practice can

dramatically affect the valuation of a case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewLegal EthicsClient RelationsEffective Representation

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31.10 Attorney's Ethical Duties and Considerations During Settlement.

31.10[1] Obtaining Client's Authority to Settle. The decision to settle a case rests with the client, not the attorney. A client does not automatically bestow the authority to settle a case merely by retaining counsel.

An attorney must have either actual or apparent authority from the client to settle a case [*Wien Air Alaska, Inc. v. Bachner (9th Cir 1988) 865 F2d 1106, 1110* ; *Inamed Corp. v. Kuzmak (CD Cal 2002) 275 F Supp2d 1100, 1119*]. Generally, a third party may rely on the apparent authority of the attorney unless he or she has reason to believe that the attorney does not have authority to negotiate a settlement [*Cristobal v. Siegel (9th Cir 1993) 26 F3d 1488, 1495*].

31.10[2] Communicating Offers and Demands to Client. An attorney must communicate "all amounts, terms, and conditions of any written offer of settlement made to the client" in any non-criminal matter [Cal Rules Prof Conduct, Rule 3-510(A)].

Warning:

To avoid subsequent problems with clients and litigation over apparent, rather than actual authority, it is best to communicate *all* offers of settlement to the client.

31.10[3] Refraining From Communicating With Represented Parties. While representing a client, an attorney must not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the attorney has the consent of the other lawyer [Cal Rules Prof Conduct, Rule 2-100(A)]. "Party" includes officers, directors, and managing agents, as well as (in certain instances) employees, of corporations [Cal Rules Prof Conduct, Rule 2-100(B)]. The prohibition does not apply to communications with public officers, boards or bodies [Cal Rules Prof Conduct, Rule 2-100(C)].

Warning:

When representing a corporation, bear in mind that contact of an adverse party by any of the corporation's departments may violate the prohibition against ex parte contact, particularly if the contact is made with the knowledge and acquiescence of the legal department and may result in information that

can be used in the corporation's litigation strategy [*see, e.g., Partida v. Union Pac. R.R. Co. (CD Cal 2004) 221 FRD 623, 629*].

31.10[4] Avoiding Conflicts of Interest. An attorney is not to allow his or her own interests, financial or otherwise, to influence the attorney's professional advice. Accordingly, an attorney is required to evaluate a settlement offer on the basis of the *client's* interest, without regard to the attorney's own interest in obtaining a fee [*see Evans v. Jeff D. (1986) 475 US 717, 728 n14, 106 S Ct 1531, 89 L Ed2d 747* (*citing* ABA Model Code Prof Responsibility EC 7-7-EC 7-9; ABA Model Rules Prof Conduct 1.2(a))].

A conflict regarding a settlement and attorney's fees may arise when the defendant seeks to settle claims for attorney's fees and the merits with one lump sum [*see* Manual for Complex Litigation 4th, § 13.24]. Negotiating the merits and the claim for attorney's fees may violate the California Rules of Professional Conduct, which forbid an attorney from obtaining a pecuniary or security interest adverse to the client unless [Cal Rules Prof Conduct, Rule 3-300]:

- The transaction is a reasonable one, fully disclosed to the client;
- The client has been advised of its ability to seek the advice of an independent attorney and has an opportunity to do so; and
- The client thereafter consents in writing to the terms of the transaction or acquisition.

Decision Points:

Counsel working for a contingent fee may be able to avoid the trap of losing all or some fees for the litigation by dealing with the settlement contingency in the engagement letter. The engagement letter may provide that settlement will not bar counsel from recovering fees, or that client's recovery will come only after a reasonable attorney's fees have been recovered. Such an agreement should comply with Cal Rules Prof Conduct, Rule 3-300.

When attorney's fees are a separate issue, counsel may avoid conflicts and facilitate settlement by negotiating the merits first, and fees only after reaching a resolution in principle on the merits [*cf.* Manual for Complex Litigation, 4th § 13.24 (simultaneous negotiation "problematic," but not absolutely prohibited)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewLegal EthicsClient RelationsAttorney FeesContingency FeesLegal EthicsClient RelationsConflicts of InterestLegal EthicsClient RelationsEffective RepresentationLegal EthicsProfessional ConductOpposing Counsel & Parties

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4-31 MB Practice Guide: Fed Pretrial Civ Proc in CA 31.11

31.11 Maintaining Confidentiality.

Settlements would be a rare occurrence if statements, offers, arguments, concessions, and other negotiation stances could be held against parties attempting to settle a case. Therefore, offers of compromise and conduct and statements made in compromise negotiations are not admissible as evidence to prove liability for or the invalidity of a claim [*Fed R Evid 408*]. However, in order to encourage settlements, courts have provided additional protection. Local rules generally require confidentiality for virtually all aspects of settlement proceedings as well. Statements of offers made, or conduct observed, in settlement proceedings may not be disclosed or reported except to the extent that all parties consent or a court authorizes or compels disclosure [*CD Cal Civ LR 16-15.8*; *ND Cal ADR LR 7-5*; *SD Cal Civ LR 16.3(h)*; *see ED Cal Civ LR 270(d)* (settlement conference statement is confidential)].

Cross Reference:

Admissibility of settlement offers or conduct at trial. See *§ 31.12*.

The confidentiality of settlement negotiations applies regardless of the process or procedure used in an attempt to reach a settlement. It is not just conduct, writings made for, and statements made at, formal court settlement conferences that are confidential. For example, the State of California has enacted a comprehensive statute guaranteeing the confidentiality of the mediation process [*see Evid Code § 1119*; *see also Rojas v. Superior Court (2004) 33 C4th 407, 415, 15 CR3d 643, 92 P.3d 260, 93 P3d 260* ("One of the fundamental ways the Legislature has sought to encourage mediation is by enacting several 'mediation confidentiality provisions' ")]. Parties should expect similar protection in the California federal district courts.

Settlement agreements are another matter. Settlement agreements are usually memorialized on the record, and often result in an order of dismissal or, sometimes, even in a judgment. The terms of a judgment based on a settlement agreement, whether reached by settlement or by trial, are usually matters of public record. If the terms of a settlement resulting in the dismissal of a case have been put on the record, those terms are a matter of public record in most cases. Once the settlement process has concluded, the court has no reason for preserving confidentiality.

However, the parties may negotiate a confidentiality provision as part of a settlement, and a court generally, but not always, has the discretion to approve and enforce such a provision if the settling parties can demonstrate good cause for it [*see Phillips v. GMC (9th Cir 2002) 307 F3d 1206, 1212*]. If the parties intend to include a confidentiality provision

in their settlement agreement, and if, as is common, the settlement agreement is placed on the record by the settlement judge at the conclusion of the settlement conference, the parties should request the court to seal the transcript.

Negotiation of a confidentiality clause on behalf of a large, corporate client can be a tricky business. It is very dangerous for a corporation to promise confidentiality on the part of every employee. Therefore, when representing a large corporation, counsel should specify exactly who is bound by the confidentiality obligation.

In addition, if a confidentiality provision is included in a settlement agreement, it may be impossible to enforce. Actual damages for breach of a confidentiality obligation may be hard to measure and hard to prove. It may be better for parties to also negotiate a liquidated damages provision as a means of enforcement of a confidentiality provision, the damages being triggered in the event of an unauthorized disclosure.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEffectsContracts LawTypes of ContractsSettlement AgreementsEvidenceRelevanceCompromise & Settlement NegotiationsLegal EthicsClient RelationsConfidentiality of Information

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31.12 Admissibility at Trial of Evidence Concerning Efforts to Settle.

Evidence concerning efforts to settle or compromise a dispute is generally inadmissible to prove the existence or amount of liability or the invalidity of a claim [*Fed R Evid 408*].

However, otherwise discoverable evidence is not excludable merely because it is presented in the course of settlement negotiations. Likewise, exclusion is not required when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution [*Fed R Evid 408*]. Proving apparent authority to settle may be a reason for admitting evidence of settlement discussions [*see, e.g., Lockwood v. Wolf Corp. (9th Cir 1980) 629 F2d 603, 609*]. Evidence of settlements by other parties may be admissible in order to allow the jury to reduce an award for damages already received [*see Manual for Complex Litigation 4th, § 13.21*].

Warning:

Efforts to settle can often be introduced by opposing counsel as evidence for reasons other than those prohibited by Rule 408, doing the damage the Rule intended to protect against. If this is unavoidable, counsel may wish to request a limiting instruction to the jury.

Cross Reference:

Inadmissibility of evidence concerning settlement or compromise, see 2 Weinstein's Federal Evidence, Ch. 408, Compromise and Offers to Compromise (Matthew Bender 2d ed.)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEffectsEvidenceRelevanceCompromise & Settlement Negotiations

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31.13 CHECKLISTS: Making an Offer of Judgment.

31.13[1] Checklist for Party Making Offer.

☐ Review general requirements for offer, including:

- ○ Offer must be made by party defending against a claim.
- ○ Offer must be in writing.
- ○ All parties must be served with offer.
- ○ Offer must include costs, either explicitly or implicitly.

Timing:

Offer must be made more than 10 days before trial begins

Authority:
Fed R Civ P 5(a)(1)(E), 6(d), 68(a)

Discussion:
See *§ 31.15, 31.16, 31.17, 31.18*

☐ Confer with client and consider conditions and provisions of offer, including:

- ○ Condition of acceptance by all offerees.

○ Condition of inclusion of costs and attorney's fees.

☐ In lump sum amount.

☐ In addition to offer.

○ Condition of exclusion of post-offer attorney's fees.

Authority:
Fed R Civ P 5(a)(1)(E), 6(d), 68(a); *Marek v. Chesny (1985) 473 US 1, 9, 105 S Ct 3012, 87 L Ed2d 1* ; *Lang v. Gates (9th Cir 1994) 36 F3d 73, 77 , cert. denied sub nom. Yagman & Yagman, P.C. v. Gates, 513 US 1017 (1994)*

Discussion:
See *§ 31.18, 31.23*

☐ Draft offer specifically to include costs and to include or exclude attorney's fees.

○ Follow format requirements for documents to be filed with the court.

○ "With costs to date" language is sufficient when underlying statute refers to attorney's fees as part of costs.

○ Language barring any award of attorney's fees may be required when underlying statute does not include attorney's fees as part of costs.

Authority:
Fed R Civ P 68(a); *Marek v. Chesny (1985) 473 US 1, 9, 105 S Ct 3012, 87 L Ed2d 1* ; *Nusom v. Comh Woodburn, Inc. (9th Cir 1997) 122 F3d 830, 833-834*

Discussion:
See *§ 31.17, 31.18*

☐ Serve offer of judgment on all adverse parties.

☐ Be aware that judgment to an individual party may not be sufficient to obtain dismissal and avoid class certification.

Authority:
Fed R Civ P 5(a)(1)(E), 6(d), 68(a) Kremnitzer v. Cabrera & Rephen, PC (ND Ill 2001) 202 FRD 239, 243

Discussion:
See *§ 31.15[3], 31.22*

☐ File any accepted offer of judgment.

Authority:
Fed R Civ P 68

Discussion:
See *§ 31.32*

☐ Seek costs (and potentially attorney's fees) for any unaccepted offer of judgment; bar costs and fees from offeree.

○ Judgment must be for offeree.

○ Judgment must be less favorable than offer, including award of any pre-offer costs and fees.

○ Ordinary contract principles will govern interpretation of offer.

Authority:
Fed R Civ P 68(b), (d)

Discussion:
See *§ 31.17*, *31.19*, *31.20*, *31.27*

31.13[2] Checklist for Party Responding to Offer.

☐ Ensure offer of judgment served pursuant to Rule 5 on all adverse parties.

Authority:
Fed R Civ P 5(a)(1)(E), 6(d), 68(a)

Discussion:
See *§ 31.22*

☐ Review offer of judgment:

○ Terms, including:

☐ Proposed judgment.

☐ Costs.

☐ Attorney's fees.

○ Effect, under:

☐ Federal law.

☐ State law in a diversity action.

Authority:
Fed R Civ P 68

Discussion:
See *§ 31.17*, *31.18*

☐ Decide whether to accept, seek clarification of offer of judgment, or move to strike.

Authority:
Fed R Civ P 5(a)(1)(E), *6(d)*, *68*

Discussion:
See *§ 31.27[3]*, *31.28*

☐ If appropriate, move to strike offer of judgment.

Timing:
Preferably, move to strike within 14 days of service of offer

○ For procedural or substantive defects.

○ Follow procedure for making motions to court.

Authority:
Fed R Civ P 68; *Klawes v. Firestone Tire & Rubber Co. (ED Wis 1983) 572 F Supp 116, 118* ; *Boorstein v. New York (SDNY 1985) 107 FRD 31, 35*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Discussion:
See *§ 31.28*

☐ If appropriate, serve and file any accepted offer of judgment:

Timing:
Within 14 days of service of offer

○ Acceptance must be in writing.

○ Acceptance must be unconditional.

Authority:
Fed R Civ P 68(a)

Discussion:
See *§ 31.31*, *31.32*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsOffers of JudgmentRejectionsCivil ProcedureSettlementsOffers of JudgmentTime LimitationsCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewLegal EthicsClient RelationsEffective Representation

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31.14 Options and Strategy.

A party defending against a claim may use an offer of judgment to generate interest in settlement discussions and to shift costs--and potentially attorney's fees--to a claimant who the defending party perceives is unwilling to consider realistic settlement offers or discussions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral Overview

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31.15 Rule 68 Is a Means to Shift Costs or Achieve Settlement.

31.15[1] Rule 68 Encourages Settlement. Rule 68 provides that at least 14 days before the date set for trial, a party "defending against a claim" can serve on the adverse party an offer to allow judgment to be taken against the defending party for the money or property or as otherwise specified in the offer, "with the costs then accrued." If within 14 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance [*Fed R Civ P 68(a)*]. An offer not accepted is "considered withdrawn" [*Fed R Civ P 68(b)*], and evidence of it is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer [*Fed R Civ P 68(d)*].

The purpose of Rule 68 is to encourage settlement and avoid litigation [*Marek v. Chesny (1985) 473 US 1, 6-7, 105 S Ct 3012, 87 L Ed2d 1*]. Only offers made pursuant to the Rule are subject to its cost-shifting provisions [*Berkla v. Corel Corp. (9th Cir 2002) 302 F3d 909, 922*].

31.15[2] Offer of Complete Relief May Moot Action. An offer of judgment that satisfies all of the plaintiff's claims can be construed to moot an action when the making of the offer eliminates any federal claim for relief [*see Greisz v. Household Bank (7th Cir 1999) 176 F3d 1012, 1015* ; *Holstein v. Chicago (7th Cir 1994) 29 F3d 1145, 1147* (offer of relief apparently made outside Rule 68's provisions)].

31.15[3] Rule 68 Offer Cannot Preclude Class Certification. Courts have been reluctant to permit defendants to use *Fed R Civ P 68* in class action litigation. In other words, courts have been reluctant to permit defendants to terminate a class action by offering complete individual relief to a plaintiff who has also prayed for class certification and class relief. Permitting a defendant to do so would permit the defendant to "pick off" strong, capable class representatives and give defendants the ability to permit class actions to go forward only in the most defendant-friendly circumstances [*see* Nasca v. GC Servs Ltd P'ship (SDNY 2002) 2002 US Dist LEXIS 16992, at *9 (citing *Deposit Guarantee Nat'l Bank v. Roper (1980) 445 US 326, 339, 100 S Ct 1166, 63 L Ed2d 427*)]. Therefore, most courts have concluded that a claim of a plaintiff who is seeking class relief may not be mooted by a Rule 68 offer for complete individual relief once a motion for class certification is pending [*see, e.g., Kremnitzer v. Cabrera & Rephen, PC (ND Ill 2001) 202 FRD 239, 243*]. A few courts have also concluded that a claim of a plaintiff who is seeking class relief

may not mooted by a Rule 68 offer for complete individual relief if the offer is made so early in the litigation that the plaintiff has not had a reasonable opportunity to file a motion for class certification [*see, e.g., McDowall v. Cogan (EDNY 2003) 216 FRD 46, 47-48*].

Cross Reference:

Extensive analysis of how and when Rule 68 offer of individual relief may moot class action, 5 *Moore's Federal Practice, § 23.64[1][b]* (Matthew Bender 3d ed.).

31.15[4] Offeror Must Make Offer at Least 14 Days Before Date Set for Trial. The offer must be made at least 14 days before the date set for the trial [*Fed R Civ P 68(a)*].

31.15[5] Computing Time to Make Offer. In calculating the time within which to make a Rule 68 offer, the day on which the offer is served is not included [*see Fed R Civ P 6(a)(1)(A)*]. Every other day, included intermediate Saturdays, Sundays, and legal holidays, as well as the last day of the period, is included in the calculation [*Fed R Civ P 6(a)(1)(B), (C)*]. However, if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday [*Fed R Civ P 6(a)(1)(C)*]. If the clerk's office is inaccessible on the last day of filing, the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday [*Fed R Civ P 6(a)(3)(A)*]. Legal holidays include New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which the district court is located [*Fed R Civ P 6(a)(6)*; *see CCP § 135* (judicial holidays); *Gov Code § 6700* (state holidays); *see also Dwyer v. Duffy (9th Cir 2005) 426 F3d 1041, 1044* (day after Thanksgiving is legal holiday under *Fed R Bankr P 9006*, which is modeled on *Fed R Civ P 6*)]. The "last day," for electronic filing means midnight at the court's timezone [*Fed R Civ P 6(a)(4)(A)*]. The "last day" for filing by other means is when the clerk's office is scheduled to close [*Fed R Civ P 6(a)(4)(B)*]. The "next day" is determined by continuing to count forward after the "event" (in this case, service of the Rule 69 offer) [*see Fed R Civ P 6(a)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsOffers of JudgmentTime LimitationsCivil ProcedureSettlementsOffers of JudgmentWithdrawals

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31.16 Plaintiff May Incur Post-Offer Costs Even If Successful.

Offers of judgment under *Fed R Civ P 68* serve as cost-shifting tools designed to encourage settlement by forcing a plaintiff to weigh the risk of incurring post-offer costs and fees even if successful on the claim [*Delta Air Lines, Inc. v. August (1981) 450 US 346, 352, n8, 101 S Ct 1146, 67 L Ed2d 287* (citing **Moore's**)]. Normally, a prevailing plaintiff is entitled to recover costs as a matter of course [*Fed R Civ P 54(d)*]. Rule 68 varies this general rule by providing that if the judgment is less than or equal to the offer, the plaintiff may not recover costs incurred from the date the offer was made to the end of the suit [*Fed R Civ P 68(d)*; *Marek v. Chesny (1985) 473 US 1, 8-9, 105 S Ct 3012, 87 L Ed2d 1*]. Moreover, the plaintiff must pay the costs incurred by the defendant from the date the offer was made to the end of the suit [*Fed R Civ P 68*; *Delta Air Lines, Inc. v. August (1981) 450 US 346, 352, 101 S Ct 1146, 67 L Ed2d 287*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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31.17 Offeror May Offer, Recover Costs Under Rule 68.

31.17[1] Rule 68 Includes Costs and Some Fees. As used in *Fed R Civ P 68*, the term "costs" refers to all costs properly awardable in an action under the relevant law, including expert witness fees and, in some instances, attorney's fees.

31.17[2] In Diversity Cases, State Law May Affect Recovery.

31.17[2][a] Preliminary *Erie* Determination Required. When applying *Fed R Civ P 68* in a diversity case, one must first ascertain whether the award of fees or costs at issue is procedural or substantive under *Erie R.R. Co. v. Tompkins* and *Hanna v. Plumer* [*see Erie R.R. Co. v. Tompkins (1938) 304 US 64, 58 S Ct 817, 82 L Ed 1188* ; *Hanna v. Plumer (1965) 380 US 460 473, 85 S Ct 1136, 14 L Ed2d 8*].

Under *Erie* and *Hanna*, the state's substantive law will govern in a diversity action, but the procedural rules of the action will be those of the federal court if they are consistent with the Rules Enabling Act and the Constitution [*see Hanna v Plumer (1965) 380 US 460, 473, 85 S Ct 1136, 14 L Ed2d 8*].

31.17[2][b] Expert Witness Fees Procedural Under *Erie*. Recovery of expert witness fees pursuant to the cost-shifting provisions of *Fed R Civ P 68* is procedural, and thus may be imposed under federal law in a diversity action. However, the Ninth Circuit has held that expert witness fees are limited to those provided for under *28 USC § 1821(b)*, or $40 a day plus the costs of attendance [*Aceves v. Allstate Ins. Co. (9th Cir 1995) 68 F3d 1160, 1167-1168*].

31.17[2][c] Attorney's Fees and Costs Are Substantive Under *Erie*; Offeree's Counsel Must Examine State Law. In a diversity action, entitlement to attorney's fees and costs for purposes of computing the judgment finally obtained will be determined under state law [*see Bevard v. Farmers Ins. Exch. (9th Cir 1997) 127 F3d 1147, 1148*].

Trap:

Counsel for offerees in a diversity action should be aware that an offer of judgment may have cost- and fee-shifting consequences under state law not provided for in the federal rule [*see MRO*

Communications, Inc. v. AT & T Co. (9th Cir 1999) 197 F3d 1276 , cert. denied, 529 US 1124 (2000)].

Example:

An offer made "Pursuant to *Rule 68 of the Federal Rules of Civil Procedure*" in a diversity action qualified as an offer of judgment under a Nevada law that allowed for the grant of fees and costs to a prevailing offeror, contrary to the result under Rule 68 [*see MRO Communications, Inc. v. AT & T Co. (9th Cir 1999) 197 F3d 1276 , cert. denied, 529 US 1124 (2000)*].

Cross Reference:

Recovery of attorney's fees under California law, see 15 California Forms of Pleading and Practice, Ch. 174, Costs and Attorney's Fees (Matthew Bender).

31.17[3] After Offer of Judgment, Plaintiff's Ability to Recover Post-Offer Attorney's Fees Depends on Underlying Statute.

31.17[3][a] Plaintiff May Not Recover Post-Offer Attorney's Fees When Statute Defines Fees As Costs. When the plaintiff or other *Fed R Civ P 68* offeree has rejected a Rule 68 offer and then obtains a judgment that fails to improve on the rejected Rule 68 offer, the plaintiff's ability to recover attorney's fees under a statute awarding attorney's fees to the prevailing party may be limited. Federal statutes may permit an award of attorney's fees to a prevailing party, and a plaintiff who obtained a favorable judgment, even though it is not more favorable than the Rule 68 offer, is still the prevailing party. However, the ability to recover post-offer attorney's fees depends on whether the underlying federal statute awards attorney's fees to a prevailing party as part of the *costs*. When, as is common, the statute awards the prevailing party fees as part of the costs, a claimant who rejected a Rule 68 offer may not recover post-offer fees. They are barred by Rule 68 [*Marek v. Chesny (1985) 473 US 1, 9, 105 S Ct 3012, 87 L Ed2d 1*]. In a diversity case, when state law authorizes an award of attorney's fees as part of the costs, the same result applies [*Champion Produce, Inc. v. Ruby Robinson Co. (9th Cir 2003) 342 F3d 1016, 1027*].

31.17[3][b] Plaintiff Possibly May Recover Post-Offer Attorney's Fees When Statute Defines Fees Separately From Costs. When a federal statute awards a prevailing party attorney's fees, and the underlying statute defines fees separately from costs, post-offer fees are not automatically shifted and may be recoverable by the claimant despite the plaintiff's rejection of a *Fed R Civ P 68* offer [*Haworth v. State of Nev. (9th Cir 1995) 56 F3d 1048, 1051* ; *Solomon v. Onyx Acceptance Corp. (CD Cal 2004) 222 FRD 418, 421*]. However, even in this case, district courts have wide discretion in refusing to award post-offer attorney fees to the plaintiff when the rejected offer of judgment exceeded the plaintiff's ultimate recovery. The court must consider the results the plaintiff obtained compared to the rejected offer looking at [*Haworth v. State of Nev. (9th Cir 1995) 56 F3d 1048, 1052-1053* ; *Solomon v. Onyx Acceptance Corp. (CD Cal 2004) 222 FRD 418, 421*]:

- The amount of the Rule 68 offer.
- The stage of litigation at which the offer was made.
- What services were rendered by plaintiff's counsel after the offer.
- The amount obtained by the judgment.
- Whether it was reasonable to proceed with the litigation after the offer was made.

31.17[4] Attorney's Fees As Part of the Costs May Be Awardable to the Offeror. An defendant offeror whose offer was rejected may recover costs after the time of the offer if the plaintiff's ultimate judgment is less favorable than the offer or the same [*Fed R Civ P 68(d)*; *Liberty Mut. Ins. Co. v. EEOC (9th Cir 1982) 691 F2d 438, 442*]. If the judgment obtained is less favorable, such an award is mandatory [*Delta Air Lines, Inc. v. August (1981) 450 US 346,*

354-355, 101 S Ct 1146, 67 L Ed2d 287 ; *Liberty Mut. Ins. Co. v. EEOC (9th Cir 1982) 691 F2d 438, 442*]. When a statute awards attorney's fees as part of the costs, post-offer fees should be recoverable by the defendant as the costs that are shifted pursuant to Rule 68. However, when fees are not defined as part of the costs, recovery will be governed by the terms of the underlying statute, and a defendant whose offer was rejected may not qualify for an award of fees if the defendant is not the prevailing party [*United States v. Trident Seafoods Corp. (9th Cir 1996) 92 F3d 855, 860* , *cert. denied, 519 US 1109 (1997)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsWitnesses

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31.18 Offer Does Not Need to Refer to Costs to Be Valid.

Although there are many reasons why it would be prudent to do so, a Rule 68 offer need not be broken down into specifics. There is no requirement for a Rule 68 offer to specify how much is being offered on the substantive claim, how much for costs, and how much, if any, for attorney's fees. A Rule 68 offer may make these sorts of specifications, or it may simply state a lump sum. The only thing that the language of Rule 68 seems to preclude is an offer that implicitly or explicitly precludes recovery of costs then accrued [*Marek v Chesny (1985) 473 US 1, 5-6, 105 S Ct 3012, 87 L Ed2d 1* (*Fed R Civ P 68* authorizes offer for judgment for money or property specified "with the costs then accrued")].

An offer may be in the form of a lump sum with the specification that the lump sum includes costs, or an offer may set out a specific sum for damages and a specific sum for costs. Either form of offer is valid. If the plaintiff accepts either form of offer, the judgment will necessarily include costs even though the offer limits the amount of costs the plaintiff may recover.

An offer may be in the form of a lump sum and make no mention of costs whatsoever. This offer is valid despite the silence, because it does not preclude the court from awarding costs in the case. This type of offer merely fails to specify any limit that the court will award for costs. If the plaintiff accepts this type of offer, the court will set costs in the normal manner and add them to the amount of the offer as part of the court's judgment [*Marek v. Chesny (1985) 473 US 1, 6, 105 S Ct 3012, 87 L Ed2d 1*].

When attorney's fees may be awarded to the prevailing party as part of the costs, the same rules apply. An offer that states only a lump sum, without reference to costs or attorney's fees, allows the court to make costs awards and attorney's fees in the usually manner and add these sums to the amount of the offer as part of court's judgment. If the offer states a specific amount for attorney's fees, or states that the lump sum includes all amounts that may be awarded as attorney's fees, the plaintiff's acceptance of the offer limits the amount of the award of fees. However, when it comes to attorney's fees, courts will interpret an offer as limiting a plaintiff's attorney's fees only when it does so in a clear and unambiguous manner.

Example--Offer's Reference to "Costs" Will Not Automatically Include Attorney's Fees:
An offer that states that costs are included in the lump sum offered, but that does not specifically refer to

"attorney's fees," allows the plaintiff offeree to recover attorney's fees in addition to the lump sum offered when the underlying statute does not define costs to include attorney's fees [*Nusom v. Comh Woodburn, Inc. (9th Cir 1997) 122 F3d 830, 834-835*].

Example--Vague Reference to Fees Does Not Preclude Additional Fees Award:

When defendant offered a lump sum that purported to included "recoverable costs and fees," this was not sufficient to limit a claim for *attorney's* fees. The plaintiff could recover attorney's fees in addition to the lump sum if the plaintiff were to accept the offer [*see Bevard v. Farmers Ins. Exch. (9th Cir 1997) 127 F3d 1147, 1148* (plaintiff actually refused offer and case concerned whether trial result was actually less favorable than offer)].

Cross Reference:

Construction of ambiguities in offers of judgment against the offeror, see *§ 31.27[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesEnglish RuleCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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31.19 Plaintiff Must Win Judgment for Rule 68 to Apply.

The cost-shifting provisions of Rule 68 apply only if the plaintiff obtains a judgment, but that judgment is less favorable or the same as the offer of judgment made by the defendant [*Fed R Civ P 68(d)*]. A summary judgment obtained by the plaintiff is a sufficient "judgment" to make Rule 68 applicable. The cost-shifting provisions will apply if the plaintiff obtains a summary judgment that is less favorable or the same as the offer of judgment made by the defendant [*see Liberty Mut. Ins. Co. v. EEOC (9th Cir 1982) 691 F2d 438, 442* (defendant actually obtained summary judgment against itself on basis that only relief permitted by law was that contained in its prior *Fed R Civ P 68* offer)].

In the Ninth Circuit, Rule 68(d) will apply when the judgment obtained by the plaintiff after the Rule 68 offer is actually a settlement and stipulated dismissal [*Lang v. Gates (9th Cir 1994) 36 F3d 73, 77 , cert. denied sub nom. Yagman & Yagman, P.C. v. Gates, 513 US 1017 (1994)* (rule language "judgment finally obtained" encompasses order finally terminating litigation as result of settlement)]. Other courts have ruled the other way, however [*EEOC v. Hamilton Standard Div., United Techs. Corp. (D Conn 1986) 637 F Supp 1155, 1158* ; *Good Timez Inc. v. Phoenix Fire & Marine Ins. Co. (DVI 1991) 754 F Supp 459, 462-463* ("Although the literal text of Rule 68 does not require that the final judgment obtained by the plaintiff be pursued to trial, it appears that Rule 68 was intended to address only such a scenario")]. Accordingly, attorneys representing parties to a stipulated dismissal should insist on a clear written agreement on this subject.

Warning:

Any settlement involving a stipulated dismissal could trigger Rule 68 shifting of costs (and potentially attorney's fees) to an offeror. When preparing a settlement that involves a stipulated dismissal, consider adding language to the agreement to avoid potential cost-shifting consequences.

If, on the other hand, the plaintiff never obtains a judgment, and the defendant obtains a judgment, Rule 68 does not apply [*Delta Air Lines, Inc. v. August (1981) 450 US 346, 354, 101 S Ct 1146, 67 L Ed2d 287* ; *see* Bower v. City of Redwood City (ND Cal 1995) 1995 US Dist LEXIS 18273, at *5].

In one unusual case, the court allowed Rule 68 cost-shifting to apply after the *defendant* obtained a summary judgment. However, in this case, the defendant's summary judgment was actually in favor of the plaintiff. The defendant made a Rule 68 offer that allowed an injunction to be taken against it, but opposed all other relief that the plaintiff requested.

The plaintiff rejected the offer, and the defendant moved for summary judgment on the grounds that the injunction stipulated in its Rule 68 offer was the only relief allowed by law. The defendant's summary judgment motion was granted, and resulted in a judgment identical to that contained in the prior Rule 68 offer. Even though the judgment was technically obtained by the defendant, the judgment was still "against" the defendant and "in favor" of the plaintiff. Therefore, the court allowed Rule 68's provisions to apply [*Liberty Mut. Ins. Co. v. EEOC (9th Cir 1982) 691 F2d 438, 442* ("The Court in *Delta Air Lines* stated that Rule 68 'applies when the defendant offers to have "judgment ... taken against him." ... The Rule obviously contemplates that a "judgment taken" against a defendant is one favorable to the plaintiff' ")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsStipulationsCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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31.20 Court Determines Whether Judgment Is More Favorable.

The cost-shifting provisions of Rule 68 apply only when the judgment recovered by the plaintiff is not more favorable than the defendant's offer of judgment [*see Fed R Civ P 68(d)*]. In determining whether a judgment was less favorable than the offer, courts consider all relief awarded, including monetary recovery, [*Real v. Continental Group, Inc. (ND Cal 1987) 653 F Supp 736, 738-739*], and pre-offer costs and attorney's fees that are includable as costs [*Corder v. Gates (9th Cir 1991) 947 F2d 374, 380-381*].

Cross Reference:

Discussion of attorney's fees includable as costs, see *§ 31.17[3]*.

A court may not properly consider a Rule 68 Offer of Judgment in denying pre-offer fees and costs [*Champion Produce, Inc. v Ruby Robinson Co. (9th Cir 2003) 342 F3d 1016, 1023*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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31.21 Only Defending Parties May Make Rule 68 Offers.

Only defending parties may make offers of judgment under Rule 68. Rule 68 does not authorize similar offers or judgment or any form of cost-shifting settlement demands by plaintiffs or other claimants [*Delta Air Lines, Inc. v. August (1981) 450 US 346, 350, 101 S Ct 1146, 67 L Ed2d 287*].

Even under Rule 68, however, plaintiffs may be defending certain counterclaims or claims in intervention. Plaintiffs may make Rule 68 offers to the extent that they are defending a claim [*see Fed R Civ P 68* (rule applicable to "a party defending against a claim")]. For example, a plaintiff may make an offer of judgment to an intervenor that has filed claims against the plaintiff. In these circumstances, however, whether the intervenor's judgment exceeds the plaintiff's offer will be assessed based on the nature of the offer and the intervenor's ultimate recovery against the plaintiff, rather than on the judgment between the plaintiff and the defendant [*see Simon v. Intercontinental Transport B.V. (9th Cir 1989) 882 F2d 1435, 1439-1440*].

Cross Reference:

Discussion of intervention, see Ch. 14, Intervention.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentMaking of Offers

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31.22 Defending Party Serves Offer of Judgment in Writing on Adverse Party.

Rule 5(a) provides that "every ... offer of judgment ... or any similar paper" must be served on every party [*Fed R Civ P 5(a)(1)(E)*] by delivering a copy of the offer of judgment to each party's attorney [*Fed R Civ P 5(b)(1)*]. In a multiple defendant case, one defendant may want to make an offer of judgment to the plaintiff, but may not want other defendants to know the amount being offered to the plaintiff, or even that an offer is being made. This may be particularly true if the true intent of the Rule 68 offer is to initiate or provoke further settlement discussions. There is a theoretical possibility that Rule 68 itself may permit this, because it requires service of an offer of judgment only on the "opposing party" [*Fed R Civ P 68(a)*]. Rule 68 may, therefore, vary the terms of Rule 5(a) [*Stewart v. County of Sonoma (ND Cal 1986) 634 F Supp 773, 775*]. In any event, an offeror's failure to serve other defendants does not prejudice the offeree, and the offeree may not have standing to raise it [*see Stewart v. County of Sonoma (ND Cal 1986) 634 F Supp 773, 775*]. However, as a practical matter, it is unlikely that one defendant's offer to the plaintiff will remain secret for long, particularly as it may be advantageous to plaintiff's counsel to use one defendant's Rule 68 offer as a tool to initiate settlement discussions with the other defendants.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedureSettlementsOffers of JudgmentMaking of Offers

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31.23 Offer May Be Conditional on Acceptance by All Parties.

A defending party may make its offer of judgment conditional on acceptance by all plaintiffs. [*Lang v. Gates (9th Cir 1994) 36 F3d 73, 77 , cert. denied sub nom. Yagman & Yagman, P.C. v. Gates, 513 US 1017 (1994)* ; *Amati v. City of Woodstock (7th Cir 1990) 176 F3d 952, 958 , cert. denied, 528 US 985 (1999)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentMaking of Offers

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31.24 Offer of Judgment Must Be Made at Least 14 Days Before Date Set for Trial.

The offer must be made at least 14 days before the date set for the trial [*Fed R Civ P 68(a)*].

Cross Reference:

Computing time, see *§ 31.15[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentTime Limitations

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31.25 When Party Found Liable, It May Make Offer of Judgment If Served At Least 14 Days Before Date Set for Hearing.

When the liability of one party has been determined by verdict or order of judgment, the party found liable may make an offer of judgment that will have the same effect as an offer made before trial if it is served not less than 14 days before the date set for the hearing on the amount or extent of liability [*Fed R Civ P 68(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentTime Limitations

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31.26 Offerors May Make Subsequent Offers of Judgment.

The fact that a defending party makes a Rule 68 offer of judgment that the plaintiff does not accept does not preclude a subsequent offer of judgment, provided the subsequent offer meets the requirements of Rule 68 [*Fed R Civ P 68(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentMaking of Offers

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31.27 Ordinary Contract Principles Govern Offer of Judgment.

31.27[1] Effect of Ambiguity in Offer of Judgment. A common ambiguity in offers of judgment is created by a defendant offeror tracking the language of *Fed R Civ P 68* in the offer by using the term "with costs." Use of this terminology may result in an ambiguity as to whether the offer is in addition to or includes attorney's fees as part of the costs [*see, e.g., Erdman v. Cochise County (9th Cir 1991) 926 F2d 877, 878-881*].

The usual rules of contract construction apply to a Rule 68 offer of judgment [*Guerrero v. Cummings (9th Cir 1995) 70 F3d 1111, 1113* , *cert. denied, 518 US 1018 (1996)*]. Ambiguities are construed against the offeror [*see Erdman v. Cochise County (9th Cir 1991) 926 F2d 877, 880-881* ; *see also Nusom v. Comh Woodburn, Inc. (9th Cir 1997) 122 F3d 830, 833-834*].

31.27[2] Ambiguities Regarding Availability of Fees Will Be Construed Against Offeror. Ambiguities in an offer may invalidate the offer, or may be construed against the offeror [*Lish v. Harper's Magazine Found. (SDNY 1993) 148 FRD 516, 519*].

Example:

When an ambiguity involves the availability of attorney's fees as a part of the costs in an offer of a lump sum "with costs now accrued," those fees will be recoverable in addition to the sum provided for in the offer, and the ambiguity will not invalidate the offer [*Erdman v. Cochise County (9th Cir 1991) 926 F2d 877, 879*].

When an offer of judgment provides in addition to costs for "reasonable attorney fees as determined by the Court," the offeree may be able to seek post-offer attorney's fees to the extent allowable under applicable law. If an offeror wishes to limit fees to those incurred as of the time of the offer, the offer should restrict itself to "costs now accrued" [*Holland v. Roeser (9th Cir 1994) 37 F3d 501, 502, 504*]. Alternatively, a statement in an offer that judgment be taken including "fees and costs incurred by this plaintiff prior to the date of this offer in an amount to be set by the court" is sufficient to bar a plaintiff's motion for post-offer fees [*Guerrero v. Cummings (9th Cir 1995) 70 F3d 1111, 1113* , *cert. denied, 518 US 1018 (1996)*].

31.27[3] Seeking Modification or Clarification of Offer of Judgment. A motion to modify or clarify a judgment on costs can be made either under *Fed R Civ P 59(e)* (amendment of judgment) or *Fed R Civ P 60* (relief from judgment) [*see Liberty Mut. Ins. Co. v. EEOC (9th Cir 1982) 691 F2d 438, 441*].

Cross References:

Amendment of judgment, see 12 Moore's Federal Practice, *§§ 59.30* -59.37. Relief from judgment, see 12 Moore's Federal Practice, Ch. 60, Relief From Judgment or Order (Matthew Bender 3d ed.).

Consider:

When there is no ambiguity as to the offer of judgment's terms, the offeror cannot seek to rescind or modify an accepted offer on the ground that there was no meeting of the minds or that there was a mistake [*Blair v. Shanahan (ND Cal 1992) 795 F Supp 309, 314-316* , *aff'd on other grounds, 38 F3d 1514 (9th Cir 1994)* , *cert. denied sub nom. California v. Blair, 514 US 1066 (1995)*].

Decision Point:

When an ambiguity in an offer may work to the benefit of the offeree, after conferring with the client, offeree's counsel must decide whether to seek clarification of the offer from opposing counsel or to accept the offer and seek the apparent benefit of the offer. For example, if the offer is silent as to attorney's fees that are not included as part of the costs, the offeree's counsel may decide, based on *Nusom v. Comh Woodburn, Inc. (9th Cir 1997) 122 F3d 830, 834-835* , to seek fees rather than clarification. Counsel and the client should be clear that, by failing to seek clarification, they bear the risk that the court will not construe the ambiguity in their favor. The offeree must, therefore, be prepared to live with the offer as construed unfavorably.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentMaking of OffersContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawContract ModificationsGeneral Overview

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31.28 Offer of Judgment May Be Stricken.

31.28[1] Motion to Strike Is Appropriate for Procedural or Substantive Defects. Because an offer of judgment has a binding effect when refused as well as when accepted, defective offers may be stricken to protect the ability of parties to make reasonable decisions regarding the conduct of litigation [*Boorstein v. New York (SDNY 1985) 107 FRD 31, 34*].

A plaintiff may move to strike a *Fed R Civ P 68* offer of judgment for procedural defects [*see Klawes v. Firestone Tire & Rubber Co. (ED Wis 1983) 572 F Supp 116, 118*] or substantive defects [*see Boorstein v. New York (SDNY 1985) 107 FRD 31, 35*].

31.28[2] Deadline for Filing Motion to Strike. The better practice for filing a motion to strike is to do so within the 14-day period for acceptance of the offer [*see Fed R Civ P 68(a)*]. However, at least one court has held that it may consider a motion to strike filed after the expiration of the period, because the validity and effect of a Rule 68 offer is not usually determined until the close of the lawsuit and the filing of attorney's fee applications [*Boorstein v. New York (SDNY 1985) 107 FRD 31, 34*].

31.28[3] Procedure for Filing Motion to Strike Offer of Judgment. A party seeking an order to strike an offer of judgment must make a formal motion to the court, and an opposing party may file opposing papers.

Cross Reference:

Discussion of the rules and procedures governing motions, see Ch. 26, Pretrial Motion Practice, see *§§ 26.12 -26.36*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentTime Limitations

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31.29 Rejected Offer of Judgment Is Withdrawn; Inadmissible As Evidence at Trial.

Under Rule 68, an unaccepted offer "is considered withdrawn" [*Fed R Civ P 68(b)*]; Littledove v. JBC & Assocs. (ED Cal 2000) 2000 US Dist LEXIS 18490, at *6]. An offer of judgment rejected by the offeree is not admissible at trial, except in a proceeding to determine costs [*Fed R Civ P 68(b)*].

In addition, a settlement offer not made pursuant to Rule 68 cannot be the basis for denying fees and costs to a prevailing party [*Berkla v. Corel Corp. (9th Cir 2002) 302 F3d 909, 922*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentRejectionsCivil ProcedureSettlementsOffers of JudgmentWithdrawalsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesEnglish RuleEvidenceRelevanceCompromise & Settlement Negotiations

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31.30 Period for Acceptance of Offer Is 14 Days.

A notice of acceptance of a Rule 68 offer of judgment must be served on the offering party within 14 days of service of the offer itself [*Fed R Civ P 68(a)*]. If the offer of judgment is not accepted within that time period, the offer is deemed withdrawn [*Fed R Civ P 68(b)*].

If the offer of judgment is served by mail, by electronic means under Rule 5(b)(2)D), or by alternate means of delivery under Rule 5(b)(2)(E), the deadline for accepting the offer is extended by three additional days [*Fed R Civ P 6(d)*; *see also Fed R Civ P 5(b)(2)(E), (F)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePleading & PracticeService of ProcessMethodsMailCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentTime Limitations

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31.31 Acceptance Must Be Unconditional and Written.

A notice of acceptance must be in writing [*Fed R Civ P 68(a)*]. To be effective, the acceptance must be unconditional. The partial acceptance of an offer of judgment is invalid [*see Whitcher v. Town of Matthews (WDNC 1991) 136 FRD 582, 584*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentAcceptances

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31.32 File Offer and Acceptance.

Either party may file the offer of judgment and timely notice of acceptance with the court, along with proof of service of both. Failure to file precludes the clerk from entering judgment according to the terms of the offer [*see Fed R Civ P 68(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentMaking of Offers

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31.33 CHECKLIST: Drafting Settlement Agreement.

☐ Consider types of settlement available and take precautions required for each:

- ○ Lump Sum Settlement
  - ☐ Advantages:
    - ○ Can be quickly performed.
    - ○ Court need not monitor performance of agreement.
    - ○ Parties need have no further contact.
  - ☐ Disadvantages:
    - ○ Defendant must have rapid access to full amount of settlement.
    - ○ Plaintiff may need money management expertise.
    - ○ Plaintiff may incur tax liability that might otherwise be legally avoided.

Authority:
Georges v. Secretary of HHS (Cl Ct 1992) 1992 US Cl Ct LEXIS 204, at *13, *16

Discussion:
See *§ 31.35[1]*

○ Structured Settlement

☐ Advantages

○ Can allow plaintiff larger total settlement.

○ Can reduce immediate monetary drain on defendant.

○ Provides plaintiff with a guaranteed source of income over time.

○ Can diminish or eliminate tax liability.

☐ Disadvantages

○ May add an unnecessary level of complexity to settlement negotiations.

○ Plaintiff cannot immediately access total settlement amount.

○ Fixed sums preclude adjustments for cost of living or inflation.

○ Need to assure financial stability of annuity carrier.

○ Difficulty in evaluating appropriate attorney's fees.

Authority:
Weil Ins. Agency, Inc. v. Manufacturers Life Ins. Co. (ND Cal 1992) 815 F Supp 1320, 1322 , aff'd sub nom. Legal Economic Evaluations, Inc. v. Metropolitan Life Ins. Co. (9th Cir 1994) 39 F3d 951, 953 , cert. denied, 514 US 1044 (1995) , Georges v. Secretary of HHS (Cl Ct 1992) 1992 US Cl Ct LEXIS 204, at *16

Discussion:
See *§ 31.35[2]*

○ Partial Settlement, as to only some defendants or claims:

☐ Plaintiffs must ensure release only relates to specified defendants/claims.

○ Sliding Scale Settlement:

☐ Mary Carter Agreements:

○ Must evaluate agreement under applicable substantive law to ensure it will be acceptable.

○ Must evaluate whether there is a duty to notify other parties.

○ Must evaluate whether agreement must be disclosed to jury.

○ Confer with client on costs and benefits of proposed agreement.

Authority:
Compare Hoops v. Watermelon City Trucking, Inc. (10th Cir 1988) 846 F2d 637, 640, *American Med. Int'l v. National Union Fire Ins. Co. (9th Cir 2001) 244 F3d 715, 718 n1*, D'Hedouville v. Pioneer Hotel Co. (9th Cir 1977) *552 F2d 886, 895*, *and Minpeco, S.A. v. Hunt (SDNY 1989) 127 FRD 460, 463*, *with Icicle Seafoods Inc. v Baker (In re The Exxon Valdez) (9th Cir 2000) 229 F3d 790, 798*

Discussion:
See *§ 31.35[4][b]*

☐ Pierringer Releases, in which a plaintiff who settles with one of multiple defendants agrees to indemnify that defendant for any eventual contribution action brought by the non-settling defendants after the entry of judgment:

○ Evaluate whether "proportionate share" approach (in which each defendant will pay only its proportionate share of the damages assessed by the finder of fact) will apply in case, making use of Pierringer release unnecessary.

○ Evaluate reasonableness of proposed release.

○ Confer with client on proposed release.

Authority:
Icicle Seafoods Inc. v Baker (In re The Exxon Valdez) (9th Cir 2000) 229 F3d 790, 797-798

Discussion:
See *§ 31.35[4][c]*

☐ "Cede-back" arrangements in mandatory punitive damages class actions:

○ Evaluate obligation to disclose to other parties.

○ Evaluate obligation to disclose to jury.

○ Confer with client on nature of arrangement.

Authority:
Icicle Seafoods Inc. v Baker (In re The Exxon Valdez) (9th Cir 2000) 229 F3d 790, 798

Discussion:
See *§ 31.35[4][d]*

☐ Evaluate items for inclusion in agreement:

○ Identification of parties.

Discussion:
See *§ 31.36[1]*

○ Recitation of disputed matters.

Discussion:
See *§ 31.36[2]*

○ Recitation of parties' obligations, including date by which the parties' obligations are to be performed.

Discussion:
See *§ 31.36[3]*

○ Release:

☐ Plaintiff should seek a narrowly worded release:

○ Do not waive attorney's fees.

○ Do not include reference to a "general release."

○ Do not waive "any and all claims."

○ Do not waive claims ancillary to dispute.

○ Do seek a mutual release, even if defendant has not brought counterclaims.

☐ Defendant should seek a broadly worded release:

○ Seek waiver of attorney's fees.

○ Include provision that release is a "general release," including all related parties, such as subsidiaries, assigns, and successors.

○ Include provision that plaintiff waives "any and all claims."

○ Include provision that waiver applies to future claims not yet known of, and future conduct.

○ Include specific reference to and waiver of *California Civil Code § 1542*.

Authority:
Shaw v. City of Sacramento (9th Cir 2001) 250 F3d 1289, 1292 ; Western Chance #2, *Inc. v. KFC Corp. (9th Cir 1992) 957 F2d 1538, 1543* ; Baskin-Robbins, Inc. v. Taj Cal., Inc. (CD Cal 2003) 2003 US Dist LEXIS 19946, at *65 ; *Stroman v. West Coast Grocery Co. (9th Cir 1989) 884 F2d 458, 460-461 , cert. denied, 498 US 854 (1990)* ; *Mardan Corp. v. C.G.C. Music (9th Cir 1985) 804 F2d 1454, 1463* ; *Mitchell v. Los Angeles (9th Cir 1984) 741 F2d 281, 283*

Discussion:
See *§ 31.36[4]*

○ Other provisions to include:

☐ Defendant's disclaimer of liability.

☐ Covenant not to sue.

☐ Mutual promises to return discovery material to producing party.

☐ Indemnity for claims brought by third parties.

☐ Confidentiality clause.

☐ Choice of forum clause.

☐ Choice of law clause.

☐ Integration clause.

☐ Agreement that court may retain jurisdiction:

○ Must be backed by court order incorporating terms of settlement or expressly retaining jurisdiction (consent decree) to be effective.

☐ Attorney's fees clause.

Authority:
Collins v. Thompson (9th Cir 1993) 8 F3d 657, 659 , cert. denied, 511 US 1127 (1994) ; *Kokkonen v. Guardian Life Ins. Co. of Am. (1994) 511 US 375, 380-381, 114 S Ct 1673, 128 L Ed2d 391*

Discussion:
See *§ 31.36[5]*

○ Signatures

☐ Include signature of client as well as counsel.

Discussion:
See *§ 31.36[6]*

☐ Comply with Post-Settlement Notification requirements under Local Rules.

Authority:
CD Cal Civ LR 40-2, *40-3*; *ED Cal Gen LR 160*; *ND Cal Civ LR 40-1*; *SD Cal Civ LR 16.4*

Discussion:
See *§ 31.37*

☐ Consider putting settlement on record in court:

○ Advantage: Ease of enforcement for party intent on doing so.

○ Disadvantage: Client generally cannot withdraw consent.

Authority:
Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1136-1137 ; *Farris v. JC Penney (3d Cir 1999) 176 F3d 706, 712*

Discussion:
See *§ 31.38*

☐ Assure action is terminated by filing stipulation of dismissal or securing signed judgment conforming to terms of settlement agreement.

Authority:
Fed R Civ P 41(a)(1)

Discussion:
See *§ 31.39*

☐ Review necessity of--and arrange for--judicial approval of settlements, including:

- ○ Class actions.
- ○ Shareholder derivative suits.
- ○ Consent decrees.
- ○ Actions involving minors and incompetents.

Authority:
Fed R Civ P 23(e), *23.1*; *ED Cal Civ LR 202*; *CD Cal Civ LR 83-5*

Discussion:
See *§ 31.40*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawTypes of ContractsReleasesContracts LawTypes of ContractsSettlement AgreementsLegal EthicsClient RelationsEffective RepresentationTortsProcedureSettlementsMultipartiesPartial SettlementsTortsProcedureSettlementsStructured SettlementsGeneral Overview

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31.34 Options and Strategy.

Because most civil cases end with a settlement agreement, the wording of that agreement is critical.

Parties will first want to choose a type of settlement on which they can agree. If the settlement involves the defendant remaining in the case in a sliding scale arrangement, the parties will have to address questions as to the validity of the agreement and whether it may be kept secret (assuming no court order or discovery request mandates its disclosure).

Once an agreement is being drafted, defense counsel will want to make the agreement sufficiently broad to cover any future disputes between the parties. Plaintiff's counsel will want an agreement limited to the particulars of the dispute at hand. Both parties may wish to consider confidentiality clauses and other provisions common to settlement agreements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawTypes of ContractsSettlement Agreements

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31.35 Consider Types of Settlements Available.

31.35[1] Lump Sum.

31.35[1][a] Lump Sum Settlement Involves Single Check or Cash Payment. The most common type of settlement is a lump sum settlement. In lump sum settlements, the defendant agrees to pay the plaintiff with a single check or cash payment, in consideration of which the plaintiff executes a release of its claims

31.35[1][b] Advantages of Lump Sum Settlement. The major advantage of lump sum settlements is their ease of execution, in that:

- The agreement may be quickly performed by the parties with an exchange of documents.
- The court need not monitor performance of the agreement.
- Payments for any future damages reduced to present value.
- Once completed, the parties need not have further contact.

31.35[1][c] Disadvantages of Lump Sum Settlement. The disadvantages of lump sum settlement agreements include the following:

- The defendant typically must have immediate access to the necessary monetary amount.
- The plaintiff may be required to manage large sums of money with little or no expertise [*see* Georges v. Secretary of HHS (Cl Ct 1992) 1992 US Cl Ct LEXIS 204, at *16 (discussing advantages and disadvantages of lump sum and structured settlements)].
- The plaintiff may incur tax liability on the lump sum settlement amount [*see* Georges v. Secretary of HHS (Cl Ct 1992) 1992 US Cl Ct LEXIS 204, at *13 ; *see also* *26 USC § 61(a)* (gross income means all

income from whatever source derived), *26 USC § 104(a)(2)* (damages received in suit or settlement for personal injuries or sickness excludable from taxable income)].

31.35[2] Structured Settlements.

31.35[2][a] Structured Settlement Typically Involves Periodic Payments for Set Length of Time. In a structured settlement, the claimant typically receives periodic payments for a set length of time, rather than a lump sum. In return, the plaintiff provides a release of its claims. To provide a source of funds from which to satisfy the defendant's obligation to the plaintiff, the defendant or its liability carrier often may purchase an annuity contract from a life insurance company with the plaintiff as a beneficiary [*see Legal Economic Evaluations, Inc. v. Metropolitan Life Ins. Co. (9th Cir 1994) 39 F3d 951, 953 , cert. denied, 514 US 1044 (1995)*].

31.35[2][b] Advantages of a Structured Settlement. Advantages of a structured settlement include [*see Weil Ins. Agency, Inc. v. Manufacturers Life Ins. Co. (ND Cal 1992) 815 F Supp 1320, 1322 , aff'd sub nom. Legal Economic Evaluations, Inc. v. Metropolitan Life Ins. Co. (9th Cir 1994) 39 F3d 951, 953 , cert. denied, 514 US 1044 (1995)* ; *see also* Georges v. Secretary of HHS (Cl Ct 1992) 1992 US Cl Ct LEXIS 204, at *16]:

- Allowing the plaintiff a larger total settlement than might be available in a lump sum, while requiring less immediate outlay from the defendant than is typically required for a lump sum payment.

- Providing the plaintiff with a guaranteed source of income over a period of time, facilitating plaintiff's financial planning.

- If properly implemented, structured settlements may result in no or diminished tax liability.

31.35[2][c] Disadvantages of Structured Settlement. Disadvantages of structured settlements include:

- The plaintiff's inability to access the total settlement amount immediately.

- The probable fixed nature of the periodic payments, which would preclude adjustments for inflation or cost of living.

- The importance of ensuring the financial stability of whatever entity is providing the payments, including any life insurance carrier providing an annuity.

- Problems with valuation of structured settlements for purposes of computing attorney's fees.

31.35[3] Partial Settlements. Partial settlement is an agreement settling some but not all claims, or an agreement settling claims against some but not all defendants. Once a judgment is entered as to the settled claims or defendants, the plaintiff continues the suit as to the remaining claims or defendants.

Partial settlements present important issues for both settling and non-settling parties. For example, the plaintiff's counsel must ensure that the agreement releases only those claims or defendants to be discharged. Defense counsel must ensure that the settlement represents their clients' entire responsibility for the plaintiff's claims, pa rticularly when the law provides, if the plaintiffs prevail in the action, that non-settling defendants are entitled to a setoff from settling defendants. Such an issue can be addressed by seeking a "bar order."

Cross Reference

Use of "bar orders" barring further contribution from settling defendants, see *§ 31.05[3]*.

31.35[4] Sliding Scale Settlements.

31.35[4][a] Sliding Scale Settlements Defined. Sliding scale settlements are those in which a defendant settles with a plaintiff, but the amount of the defendant's settlement is ultimately determined by the outcome of the case. The settling defendant frequently, but not always, remains in the case. Even though there is no longer an adversary relationship between the plaintiff and the settling defendant, defendants agreeing to sliding scale agreements frequently remain in the case to convince the trier of fact of their comparative lack of fault and the greater percentage of comparative fault of the non-settling defendants.

31.35[4][b] "Mary Carter" Agreements. A "Mary Carter" agreement is a special kind of sliding scale settlement of a multi-party case. A "Mary Carter" agreement is one in which the liability of a settling defendant is limited in comparison to that of non-settling defendants. The greater the recovery from the non-settling defendants, the less the settling defendant pays [*see, e.g., American Med. Int'l v. National Union Fire Ins. Co. (9th Cir 2001) 244 F3d 715, 718 n1*]. There is no fixed form of a "Mary Carter" agreement. The variations on the general formula are limited only by the imagination of lawyers. Nonetheless, a typical "Mary Carter agreement has the following features [*Hoops v. Watermelon City Trucking, Inc. (10th Cir 1988) 846 F2d 637, 640*]:

- Secrecy.
- Contracting defendant remains in lawsuit.
- Contracting defendant guarantees plaintiff a certain monetary recovery.
- Contracting defendant's liability is decreased in direct proportion to the increase in the non-settling defendant's liability.

"Mary Carter" agreements have been challenged on the ground that they may deny the non-settling defendants a fair trial by causing the jury to think that the settling defendant is adverse to the plaintiff when in fact that defendant is adverse to the other defendants [*see D'Hedouville v. Pioneer Hotel Co. (9th Cir 1977) 552 F2d 886, 895*]. Some courts have held them invalid as against public policy [*see, e.g., Hoops v. Watermelon City Trucking, Inc. (10th Cir 1988) 846 F2d 637, 639-640* (Oklahoma law precludes enforcement of Mary Carter settlements)], and other courts have invalidated them when not disclosed to all parties [*see Minpeco, S.A. v. Hunt (SDNY 1989) 127 FRD 460, 463*]. Under Ninth Circuit reasoning, the Mary Carter agreements are probably permissible [*see Icicle Seafoods Inc. v. Baker (In re The Exxon Valdez) (9th Cir 2000) 229 F3d 790, 798* (jury determines only amount of damages and proportion of liability, and should never be informed of agreements, or even statutes, that will alter jury's assessment of plaintiff's damages and allocation of proportionate fault)].

Strategic Point--Defendant:

Consider making a discovery motion or request for disclosure of any agreements between a plaintiff and other defendants. In the alternative, consider seeking a court order to impose a continuing duty on plaintiff's counsel to disclose all such agreements without the necessity of a discovery request.

31.35[4][c] Pierringer Releases. In a "Pierringer release," a plaintiff who settles with one of multiple defendants agrees to indemnify that defendant for any eventual contribution action brought by the non-settling defendants after the entry of judgment. The Ninth Circuit has endorsed the use of Pierringer releases [*Icicle Seafoods Inc. v. Baker (In re The Exxon Valdez) (9th Cir 2000) 229 F3d 790, 797* (approving use of Pierringer release)].

By their nature, "Pierringer releases" are useful only when a defendant may be compelled to pay more than his or her proportionate share of fault and then seek contribution from co-defendants. In the vast majority of cases, such releases will not be needed. In a wide variety of cases governed by federal law, the Ninth Circuit has supported a "proportionate share" approach to the allocation of fault among multiple defendants, in which each defendant may be compelled to pay

only his or her proportionate share and in which contribution claims will never be required [*see Icicle Seafoods Inc. v. Baker (In re The Exxon Valdez) (9th Cir 2000) 229 F3d 790, 796-797* (noting that approach has been recommended for tort cases); *Franklin v. Kaypro Corp. (9th Cir 1989) 884 F2d 1222, 1231* (applying method in context of federal securities laws)]. Under California law, a defendant may be held jointly and severally liable for the entire amount of the plaintiff's "economic" tort damages, and be forced to resort to contribution claims if compelled to pay more than the proportionate share [*see CC §§ 1431, 1431.2*]. But, even under California law, a defendant may not be compelled to pay more than that defendant's proportionate share of a plaintiff's "non-economic" tort damages [*CC § 1431.2*]. Thus, there is some possibility that a "Pierringer release" may be useful; but it is unlikely to be useful in the vast majority of cases.

31.35[4][d] "Cede-back" Arrangements in Mandatory Punitive Damages Class Actions. In a mandatory punitive damages class action against one defendant, the Ninth Circuit has also approved the use of a "cede-back" provision allowing the defendant to recover punitive damages allocated to a settling plaintiff. Under that cede-back arrangement, the plaintiff remained in the case for the purpose of recovering its portion of a lump-sum punitive damages award [*Icicle Seafoods Inc. v. Baker (In re The Exxon Valdez) (9th Cir 2000) 229 F3d 790, 798*]. The plaintiff was to recover a portion of that award but cede back the remainder to the defendant. The Ninth Circuit found that the provision was a lawful means by which the defendant could prevent the assessment of punitive damages that did not account for its settlement with one or more plaintiffs [*Icicle Seafoods Inc. v. Baker (In re The Exxon Valdez) (9th Cir 2000) 229 F3d 790, 798*].

Warning:

To avoid undermining a cede-back arrangement, do not disclose it to the jury [*see Icicle Seafoods Inc. v. Baker (In re The Exxon Valdez) (9th Cir 2000) 229 F3d 790, 798*].

31.35[5] Consent Decrees. A consent decree usually is a settlement containing an injunction. Unlike typical settlements, the court issuing a consent decree exercises continuing authority and supervision to ensure that the parties fulfill their express obligations under the decree [*see International Ass'n of Firefighters v. Cleveland (1986) 478 US 501, 523 n13, 106 S Ct 3063, 92 L Ed2d 405* ; *see also Keith v. Volpe (9th Cir 1997) 118 F3d 1386, 1390*].

A consent decree is subject to independent district court review before it is entered. The court may approve or reject the consent decree. For court approval, the decree must be fundamentally substantively and procedurally fair, adequate and reasonable. However, when the decree has been negotiated by the Department of Justice on behalf of a federal agency that is an expert in its field, the court must accord substantial deference to the settlement [*United States v. Chevron U.S.A. Inc. (ND Cal 2005) 380 F Supp2d 1104, 1110, 1121*].

A federal court may refuse to exercise continuing jurisdiction even when the parties have agreed to it [*Arata v. Nu-Skin Int'l, Inc. (9th Cir 1996) 96 F3d 1265, 1269*]. Thus the court may vacate a consent decree once its terms have been met [*Collins v. Thompson (9th Cir 1993) 8 F3d 657, 659 , cert. denied, 511 US 1127 (1994)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesCivil ProcedureSettlementsReleases From LiabilityMary Carter AgreementsCivil ProcedureSettlementsReleases From LiabilityPierringer ReleasesCivil ProcedureJudgmentsEntry of JudgmentsConsent DecreesContracts LawTypes of ContractsSettlement AgreementsTortsProcedureSettlementsMultipartiesPartial SettlementsTortsProcedureSettlementsStructured SettlementsGeneral Overview

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Unit 9 Ending the Case Before Trial
CHAPTER 31 Settlement Agreements and Offers of Judgment *
IV. DRAFTING SETTLEMENT AGREEMENTS

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31.36 Common Settlement Agreement Provisions.

31.36[1] Identification of Parties. All settlement agreements should contain a section or paragraph naming and describing the parties to the agreement and naming their counsel. In addition, it is wise to include a clause binding the parties' corporate parents, subsidiaries, divisions, successors, assigns, employees and representatives. If any party acts in a representative capacity, the clause describing that party should delineate the capacity in which the representative serves. Similarly, when a corporate party's representative is signing the agreement on the corporation's behalf, the agreement should describe the corporate representative's authority to bind the corporation.

31.36[2] Recitation of Disputed Matters. The settlement agreement should generally recite the disputed matters of the case, together with enough facts to clarify the nature of those claims. The agreement should also include the case name, court, and docket number for any litigation settled by the agreement.

31.36[3] Recitation of the Parties' Obligations. Settlement agreements should detail the obligations assumed by each party in settlement of disputed claims.

Example:

In a lump sum settlement, [*see 31.35[1]*], the agreement should recite that the defendant agrees to give the plaintiff a check or cash in the form of a wire transfer or, in some instances, a cashier's check, in a specified amount, in return for which the plaintiff agrees to execute a release of the plaintiff's claims.

Attempt to anticipate all possible issues regarding settlement terms, and avoid ambiguity, because post-settlement litigation is common.

Plaintiff's counsel should ensure that the settlement agreement specifies a deadline for the defendant's settlement payments. If a settlement agreement does not provide any specific time for payment, the law implies a reasonable period of time in which to make the payment [*Janneh v. GAF Corp. (2d Cir 1989) 887 F2d 432, 436 , cert. denied, 498 US 865 (1990)*].

31.36[4] Release Provisions. The settlement agreement should list the rights, claims, interests, or obligations

released in return for settlement. In addition, if the settlement is partial, the agreement should specify those claims or obligations, if any, not included in the settlement.

While counsel for the defendant may wish to include a release using broad, general language, counsel for the plaintiff should exercise caution in agreeing to such general language.

Examples--Interpretation and Scope of Release Provisions:

- A release of "all claims arising from or related to employment and departure from employment" has been interpreted to include claims for defamation and civil rights violations during employment [*Shaw v. City of Sacramento (9th Cir 2001) 250 F3d 1289, 1292*].

- A release of future claims may act as a bar even though those claims are unknown at the time of execution of the agreement [Western Chance #2, *Inc. v. KFC Corp. (9th Cir 1992) 957 F2d 1538, 1543* ; Baskin-Robbins, Inc. v. Taj Cal., Inc. (CD Cal 2003) 2003 US Dist LEXIS 19946, at *65 ("Courts in California ... strictly enforce the express provisions of General Release agreements")], and is usually more effective if the waiver makes express reference to the provisions of *California Civil Code § 1542*.

- A general release of claims including employment discrimination or CERCLA claims does not violate public policy [*Stroman v. West Coast Grocery Co. (9th Cir 1989) 884 F2d 458, 460-461 , cert. denied, 498 US 854 (1990)* ; *Mardan Corp. v. C.G.C. Music (9th Cir 1985) 804 F2d 1454, 1463*].

- A general release may be interpreted to waive any claim for attorney's fees [*Mitchell v. Los Angeles (9th Cir 1984) 741 F2d 281, 283*].

31.36[5] Other Settlement Provisions. Other provisions typically contained in the settlement agreement include:

- Disclaimer by the defendant providing that the settlement is not an admission of liability.

- Confidentiality clause precluding the parties from divulging all or part of the settlement terms.

- Choice of law clause indicating the law governing construction of the settlement agreement.

- Choice of forum clause regarding where any dispute regarding settlement may be litigated or, if desired, the exclusive forum where any dispute must be litigated.

- Integration clause providing that the settlement agreement represents the final agreement between the parties thus precluding the introduction of extrinsic evidence.

- Agreement that the court retains jurisdiction of the case for purposes of enforcing the settlement.

Warning:

An agreement between the parties alone cannot retain jurisdiction in the district court. The court itself must retain such jurisdiction either by incorporating the terms of the settlement agreement into its order or expressly retaining jurisdiction to enforce it [*see Kokkonen v. Guardian Life Ins. Co. of Am. (1994) 511 US 375, 381-382, 114 S Ct 1673, 128 L Ed2d 391*].

- Covenant not to sue.
- Mutual promises to return discovery materials to the producing party.
- Attorney's fee clause providing that the prevailing party in any action to enforce or construe the settlement is entitled to recover such fees.

31.36[6] Signatures. It is important to have the parties as well as the attorneys execute the settlement agreement. Securing parties' signatures may forestall later argument that the settlement was negotiated without a particular party's authority.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral ReleasesCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawTypes of ContractsReleasesContracts LawTypes of ContractsSettlement Agreements

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31.37 Post-Settlement Notification and Filing Requirements Under Local Rules.

31.37[1] LOCAL PRACTICE: Duty to File Notice of Settlement.

31.37[1][a] LOCAL PRACTICE: CD Cal Requirements. Counsel are to inform the court immediately by telephone or other expeditious means if a case set for trial or other proceeding has been settled [*CD Cal Civ LR 40-2*]. Failure to so notify can be grounds for sanctions including payment of costs and attorney's fees of an opposing party [*CD Cal Civ LR 40-3(a), (c)*].

31.37[1][b] LOCAL PRACTICE: ED Cal Requirements. When an action has been settled or otherwise disposed of, or when any motion for interim or general relief has been resolved, counsel must inform the courtroom deputy clerk and the assigned court's chambers immediately [ED Cal Gen LR 160(a)]. The court will then set a date for the filing of dispositional documents in the action that will be no later than 21 calendar days after the notification, absent good cause [*ED Cal Gen LR 160(b)*]. Failure to file the papers by that date may be a ground for sanctions [*ED Cal Gen LR 160(b)*].

31.37[1][c] LOCAL PRACTICE: ND Cal Requirements. The court may assess jury costs as sanctions against a party for failing to provide timely written notice of a settlement [*ND Cal Civ LR 40-1*].

31.37[1][d] LOCAL PRACTICE: SD Cal Requirements. The Southern District has no local rule on the duty to file the notice of settlement. Individual judges' rules may address this topic, however [*see also 31.37[2][d]* (possible imposition of juror costs if jury impaneled)].

31.37[2] LOCAL PRACTICE: Juror Costs Will Be Assessed If No Timely Notice of Settlement.

31.37[2][a] LOCAL PRACTICE: CD Cal Requirements. If counsel for a party has failed to notify the court of settlement of an action, it may be subject to payment of one day's jury fees if a jury is summoned for trial [*CD Cal Civ LR 40-3(b)*].

31.37[2][b] LOCAL PRACTICE: ED Cal Requirements. If for any reason attributable to counsel or the parties, including settlement, the court is unable to commence a jury trial after a panel has reported for voir dire, the court may

assess against counsel or the parties responsible all or part of the cost of calling the panel [*ED Cal Civ LR 272(b)*].

31.37[2][c] LOCAL PRACTICE: ND Cal Requirements. No continuance of a scheduled trial date will be granted except in accordance with a motion made pursuant to local rules [*ND Cal Civ LR 40-1*]. A party's failure to proceed to trial on the scheduled date may result in sanctions including default or dismissal [*ND Cal Civ LR 40-1*]. Jury costs may be assessed against a party or counsel for failure to proceed to trial as scheduled or for failure to provide the court with timely written notice of a settlement [*ND Cal Civ LR 40-1*].

31.37[2][d] LOCAL PRACTICE: SD Cal Requirements. If for any reason attributable to counsel or the parties, including settlement, the court is unable to commence a jury trial as scheduled, when a panel has been summoned for voir dire, the court may assess against counsel or parties responsible all or part of the cost of the panel [*SD Cal Civ LR 16.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureSanctionsGeneral Overview

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31.38 Oral Settlement May Be Put on Record.

To avoid disputes concerning the existence or terms of an oral settlement agreement, counsel may request or the judge may require that the agreement be "put on the record" by stating the terms of the settlement in open court when they are transcribed by a court reporter, or entered into the minutes of the court. Ordinarily, the parties will follow up the recorded settlement with a detailed written settlement agreement.

Warning:

Absent extenuating circumstances, the court will enforce counsel and client's apparent assent to the terms of an agreement entered into in open court [*see Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1136-1137* ; *but see Farris v. JC Penney (3d Cir 1999) 176 F3d 706, 712* (interpreting Pennsylvania law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawTypes of ContractsOral AgreementsContracts LawTypes of ContractsSettlement Agreements

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31.39 Action Not Terminated Until Dismissal Filed or Judgment Entered.

Settlements are usually implemented by filing with the court a stipulation of dismissal [*see Fed R Civ P 41(a)(1)(A)(ii)*] or the entry of a stipulated judgment that conforms to the terms of the settlement agreement. Obviously, the entry of a judgment will terminate the action. However, if a stipulated dismissal is the means by which the settlement will be implemented, the stipulation must be filed with the court. A stipulation of dismissal does not terminate the action until it is filed with the court [*Fed R Civ P 41(a)(1)*]. If a party executes a settlement agreement providing for the filing of a stipulation of dismissal and fails to file such a stipulation, the opponent may move to enforce the settlement agreement and the district court will retain jurisdiction [*see 31.45[1]*].

Cross Reference:

Stipulated dismissal, see Ch. 30, Voluntary Dismissal, see *§§ 30.12 -30.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsStipulationsCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsIncorporation in Judgments

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31.40 Judicial Approval of Settlement.

Typically, settlements rest solely in the parties' discretion. However, settlements may not be effective in "representative" actions without judicial approval. Thus, court approval for a settlement is required in the following types of actions:

- Class actions [*Fed R Civ P 23(e)*].
- Shareholder derivative suits [*Fed R Civ P 23.1*].
- Actions involving minors and incompetents [*ED Cal Civ LR 202*; *CD Cal Civ LR 83-5*].

Settlements that involve an injunction to be issued by the court, such as consent decrees in civil rights or environmental litigation, require court approval as well. The parties have no power to stipulate among themselves the terms of a decree that will be supervised and enforced by court order [*see Arata v. Nu-Skin Int'l, Inc. (9th Cir 1996) 96 F3d 1265, 1269*].

Cross Reference:

Consent decrees defined, see *§ 31.35[5]*.

The requirements for court approval of a settlement in a class action may be the most elaborate, but the procedures are similar, if less formal and less detailed, in all cases in which court approval is required. In a class action, the court is formally responsible for "directing" and approving the form of notice to all parties and absent members of the class concerning the proposed settlement [*see Fed R Civ P 23(e)*], but in practice the parties actually have the responsibility for informing the court of the settlement, drafting the notices, and requesting the hearing. The court is unlikely to act on its own motion. In class actions, the parties have to disclose other matters, including all terms of the proposed settlement and must identify any side agreements that contributed to the settlement [*see Fed R Civ P 23(e)*]. There must be a formal hearing [*see Fed R Civ P 23(e)(2)*] at which class members may appear and object [*see Fed R Civ P 23(e)(5)*]. The court will not approve a settlement unless it finds that the settlement is fair, reasonable, and adequate with respect to all class members [*see Fed R Civ P 23(e)(2)*].

Cross Reference:

Consent decrees defined, see *§ 31.35[5]*. Judicial approval required for class action settlement, see Ch. 20, Class Actions, see *§ 20.42*.

Courts may engage in a limited review of settlement agreements even when formal judicial approval is not required. Courts will review, and court approval is required to implement, any term of a settlement agreement that requires the court to take some action. This may occur, for example, when the settlement agreement requires that the court retain jurisdiction over the settlement for purposes of enforcement, or when the parties ask for sealing of certain court files.

Cross References:

Confidentiality terms in settlement agreements, see *§ 31.11*. Jurisdiction to enforce terms of settlement agreements, see *§ 31.44*.

Court hearings may be required even after an enforceable settlement has been reached. It is not uncommon, for example, to have the merits of the case completely resolved by an enforceable settlement agreement that requires no court approval or that has been approved by the court, but which still requires a court hearing to set the amount of disputed court costs or the amount of attorney's fees recoverable under the settlement.

Cross Reference:

Recovery of attorney's fees after acceptance of *Fed R Civ P 68* offer, see *§ 31.17*.

In a diversity action, counsel should consult state law for any other type of action in which settlement requires the court's approval.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesCivil ProcedureSettlementsSettlement AgreementsIncorporation in JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsConsent Decrees

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31.41 CHECKLISTS: Enforcing Settlement Agreement.

31.41[1] Enforcing Settlement.

☐ Confirm that breach of settlement agreement has occurred.

☐ Confer with counsel for party in breach to attempt informal resolution.

☐ If informal resolution not possible, choose strategy:

- ○ Seek enforcement of settlement;
- ○ View agreement as rescinded and sue on original claims; or
- ○ Institute separate suit for breach of settlement agreement.

Authority:
Arnold v. United States (9th Cir 1987) 816 F2d 1306, 1309

Discussion:
See *§ 31.43[1][a]*

☐ If enforcing settlement agreement, confirm that agreement is legally valid:

- ○ Look to law of state that governs interpretation and validity of contract:

☐ Examine forum selection clause in contract.

☐ Examine choice of law clause in contract.

☐ Look at choice of law rules for state in which district court sits or from which case will be transferred.

○ Establish that under applicable state law no public policy reasons invalidate the agreement in whole or in part.

○ Establish that under any applicable federal law no public policy reasons invalidate the agreement in whole or in part.

Authority:

Piper Aircraft Co. v. Reyno (1981) 454 US 235, 243 n8, 102 S Ct 252, 70 L Ed2d 419 ; *United States ex rel. Green v. Northrop Corp. (9th Cir 1995) 59 F3d 953, 962-965 , cert. denied, 518 US 1018 (1996)* ; *Davies v. Grossmont Union High Sch. Dist. (9th Cir 1991) 930 F2d 1390, 1396 , cert. denied, 501 US 1252 (1991)*

Discussion:

See *§ 31.43[1]*

☐ Confirm that a complete agreement existed between the parties:

○ Establish under applicable law that both parties either:

☐ Agreed to terms of settlement, or

☐ Authorized counsel to settle dispute.

○ Assent of client on record in open court will likely be found binding.

Authority:

Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1136-1137 ; *Inamed Corp. v. Kuzmak (CD Cal 2002) 275 F Supp2d 1100, 1120* ; *Marks-Foreman v. Reporter Publ'g Co. (SD Cal 1998) 12 F Supp2d 1089, 1092*

Discussion:

See *§ 31.43[2]*

☐ Determine whether District Court has jurisdiction to enforce settlement agreement:

○ If case is still pending, jurisdiction still exists.

○ If case is no longer pending, establish that District Court retained jurisdiction in its dismissal order by:

☐ Incorporating settlement agreement into its order.

☐ Expressly retaining jurisdiction to enforce.

○ If court retained jurisdiction, it must have done so over particular matter for which enforcement is sought.

○ If agreement provided for arbitration, Federal Arbitration Act will govern.

Authority:
Kokkonen v. Guardian Life Ins. Co. of Am. (1994) 511 US 375, 380-381, 114 S Ct 1673, 128 L Ed2d 391 ; *Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1140* ; *William Keeton Enters. v. A All Am. Strip-O-Rama (9th Cir 1996) 74 F3d 178, 182* ; *Homestake Lead Co. v. Doe Run Res. Corp. (ND Cal 2003) 282 F Supp2d 1131, 1131*

Discussion:
See *§ 31.44, 31.45[1], [2]*

☐ Invoke District Court's discretionary jurisdiction for enforcement if jurisdiction has been retained.

Authority:
Arata v. Nu-Skin Int'l, Inc. (9th Cir 1996) 96 F3d 1265, 1269

Discussion:
See *§ 31.45[2][a]*

☐ Enforce settlement in state court if jurisdiction not retained in federal court.

Authority:
Ortolf v. Silver Bar Mines Inc. (9th Cir 1997) 111 F3d 85, 88

Discussion:
See *§ 31.45[2][b]*

☐ If enforcement proceeding will be in federal court, use contempt or summary proceedings.

○ Contempt proceedings available when opponent has violated court order approving settlement and commanding or enjoining particular conduct.

○ Avoid evidentiary hearing on contract formation by establishing:

☐ Agreement between parties was complete.

☐ No material facts as to existence or terms of an agreement to settle are in dispute.

Authority:
Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1138 ; *Callie v. Near (9th Cir 1987) 829 F2d 888, 890* ; *TNT Mktg. Inc. v. Agresti (9th Cir 1986) 796 F2d 276, 278*

Discussion:
See *§ 31.43[3], 31.45[2][c]*

☐ Seek an injunction against any inconsistent proceedings brought by opponent.

○ Anti-Injunction Act does not prohibit injunctions against state court actions when:

☐ Necessary in aid of district court's jurisdiction.

☐ Necessary to protect and effectuate judgments.

○ Can raise settlement agreement in motion to dismiss as bar to further federal court litigation if settlement agreement so provides.

Authority:
28 USC § 2283; *Flanagan v. Arnaiz (9th Cir 1998) 143 F3d 540, 545-546* ; Willis Corroon Corp. v. United Capitol Ins. Co. (ND Cal 1998) 1998 US Dist LEXIS 23226, at *10

Discussion:
See *§ 31.45[3], [4]*

☐ Prepare and file motion to enforce or motion for contempt as appropriate:

○ Review rules for contempt proceedings.

○ Comply with local rules requirements for format, serving and filing of papers.

Authority:
TNT Mktg. Inc. v. Agresti (9th Cir 1986) 796 F2d 276, 278

Standard Procedure Checklist:
See Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Discussion:
Moving for contempt, see Ch. 35, Contempt, *§§ 35.03 -35.20*. Formatting papers, see Ch. 5, Formatting, Serving, and Filing Papers, *§§ 5.03 -5.14*

31.41[2] Opposing Enforcement of Settlement.

☐ Ascertain whether enforcement may be challenged based on invalidity, incompleteness, or lack of jurisdiction:

○ Invalid agreement. Determine whether settlement agreement is invalid, in whole or in part:

☐ Look to law of state that governs interpretation and validity of contract:

○ Review forum selection clause.

○ Review any choice of law clause.

○ Research choice of law rules for state in which district court sits or from which case was transferred.

☐ Consider whether under applicable state law, public policy reasons would invalidate agreement in whole or in part.

☐ Consider whether under applicable federal law public policy reasons invalidate agreement in whole or in part.

Authority:

Piper Aircraft Co. v. Reyno (1981) 454 US 235, 243 n8, 102 S Ct 252, 70 L Ed2d 419 ; *United States ex rel. Green v. Northrop Corp. (9th Cir 1995) 59 F3d 953, 962-965 , cert. denied, 518 US 1018 (1996)* ; *Davies v. Grossmont Union High Sch. Dist. (9th Cir 1991) 930 F2d 1390, 1396 , cert. denied, 501 US 1252 (1991)*

Discussion:

See *§ 31.43[1]*

○ Incomplete agreement. Ascertain whether agreement between the parties was incomplete.

☐ Consider whether, under applicable state law, the parties:

○ Did not agree on some essential term of settlement.

○ Did not authorize counsel to settle the dispute.

☐ Determine whether acceptance of key term or terms of the agreement is lacking.

☐ Attempt to establish lack of assent to terms in open court if necessary, if settlement was purportedly entered into in open court.

Authority:

Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1136-1137 ; *Inamed Corp. v. Kuzmak (CD Cal*

2002) 275 F Supp2d 1100, 1120 ; *Marks-Foreman v. Reporter Publ'g Co. (SD Cal 1998) 12 F Supp2d 1089, 1092*

Discussion:
See *§ 31.43[2]*

○ No enforcement jurisdiction. Ascertain whether district court lacks jurisdiction to enforce the settlement agreement.

☐ Review status of case.

☐ If case not pending, determine whether district court ever retained jurisdiction in its order of dismissal by:

○ Incorporating settlement agreement by reference.

○ Explicitly retaining jurisdiction in its order.

☐ If court retained jurisdiction over some matters, determine whether it did or did not retain jurisdiction over the particular matter sought to be enforced.

☐ If agreement provided for arbitration, ask for enforcement of arbitration as sole remedy under Federal Arbitration Act.

Authority:
Kokkonen v. Guardian Life Ins. Co. of Am. (1994) 511 US 375, 380-381, 114 S Ct 1673, 128 L Ed2d 391 ; *Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1140* ; *William Keeton Enters. v. A All Am. Strip-O-Rama (9th Cir 1996) 74 F3d 178, 182* ; *Homestake Lead Co. v. Doe Run Res. Corp. (ND Cal 2003) 282 F Supp2d 1131, 1131* .

Discussion:
See *§ 31.44*, *31.45[1]*, *[2]*

☐ Be prepared to argue that district court should decline discretionary exercise of enforcement jurisdiction

Authority:
Arata v. Nu-Skin Int'l, Inc. (9th Cir 1996) 96 F3d 1265, 1269

Discussion:
See *§ 31.45[2][a]*

☐ If court takes jurisdiction, ask for an evidentiary hearing by establishing question of material fact as to:

○ Complete agreement between the parties.

- ○ Material facts as to the existence of the agreement or its consummation.

Authority:
Callie v. Near (9th Cir 1987) 829 F2d 888, 890-891

Discussion:
See *§ 31.43[3]*

☐ If court takes jurisdiction argue against any contempt proceeding:

- ○ Show no violation of court order.
- ○ Show that court order did not command or enjoin particular conduct.

Authority:
TNT Mktg. Inc. v. Agresti (9th Cir 1986) 796 F2d 276, 278

Discussion:
See *§ 31.45[2][c]*

☐ If opposing a request for an injunction against state proceedings sought by your client, argue jurisdiction with state court is concurrent because an injunction is not necessary in aid of the district court's jurisdiction or to protect or effectuate judgments.

Authority:
Hinduja v. Arco Prods. Co. (9th Cir 1996) 102 F3d 987, 989-990

Discussion:
See *§ 31.45[3]*

☐ Prepare and file opposition to motion to enforce settlement agreement or for contempt of court as appropriate.

- ○ Clearly set forth grounds for opposition (e.g., invalid or incomplete agreement).
- ○ Review rules for contempt proceedings, if appropriate.
- ○ Comply with local rules requirements for formatting, serving and filing of papers.

Authority:
TNT Mktg. Inc. v. Agresti (9th Cir 1986) 796 F2d 276, 278

Standard Procedure Checklist:
See Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Discussion:
Moving for contempt, see Ch. 35, Contempt, see *§§ 35.03 -35.20*. Formatting papers, see Ch. 5, Formatting, Serving, and Filing Papers, see *§§ 5.03 -5.14*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementBreach of Contract ActionsCivil ProcedureSettlementsSettlement AgreementsEnforcementContempt

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31.42 Options and Strategy.

The goal of the settlement agreement itself is to resolve litigation between the parties. Ideally, a party will not have to seek enforcement of a settlement agreement. However, if enforcement is required, the enforcing party must establish at a minimum that the agreement is an enforceable contract, that it is complete, and that none of its terms are void as against public policy. Additionally, if the party seeks enforcement in federal court, the party must establish jurisdiction for the enforcement of the agreement in that court.

A party opposing enforcement will have the opportunity to raise all of the above issues--namely, asserting that the agreement is not enforceable, is incomplete, or is void either partially or entirely as against public policy. Finally, the party can challenge the basis for federal jurisdiction if enforcement is sought in federal court.

Legal Topics:

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

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31.43 Party Seeking Enforcement Must Show Settlement Agreement Is Legally Valid.

31.43[1] Construction of Settlement Agreement.

31.43[1][a] Settlement Agreement Is an Enforceable Contract. A settlement agreement is an enforceable contract. The general requirements for contract enforcement must be satisfied. Thus, the court may only enforce complete settlement agreements [*Callie v. Near (9th Cir 1987) 829 F2d 888, 890*].

Decision Point:

If a settlement agreement is breached, the opposing party has the option of attempting to seek enforcement of the settlement agreement in the original action, bringing a new, separate action for breach of the settlement agreement, or rescinding the agreement and suing on the original claims [*Arnold v. United States (9th Cir 1987) 816 F2d 1306, 1309*]. In considering whether to rescind and sue on the original claims, counsel must analyze whether there are actual grounds for rescission of the settlement agreement as opposed to merely suing for its breach. Counsel must also consider whether there are any limitations defenses that might bar this strategy, and whether, with the passage of time, it will be practical and economical to attempt to reassert the original claims or defenses. On the other hand, if the settlement represents a substantial discount to the value of the claims, and the plaintiff believes that the claims are easily proved, the rescission option makes sense. In all other cases, unless the court has retained jurisdiction of the matter for purposes of enforcement, the most practical solution may be a separate action for breach of a settlement agreement. However, counsel may have to bring this action in state court unless there are independent grounds for federal subject matter jurisdiction over this breach of contract action.

31.43[1][b] Settlement Agreement Interpreted According to State Contract Law. The construction and enforcement of settlement agreements are governed by principles of local law that apply to interpretation of contracts generally--even if the underlying claim is federal [*United Commercial Ins. Serv. v. Paymaster Corp. (9th Cir 1992) 962 F2d 853, 856 , cert. denied sub nom. Paymaster Corp. v. American Bankers Ins. Co., 506 US 1022 (1992)*]. When the settled claim is based on federal law, however, federal public policy may require that the *validity* of the settlement

agreement be measured by federal law [*United States ex. rel. Green v. Northrop Corp. (9th Cir 1995) 59 F3d 953, 961-962 , cert. denied, 518 US 1018 (1996)*].

The choice of which state law will govern interpretation of the settlement contract will be determined by the choice of law rules of the state in which the District Court sits or from which the case was transferred [*Piper Aircraft Co. v. Reyno (1981) 454 US 235, 243 n8, 102 S Ct 252, 70 L Ed2d 419*]. If, as is normally the case, the governing law permits it, the parties may include a provision in settlement agreement that specifies which state's law will govern interpretation of the settlement agreement [*Consul, Ltd. v. Solide Enters., Inc. (9th Cir 1986) 802 F2d 1143, 1146-1147*].

Cross Reference:

Interpretation of contracts under California law, see 13 California Forms of Pleading and Practice, see § 140.32 (Matthew Bender).

31.43[1][c] Void Terms Will Not Be Enforced. As with other contracts, a term of a settlement agreement which is void as against public policy may not be enforced [*see Davies v. Grossmont Union High Sch. Dist. (9th Cir 1991) 930 F2d 1390, 1396 , cert. denied, 501 US 1252 (1991)* ; *see also United States ex rel Green v. Northrop Corp. (9th Cir 1995) 59 F3d 953, 962-965 , cert. denied, 518 US 1018 (1996)*].

31.43[2] Complete Agreement Must Have Existed Between Parties.

31.43[2][a] Both Parties Must Have Agreed to Terms of Settlement or Authorized Counsel to Settle Dispute. To be enforceable, a settlement agreement (1) must represent a complete agreement, and (2) both parties must have either agreed to the terms of the settlement or authorized their respective counsel to settle the dispute [*Marks-Foreman v. Reporter Publ'g Co. (SD Cal 1998) 12 F Supp2d 1089, 1092*].

31.43[2][b] Client May Grant Authority to Make Binding Settlement on Its Behalf. A client may grant an attorney valid authority to make a binding settlement on its behalf [*Inamed Corp. v. Kuzmak (CD Cal 2002) 275 F Supp2d 1100, 1128*]. Enforceability of a settlement agreement, including the issue of apparent authority, is governed by state contract law [Vazquez v. Secretary of Navy (ND Cal 1993) 1993 US Dist LEXIS 6325, at *7-*9]. If California law governs, mere employment of the attorney does not give the attorney settlement authority automatically--agency principles are applied to determine whether a lawyer has been granted express, apparent, or ostensible authority to make a binding settlement on the client's behalf [*Inamed Corp. v. Kuzmak (CD Cal 2002) 275 F Supp2d 1100, 1118 , citing Blanton v. Womancare, Inc. (1985) 38 Cal 3d 396, 404, 212 Cal Rptr 151, 696 P2d 645 and Murphy v. Padilla (1996) 42 CA4th 707, 716-717, 49 Cal Rptr 2d 722*].

An attorney may have apparent authority to enter into a settlement agreement, but it may not be valid if there was no meeting of the minds [*Inamed Corp. v. Kuzmak (CD Cal 2002) 275 F Supp2d 1100, 1122, 1128*].

31.43[2][c] Client's Signature on Agreement Not Required. Absent duress or public policy considerations to the contrary, a settlement agreement put on the record in open court will be binding on a party regardless of whether the client has been asked to sign anything [*Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1136* ; Veronda v. California Dept. of Forestry & Fire Prot. (ND Cal 2002) 2002 US Dist LEXIS 12993, at *15 , *aff'd*, 2003 US App LEXIS 4801 (9th Cir. 2003)].

Example:

A client's statement "yeah" in response to the court's question whether the terms enumerated by counsel were agreeable is sufficient to bind the client [*Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1137*].

Warning:

Advise the client to consider any settlement agreements before agreeing to them on the record, because the statement will be irrevocable.

31.43[3] Court May Have to Hold Evidentiary Hearing on Question of Formation of Contract. While the court has authority to enforce settlement agreements through summary proceedings, when there is a question as to the existence of an agreement, the court may be required to hold a hearing as to the formation of the agreement or its consummation [*see Callie v. Near (9th Cir 1987) 829 F2d 888, 890-891* ; *Russell v. Puget Sound Tug & Barge Co. (9th Cir 1984) 737 F2d 1510, 1511* ; *but see Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1138*].

Example:

Parties in a fraud and breach of fiduciary duty action engaged in negotiations for a settlement agreement. The settlement agreement was contingent on execution of a stipulation and judgment, which never occurred. The parties agreed on a settlement but differed on a theory of liability on which the judgment would be based, and no judgment was executed. Because one set of parties indicated that the legal basis of the judgment was an important part of the settlement negotiations, a hearing was necessary, and the district court could not properly resolve the factual dispute merely by weighing the affidavits and relying on the unsworn statements of counsel [*Callie v. Near (9th Cir 1987) 829 F2d 888, 891*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActApparent AuthorityGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementBreach of Contract ActionsCivil ProcedureSettlementsSettlement AgreementsValidityContracts LawContract InterpretationGeneral OverviewContracts LawTypes of ContractsSettlement Agreements

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31.44 Court Must Have Jurisdiction to Enforce Settlement Agreement.

31.44[1] Independent Basis of Jurisdiction Must Exist. A settlement agreement reached in a federal court case might not be enforceable in federal court. The simple fact that the settlement was reached in a federal district court proceeding does *not* automatically give that court subject matter jurisdiction over subsequent proceedings to enforce the settlement agreement. "Enforcement of the settlement agreement ... is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction" [*Kokkonen v. Guardian Life Ins. Co. of Am. (1994) 511 US 375, 378, 380-381, 114 S Ct 1673, 128 L Ed2d 391* ; *see 31.45[2]*].

31.44[2] Federal Arbitration Act May Govern If Agreement Provides for Arbitration. If the settlement agreement provides for arbitration, the court's enforcement of the arbitration provision will be governed by the Federal Arbitration Act [*Homestake Lead Co. v. Doe Run Res. Corp. (ND Cal 2003) 282 F Supp2d 1131, 1138*].

31.44[3] Courts Can Retain Jurisdiction Over Class Actions, Multiparty Settlements. Courts often retain jurisdiction over class action and multiparty settlements [*see, e.g.* In re California Micro Devices Corp. Sec. Litig. (ND Cal 2001) 2001 US Dist LEXIS 7994, at *11 ; In re Sorbates Direct Purchaser Antitrust Litig. (ND Cal 2002) 2002 US Dist LEXIS 23468, at *8].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCompromisesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & ExceptionsCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral Overview

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31.45 Enforcing Settlement Agreement.

31.45[1] Enforcement While Case Still Pending Before Court. The Court retains jurisdiction of the original action prior to dismissal. Thus a settlement agreement entered into prior to the dismissal of the action may be enforced in that action [*see, e.g., Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1140*]

Strategic Point--Delayed Dismissal May Provide for Jurisdiction to Enforce Settlement:

The settlement agreement need not call for immediate dismissal of the action or the immediate entry of a judgment conforming to the terms of the settlement agreement. Courts frequently will allow the parties to have a reasonable period of time to implement the terms of a settlement. Thus, the settlement agreement may provide for dismissal at a future time, such as in 90 days, unless either party gives notice that the settlement has not been completed within that time. The court may be more willing to consent to this procedure than it would be to actually dismiss the case or to enter a final judgment based on the terms of the settlement agreement, yet "retain" jurisdiction for an indefinite period for the purpose of enforcing the settlement agreement. In fact, courts may be willing to "retain" jurisdiction only to enforce consent decrees, or to enforce complex settlements in large multi-party or class action cases.

31.45[2] Post-Dismissal Enforcement of Settlement Agreement.

31.45[2][a] Post-Dismissal Enforcement Possible Only If Court Retains Jurisdiction. One form of settlement agreement over which the court invariably retains jurisdiction is a consent decree [*California v. Randtron (9th Cir 2001) 284 F3d 970, 974*]. In all other types of cases, once the court dismisses the action or enters a final judgment based on the terms of the settlement agreement, the court loses jurisdiction over the matter. The court does *not* have subject matter jurisdiction of proceedings to enforce the settlement agreement unless there is some independent basis for jurisdiction [*Kokkonen v. Guardian Life Ins. Co. of Am. (1994) 511 US 375, 378, 114 S Ct 1673, 128 L Ed2d 391*]. A motion to enforce the settlement agreement is a separate contract dispute requiring its own independent basis for jurisdiction [*O'Connor v. Colvin (9th Cir 1995) 70 F3d 530, 532*].

As an alternative to an independent basis for jurisdiction over the enforcement proceedings, the district court may retain jurisdiction over the matter for the express purpose of enforcing the settlement agreement, either by so stating in an order or by incorporating the settlement agreement into the terms of its order [*see Kokkonen v. Guardian Life Ins. Co. of Am. (1994) 511 US 375, 382, 114 S Ct 1673, 128 L Ed2d 391*].

The cases have required that, if the court agrees to retain jurisdiction, it do so explicitly, formally, and without any ambiguity.

Example:

An expression on the record by the district judge that he or she "will act as a czar with regard to ... the execution of the settlement" was *not* sufficient to retain jurisdiction, despite the District Court's intent to the contrary, when that expression was not accompanied by a formal order retaining jurisdiction [*Hagestad v. Tragesser (9th Cir 1995) 49 F3d 1430, 1433, 1433*].

As noted above, the settlement agreement may contain terms expressly reserving court jurisdiction for enforcement of the settlement agreement. However, for the retention of jurisdiction to be effective, the court must agree and must incorporate the settlement agreement in its order. The parties do not have the power to force the court to retain jurisdiction merely by including such a term in a settlement agreement [*Arata v. Nu-Skin Int'l, Inc. (9th Cir 1996) 96 F3d 1265, 1269*]. The mere inclusion of a term in a settlement agreement reserving jurisdiction, such as a term providing that the plaintiff may reinstitute the action if the settlement agreement is not performed, is not a retention of jurisdiction by or on behalf of the court [*Ortolf v. Silver Bar Mines, Inc. (9th Cir 1997) 111 F3d 85, 87*].

Strategic Point--Parties Should Expressly Request Retention of Jurisdiction and Secure Explicit Court Order:

Assuming that the court is willing to retain jurisdiction over the proceeding to handle possible disputes concerning enforcement of the settlement agreement, the best procedure would be to make a formal request for an order under which the court would retain jurisdiction for settlement enforcement purposes. If an oral settlement is read into the record, the parties could, following the specification of settlement terms, formally request, and the court could formally order, that the court retains jurisdiction to enforce the terms of the settlement agreement. If a written settlement agreement is reached by the parties and the terms will not be read into the record, the request for a jurisdiction-retention order will have to be made by means of a written motion [*see Fed R Civ P 7(b)*]. In any event, the parties should be sure that the court's order retaining jurisdiction is either reflected in the court minutes or formalized in an explicit written order signed by the court.

Incorporating the settlement agreement, in written form, into the terms of a court order may not be advisable. The terms of the settlement agreement may not be explicit enough. Furthermore, if the parties seek to have any of the terms of the settlement agreement confidential, it will be extremely difficult, if not impossible, to do so and have the terms incorporated by reference into a court order.

31.45[2][b] Party Seeking Enforcement May Bring Separate Action. A party seeking enforcement of a settlement agreement may bring a separate action to enforce the settlement. The action may be brought in federal court if the court has retained jurisdiction, or in state court if it has not [*see Ortolf v. Silver Bar Mines, Inc. (9th Cir 1997) 111 F3d 85, 88* (remanding for dismissal without prejudice to refiling action in state court)].

If the matter is filed in federal court, it is essential that the court has retained jurisdiction with regard to the particular matter sought to be enforced [*William Keeton Enters. v. A All Am. Strip-O-Rama (9th Cir 1996) 74 F3d 178, 182*].

31.45[2][c] If Jurisdiction Retained, Party May Be Able to Bring Contempt Proceedings. Although a party

normally brings an action to enforce a settlement agreement, when jurisdiction has been retained it may do so through contempt proceedings when the opponent has violated a court order approving the settlement and commanding or enjoining particular conduct [*TNT Mktg. Inc. v. Agresti (9th Cir 1986) 796 F2d 276, 278*].

Cross Reference:

Further details on contempt proceedings, see Ch. 35, Contempt.

31.45[3] Injunctions to Enjoin Inconsistent Actions May Be Available. Assuming the court has retained jurisdiction to enforce a settlement agreement in federal court, an injunction may be available to bar an inconsistent state court action when such an action would pose a significant risk of frustrating the District Court's jurisdiction over the consent judgment -- such as when the court exercises its power over a res [*United States v. Alpine Land & Reservoir Co. (9th Cir 1998) 174 F3d 1007, 1013*]. Such an injunction does not violate the Anti-Injunction Act, [*28 USC § 2283*], because the second and third exceptions to the Act--"necessary in aid of [the district court's] jurisdiction" and "to protect or effectuate judgments"--apply when the district court expressly retains jurisdiction to construe and enforce a settlement agreement [*Flanagan v. Arnaiz (9th Cir 1998) 143 F3d 540, 545-546*].

However, there can be concurrent state and federal jurisdiction to enforce a settlement agreement, and when the state exercise of jurisdiction is not inconsistent with the federal court order it may not be enjoined [*Hinduja v. Arco Prods. Co. (9th Cir 1996) 102 F3d 987, 989-990*].

31.45[4] Party May Raise Settlement Agreement Bar to Further Litigation in a Motion to Dismiss. Some settlement agreements prescribe procedures for or limitations on further litigation. The motion-to-dismiss procedure under [*Fed R Civ P 12(b)(6)*] may be used to enforce such terms, and courts have interpreted such agreements to establish bars to the maintenance of a civil action [Willis Corroon Corp. v. United Capitol Ins. Co. (ND Cal 1998) 1998 US Dist LEXIS 23226, at *10].

Cross Reference:

For guidance on making or opposing a motion under *Fed R Civ P 12(b)(6)*, see Ch. 8, Answers and Responsive Motions Under Rule 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral Overview

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31.46 Opposing Enforcement of Settlement Agreement.

A party opposing enforcement of a settlement agreement may challenge:

- Whether there was actual or apparent authority on behalf of counsel to enter into the agreement [*see Farris v. JC Penney (3d Cir 1999) 176 F3d 706, 712* (interpreting Pennsylvania law)];

- Whether there was a meeting of the minds sufficient to create an enforceable agreement [*see Callie v. Near (9th Cir 1987) 829 F2d 888, 891* ; *Inamed Corp. v. Kuzmak (CD Cal 2002) 275 F Supp2d 1100, 1122, 1128*];

- Whether the agreement is void in whole or in part for public policy reasons [*United States ex rel. Green v. Northrop Corp. (9th Cir 1995) 59 F3d 953, 962-965 , cert. denied, 518 US 1018 (1996)*]; and

- Whether the district court has jurisdiction to enforce the settlement agreement [*see Kokkonen v. Guardian Life Ins. Co. of Am. (1994) 511 US 375, 380-381, 114 S Ct 1673, 128 L Ed2d 391*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementBreach of Contract Actions

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31.47 Appeal of Enforcement of Settlement Agreement.

The Ninth Circuit reviews a district court decision to enforce a settlement agreement for abuse of discretion [*Maynard v. City of San Jose (9th Cir 1994) 37 F3d 1396, 1401*]. The district court abuses its discretion when its decision is based on an error of law or a clearly erroneous factual finding [*Rabkin v. Oregon Health Scis. Univ. (9th Cir 2003) 350 F3d 967, 977*]. The court reviews *de novo* a legal challenge to the interpretation of a settlement agreement [*Jeff D. v. Andrus (9th Cir 1989) 899 F2d 753, 759*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewDe Novo Review

* The authors acknowledge the contribution of Hannah Bentley, a member of the California Bar, in preparing this chapter.

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Unit 9 Ending the Case Before Trial
CHAPTER 31 Settlement Agreements and Offers of Judgment *
VI. FORMS

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31.48 Offer of Judgment.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	OFFER OF JUDGMENT
	)	
	)	

PLEASE TAKE NOTICE that pursuant to *Federal Rules of Civil Procedure, Rule 68*, defendant [_____ *insert name of defendant making offer*] offers to allow judgment to be taken against _____ [*insert either* him, her *or* it *as appropriate*] in this action in the amount of $ _____ [*insert amount of offer*],

inclusive of costs and attorney's fees. [*If offer of judgment is for injunctive relief as well add the following sentence:* Defendant further offers that judgment be taken against _____ [*insert either* him, her *or* it *as appropriate*] for injunctive relief as follows: _____].

PLEASE TAKE FURTHER NOTICE THAT this offer is made for the purposes specified in *Federal Rules of Procedure, Rule 68*, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damages.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 68

Discussion:
See *§§ 31.13 -31.32*

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CHAPTER 31 Settlement Agreements and Offers of Judgment *
VI. FORMS

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31.49 Acceptance of Offer of Judgment.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	
Defendant	)	NOTICE OF ACCEPTANCE OF OFFER OF
	)	JUDGMENT
	)	

PLEASE TAKE NOTICE that pursuant to *Federal Rules of Civil Procedure, Rule 68*, plaintiff _____ [*name of plaintiff accepting offer*] accepts the offer of judgment of defendant _____ [*name of defendant*] dated _____ [*date of offer*], allowing plaintiff to take judgment in this action in the amount

of $ _____ [*insert amount of offer*] _____ [*add one of the following:* "inclusive of costs" *or* "together with costs accrued up to the making of said offer"].
Dated: _____

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Fed R Civ P 68

Discussion:
See *§ 31.30 -31.32*

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CHAPTER 31 Settlement Agreements and Offers of Judgment *
VI. FORMS

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31.50 Local District Court Forms.

Local district court forms relating to matters addressed in this chapter are listed below.

Central District

Settlement Procedure Selection: Notice Request and Order (ADR-01)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Click here to view image.

Stipulation Regarding Selection of Attorney Settlement Officer (ADR-02)

Click here to view image.

Attorney Settlement Officer Proceeding Report (ADR-03)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

ADR Program Questionnaire (ADR-09)

Click here to view image.

Eastern District

Notice of Availability of VDRP

Click here to view image.

Stipulation and Order for VDRP Referral

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Northern District

Notice of Need for ADR Phone Conference

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Stipulation and (Proposed) Order Selecting ADR Process

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Cross Reference:

Automated HotDocs(R) and PDF versions of these forms may be accessed and filled in from the online version of this publication, and are also available at www.LexisOne.com/forms.

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Unit 9 Ending the Case Before Trial
CHAPTER 32 Court Annexed ADR

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§ 32.syn Synopsis to Chapter 32: Court Annexed ADR

32.01 Scope.

32.02 Objective and Strategy.

32.02[1] Court Annexed ADR May Achieve Early and Equitable Settlement.

32.02[2] When ADR May Be Ineffective.

32.02[3] Enforcing ADR Resolutions.

32.03 CHECKLIST: Northern District ADR.

32.04 Organization, Rules, Internet Site, and Handbook.

32.05 Assignment of Action to ADR Program.

32.05[1] Northern District Has Discontinued Automatic Assignment of Cases to Arbitration.

32.05[2] Clerk May Assign Action to ADR Multi-Option Program.

32.05[3] Action Not Assigned at Filing May Be Assigned to ADR on Stipulation or Motion of Party, or at Court's Initiative.

32.05[4] Party May Seek Relief From Assignment to ADR.

32.06 ADR Multi-Option Program.

32.06[1] Action Assigned to Multi-Option Program Is Presumptively Subject to One Mandatory Nonbinding ADR Process.

32.06[2] Several ADR Options Are Available.

32.06[3] ADR Certification Is Required.

32.06[3][a] Certification Must Be Signed, Served, and Filed Prior to Time Specified in Initial Case Management Scheduling Order.

32.06[3][b] Required Content of ADR Certification.

32.06[3][c] ADR Certification Must Be Accompanied by Either Stipulation and Order or Notice of Need for Telephone Conference.

32.06[4] Parties Can Select ADR Process.

32.06[4][a] Counsel Must Meet and Confer on ADR Options.

32.06[4][b] Selection of ADR Process Through Phone Conference With Member of ADR Unit Staff.

32.06[4][c] Selection of ADR Process at Case Management Conference.

32.06[5] Timing of ADR Process in ADR Multi-Option Program.

32.07 Nonbinding Arbitration Process Resembles Trial.

32.08 Reserved.

32.09 Appointment of Arbitrator or Panel of Three Arbitrators.

32.10 Arbitrator Will Schedule Arbitration.

32.10[1] Arbitrator Will Consult With Parties.

32.10[2] Hearing Date Must Fall Within Time Fixed by Assigned Judge or Within 90 Days of Appointment of Arbitrator.

32.10[3] Motion Is Required to Extend Deadline for Conducting Arbitration Hearing.

32.11 Written Arbitration Statements Are Required.

32.11[1] Parties Must Submit Statement at Least Seven Days Before Hearing.

32.11[2] Required Content of Statement.

32.11[3] Arbitrator May Excuse or Modify Requirement of Statements.

32.11[4] Statement Is Not Filed With Court.

32.12 Attendance at Hearing.

32.12[1] Parties Are Required to Attend.

32.12[2] Corporation or Government Entity Must Be Represented by Person Knowledgeable of Facts of Case.

32.12[3] Each Party Must Be Represented by Trial Counsel.

32.12[4] Required Persons May Request to Be Excused From Attendance.

32.12[4][a] Request Must Be in Writing, 14 Days Before Hearing.

32.12[4][b] Hardship Is Required.

32.12[4][c] Excused Person Must Be Available by Telephone.

32.12[5] Failure of Party to Attend.

32.13 Conduct of Arbitration Hearing.

32.13[1] Arbitrator Does Not Facilitate Settlement.

32.13[2] Witnesses and Documents May Be Subpoenaed.

32.13[3] Testimony Must Be Taken Under Oath With Opportunity for Cross-Examination.

32.13[4] Admission of Evidence Guided by Federal Rules of Evidence.

32.13[5] Ex Parte Contact With Arbitrator Prohibited.

32.13[6] Hearing May Be Recorded or Transcribed.

32.14 Arbitration Award.

32.14[1] Form of Arbitration Award.

32.14[2] Award Must Be Filed by Arbitrator With Clerk Within 14 Days After Arbitration Hearing Concluded.

32.14[3] Award Must Be Served on Parties Both by Clerk and by Prevailing Party.

32.14[4] Award Must Be Sealed by Clerk.

32.15 Challenging Arbitration Award.

32.15[1] Demanding Trial De Novo.

32.15[1][a] Demand for Trial De Novo Must Be Filed and Served Within 30 Days of Notice of Award.

32.15[1][b] Timely Demand Precludes Entry of Judgment on Award.

32.15[1][c] Award Must Not Be Attached to Demand.

32.15[2] Evidence of Arbitration Proceeding Inadmissible in Trial De Novo.

32.16 Entry of Judgment on Arbitration Award.

32.16[1] Judgment Entered on Award If No Timely Demand for Trial De Novo Filed.

32.16[2] Judgment Entered on Award If Parties Have Stipulated in Writing to Waive Right to Trial De Novo.

32.17 ENE Can Focus Issues Early in Pretrial Process.

32.18 Case Will Be Assigned to Experienced Neutral With Subject Matter Expertise.

32.19 Party May Object to Evaluator.

32.20 Ex Parte Contact With Evaluator Prohibited.

32.21 Evaluator Will Schedule ENE Session.

32.21[1] Evaluator Will Consult With Parties.

32.21[2] ENE Session Must Be Held Within 90 Days After Entry of Order Referring Case to ENE.

32.21[3] Party May Request to Extend Time to Conduct ENE Session.

32.21[3][a] Motion Must Be Filed No Later Than 14 Days Before ENE Session Is to Be Held.

32.21[3][b] Required Content of Motion.

32.22 Written ENE Statements Are Required.

32.22[1] Parties Must Submit ENE Statements at Least Seven Days Before First ENE Session.

32.22[2] ENE Statement Is Not Filed With Court.

32.22[3] Required Content of ENE Statement.

32.23 Attendance at ENE Session.

32.23[1] Parties Are Required to Attend.

32.23[2] Corporation or Government Entity Must Be Represented by Person Knowledgeable of Facts With Authority to Settle.

32.23[3] Parties Must Be Represented by Trial Counsel.

32.23[4] Insurer Must Attend When Necessary to Achieve Settlement.

32.23[5] Required Person May Request to Be Excused From Attendance at ENE Session.

32.23[5][a] Request Must Be in Writing.

32.23[5][b] Request Must Be Made No Fewer Than 14 Days Before Date of ENE Session.

32.23[5][c] Hardship Is Required.

32.23[5][d] Required Content of Request.

32.23[5][e] Excused Person Must Be Available by Phone.

32.23[6] Party May Oppose Request to Be Excused.

32.23[6][a] Request Must Be in Writing.

32.23[6][b] Request Must Be Made Within Four Days of Receiving Request to Be Excused.

32.23[6][c] Required Content of Request.

32.23[6][d] Request Is Not Filed With Court.

32.23[7] Party May Seek to Compel Attendance by Appropriate Party Representative.

32.23[7][a] Allegation Must Be in Writing.

32.23[7][b] Letter Must Be Submitted As Far in Advance of ENE Session as Practicable.

32.23[7][c] Required Content of Letter.

32.23[7][d] Letter Is Not Filed With Court.

32.23[8] Challenged Party May Respond to Allegation That It Will Not Be Represented by Appropriate Representative at ENE Session.

32.23[8][a] Response Must Be in Writing.

32.23[8][b] Response Must Be Made Within Four Days of Receiving Letter Seeking to Compel Attendance by Appropriate Representative.

32.23[8][c] Response Is Not Filed With Court.

32.24 Procedure at ENE Session.

32.24[1] Assigned Duties of Evaluator.

32.24[2] Limitations on Authority of Evaluator.

32.24[3] Proceedings Are Informal; Rules of Evidence Inapplicable.

32.24[4] Transcript Is Not Permitted.

32.24[5] Delivery of Evaluation.

32.25 ENE Sessions Are Confidential.

32.26 Follow Up to ENE Session.

32.26[1] Evaluator May Order Limited Follow Up Without Stipulation of Parties.

32.26[2] With Stipulation of Parties, Evaluator May Order Additional ENE Sessions.

32.27 Evaluator Must File Certification of ENE Session Within 14 Days After Close of Session.

32.28 Mediator Facilitates Settlement.

32.29 Party May Object to Mediator.

32.30 Mediator Schedules Mediation Session.

32.30[1] Mediator Will Consult With Parties.

32.30[2] Mediation Must Be Held Within 90 Days After Entry of Order Referring Case to Mediation.

32.30[3] Party May Move to Extend Time for Mediation.

32.30[3][a] Motion Must Be Filed No Later Than 14 Days Before Mediation Is to Be Held.

32.30[3][b] Required Content of Motion.

32.31 Parties Must Submit Mediation Statement.

32.31[1] Statements Must Be Submitted at Least Seven Days Before First Mediation Session.

32.31[2] Required Content of Mediation Statement.

32.31[3] Mediation Statements Are Not Filed With Court.

32.31A Contact with Mediator Before Mediation.

32.31A[1] Mediator May Ask Parties to Submit Additional Mediation Statement Only to Mediator.

32.31A[2] Additional Mediation Statement Is Confidential.

32.31A[3] Content of Additional Mediation Statement.

32.32 Attendance at Mediation.

32.32[1] Parties Are Required to Attend.

32.32[2] Corporation or Government Entity Must Be Represented by Person Knowledgeable of Facts With Authority to Settle.

32.32[3] Each Party Must Be Represented by Trial Counsel.

32.32[4] Insurer Must Attend When Necessary to Achieve Settlement.

32.32[5] Required Person May Request to Be Excused From Attendance at Mediation.

32.32[5][a] Request Must Be Made in Writing.

32.32[5][b] Request Must Be Made No Fewer Than 14 Days Before Date of Mediation.

32.32[5][c] Hardship Is Required.

32.32[5][d] Required Content of Request.

32.32[5][e] Excused Person Must Be Available by Phone.

32.32[6] Party May Oppose Another Party's Request to Be Excused.

32.32[6][a] Opposition Must Be in Writing.

32.32[6][b] Letter Is Confidential.

32.32[6][c] Letter Must Be Submitted Within Four Days of Receiving Copy of Request to Be Excused.

32.32[6][d] Required Content of Letter.

32.32[7] Party May Seek to Compel Attendance by Appropriate Party Representative.

32.32[7][a] Opposition Must Be in Writing.

32.32[7][b] Letter Is Confidential.

32.32[7][c] Letter Must Be Submitted As Far in Advance of Mediation Session as Practicable.

32.32[7][d] Required Content of Letter.

32.32[8] Party May Challenge Allegations That It Will Not Be Represented at Mediation Session by Appropriate Representative.

32.32[8][a] Challenged Party May Submit Responsive Letter.

32.32[8][b] Letter Is Confidential.

32.32[8][c] Letter Must Be Submitted Within Four Days of Receiving Written Allegations.

32.33 Mediation Procedures.

32.33[1] Proceedings Are Informal.

32.33[2] Mediator May Meet Separately With Each Side, or With Counsel Only, or Parties Only.

32.33[3] Proceedings Are Confidential.

32.33[4] Follow Up to Mediation.

32.33[5] Mediator Must File Certification of Mediation Within 14 Days After Close of Session.

32.34 Settlement Conference Focuses Parties on Evidence and Law.

32.35 Referral of Case for Conference.

32.35[1] Case May Be Referred Sua Sponte or on Motion or Stipulation of Parties.

32.35[2] General Rule: Motion May Be Made at Any Time.

32.36 Settlement Judge.

32.36[1] Settlement Conference Generally Conducted by Magistrate Judge.

32.36[2] Stipulated Preference of Parties As to Settlement Judge Will, If Feasible, Be Given Effect.

32.36[3] On Stipulation of Parties, Assigned Judge May Hold Settlement Conference.

32.37 Settlement Judge Will Schedule Conference.

32.38 Settlement Judge Will Notify Parties of Submission and Attendance Requirements.

32.39 Attendance of Parties.

32.39[1] Parties May Be Required to Attend Conference.

32.39[2] Corporation or Government Entity Must Be Represented by Person Knowledgeable of Facts With Authority to Settle.

32.39[3] Insurer Must Attend When Necessary to Achieve Settlement.

32.40 Settlement Conference Is Confidential.

32.41 Nonbinding Summary Trial to Bench or Jury.

32.42 Privately Conducted ADR.

32.43 CHECKLIST: Eastern District--Voluntary Dispute Resolution Program (VDRP).

32.44 Parties Must Consider Availability of Program.

32.45 Certain Actions Are Exempted From VDRP.

32.46 Clerk Will Notify Plaintiffs of Availability of VDRP.

32.47 Plaintiffs Must Notify Other Parties of Availability of VDRP.

32.48 Parties Must Report Consideration of VDRP in Status Conference Report.

32.49 Referral to VDRP Requires Consent of All Parties.

32.50 Parties Must File Stipulation and Order for VDRP Referral.

32.51 Parties May Request Referral to VDRP at Any Time.

32.52 Parties May Select Neutral.

32.53 Neutral Schedules and Sets Agenda for VDRP Session.

32.53[1] Neutral Will Consult With Parties.

32.53[2] VDRP Session Must Occur Within 91 Days of Appointment of Neutral.

32.54 Parties Must Submit Written VDRP Statements.

32.54[1] Required Content of VDRP Statement.

32.54[2] Statements May Not Exceed 10 Pages.

32.54[3] Submit Statements at Least Seven Days Prior to First VDRP Session.

32.54[4] Serve Statements on Other Parties.

32.54[5] Do Not File Statement.

32.55 Attendance at VDRP Session.

32.55[1] Parties and Lead Counsel Must Attend.

32.55[2] Corporation or Government Entity Must Be Represented by Person Knowledgeable of Facts With Authority to Settle.

32.55[3] Insurer Must Attend When Necessary to Achieve Settlement.

32.55[4] Required Person May Request to Be Excused From Attendance at VDRP Session.

32.55[4][a] Confer With Other Parties Before Request to Be Excused From Attendance.

32.55[4][b] Hardship Must Be Shown.

32.55[4][c] Telephone Availability Is Required.

32.56 VDRP Session Is Confidential.

32.57 Completion of VDRP Session.

32.57[1] Neutral's Reporting Obligations.

32.57[1][a] Neutral Reports Date of Completion of Session.

32.57[1][b] Neutral Must Report by Time Fixed in VDRP Referral or Within 14 Days of Completion of VDRP Session.

32.57[2] Parties' Reporting Obligations.

32.57[2][a] Parties Must File Joint VDRP Completion Report.

32.57[2][b] VDRP Completion Report Must Be Filed by Time Fixed in VDRP Referral or Within 14 Days of Completion of VDRP Session.

32.57[2][c] Required Content of VDRP Completion Report.

32.57[2][d] Dismissal Order May Be Filed in Lieu of VDRP Completion Report.

32.58 Procedures for Violations of VDRP Rules.

32.58[1] Complaints Alleging Material Violations Must Be in Writing.

32.58[2] Sanctions Are Available.

32.59 CHECKLIST: Central District--Mandatory Settlement Procedures.

32.60 Parties Are Required to Participate in One Settlement Procedure.

32.61 Four Settlement Procedures Are Available.

32.62 Parties May Select ADR Procedure.

32.62[1] Notice of Settlement Procedure Selection Is Required.

32.62[2] File Notice of Selection Not Later Than 14 Days After Entry of Scheduling Order.

32.62[3] Court Selects Settlement Procedure If Parties Fail to File Notice of Selection.

32.62[4] Other ADR Options or Settlement Procedures Not Precluded.

32.63 Settlement Procedure Must Occur No Later Than 45 Days Before Final Pretrial Conference.

32.64 Parties Must Submit Settlement Statement.

32.64[1] Content of Settlement Statement.

32.64[2] Statement Must Be Submitted at Least Five Days Before Conference.

32.64[3] Statement May Not Exceed Five Pages.

32.65 Conduct of Proceedings.

32.65[1] Parties or Representative With Authority to Settle Must Attend.

32.65[2] Trial Counsel Must Attend.

32.65[3] Parties Must Be Prepared for Conference.

32.65[4] Settlement Officer at Conference May Require Statements and Testimony.

32.66 Proceedings Are Confidential.

32.67 Settlement Must Be Reported and Memorialized.

32.68 CHECKLIST: ADR Procedures in Southern District.

32.69 Southern District Mandates Early Neutral Evaluation (ENE) Conference.

32.69[1] Timing of ENE Conference.

32.69[1][a] Conference Must Be Held Within 45 Days of Filing of Answer.

32.69[1][b] Conference May Be Held Before Answer on Request of Party.

32.69[2] Cases in Which ENE Conference May Be Excused.

32.69[3] Conduct of ENE Conference.

32.69[3][a] ENE Conference Is Held Before Judicial Officer Supervising Discovery.

32.69[3][b] Parties and Counsel Must Attend Conference Unless Excused for Good Cause.

32.69[3][c] Parties and Officer Discuss Claims and Defenses With View to Settlement.

32.69[3][d] Conference Is Informal and Confidential.

32.69[4] Case May Be Referred to Mediation or Arbitration If Not Settled by ENE Conference.

32.69[5] Case Management Conference Must Be Held After Unsuccessful ENE Conference.

32.69[5][a] Conference Must Be Held Within 60 Days If Case Referred for Arbitration or Mediation.

32.69[5][b] Conference Must Be Held Within 30 Days If No Arbitration or Mediation Is Held.

32.70 Southern District Mandates Settlement Conference.

32.70[1] Timing of Settlement Conference.

32.70[1][a] Settlement Conference Is Held at Direction of Assigned Judge or Presiding Judicial Officer.

32.70[1][b] One or More Follow-Up Conferences May Be Held.

32.70[1][c] Trial Judge May Order Post-Verdict Settlement Conference.

32.70[2] Conduct of Settlement Conference.

32.70[2][a] Settlement Judge May Require Attendance of Parties or Representatives With Authority to Settle.

32.70[2][b] Settlement Judge Is Disqualified From Trying Case, Absent Waiver.

32.70[2][c] Proceedings Are Informal and Confidential.

32.71 Nonbinding Mini-Trial or Summary Jury Trial Are Also Available.

32.71[1] May Be Ordered at Option of District or Magistrate Judge.

32.71[2] Potential Judgment May Not Exceed $250,000, and Procedure Will Probably Resolve Case.

32.71[3] Consent of Parties Not Required.

32.72 Local District Court Forms.

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Unit 9 Ending the Case Before Trial
CHAPTER 32 Court Annexed ADR
I. STRATEGY

4-32 MB Practice Guide: Fed Pretrial Civ Proc in CA 32.01

32.01 Scope.

This chapter covers the topic of alternative dispute resolution (ADR) conducted as either required or approved by the federal district courts in California. The chapter discusses:

- ADR in the Northern District, which has an extremely sophisticated program conducted under a set of local ADR rules that address:
  - The assignment or referral of cases, some on a mandatory basis, to the ADR program [*see 32.05*, *32.06*].
  - Arbitration under the program [*see 32.07 -32.16*].
  - Early neutral evaluation under the program [*see 32.17 -32.27*].
  - Mediation under the program [*see 32.28 -32.33*].
  - Settlement conferences under the program [*see 32.34 -32.40*].
  - Other ADR options [*see 32.41*, *32.42*].
- The Eastern District, which operates a Voluntary Dispute Resolution Program (VDRP) [*see 32.43 -32.58*].
- The Central District, which requires the parties to engage in one mandatory settlement procedure [*see 32.59 -32.67*].
- The Southern District, which requires one Early Neutral Evaluation (ENE) conference, followed by

an optional arbitration or mediation, and also requires a settlement conference [*see 32.69 -32.71*].

Core Rules: *28 USC § 651*; *Fed R Civ P 16*, *83(a)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral Overview

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Unit 9 Ending the Case Before Trial
CHAPTER 32 Court Annexed ADR
I. STRATEGY

4-32 MB Practice Guide: Fed Pretrial Civ Proc in CA 32.02

32.02 Objective and Strategy.

32.02[1] Court Annexed ADR May Achieve Early and Equitable Settlement. The purpose of alternative dispute resolution (ADR) is to provide an efficient and economical means of resolving disputes between parties who might otherwise be involved in lengthy and expensive court proceedings [*see 28 USC § 651(a)*]. Federal district courts are required to devise, implement, and administer an ADR program to be used in civil actions [The Alternative Dispute Resolution Act of 1998, *28 USC §§ 651-658*]. As a result, most federal civil lawsuits may be subject to referral for some type of ADR process during the litigation. At a minimum, every federal litigator will need to be familiar with the local district court ADR processes and rules and any standing orders pertaining to ADR of the particular judge assigned to the case.

Counsel must review the ADR options in his or her district court and be ready to explain the various procedures, including their advantages and disadvantages, to the client.

ADR may:

- Help settle all or part of the dispute much sooner than trial.
- Permit a mutually acceptable solution that a court would not have the power to order.
- Save time and money.
- Preserve ongoing business or personal relationships.
- Increase satisfaction and thus result in a greater likelihood of a lasting resolution.

Properly utilized, court annexed ADR programs may serve as a reality check. For an attorney whose view of the case may be rather one-sided, ADR can provide a first-hand look at the case from the point of view of not only the opposing party, but also from a disinterested, knowledgeable neutral. Court annexed ADR also provides an opportunity for the

parties to address one another directly, an opportunity often lost once litigation has commenced and communication is carried out through sometimes contentious counsel.

Counsel need to make their clients aware that most cases are disposed of through settlement, either before or during trial. In general, the earlier the settlement the better, as clients, counsel, and the court are spared the expense of protracted proceedings leading to the same result.

It is important to review with the client that ADR is not simply another occasion to argue the merits of a party's legal position, but rather to explore if a resolution acceptable to all sides is possible. By definition, to be successful in ADR the client must appreciate that compromise will be required and that achieving 100 percent of the relief sought in the litigation will be highly unlikely. Before the ADR session, the client should work with counsel in identifying his or her priorities among the terms of any preferred resolution of the dispute. The client should be alerted that the ADR session may involve dialogue directly between the neutral and the client, generally with counsel present. In advance of the ADR event, client and counsel should anticipate the offers or demands likely to be put forward by the other parties and be prepared to react accordingly.

Counsel should inform clients that ADR procedures may work to their advantage by providing an early, cost-efficient glimpse of the opposing party's case and an early resolution to the litigation. Counsel should also emphasize that ADR procedures are nonbinding and do not result in loss of the ability to pursue a judicial resolution.

Finding and Investigating ADR Practitioners Using Online Resources:

Many resources are available online for finding and investigating potential arbitrators, mediators, and neutrals. For example, helpful resources at *lexis.com* include:

- Legal tab> Reference> Biographies> Biographies.
  - Sample Search: To find biographical information about a particular ADR practitioner, try this NAME segment search of the Biographies file: *name (First Name /3 Last Name)*.
- News & Business tab> Combined Sources> News, All (English, Full Text)
  - Sample Search: To find news articles about an ADR practitioner, search the News, All (English, Full Text) file using this format: *First Name /3 Last Name*.

Detailed Discussion

/Forms: 3 Moore's Federal Practice, Ch. 16, Pretrial Conferences; Scheduling; Management (Matthew Bender 3d ed.).

5 Bender's Federal Practice Forms, Rule 16, Pretrial Conferences; Scheduling; Management (Matthew Bender).

Cross Reference:

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

32.02[2] When ADR May Be Ineffective. Despite the great benefits often derived through court annexed ADR, some cases may be inappropriate for referral to ADR. Indeed, the ADR programs themselves often recognize this fact,

as certain cases may be exempted or otherwise excluded from the court's ADR program [*28 USC § 652(b)* (authorizing exemptions); *see, e.g., ND Cal ADR LR 4-2* (eligible cases)]. Even if not formally exempted, a case may be shown to be inappropriate for ADR if, for example:

- A precedent needs to be established, i.e., the case presents novel and important legal issues requiring resolution after a full trial on the merits.

- The party has some proper motivation in resisting settlement or other early disposition of the action, e.g., vigorous prosecution of a trademark towards a court ruling upholding the mark to reduce the risk of further misappropriation of the mark.

- A party appears to have justified suspicions of malfeasance, but the factual and legal development of the action requires the benefit of liberal disclosure and discovery that could be short-circuited by referral to ADR. A fishing expedition, however, will not be countenanced.

If counsel can present some compelling argument as to why a particular case would be inappropriate for referral to ADR, counsel should advise the court of these reasons. In the event the case has already been referred to ADR, counsel should advise the mediator, arbitrator, or other neutral of the reasons why the process likely will not be productive. In that event, an experienced neutral generally will shortcut the process so that the parties do not spend unnecessary time and money.

Cross Reference:

3 Moore's Federal Practice, Ch. 16, PretrialConferences; Scheduling; Management (Matthew Bender 3d ed.).

32.02[3] Enforcing ADR Resolutions. District courts have no inherent power after rendering final judgment to enforce settlement agreements or other ADR resolutions that were entered into by parties. However, in a final judgment, a court may retain jurisdiction over the settlement agreement expressly or may incorporate the terms of a settlement agreement in its judgment or other order disposing of the case. If a court retains jurisdiction, or if the agreement is made an express part of the court judgment, a breach of the agreement constitutes a violation of a court judgment or order, and the court may exercise its ancillary jurisdiction to enforce the judgment or order so violated. Although a court may reserve jurisdiction, it is under no obligation to do so. Furthermore, a court is not bound by an agreement of the parties, particular a provision in a settlement agreement, that the court should or will exercise continuing jurisdiction [*Arata v. Nu Skin Int'l, Inc. (9th Cir 1996) 96 F3d 1265, 1268-1269*].

In the context of settlement agreements and other ADR resolutions, an oral agreement is binding on the parties, particularly when the terms are memorialized in the record [*Sargent v. HHS (Fed Cir 2000) 229 F3d 1088, 1090*]. In most instances, the settlement is negotiated in off-the-record discussions with the court. The parties then go into open court and announce that there is a settlement. The settlement typically contains an agreement as to all material terms, which are put on the record. Then, in response to direct questioning by the court, the parties typically are asked if they agree with the terms of the settlement [*see, e.g., Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1137-1138*].

ADR resolutions can run into problems. Typically when one party seeks to enforce a settlement agreement against another, parties exchange phone calls, emails, and drafts of a settlement agreement outside of court [*see Ciaramella v. Reader's Digest Ass'n, Inc. (2d Cir 1997) 131 F3d 320, 323*]. At some point in the process, one party concludes that a final agreement has been reached; the other party, however, may disagree. It is reasonable that a party could dispute having made a binding agreement in such a case [*see, e.g., Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1137-1138*]. A district court can enforce only complete settlement agreements. So in this instance, when facts concerning the existence or terms of an agreement are in dispute, the parties are allowed an evidentiary hearing [*Doi v. Halekulani Corp. (9th Cir 2002) 276 F3d 1131, 1137-1138*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsLegal EthicsClient RelationsEffective Representation

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32.03 CHECKLIST: Northern District ADR.

☐ Review ADR programs and processes:

- ○ ADR website www.adr.cand.uscourts.gov.
- ○ ADR Handbook *Dispute Resolution Procedures in the Northern District of California*, available on the ADR website.
- ○ Local ADR Rules.

☐ If case is assigned to ADR Multi-Option Program:

- ○ Review options.
- ○ Sign, serve and file ADR certification, accompanied by Stipulation and Proposed Order.
- ○ Meet and confer with other parties.
- ○ Select ADR process.

Authority:
ND Cal ADR LR 3-3-3-6

Discussion:
See *§ 32.06*

☐ If non-binding arbitration is selected:

○ Consider making objection to appointed arbitrator or making joint request for panel of three arbitrators

○ Consult with arbitrator and other parties to schedule hearing.

○ Prepare arbitration statement; submit 10 days before hearing.

○ Calendar date of arbitration hearing and plan to attend.

☐ If party and trial counsel cannot attend, request to be excused in writing 15 days before hearing.

☐ Plan to be available by phone.

○ Request that hearing be recorded or transcribed; provide copies to other parties.

○ Award will be filed by arbitrator with clerk within 10 days after arbitration hearing concluded.

○ If prevailing party, serve copy of award on other parties immediately on receipt of award.

○ Consider challenging award.

☐ File and serve demand for trial de novo within 30 days of filing notice of award by arbitrator.

○ Judgment will be entered if no timely demand for trial de novo is filed.

Authority:
ND Cal ADR LR 4-1-4-14

Discussion:
See *§§ 32.09 -32.16*

☐ If Early Neutral Evaluation (ENE) is selected:

○ Consider challenging evaluator.

○ Consult with evaluator about scheduling ENE session.

○ Consider moving to extend time for ENE session; file motion 15 days before scheduled date of session.

○ Prepare ENE statement.

☐ Check rule for required contents.

☐ Submit 10 days before first ENE session.

☐ Do not file with court.

○ Calendar date of session and prepare to attend.

○ Request to be excused from attending session in writing 15 days before session.

○ Prepare to present claims and defenses and describe evidence on which they are based; rules of evidence do not apply.

○ Evaluator will deliver an evaluation of strengths and weaknesses of the parties positions.

○ Evaluator may order follow-up conferences, reports, or sessions.

○ Evaluator will file Certificate of ENE session within 10days.

Authority:
ND Cal ADR LR 5-1-5-14

Discussion:
See *§§ 32.17 -32.27*

☐ If Mediation is selected:

○ Consider challenging mediator.

○ Consult with mediator about scheduling mediation session.

○ Consider moving to extend time for mediation session; file motion 15 days before scheduled date of session; check rule for required contents of motion.

○ Prepare mediation statement.

☐ Check rule for required contents.

☐ Submit to mediator 10 days before first mediation session; serve on all other parties.

☐ Do not file with court.

○ Calendar date of session and prepare to attend.

○ Request to be excused from attending session in writing 15 days before session.

○ Prepare to present claims and defenses and describe evidence on which they are based; rules of evidence do not apply.

○ Discuss possible follow-up procedures with mediator and other parties.

○ Mediator will file Certificate of Mediation within 10 days.

Authority:
ND Cal ADR LR 6-1-6-13

Discussion:
See *§§ 32.28 -32.33*

☐ If case is referred for Settlement Conference:

○ Stipulate to preference for particular judge.

○ Judge will schedule conference.

○ Judge will notify counsel of requirements for submissions.

○ Judge may require parties to attend.

○ Check any standing order on settlement procedure for particular assigned judge.

Authority:
ND Cal ADR LR 7-1-7-5

Discussion:

See *§§ 32.34 -32.40*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral Overview

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32.04 Organization, Rules, Internet Site, and Handbook.

The ADR program in the Northern District maintains its own Internet site, located at www.adr.cand.uscourts.gov. This website contains information about the court's available ADR processes and their comparative benefits, answers to frequently asked questions, various forms approved by the court, information about becoming a neutral, and any standing orders regarding settlement issued by the particular judge [*ND Cal ADR LR 2-1(b)*]. This information may also be found in a handbook entitled *Dispute Resolution Procedures in the Northern District of California*, which is available on the ADR website.

The ADR program in the Northern District is implemented by a set of local rules known as the Local Rules for Alternative Dispute Resolution in the United States District Court for the Northern District of California [*ND Cal ADR LR 1-1*]. This set of rules is available on the ADR unit's website.

An ADR magistrate judge, appointed by the court, is responsible for overseeing the ADR unit and consulting with the ADR director and ADR program counsel on matters of policy, program design and evaluation, education, training, and administration. The ADR magistrate judge rules on requests to be excused from appearing in person at ADR sessions, and hears and determines complaints alleging violations of the ADR local rules [*ND Cal ADR LR 2-2*].

Contact information for the ADR unit is as follows [*ND Cal ADR LR 2-1(c)*]:

U.S. District Court-ADR Unit

450 Golden Gate Avenue, 16th Floor

San Francisco, CA 94102

Phone, fax and e-mail:

Telephone: (415) 522-2199
Telephone for ADR Telephone Conferences only: (415) 522-4603
Fax: (415) 522-4112
E-Mail: ADR@cand.uscourts.gov

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral Overview

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32.05 Assignment of Action to ADR Program.

32.05[1] Northern District Has Discontinued Automatic Assignment of Cases to Arbitration. Effective January 20, 2005, the Northern District of California is no longer assigning cases to nonbinding arbitration at filing. Cases that were being assigned automatically to arbitration (tort and contract matters with $150,000 or less in controversy) are now being assigned, at filing, to the ADR Multi-Option Program governed by ND Cal ADR LR 3. Non-binding arbitration remains an option in the ADR Multi-Option Program. Cases that were previously assigned to arbitration remain subject to the arbitration procedures of ND Cal ADR LR 4.

32.05[2] Clerk May Assign Action to ADR Multi-Option Program. In the Northern District of California, any civil case may be assigned to the ADR Multi-Option Program by the clerk of the court when the complaint or notice of removal is filed. Notice of the assignment will be given in the Order Setting Initial Case Management Conference and ADR Deadlines issued under *ND Cal Civ LR 16-2* [*ND Cal ADR LR 3-3(a)*].

32.05[3] Action Not Assigned at Filing May Be Assigned to ADR on Stipulation or Motion of Party, or at Court's Initiative. In the Northern District of California, if a case is not assigned by the clerk to the ADR Multi-Option Program, the case may nevertheless be referred for ADR by an order of the assigned judge following a stipulation by all parties, a motion of a party, under ND Cal Civ LR 7, or on the judge's initiative [*ND Cal ADR LR 2-3*; *ND Cal ADR LR 3-3(b)*]. A stipulation of the parties as to an ADR assignment must: (1) designate the specific ADR process the parties have selected, (2) specify the time frame within which the ADR process will be completed, and (3) set forth any other information the parties would like the court to know [*ND Cal ADR LR 2-3*].

Cross Reference:

Form, see *§ 32.72*, also available at http://www.adr.cand.uscourts.gov.

32.05[4] Party May Seek Relief From Assignment to ADR. When a case has been referred automatically to the ADR Multi-Option program, any party may file a motion with the assigned judge for relief from the automatic referral [*ND Cal ADR LR 3-3(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionValidity of ADR Methods

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32.06 ADR Multi-Option Program.

32.06[1] Action Assigned to Multi-Option Program Is Presumptively Subject to One Mandatory Nonbinding ADR Process. The parties in cases assigned to the ADR Multi-Option Program in the Northern District of California are presumptively required to participate in one nonbinding ADR process offered by the court or, with the permission of the district judge, may substitute an ADR process offered by a private provider [*ND Cal ADR LR 3-2*; *ND Cal ADR LR 3-4(b)*].

32.06[2] Several ADR Options Are Available. In an action assigned to the ADR Multi-Option Program in the Northern District of California, the available ADR options are: (1) nonbinding arbitration; (2)early neutral evaluation; (3) mediation; and (4) early settlement conference with a magistrate judge [*ND Cal ADR LR 3-4(a)*, *(c)*]. A private ADR procedure may be substituted for the court annexed program on a stipulation of the parties and permission of the assigned judge [*ND Cal ADR LR 3-4(b)* (private ADR proceedings not subject to enforcement, immunity, or other provisions of ADR local rules); *see 32.02[3]* (enforcing court-annexed ADR resolutions)].

Consider:

Care should be taken to select the type of ADR process best suited for the particular case. For example, if the parties fundamentally disagree on a potentially dispositive legal issue such as the viability of a claim, ENE might be particularly appropriate to give the litigants the benefit of a skilled evaluator's view. If the issues are largely factual of emotional, a mediator might be better positioned to work through the dispute with the parties. Finally, a settlement conference with a magistrate judge may be preferable if, for example, the parties would be inclined to give more credence to the influence of a judicial officer (the "robe" factor). In any event, it is important to remember that the ADR options are not mutually exclusive. If the ADR mechanism selected proves unsuccessful, counsel might consider requesting an alternate form of ADR from the assigned judge as the case proceeds.

Cross Reference:

Discussion of advantages and limitations of ADR procedures, see 3 Moore's Federal Practice, see § 16.53

(Matthew Bender 3d ed.).

32.06[3] ADR Certification Is Required.

32.06[3][a] Certification Must Be Signed, Served, and Filed Prior to Time Specified in Initial Case Management Scheduling Order. In an action assigned to the ADR Multi-Option Program in the Northern District of California, unless otherwise ordered, counsel and client must sign, serve, and file an ADR Certification no later than the date specified in the Order Setting Initial Case Management Conference and ADR Deadlines [*ND Cal Civ LR 16-8(b)*; *ND Cal ADR LR 3-5(b)*].

32.06[3][b] Required Content of ADR Certification. The ADR certification signed, served, and filed in the Northern District of California must certify that both counsel and client have [*ND Cal Civ LR 16-8(b)*; *ND Cal ADR LR 3-5(b)*]:

- Read the handbook entitled *Dispute Resolution Procedures in the Northern District of California* on the ADR unit's website;
- Discussed the available ADR options provided by the court and private entities; and
- Considered whether their case might benefit from any of the available ADR options.

Separate certifications may be filed by each party. If the client is a government or government agency, the certificate must be signed by a representative of the government or agency who is both authorized to sign for the government or agency, and is knowledgeable about the facts of the case and the position of the government or agency [*ND Cal ADR LR 3-5(b)*; *see ND Cal Civ LR 3-9(c)*].

Cross Reference:

Local District Court Forms, see *§ 32.72* and www.adr.cand.uscourts.gov.

32.06[3][c] ADR Certification Must Be Accompanied by Either Stipulation and Order or Notice of Need for Telephone Conference. If counsel for the parties in an action assigned to the ADR Multi-Option Program in the Northern District of California have agreed to a particular ADR process, the ADR certification should be accompanied by a stipulation and proposed order selecting an ADR process [*ND Cal Civ LR 16-8(c)*; *ND Cal ADR LR 3-5(c)*].

Cross Reference:

Form, see *§ 32.72* and www.adr.cand.uscourts.gov.

If, however, counsel are unable to agree on the selection of an ADR process, or if counsel agree tentatively that they would prefer an early settlement conference, the ADR certification should be accompanied by a Notice of Need for ADR Phone Conference [*ND Cal Civ LR 16-8(c)*; *ND Cal ADR LR 3-5(c)*]. A member of the ADR unit's staff will then conduct the phone conference to assist the parties in selecting a particular ADR process [*ND Cal ADR LR 3-5(d)*].

Cross Reference:

Form, see *§ 32.72* and www.adr.cand.uscourts.gov.

32.06[4] Parties Can Select ADR Process.

32.06[4][a] Counsel Must Meet and Confer on ADR Options. As soon as feasible after filing or removal, and no later than the deadline to meet and confer, counsel for the parties must confer in an attempt to agree on an ADR process [*ND Cal ADR LR 3-5(a)*]. Because the referral of the case to the ADR program virtually ensures that some ADR process

will be required, it is in the interest of all parties and counsel to make a serious effort to reach consensus on an ADR process without involving the staff of the ADR unit or the judge presiding over the action.

Strategic Point:

If the parties agree to nonbinding arbitration as the appropriate ADR process, they will have an opportunity to participate in the selection of the arbitrator. If, on the other hand, mediation or early neutral evaluation is selected, the mediator or evaluator will be chosen at random with no input from the parties. This may provide some incentive for one or more of the parties to favor arbitration.

Cross Reference:

Discussion of advantages and limitations of ADR procedures, see 3 Moore's Federal Practice, see § 16.53 (Matthew Bender 3d ed.).

32.06[4][b] Selection of ADR Process Through Phone Conference With Member of ADR Unit Staff. In an action assigned to the ADR Multi-Option Program in the Northern District of California in which the parties have filed a notice of need for an ADR phone conference, counsel are required to participate in a joint ADR phone conference at a time designated by the court. During this phone conference, a member of the ADR legal staff will help counsel identify the ADR process that is likely to be the most beneficial to their particular case [*ND Cal ADR LR 3-5(d)*].

The trial counsel for each party is required to participate in the phone conference, and clients and their insurance carriers may participate as well [*ND Cal ADR LR 3-5(d)(1)*]. Counsel and their clients must review the ADR local rules and the court's ADR handbook on the court's ADR website before the conference [*ND Cal ADR LR 3-5(d)(3)*]. Trial counsel for the first-listed plaintiff in the case caption must arrange for and initiate the conference by calling all other counsel and then the ADR phone conference number, (415) 522-4603, at the appointed time. One-half hour will be reserved for each conference [*ND Cal ADR LR 3-5(d)(2)*].

Parties who stipulate to an ADR process after the ADR phone conference may do so on a form provided by the court under the ADR local rules, or in their case management statement, or may file a separate stipulation and proposed order under *ND Cal ADR LR 2-3(b)* [*ND Cal ADR LR 3-5(d)(5)*].

32.06[4][c] Selection of ADR Process at Case Management Conference. If the parties do not stipulate to a particular ADR process before the case management conference, the assigned judge will discuss with the parties the selection of an option at that conference. The ADR legal staff ordinarily will have recommended to the judge a specific ADR process for the case or that the case be exempted from referral to a process [*ND Cal ADR LR 3-5(e)(1)*].

If the parties agree to a particular ADR process at the conference, and the assigned judge approves, the judge will issue an order referring the case to that process. If the parties still cannot agree on a particular ADR process, the judge may select an appropriate ADR process and issue an order referring the case to that process, or may issue an order referring the case to an early settlement conference [*ND Cal ADR LR 3-5(e)(2)*]. If, however, the parties can demonstrate to the judge at the conference that no ADR process is likely to deliver benefits to the parties sufficient to justify the resources consumed by its use, the judge will exempt the case from participating in any ADR process [*ND Cal ADR LR 3-5(e)(3)*].

32.06[5] Timing of ADR Process in ADR Multi-Option Program. When a case is assigned to the ADR Multi-Option Program, unless otherwise ordered, the ADR session must be held within 90 days after the entry of an order referring the case to a specific ADR process [*ND Cal ADR LR 3-6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADR

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32.07 Nonbinding Arbitration Process Resembles Trial.

While some other ADR processes involve informal dialogue about settlement or case development planning, the process in arbitrations more closely resembles the process in a trial. Although the setting is informal, evidence is presented, testimony is taken, there are opportunities for cross-examination and rebuttal, and closing arguments (or briefs) are entertained. After the parties have presented their evidence and argument the arbitrators retire to deliberate and form their judgment.

Cross Reference:

Discussion of advantages and limitations of arbitration, see 3 Moore's Federal Practice, see § 16.53[3] (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Reserved.

32.08Reserved.

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4-32 MB Practice Guide: Fed Pretrial Civ Proc in CA 32.09

32.09 Appointment of Arbitrator or Panel of Three Arbitrators.

After the entry of an order referring a case to arbitration, the ADR Unit will appoint an arbitrator from the court's panel who has expertise in the subject matter of the case, is available during the appropriate period, and has no apparent conflict of interest. Conflicts of interest and the procedure for objecting to an arbitrator on that basis are governed by *ND Cal ADR LR 2-5(d)*. The court will notify the parties of the appointment [*ND Cal ADR LR 4-3(a)*].

Although generally an ADR arbitration is conducted before a single arbitrator, the court will appoint a panel of three arbitrators on the joint request of all parties and will designate the person to serve as the panel's presiding arbitrator [*ND Cal ADR LR 4-3(a)*].

Cross Reference:

Qualifications of arbitrators, *ND Cal ADR LR 2-5*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-32 MB Practice Guide: Fed Pretrial Civ Proc in CA 32.10

32.10 Arbitrator Will Schedule Arbitration.

32.10[1] Arbitrator Will Consult With Parties. In a case referred for arbitration under the ADR rules of the Northern District of California, the selected arbitrator arranges a phone conference with the parties to discuss the scheduling of the arbitration, as well as other matters such as the procedures to be followed, the submission of written materials, which witnesses will attend, how testimony will be presented, including expert testimony, and whether and how the arbitration will be recorded [*ND Cal ADR LR 4-7*].

After this telephone conference, the arbitrator will fix the date and place for the arbitration [*ND Cal ADR LR 4-4(a)*], which may take place at any location within the district [*ND Cal ADR LR 4-4(b)*]. All counsel are required to respond promptly and cooperate fully with the arbitrator in scheduling both the phone conference and the arbitration hearing [*ND Cal ADR LR 4-4(a)*].

32.10[2] Hearing Date Must Fall Within Time Fixed by Assigned Judge or Within 90 Days of Appointment of Arbitrator. In scheduling the arbitration hearing, the arbitrator must set the hearing for a date that falls within the deadline fixed by the assigned judge, or, in the absence of such a deadline, within 90 days after the entry of an order referring the case to arbitration [*ND Cal ADR LR 4-4(a)*].

If the case is resolved before the scheduled hearing date, or if due to an emergency a participant cannot attend the arbitration, counsel must notify the arbitrator and the ADR unit immediately on learning of the settlement or emergency [*ND Cal ADR LR 4-4(a)*].

32.10[3] Motion Is Required to Extend Deadline for Conducting Arbitration Hearing. A motion under ND Cal Civ LR 7 is required to request an extension of the deadline for conducting an arbitration hearing. The motion must be made no later than 14 days before the hearing is to be held, and must be directed to the assigned judge with copies to the other parties, any appointed arbitrator, and the ADR Unit. The motion must detail the supporting considerations, indicate whether the other parties concur in or object to the request, and be accompanied by a proposed order setting forth a new deadline by which the arbitration hearing must be held [*ND Cal ADR LR 4-5*].

Legal Topics:

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32.11 Written Arbitration Statements Are Required.

32.11[1] Parties Must Submit Statement at Least Seven Days Before Hearing. In a case referred for arbitration under the ADR rules of the Northern District of California, each party must prepare a written arbitration statement. The statement must be submitted directly to the arbitrator and served on all other parties in the action no later than seven days before the arbitration session [*ND Cal ADR LR 4-8(a)*].

32.11[2] Required Content of Statement. The arbitration statements prepared by the parties must be concise and must [*ND Cal ADR LR 4-8(c)*]:

- Summarize the claims and defenses;
- Identify the significant contested factual and legal issues,citing authority on the questions of law;
- Identify proposed witnesses; and
- Identify, by name and title or status, the person(s) with decision-making authority, who, in addition to counsel, will attend the arbitration as representative(s) of the party.

32.11[3] Arbitrator May Excuse or Modify Requirement of Statements. After jointly consulting counsel for all parties, the arbitrator may modify or dispense with the requirements for the parties' written arbitration statements [*ND Cal ADR LR 4-8(d)*].

32.11[4] Statement Is Not Filed With Court. The arbitration statements prepared by the parties must be submitted to the arbitrator and served on the other parties, but must not be filed with the court and the assigned judge must not have access to them [*ND Cal ADR LR 4-8(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods

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32.12 Attendance at Hearing.

32.12[1] Parties Are Required to Attend. In a case referred for arbitration under the ADR rules of the Northern District of California, each party to the action must attend the arbitration hearing unless excused under the court's ADR local rules [*ND Cal ADR LR 4-9(a)*]. The requirement of personal attendance by the parties guarantees litigants an opportunity to articulate their positions and ensures that the party will hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the merits of the case [*ND Cal ADR LR 4-9(a)*].

32.12[2] Corporation or Government Entity Must Be Represented by Person Knowledgeable of Facts of Case. Parties other than natural persons must attend an ADR arbitration, but of course must do so through attendance by an actual person. Accordingly, a corporation or association satisfies the attendance requirement if represented by a person, other than outside counsel, who is knowledgeable about the facts of the case [*ND Cal ADR LR 4-9(a)(1)*]. A governmental entity must send a representative knowledgeable about both the facts of the case and the governmental unit's position [*ND Cal ADR LR 4-9(a)(2)*].

32.12[3] Each Party Must Be Represented by Trial Counsel. Each party to an ADR arbitration must be accompanied at the arbitration session by the lawyer who will be primarily responsible for handling the trial of the matter [*ND Cal ADR LR 4-9(b)*].

32.12[4] Required Persons May Request to Be Excused From Attendance.

32.12[4][a] Request Must Be in Writing, 14 Days Before Hearing. A party or other person required to attend an ADR arbitration may seek to be excused from attendance by submitting a letter to the ADR magistrate judge, with copies submitted to the ADR unit, all other counsel, and the arbitrator [*ND Cal ADR LR 4-9(c)*].

The letter must be submitted no fewer than 14 days before the date set for the arbitration [*ND Cal ADR LR 4-9(c)*].

32.12[4][b] Hardship Is Required. The letter seeking permission on behalf of a party or attorney to be excused from required attendance at an ADR arbitration must establish that personal attendance would impose an extraordinary

or otherwise unjustifiable hardship and must [*ND Cal ADR LR 4-9(c)*]:

- Set forth with specificity all considerations that support the request;
- State realistically the amount in controversy in the case;
- Indicate whether the other party or parties join in or object to the request; and
- Be accompanied by a proposed order.

32.12[4][c] Excused Person Must Be Available by Telephone. If attendance of the party or attorney is excused, the person must nevertheless be available to participate by telephone [*ND Cal ADR LR 4-9(d)*].

32.12[5] Failure of Party to Attend. When a party has not been excused from attendance at an ADR arbitration, the party's unexcused absence is not a ground for continuance of the arbitration. However, default damages may not be awarded against an absent party; instead, the party seeking the damages must make a proper evidentiary showing for those damages to the arbitrator [*ND Cal ADR LR 4-10(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesRequired RepresentationCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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32.13 Conduct of Arbitration Hearing.

32.13[1] Arbitrator Does Not Facilitate Settlement. In a case referred for arbitration under the ADR rules of the Northern District of California, the arbitrator is generally empowered to take whatever actions are necessary to conduct the required arbitration hearing, including administering oaths and affirmations, making rulings necessary for the fair and efficient conduct of the hearing, and making awards [*ND Cal ADR LR 4-10(a)*; *see 28 USC § 655(a)*].

An ADR arbitrator, however, is not a settlement facilitator [*ND Cal ADR LR 4-1*]. If the parties to the ADR arbitration desire assistance with settlement, the parties or the arbitrator may request that the case be referred to mediation, early neutral evaluation, or a settlement conference [*ND Cal ADR LR 4-10(b)*]. The arbitrator also should not bifurcate the arbitration except in extraordinary circumstances [*ND Cal ADR LR 4-10(c)*].

32.13[2] Witnesses and Documents May Be Subpoenaed. In a case referred for arbitration under the ADR rules of the Northern District of California, the arbitrator may compel the attendance of witnesses and the production of documents for the arbitration hearing when appropriate under *Fed R Civ P 45* [*ND Cal ADR LR 4-10(e)(1)*; *see 28 USC § 656*].

32.13[3] Testimony Must Be Taken Under Oath With Opportunity for Cross-Examination. Testimony at an ADR arbitration must be taken under oath or affirmation, and must be subject to reasonable cross-examination as warranted by the circumstances [*ND Cal ADR LR 4-10(e)(2)*].

32.13[4] Admission of Evidence Guided by Federal Rules of Evidence. In receiving evidence at an ADR arbitration, the arbitrator is to be guided by the Federal Rules of Evidence, but the arbitrator is not precluded by those rules from receiving evidence that is not privileged if the arbitrator considers the evidence relevant and trustworthy [*ND Cal ADR LR 4-10(e)(3)*].

32.13[5] Ex Parte Contact With Arbitrator Prohibited. With the exception of contacts necessary for scheduling conferences and the arbitration hearing, the arbitrator and the parties are not to engage in any ex parte communications [*ND Cal ADR LR 4-6*].

32.13[6] Hearing May Be Recorded or Transcribed. Any party may cause a transcript or recording of the arbitration proceedings to be made. That party, however, must provide a copy of the transcript or recording to any other party who both requests and agrees to pay the reasonable costs of producing the copy [*ND Cal ADR LR 4-10(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.14 Arbitration Award.

32.14[1] Form of Arbitration Award. After an arbitration session has been held under the ADR rules of the Northern District of California, the arbitrator must enter an arbitration award that states clearly and concisely the name or names of the prevailing parties, and the party or parties against which it is rendered, as well as the precise amount of money, if any, awarded [*ND Cal ADR LR 4-11(a)*]. The award may, at the discretion of the arbitrator, include a statement of reasons for the decision. The award must be in writing and, unless the parties stipulate otherwise, be signed by the arbitrator. An award may include any costs authorized by *Fed R Civ P 54* and ND Cal Civ LR 54 [*ND Cal ADR LR 4-11(a)*].

32.14[2] Award Must Be Filed by Arbitrator With Clerk Within 14 Days After Arbitration Hearing Concluded. The arbitrator must, within 14 days after the arbitration hearing is concluded, file the arbitration award with the clerk in an unsealed envelope, with a cover sheet that [*ND Cal ADR LR 4-11(b)*]:

- Lists the case caption, case number, and name of the arbitrator, but does not specify the content of the arbitration award; and

- States the following: "Arbitration Award to be filed under seal pursuant to ADR LR 4-11--not to be forwarded to the Assigned Judge."

32.14[3] Award Must Be Served on Parties Both by Clerk and by Prevailing Party. After the arbitration award has been filed by the arbitrator, the clerk is to promptly serve copies of the arbitration award on the parties [*ND Cal ADR LR 4-11(b)*]. In addition, the prevailing party in the arbitration must serve a copy of the award on the other parties immediately after receipt of the award [*ND Cal ADR LR 4-11(b)*; *see 28 USC § 657(a)* (similar statutory provision)]. The prevailing party must file proof of that service under *ND Cal Civ LR 5-6*, but must not attach a copy of the award to the proof of service [*ND Cal ADR LR 4-11(b)*].

32.14[4] Award Must Be Sealed by Clerk. After the arbitration award has been filed by the arbitrator, the clerk is to promptly seal the award, and it is not to be unsealed or otherwise disclosed to the assigned judge until the court has

entered a final judgment in the action, or the action has been otherwise terminated, except as necessary to assess costs or prepare any report required by an applicable federal statute [*ND Cal ADR LR 4-11(c)*; *see 28 USC§ 657(b)*]. This sealing of the award is designed to ensure that the result of the arbitration proceeding will not be known in any subsequent trial de novo in the district court.

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.15 Challenging Arbitration Award.

32.15[1] Demanding Trial De Novo.

32.15[1][a] Demand for Trial De Novo Must Be Filed and Served Within 30 Days of Notice of Award. After the arbitration award has been filed by the arbitrator and served on the parties, any party wishing to challenge the award must file and serve a demand for trial de novo within 30 days of notice of the filing of the arbitration award [*ND Cal ADR LR 4-12(a)*; *see 28 USC § 657(c)(1)*].

32.15[1][b] Timely Demand Precludes Entry of Judgment on Award. If any party to the arbitration award makes a timely demand for trial de novo in the district court, no judgment is entered, and the actions proceeds in the normal manner before the assigned judge [*ND Cal ADR LR 4-12(a)*; *see 28 USC § 657(c)(2)*].

32.15[1][c] Award Must Not Be Attached to Demand. A party filing a demand for trial de novo after an arbitration award must not attach the award to the demand [*ND Cal ADR LR 4-12(c)*].

32.15[2] Evidence of Arbitration Proceeding Inadmissible in Trial De Novo. If any party to the arbitration award makes a timely demand for trial de novo in the district court, evidence indicating that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding is not admissible at the trial de novo, unless the evidence is admissible under the Federal Rules of Evidence or the parties have otherwise stipulated [*ND Cal ADR LR 4-12(b)*; *see 28 USC § 657(c)(3)* (similar statutory provision)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.16 Entry of Judgment on Arbitration Award.

32.16[1] Judgment Entered on Award If No Timely Demand for Trial De Novo Filed. If the parties to an arbitration award fail to make a timely demand for trial de novo in the district court, the arbitration award is entered as the judgment of the court. That judgment has the same force and effect as any other judgment of the court, except that the judgment may not be reviewed by appeal or otherwise [*ND Cal ADR LR 4-11(d)*; *see 28 USC § 657(a)*]. Judgment may be entered on the award because the failure to file a timely demand for trial de novo waives any right to seek trial de novo [*ND Cal ADR LR 4-12(a)*].

32.16[2] Judgment Entered on Award If Parties Have Stipulated in Writing to Waive Right to Trial De Novo. At any time before the arbitration hearing, the parties may stipulate in writing to waive their rights to request trial de novo of any arbitration award. Such a stipulation must be filed and submitted to the assigned judge for approval. If such a stipulation is made and approved, judgment is to be entered on the arbitration award under *ND Cal ADR LR 4-11(d)* [*ND Cal ADR LR 4-13*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.17 ENE Can Focus Issues Early in Pretrial Process.

ENE may be particularly useful when one or more of the parties needs a reality check, has difficulty seeing the case from the opponent's perspective, or would simply feel more comfortable deciding whether to settle, or how to move the case forward, if that party had input from a neutral lawyer with considerable experience in the same kind of litigation. This process may also be useful to position the matter for later disposition by settlement, motion, or trial. The experienced neutral evaluator can work with the parties to narrow and focus the dispute early in the pretrial period.

Cross Reference:

Discussion of advantages and limitations of ENE, see 3 Moore's Federal Practice, see § 16.53[5] (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.18 Case Will Be Assigned to Experienced Neutral With Subject Matter Expertise.

In an action referred for ENE in the Northern District, the parties and their counsel make compact presentations of their claims and defenses, and receive a nonbinding evaluation by an experienced neutral with subject matter expertise [*ND Cal ADR LR 5-1*]. This evaluation may be of great assistance to the parties in negotiating a settlement of the action, either with or without the assistance of the evaluator. Subject to the availability of administrative resources and of an evaluator with subject matter expertise, appropriate civil cases may be referred to ENE by order of the assigned judge following a stipulation by all parties, on motion of a party, or on the judge's initiative [*ND Cal ADR LR 5-2*].

Cross Reference:

Qualifications of evaluator, *ND Cal ADR LR 2-5(b)(2)*.

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32.19 Party May Object to Evaluator.

If a party wishes to object to the appointment of a particular evaluator for some reason not disclosed by the evaluator, the party must, within seven days of learning the identity of the evaluator, deliver to the ADR unit and to all other counsel a writing that specifies the bases for the objection. The ADR director will then determine whether the proposed evaluator will serve, or whether another should be appointed. Appeal from such a determination must be made directly to the ADR magistrate judge within seven days of the notice of the ADR director's determination [*ND Cal ADR LR 2-5(d)(4)*].

Legal Topics:

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32.20 Ex Parte Contact With Evaluator Prohibited.

With the exception of contacts necessary for scheduling conferences and the ENE session, the evaluator and the parties are not to engage in any ex parte communications until after the evaluator has committed any evaluation to writing and all parties have agreed that ex parte communications with the evaluator may occur [*ND Cal ADR LR 5-6*].

Legal Topics:

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32.21 Evaluator Will Schedule ENE Session.

32.21[1] Evaluator Will Consult With Parties. In a case referred for ENE evaluation under the ADR rules of the Northern District of California, the selected evaluator arranges a phone conference with the counsel who will attend the ENE session to discuss the scheduling of the ENE session, as well as other matters such as the procedures to be followed, the nature of the case, and which client representatives will attend the session [*ND Cal ADR LR 5-7*].

After the telephone conference, the evaluator will fix the date and place for the ENE session. All counsel are required to respond promptly and cooperate fully with the evaluator in scheduling both the phone conference and the ENE session [*ND Cal ADR LR 5-4(a)*].

32.21[2] ENE Session Must Be Held Within 90 Days After Entry of Order Referring Case to ENE. Unless otherwise ordered, the ENE session must be held within 90 days after the entry of the order referring the case to ENE [*ND Cal ADR LR 5-4(b)*].

32.21[3] Party May Request to Extend Time to Conduct ENE Session.

32.21[3][a] Motion Must Be Filed No Later Than 14 Days Before ENE Session Is to Be Held. Any request for an extension of the deadline for conducting an ENE session must be made by motion no later than 14 days before the ENE session is to be held [*ND Cal ADR LR 5-5(a)*]. The motion must be directed to the assigned judge, with copies presented to the other parties, any appointed evaluator, and the ADR unit [*ND Cal ADR LR 5-5(a)*].

32.21[3][b] Required Content of Motion. A motion seeking an extension of the deadline for conducting an ENE session must [*ND Cal ADR LR 5-5(b)*]:

- Detail the considerations that support the request;
- Indicate whether the other parties concur in or object to the request; and

- Be accompanied by a proposed order setting forth a new deadline by which the ENE session will be held.

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.22 Written ENE Statements Are Required.

32.22[1] Parties Must Submit ENE Statements at Least Seven Days Before First ENE Session. In a case referred for ENE in the Northern District of California, each party must prepare a written ENE statement. The statement must be submitted directly to the evaluator and served on all other parties in the action no later than seven calendar days before the first ENE session [*ND Cal ADR LR 5-8(a)*].

32.22[2] ENE Statement Is Not Filed With Court. The ENE statements prepared by the parties are to be submitted to the evaluator and served on the other parties, but are otherwise confidential, and are not to be filed with the court or the judge assigned to the action [*ND Cal ADR LR 5-8(b)*].

32.22[3] Required Content of ENE Statement. The ENE statements prepared by the parties must be concise, and may include any information that may be useful to the evaluator [*ND Cal ADR LR 5-8(c)*]. The statements must [*ND Cal ADR LR 5-8(c)*]:

- Identify, by name and title or status: (1) the person with decision-making authority, who, in addition to counsel, will attend the ENE session as representative of the party; and (2) persons connected with a party opponent, such as an insurer, whose presence might substantially improve the utility of the ENE session or the prospects for settlement;

- Briefly describe the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence;

- Address whether there are legal or factual issues whose early resolution would reduce significantly the scope of the dispute or contribute to settlement negotiations;

- Identify the discovery that is necessary to equip the parties for meaningful settlement negotiations; and

- Include copies of documents, such as contracts, on which the suit is premised, or whose availability would materially advance the purposes of the ENE session, such as medical reports or other documents supporting damage claims.

Distinguish--Special Provisions in Intellectual Property Cases:

- *Patent Cases:* When the case concerns the validity or infringement of a utility patent, each party must attach to its written ENE Statement a copy of each document the party has by that time been required to generate under the court's preliminary disclosure obligations for patent cases found in *ND Cal Pat LR 3-1*, *3-3*, *3-5(a)*, or under any case-specific order modifying the requirements of those rules. A party whose disclosure duty has arisen only under *ND Cal Pat LR 3-5(a)* may satisfy these requirements by attaching to its written ENE Statement a copy of documents it was required to generate under *ND Cal Pat LR 3-3* [*ND Cal ADR LR 5-9(a)*].

- *Copyright Cases:* A party who bases a claim on copyright must attach to its written ENE Statement the copyright registration and exemplars of both the copyrighted work and the allegedly infringing work, and must make a systematic comparison showing points of similarity. The party's ENE Statement must also present whatever direct or indirect evidence it has of copying, and must indicate whether it intends to elect statutory or actual damages. Each party in a copyright case that is accused of infringing must set forth in its written ENE statement the dollar volume of sales of and profits from the allegedly infringing works that it and any entities for which it is legally responsible have made [*ND Cal ADR LR 5-9(b)*].

- *Trademark Cases:* A party who bases a claim on trademark or trade dress infringement, or on other unfair competition, must attach to its written ENE Statement its registration, if any, exemplars of both its use of its mark and use of the allegedly infringing mark, both including a description or representation of the goods or services on or in connection with which the marks are used, and any evidence it has of actual confusion. If "secondary meaning" is in issue, the party must also describe the nature and extent of the advertising it has done with its mark, and the volume of goods it has sold under its mark. Both parties must describe in their ENE Statements how the consuming public is exposed to their respective marks and goods or services, including, if available, photographic or other demonstrative evidence. Each party in a trademark or unfair competition case that is accused of infringement must set forth the dollar volume of sales of and profits from goods or services bearing the allegedly infringing mark [*ND Cal ADR LR 5-9(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.23 Attendance at ENE Session.

32.23[1] Parties Are Required to Attend. In a case referred for ENE evaluation under the ADR rules of the Northern District of California, each party to the action must attend the ENE session unless excused under the court's ADR local rules [*ND Cal ADR LR 5-10(a)*]. The requirement of personal attendance by the parties guarantees litigants an opportunity to articulate their positions and ensures that the party will hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the merits of the case [*ND Cal ADR LR 5-10(a)*].

32.23[2] Corporation or Government Entity Must Be Represented by Person Knowledgeable of Facts With Authority to Settle. Parties other than natural persons must attend an ENE session, but of course must do so through attendance by an actual person. Accordingly, a corporation or association satisfies the attendance requirement if represented by a person, other than outside counsel, who has authority to settle and is knowledgeable about the facts of the case [*ND Cal ADR LR 5-10(a)(1)*]. A governmental entity must send a representative who has the authority to settle, and is knowledgeable about the facts of the case, the governmental unit's position, and the governmental unit's settlement procedures and policies [*ND Cal ADR LR 5-10(a)(2)*].

32.23[3] Parties Must Be Represented by Trial Counsel. Each party to an ENE process must be accompanied at the ENE session by the lawyer who will be primarily responsible for handling the trial of the matter [*ND Cal ADR LR 5-10(b)*].

32.23[4] Insurer Must Attend When Necessary to Achieve Settlement. Insurer representatives are required to attend an ENE session in person if their agreement would be necessary to achieve a settlement [*ND Cal ADR LR 5-10(c)*]. An insurer, however, may seek to be excused from required attendance [*ND Cal ADR LR 5-10(c)*].

32.23[5] Required Person May Request to Be Excused From Attendance at ENE Session.

32.23[5][a] Request Must Be in Writing. A party or other person required to attend an ENE session may seek to be excused from attendance by submitting a letter to the ADR magistrate judge, with copies submitted to the ADR unit, all other counsel, and the evaluator [*ND Cal ADR LR 5-10(d)*].

32.23[5][b] Request Must Be Made No Fewer Than 14 Days Before Date of ENE Session. The letter seeking permission on behalf of a party, attorney, or insurer to be excused from required attendance at an ENE session must be submitted no fewer than 14 days before the date set for the session [*ND Cal ADR LR 5-10(d)*].

32.23[5][c] Hardship Is Required. The letter seeking permission for nonattendance must establish that personal attendance would impose an extraordinary or otherwise unjustifiable hardship [*ND Cal ADR LR 5-10(d)*].

32.23[5][d] Required Content of Request. The letter seeking permission on behalf of a party, attorney, or insurer to be excused from required attendance at an ENE session must [*ND Cal ADR LR 5-10(d)*]:

- Set forth all considerations that support the request;
- State realistically the amount in controversy in the case;
- Indicate whether the other party or parties join in or object to the request; and
- Be accompanied by a proposed order.

32.23[5][e] Excused Person Must Be Available by Phone. If attendance of the party, attorney, or insurer is excused, the person must nevertheless be available to participate in the ENE session by telephone [*ND Cal ADR LR 5-10(f)*].

32.23[6] Party May Oppose Request to Be Excused.

32.23[6][a] Request Must Be in Writing. A party may oppose another party's request to be excused from attending in person an ENE session by submitting a letter to the ADR magistrate judge, with copies served simultaneously on the ADR Unit, all other parties, and the evaluator [*ND Cal ADR LR 5-10(e)(1)*].

32.23[6][b] Request Must Be Made Within Four Days of Receiving Request to Be Excused. The letter opposing another party's request to be excused from attending in person an ENE session must be submitted within four days of receiving a copy of the request [*ND Cal ADR LR 5-10(e)(1)*].

32.23[6][c] Required Content of Request. The letter opposing another party's request to be excused from attending in person an ENE session must state all grounds for the opposition [*ND Cal ADR LR 5-10(e)(1)*].

32.23[6][d] Request Is Not Filed With Court. The letter opposing another party's request to be excused from attending in person an ENE session may not be filed with the court or disclosed to the assigned judge [*ND Cal ADR LR 5-10(e)(1)*].

32.23[7] Party May Seek to Compel Attendance by Appropriate Party Representative.

32.23[7][a] Allegation Must Be in Writing. A party may allege that another party will not be represented at an ENE session by an appropriate representative by submitting a letter to the ADR magistrate judge, with copies served simultaneously on the ADR Unit, all other parties, and the evaluator [*ND Cal ADR LR 5-10(e)(2)*].

32.23[7][b] Letter Must Be Submitted As Far in Advance of ENE Session as Practicable. The letter alleging that another party will not be represented at an ENE session by an appropriate representative must be submitted as far in advance of the session as practicable [*ND Cal ADR LR 5-10(e)(2)*].

32.23[7][c] Required Content of Letter. The letter alleging that another party will not be represented at an ENE session by an appropriate representative must state the bases for this allegation, along with a proposed order [*ND Cal ADR LR 5-10(e)(2)*].

32.23[7][d] Letter Is Not Filed With Court. The letter alleging that another party will not be represented at an ENE session by an appropriate representative may not be filed with the court or disclosed to the assigned judge [*ND Cal ADR LR 5-10(e)(2)*].

32.23[8] Challenged Party May Respond to Allegation That It Will Not Be Represented by Appropriate Representative at ENE Session.

32.23[8][a] Response Must Be in Writing. A party may respond to another party's allegation that the respondent will not be represented at an ENE session by an appropriate representative by submitting a letter to the ADR magistrate judge, with copies served simultaneously on the ADR Unit, all other parties, and the evaluator [*ND Cal ADR LR 5-10(e)(2)*].

32.23[8][b] Response Must Be Made Within Four Days of Receiving Letter Seeking to Compel Attendance by Appropriate Representative. The letter responding to a party's allegation that the respondent will not be represented at an ENE session by an appropriate representative must be submitted within four days of receiving the letter seeking to compel attendance by an appropriate representative [*ND Cal ADR LR 5-10(e)(2)*].

32.23[8][c] Response Is Not Filed With Court. The letter responding to a party's allegation that the respondent will not be represented at an ENE session by an appropriate representative may not be filed with the court or disclosed to the assigned judge [*ND Cal ADR LR 5-10(e)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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C. Early Neutral Evaluation (ENE)

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32.24 Procedure at ENE Session.

32.24[1] Assigned Duties of Evaluator. In a case referred for early neutral evaluation (ENE) under the ADR rules of the Northern District of California, the evaluator is generally empowered to take whatever actions are necessary to conduct the required ENE session, including any or all of the following [*ND Cal ADR LR 5-11(a)*]:

- Permitting each party (through counsel or otherwise), orally and through documents or other media, to present its claims or defenses and to describe the principal evidence on which the claims and defenses are based;

- Helping the parties identify areas of agreement and, if feasible, entering stipulations;

- Assessing the relative strengths and weaknesses of the parties'contentions and evidence, and explaining carefully the reasoning that supports these assessments;

- Estimating, if feasible, the likelihood of liability and the dollar range of damages;

- Helping the parties devise a plan for disclosures or discovery of key information that will equip them as expeditiously as possible to enter meaningful settlement discussions or to position the case for disposition by other means;

- Helping the parties assess litigation costs realistically;

- Helping the parties, if they are interested, explore the possibility of settling the case; and

- Determining whether some form of follow up to the session would contribute to the case development process or to settlement.

32.24[2] Limitations on Authority of Evaluator. Although an ENE evaluator may have broad powers to

accomplish the goals of an ENE session, an evaluator is not the equivalent of a presiding judge or magistrate judge, and therefore does not have the full authority of such a judge. Specifically, an evaluator does not have the authority to compel parties to conduct or respond to discovery or to file motions. Nor do evaluators have the authority to determine what the issues in any case are, to impose limits on the parties' pretrial activities, or to impose any sanctions [*ND Cal ADR LR 5-13(d)*].

32.24[3] Proceedings Are Informal; Rules of Evidence Inapplicable. An ENE session is designed to be an extremely flexible process, and the session is therefore informal. Specifically, the rules of evidence do not apply, and there is to be no formal examination or cross-examination of witnesses [*ND Cal ADR LR 5-11(b)*].

32.24[4] Transcript Is Not Permitted. An ENE session is designed to be an extremely flexible process, and the session is therefore informal; no transcript or other recording of the proceedings is permitted [*ND Cal ADR LR 5-11(b)*].

32.24[5] Delivery of Evaluation. After the parties have made their presentations and arguments at the ENE session, the evaluator will deliver an overall evaluation of the strengths and weaknesses of the parties' positions. On demand by any party, the evaluation is to be presented orally [*ND Cal ADR LR 5-11(c)*]. If all parties agree, they may proceed to discuss settlement after the evaluation has been written but before it is presented [*ND Cal ADR LR 5-11(c)*]. The parties also may agree to discuss settlement after the evaluation has been presented [NC Cal ADR LR 5-11(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.25 ENE Sessions Are Confidential.

In a case referred for ENE in the Northern District of California, the court, the evaluator, all counsel and parties, and any other persons attending the ENE session must safeguard the confidentiality of the ENE proceedings, including the contents of the written ENE Statements, anything that happened or was said, any position taken, and any view of the merits of the case formed by any participant in connection with any ENE session [*ND Cal ADR LR 5-12(a)*]. The evaluator may ask the parties and all persons attending the ENE session to sign a confidentiality agreement [*ND Cal ADR LR 5-12(c)*].

The confidentiality of ENE sessions does not preclude the following [*ND Cal ADR LR 5-12(b)*]:

(1) Disclosures as stipulated by all parties and the evaluator;

(2) Disclosures as stipulated by all parties, without the consent of the evaluator, for use in a subsequent confidential ADR or settlement proceeding;

(3) A report to or inquiry by the ADR magistrate judge regarding a possible violation of the ADR local rules;

(4) The evaluator from discussing the ENE session in confidence with the court's ADR staff;

(5) Any participant or the evaluator from responding to a proper request for information made in connection with monitoring or evaluating the court's ADR program; or

(6) Disclosures otherwise required by law.

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.26 Follow Up to ENE Session.

32.26[1] Evaluator May Order Limited Follow Up Without Stipulation of Parties. At the close of the ENE session, the evaluator and the parties must discuss whether it would be beneficial to schedule any follow up to the session [*ND Cal ADR LR 5-13(a)*]. With or without a stipulation of the parties, the evaluator may order the parties to engage in any of the following types of follow up [*ND Cal ADR LR 5-13(b)*]:

- Responses to settlement offers or demands;
- A focused telephone conference;
- Exchanges of letters between counsel addressing specified legal or factual issues; or
- Written or telephonic reports to the evaluator, e.g., describing how discovery or other events occurring after the ENE session have affected a party's analysis of the case or position with respect to settlement.

32.26[2] With Stipulation of Parties, Evaluator May Order Additional ENE Sessions. If the parties consent, the evaluator may schedule one or more follow up ENE sessions. These follow up sessions may include additional evaluation, settlement discussions, or case development planning [*ND Cal ADR LR 5-13(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.27 Evaluator Must File Certification of ENE Session Within 14 Days After Close of Session.

Within 14 days of the close of each ENE session, the evaluator must report to the ADR unit on a court-provided form, which the ADR unit will then file with the court. The report must contain the date of the ENE session, whether any follow up is scheduled, whether the case settled in whole or in part, and any stipulations the parties agree may be disclosed [*ND Cal ADR LR 5-14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.28 Mediator Facilitates Settlement.

Mediation in the Northern District is a flexible, nonbinding, confidential process in which a neutral person, the mediator, facilitates settlement negotiations. The mediator generally does not provide an overall evaluation of the merits of the case, but instead facilitates settlement in a variety of ways, such as [*ND Cal ADR LR 6-1*]:

- Improving communication across party lines;
- Helping parties articulate their interests and understand those of their opponent;
- Probing the strengths and weaknesses of each party's legal positions;
- Identifying areas of agreement; and
- Helping to generate options for a mutually agreeable resolution to the dispute.

Subject to the availability of administrative resources and of a suitable mediator, appropriate civil cases may be referred to mediation by order of the assigned judge following a stipulation by all parties, on motion of a party, or on the judge's initiative [*ND Cal ADR LR 6-2*].

Cross References:

Qualifications of mediators, *ND Cal ADR LR 2-5(b)*.

Advantages and limitations of mediation, see 3 Moore's Federal Practice, see § 16.53[2] (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.29 Party May Object to Mediator.

If a party wishes to object to service by a mediator for some reason not disclosed by the mediator, the party must, within seven days of learning the identity of the mediator, deliver to the ADR unit and to all other counsel a writing that specifies the bases for the objection. The ADR director will then determine whether the proposed mediator will serve, or whether another should be appointed. Appeal from such a determination must be made directly to the ADR magistrate judge within seven days of the notice of the ADR director's determination [*ND Cal ADR LR 2-5(d)(4)*].

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32.30 Mediator Schedules Mediation Session.

32.30[1] Mediator Will Consult With Parties. In a case referred for mediation under the ADR rules of the Northern District of California, the selected mediator arranges a phone conference with the counsel who will attend the mediation session to discuss the scheduling of the mediation session, as well as other matters such as the procedures to be followed, the nature of the case, and which client representatives will attend the session [*ND Cal ADR LR 6-6*].

After this telephone conference, the mediator will fix the date and place for the mediation session. All counsel are required to respond promptly and cooperate fully with the mediator in scheduling both the phone conference and the mediation session [*ND Cal ADR LR 6-4(a)*].

32.30[2] Mediation Must Be Held Within 90 Days After Entry of Order Referring Case to Mediation. Unless otherwise ordered, the mediation session must be held within 90 days after the entry of the order referring the case to mediation [*ND Cal ADR LR 6-4(b)*].

32.30[3] Party May Move to Extend Time for Mediation.

32.30[3][a] Motion Must Be Filed No Later Than 14 Days Before Mediation Is to Be Held. Any request for an extension of the deadline for conducting a mediation session must be made by motion no later than 14 days before the session is to be held [*ND Cal ADR LR 6-5(a)*]. The motion must be directed to the assigned judge, with copies presented to the other parties, any appointed mediator, and the ADR unit [*ND Cal ADR LR 6-5(a)*].

32.30[3][b] Required Content of Motion. A motion seeking an extension of the deadline for conducting a mediation session must [*ND Cal ADR LR 6-5(b)*]:

- Detail the considerations that support the request;
- Indicate whether the other parties concur in or object to the request; and

- Be accompanied by a proposed order setting forth a new deadline by which the mediation session will be held.

Legal Topics:

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32.31 Parties Must Submit Mediation Statement.

32.31[1] Statements Must Be Submitted at Least Seven Days Before First Mediation Session. In a case referred for mediation in the Northern District of California, each party must prepare a written mediation statement. The statement must be submitted directly to the mediator and served on all other parties in the action no later than seven calendar days before the first mediation session [*ND Cal ADR LR 6-7(a)*].

32.31[2] Required Content of Mediation Statement. The mediation statements prepared by the parties must be concise, and may include any information that may be useful to the mediator [*ND Cal ADR LR 6-7(c)*]. The statements must [*ND Cal ADR LR 6-7(c)*]:

- Identify, by name and title or status (1) the person with decision-making authority, who, in addition to counsel, will attend the mediation as representative of the party; and (2) persons connected with a party opponent, such as an insurer, whose presence might substantially improve the utility of the mediation or the prospects for settlement;

- Describe briefly the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence;

- Identify the discovery or motions that promise to contribute most to equipping the parties for meaningful settlement negotiations;

- Describe the history and status of any settlement negotiations, and provide any other information about any interests or considerations not described elsewhere in the statement that might be pertinent to settlement; and

- Include copies of documents likely to either make the mediation more productive, or to materially advance settlement prospects.

Caution:

Ordinarily, parties should be able to include in their mediation statements a description of the history and status of any settlement negotiations. An exception may exist for negotiations held during a prior mediation or ENE session, if all parties do not agree to the disclosure of these negotiations [ND Cal ADR 6-7 Commentary]. These prohibitions are distinct from rules (*e.g.*, Fed R Evid 408) prohibiting the admission into evidence of settlement offers and demands, which ordinarily would not prevent inclusion of the settlement history in a mediation statement [ND Cal ADR 6-7 Commentary].

32.31[3] Mediation Statements Are Not Filed With Court. The mediation statements prepared by the parties are to be submitted to the mediator and served on the other parties, but are otherwise confidential, and are not to be filed with the court or the judge assigned to the action [*ND Cal ADR LR 6-7(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.31A Contact with Mediator Before Mediation.

32.31A[1] Mediator May Ask Parties to Submit Additional Mediation Statement Only to Mediator. Before the mediation, the mediator may ask each party to submit only to the mediator an additional confidential written statement or may discuss the case in confidence with a lawyer by telephone [*ND Cal ADR LR 6-9*].

32.31A[2] Additional Mediation Statement Is Confidential. The mediator must not disclose any party's confidential communication without permission [*ND Cal ADR LR 6-9*].

32.31A[3] Content of Additional Mediation Statement. Confidential mediation statements may address such matters as the party's views about his/her own interests, the interests of the other side, analysis of the best and worst alternatives to a negotiated settlement, the strengths and weaknesses of the legal case, and an estimated budget to litigate the case [*ND Cal ADR LR 6-9*].

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32.32 Attendance at Mediation.

32.32[1] Parties Are Required to Attend. In a case referred for mediation under the ADR rules of the Northern District of California, each party must attend the mediation session unless excused under the court's ADR local rules [*ND Cal ADR LR 6-10(a)*]. The requirement of personal attendance by the parties guarantees litigants an opportunity to articulate their positions, and ensures that the party will hear, first hand, their opponent's version of the matters in dispute. Personal attendance also enables parties to work directly with their opponents to reach mutually agreeable solutions [*ND Cal ADR LR 6-10(a)*].

32.32[2] Corporation or Government Entity Must Be Represented by Person Knowledgeable of Facts With Authority to Settle. Parties other than natural persons must attend a mediation session, but of course must do so through attendance by an actual person. Accordingly, a corporation or association satisfies the attendance requirement if represented by a person, other than outside counsel, who is knowledgeable about the facts of the case and has authority to settle the action [*ND Cal ADR LR 6-10(a)(1)*]. A governmental entity must send a representative who has the authority to settle, and who is knowledgeable about the facts of the case, the governmental unit's position, and the governmental unit's settlement procedures and policies [*ND Cal ADR LR 6-10(a)(2)*].

32.32[3] Each Party Must Be Represented by Trial Counsel. Each party to a mediation must be accompanied at the mediation session by the lawyer who will be primarily responsible for handling the trial of the matter [*ND Cal ADR LR 6-10(b)*].

32.32[4] Insurer Must Attend When Necessary to Achieve Settlement. Insurer representatives are required to attend a mediation session in person if their agreement would be necessary to achieve a settlement [*ND Cal ADR LR 6-10(c)*]. An insurer, however, may seek to be excused from required attendance [*ND Cal ADR LR 6-10(c)*].

32.32[5] Required Person May Request to Be Excused From Attendance at Mediation.

32.32[5][a] Request Must Be Made in Writing. A party or other person required to attend a mediation session may seek to be excused from attendance by submitting a letter to the ADR magistrate judge, with copies submitted to

the ADR unit, all other counsel, and the mediator [*ND Cal ADR LR 6-10(d)*].

32.32[5][b] Request Must Be Made No Fewer Than 14 Days Before Date of Mediation. The letter seeking permission on behalf of a party, attorney, or insurer to be excused from required attendance at a mediation must be submitted no fewer than 14 days before the date set for the mediation session [*ND Cal ADR LR 6-10(d)*].

32.32[5][c] Hardship Is Required. The letter seeking permission must establish that personal attendance "would impose an extraordinary or otherwise unjustifiable hardship" [*ND Cal ADR LR 6-10(d)*].

32.32[5][d] Required Content of Request. The letter seeking permission on behalf of a party, attorney, or insurer to be excused from required attendance at a mediation session must [*ND Cal ADR LR 6-10(d)*]:

- Set forth all considerations that support the request;
- State realistically the amount in controversy in the case;
- Indicate whether the other party or parties join in or object to the request; and
- Be accompanied by a proposed order.

32.32[5][e] Excused Person Must Be Available by Phone. If attendance of the party, attorney, or insurer is excused, the person must nevertheless be available to participate in the mediation by telephone [*ND Cal ADR LR 6-10(f)*].

32.32[6] Party May Oppose Another Party's Request to Be Excused.

32.32[6][a] Opposition Must Be in Writing. A party may submit a letter to the ADR Magistrate Judge opposing another party's request to be excused from attending in person a mediation session [*ND Cal ADR LR 6-10(e)(1)*]. The letter must be served simultaneously on the ADR Unit, all other parties, and the mediator [*ND Cal ADR LR 6-10(e)(1)*].

32.32[6][b] Letter Is Confidential. The letter opposing another party's request to be excused from attending in person a mediation session may not be filed or disclosed to the assigned judge [*ND Cal ADR LR 6-10(e)(1)*].

32.32[6][c] Letter Must Be Submitted Within Four Days of Receiving Copy of Request to Be Excused. The letter opposing another party's request to be excused from attending in person a mediation session must be submitted within four days of receiving a copy of the request [*ND Cal ADR LR 6-10(e)(1)*].

32.32[6][d] Required Content of Letter. The letter opposing another party's request to be excused from attending in person a mediation session must state all grounds for the opposition [*ND Cal ADR LR 6-10(e)(1)*].

32.32[7] Party May Seek to Compel Attendance by Appropriate Party Representative.

32.32[7][a] Opposition Must Be in Writing. A party may submit a letter to the ADR Magistrate Judge alleging that another party will not be represented at a mediation session by an appropriate representative [*ND Cal ADR LR 6-10(e)(2)*]. The letter must be served simultaneously on the ADR Unit, all other parties, and the mediator [*ND Cal ADR LR 6-10(e)(2)*].

32.32[7][b] Letter Is Confidential. The letter alleging that another party will not be represented at a mediation session by an appropriate representative may not be filed or disclosed to the assigned judge [*ND Cal ADR LR 6-10(e)(2)*].

32.32[7][c] Letter Must Be Submitted As Far in Advance of Mediation Session as Practicable. The letter

alleging that another party will not be represented at a mediation session by an appropriate representative must be submitted as far in advance of the mediation session as practicable [*ND Cal ADR LR 6-10(e)(2)*].

32.32[7][d] Required Content of Letter. The letter alleging that another party will not be represented at a mediation session by an appropriate representative must state the bases for this allegation, along with a proposed order [*ND Cal ADR LR 6-10(e)(2)*].

32.32[8] Party May Challenge Allegations That It Will Not Be Represented at Mediation Session by Appropriate Representative.

32.32[8][a] Challenged Party May Submit Responsive Letter. A party who has received a letter alleging that the party will not be represented at a mediation session by an appropriate representative may submit a responsive letter to the ADR Magistrate Judge [*ND Cal ADR LR 6-10(e)(2)*]. The letter must be served simultaneously on the ADR Unit, all other parties, and the mediator [*ND Cal ADR LR 6-10(e)(2)*].

32.32[8][b] Letter Is Confidential. The letter responding to allegations that another party will not be represented at a mediation session by an appropriate representative may not be filed or disclosed to the assigned judge [*ND Cal ADR LR 6-10(e)(2)*].

32.32[8][c] Letter Must Be Submitted Within Four Days of Receiving Written Allegations. The letter responding to allegations that another party will not be represented at a mediation session by an appropriate representative must be submitted within four days of receiving a copy of the letter making those allegations [*ND Cal ADR LR 6-10(e)(2)*].

Legal Topics:

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32.33 Mediation Procedures.

32.33[1] Proceedings Are Informal. A mediation session is designed to be an extremely flexible process, so that the session is to be conducted on an informal basis. A mediator has the discretion to structure the mediation so as to maximize the benefits of the process [*ND Cal ADR LR 6-11(a)*].

32.33[2] Mediator May Meet Separately With Each Side, or With Counsel Only, or Parties Only. A mediator may hold separate, private caucuses with each side, with each lawyer or, if the parties agree, with the clients only [*ND Cal ADR LR 6-11(b)*]. The mediator may not disclose communications made during such a caucus to another party or counsel without the consent of the party who made the communication [*ND Cal ADR LR 6-11(b)*].

32.33[3] Proceedings Are Confidential. In a case referred for mediation in the Northern District of California, the court, the mediator, all counsel and parties, and any other persons attending the mediation must safeguard the confidentiality of the mediation proceedings, including the contents of the written mediation statements, anything that happened or was said, any position taken, and any view of the merits of the case formed by any participant in connection with any mediation [*ND Cal ADR LR 6-12(a)*]. The mediator may ask the parties and all persons attending the mediation to sign a confidentiality agreement [*ND Cal ADR LR 6-12(c)*; *see Olam v. Congress Mortgage Co (ND Cal 1999) 68 F Supp2d 1110, 1121-1125* (enforceability of confidentiality agreement signed by parties to mediation is question of state contract law)].

The confidentiality of mediation sessions does not preclude [*ND Cal ADR LR 6-12(b)*]:

(1) Disclosures as stipulated by all parties and the mediator;

(2) Disclosures as may be stipulated by all parties, without the consent of the mediator, for use in a subsequent confidential ADR or settlement proceeding;

(3) A report to or inquiry by the ADR magistrate judge regarding a possible violation of the ADR local rules;

(4) The mediator from discussing the mediation in confidence with the court's ADR staff;

(5) Any participant or the mediator from responding to a proper request for information made in connection with monitoring or evaluating the court's ADR program; or

(6) Disclosures otherwise required by law.

32.33[4] Follow Up to Mediation. At the close of the mediation session, the mediator and the parties must discuss whether it would be beneficial to schedule any follow up to the session, which may include, but need not be limited to, written or telephonic reports that the parties might make to one another or to the mediator, exchange of specified kinds of information, or another mediation session [*ND Cal ADR LR 6-13*].

32.33[5] Mediator Must File Certification of Mediation Within 14 Days After Close of Session. Within 14 days of the close of each mediation session, the mediator must report to the ADR unit on a court-provided form, which the ADR unit will then file with the court. The report must contain the date of the mediation session, whether the case settled in whole or in part, and whether any follow up is scheduled [*ND Cal ADR LR 6-14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediations

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E. Settlement Conferences

4-32 MB Practice Guide: Fed Pretrial Civ Proc in CA 32.34

32.34 Settlement Conference Focuses Parties on Evidence and Law.

Settlement conferences can provide the litigants valuable services even when an early settlement is not achieved, by helping the parties understand their respective positions (as well as the evidence and reasoning that supports those positions), and identifying what the parties need to do by way of disclosures, discovery, or motion work to position the case in a focused way for more productive negotiations or for litigated disposition.

Cross Reference:

Discussion of advantages and limitations of settlement conferences, see 3 Moore's Federal Practice, see § 16.53[9] (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral Overview

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32.35 Referral of Case for Conference.

32.35[1] Case May Be Referred Sua Sponte or on Motion or Stipulation of Parties. In the Northern District of California, the court may refer a case to a settlement conference on its own initiative, on the motion of a party, or on a stipulation of the parties [*ND Cal ADR LR 7-2*].

32.35[2] General Rule: Motion May Be Made at Any Time. In general, a party to a civil action in the Northern District may file a motion with the assigned judge seeking a referral of a case to a settlement conference at any time after the action has been commenced [*ND Cal ADR LR 7-3*].

Exception:

In Case Assigned to ADR Multi-Option Program, Phone Conference First. If a civil action in the Northern District has been assigned to the ADR Multi-Option Program [*see 32.06* (discussing assignment of case to Multi-Option Program)], any motion to the assigned judge seeking a referral of the action for a settlement conference may be filed only after any required ADR phone conference has occurred [*ND Cal ADR LR 7-3*; *see 32.06[3], [4]* (discussing when ADR phone conference is required and procedure for conference)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods

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32.36 Settlement Judge.

32.36[1] Settlement Conference Generally Conducted by Magistrate Judge. A case may be referred to a settlement conference only by order of the assigned judge [*ND Cal ADR LR 3-4(c)*]. In a settlement conference, the presiding judicial officer, i.e., the settlement judge, facilitates the parties' efforts to negotiate a settlement. A settlement conference generally will be conducted by a magistrate judge, but in some limited circumstances may be conducted by a district judge [*ND Cal ADR LR 7-2*].

32.36[2] Stipulated Preference of Parties As to Settlement Judge Will, If Feasible, Be Given Effect. In selecting a settlement judge to conduct a settlement conference, the parties may stipulate to a preference for one or more particular magistrate judges or district judges. The court will attempt to honor the stipulated preference, subject to the needs of the court, and the availability of the preferred judges [*ND Cal ADR LR 7-3*]. In the San Jose division of the Northern District, the magistrate judge designated as the referral judge at the outset of the case will presumptively act as the settlement judge if a conference is ordered.

32.36[3] On Stipulation of Parties, Assigned Judge May Hold Settlement Conference. On the written stipulation of all the parties to a settlement conference, the assigned judge may, in the judge's discretion, conduct a settlement conference [*ND Cal ADR LR 7-2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods

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32.37 Settlement Judge Will Schedule Conference.

Within any time constraints or other requirements established by the judge who referred the case to a settlement conference, the settlement judge must notify the parties of the time and date of the settlement conference [*ND Cal ADR LR 7-4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral Overview

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32.38 Settlement Judge Will Notify Parties of Submission and Attendance Requirements.

The settlement judge must notify the parties of the requirements for preconference submissions, if any, and for attendance of parties, attorneys, or other persons at the settlement conference [*ND Cal ADR LR 7-4*]. Some judges maintain standing orders governing settlement conference procedures in cases assigned to them, which can be found under the individual judge's name on the court's website.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral Overview

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32.39 Attendance of Parties.

32.39[1] Parties May Be Required to Attend Conference. Because personal attendance of the parties may help to facilitate settlement and therefore further the goals of the conference, the settlement judge may order the parties to the action to attend any settlement conference [*ND Cal ADR LR 7-4*].

32.39[2] Corporation or Government Entity Must Be Represented by Person Knowledgeable of Facts With Authority to Settle. A corporation or association satisfies the attendance requirement if represented by a person, other than outside counsel, who is knowledgeable about the facts of the case and has authority to settle the action [*ND Cal ADR LR 7-4(a)*]. A governmental entity must send a representative who has the authority to settle, and is knowledgeable about the facts of the case, the governmental unit's position, and the governmental unit's settlement procedures and policies [*ND Cal ADR LR 7-4(b)*].

32.39[3] Insurer Must Attend When Necessary to Achieve Settlement. Unless excused by the settlement judge, insurer representatives are required to attend a settlement conference in person if the insurer's agreement is necessary to achieve a settlement [*ND Cal ADR LR 7-4(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesRequired RepresentationCivil ProcedureAlternative Dispute ResolutionGeneral Overview

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32.40 Settlement Conference Is Confidential.

In a case referred for a settlement conference in the Northern District of California, the court, the settlement judge, all counsel and parties, and any other persons attending the conference must safeguard the confidentiality of the conference, including the contents of any written settlement conference statements, anything that happened or was said, any position taken, and any view of the merits of the case formed by any participant in connection with any settlement conference [*ND Cal ADR LR 7-5(a)*].

The confidentiality of settlement conferences does not preclude [*ND Cal ADR LR 7-5(b)*]:

(1) Disclosures as stipulated by all parties;

(2) Any participant or the settlement judge from responding to a proper request for information made in connection with monitoring or evaluating the court's ADR program;

(3) Disclosures that are necessary to preserve the court's capacity to enforce lawful orders or to discipline contumacious conduct; or

(4) Disclosures otherwise required by law.

Legal Topics:

For related research and practice materials, see the following legal topics:
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F. Additional ADR Processes

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32.41 Nonbinding Summary Trial to Bench or Jury.

A summary trial to the bench or a jury is a flexible, nonbinding process designed to promote settlement in complex cases headed for protracted trials. This process, which is seldom used, provides the parties and attorneys with an advisory verdict that may be of assistance in advancing settlement negotiations. Parties in the Northern District of California who are considering a nonbinding summary trial as an ADR option are encouraged to contact the district's ADR unit for assistance in structuring a summary trial tailored to their case [*ND Cal ADR LR 8-1(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionSummary Jury Trials

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32.42 Privately Conducted ADR.

There are numerous private sector providers of ADR services including arbitration, mediation, fact-finding, neutral evaluation and private judging [*ND Cal ADR LR 8-2*]. If the parties to an action in the Northern District of California desire to employ the services of private ADR in lieu of use of the court-annexed ADR procedures, the parties should seek permission from the court and prior assurance that the private process will be deemed sufficient by the court [*ND Cal ADR LR 3-2*; *ND Cal ADR LR 3-4(b)* (with assigned judge's permission, private ADR may be substituted for required ADR process offered by court)]. In general, the court will not refer a case to a private ADR provider except on the stipulation of the parties. When a case is referred for private ADR, the assigned judge is to take appropriate steps to assure that the referral does not result in imposing an unfair or unreasonable economic burden on any party [*ND Cal ADR LR 8-2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.43 CHECKLIST: Eastern District--Voluntary Dispute Resolution Program (VDRP).

- ☐ Clerk notifies plaintiff (or notifies defendant if case was removed) of VDRP availability.
- ☐ Plaintiff must notify other parties within 14 days of receiving notice.
- ☐ Parties must confer and report consideration of VDRP in status conference report.
- ☐ Parties may stipulate to using VDRP.
  - ○ File Stipulation and Order for VDRP Referral in status conference report; check local rules for content of stipulation.
- ☐ Parties may select neutral.
- ☐ Consult with neutral about scheduling and agenda.
- ☐ VDRP session will be scheduled within 91 days of appointment of neutral.
- ☐ Prepare VDRP statement.

- ○ Statement may not exceed 10 pages.
- ○ Check local rules for required contents.
- ○ Submit to neutral seven days before session.
- ○ Serve on other parties seven days before session.
- ○ Do not file with court.

☐ Calendar VDRP session and plan to attend.

☐ If necessary, request to be excused from attendance; be available by phone.

☐ Neutral will file date of completion report.

☐ Parties must file Joint VDRP Completion Report with assigned judge, within 14 days of completion of session.

- ○ Check local rules for required contents.
- ○ Dismissal order may be filed in lieu of joint report.

☐ Sanctions are available for violation of VDRP procedures.

Authority:
ED Cal Civ LR 271

Discussion:
See *§§ 32.44 -32.58*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionValidity of ADR Methods

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32.44 Parties Must Consider Availability of Program.

The Eastern District of California has complied with the ADR Act of 1998 by devising and implementing a Voluntary Dispute Resolution Program (VDRP). Compulsory assignment to the program is generally not permitted [*ED Cal Civ LR 271(c)(2)*]. The parties, however, are required to consider whether their action is appropriate for VDRP [*ED Cal Civ LR 271(d)(1)*]. The various methods of VDRP available to the parties under the program include, but are not limited to, mediation, negotiation, early neutral evaluation, and settlement facilitation. The specific method or methods employed will be determined by the VDRP neutral and the parties [*ED Cal Civ LR 271(a)(1)*].

Cross Reference:

Discussion of advantages and limitations of ADR procedures, see 3 Moore's Federal Practice, see § 16.53 (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral Overview

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32.45 Certain Actions Are Exempted From VDRP.

The VDRP program of the Eastern District generally does not apply to the following civil actions [*ED Cal Civ LR 271(a)(2)*]:

- Prisoner petitions and actions, including habeas corpus petitions;
- Actions in which one of the parties is appearing pro se;
- Voting rights actions;
- Social security actions;
- Deportation actions;
- Freedom of Information Act actions; and
- Actions involving the constitutionality of federal, state, or local statutes or ordinances.

Though the VDRP program does not apply to these actions, the parties may nevertheless agree to participate in some form of ADR [*ED Cal Civ LR 271(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.46 Clerk Will Notify Plaintiffs of Availability of VDRP.

In a civil action in the Eastern District of California, the clerk provides a notice of the availability of VDRP to all plaintiffs when the complaint is filed or notifies all defendants if the action is removed [*ED Cal Civ LR 271(c)(1)*].

Any party who causes a new party to be joined in the action must promptly serve a copy of the notice on the new party [*ED Cal Civ LR 271(c)(1)*].

Cross Reference:

Form, see *§ 32.72* and www.caed.uscourts.gov.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewGovernmentsCourtsClerks of Court

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32.47 Plaintiffs Must Notify Other Parties of Availability of VDRP.

The plaintiff, after receiving notice from the clerk, must provide all the other parties with copies of the notice at the time service is effected or, for parties already served, no more than 14 days after the plaintiff receives the notice. Any party who causes a new party to be joined in the action must promptly serve a copy of the notice on the new party [*ED Cal Civ LR 271(c)(1)*].

In addition to the original notice of the availability of VDRP from the clerk, an assigned judge or magistrate judge in the action may also inform the parties of the availability of VDRP at any time, including as part of a status or scheduling conference [*ED Cal Civ LR 271(c)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.48 Parties Must Report Consideration of VDRP in Status Conference Report.

After the parties have conferred as to whether and when to participate in the court's VDRP program, they must report their views to the court in a status conference report. In these reports, counsel must represent that they understand and have explained to their clients the local VDRP rules and process and that, with their assistance, their clients have carefully considered whether their case might benefit from participation. If all parties stipulate to using VDRP, this report or statement must be accompanied by a Stipulation and Order for VDRP Referral [*ED Cal Civ LR 271(d)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.49 Referral to VDRP Requires Consent of All Parties.

In general, the referral of an action to VDRP in the Eastern District of California cannot be made over the objection of any party to the action [*ED Cal Civ LR 271(c)(2)*].

Distinguish-- Discrete Portion of Complex Action May Be Referred on Consent of All Relevant Parties: Though the consent of all parties is generally required for referral to VDRP, when a complex action is pending that includes counterclaims, cross-claims, or third-party actions, the court may assign one or more discrete subparts of the action to VDRP if all parties to those subparts agree to reference to the VDRP, and the party objecting to VDRP is not a party to any of those discrete subparts [*ED Cal Civ LR 271(c)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.50 Parties Must File Stipulation and Order for VDRP Referral.

If all parties stipulate to using VDRP, counsel must file, with their status conference reports or otherwise, a Stipulation and Order for VDRP Referral [*ED Cal Civ LR 271(i)(1)*]. This stipulation and order must [*ED Cal Civ LR 271(i)(2)*]:

- Specify the time frame within which the parties propose the VDRP process will be completed and the date by which the neutral must file written confirmation of that completion;

- Suggest and explain any modifications or additions to the case management plan that would be advisable because of the reference to VDRP; and

- Describe any pretrial activity, e.g., specified discovery or motions, that are to be completed before the VDRP session is held, or that are to be stayed until the VDRP session is concluded.

Cross Reference:

Form, see *§ 32.72* and www.caed.uscourts.gov.

The time frame designated by the parties in their Stipulation and Order for VDRP Referral is not binding on the court. Instead, the court must ensure that the time allotted for completing the VDRP process is no more than is appropriate, and that the referral does not cause unreasonable delay in case development, in hearing motions, or in commencing trial [*ED Cal Civ LR 271(i)(3)*]. Similarly, the referral of an action for VDRP does not deprive the assigned judge of continuing authority and responsibility over the action [*ED Cal Civ LR 271(i)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.51 Parties May Request Referral to VDRP at Any Time.

Though the parties are required to consider the availability of VDRP soon after the commencement of the action, this initial consideration of the issue does not exhaust the potential for VDRP. Instead, parties, individually or in any combination, may ask the assigned judge at any stage in the proceedings to refer the case to VDRP. The court, however, may enter an order of reference only if all parties to the action or the portion of the action to be referred voluntarily agree to the proposed reference [*ED Cal Civ LR 271(b)(4)*]. For example, if one party initially refuses to consent to referral, but all claims by or against that party are later disposed of, the remaining parties may then seek referral of the action to VDRP.

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.52 Parties May Select Neutral.

If the assigned judge or magistrate judge has not selected a neutral, the VDRP Administrator may supply to the parties a list of no more than three potential neutrals, and the parties must then agree to select one from that list. In that event, counsel for the party first asserting jurisdiction in the court must report the selection of the parties, in writing, to the VDRP Administrator within 14 days of service of the original list [*ED Cal Civ LR 271(e)(3)*].

If the parties have been given the opportunity to select a neutral, but either cannot agree or fail to report their choice, the VDRP Administrator selects a neutral at random from the court's panel [*ED Cal Civ LR 271(e)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.53 Neutral Schedules and Sets Agenda for VDRP Session.

32.53[1] Neutral Will Consult With Parties. After being appointed to preside over a VDRP session, a neutral is to promptly communicate with all counsel, either through a brief joint telephone conference or in writing, to discuss the scheduling and the agenda for the VDRP session. Specifically, the neutral is to consult with counsel as to [*ED Cal Civ LR 271(j)*]:

- Fixing a convenient date and place for the VDRP session;
- The type of session desired by the parties, i.e., settlement conference, early neutral evaluation, mediation, or other dispute resolution process, and the procedures that will be following during the session;
- Who must attend the VDRP session on behalf of each party;
- What material or exhibits should be provided to the neutral before the session or brought by the parties to the session;
- Any issues or matters that it would be especially helpful to have the parties address in their written VDRP statements; and
- Any other matters that might enhance the utility of the VDRP proceeding.

32.53[2] VDRP Session Must Occur Within 91 Days of Appointment of Neutral. As to the timing of a VDRP session in the Eastern District, the neutral is to schedule the session as soon as reasonably possible, but the session must occur no more than 91 days after the neutral is selected, unless otherwise ordered by the Court [*ED Cal Civ LR 271(j)(1)*].

Legal Topics:

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32.54 Parties Must Submit Written VDRP Statements.

32.54[1] Required Content of VDRP Statement. The VDRP statements prepared by the parties, unless otherwise directed by the neutral, must [*ED Cal Civ LR 271(k)(2)*]:

- Give a brief statement of the facts;
- Identify the pertinent principles of law;
- Identify the significant legal and factual issues that are in dispute;
- Identify any legal or factual issues whose early resolution might reduce the scope of the dispute or contribute significantly to the productivity of settlement discussions;
- Identify by name and role with respect to the litigation and the litigants any person with decision-making authority who, in addition to counsel, will attend the session as a representative of the party filing the statement; and
- Identify or attach particular documents or other physical evidence, if any, central to an understanding of the dispute and an appreciation of the merits of each party's case.

32.54[2] Statements May Not Exceed 10 Pages. The VDRP statements prepared by the parties and submitted to the neutral may not exceed 10 pages [*ED Cal Civ LR 271(k)(1)*].

32.54[3] Submit Statements at Least Seven Days Prior to First VDRP Session. In an action referred for a VDRP session in the Eastern District, unless otherwise directed by the assigned neutral, each party must submit to the neutral a written VDRP statement at least seven days prior to the VDRP session [*ED Cal Civ LR 271(k)(1)*].

32.54[4] Serve Statements on Other Parties. Unless otherwise directed by the assigned neutral, each party must

serve on all other parties a written VDRP statement at least seven days prior to the VDRP session [*ED Cal Civ LR 271(k)(1)*].

32.54[5] Do Not File Statement. The VDRP statements prepared by the parties are to be submitted to the neutral and served on the other parties, but are not to be filed [*ED Cal Civ LR 271(k)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionValidity of ADR Methods

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III. COURT ANNEXED ALTERNATIVE DISPUTE RESOLUTION IN EASTERN DISTRICT OF CALIFORNIA: VOLUNTARY DISPUTE RESOLUTION PROGRAM (VDRP)

4-32 MB Practice Guide: Fed Pretrial Civ Proc in CA 32.55

32.55 Attendance at VDRP Session.

32.55[1] Parties and Lead Counsel Must Attend. At a VDRP session in the Eastern District, all parties and their lead counsel, having authority to settle and to adjust pre-existing settlement authority if necessary, are required to attend the scheduled VDRP session in person unless excused after request to the neutral [*ED Cal Civ LR 271*(*l*)].

32.55[2] Corporation or Government Entity Must Be Represented by Person Knowledgeable of Facts With Authority to Settle. Parties other than natural persons must attend a VDRP session, though, of course, attendance must be by an actual person. Accordingly, a corporation or association satisfies the attendance requirement if represented by a person who has authority to settle the action, and is knowledgeable about the facts of the case and the corporation's or association's position in the action [*ED Cal Civ LR 271*(*l*)(1)(A)]. A governmental entity must send a representative who has the authority to settle, and is knowledgeable about the facts of the case, the governmental unit's position, and the governmental unit's settlement procedures and policies [*ED Cal Civ LR 271*(*l*)(1)(B)].

32.55[3] Insurer Must Attend When Necessary to Achieve Settlement. Insurer representatives are required to attend a VDRP session in person if their agreement would be necessary to achieve a settlement. An insurer, however, may seek to be excused from required attendance [*ED Cal Civ LR 271*(*l*)(1)].

32.55[4] Required Person May Request to Be Excused From Attendance at VDRP Session.

32.55[4][a] Confer With Other Parties Before Request to Be Excused From Attendance. A party or other person required to attend a VDRP session may seek the permission of the neutral to be excused from attendance, but must first confer about the matter with the other parties who will be participating in the session [*ED Cal Civ LR 271*(*l*)(2)(A)].

32.55[4][b] Hardship Must Be Shown. The person seeking to be excused from attendance must establish that personal attendance would impose a serious and unjustifiable hardship [*ED Cal Civ LR 271*(*l*)(2)(B)]. If a dispute arises over the neutral's disposition of a person's request to be excused, the ADR judge may decide the matter [*ED Cal Civ LR 271(b)(1)(B)*].

32.55[4][c] Telephone Availability Is Required. Any person excused from personal attendance as a VDRP session must be available to participate by telephone, unless otherwise directed by the neutral [*ED Cal Civ LR 271*(*l*)(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesRequired RepresentationCivil ProcedureAlternative Dispute ResolutionGeneral OverviewInsurance LawClaims & ContractsArbitration

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32.56 VDRP Session Is Confidential.

In a case referred to VDRP in the Eastern District of California, all communications made in connection with any VDRP proceeding are privileged and confidential, except as otherwise stipulated in writing by all parties and the neutral, or as required by the court's rules or other sources of law [*ED Cal Civ LR 271(m)(1)*].

VDRP proceedings are to be shielded from the assigned judge, and no communication made, position taken, or opinion formed by any party or neutral in the VDRP session is to be disclosed to the assigned judge law unless [*ED Cal Civ LR 271(m)(2)*]:

(1) Stipulated in writing by all parties and the neutral;

(2) Required by the court's local rules; or

(3) Ordered by the court to determine if the parties either reached an enforceable settlement, or violated a legal or ethical duty.

The confidential nature of VDRP proceedings, however, does not preclude a party or a neutral in those proceedings from responding to a proper request for information made in connection with monitoring or evaluating the court's program [*ED Cal Civ LR 271(m)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.57 Completion of VDRP Session.

32.57[1] Neutral's Reporting Obligations.

32.57[1][a] Neutral Reports Date of Completion of Session. After a VDRP session is concluded in the Eastern District of California, the presiding neutral must submit a VDRP Completion Report to the VDRP Administrator. That report, however, is to contain only the date on which the parties completed the VDRP process [*ED Cal Civ LR 271(n)(1)*].

32.57[1][b] Neutral Must Report by Time Fixed in VDRP Referral or Within 14 Days of Completion of VDRP Session. The VDRP Completion Report must be submitted by the neutral by the deadline fixed in the Stipulation and Order for VDRP Referral. If, however, the order did not establish a deadline, the report must be submitted no later than 14 days after the conclusion of the VDRP session [*ED Cal Civ LR 271(n)(1)*].

32.57[2] Parties' Reporting Obligations.

32.57[2][a] Parties Must File Joint VDRP Completion Report. After a VDRP session is concluded in the Eastern District of California, the parties to the proceeding must file with the assigned judge a Joint VDRP Completion Report [*ED Cal Civ LR 271(o)(1)*].

32.57[2][b] VDRP Completion Report Must Be Filed by Time Fixed in VDRP Referral or Within 14 Days of Completion of VDRP Session. The Joint VDRP Completion Report must be submitted by the parties by the deadline fixed in the Stipulation and Order for VDRP Referral. If, however, the order did not establish a deadline, the report must be submitted no later than 14 days after the conclusion of the VDRP session [*ED Cal Civ LR 271(o)(1)*].

32.57[2][c] Required Content of VDRP Completion Report. The Joint VDRP Completion Report filed by the parties with the assigned judge must indicate [*ED Cal Civ LR 271(o)(1)*]:

- Whether the action was resolved or settled in its entirety during the VDRP session, and if so, when a request for dismissal will be filed with the clerk;

- If the action was not resolved or settled in its entirety, whether any resolution, stipulation, or agreement was reached as to any facts, issues, procedures, or claims; and

- The current status of the action, including, when appropriate, an update on the subjects addressed in a status conference under *ED Cal Civ LR 240*.

32.57[2][d] Dismissal Order May Be Filed in Lieu of VDRP Completion Report. If the action is settled or otherwise disposed of during the VDRP session, the parties may, in lieu of filing the Joint VDRP Completion Report, instead file a dismissal or stipulation and order of dismissal. The dismissal or stipulation and order for dismissal must be filed within 14 days after completion of the VDRP session [*ED Cal Civ LR 271(o)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-32 MB Practice Guide: Fed Pretrial Civ Proc in CA 32.58

32.58 Procedures for Violations of VDRP Rules.

32.58[1] Complaints Alleging Material Violations Must Be in Writing. A complaint alleging that any person or party has materially violated the VDRP rules must be presented in writing directly to the ADR judge or a judge who has been designated by the chief judge to hear the matter and to whom the underlying case is not assigned (the "designated judge") [*ED Cal Civ LR 271(p)(1)*].

Copies of the complaint must be sent to all counsel and the neutral at the time they are presented to the ADR judge or designated judge [*ED Cal Civ LR 271(p)(1)*].

The complaint must be accompanied by a competent affidavit, must not be filed or lodged with the clerk, and must not be presented to the judge to whom the underlying case is assigned for litigation [*ED Cal Civ LR 271(p)(1)*].

32.58[2] Sanctions Are Available. If the ADR judge or designated judge determines that further proceedings are warranted, the ADR judge or designated judge may issue an order to show cause why sanctions should not be imposed [*ED Cal Civ LR 271(p)(2)*].

The proceedings will be conducted on the record, and the ADR judge or designated judge has the discretion as to whether the proceedings should be under seal [*ED Cal Civ LR 271(p)(2)*].

The ADR judge or designated judge must afford all interested persons an opportunity to be heard before deciding whether to impose or recommend a sanction [*ED Cal Civ LR 271(p)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-32 MB Practice Guide: Fed Pretrial Civ Proc in CA 32.59

32.59 CHECKLIST: Central District--Mandatory Settlement Procedures.

☐ Review available procedures.

☐ Select procedure.

- ○ Notice of Settlement Procedure Selection must be signed by counsel for all parties.
- ○ File Notice of Settlement Procedure Selection within 14 days of court's Rule 16(b) scheduling order.
- ○ If Notice is not timely filed, trial judge will order settlement procedure.

☐ Settlement procedure must take place no later than 45 days before final pretrial conference.

Form:
See *§ 32.72* and www.cacd.uscourts.gov

☐ Prepare settlement statement.

- ○ Not longer than five pages.

- Check local rules for required contents.
- Submit at least five days before conference.

- [ ] Calendar conference and plan to attend.
- [ ] Prepare to discuss all economic and noneconomic factors relevant to full and final settlement of case.
- [ ] Consider that settlement officer may require oral presentations, summary of evidence, and expert witness reports.
- [ ] Any settlement must be reported to trial judge's courtroom deputy clerk and timely memorialized.

Authority:
CD Cal Civ LR 16-15-16-15.5, *16-15.7-* 16-15 .8

Discussion:
See *§§ 32.60 -32.67*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral Overview

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32.60 Parties Are Required to Participate in One Settlement Procedure.

Unless exempted by the trial judge, the parties in every civil action in the Central District of California must participate in one settlement procedure offered by the local rules of the court, or an alternative procedure approved by the court [*CD Cal Civ LR 16-15.1*]. Any presiding trial judge or magistrate judge, however, may dispense with this requirement as to any particular case or category of cases [*CD Cal Civ LR 16-15.9*].

Cross Reference:

Discussion of advantages and limitations of ADR procedures, see 3 Moore's Federal Practice, see § 16.53 (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.61 Four Settlement Procedures Are Available.

Unless exempted by the trial judge, the parties in every civil action in the Central District of California must participate in one of the following settlement procedures [*CD Cal Civ LR 16-15.4*]:

- *PROCEDURE NO. 1:* The parties appear before the assigned district judge or magistrate judge for whatever settlement procedures the judge may conduct or direct.

- *PROCEDURE NO. 2:* The parties appear before an attorney selected from the court's Attorney Settlement Officer Panel or an attorney appointed by the trial judge for settlement proceedings.

- *PROCEDURE NO. 3:* The parties participate in a nonjudicial dispute resolution proceeding.

Judge's Perspective:

In selecting among the available settlement procedures, the threshold question is whether the involvement of a judicial officer, as opposed to an outside neutral, would be beneficial. In some cases, a judicial officer, either a district or magistrate judge, will carry a higher level of credibility and influence with litigants. At the same time, judicial officers may not be in a position to devote the same amount of time and preparation to the settlement session. So if several sessions are necessary, an outside neutral may be preferable. Caution should be employed in adapting Procedure No. 1, in which the judicial officer assigned to the case presides over settlement proceedings, because the potential for ex parte discussion of the merits of the case may become unavoidable.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral Overview

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32.62 Parties May Select ADR Procedure.

32.62[1] Notice of Settlement Procedure Selection Is Required. Although the parties to a civil action in the Central District of California are required to participate in a settlement procedure, the parties generally may select which procedure they will follow by filing a Notice of Settlement Procedure Selection signed by counsel for all parties [*CD Cal Civ LR 16-15.2*].

Cross Reference:

Form, see *§ 32.72* and
www.adr.cacd.uscourts.gov.

32.62[2] File Notice of Selection Not Later Than 14 Days After Entry of Scheduling Order. To be effective, any Notice of Settlement Procedure Selection must be filed by the parties not later that 14 days after entry of the court's scheduling order under *Fed R Civ P 16(b)* [*CD Cal Civ LR 16-15.2*].

32.62[3] Court Selects Settlement Procedure If Parties Fail to File Notice of Selection. If the parties do not file a timely Notice of Settlement Procedure Selection, the trial judge may order the parties to engage in any of the available settlement procedure options [*CD Cal Civ LR 16-15.3*].

32.62[4] Other ADR Options or Settlement Procedures Not Precluded. Nothing in the local rules of the Central District of California preclude or replace any settlement practice used by any judge or magistrate judge in the district [*CD Cal Civ LR 16-15.9*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.63 Settlement Procedure Must Occur No Later Than 45 Days Before Final Pretrial Conference.

Whether selected by the parties or by the court, the settlement procedure required in the Central District of California must take place no later than 45 days before the final pretrial conference [*CD Cal Civ LR 16-15.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.64 Parties Must Submit Settlement Statement.

32.64[1] Content of Settlement Statement. Unless otherwise ordered by the trial judge or the settlement officer conducting the settlement procedure, the parties must submit to the settlement officer, but not to the court, a confidential settlement statement. This settlement statement must contain the party's statement of the case and the party's settlement position, including the last offer or demand made by that party, and a separate statement of the offer or demand the party is prepared to make at the settlement conference [*CD Cal Civ LR 16-15.5(a)*].

32.64[2] Statement Must Be Submitted at Least Five Days Before Conference. A party's settlement statement must be submitted to the settlement officer at least five days before the date of the conference [*CD Cal Civ LR 16-15.5(a)*].

32.64[3] Statement May Not Exceed Five Pages. A party's settlement statement must be written, but may not exceed five pages in length [*CD Cal Civ LR 16-15.5(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.65 Conduct of Proceedings.

32.65[1] Parties or Representative With Authority to Settle Must Attend. Each party must appear at the settlement proceeding, either in person or by a representative with full authority to settle the case [*CD Cal Civ LR 16-15.5(b)*].

At the discretion of the settlement officer, and only with the settlement officer's express authorization, parties residing outside the district, however, may have a representative with final settlement authority available by telephone during the entire proceeding in lieu of personal appearance [*CD Cal Civ LR 16-15.5(b)*].

32.65[2] Trial Counsel Must Attend. Unless excused by the settlement officer, each party must be represented at the settlement proceeding by the attorney who is expected to conduct the trial of the case [*CD Cal Civ LR 16-15.5(c)*].

32.65[3] Parties Must Be Prepared for Conference. Each party at the settlement proceeding must conduct a thorough analysis of the case before the settlement proceeding, and must be fully prepared to discuss all economic and noneconomic factors relevant to a full and final settlement of the case [*CD Cal Civ LR 16-15.5(d)*].

32.65[4] Settlement Officer at Conference May Require Statements and Testimony. The settlement officer has broad discretion in carrying out the settlement proceeding, and may require any one or more of the following [*CD Cal Civ LR 16-15.6*]:

- An opening statement by each counsel;
- With the agreement of the parties, a "summary" or "mini-trial," tried either to the settlement officer or to a mock jury;
- Presentation of the testimony, summary of testimony, or report of expert witnesses;
- A closing argument by each counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:
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32.66 Proceedings Are Confidential.

All settlement proceedings conducted in the Central District of California are confidential, and no part of a settlement proceeding may be reported or otherwise recorded without the consent of the parties, except for any memorialization of a settlement and the clerk's minutes of the proceeding [*CD Cal Civ LR 16-15.8*; *see Folb v. Motion Picture Indus. Pension & Health Plans (CD Cal 1998) 16 F Supp2d 1164, 1171-1176* (recognizing federal privilege for mediation statements, including those made under Central District's ADR program)].

Legal Topics:

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32.67 Settlement Must Be Reported and Memorialized.

If the parties and the settlement officer are successful in resolving the case in whole or in part, the settlement must be reported immediately to the trial judge's courtroom deputy clerk and timely memorialized [*CD Cal Civ LR 16-15.7*].

Legal Topics:

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V. COURT ANNEXED ALTERNATIVE DISPUTE RESOLUTION IN SOUTHERN DISTRICT OF CALIFORNIA

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32.68 CHECKLIST: ADR Procedures in Southern District.

☐ Early Neutral Evaluation (ENE) conference required.

- ○ Party may request conference before answer.
- ○ Conference must be held within 45 days after answer is filed.
- ○ Discovery is not stayed, except by order on good cause.
- ○ Parties and counsel must attend conference.
  - ☐ Attendance excused by court on good cause.
  - ☐ Sanctions may be imposed for failure to attend.

○ Prepare to discuss claims and defenses at conference.

○ If case is not settled, it may be referred to mediation or arbitration.

○ Case management conference will be held after unsuccessful ENE conference.

- ☐ Within 60 days if referred for arbitration or mediation.

☐ Within 30 days if not referred for arbitration or mediation.

☐ Mandatory Settlement Conference.

○ Judge will schedule.

○ Parties and counsel may be required to attend.

○ Judge may order parties to engage in nonbinding mini-trial or summary jury trial.

Authority:
SD Cal Civ LR 16.1

Discussion:
See *§§ 32.69 -32.71*

Legal Topics:

For related research and practice materials, see the following legal topics:
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V. COURT ANNEXED ALTERNATIVE DISPUTE RESOLUTION IN SOUTHERN DISTRICT OF CALIFORNIA

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32.69 Southern District Mandates Early Neutral Evaluation (ENE) Conference.

32.69[1] Timing of ENE Conference.

32.69[1][a] Conference Must Be Held Within 45 Days of Filing of Answer. Unless exempted by the trial judge, the parties and counsel in every civil action in the Southern District of California are required to participate in an Early Neutral Evaluation (ENE) conference, which must be held within 45 days of the filing of an answer [*SD Cal Civ LR 16.1(c.1)*].

32.69[1][b] Conference May Be Held Before Answer on Request of Party. Although the ENE conference required in the Southern District of California is usually held after an answer is filed, the ENE conference may be held before any answer is filed on the request of a party. The request is to be sent by the requesting party to counsel for the parties and the parties whose addresses are known. An early ENE conference may be held whenever the presiding judicial officer deems it appropriate [*SD Cal Civ LR 16.1(c.1)*].

32.69[2] Cases in Which ENE Conference May Be Excused. Although an ENE conference is generally required in the Southern District of California, the assigned judge in the following types of actions may exempt the case from both ENE and case managements conference requirements [*SD Cal Civ LR 16.1(e)*]:

- Habeas corpus cases;
- Cases reviewing administrative rulings;
- Social Security cases;
- Default proceedings;
- Cases in which a substantial number of defendants have not answered;
- Actions to enforce judgments; and

- Bankruptcy appeals.

In addition, an ENE conference will not be set in cases brought by prisoners under *42 USC § 1983* [*SD Cal Civ LR 16.1(e.8)*].

32.69[3] Conduct of ENE Conference.

32.69[3][a] ENE Conference Is Held Before Judicial Officer Supervising Discovery. The presiding judicial officer in the ENE conference required in the Southern District is the magistrate judge, district judge, master, or other judicial officer supervising discovery in the action [*SD Cal Civ LR 16.1(c.1)*].

32.69[3][b] Parties and Counsel Must Attend Conference Unless Excused for Good Cause. At the required ENE conference, all the parties and their counsel are required to attend [*SD Cal Civ LR 16.1(c.1)*]. Attendance may be excused only with the permission of the court and for good cause shown. Sanctions may be imposed for an unexcused failure to attend [*SD Cal Civ LR 16.1(c.1.c)*].

32.69[3][c] Parties and Officer Discuss Claims and Defenses With View to Settlement. At the required ENE conference, the judicial officer and the parties are to discuss the various claims and defenses presented in the action with a view toward settling the action in whole or in part [*SD Cal Civ LR 16.1(c.1.a)*].

32.69[3][d] Conference Is Informal and Confidential. The required ENE conference is conducted informally, and is off the record. The proceedings are also privileged and confidential [*SD Cal Civ LR 16.1(c.1.b)*]. Accordingly, the parties and counsel should be as forthcoming and forthright as possible in achieving the goals of the ENE conference, as nothing said or revealed in the conference can be used in a later trial of the action if settlement is not achieved.

32.69[4] Case May Be Referred to Mediation or Arbitration If Not Settled by ENE Conference. If the required ENE conference does not result in a settlement of the action, the judicial officer may refer the action to nonbinding arbitration or mediation if: (1) the judicial officer believes arbitration or mediation might result in a cost-effective resolution of the lawsuit; or (2) the parties have agreed to arbitration or mediation [*SD Cal Civ LR 16.1(c.2.a)*].

If arbitration or mediation is pursued, the parties must comply with the rules of arbitration and mediation adopted in the court's General Order 387 [SD Cal Gen Order 387]. The parties may also stipulate to any other rules for the conduct of the optional arbitration or mediation [*SD Cal Civ LR 16.1(c.2.a)*].

Cross Reference:

Discussion of advantages and limitations of ADR procedures, see 3 Moore's Federal Practice, see § 16.53 (Matthew Bender 3d ed.).

32.69[5] Case Management Conference Must Be Held After Unsuccessful ENE Conference.

32.69[5][a] Conference Must Be Held Within 60 Days If Case Referred for Arbitration or Mediation. If the judicial officer has ordered or the parties have agreed to optional arbitration or mediation after an unsuccessful ENE conference, the judicial officer must schedule a case management conference approximately 60 days after the conclusion of the ENE conference [*SD Cal Civ LR 16.1(c.2.a)*].

32.69[5][b] Conference Must Be Held Within 30 Days If No Arbitration or Mediation Is Held. If an unsuccessful ENE conference is not to be followed by arbitration or mediation, the judicial officer must schedule a case management conference within 30 days after the conclusion of the ENE conference. At the judicial officer's option, the

case management conference may be held immediately at the end of the ENE conference [*SD Cal Civ LR 16.1(c.2.b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial Conferences

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Unit 9 Ending the Case Before Trial
CHAPTER 32 Court Annexed ADR
V. COURT ANNEXED ALTERNATIVE DISPUTE RESOLUTION IN SOUTHERN DISTRICT OF CALIFORNIA

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32.70 Southern District Mandates Settlement Conference.

32.70[1] Timing of Settlement Conference.

32.70[1][a] Settlement Conference Is Held at Direction of Assigned Judge or Presiding Judicial Officer. In each civil action in the Southern District, a settlement conference must be scheduled before the assigned magistrate judge or such other judicial officer as the assigned district judge may direct. If the judicial officer assigned to conduct the settlement conference determines that a case is ready for a settlement conference prior to the scheduled date, the judge may order the parties and counsel to appear at an earlier date [*SD Cal Civ LR 16.3(a)*].

32.70[1][b] One or More Follow-Up Conferences May Be Held. Though only one settlement conference is mandated by rule in the Southern District, the judge conducting the settlement conference may schedule as many follow-up settlement conferences as the judge finds appropriate in light of the complexity of the matter or any circumstances in the case [*SD Cal Civ LR 16.3(e)*].

32.70[1][c] Trial Judge May Order Post-Verdict Settlement Conference. Though only one settlement conference is mandated, when a case is tried before the court or a jury and a verdict is returned, the trial judge may order the case referred to a post-verdict settlement conference before the assigned magistrate judge or another judge agreed on by the parties. The designated judge must immediately schedule the settlement conference, and order the parties and counsel to be present. The post-verdict settlement conference must be held before the judgment becomes final [*SD Cal Civ LR 16.3(g)*].

32.70[2] Conduct of Settlement Conference.

32.70[2][a] Settlement Judge May Require Attendance of Parties or Representatives With Authority to Settle. At the settlement conference mandated by rule in the Southern District, the settlement judge may require attendance by the parties or representatives of a party other than counsel, who have authority to negotiate and enter into a binding settlement [*SD Cal Civ LR 16.3(b)*].

32.70[2][b] Settlement Judge Is Disqualified From Trying Case, Absent Waiver. The judge conducting the settlement conference is disqualified from conducting any subsequent trial in the case, unless there is an agreement by

all the parties to waive this restriction [*SD Cal Civ LR 16.3(c)*].

32.70[2][c] Proceedings Are Informal and Confidential. The settlement conference will be off the record, privileged, and confidential, unless otherwise ordered by the court [*SD Cal Civ LR 16.3(h)*]. To facilitate confidentiality, the settlement judge may receive in camera communications from each party and its counsel. If such communications are received, the judge must maintain their confidentiality absent a stipulation to the contrary [*SD Cal Civ LR 16.3(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADR

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CHAPTER 32 Court Annexed ADR
V. COURT ANNEXED ALTERNATIVE DISPUTE RESOLUTION IN SOUTHERN DISTRICT OF CALIFORNIA

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32.71 Nonbinding Mini-Trial or Summary Jury Trial Are Also Available.

32.71[1] May Be Ordered at Option of District or Magistrate Judge. In addition to the mandatory settlement conference, a district or magistrate judge in the Southern District may order the parties to engage in a nonbinding mini-trial or summary jury trial in certain circumstances [*SD Cal Civ LR 16.3(f)*].

32.71[2] Potential Judgment May Not Exceed $250,000, and Procedure Will Probably Resolve Case. Before a district or magistrate judge may order the parties to engage in a nonbinding mini-trial or summary jury trial, the judge must find, after a hearing with an opportunity to be heard, that (1) the potential judgment does not exceed $250,000; and (2) that the use of the procedure will probably resolve the case [*SD Cal Civ LR 16.3(f)*].

In determining whether to order a mini-trial or summary jury trial, the judge must also consider the costs of the procedure, as well as the costs that may be saved by ordering the procedure [*SD Cal Civ LR 16.3(f)*].

32.71[3] Consent of Parties Not Required. Provided that the district or magistrate judge has made the required findings and considered the appropriate factors, the judge may order the parties to participate in a nonbinding mini-trial or summary jury trial even if one or more of the parties refuses to consent to the procedure [*SD Cal Civ LR 16.3(f)*].

If, however, the parties have consented to either a nonbinding mini-trial or summary jury trial, the district or magistrate judge may order the procedure without the findings required when consent is absent [*SD Cal Civ LR 16.3(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionSummary Jury Trials

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CHAPTER 32 Court Annexed ADR
VI. FORMS

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32.72 Local District Court Forms.

Local district court forms for court annexed ADR are listed below.

Central District

Settlement Procedure Selection: Notice Request and Order (ADR-01)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Stipulation Regarding Selection of Attorney Settlement Officer (ADR-02)

Click here to view image.

Attorney Settlement Officer Proceeding Report (ADR-03)

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

ADR Program Questionnaire (ADR-09)

Click here to view image.

Eastern District

Notice of Availability of VDRP

Click here to view image.

Stipulation and Order to Elect Referral of Action to Voluntary Dispute Resolution Program (VDRP) Pursuant to Local Rule 271

Click here to view image.

Northern District

Notice of Need for ADR Phone Conference; ADR Certification

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Stipulation and (Proposed) Order Selecting ADR Process; ADR Certification

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

Cross Reference:

Automated HotDocs(R) and PDF versions of these forms may be accessed and filled in from the online version of this publication, and are also available at www.LexisOne.com/forms.

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Unit 10 Sanctions
CHAPTER 33 Rule 11 Sanctions

4-33 MB Practice Guide: Fed Pretrial Civ Proc in CA 33.syn

§ 33.syn Synopsis to Chapter 33: Rule 11 Sanctions

33.01 Scope.

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33.04 Rule 11 Is Designed to Deter Baseless Filings.

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33.07[2] Sanctions for Noncompliance With Local Rule 11, and for Frivolous Motions and Opposition to Motions.

33.08 Rule 11 Is Not Aimed at General Misconduct.

33.09 Rule 11 Is Inapplicable When More Specific Rules Apply.

33.10 Sanctions Are Available Under § 1927 for Wrongful Proliferation of Proceedings.

33.10[1] Attorney's Conduct Must Be Unreasonable and Vexatious.

33.10[2] Attorney's Fees Can Be Awarded.

33.11 Sanctions Are Available Under Inherent Power of Court to Punish Bad-Faith Conduct.

33.12 Other Rules Providing for Sanctions.

33.12[1] Rule 16 Sanctions for Failure to Comply With Pretrial Requirements.

33.12[2] Rule 37 Sanctions for Discovery Abuse.

33.12[3] Rule 45 Sanctions for Abuse of Subpoena Process.

33.12[4] Rule 56 Sanctions for Affidavit Filed for Improper Purpose in Summary Judgment Motion.

33.12[5] Dismissal Under Rule 41 for Failure to Prosecute or Comply With Court Order.

33.13 CHECKLIST: Moving for Rule 11 Sanctions.

33.14 Give Informal Notification Before Moving for Sanctions.

33.15 Motion for Rule 11 Sanctions Must Be Separate From Other Motions.

33.16 Move for Sanctions Promptly.

33.17 Motion Must State Specific Grounds for Sanctions and Relief Sought.

33.18 Serve Motion 21 Days Before Filing: "Safe Harbor" Provision.

33.18[1] Opposition Can Correct or Withdraw Challenged Paper.

33.18[2] Safe-Harbor Provision Is Mandatory.

33.18[3] Do Not File If Challenged Pleading Is Corrected or Withdrawn.

33.19 LOCAL PRACTICE: ND Cal Requirements

33.19[1] Motion for Sanctions Must Comply With Local Rule 7-8.

33.19[2] Set Hearing Date Not Earlier Than 35 Days After Service of Motion.

33.19[3] Format of Motion Must Comply With Local Rule 7-2.

33.20 Motion May Be Heard on Affidavits or on Oral Testimony or Depositions.

33.21 Prevailing Party May Obtain Reasonable Expenses and Fees.

33.22 Law Firm Is Subject to Joint Liability for Sanctions.

33.23 Rule 11 Sanctions Should Deter Repetition of Conduct.

33.24 Limitations on Rule 11 Monetary Sanctions.

33.24[1] Only Attorney Is Responsible for Groundless Legal Contentions.

33.24[2] Fees Must Result From Rule Violation.

33.25 Order for Rule 11 Sanctions Must Describe Violative Conduct.

33.26 CHECKLIST: Opposing Motion for Sanctions.

33.27 Use "Safe Harbor" Provision to Cure Rule 11 Violation.

33.28 Assert That Contention Was Supported by Law and Fact.

33.29 Assert That Particular Conduct Cannot Be Basis for Rule 11 Sanctions.

33.30 Assert That Attorney Fees Sought Were Not Incurred by Challenged Paper.

33.31 Notice of Motion for Rule 11 Sanctions.

33.32 Affidavit in Opposition to Motion for Sanctions.

33.33 Order Granting Sanctions.

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Unit 10 Sanctions
CHAPTER 33 Rule 11 Sanctions
I. STRATEGY

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33.01 Scope.

This chapter covers:

- Making an initial determination regarding the availability of sanctions [*see 33.03 -33.12*].
- Seeking sanctions under *Fed R Civ P 11* [*see 33.13 -33.25*; *Forms: 33.31*, *33.33*].
- Avoiding and opposing sanctions under *Fed R Civ P 11* [*see 33.26 -33.30*; *Form: 33.32*].

Core Rule:
Fed R Civ P 11.

Legal Topics:

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

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Unit 10 Sanctions
CHAPTER 33 Rule 11 Sanctions
I. STRATEGY

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33.02 Objective and Strategy.

Sanctions and contempt may be available for improper conduct by an adversary party or lawyer. Because of the courts' reluctance to impose either sanctions or orders of contempt, except in clear cases of wrongful conduct, neither should be sought lightly. Nonetheless, in the appropriate case, when the adversary's conduct is indefensible, motions for sanctions (and, even more rarely, contempt) can provide an invaluable tool. If the motion demonstrates egregious conduct that the court cannot disregard, it may have a substantial impact on the course of litigation. An order for sanctions or contempt may cast a cloud of suspicion over the conduct of an attorney or party for the balance of the action.

Strategic Point--Moving Party:

The advantages of moving for sanctions include bringing the misconduct to the court's attention, obtaining redress for the opposing party's misconduct, and possibly gaining substantive relief as a sanction (e.g., dismissal of claim). The disadvantages include further straining relations with opposing counsel, the possibility that your client won't be able to recover all of the fees expended to seek relief, the risk that you or your client might have to pay opposing party's fees if you don't prevail, and the possibility of alienating the court if the motion is not well founded. It is imperative to anticipate the opposing party's response in order to accurately assess whether a legitimate defense exists. The motion should be made only if there is no apparent defense for the conduct, and if the court will have trouble avoiding a condemnation of the conduct in question.

Judge's Perspective:

Moving for sanctions increases the acrimony and irritates the judge, unless the motion is really meritorious. What goes around comes around. When it's done, the moving party should be straightforward and not too greedy.

Investigating Whether Attorney Has Previously Been Sanctioned Under Rule 11:

Use LexisNexis(R) CourtLink(R) to Federal District Court and Appellate Court dockets to discover whether an attorney has been subject to Rule 11 sanctions previously. Search federal court docket entries by attorney's name, firm name, and/or judge with terms "Rule 11 or Sanction" appearing in the docket

entry.

Go to www.Courtlink.com

Detailed Discussion/Forms:

2 Moore's Federal Practice, Ch. 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions (Matthew Bender 3d ed.).

4 Bender's Federal Practice Forms, Rule 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions (Matthew Bender).

Joseph, Sanctions: The Federal Law of Litigation Abuse (Matthew Bender 3d ed.).

Cross References:

Discussion of sanctions under *28 USC § 1927* for multiplying litigation unreasonably and vexatiously, sanctions for bad-faith litigation abuse under inherent power of court, and sanctions under local district court rules or procedures, see Ch. 34, Other Sanction Provisions. Discussion of contempt, see Ch. 35, Contempt.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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Unit 10 Sanctions
CHAPTER 33 Rule 11 Sanctions
II. DETERMINING AVAILABILITY OF SANCTIONS

4-33 MB Practice Guide: Fed Pretrial Civ Proc in CA 33.03

33.03 CHECKLIST: Authority for Sanctions.

The following checklist may be used to determine what authority for sanctions is available to counsel who has been subjected to improper conduct or procedure by the opposition.

☐ Rule 11.

○ Rule 11 provides for sanctions when a pleading, written motion, or other paper:

☐ Is presented for an improper purpose;

☐ Contains claims, defenses, or other legal contentions that are not warranted by existing law or by a nonfrivolous argument to change existing law or establish new law;

☐ Contains allegations or factual contentions that do not have or are unlikely to have evidentiary support; or

☐ Contains denials of factual contentions that are not are warranted on the evidence.

Authority:
Fed R Civ P 11

Discussion:
See *§§ 33.06 -33.09*

☐ Rule 16.

○ Sanctions may be imposed under Rule 16 against a party, a party's attorney, or both for engaging in any of the following:

○ Failure to obey a scheduling or pretrial order.

○ Failure to appear at a scheduling or pretrial conference.

○ Being substantially unprepared to participate in a scheduling or pretrial conference.

○ Failure to participate in good faith.

Warning:

Rule 16(f) is limited to imposing sanctions in these four specific instances and is not available to punish a general discovery failure to cooperate [*Fed R Civ P 16(f)*].

Authority:

Fed R Civ P 16(f)

Discussion:

See *§ 33.12[1]*

☐ Rule 37. Rule 37 governs imposition of sanctions if a party:

○ Fails to make the required disclosures as required by Rule 26(a);

○ Loses a motion to compel;

○ Violates a discovery order;

○ Fails without justification to admit matters addressed in a request for admission;

○ Fails to respond to a notice of deposition, to interrogatories, or to a request for production of documents or for inspection; or

○ Fails to participate in good faith in developing a discovery plan.

Authority:

Fed R Civ P 37

Discussion:

Discovery sanctions, Ch. 25, Motions to Compel and Discovery Sanctions.

☐ Rule 41.

○ Rule 41(b) allows a defendant to move for dismissal of a claim or the action if the plaintiff fails to prosecute or to comply with a court order.

○ This remedy can be utilized only in extreme situations.

Authority:
Fed R Civ P 41

Discussion:
See *§ 33.12[5]*

☐ Rule 45.

○ Sanctions may be awarded against an attorney or party who issues and serves a subpoena that imposes an undue burden or expense on the recipient.

○ Failure to obey a subpoena can result in a contempt citation.

Authority:
Fed R Civ P 45

Discussion:
See *§ 33.12[3]*

☐ Rule 56.

○ A party who files an affidavit in connection with a motion for summary judgment in bad faith or solely for the purpose of delay is subject to sanction of reasonable expenses and attorney's fees incurred by the opposition in connection with the offending affidavit.

Authority:
Fed R Civ P 56(g)

Discussion:
See *§ 33.12[4]*

☐ *28 USC § 1927.*

○ An attorney who "so multiplies the proceedings in any case unreasonably and vexatiously" may be required to pay excess costs, expenses, and attorney's fees reasonably incurred by the other party as a result of the conduct.

○ The following considerations apply:

☐ Violations apply only to counsel.

☐ Violations do not hinge on the presence of a paper.

☐ A violation results from a course of conduct, and the section imposes a continuing obligation on attorneys to avoid dilatory tactics.

☐ There are no counterparts to the safe-harbor and separate-motion requirements of *Fed R Civ P 11*.

Authority:
28 USC § 1927

Discussion:
See *§ 33.10*; Ch. 34, Other Sanction Provisions, see *§§ 34.03 -34.15*

☐ Inherent power of court.

○ Under its inherent power the court can assess sanctions against either the client or the attorney for acting "in bad faith, vexatiously, wantonly, or for oppressive reasons."

Authority:
See Roadway Express, Inc. v. Piper (1980) 447 US 752, 766-767, 100 S Ct 2455, 65 L Ed2d 488 , superseded on other grounds by amendment of *28 USC § 1927*

Discussion:
See *§ 33.11*; Ch. 34, Other Sanction Provisions, see *§§ 34.16 -34.25*

☐ Local district court rules.

○ Power to sanction under local district court rules derives from the inherent authority of the court.

Authority:
See Roadway Express, Inc. v. Piper (1980) 447 US 752, 764-765, 100 S Ct 2455, 65 L Ed2d 488 , superseded on other grounds by amendment of *28 USC § 1927*.

Discussion:
See *§ 33.11*; Ch. 34, Other Sanction Provisions, see *§§ 34.26 -34.30*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDismissalsInvoluntary DismissalsFailures to ComplyCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedurePretrial MattersConferencesSanctionsCivil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsBaseless FilingsGeneral Overview

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Unit 10 Sanctions
CHAPTER 33 Rule 11 Sanctions
II. DETERMINING AVAILABILITY OF SANCTIONS

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33.04 Rule 11 Is Designed to Deter Baseless Filings.

33.04[1] Pleadings and Papers Must Be Properly Signed. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, by the party [*Fed R Civ P 11(a)*]. Each paper must state the signer's address, e-mail address, and telephone number [*Fed R Civ P 11(a)*].

A typed name is not sufficient to meet the signature requirements; the name must be handwritten [*Becker v. Montgomery (2001) 532 US 757, 764-768, 121 S Ct 1801, 149 L Ed2d 983*].

Exception:
A typed signature may be acceptable in courts that accept documents by electronic filing.

An unsigned paper will be stricken unless it is promptly signed after the error is called to the attention of attorney or party [*Fed R Civ P 11(a)*].

Warning:

Fed R Civ P 11 is directed at papers signed in violation of the rule, not at general misconduct [*Truesdell v. Southern Cal. Permanente Med. Group (9th Cir 2002) 293 F3d 1146, 1154* (noting that it had remanded in a previous case when the court could not tell from the record whether the district court had imposed sanctions for a particular filing, or simply for counsel's extraneous "boorish conduct")].

Cross Reference:

Signing requirements, see 2 Moore's Federal Practice, *§ 11.10* (Matthew Bender 3d ed.).

33.04[2] Signing or Later Advocacy Certifies Content of Filings. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances [*Fed R Civ P 11(b)*]:

- It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation [*Fed R Civ P 11(b)(1)*];

- The claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law [*Fed R Civ P 11(b)(2)*];

- The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery [*Fed R Civ P 11(b)(3)*]; and

- The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief [*Fed R Civ P 11(b)(4)*].

An attorney's signature on a complaint is tantamount to a warranty that the complaint is well grounded in fact and existing law (or proposes a good-faith extension of the existing law) and that it is not filed for an improper purpose [*Christian v. Mattel, Inc. (9th Cir 2002) 286 F3d 1118, 1127*].

Cross Reference:

Certifications, see 2 Moore's Federal Practice, *§ 11.11* (Matthew Bender 3d ed.).

33.04[3] Attorney Must Make Reasonable Investigation. *Fed R Civ P 11* requires counsel to make a reasonable investigation, under the circumstances, of the facts and the law before submitting pleadings [*Fed R Civ P 11(b)*].

An attorney has a duty prior to filing a complaint to conduct a reasonable factual investigation and perform adequate legal research to confirm whether the theoretical underpinnings of the complaint are warranted by existing law or a good-faith argument for an extension, modification or reversal of existing law [*Christian v. Mattel, Inc. (9th Cir 2002) 286 F3d 1118, 1127*].

Example:

In an Americans With Disabilities Act accessibility suit against a retailer, plaintiff's counsel violated Rule 11's investigation requirement by filing a generic complaint which listed "hypothetical" violations, i.e., a complaint containing allegations without factual support. However, the court declined to impose monetary sanctions because it appeared counsel had learned the error of his ways from being admonished and it did not appear that monetary sanctions were required to deter future violations [*Pickern v. Pier 1 Imports (U.S.), Inc. (ED Cal 2004) 339 F Supp2d 1081, 1089-1091*].

In determining whether a reasonable inquiry into the law has been made, all relevant circumstances, including the following may be considered [*see Cooter & Gell v. Hartmarx Corp. (1990) 496 US 384, 401-402, 110 S Ct 2447, 110 L Ed2d 359*]:

- The amount of time available to research and analyze the relevant legal issues.

- The complexity of the factual and legal issues in question.

- The clarity or ambiguity of existing law.

- The plausibility of the legal position asserted.

- The knowledge of the presenter.
- The extent to which counsel relied on other counsel to conduct the legal research and analysis underlying the position asserted.
- The sources reasonably available to the presenter to devote to the inquiry.
- The extent to which the presenter was on notice that further inquiry might be appropriate.

The reasonableness of the inquiry into the law is determinative. If a pleading is well-grounded in law, the bad faith of the signatory is irrelevant; conversely, good faith does not preclude imposition of Rule 11 sanctions when no reasonable inquiry was made [*G.C. & K.B. Invs., Inc. v. Wilson (9th Cir 2003) 326 F3d 1096, 1109* ; *Zaldivar v. Los Angeles (9th Cir 1986) 780 F2d 823, 830* , *abrogated on other grounds by Cooter & Gell v. Hartmarx Corp. (1990) 496 US 384, 110 S Ct 2447, 110 L Ed2d 359* ; *Moser v. Bret Harte Union High Sch. Dist. (ED Cal 2005) 366 F Supp 2d 944, 950*].

Cross Reference:

Reasonable investigation, see 2 Moore's Federal Practice, *§ 11.11[2]* (Matthew Bender 3d ed.).

33.04[4] Pleadings Must Not Be Frivolous. A frivolous pleading argues a legal position that clearly has no chance of success [*Pierce v. F.R. Tripler & Co. (2d Cir 1992) 955 F2d 820, 830*].

Sanctions may be ordered if a filing is either legally frivolous or factually unsupported [*see Fed R Civ P 11(b)(2), (3)*; *Truesdell v. Southern Cal. Permanente Med. Group (9th Cir 2002) 293 F3d 1146, 1153* (district court applied the correct standard of objective reasonableness and properly concluded that no reasonable lawyer would have certified that the claims raised in plaintiff's complaint were "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law")].

Consider:

It is not necessary that the pleading as a whole be frivolous or filed for an improper purpose: Rule 11 sanctions may be imposed for improper or unwarranted allegations even when combined with at least one non-frivolous claim [*Townsend v. Holman Consulting Corp. (9th Cir 1990) 929 F2d 1358, 1362-1365* ; *Moser v. Bret Harte Union High Sch. Dist. (ED Cal 2005) 366 F Supp 2d 944, 950*].

Distinguish:

As to plaintiffs who are uncertain about the facts and law at the time an action is filed, Rule 11(a) does not prohibit pleadings in the alternative, even if the alternatives are mutually exclusive [*see PAE Gov't Servs. v. MPRI, Inc. (9th Cir 2007) 514 F3d 856, 858-860* ("there is nothing in the Federal Rules of Civil Procedure to prevent a party from filing successive pleadings that make inconsistent or even contradictory allegations")].

Cross Reference:

Frivolousness test, see 2 Moore's Federal Practice, *§ 11.11[5]* (Matthew Bender 3d ed.).

33.04[5] Pleadings Must Not Have Improper Purpose. Representations to the court must not have an improper purpose, such as to harass to cause unnecessary delay [*Fed R Civ P 11(b)(1)*; *see, e.g., Montrose Chem. Corp. v. American Motorists Ins. Co. (9th Cir 1997) 117 F3d 1128, 1136* (reversing Rule 11 sanctions, the court stated that the district court did not find, nor was there sufficient evidence on the record to conclude, that plaintiff's initial failure to allege diversity jurisdiction was the result of any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation)].

33.04[6] Legal Contentions Must Be Justified by Existing Law. *Fed R Civ P 11* requires that legal contentions in pleadings be warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law, or the establishment of new law [*Fed R Civ P 11(b)(2)*; *see, e.g., Foster v. Skinner (9th Cir 1995) 70 F3d 1084, 1089* (complaint contained at least 10 claims that had previously been rejected by Ninth Circuit and other circuits); *Roundtree v. United States (9th Cir 1994) 40 F3d 1036, 1040* (sanctions proper when attorney brought theory to court in several different cases and each time it was rejected)].

Cross Reference:

Argument for change in existing law, see 2 Moore's Federal Practice, *§ 11.11[7][b]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsBad Faith MotionsCivil ProcedureSanctionsBaseless FilingsFrivolous LawsuitsCivil ProcedureSanctionsBaseless FilingsSigning RequirementsCivil ProcedureSanctionsBaseless FilingsVexatious Litigants

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33.05 Rule 11 Is Not Substitute for Motion for Summary Judgment.

Rule 11 motions should not be employed to test the sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes [*Fed R Civ P 11*, Committee Note of 1993]. Dismissal of a frivolous case on the merits should be the first option, whereas imposition of sanctions should be a matter of last resort; a Rule 11 motion for sanctions is not a proper substitute for a motion for summary judgment [*Safe-Strap Co. v. Koala Corp. (SDNY 2003) 270 F Supp2d 407, 416*].

Legal Topics:

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

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33.06 Sanctions Are Available for Rule 11 Violations.

33.06[1] Court May Impose Sanction on Attorney, Law Firm, or Party. If, after notice and a reasonable opportunity to respond, the court determines that *Fed R Civ P 11(b)* has been violated, the court may impose an appropriate sanction on the attorneys, law firms, or parties that have violated Rule 11(b) or are responsible for the violation [*Fed R Civ P 11(c)(1)*].

Cross Reference:

Imposition of sanctions, see 2 Moore's Federal Practice, *§ 11.23* (Matthew Bender 3d ed.).

33.06[2] Reasonableness Standard Will Be Applied. *Fed R Civ P 11(b)(2)*, which relates to legal contentions, establishes an objective standard of reasonable conduct, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments [*see Fed R Civ P 11*, Committee Note of 1993; *see Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 174*].

Before awarding Rule 11 sanctions, a district court must conduct a two-prong inquiry to determine (1) whether the complaint or relevant document is legally or factually "baseless" from an objective perspective, and (2) if the attorney has conducted "a reasonable and competent inquiry" before signing and filing it" [*ICU Medical, Inc. v. Alaris Med. Systems, Inc. (Fed Cir 2009) 558 F3d 1368, 1381* (construing 9th Circuit law)].

33.06[3] Sanctions Must Have Deterrent Effect. *Fed R Civ P 11* is not designed as a fee-shifting provision or to compensate the opposing party; its primary purpose is to deter sanctionable conduct [*Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 175*]. Thus, in addition to requiring that any fees be a direct result of the offending conduct, the court must consider the deterrent effect of any fee award [*see Fed R Civ P 11(c)(4) Cooter & Gell v. Hartmarx Corp. (1990) 496 US 384, 406, 110 S Ct 2447, 110 L Ed2d 359] , superseded by statute as stated in* In re Jazz Photo Corp., (2004) . Moreover, an award of fees is limited to fees "reasonably" expended as a result of an unwarranted filing [*Fed R Civ P 11(c)(4)*].

Legal Topics:

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

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33.07 LOCAL PRACTICE: CD Cal Requirements

33.07[1] Signature Requirements. In the Central District, all documents except declarations must be signed by the attorney for the party or the party appearing pro se. The name of the person signing the document must be clearly typed below the signature [*CD Cal Civ LR 11-1*].

33.07[2] Sanctions for Noncompliance With Local Rule 11, and for Frivolous Motions and Opposition to Motions. The presentation to the court of frivolous motions or opposition to motions (or the failure to comply fully with *CD Cal Civ LR 11-1 et seq*.) subjects the offender at the discretion of the court to the sanctions of *CD Cal Civ LR 83-7* [*CD Cal Civ LR 11-9*].

Under *CD Cal Civ LR 83-7*, the violation of or failure to conform to any of the Local Rules of the Central District may subject the offending party or counsel to:

- Monetary sanctions, if the court finds that the conduct was willful, grossly negligent, or reckless [*CD Cal Civ LR 83-7(a)*];

- The imposition of costs and attorney's fees to opposing counsel, if the court finds that the conduct rises to the level of bad faith and/or a willful disobedience of a court order [*CD Cal Civ LR 83-7(b)*]; and/or

- For any of the conduct specified in (a) and (b) above, such other sanctions as the court may deem appropriate under the circumstances [*CD Cal Civ LR 83-7(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsBad Faith MotionsCivil ProcedureSanctionsBaseless FilingsFrivolous LawsuitsCivil ProcedureSanctionsBaseless FilingsSigning Requirements

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33.08 Rule 11 Is Not Aimed at General Misconduct.

Fed R Civ P 11 is not a panacea intended to remedy all manner of attorney misconduct occurring before or during the trial of cases. It does not repeal or modify existing authority of federal courts to deal with abuses of counsel under *28 USC § 1927* or under the court's inherent power to discipline attorney misconduct [*Zaldivar v. City of Los Angeles (9th Cir 1986) 780 F2d 823, 829-830 , disapproved on another ground in Cooter & Gell v. Hartmarx Corp. (1990) 496 US 384, 397, 110 S Ct 2447, 110 L Ed2d 359*].

Rule 11 sanctions are directed at papers signed in violation of the rule, not at general misconduct [*Truesdell v. Southern Cal. Permanente Med. Group (9th Cir 2002) 293 F3d 1146, 1154* (remanding because the record was not clear as to the bases for sanctions)].

A showing of bad faith is not a prerequisite to the imposition of Rule 11 sanctions [McMahon v. Pier 39 Ltd. P'ship (ND Cal 2003) 2003 US Dist LEXIS 22178, at *17].

Cross References:

Discussion of *28 USC § 1927*, see Ch. 34, Other Sanction Provisions, see *§§ 34.03 -34.11*. Discussion of court's inherent powers to impose sanctions, see Ch. 34, Other Sanction Provisions, see *§§ 34.16 -34.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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33.09 Rule 11 Is Inapplicable When More Specific Rules Apply.

Fed R Civ P 11 is not properly used to sanction the inappropriate filing of papers when other rules more directly apply. Note that *Fed R Civ P 11(d)* explicitly states that Rule 11 does not apply to discovery matters encompassed by *Fed R Civ P 26-37*. Therefore, excessive discovery requests should be addressed under *Fed R Civ P 26(g)* rather than Rule 11. Similarly, the filing of inappropriate affidavits in support of, or in opposition to, motions for summary judgment should be considered under *Fed R Civ P 56(g)*, rather than Rule 11. To apply Rule 11 literally to all papers filed in the case, including those subject to special rules, would risk the denial of the protection afforded by those special rules [*Zaldivar v. City of Los Angeles (9th Cir 1986) 780 F2d 823, 829-830* , *disapproved on another ground in Cooter & Gell v. Hartmarx Corp. (1990) 496 US 384, 397, 110 S Ct 2447, 110 L Ed2d 359*].

Cross References:

Discovery sanctions, see Ch. 25, Motions to Compel and Discovery Sanctions. Motions for summary judgment, see Ch. 29, Summary Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureSummary JudgmentOppositionSupporting MaterialsCivil ProcedureSummary JudgmentSupporting MaterialsAffidavitsCivil ProcedureSanctionsBaseless FilingsGeneral Overview

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33.10 Sanctions Are Available Under § 1927 for Wrongful Proliferation of Proceedings.

33.10[1] Attorney's Conduct Must Be Unreasonable and Vexatious. An attorney who "so multiplies the proceedings in any case unreasonably and vexatiously" may be required to pay excess costs, expenses, and attorney's fees reasonably incurred by the other party as a result of the conduct [*28 USC § 1927*; *see Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc. (9th Cir 2000) 210 F3d 1112, 1117* (*28 USC § 1927* authorizes the imposition of sanctions against any lawyer who wrongfully proliferates litigation proceedings once a case has commenced)].

Distinguish:

Because *28 USC § 1927* applies only to unnecessary filings and tactics once a lawsuit has begun [*In re Keegan Mgmt. Co. Secs. Litig. (9th Cir 1996) 78 F3d 431, 435*], the filing of an original complaint cannot be sanctioned under § 1927. The filing of a complaint may be sanctioned under Rule 11 or a court's inherent authority [*In re Keegan Mgmt. Co. Secs. Litig. (9th Cir 1996) 78 F3d 431, 435* ; *Willis v. City of Oakland (ND Cal 2005) 231 FRD 597, 598*].

In that *28 USC § 1927* requires that an attorney's multiplication of proceedings be both unreasonable and vexatious, the conduct of the attorney in question must have been somehow wrongful; the imposition of sanctions under § 1927 requires a finding of bad faith. Knowing or reckless conduct meets this standard [*Fink v. Gomez (9th Cir 2001) 239 F3d 989, 993 , cert. denied sub nom. Fink v. Nourse, 538 US 929 (2003)* ; *Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 175-176*].

33.10[2] Attorney's Fees Can Be Awarded. *28 USC § 1927* sanctions may be an award of reasonable attorney's fees, but an attorney may be ordered to pay only excess costs resulting from improper conduct [*28 USC § 1927*; *see Salstrom v. Citicorp Credit Servs., Inc. (9th Cir 1996) 74 F3d 183, 185*].

Cross Reference:

Sanctions under § 1927, see Ch. 34, Other Sanction Provisions, see *§§ 34.03 -34.11*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureSanctionsBaseless FilingsVexatious LitigantsCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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33.11 Sanctions Are Available Under Inherent Power of Court to Punish Bad-Faith Conduct.

A court has inherent power to curb bad-faith litigation practices [*see International Union, UMW v. Bagwell (1994) 512 US 821, 828, 114 S Ct 2552, 129 L Ed2d 642*].

Courts have the inherent power to impose attorney's fees as a sanction for bad-faith conduct, and this sanction can be imposed directly on the parties. However, the court must exercise caution in invoking its inherent power, and it is in cases when neither the statute nor the Rules are up to the task that the court may safely rely on its inherent power [*Chambers v. NASCO, Inc. (1991) 501 US 32, 50, 111 S Ct 2123, 115 L Ed2d 27* (sanctions under the court's inherent power are appropriate when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons)].

The power to sanction under local district court rules derives from the court's inherent authority to assess sanctions against either the client or the attorney for acting in bad faith, vexatiously, wantonly, or for oppressive reasons [*see Roadway Express, Inc. v. Piper (1980) 447 US 752, 764-765, 100 S Ct 2455, 65 L Ed2d 488* ; *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y (1975) 421 US 240, 258-259, 95 S Ct 1612, 44 L Ed2d 141*].

Cross References:

Sanctions under local rules and inherent power of court, see Ch. 34, Other Sanction Provisions, see *§§ 34.16 -34.30*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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33.12 Other Rules Providing for Sanctions.

33.12[1] Rule 16 Sanctions for Failure to Comply With Pretrial Requirements. Sanctions may be imposed against a party, a party's attorney, or both on any of the following grounds [*Fed R Civ P 16(f)*]:

- Failure to obey a scheduling or pretrial order;
- Failure to appear at a scheduling or pretrial conference;
- Being substantially unprepared to participate in a scheduling or pretrial conference; or
- Failure to participate in good faith.

Cross Reference:

Rule 16 sanctions, see Ch. 17, Final Pretrial Conference, see *§ 17.16*, *17.17*.

33.12[2] Rule 37 Sanctions for Discovery Abuse. *Fed R Civ P 37* governs motions to compel disclosure and discovery, and empowers courts to impose sanctions when a party:

- Fails to make the required disclosures as required by *Fed R Civ P 26(a)*;
- Loses a motion to compel;
- Violates a discovery order;
- Fails without justification to admit matters addressed in a request for admission;
- Fails to respond to a notice of deposition, to interrogatories, or to a request for production of documents or for inspection; or

- Fails to participate in good faith in developing a discovery plan.

Cross References:

Discovery sanctions, see Ch. 25, Motions to Compel and Discovery Sanctions.

7 Moore's Federal Practice, Ch. 37, Failure to Make Disclosure or to Cooperate in Discovery: Sanctions (Matthew Bender 3d ed.).

33.12[3] Rule 45 Sanctions for Abuse of Subpoena Process. Sanctions may be awarded against an attorney or party who issues and serves a subpoena that imposes undue burden or expense on the recipient [*see Fed R Civ P 45(c)(1)*]. In addition, a person who fails to obey a subpoena may be found in contempt of court [*see Fed R Civ P 45(e)*].

Cross Reference:

Fed R Civ P 45 sanctions, see 9 Moore's Federal Practice, *§ 45.04[1]*, [6][b] (Matthew Bender 3d ed.).

33.12[4] Rule 56 Sanctions for Affidavit Filed for Improper Purpose in Summary Judgment Motion. A party who files an affidavit in connection with a motion for summary judgment in bad faith or solely for the purpose of delay is subject to the sanction of reasonable expenses and attorney's fees incurred by the opposition in connection with the offending affidavit [*see Fed R Civ P 56(g)*].

Cross Reference:

Summary judgment sanctions, see 11 Moore's Federal Practice, *§ 56.33* (Matthew Bender 3d ed.).

33.12[5] Dismissal Under Rule 41 for Failure to Prosecute or Comply With Court Order. *Fed R Civ P 41* allows a defendant to move for dismissal of a claim or the action if the plaintiff fails to prosecute or to comply with a court order [*see Fed R Civ P 41(b)*].

Cross References:

Motion for dismissal, see Ch. 28, Dismissal for Delay in Bringing to Trial.

Rule 41 dismissal, 8 Moore's Federal Practice, *§§ 41.50* -41.53 (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDismissalsInvoluntary DismissalsFailures to ComplyCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureSummary JudgmentSupporting MaterialsAffidavitsCivil ProcedurePretrial MattersConferencesSanctionsCivil ProcedurePretrial MattersSubpoenas

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33.13 CHECKLIST: Moving for Rule 11 Sanctions.

The following checklist may be used as a general guide for moving for Rule 11 sanctions.

- ☐ Determine that conduct of opponent falls under Rule 11.
- ☐ Inform opponent in writing that you plan to move for Rule 11 sanctions.
- ☐ Check local court rules for:
  - ○ General motion procedure.
  - ○ Any motion procedure applicable to motions for sanctions generally.
  - ○ Any procedure applicable to the particular type of sanctions sought.
- ☐ Clearly set forth the grounds for sanctions.
  - ○ A motion for sanctions must indicate specifically how Rule 11 has been violated.
- ☐ Specify the order sought.
  - ○ Request a sanction aimed at deterring similar conduct, such as:
    - ☐ Attorney's fees and costs.

- [ ] Striking the sanctionable paper.
- [ ] Payment of a fine.
- [ ] Dismissal of the action or claim.

- [ ] Draft supporting documents.
  - Supporting affidavits and memoranda of law may be required by local district court rules.

- [ ] State an intent to reply to opposition.
  - Local district court rules may require a statement that movant intends to submit reply papers.
  - Serve the filing-ready motion for sanctions and supporting documents on opposing parties.
    - [ ] Note that the respondent has 21 days to cure the violation.
  - File the motion for sanctions at least 21 days after service.

Authority:
Fed R Civ P 7, 11

Discussion:
See *§ 33.14* et seq.

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Form:
See *§ 33.31*

- [ ] In the Northern District, comply with the following [*ND Cal Civ LR 7-8*]:
  - Separately file the motion.
    - [ ] Set the date for hearing in conformance with *ND Cal Civ LR 7-2*.
    - [ ] Draft the form of the motion pursuant to *ND Cal Civ LR 7-2*.
    - [ ] Comply with any applicable Federal Rules of Civil Procedure.

☐ Make the motion as soon as practicable after learning of the underlying circumstances.

☐ Unless otherwise ordered by the court, no motion for sanctions may be served and filed more than 14 days after entry of judgment.

Authority:
ND Cal Civ LR 7-8

Discussion:
See *§ 33.19*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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33.14 Give Informal Notification Before Moving for Sanctions.

Counsel should consider notifying opposing counsel by letter of any intention to seek Rule 11 sanctions ("Rule 11 letter") [*Fed R Civ P 11*, Committee Note of 1993 (in most cases, counsel should be expected to give informal notice of a potential violation to the other party, in person or by telephone or letter, before proceeding to prepare and serve a Rule 11 motion)]. The letter should outline the grounds for sanctions and ask that the offending paper be withdrawn or corrected.

Strategic Point--Moving Party:

Informal notice is almost always a good idea except in the most egregious cases. It sometimes obtains the necessary relief without a fight, and the judge will appreciate it.

Judge's Perspective:

Failure to grant this courtesy may alienate the judge. Notice should be given on almost everything unless there is a confidentiality issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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33.15 Motion for Rule 11 Sanctions Must Be Separate From Other Motions.

A motion for sanctions under Rule 11 must be made separately from other motions or requests and must describe the specific conduct alleged to violate *Fed R Civ P 11(b)* [*Fed R Civ P 11(c)(2)*; *Dunn v. Pepsi-Cola Metro. Bottling Co. (ND Cal 1994) 850 F Supp 853, 856*].

Judge's Perspective:

Although the prior practice was to often combine motions for sanctions under different authority, this practice now runs contra to Rule 11(c)(2). There is a higher risk of reversal if the motion is not specific.

Warning:

Sanctions motions should not be used to intimidate, harass, increase litigation costs, obtain a settlement, test the sufficiency of allegations, emphasize the merits of a claim, create a conflict of interest between attorney and client, reveal privileged information or work-product, or as a discovery device [*Fed R Civ P 11*, Committee Note of 1993]. Inasmuch as a motion for sanctions is subject to the certification requirements of Rule 11, an attorney or party may be sanctioned for filing a sanctions motion for an improper purpose [*Fed R Civ P 11(b)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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33.16 Move for Sanctions Promptly.

Ordinarily, Rule 11 motions should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely [*Fed R Civ P 11*, Committee Note of 1993; *Price v. Hawaii (D Haw 1992) 789 F Supp 330, 335-336* (a motion for sanctions under Rule 11 should be denied when the moving party fails to act promptly)].

Warning:

Sanctions are not to be lightly granted, and neither Rule 11 nor any other sanctioning authority should be used to "chill" creative advocacy or attorneys' enthusiasm in pursuing legal or factual theories [*Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 176*].

When the inappropriate paper averred to is the complaint, the party that hopes to secure sanctions for the submission of that pleading should move for sanctions promptly after the complaint is filed [*Safe-Strap Co. v. Koala Corp. (SDNY 2003) 270 F Supp2d 407, 413* (deferring its ruling on sanctions until the end of the litigation)].

A party cannot delay serving the Rule 11 motion until the conclusion of the case. To allow this conduct would frustrate the safe harbor provisions of Rule 11 [*Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC (9th Cir 2003) 339 F3d 1146, 1151* (Rule 11 motion was filed after time for adverse party to correct or withdraw complaint had passed)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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33.17 Motion Must State Specific Grounds for Sanctions and Relief Sought.

A motion for sanctions must comply with *Fed R Civ P 7*, which requires that, among other things [*Fed R Civ P 7(b)(1)*]:

- The motion must state with particularity the grounds for sanctions.
- The motion must state the relief sought.

A party's motion initiating the sanctions process must describe the specific conduct alleged to violate subdivision (b) [*Fed R Civ P 11(c)(2)*]. At a minimum, the notice requirement mandates that the subject of a Rule 11 sanctions motion be informed of the specific conduct or omission for which the sanctions are being considered so that the subject of the sanctions motion can prepare a defense [*Storey v. Cello Holdings, L.L.C. (2d Cir 2003) 347 F3d 370, 389*].

Relief sought may include:

- Monetary sanctions against counsel [*Fed R Civ P 11(c)(5)(A)*].
- Directives of a nonmonetary nature [*Fed R Civ P 11(c)(4)*; *see, e.g., Ivanova v. Columbia Pictures Indus. (CD Cal 2003) 217 FRD 501, 512* (court struck alleged facts and references in complaint that were contrary to known facts or otherwise barred by prior judgments)].
- Fine to be paid to the court [*Fed R Civ P 11(c)(4)*].
- Attorney's fees and costs [*Fed R Civ P 11(c)(4)*; *see, e.g., Ivanova v. Columbia Pictures Indus. (CD Cal 2003) 217 FRD 501, 512*].

When requesting reasonable costs and attorney's fees, counsel should submit a brief and supporting documents detailing the costs and attorney's fees incurred, including hourly rates, along with a proposed order [*Ivanova v. Columbia Pictures Indus. (CD Cal 2003) 217 FRD 501, 514*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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33.18 Serve Motion 21 Days Before Filing: "Safe Harbor" Provision.

33.18[1] Opposition Can Correct or Withdraw Challenged Paper. A motion for Rule 11 sanctions must be served at least 21 days before filing [*Fed R Civ P 11(c)(2)*]. Failure to provide the required notice precludes an award of sanctions on a Rule 11 motion [*Winterrowd v. Am. General Annuity Ins. Co. (9th Cir 2009) 556 F3d 815, 826]* .

This is the "safe harbor" provision that allows opposing counsel to withdraw or correct the offending paper. A party will not be subject to sanctions unless, after receiving the motion, it refuses to withdraw that position or acknowledge candidly that it does not currently have evidence to support a specified allegation [*see Fed R Civ P 11*, Committee Note of 1993].

Warning:

A party may not wait to serve its motion for sanctions until the court has ruled on the offending filing. A motion served after the offending complaint has been dismissed deprives opposing counsel of any opportunity to take advantage of the safe-harbor provision [*Barber v. Miller (9th Cir 1998) 146 F3d 707, 710-711* ; *see Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC (9th Cir 2003) 339 F3d 1146, 1150* (allowing a party to wait until judgment is entered before serving a Rule 11 motion would effectively eliminate the safe harbor altogether)].

33.18[2] Safe-Harbor Provision Is Mandatory. The 21-day safe-harbor period is an absolute prerequisite to a motion for sanctions brought by any party, unless some other period is established by the court [*Barber v. Miller (9th Cir 1998) 146 F3d 707, 710-711* ; *Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 174*].

Example:

In a civil rights action, the defendant filed a Rule 11 motion along with a motion for summary judgment with the court. The district court awarded sanctions, stating that, even though the defendants did not give 21-day advance service to the plaintiffs, a "literal application of the safe harbor provision" was unnecessary in this case. The district court decided that because defendant had filed a Rule 11 motion in

response to the plaintiff's first amended complaint, and three months had passed between the motion and the court's order concerning sanctions, the plaintiffs and their attorneys had been given adequate notice and opportunity to withdraw the challenged allegation. The Ninth Circuit Court of Appeal reversed the award of sanctions, noting that the district court had failed to take proper account of its decision in *Barber v. Miller (9th Cir 1998) 146 F3d 707* , holding that the procedural requirements of former *Fed R Civ P 11(c)(1)(A)* (now see *Fed R Civ P 11(c)(2)*) are mandatory [*Radcliffe v. Rainbow Constr. Co. (9th Cir 2001) 254 F3d 772, 788-789* , *cert. denied, 534 US 1020 (2001)*].

Distinguish:

The safe-harbor provision does not apply to court-initiated sanction proceedings. However, the court must issue an order to show cause under that procedure [*see Barber v. Miller (9th Cir 1998) 146 F3d 707, 710-711* ; *Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 174*].

33.18[3] Do Not File If Challenged Pleading Is Corrected or Withdrawn. If the challenged paper is withdrawn or corrected within the prescribed period (21 days from service), the motion for sanctions may not be filed [*see Fed R Civ P 11(c)(2)*; *see Smith & Green Corp. v. Trustees of the Constr. Indus. & Laborers Health & Welfare Trust (D Nev 2003) 244 F Supp2d 1098, 1102*].

A party cannot delay serving the Rule 11 motion until the conclusion of the case. To allow this conduct would frustrate the safe harbor provisions of Rule 11 [*Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC (9th Cir 2003) 339 F3d 1146, 1151* (Rule 11 motion was filed after time for adverse party to correct or withdraw complaint had passed)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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III. SEEKING RULE 11 SANCTIONS: PLEADINGS, WRITTEN MOTIONS, AND OTHER PAPERS

4-33 MB Practice Guide: Fed Pretrial Civ Proc in CA 33.19

33.19 LOCAL PRACTICE: ND Cal Requirements

33.19[1] Motion for Sanctions Must Comply With Local Rule 7-8. In the Northern District, the following requirements apply to any motion for sanctions, regardless of the sources of authority invoked [*ND Cal Civ LR 7-8*]:

- The motion must be separately filed and the date for hearing must be set in conformance with *ND Cal Civ LR 7-2* [*ND Cal Civ LR 7-8(a)*];

- The form of the motion must comply with *ND Cal Civ LR 7-2* [*ND Cal Civ LR 7-8(b)*];

- The motion must comply with any applicable Federal Rules of Civil Procedure, and must be made as soon as practicable after the filing party learns of the circumstances that it alleges make the motion appropriate [*ND Cal Civ LR 7-8(c)*]; and

Timing:

Unless otherwise ordered by the court, no motion for sanctions may be served and filed more than 14 days after entry of judgment [*ND Cal Civ LR 7-8(d)*].

33.19[2] Set Hearing Date Not Earlier Than 35 Days After Service of Motion. In the Northern District, except as otherwise ordered or permitted by the assigned judge or the local rules, and except for motions made during the course of a trial or hearing, all motions must be filed, served and noticed in writing on the motion calendar of the assigned judge for hearing not earlier than 35 days after service of the motion [*ND Cal Civ LR 7-2(a)*; *see ND Cal Civ LR 5-5*].

33.19[3] Format of Motion Must Comply With Local Rule 7-2. In one filed document not exceeding 25 pages in length, the motion must contain [*ND Cal Civ LR 7-2(b)*]:

- On the first page in the space opposite the caption and below the case number, the noticed hearing date and time [*ND Cal Civ LR 7-2(b)(1)*];

- In the first paragraph, notice of the motion including date and time of hearing [*ND Cal Civ LR 7-2(b)(2)*];

- In the second paragraph, a concise statement of what relief or court action the movant seeks [*ND Cal Civ LR 7-2(b)(3)*]; and

- In the succeeding paragraphs, the points and authorities in support of the motion, in compliance with *ND Cal Civ LR 7-4(a)* [*ND Cal Civ LR 7-2(b)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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4-33 MB Practice Guide: Fed Pretrial Civ Proc in CA 33.20

33.20 Motion May Be Heard on Affidavits or on Oral Testimony or Depositions.

When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties. However, the court may direct that the matter be heard wholly or partly on oral testimony or depositions [*Fed R Civ P 43(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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33.21 Prevailing Party May Obtain Reasonable Expenses and Fees.

If warranted, the court may award to the party prevailing on the motion for sanctions under Rule 11 the reasonable expenses and attorney's fees incurred in presenting or opposing the motion [*Fed R Civ P 11(c)(1)(A)*; *see, e.g.,* Harara v. Conoco Phillips Co. (ND Cal 2005) 2005 US Dist LEXIS 1426, at *4-*5].

Distinguish:

If the court imposes Rule 11 sanctions by a show-cause order on the court's own initiative, the court cannot direct payment of attorney fees and costs to the party that incurred them; in such a case, the sanction is payable to the court [*Willis v. City of Oakland (ND Cal 2005) 231 FRD 597, 600*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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33.22 Law Firm Is Subject to Joint Liability for Sanctions.

Absent exceptional circumstances, a law firm must be held jointly responsible for violations committed by its partners, associates, and employees [*Fed R Civ P 11(c)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewLegal EthicsLaw Firms

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33.23 Rule 11 Sanctions Should Deter Repetition of Conduct.

A sanction imposed for violation of Rule 11 must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated [*Fed R Civ P 11(c)(4)*]. The purpose of sanctions under Rule 11 is to deter frivolous litigation and filings [*see Cooter & Gell v. Hartmarx Corp. (1990) 496 US 384, 393, 110 S Ct 2447, 110 L Ed2d 359* , *superseded in part by* amended *Fed R Civ P 11* regarding safe-harbor provision]. Rule 11 is not designed as a fee-shifting provision or to compensate the opposing party; its primary purpose is to deter sanctionable conduct [*see Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 175*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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4-33 MB Practice Guide: Fed Pretrial Civ Proc in CA 33.24

33.24 Limitations on Rule 11 Monetary Sanctions.

33.24[1] Only Attorney Is Responsible for Groundless Legal Contentions. Monetary sanctions may not be awarded against a represented party for a violation of *Fed R Civ P 11(b)(2)*, that is, if the claims, defenses, and other legal contentions therein are not warranted by existing law nor by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law [*Fed R Civ P 11(c)(5)(A)*; *see, e.g., Ivanova v. Columbia Pictures Indus. (CD Cal 2003) 217 FRD 501, 512 n7*].

33.24[2] Fees Must Result From Rule Violation. Fees that are assessed should be limited to amounts incurred as a result of the rule violation. The court has an independent duty to determine the appropriate "lodestar" amount based on a reasonable hourly rate multiplied by a reasonable number of hours expended [*Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 178* ; *see, e.g., Van Gerwen v. Guarantee Mut. Life Co. (9th Cir 2000) 214 F3d 1041, 1045*].

In this determination, the court also keeps in mind the level of fees necessary to act as a deterrent [*see Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 178*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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33.25 Order for Rule 11 Sanctions Must Describe Violative Conduct.

When imposing sanctions under Rule 11, the order must describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed [*Fed R Civ P 11(c)(6)*].

Rule 11 sanctions must be directed at papers signed in violation of the rule not at general misconduct [*Truesdell v. Southern Cal. Permanente Med. Group (9th Cir 2002) 293 F3d 1146, 1154* (remanding because the record was not clear as to the bases for sanctions); *Christian v. Mattel, Inc. (9th Cir 2002) 286 F3d 1118, 1131* (remanding because the court could not tell from the record whether the district court had imposed sanctions for a particular filing, or simply for counsel's extraneous "boorish conduct")].

Cross Reference:

2 Moore's Federal Practice, *§§ 11.25*, *11.26* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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33.26 CHECKLIST: Opposing Motion for Sanctions.

The following checklist may be used as a general guide for opposing a motion for sanctions.

☐ Cure any Rule 11 violation, if possible, during the 21-day safe-harbor period.

☐ If the motion has been determined or filed prior to the 21-day safe-harbor period, raise that point in opposition to the premature imposition of sanctions.

☐ Assert that the contention in question was made in good faith.

☐ Substantiate any legal authority in support for the contention in question, particularly if the point is unsettled in the Ninth Circuit.

☐ Assert that the conduct in question is not covered under Rule 11, e.g., that it does not involve a signature on a paper presented to the court.

☐ Dispute the reasonableness or amount of attorney's fees sought.

Authority:
Fed R Civ P 11

Discussion:
See *§ 33.27* et seq.

Form:

See § 33.78

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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33.27 Use "Safe Harbor" Provision to Cure Rule 11 Violation.

If a motion for sanctions alleges that a paper presented to the court violated the certification requirements of Rule 11, the challenged paper may be corrected or withdrawn within 21 days after service without incurring sanctions [*Fed R Civ P 11(b), (c)(2)*]. Counsel can correct or withdraw the challenged paper during the 21-day period between service and filing [*see Truesdell v. Southern Cal. Permanente Med. Group (9th Cir 2002) 293 F3d 1146, 1152*].

Distinguish:

On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) [*Fed R Civ P 11(c)(3)*]. The safe-harbor provision does not apply to court-initiated sanction proceedings. Furthermore, there are restrictions on the court's *sua sponte* sanctions authority, e.g., on monetary sanctions to an opposing party [*see Barber v. Miller (9th Cir 1998) 146 F3d 707, 710-711* ; *Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 174*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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33.28 Assert That Contention Was Supported by Law and Fact.

A request for sanctions under *Fed R Civ P 11(b)(2)* (on the basis that a contention is not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law) may be opposed on the ground that the person subject to sanctions made a good-faith argument in support of that contention [*see, e.g., Somerset Marine, Inc. v. Forespar Prods. (CD Cal 1994) 876 F Supp 1114, 1115-1116*].

Strategic Point--Person Opposing Sanctions:

Having relied on good direct authority for a contention will strengthen a subsequent opposition to the award of sanctions. This argument may prevent the imposition of sanctions particularly if it involves an issue that is unsettled or unclear in the Ninth Circuit [*see, e.g., Somerset Marine, Inc. v. Forespar Prods. (CD Cal 1994) 876 F Supp 1114, 1115-1116* (defendant's motion for Rule 11 sanctions denied although motion for summary judgment granted)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsBad Faith MotionsCivil ProcedureSanctionsBaseless FilingsFrivolous Lawsuits

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33.29 Assert That Particular Conduct Cannot Be Basis for Rule 11 Sanctions.

Rule 11 sanctions are limited to specified representations to the court in violation of that rule [*Fed R Civ P 11*]. The district court may not consider extra-pleadings conduct as a basis for Rule 11 sanctions [*Christian v. Mattel, Inc. (9th Cir 2002) 286 F3d 1118, 1131*].

Sanctions under *Fed R Civ P 11* may not be imposed for conduct in depositions, discovery meetings of counsel, oral representations at hearings, and behavior in prior proceedings [*Christian v. Mattel, Inc. (9th Cir 2002) 286 F3d 1118, 1131* ; *see also Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 170*].

Warning--Sanctions May Nevertheless Be Available Under Other Authority:

Counsel should understand that although sanctions may not be available specifically under Rule 11 for the conduct asserted in a Rule 11 motion, sanctions may nevertheless be available for the same conduct under some other authority, e.g., *Fed R Civ P 37*, *28 USC § 1927*, or the court's inherent authority to impose sanctions.

Cross References:

28 USC § 1927 sanctions, see Ch. 34, Other Sanction Provisions, see *§§ 34.03 -34.11*. Courts's inherent power to impose sanctions, see Ch. 34, Other Sanction Provisions, see *§§ 34.16 -34.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorDiscourtesies

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33.30 Assert That Attorney Fees Sought Were Not Incurred by Challenged Paper.

The amount of attorney's fees awarded under *Fed R Civ P 11* must be reasonably and appropriately spent in relation to the offensive pleading or other paper [*see, e.g., Christian v. Mattel, Inc. (9th Cir 2002) 286 F3d 1118, 1131, n12*]. Counsel should therefore oppose an award of fees if the moving party has not provided a sufficient showing that fees are based on a reasonable rate for reasonable number of hours spent addressing the specific Rule 11 violation described in the motion.

Example:

Seven hundred hours of attorney billing on a summary judgment motion and response to a complaint that is frivolous on its face may be questionable. That is, if the action is frivolous on its face, why would the attorneys need to spend 700 hours responding to it [*see, e.g., Christian v. Mattel, Inc. (9th Cir 2002) 286 F3d 1118, 1131 n12* (not deciding the issue, but vacating the ruling on other grounds)]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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V. FORMS

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33.31 Notice of Motion for Rule 11 Sanctions.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR RULE
_____ [*name*],	)	11 SANCTIONS
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for:

(a) An order pursuant to *Federal Rules of Civil Procedure, Rule 11(b)*, imposing appropriate sanctions on _____ [*party designation and name of party against whom sanctions are sought*]; and/or on _____ [*name of attorney for sanctioned party*], attorney representing _____ [*name of sanctioned party*]; and/or on his/her law firm, _____ [*name of law firm, if any, employing sanctioned attorney*], for _____ [*describe allegedly offending pleading, motion or other paper, and violation of Rule 11, e.g.*, presenting a complaint to this court for the purpose of harassment];

(b) An order granting _____ [*name of moving party*] such other incidental relief as may be appropriate.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel*.]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum*.]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations*.]

[*Attach certificate of service*.]

NOTES.

Authority:
Fed R Civ P 11

Discussion:

See *§§ 33.13 -33.25*

Related Forms of Affidavit and Declaration:

4 Bender's Federal Practice Forms, Forms 11:52, 11:53 (Matthew Bender)

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33.32 Affidavit in Opposition to Motion for Sanctions.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	Civil Action No. _____
Plaintiff	)	
vs.	)	
_____ [*name*],	)	AFFIDAVIT OF _____ [*name*] IN
Defendant	)	OPPOSITION
	)	TO MOTION FOR RULE 11 SANCTIONS
	)	

_____ [*Name of affiant*], being duly sworn, deposes and says:

1. _____ [*Provide relevant identifying information, e.g.,* I am over 18 years of age, an attorney duly licensed to practice in the State of _____ and before this Court, and the attorney of record for _____ [*name of moving*] party in this action].

2. I have personal knowledge of all of the facts stated in this Affidavit, and if called to testify as a witness in this matter, I could and would competently testify to each of the facts set forth in this Affidavit.

3. I make this Affidavit in opposition to the Motion for Sanctions made by _____ [*name of moving party*] claiming that _____ [*describe basis for sanctions under Fed R Civ P 11, e.g.,* the complaint in this action was presented for the purpose of harassment].

4. _____ [*Set forth points in opposition to motion, using additional paragraphs if necessary*].

[5. To date, I have spent _____ [*number*] hours researching and drafting this response to the motion. I estimate that I will spend at least _____ [*number*] additional hours preparing for and attending the hearing on this motion. My client _____ [*name of client*] will be billed for my time at my normal billing rate, which is $_____ per hour. Therefore, $_____ is a reasonable sum to be awarded should I prevail on this motion.]

_____ [*signature of affiant*]

SUBSCRIBED AND SWORN TO BEFORE ME on _____ [*date*].

[*Seal*]

_____ [*notary's signature*]

_____ [*typed name*]

Notary Public in and for the

State of _____.

My commission expires on _____ [*date*].

NOTES.

Authority:
Fed R Civ P 11

Discussion:
See *§§ 33.26 -33.30*

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33.33 Order Granting Sanctions.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	ORDER AWARDING ATTORNEY'S FEES
Defendant	)	AS RULE 11 SANCTIONS
	)	
	)	

On _____ [*date*], _____ [*name and designation of moving party*], moved this court for sanctions under *Federal Rule of Civil Procedure 11*. The motion was duly noticed in compliance with the provisions of *Federal Rule of Civil Procedure 11(c)(1)(A)*. _____ [*Name of moving attorney*] of the firm of _____ [*firm name*] appeared and argued in support of the motion. _____ [*Name of opposing attorney*] of the firm of _____ [*firm name*] appeared and argued against the motion. The court has considered the papers submitted in support of and in opposition to the motion, the authorities cited by the parties, and the argument of counsel. After due deliberation, the court has reached the following conclusions:

1. Sanctions are warranted in this case because _____ [*set forth basis for sanctions under Fed R Civ P 11, e.g.,* the complaint in this case was presented for the improper purpose of harassment].

2. The appropriate sanction in this case is an award of fees in the amount of $_____. The logical starting point for a determination of attorney's fees is a calculation of the number of hours reasonably expended in responding to _____ [*describe pleading, motion, or other paper, e.g.,* the complaint], multiplied by a reasonable hourly attorney's fee based on the prevailing market rate. _____ [*Name of moving party*] seeks a fee award for _____ [*number*] hours spent responding to _____ [*describe pleading, motion, or other paper, e.g.,* the complaint] and _____ [*number*] hours spent preparing the motion for sanctions. The reasonable hourly attorney's fee is $_____ per hour.

THEREFORE, IT IS ORDERED THAT:

1. _____ *Name of person(s) and firms sanctioned*] pay to _____ [*name of moving party*] the sum of $_____.

2. The amount set forth above must be paid no later than _____ days from notice of this order.

3. Failure to comply with this order will result in further sanctions.
Dated: _____

_____ [*signature*]

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:
Fed R Civ P 11

Discussion:
See *§ 33.25*

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Unit 10 Sanctions
CHAPTER 34 Other Sanction Provisions

4-34 MB Practice Guide: Fed Pretrial Civ Proc in CA 34.syn

§ 34.syn Synopsis to Chapter 34: Other Sanction Provisions

34.01 Scope.

34.02 Objective and Strategy.

34.03 CHECKLIST: Seeking Sanctions Under 28 USC § 1927.

34.04 Section 1927 Sanctions Are Aimed at Deterring Improper Multiplication of Proceedings.

34.05 Section 1927 Applies to Conduct After Commencement of Case, Including During Trial.

34.06 Section 1927 Sanctions Are Available for Later Proceedings.

34.07 Section 1927 Sanctions Are Imposed Only on Attorney.

34.08 Sanctions Under § 1927 Require Bad Faith or Recklessness.

34.09 Mere Negligence or Ignorance Does Not Support § 1927 Sanctions.

34.10 LOCAL PRACTICE: CD Cal Requirements--Discouraging Vexatious Litigation by Requiring Security.

34.11 Motion for Sanctions Under § 1927.

34.11[1] State Specific Grounds for Sanctions and Relief Sought.

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34.12 CHECKLIST: Opposing Motion for § 1927 Sanctions.

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34.16 CHECKLIST: Seeking Sanctions Under Inherent Power of Court.

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34.18 Federal Courts Have Inherent Powers to Sanction Bad-Faith Conduct.

34.19 Court May Rely Both on Specific Rule or Statute and on Inherent Authority.

34.20 Court Must Specifically Find Bad Faith or Conduct Tantamount to Bad Faith.

34.21 Due Process Protection That Must Be Afforded Depends on Whether Sanctions Are Tantamount to Criminal Contempt.

34.22 Sanctions Are Available for Variety of Willful Actions.

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34.22[2] Sanctions Must Be Based on Recklessness Combined With Aggravating Factor.

34.23 Court Has Inherent Authority to Impose Wide Range of Sanctions, Including Dismissal.

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34.24[2] Motion Must Be Served Pursuant to Rule 5.

34.25 Responding to and Opposing Motion for Sanctions Under Court's Inherent Powers.

34.25[1] Assert Absence of Bad Faith.

34.25[2] Assert That Nature of Sanctions Requires Due Process Protections Available for Criminal Contempt.

34.26 CHECKLIST: Seeking Sanctions Under Local District Court Rules or Procedures.

34.27 LOCAL PRACTICE: CD Cal Sanction Provisions

34.27[1] Sanctions May Be Imposed for Failure to Comply With Local Rules Relating to Presentations to the Court.

34.27[2] Monetary and Other Appropriate Sanctions for Bad Faith or Willful Violation of Local Rules.

34.27[3] Sanctions for Late Filing of Motion Papers.

34.27[4] Sanctions for Requesting Presence of Declarant in Motion for Civil Contempt Without Good-Faith Intention to Cross-Examine.

34.27[5] Sanctions for Failing to Comply With Requirements for Application for Continuance or Notice of Settlement.

34.27[6] Sanctions for Reinstatement of Case Dismissed for Want of Prosecution.

34.28 LOCAL PRACTICE: ED Cal Sanction Provisions

34.28[1] Sanctions for Violation of Local Rules or Court Order.

34.28[2] Sanctions for Failure to Appear at Motion Proceeding.

34.28[3] Assessment of Costs of Jury Panel for Conduct Preventing Court From Commencing Jury Trial As Scheduled.

34.28[4] Sanctions for Violation of ADR Procedures.

34.28[5] Sanctions for Failure to Notify Court of Settlement.

34.29 LOCAL PRACTICE: ND Cal Sanction Provisions.

34.29[1] Sanctions for Violation of Local or Federal Rules.

34.29[2] Restrictions on Sanctions for Violation of General and Standing Court Orders.

34.29[2][a] Violation of General Order Not Sanctionable Unless Order Specifically Adopted by Judge.

34.29[2][b] Notice of Standing Order Must Precede Sanctions.

34.29[3] Sanctions Against Attorney for Unprofessional Conduct.

34.29[4] Sanctions for Wrongfully Exercising Privilege of Bar Membership.

34.29[5] Sanctions for Violation of ADR Local Rules.

34.29[6] Sanctions for Failure to Proceed on Scheduled Trial Date.

34.29[7] Assessment of Jury Costs for Failure to Proceed on Scheduled Trial Date or Failure to Give Notice of Settlement.

34.29[8] Sanctions for Filing or Refiling Case to Circumvent Case Assignment to Particular Judge.

34.29[9] Sanctions for Repeating Argument in Motion for Leave to File Motion for Reconsideration.

34.30 LOCAL PRACTICE: SD Cal Sanction Provisions.

34.30[1] Sanctions for Violation of Local and Federal Rules and Court Orders.

34.30[2] Sanctions for Violation of Rules of Professional Conduct.

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Unit 10 Sanctions
CHAPTER 34 Other Sanction Provisions
I. STRATEGY

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34.01 Scope.

This chapter covers:

- Seeking sanctions under *28 USC § 1927* [*see 34.03 -34.11*].
- Avoiding and opposing sanctions under *28 USC § 1927* [*see 34.12 -34.15*].
- Seeking sanctions under the court's inherent power [*see 34.16 -34.24*].
- Avoiding and opposing sanctions under the court's inherent power [*see 34.25*].
- Miscellaneous local court rules providing for sanctions [*see 34.26 -34.30*].

Core Statute: *28 USC § 1927*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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34.02 Objective and Strategy.

Fed R Civ P 11 is commonly regarded as the key provision that imposes sanctions on attorneys for improper conduct. However, Rule 11 is limited to conduct associated with pleadings and motions. A broader array of conduct (not limited to pleadings and motions) is sanctionable under *28 USC § 1927*, which authorizes the imposition of costs and attorney's fees as a personal obligation on an attorney "who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously." Sanctions under § 1927 may also be imposed on an attorney who does not reevaluate the merits of his or her claims or advances an unreasonable claim or one that is "not brought with a reasonable good faith belief that it is justified." *28 USC § 1927* is powerful because it authorizes the imposition of costs and attorney's fees on the infringing attorney "personally."

Sanctions may also be imposed under the court's inherent authority, as well as under specific local district court rules governing sanctions.

Detailed Discussion

Moore's Federal Practice, Ch. 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions (Matthew Bender 3d ed.).

4 Bender's Federal Practice Forms, Rule 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions (Matthew Bender).

Joseph, Sanctions: The Federal Law of Litigation Abuse (Matthew Bender 3d ed.).

Cross Reference :

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

Legal Topics:

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

Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsVexatious LitigantsCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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Unit 10 Sanctions
CHAPTER 34 Other Sanction Provisions
II. SEEKING SANCTIONS UNDER 28 USC § 1927 FOR MULTIPLYING LITIGATION UNREASONABLY AND VEXATIOUSLY

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34.03 CHECKLIST: Seeking Sanctions Under 28 USC § 1927.

The following checklist may be used to move for sanctions under *28 USC § 1927*.

☐ Determine particular actions of opposing counsel that have multiplied proceedings unreasonably and vexatiously.

☐ Consider how you will prove bad faith or recklessness.

☐ Determine the amount of time reasonably spent in response to this conduct.

- ○ Calculate excess costs.
- ○ Calculate expenses related only to this conduct.
- ○ Calculate attorney's fees.

Authority:
28 USC § 1927

Discussion:
See *§ 34.04 -34.09*

☐ Draft motion for sanctions under *28 USC § 1927*.

- State with particularity the grounds for sanctions.
- Set forth the relief or order sought.
  - Order must include a specific finding of bad faith.

Authority:
Fed R Civ P 7(b)(1)

Discussion:
See *§ 34.11*

- Follow procedure applicable to motions generally.
- File motion papers with clerk.
  - Comply with time limits specified by local district court rules.
    - Note that individual judge's rules may require a pre-motion "heads up" of an intended motion, followed by a pre-motion conference.

Authority:
Fed R Civ P 5, 7

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

- In the Northern District:
  - Separately file the motion.
  - Set the date for hearing in conformance with *ND Cal Civ LR 7-2*.
  - Draft the form of the motion pursuant to *ND Cal Civ LR 7-2*.
  - Comply with any applicable Federal Rules of Civil Procedure.
  - Make the motion as soon as practicable after learning of the underlying circumstances.
  - Unless otherwise ordered by the court, no motion for sanctions may be served and filed more than 14 days after entry of judgment.

Authority:
ND Cal Civ LR 7-8

Discussion:

See *§ 34.11*

Legal Topics:

For related research and practice materials, see the following legal topics:
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34.04 Section 1927 Sanctions Are Aimed at Deterring Improper Multiplication of Proceedings.

A court may impose sanctions on any attorney who unreasonably and vexatiously multiplies legal proceedings [*28 USC § 1927*; *Cline v. Industrial Maint. Eng'g & Contr. Co. (9th Cir 2000) 200 F3d 1223, 1236*].

Deterrence of intentional and unnecessary delay in the proceedings is a principal purpose of *28 USC § 1927* [*Beatrice Foods Co. v. New England Printing & Lithographing Co. (Fed Cir 1990) 899 F2d 1171, 1177* (remanding for the conduct of an appropriate hearing)].

Section 1927 permits the imposition of excess costs, expenses and attorney fees that are incurred due to the prohibited conduct [*28 USC § 1927*].

Judge's Perspective:

Unreasonably vexatious conduct is difficult to establish unless it is ongoing and egregious. Most judges impose sanctions rarely. Lawyers are contentious enough without the exacerbation of sanctions. But if sanctions are to be sought, *28 USC § 1927* is one of the easiest statutes to use because it is so broad.

Cross Reference:

2 Moore's Federal Practice, see *§ 11.40* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsVexatious LitigantsCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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34.05 Section 1927 Applies to Conduct After Commencement of Case, Including During Trial.

28 USC § 1927 provides a mechanism for sanctioning conduct that occurs after commencing a case, including during trial [*MGIC Indem. Corp. v. Moore (9th Cir 1991) 952 F2d 1120, 1121* (reversing the district court's § 1927 sanctions award when there was no finding of bad-faith conduct)].

Distinguish:

Because *28 USC § 1927* applies only to unnecessary filings and tactics once a lawsuit has begun [*In re Keegan Mgmt. Co. Secs. Litig. (9th Cir 1996) 78 F3d 431, 435*], the filing of an original complaint cannot be sanctioned under § 1927. The filing of a complaint may be sanctioned under Rule 11 or a court's inherent authority [*In re Keegan Mgmt. Co. Secs. Litig. (9th Cir 1996) 78 F3d 431, 435* ; *Willis v. City of Oakland (ND Cal 2005) 231 FRD 597, 598*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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34.06 Section 1927 Sanctions Are Available for Later Proceedings.

Although *Fed R Civ P 11* sanctions attach only on the basis of the attorney's signature on pleadings, motions, or other papers, *28 USC § 1927* sanctions are available based on, among other things, misconduct occurring in later proceedings [*West Coast Theater Corp. v. City of Portland (9th Cir 1990) 897 F2d 1519, 1528*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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34.07 Section 1927 Sanctions Are Imposed Only on Attorney.

28 USC § 1927 may not be used to impose sanctions on a represented party, even if the client is jointly and severally responsible for a sanctionable action [*see FTC v. Alaska Leasing, Inc. (9th Cir 1986) 799 F2d 507, 510* ; *Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 175 n8*].

Distinguish--Applying § 1927 to Pro Se Litigant:
Although the Ninth Circuit has allowed a § 1927 sanction against a pro se litigant, courts are split on that issue [*Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 175 n8* ; *see Wages v. IRS (9th Cir 1990) 915 F2d 1230, 1235-1236* ; *cf. Sassower v. Field (2d Cir 1992) 973 F2d 75, 80* (not allowing pro se sanction)].

Distinguish--Represented Party May Be Declared a Vexatious Litigant:
A represented party may be declared a vexatious litigant and be required to obtain leave of court before filing specified claims [*see, e.g., Molski v. Mandarin Touch Rest. (CD Cal 2004) 347 F Supp2d 860* (ADA plaintiff found to be vexatious litigant who filed complaints to extort settlements); *but see Molski v. Arby's Huntington Beach (CD Cal 2005) 359 F Supp2d 938, 945* (plaintiff's motive is irrelevant to jurisdiction and standing); *Wilson v. Pier 1 Imports (US), Inc. (ED Cal 2006) 411 F Supp2d 1196, 1199-1200* (ADA plaintiff was not vexatious because filings were not frivolous and harassing)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-34 MB Practice Guide: Fed Pretrial Civ Proc in CA 34.08

34.08 Sanctions Under § 1927 Require Bad Faith or Recklessness.

A finding of recklessness suffices to support an award of sanctions under *28 USC § 1927* [*B.K.B. v. Maui Police Dep't (9th Cir 2002) 276 F3d 1091, 1107* ; *Fink v. Gomez (9th Cir 2001) 239 F3d 989, 993*].

Warning:

A showing of bad faith is not necessarily a prerequisite to the imposition of Rule 11 sanctions [McMahon v. Pier 39 Ltd. P'ship (ND Cal 2003) 2003 US Dist LEXIS 22178, at *17, *aff'd*, 2005 US App LEXIS 12306 (9th Cir 2005)]. Ninth Circuit cases are inconsistent with respect to whether the bad-faith standard is applied to § 1927 sanctions [*see Ingle v. Circuit City (9th Cir 2005) 408 F3d 592, 596* (declining to impose § 1927 sanctions when appeal was wholly without merit but respondent failed to provide evidence appellant was motivated by bad faith); *B.K.B. v. Maui Police Dep't (9th Cir 2002) 276 F3d 1091, 1107* ("To be sure, our cases have been less than a model of clarity regarding whether a finding of mere recklessness alone may suffice to impose sanctions for attorneys' fees.")]. Some courts continue to cite *Moore v. Keegan Mgmt. Co. (9th Cir 1996) 78 F3d 431, 435* , for the proposition that "subjective bad faith" is required for imposition of sanctions under § 1927 [*see, e.g.,* Network Caching Tech., LLC v. Novell, Inc. (ND Cal 2003) 2003 US Dist LEXIS 9881, at *24 ; China Healthways Inst., Inc. v. Hsin Ten Enter. USA, Inc. (CD Cal 2003) 2003 US Dist LEXIS 16286, at *11 ; *Heary Bros. Lightning Prot. Co. v. Lightning Prot. Inst. (D Ariz 2003) 287 F Supp2d 1038, 1080*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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34.09 Mere Negligence or Ignorance Does Not Support § 1927 Sanctions.

A finding of ignorance or negligence, by contrast to recklessness, does not support the imposition of sanctions under *28 USC § 1927* [*Barber v. Miller (9th Cir 1998) 146 F3d 707, 711*

Legal Topics:

For related research and practice materials, see the following legal topics:
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34.10 LOCAL PRACTICE: CD Cal Requirements--Discouraging Vexatious Litigation by Requiring Security.

In the Central District, the court, on motion of a party or on its own motion, after opportunity to be heard, may order a party to give security in such amount as the court determines to be appropriate to secure the payment of any costs, sanctions or other amounts which may be awarded against a vexatious litigant [*CD Cal Civ LR 83-8.2*].

Any order issued under *CD Cal Civ LR 83-8.2* must be based on a finding that the litigant to whom the order is issued has abused the court's process and is likely to continue such abuse, unless protective measures are taken [*CD Cal Civ LR 83-8.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsVexatious Litigants

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II. SEEKING SANCTIONS UNDER 28 USC § 1927 FOR MULTIPLYING LITIGATION UNREASONABLY AND VEXATIOUSLY

4-34 MB Practice Guide: Fed Pretrial Civ Proc in CA 34.11

34.11 Motion for Sanctions Under § 1927.

34.11[1] State Specific Grounds for Sanctions and Relief Sought. A motion for sanctions must comply with *Fed R Civ P 7*, which requires that, among other things [*Fed R Civ P 7(b)(1)*]:

- The motion must "state with particularity" the grounds for sanctions.
- The motion must state the relief sought.

Warning:

The order should include a specific finding of bad faith or recklessness [*MGIC Indem. Corp. v. Moore (9th Cir 1991) 952 F2d 1120, 1122*].

34.11[2] Serve Motion Pursuant to Rule 5. A motion must be served pursuant to *Fed R Civ P 5*; serve motion on all parties that have appeared in the action [*Fed R Civ P 5(a)*].

Cross References:

Service of motions, see *Ch. 5, Formatting, Serving, and Filing Papers, 5.18*.

1 Moore's Federal Practice, Ch. 5, Servicing and Filing Pleadings and Other Papers (Matthew Bender 3d ed.).

Special requirements for sanction motions in Northern District, under *ND Cal Civ LR 7-8*, see *Ch. 33, Rule 11 Sanctions, 33.19*.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureSanctionsBaseless FilingsVexatious LitigantsCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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III. OPPOSING § 1927 SANCTIONS

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34.12 CHECKLIST: Opposing Motion for § 1927 Sanctions.

Consider the following when opposing sanctions under *28 USC § 1927*.

☐ Assert that *28 USC § 1927* is inapplicable to the facts.

☐ Assert that the motion was filed to accomplish a purpose other than deterrence.

☐ Assert that respondent acted from mere negligence or ignorance, not amounting to recklessness.

Authority:
See 28 USC § 1927; *Fink v. Gomez (9th Cir 2001) 239 F3d 989, 993* , discussing *Barber v. Miller (9th Cir 1998) 146 F3d 707, 711* ; *Moore v. Keegan Mgmt. Co. (9th Cir 1996) 78 F3d 431, 435*

Discussion:
See *§§ 34.13 -34.15*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsVexatious LitigantsCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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34.13 Assert Inapplicability of § 1927.

A person subject to sanctions under *28 USC § 1927* may assert, when appropriate, that the statute is inapplicable to the instant case.

Example:

If the motion for sanctions under *28 USC § 1927* seeks attorney's fees from a represented party, the responding party may assert that the statute does not apply [*see FTC v. Alaska Leasing, Inc. (9th Cir 1986) 799 F2d 507, 510* ; *Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 175 n8*].

Cross Reference:

Sanctions for conduct during trial, see *§ 34.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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III. OPPOSING § 1927 SANCTIONS

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34.14 Assert That Motion Under § 1927 Not Filed to Accomplish Purpose of Deterrence.

If appropriate under the circumstances, the responding party to a motion under *28 USC § 1927* may assert that the motion was not filed for a legitimate purpose under the statute, in that it was not intended to seek sanctions for the purpose of deterring attorney misconduct [*see Truesdell v. Southern Cal. Permanente Med. Group (CD Cal 2002) 209 FRD 169, 173-174*].

Cross Reference:

Sanctions aimed at deterrence, see *§ 34.04*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsVexatious LitigantsCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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34.15 Assert That Conduct Was Product of Mere Ignorance or Negligence.

If the respondent did engage in the conduct described in the motion under *28 USC § 1927*, but the conduct involved mere ignorance or negligence rather than bad faith or recklessness, the responding party should raise that issue, because sanctions are not properly imposed on those grounds [*see Fink v. Gomez (9th Cir 2001) 239 F3d 989, 993* , discussing *Barber v. Miller (9th Cir 1998) 146 F3d 707, 711* (combining discussion of sanctions under inherent powers and § 1927, but properly finding sanctions not warranted based on ignorance or negligence)].

Judge's Perspective:
Never put the blame on a secretary or junior associate. An apology never hurts.

Cross Reference:
Bad faith required, see *§§ 34.08*, *34.09*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 34 Other Sanction Provisions
IV. SEEKING AND OPPOSING SANCTIONS FOR BAD-FAITH LITIGATION ABUSE UNDER INHERENT POWER OF COURT

4-34 MB Practice Guide: Fed Pretrial Civ Proc in CA 34.16

34.16 CHECKLIST: Seeking Sanctions Under Inherent Power of Court.

☐ Determine whether a party in engaged in some type of objectionable conduct, such as the following:

- ○ Disobedience of a judicial order.
- ○ Fraud.
- ○ Abuse of judicial process.
- ○ Actions that are vexatious, wanton, or for oppressive purpose.
- ○ Attempt by an attorney to influence or manipulate proceedings in one case in order to gain tactical advantage in another case.

Discussion:
See *§ 34.18*

☐ Determine whether the person acted in bad faith or in a manner tantamount to bad faith.

Authority:
Gomez v. Vernon (9th Cir 2001) 255 F3d 1118, 1134 , cert. denied sub nom. Beauclair v. Gomez, 534

US 1066 (2001)

Discussion:
See *§ 34.18*

☐ Consider whether a particular federal or local rule applies to conduct at issue.

Discussion:
Ch. 33, Rule 11 Sanctions, see *§ 33.03*

☐ Determine whether any of the following sanctions would be appropriate:

- ○ Attorney's fees.
- ○ Dismissal of the action.
- ○ Default judgment against the offending party.
- ○ Vacation of judgment.
- ○ Contempt citation.
- ○ Disqualifying or suspending counsel.
- ○ Injunction against further litigation.
- ○ Exclusion of evidence.
- ○ Monetary sanctions to compensate wronged party.

Authority:
See *Chambers v. NASCO, Inc. (1991) 501 US 32, 44, 111 S Ct 2123, 115 L Ed2d 27* ; *B.K.B. v. Maui Police Dep't (9th Cir 2002) 276 F3d 1091, 1108-1109* ; *Shafii v. British Airways (2d Cir 1996) 83 F3d 566, 571* ; *Shepherd v. ABC (DC Cir 1995) 62 F3d 1469, 1475* ; *Corder v. Howard Johnson & Co. (9th Cir 1994) 53 F3d 225, 232*

Discussion:
See *§ 34.22, 34.23*

☐ Draft motion for sanctions under court's inherent power.

- ○ State with particularity the grounds for sanctions.
- ○ State the relief sought.

Authority:
Fed R Civ P 7(b)(1)

Discussion:
See *§ 34.24*

○ Follow procedure applicable to motions generally.

○ File motion papers with clerk.

☐ Comply with time limits specified by local district court rules.

○ Note that individual judge's rules may require a pre-motion "heads up" of an intended motion, followed by a pre-motion conference.

Authority:
Fed R Civ P 5, 7

Discussion:
See *§ 34.24*

Standard Procedure Checklist:
Ch. 26, Pretrial Motion Practice, see *§ 26.12*

☐ In the Northern District:

○ Separately file the motion.

○ Set the date for hearing in conformance with *ND Cal Civ LR 7-2*.

○ Draft the form of the motion pursuant to *ND Cal Civ LR 7-2*.

○ Comply with any applicable Federal Rules of Civil Procedure.

○ Make the motion as soon as practicable after learning of the underlying circumstances.

○ Unless otherwise ordered by the court, no motion for sanctions may be served and filed more than 14 days after entry of judgment.

Authority:
ND Cal Civ LR 7-8

Discussion:
Ch. 33, Rule 11 Sanctions, see *§ 33.19*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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4-34 MB Practice Guide: Fed Pretrial Civ Proc in CA 34.17

34.17 CHECKLIST: Opposing Motion for Sanctions Under Court's Inherent Power.

The following checklist may be used to oppose a motion for sanctions under the court's inherent power.

☐ Dispute the facts asserted in the motion.

☐ Assert that the respondent acted in good faith, and support this assertion with an explanation that shows that the respondent did not act in bad faith, nor in a manner tantamount to bad faith.

☐ Assert that the sanctions requested or imposed are so severe that a normal motion procedure is inadequate, in that the respondent is entitled to the due process protections available for criminal contempt.

Authority:
See Gomez v. Vernon (9th Cir 2001) 255 F3d 1118, 1134 , cert. denied sub nom. Beauclair v. Gomez, 534 US 1066 (2001) ; F.J. Hanshaw Enters. v. Emerald River Dev., Inc. (9th Cir 2001) 244 F3d 1128, 1132-1142

Discussion:
See *§§ 34.18 -34.25*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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34.18 Federal Courts Have Inherent Powers to Sanction Bad-Faith Conduct.

A district court has inherent power to sanction bad-faith conduct [*Earthquake Sound Corp. v. Bumper Indus. (9th Cir 2003) 352 F3d 1210, 1220* (awarding attorney's fees)].

Federal courts have inherent power to levy sanctions, including attorney's fees, for willful disobedience of a court order, or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. In addition, a court may assess sanctions against counsel who willfully abuse judicial processes [Aloe Vera of Am., Inc. v. United States (9th Cir 2004) 376 F3d 960, 966 ; *Fink v. Gomez (9th Cir 2001) 239 F3d 989, 991*].

Judge's Perspective:

Courts are reluctant to impose sanctions, and the bad-faith standard is difficult to establish. As with *Fed R Civ P 11* and *28 USC § 1927* motions for sanctions, moving for sanctions under the court's inherent power should be reserved for the really egregious cases, or for times when the inappropriate conduct is repeated.

Cross Reference:

Court's inherent power to impose sanctions, see 2 Moore's Federal Practice, see *§ 11.41* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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34.19 Court May Rely Both on Specific Rule or Statute and on Inherent Authority.

The Supreme Court cautions against reliance on inherent powers if appropriate sanctions can be imposed under provisions such as *Fed R Civ P 11*. The procedures specified in Rule 11 (i.e., notice, opportunity to respond, and findings) should ordinarily be employed when seeking a sanction under the court's inherent powers. Moreover, Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process [*see Fed R Civ P 11*, Committee Note of 1993].

Cross Reference:

Rule 11 sanctions, see Ch. 33, Rule 11 Sanctions.

The inherent power of federal courts to impose sanctions for bad-faith conduct in the course of litigation is not displaced by the sanctioning provision of *28 USC § 1927* or *Fed R Civ P 11*. Moreover, the district court is not required to apply other sanctions provisions first. When much of the bad-faith conduct is beyond the reach of the rules, but a party's entire course of conduct evidences bad faith, and the conduct sanctionable under the rules is intertwined with conduct that can only be reached by the inherent power, application of the rules before resort to inherent power would only delay litigation further [*Chambers v. NASCO, Inc. (1991) 501 US 32, 46-51, 111 S Ct 2123, 115 L Ed2d 27* ; *see Heary Bros. Lightning Prot. Co. v. Lightning Prot. Inst. (D Ariz 2003) 287 F Supp2d 1038, 1080-1081*].

Example:

In a sex-discrimination case the district court awarded the plaintiff $5000 under *28 USC § 1927*, and $5000 under its inherent powers. The sanctions arose from the defendant's presentation of evidence in violation of *Fed R Evid 412*. The awards were for attorney's fees, and for compensation to the plaintiff for the emotional damage caused by the improper testimony, respectively. The Ninth Circuit upheld both awards [*see B.K.B. v. Maui Police Dep't (9th Cir 2002) 276 F3d 1091, 1107-1109*].

Judge's Perspective:

Although the court is allowed to use inherent authority at any time, usually the better practice is to proceed under the Rule or statute if there is one that fits. Sometimes judges add inherent authority as an additional ground for granting sanctions just as a precaution.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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34.20 Court Must Specifically Find Bad Faith or Conduct Tantamount to Bad Faith.

Sanctions under the court's inherent powers are available if the court specifically finds bad faith or conduct tantamount to bad faith [*Fink v. Gomez (9th Cir 2001) 239 F3d 989, 993-994* , citing *Chambers v. NASCO, Inc. (1991) 501 US 32, 46, 111 S Ct 2123, 115 L Ed2d 27* and *Roadway Express, Inc. v. Piper (1980) 447 US 752, 766, 100 S Ct 2455, 65 L Ed2d 488* ; *see also B.K.B. v. Maui Police Dep't (9th Cir 2002) 276 F3d 1091, 1108* (conduct tantamount to bad faith is sanctionable)].

For purposes of imposing sanctions under the inherent power of the court, a finding of bad faith does not require that the legal and factual basis for the action be totally frivolous; when a litigant is substantially motivated by vindictiveness, obduracy, or *mala fides*, the assertion of a colorable claim will not bar the assessment of attorney's fees [*B.K.B. v. Maui Police Dep't (9th Cir 2002) 276 F3d 1091, 1108* ; *Fink v. Gomez (9th Cir 2001) 239 F3d 989, 992*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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34.21 Due Process Protection That Must Be Afforded Depends on Whether Sanctions Are Tantamount to Criminal Contempt.

When a court uses its inherent powers to impose sanctions that are criminal in nature, it must provide the same due process protections that would be available in a criminal contempt proceeding. If the imposition of sanctions under the court's inherent powers is tantamount to a finding of criminal contempt, the person subject to sanctions is entitled to all the procedural protections available to an alleged contemnor under criminal contempt [*F.J. Hanshaw Enters. v. Emerald River Dev., Inc. (9th Cir 2001) 244 F3d 1128, 1136-1142*].

Cross Reference:

Due process rights in criminal contempt actions, see Ch. 35, Contempt, see *§ 35.19[3].*

In contrast, civil sanctions may be imposed so long as the court provides adequate notice and an opportunity to be heard [*International Union, UMW v. Bagwell (1994) 512 US 821, 827, 114 S Ct 2552, 129 L Ed2d 642* ; *Lasar v. Ford Motor Co. (9th Cir 2005) 399 F3d 1101, 1110*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCriminal ContemptCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptProceedingsDue Process

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4-34 MB Practice Guide: Fed Pretrial Civ Proc in CA 34.22

34.22 Sanctions Are Available for Variety of Willful Actions.

34.22[1] Particular Conduct As Bases for Inherent Power Sanctions. Federal courts' inherent power to levy sanctions has been based on the following conduct:

- Disobeying judicial orders [*Young v. United States (1987) 481 US 787, 798, 107 S Ct 2124, 95 L Ed2d 740* ; *Roadway Express, Inc. v. Piper (1980) 447 US 752, 766, 100 S Ct 2455, 65 L Ed2d 488*].

- Fraud [*see Hazel-Atlas Glass Co. v. Hartford-Empire Co. (1944) 322 US 238, 244, 64 S Ct 997, 88 L Ed 1250*].

- Abuse of judicial process [*see Roadway Express, Inc. v. Piper (1980) 447 US 752, 766-767, 100 S Ct 2455, 65 L Ed2d 488*].

- Acting vexatiously, wantonly, or for oppressive purpose [*see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y (1975) 421 US 240, 258-259, 95 S Ct 1612, 44 L Ed2d 141*].

- Attorney's reckless misstatements of law and fact, coupled with an improper purpose, e.g., an attempt to influence or manipulate proceedings in one case in order to gain tactical advantage in another case [*see Fink v. Gomez (9th Cir 2001) 239 F3d 989, 994* (not determining existence of those factors, but remanding case for determination on facts)].

- Flagrant violation of Federal Rules of Evidence [*see B.K.B. v. Maui Police Dep't (9th Cir 2002) 276 F3d 1091, 1108-1109* (also reversing denial of motion for mistrial on ground of violation of *Fed R Evid 412*)].

Example:

In a sex-discrimination case the district court awarded the plaintiff $5000 under *28 USC § 1927*, and $5000 under its inherent powers. The sanctions arose from the defendant's presentation of evidence

violation of *Fed R Evid 412*. The awards were for attorney's fees, and for compensation to the plaintiff for the emotional damage caused by the improper testimony, respectively. The Ninth Circuit upheld both awards [*see B.K.B. v. Maui Police Dep't (9th Cir 2002) 276 F3d 1091, 1107-1109*].

34.22[2] Sanctions Must Be Based on Recklessness Combined With Aggravating Factor. With respect to the court's inherent powers to impose sanctions, bad faith or willful misconduct consists of something more egregious than mere negligence or recklessness [*Knupfer v. Lindblade (9th Cir 2003) 322 F3d 1178, 1197* ; *Fink v. Gomez (9th Cir 2001) 239 F3d 989, 993-994* (mere recklessness, without more, does not justify sanctions under a court's inherent power)]. Sanctions are available only if recklessness is combined with an additional factor, such as frivolousness, harassment, or an improper purpose [*Gomez v. Vernon (9th Cir 2001) 255 F3d 1118, 1134* , *cert. denied sub nom. Beauclair v. Gomez, 534 US 1066 (2001)* , citing *Fink v. Gomez (9th Cir 2001) 239 F3d 989, 994* ; *see also Lasar v. Ford Motor Co. (D Mont 2003) 239 F Supp2d 1022, 1026-1027*]. Thus, an attorney's reckless misstatements of law and fact, when coupled with an improper purpose, are sanctionable under a court's inherent power [*B.K.B. v. Maui Police Dep't (9th Cir 2002) 276 F3d 1091, 1108*]. But sanctions are also justified if a party acts for an improper purpose, even if the acts consist of making a truthful statement or a nonfrivolous argument or objection [*Gomez v. Vernon (9th Cir 2001) 255 F3d 1118, 1134* , *cert. denied sub nom. Beauclair v. Gomez, 534 US 1066 (2001)* , citing *Fink v. Gomez (9th Cir 2001) 239 F3d 989, 992*].

Example--Sanctions Appropriate:

An attorney's reckless misstatements of law and fact, when coupled with an improper purpose, such as an attempt to influence or manipulate proceedings in one case in order to gain tactical advantage in another case, are sanctionable under a court's inherent power [*see Fink v. Gomez (9th Cir 2001) 239 F3d 989, 994* (not determining existence of those factors, but remanding case for determination on facts)].

Examples--Sanctions Inappropriate:

Mere tardiness does not demonstrate the improper purpose or intent required for inherent-power sanctions. A specific finding of bad faith must precede any sanction under the court's inherent powers [*United States v. Stoneberger (9th Cir 1986) 805 F2d 1391, 1393* (reversing imposition of sanctions based on attorney's chronic tardiness)].

Counsel's negligent failure to comply with local court rules requiring admission to the district court bar did not warrant the imposition of sanctions under the court's inherent powers. [*Zambrano v. City of Tustin (9th Cir 1989) 885 F2d 1473, 1484-1485* (vacating imposition of sanctions)].

Distinguish:

Recklessness suffices for *28 USC § 1927*, but bad faith is required for sanctions under the court's inherent power [*B.K.B. v. Maui Police Dep't (9th Cir 2002) 276 F3d 1091, 1107*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsVexatious LitigantsCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorMisrepresentations

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4-34 MB Practice Guide: Fed Pretrial Civ Proc in CA 34.23

34.23 Court Has Inherent Authority to Impose Wide Range of Sanctions, Including Dismissal.

The district court's wide discretion to impose sanctions under its inherent power includes dismissal of a lawsuit [*see Chambers v. NASCO, Inc. (1991) 501 US 32, 43-44, 111 S Ct 2123, 115 L Ed2d 27* ; *B.K.B. v. Maui Police Dep't (9th Cir 2002) 276 F3d 1091, 1108*].

Sanctions that may be imposed pursuant to the court's inherent power include:

- Attorney's fees [*see, e.g., Corder v. Howard Johnson & Co. (9th Cir 1994) 53 F3d 225, 232*].
- Dismissal of the action [*see, e.g., Chambers v NASCO, Inc. (1991) 501 US 32, 44, 111 S Ct 2123, 115 L Ed2d 27*].
- Default judgment against the offending party [*see Shepherd v. ABC (DC Cir 1995) 62 F3d 1469, 1475*].
- Vacation of judgment [*see, e.g., Chambers v. NASCO, Inc. (1991) 501 US 32, 44, 111 S Ct 2123, 115 L Ed2d 27*].
- Contempt citation [*see, e.g., Chambers v. NASCO, Inc. (1991) 501 US 32, 51, 111 S Ct 2123, 115 L Ed2d 27*].
- Disqualifying or suspending counsel [*see, e.g., Lasar v. Ford Motor Co. (9th Cir 2005) 399 F3d 1101, 1107* (revocation of attorney's pro hac vice admission); *Shepherd v. ABC (DC Cir 1995) 62 F3d 1469, 1475*].
- Injunction against further litigation [*see, e.g., Shafii v. British Airways (2d Cir 1996) 83 F3d 566, 571*].
- Exclusion of evidence [*see, e.g., Shepherd v. ABC (DC Cir 1995) 62 F3d 1469, 1475*].

- Monetary sanctions to compensate wronged party [*see B.K.B. v. Maui Police Dep't (9th Cir 2002) 276 F3d 1091, 1108-1109* ($5000 awarded to plaintiff for defendant's violation of *Fed R Evid 412* resulting in plaintiff's "public embarrassment; also reversing denial of motion for mistrial on ground of violation of Evidence Rule 412)].

- Monetary sanctions payable to a district court to reimburse the court for its expenses [*Lasar v. Ford Motor Co. (9th Cir 2005) 399 F3d 1101, 1107* (monetary sanction in amount to reimburse court for costs related to empaneling jury was compensatory and civil)].

- Order requiring vexatious litigant to file a motion for leave to file a complaint before filing any new litigation [*Molski v. Mandarin Touch Rest. (CD Cal 2004) 347 F Supp2d 860, 868* (ADA plaintiff found to be vexatious litigant who filed complaints to extort settlements)].

Judge's Perspective:

Judges are reluctant to use this authority if a specific statutory basis for sanctions applies.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesBad Faith AwardsCivil ProcedureSanctionsGeneral Overview

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34.24 Motion for Sanctions Under Court's Inherent Powers.

34.24[1] State Specific Grounds for Sanctions and Relief Sought. A motion for sanctions must comply with *Fed R Civ P 7*, which requires, among other things that [*Fed R Civ P 7(b)(1)*]:

- The motion state with particularity the grounds for sanctions.
- The motion state the relief sought.

34.24[2] Motion Must Be Served Pursuant to Rule 5. A motion must be served pursuant to *Fed R Civ P 5*; serve all parties that have appeared in the action [*Fed R Civ P 5(a)*].

Cross References:

Service of motions, see Ch. 5, Formatting, Serving, and Filing Papers, see *§ 5.18*.

Special requirements for sanctions motion in Northern District, under *ND Cal Civ LR 7-8*, see Ch. 33, Rule 11 Sanctions, see *§ 33.19*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureSanctionsGeneral Overview

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4-34 MB Practice Guide: Fed Pretrial Civ Proc in CA 34.25

34.25 Responding to and Opposing Motion for Sanctions Under Court's Inherent Powers.

34.25[1] Assert Absence of Bad Faith. If a person who is subject to the imposition of sanctions under the district court's inherent powers did engage in the conduct described in the motion and the conduct would otherwise constitute grounds for sanctions, he or she may raise as a defense the absence of any bad faith or conduct tantamount to bad faith. The imposition of sanctions under the court's inherent power require underlying bad faith or equivalent conduct [*Gomez v. Vernon (9th Cir 2001) 255 F3d 1118, 1134* , *cert. denied sub nom. Beauclair v. Gomez, 534 US 1066 (2001)*].

Cross Reference:

Bad faith required, see *§ 34.18*.

34.25[2] Assert That Nature of Sanctions Requires Due Process Protections Available for Criminal Contempt. When a court uses its inherent powers to impose sanctions that are criminal in nature, it must provide the same due process protections that would be available in a criminal contempt proceeding. If the imposition of sanctions under the court's inherent powers is tantamount to a finding of criminal contempt, the person subject to sanctions is entitled to all the procedural protections available to an alleged contemnor under criminal contempt [*F.J. Hanshaw Enters. v. Emerald River Dev., Inc. (9th Cir 2001) 244 F3d 1128, 1136-1142* (holding that a $500,000 sanction was criminal in nature because it was punitive and intended to vindicate the court's authority)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsContemptCriminal ContemptCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptProceedingsDue Process

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V. SEEKING AND OPPOSING SANCTIONS UNDER LOCAL DISTRICT COURT RULES OR PROCEDURES

4-34 MB Practice Guide: Fed Pretrial Civ Proc in CA 34.26

34.26 CHECKLIST: Seeking Sanctions Under Local District Court Rules or Procedures.

The following checklist may be used to move for sanctions under particular local court rules.

☐ **Central District.**

○ Ascertain whether the person in question did any of the following:

☐ Failed to comply with any Local Rules of the Central District Court of California, or any federal rule.

☐ Failed to comply with any provision of the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Evidence, and Federal Rules of Appellate Procedure.

☐ Filed late any document in support of, or in opposition to, any motion noticed for hearing.

☐ Requested the presence of a declarant in a civil contempt motion without a good-faith intention to cross-examine him or her.

☐ Failed to comply with *CD Cal Civ LR 40-1*, *40-2*, setting forth requirements for continuances and settlement notice.

☐ Refiled an action that had been dismissed for want of prosecution.

Authority:
CD Cal Civ LR 7-8, *7-13*, *40-3*, *41-3*, *83-2.10.3*, *83-2.10.4*, *83-7*

Discussion:
See *§ 34.27*

☐ **Eastern District.**

○ Ascertain whether the person in question did any of the following:

☐ Violated a Local Rule of the Eastern District Court of California.

☐ Violated a court order.

☐ Failed to appear at a motion proceeding, without giving proper notice.

☐ Failed either to respond to or to state no opposition to a motion involving an incarcerated party who is proceeding in propria persona.

☐ Preventing the court from proceeding with a jury trial as scheduled.

☐ Violating ADR rules.

☐ Failed to properly notify the court of a settlement or other disposition.

Authority:
ED Cal Gen LR 110, *160(a)*; *ED Cal Civ LR 230(i)*, (*l*), 271(p), 272(b)

Discussion:
See *§ 34.28*

☐ **Northern District.**

○ Ascertain whether the person in question did any of the following:

☐ Violated any Local Rule of the Northern District Court of California (including pro se litigant).

☐ Violated any Federal Rule (including pro se litigant).

☐ Attorney engaged in unprofessional conduct.

☐ Wrongfully exercised any privileges of membership in the bar of the Northern District Court of California.

☐ Violated ADR rules.

☐ Failed to proceed on scheduled trial date.

☐ Attempt to circumvent judge assignment.

☐ Repeat argument in motion for leave to file motion for reconsideration.

Authority:
ND Cal Civ LR 1-4, *3-3(c)*, *3-9(a)*, *7-9(c)*, *11-6(a)*, *11-8*, *40-1*; *ND Cal ADR LR 2-4(c)*

Discussion:
See *§ 34.29*

☐ **Southern District.**

○ Ascertain whether the person in question did any of the following:

☐ Failed to comply with the Local Rules of the Southern District Court of California.

☐ Violated of Federal Rules of Civil Procedure.

☐ Violated of Federal Rules of Criminal Procedure.

☐ Violated of any court order.

☐ Attorney engaged in unprofessional conduct.

Authority:
SD Cal Civ LR 83.1(a), *83.5*

Discussion:
See *§ 34.30*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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4-34 MB Practice Guide: Fed Pretrial Civ Proc in CA 34.27

34.27 LOCAL PRACTICE: CD Cal Sanction Provisions

34.27[1] Sanctions May Be Imposed for Failure to Comply With Local Rules Relating to Presentations to the Court. In the Central District, failure to comply with the rules relating to signing pleadings, motions, and other papers, and representations to the court [*see CD Cal Civ LR 11-1-11-8*] may be grounds for sanctions [*CD Cal Civ LR 11-9*].

34.27[2] Monetary and Other Appropriate Sanctions for Bad Faith or Willful Violation of Local Rules. In the Central District, the violation of or failure to conform to any of the Local Rules of the Central District may subject the offending party or counsel to [*CD Cal Civ LR 83-7*]:

- Monetary sanctions, if the court finds that the conduct was willful, grossly negligent, or reckless [*CD Cal Civ LR 83-7(a)*];

- The imposition of costs and attorneys' fees to opposing counsel, if the court finds that the conduct rises to the level of bad faith and/or a willful disobedience of a court order [*CD Cal Civ LR 83-7(b)*]; and/or

- For any of the conduct specified in (a) and (b) above, such other sanctions as the court may deem appropriate under the circumstances [*CD Cal Civ LR 83-7(c)*].

34.27[3] Sanctions for Late Filing of Motion Papers. In the Central District, a party filing any document in support of, or in opposition to, any motion noticed for hearing as provided in the rules for motion procedure [*see CD Cal Civ LR 7-3 et seq.*] after the time for filing has expired, is subject to the sanctions of *CD Cal Civ LR 83-7* and the Federal Rules of Civil Procedure [*CD Cal Civ LR 7-13*].

34.27[4] Sanctions for Requesting Presence of Declarant in Motion for Civil Contempt Without Good-Faith Intention to Cross-Examine. In the Central District, the Court may impose sanctions under the Local Rules against any party or counsel who requests the presence of any declarant in a hearing on a motion in which an issue of fact is to be determined (excluding motions contesting venue and personal jurisdiction) without a good-faith intention to

cross-examine the declarant [*CD Cal Civ LR 7-8*].

34.27[5] Sanctions for Failing to Comply With Requirements for Application for Continuance or Notice of Settlement. In the Central District, failure to comply with the provisions of *CD Cal Civ LR 40-1* and *CD Cal Civ LR 40-2* may subject counsel to the following sanctions [*CD Cal Civ LR 40-3*]:

- Payment of costs and attorney's fees of an opposing party;
- Payment of one day's jury fees of the panel if one has been called for the trial; and
- Such other sanctions as may seem proper to the Court under the circumstances.

CD Cal Civ LR 40-1 provides that any application for continuance of any trial or similar proceeding must be served and filed at least five days before the day set for the trial or proceeding. The application must set forth in detail the reasons therefor.

CD Cal Civ LR 40-1.1 provides that counsel must notify the court clerk immediately when a stipulation for the continuance of a hearing, pre-trial conference, trial or other proceeding is to be submitted for court approval.

CD Cal Civ LR 40-1.2 provides that no continuance (whether stipulated to by counsel or not) will be effective unless approved in writing or announced in open court by the judge.

CD Cal Civ LR 40-2 provides that counsel must inform the court clerk immediately by telephone or other expeditious means when a case set for trial or other proceeding has been settled.

34.27[6] Sanctions for Reinstatement of Case Dismissed for Want of Prosecution. In the Central District, if any action dismissed for want of prosecution [*CD Cal Civ LR 41-1*] is reinstated, the court may impose such sanctions as it deems just and reasonable [*CD Cal Civ LR 41-3*].

Legal Topics:

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

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4-34 MB Practice Guide: Fed Pretrial Civ Proc in CA 34.28

34.28 LOCAL PRACTICE: ED Cal Sanction Provisions

34.28[1] Sanctions for Violation of Local Rules or Court Order. In the Eastern District, failure of counsel or of a party to comply with the Local Rules or with any order of the court may be grounds for imposition by the court of any and all sanctions authorized by statute or Rule or within the court's inherent power [*ED Cal Gen LR 110*].

34.28[2] Sanctions for Failure to Appear at Motion Proceeding. In the Eastern District, absent notice of intent to submit the matter on the briefs, failure to appear at a motion hearing may be deemed withdrawal of the motion or of opposition to the motion, in the court's discretion, or may result in the imposition of sanctions [*ED Cal Civ LR 230(i)*].

34.28[3] Assessment of Costs of Jury Panel for Conduct Preventing Court From Commencing Jury Trial As Scheduled. In the Eastern District, if for any reason attributable to counsel or parties, including settlement, the court is unable to commence a jury trial as scheduled when a panel of prospective jurors has reported for voir dire, the court may assess against counsel or parties responsible all or part of the cost of the panel [*ED Cal Civ LR 272(b)*].

34.28[4] Sanctions for Violation of ADR Procedures. On receipt of an appropriately presented and supported complaint of material violation of *ED Cal Civ LR 271* regarding the Voluntary Dispute Resolution Program, the ADR judge or designated judge must determine whether the matter warrants further proceedings. If further proceedings are warranted, the ADR judge or designated judge must so notify the parties and the person complaining and may issue an order to show cause why sanctions should not be imposed. Any such proceeding must be conducted on the record [*ED Cal Civ LR 271(p)(2)*].

The ADR judge or designated judge must afford all interested persons an opportunity to be heard before deciding whether to impose or recommend a sanction [*ED Cal Civ LR 271(p)(2)*].

34.28[5] Sanctions for Failure to Notify Court of Settlement. In the Eastern District, when an action has been settled or otherwise disposed of, or when any motion seeking general or interim relief has been resolved, whether by settlement conference or out of court, and whether the action is pending in the District Court or is before an appellate court, it is counsel's duty to inform the courtroom deputy clerk and the assigned court's chambers immediately [*ED Cal Gen LR 160(b)*; *see ED Cal Civ LR 272*].

On such notification of disposition or resolution of an action or motion, the court must fix a date on which the documents disposing of the action or motion must be filed. This date must not be more than 21 calendar days from the date of the notification, absent good cause. The court may, on good cause shown, extend the time for filing the dispositional papers. A failure to file dispositional papers on the date prescribed by the court may be grounds for sanctions [*ED Cal Gen LR 160(b)*; *see ED Cal Civ LR 272*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

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4-34 MB Practice Guide: Fed Pretrial Civ Proc in CA 34.29

34.29 LOCAL PRACTICE: ND Cal Sanction Provisions.

34.29[1] Sanctions for Violation of Local or Federal Rules. In the Northern District, failure by counsel or a party to comply with any duly promulgated local rule or any Federal Rule may be a ground for imposition of any authorized sanction [*ND Cal Civ LR 1-4*].

34.29[2] Restrictions on Sanctions for Violation of General and Standing Court Orders.

34.29[2][a] Violation of General Order Not Sanctionable Unless Order Specifically Adopted by Judge. In the Northern District, "General Orders" are made by the Chief Judge or by the court relating to court administration. A General Order also may be used to promulgate modifications of the local rules. General Orders remain in effect until the rules are properly amended. No litigant may be sanctioned for violating a General Order unless the General Order is adopted by a judge as a specific order in a particular case [*ND Cal Civ LR 1-5(j)*].

34.29[2][b] Notice of Standing Order Must Precede Sanctions. In the Northern District, the court must provide notice of any applicable Standing Orders to parties before they are subject to sanctions for violating such orders. Nothing in the local rules precludes a judge from issuing Standing Orders to govern matters not covered by these local rules or by the Federal Rules [*ND Cal Civ LR 1-5(o)*].

34.29[3] Sanctions Against Attorney for Unprofessional Conduct. In the Northern District, if a judge has cause to believe that an attorney has engaged in unprofessional conduct, the judge may, among other things [*see ND Cal Civ LR 11-6(a)*]:

- Initiate proceedings for civil or criminal contempt under 18 USC and *Fed R Crim P 42* [*ND Cal Civ LR 11-6(a)(1)*];

- Impose other appropriate sanctions [*ND Cal Civ LR 11-6(a)(2)*].

34.29[4] Sanctions for Wrongfully Exercising Privilege of Bar Membership. A person who exercises, or pretends to be entitled to exercise, any of the privileges of membership in the bar of the Northern District when not

entitled to do so is subject to sanctions or other punishment, including a finding of contempt [*ND Cal Civ LR 11-8*].

34.29[5] Sanctions for Violation of ADR Local Rules. If, on receiving an appropriately presented and supported complaint or report of a material violation of the ADR local rules of the Northern District Court, the ADR Magistrate Judge determines that the matter warrants further proceedings, the ADR Magistrate Judge must issue an order to show cause why sanctions should not be imposed. Any such proceedings must be conducted on the record but under seal [*ND Cal ADR LR 2-4(c)*].

The ADR Magistrate Judge will afford all interested parties an opportunity to be heard before deciding whether to impose sanctions. Any objections to such sanctions must be made by motion under *ND Cal Civ LR 7-1 et seq*. before the General Duty Judge, unless the General Duty Judge is the assigned judge, in which case the objections must be made to the Chief Judge [*ND Cal ADR LR 2-4(c)*].

Any such objection must be delivered under seal to the appropriate judge within 14 days of the filing the Magistrate Judge's order resolving the sanctions issue. The objection must not be filed, and must be served immediately on the ADR Magistrate Judge, all other counsel, the neutral and the ADR unit [*ND Cal ADR LR 2-4(c)*].

34.29[6] Sanctions for Failure to Proceed on Scheduled Trial Date. In the Northern District, no continuance of a scheduled trial date will be granted except by order of the court issued in response to a motion made in accordance with the provisions of *ND Cal Civ LR 7-1 et seq*.. Failure of a party to proceed with the trial on the scheduled trial date may result in the imposition of appropriate sanctions, including dismissal or entry of default [*ND Cal Civ LR 40-1*].

34.29[7] Assessment of Jury Costs for Failure to Proceed on Scheduled Trial Date or Failure to Give Notice of Settlement. In the Northern District, jury costs may be assessed as sanctions against a party or the party's attorney for failure to proceed with a scheduled trial, or failure to provide the court with timely written notice of a settlement [*ND Cal Civ LR 40-1*].

34.29[8] Sanctions for Filing or Refiling Case to Circumvent Case Assignment to Particular Judge. In the Northern District, *ND Cal Civ LR 3-3* controls the assignment of an action to a judge. If any civil action or claim of a civil action is dismissed and is subsequently refiled, the refiling party must file an Administrative Motion to Consider Whether Cases Should Be Related pursuant to *ND Cal Civ LR 3-12*. On a determination by a judge that an action or claim pending before him or her is covered by this Local Rule, that judge may transfer the refiled action to the judge originally assigned to the action which had been dismissed [*ND Cal Civ LR 3-3(c)*].

Any party who files an action in multiple divisions or dismisses an action and subsequently refiles it for the purpose of obtaining an assignment in contravention of *ND Cal Civ LR 3-3(b)* is subject to appropriate sanctions [*ND Cal Civ LR 3-3(c)*].

34.29[9] Sanctions for Repeating Argument in Motion for Leave to File Motion for Reconsideration. In the Northern District, no motion for leave to file a motion for reconsideration may repeat any oral or written argument made by the applying party in support of or in opposition to the interlocutory order that the party asks to have reconsidered. Any party who violates this restriction is subject to appropriate sanctions [*ND Cal Civ LR 7-9(c)*; *see ND Cal Civ LR 7-9* (requirements for motion for reconsideration)].

Cross Reference:

Motion for sanctions in Northern District, under *ND Cal Civ LR 7-8*, see Ch. 33, Rule 11 Sanctions, see *§ 33.19*.

Legal Topics:

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

Civil ProcedureSanctionsBaseless FilingsBad Faith MotionsCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewLegal EthicsSanctionsGeneral Overview

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34.30 LOCAL PRACTICE: SD Cal Sanction Provisions.

34.30[1] Sanctions for Violation of Local and Federal Rules and Court Orders. Failure of counsel or of any party to comply with the Local Rules of the Southern District, with the Federal Rules of Civil or Criminal Procedure, or with any order of the court may be ground for imposition by the court of any and all sanctions authorized by statute or rule or within the inherent power of the court, including, without limitation, dismissal of any actions, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions [*SD Cal Civ LR 83.1(a)*].

For violations of the Local Rules or of a specific court order, the court may, in imposing monetary sanctions, order that the monetary sanctions be paid to the nonappropriated fund of the court [*SD Cal Civ LR 83.1(b)*].

34.30[2] Sanctions for Violation of Rules of Professional Conduct. If any attorney engages in conduct that may warrant discipline or other sanctions, the court or any judge may, in addition to initiating proceedings for contempt under 18 USC and *Fed R Crim P 42*, or imposing other appropriate sanctions, refer the matter to the disciplinary body of any court before which the attorney has been admitted to practice [*SD Cal Civ LR 83.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 35 Contempt

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35.12 LOCAL PRACTICE: SD Cal Requirements--Contempt Proceedings for Attorney Misconduct.

35.13 Defining Direct and Indirect Contempt.

35.13[1] Direct Contempt Occurs in Court's Presence, Indirect Contempt Occurs Outside Court's Presence.

35.13[2] Petty, Direct Contempt Is Normally Subject to Summary Adjudication.

35.13[3] If Court Delays in Punishing Direct Contempt, Notice and Hearing Are Required.

35.14 Distinction Between Civil and Criminal Contempt Depends on Penalty.

35.14[1] Contempt Is Civil If Purpose Is Remedial.

35.14[2] Contempt Is Criminal If Purpose Is Punitive.

35.14[3] Imprisonment and Monetary Fines Are Available in Both Civil and Criminal Contempt Proceedings.

35.15 Civil Contempt.

35.15[1] Civil Contempt Sanctions Punish Failure to Obey Court Order.

35.15[2] Contemnor May Purge Contempt by Affirmative Act.

35.15[3] Civil Contempt Proceedings Are Trials; No Right to Jury Trial.

35.15[4] No Civil Contempt If Violation Is Based on Good Faith and Reasonable Interpretation of Order.

35.15[5] Moving Party Must Show Clear and Convincing Evidence of Violation of Court Order.

35.16 Motion for Civil Contempt.

35.16[1] Motion Must State Specific Grounds for Contempt and Relief Sought.

35.16[2] Alleged Contemnor Entitled to Notice, Opportunity to Be Heard.

35.17 Compliance with Underlying Order Purges Civil Contempt.

35.18 Civil Contempt Order Not Appealable Until Final Judgment.

35.19 Criminal Contempt.

35.19[1] Criminal Contempt Requires Willful Conduct.

35.19[2] Federal Courts Have Criminal Contempt Authority Under 18 USC § 401.

35.19[3] Due Process Is Required.

35.19[4] Criminal Contempt Proceeding Is Separate From Original Action.

35.20 Responding to and Opposing Allegations of Contempt.

35.20[1] Responding to and Opposing Allegations of Civil Contempt.

35.20[1][a] Purge Contempt by Affirmative Act.

35.20[1][b] Assert Good Faith and Reasonable Interpretation of Order.

35.20[1][c] Impossibility of Compliance Is Defense If Not Self Created.

35.20[2] Nature or Severity of Penalties Requires Criminal Due Process.

35.20[3] Responding to and Opposing Allegations of Criminal Contempt.

35.20[3][a] Motion to Discharge Order to Show Cause.

35.20[3][b] Absence of Willfulness.

35.20[3][c] Violation of Due Process.

35.20[3][d] Summary Criminal Contempt Unavailable.

35.21 Notice of Motion and Motion for Civil Contempt.

35.22 Judgment of Civil Contempt.

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Unit 10 Sanctions
CHAPTER 35 Contempt
I. STRATEGY

4-35 MB Practice Guide: Fed Pretrial Civ Proc in CA 35.01

35.01 Scope.

This chapter covers:

- Seeking contempt adjudication [*see 35.03 -35.18*; *Forms: 35.21*, *35.22*].
- Avoiding and opposing contempt adjudication [*see 35.20*].

Core Rule:
Fed R Crim P 42(b).

Legal Topics:

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

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I. STRATEGY

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35.02 Objective and Strategy.

Civil contempt findings mean that the "key to the jailhouse door" is in the wrongdoer's pocket. When the offensive conduct ends, the fines or imprisonment ends. Criminal contempt is imposed for a fixed amount of money or jail time to punish past conduct. An attorney may be subject to both civil and criminal contempt proceedings for failing to obey a court order.

Though findings or hearing for contempt of court are normally entered or initiated by the court itself, a motion for a finding of contempt can be made by others, including attorneys for parties in the case aggrieved by the improper conduct. However, the motion must be addressed to conduct that either offends the dignity of the court or prevents the proper conduct of the proceedings. Accordingly, the motion must normally show that the adversary's conduct (1) creates an obstruction blocking the judge's performance of his or her duties and (2) delays the proceedings.

Detailed Discussion/Forms:

27 Moore's Federal Practice, Ch. 642, Criminal Contempt (Matthew Bender 3d ed.).

12 Bender's Federal Practice Forms, Civil Contempt (Matthew Bender).

Joseph, Sanctions: The Federal Law of Litigation Abuse (Matthew Bender 3d ed.).

Cross Reference:

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptElementsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptPenalties

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CHAPTER 35 Contempt
II. SEEKING AND OPPOSING CONTEMPT ADJUDICATION

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35.03 CHECKLIST: Drafting Motion for Contempt.

The following checklist may be used as a general guide for preparing a motion for contempt.

☐ State the grounds for contempt.

- ○ Describe the contumacious conduct in the motion or accompanying affidavit.
- ○ Describe conduct as criminal if appropriate.

Authority:
Fed R Crim P 42(b)

Discussion:
See *§ 35.06* et seq.

☐ Specify the order sought.

☐ State the claims for damages.

- ○ State any claims for damages resulting from the contumacious conduct and the attorney's fees incurred as a result of the contempt proceeding.

☐ Include evidence of damages.

- ○ Local district court rules may require evidence regarding damages.

Authority:
United States v. United Mine Workers (1947) 330 US 258, 304, 67 S Ct 677, 91 L Ed 884

Discussion:
See *§ 35.16*

☐ File motion papers.

○ A motion for contempt and supporting documents must be filed with the clerk of the court, unless the judge has authorized filing with the judge. Note that individual judge's rules may require scheduling a pre-motion conference.

☐ Serve motion papers.

○ If formal service is required, serve the motion on the contemnor or the contemnor's attorney.

Authority:
Fed R Civ P 5(d)

Standard Procedure Checklist: Ch. 26, Pretrial Motion Practice, see *§ 26.12*

Form:
See *§ 35.21*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureSanctionsContemptGeneral Overview

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35.04 CHECKLIST: Opposing Motion for Contempt.

The following checklist may be used as a general guide for opposing a motion for contempt.

☐ Move to discharge show cause order.

○ An alleged contemnor may move to discharge an order to show cause citing for contempt.

Authority:
United States v. United Mine Workers (1947) 330 US 258, 268 n14, 67 S Ct 677, 91 L Ed 884

☐ Determine grounds for opposition.

☐ Demand hearing or jury trial if applicable.

☐ Request attorney's fees and costs.

○ An alleged contemnor who is found not guilty may be awarded attorney's fees and costs.

Authority:
Fed R Civ P 4, 7

Discussion:
See *§ 35.19*

Standard Procedure Checklist: Ch. 26, Pretrial Motion Practice, see *§ 26.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 35 Contempt
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35.05 Court Has Inherent Power to Punish for Contempt.

Federal courts have inherent power to punish persons for committing acts that tend to obstruct or interfere with the orderly administration of justice, or that impair the dignity or authority of the court: that is, to punish for contempt [*Young v. United States (1987) 481 US 787, 795, 107 S Ct 2124, 95 L Ed2d 740*]. These powers reach conduct outside the presence of the court and are governed by the control vested in courts to achieve orderly disposition of cases [*Chambers v. NASCO, Inc. (1991) 501 US 32, 43, 111 S Ct 2123, 115 L Ed2d 27*].

Distinguish--Inherent-Power Sanctions and Civil Contempt:

Before imposing sanctions under its inherent-power authority, a court must make an explicit finding of bad faith; civil contempt however does not depend on the intent of the party that disobeys a court order [*see Knupfer v. Lindblade (9th Cir 2003) 322 F3d 1178, 1190-1191* ; *Fink v. Gomez (9th Cir 2001) 239 F3d 989, 992-993*].

Cross Reference:

Court's inherent power to impose sanctions, see Ch. 34, Other Sanction Provisions, see *§§ 34.16 -34.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptProceedingsCourt's Power to Punish

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35.06 Contempt for Violation of Rule 45: Disobeying Subpoena.

Failure by any person without adequate excuse to obey a subpoena served on that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by *Fed R Civ P 45(c)(3)(A)(ii)* (requiring over 100 miles of travel) [*Fed R Civ P 45(e)*].

Cross Reference:

Rule 45 subpoenas, see Ch. 23, Methods of Discovery, see *§§ 23.259 -23.285*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsContemptGeneral Overview

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35.07 Contempt for Violation of Rule 56: Summary Judgment Affidavit Filed in Bad Faith.

If affidavits presented pursuant to a motion for summary judgment are presented in bad faith or solely for the purpose of delay, the court must immediately order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt [*Fed R Civ P 56(g)*].

Cross Reference:

Motions for summary judgment, see Ch. 29, Summary Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
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35.08 Contempt for Violation of Rule 70: Failure to Obey Judgment Regarding Land Conveyance and Other Acts.

A party who is required by a judgment to execute a conveyance of land, deliver deeds or other documents, or perform any other specific act may be adjudged in contempt for failure to comply within the specified time [*see Fed R Civ P 70*; *see, e.g., Peterson v. Highland Music, Inc. (9th Cir 1998) 140 F3d 1313, 1324* , *cert. denied*, *525 US 983 (1998)*].

Cross Reference:

Operation of Rule 70, see 13 Moore's Federal Practice, Ch. 70, Enforcing a Judgment for a Specific Act (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsSpecific ActsCivil ProcedureSanctionsContemptGeneral Overview

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35.09 LOCAL PRACTICE: CD Cal Requirements.

35.09[1] Contempt Proceedings for Attorney Misconduct. In the Central District, powers of an individual judge to deal with contempt or other misconduct are not affected by proceedings for criminal contempt under the US Criminal Code (Title 18) [CD Cal Civ LR 83-3.2.7].

35.09[2] Contempt of Court Proceeding Available for Violation of Local Court Rules Restricting Broadcasting, Television, Photography, and Recording. In the Central District, a violation of *CD Cal Civ LR 83-6.1* or *83-6.5* may constitute contempt of court. All proceedings for such contempt occurring in or in connection with a case assigned to a judge must be heard by the judge presiding over such case. [*see* CD Cal Civ LR 83-6.1 et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
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35.10 LOCAL PRACTICE: ED Cal Requirements--Contempt Proceedings for Attorney Misconduct.

If an attorney subject to the Local Rules of the Eastern District engages in conduct that may warrant discipline or other sanctions, any judge or magistrate judge may initiate proceedings for contempt under *18 USC § 401* or *Fed R Crim P 42*, or may, after reasonable notice and opportunity to show cause to the contrary, take any other appropriate disciplinary action against the attorney [*ED Cal Gen LR 184(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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35.11 LOCAL PRACTICE: ND Cal Requirements--Contempt for Unprofessional Conduct.

In the Northern District, when a judge has cause to believe that an attorney has engaged in unprofessional conduct, the judge may initiate proceedings for civil or criminal contempt under 18 USC and *Fed R Crim P 42* [*ND Cal Civ LR 11-6(a)(1)*]; or impose other appropriate sanctions [*ND Cal Civ LR 11-6(a)(2)*].

Legal Topics:

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35.12 LOCAL PRACTICE: SD Cal Requirements--Contempt Proceedings for Attorney Misconduct.

If an attorney engages in conduct that warrants discipline or other sanctions, the court or any judge may, in addition to initiating proceedings for contempt under 18 USC and *Fed R Crim P 42*, or imposing other appropriate sanctions, refer the matter to the disciplinary body of any court before which the attorney has been admitted to practice [*SD Cal Civ LR 83.5*; *see SD Cal Civ LR 83.4* (standards for attorney conduct)].

Legal Topics:

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Kendall, Seeborg, Shartsis, Smith

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Unit 10 Sanctions
CHAPTER 35 Contempt
II. SEEKING AND OPPOSING CONTEMPT ADJUDICATION

4-35 MB Practice Guide: Fed Pretrial Civ Proc in CA 35.13

35.13 Defining Direct and Indirect Contempt.

35.13[1] Direct Contempt Occurs in Court's Presence, Indirect Contempt Occurs Outside Court's Presence. Direct contempt occurs within the court's presence [*see International Union, UMW v. Bagwell (1994) 512 US 821, 827 n2, 832, 114 S Ct 2552, 129 L Ed2d 642* ; *F.J. Hanshaw Enters. v. Emerald River Dev., Inc. (9th Cir 2001) 244 F3d 1128, 1138*].

Indirect contempt takes place out of court [*see International Union, UMW v. Bagwell (1994) 512 US 821, 827 n2, 114 S Ct 2552, 129 L Ed2d 642* ; *F.J. Hanshaw Enters. v. Emerald River Dev., Inc. (9th Cir 2001) 244 F3d 1128, 1138*].

35.13[2] Petty, Direct Contempt Is Normally Subject to Summary Adjudication. Because a court's need for contempt authority is at its greatest when contumacious conduct occurs in its presence and threatens its immediate ability to conduct its proceedings, petty, direct contempts in the presence of the court traditionally have been subject to summary adjudication because of a court's substantial interest in rapidly coercing compliance and restoring order, and because the contempt's occurrence before the court reduces the need for extensive factfinding and the likelihood of an erroneous deprivation [*see International Union, UMW v. Bagwell (1994) 512 US 821, 832, 114 S Ct 2552, 129 L Ed2d 642* ; *F.J. Hanshaw Enters. v. Emerald River Dev., Inc. (9th Cir 2001) 244 F3d 1128, 1138*].

35.13[3] If Court Delays in Punishing Direct Contempt, Notice and Hearing Are Required. If a court delays punishing a direct contempt until a later time in the proceedings, the court must provide notice and a hearing [*see International Union, UMW v. Bagwell (1994) 512 US 821, 832-833, 114 S Ct 2552, 129 L Ed2d 642* ; *F.J. Hanshaw Enters. v. Emerald River Dev., Inc. (9th Cir 2001) 244 F3d 1128, 1138*].

Cross Reference:

Direct and indirect contempt, see 27 Moore's Federal Practice, § 642.04 (Matthew Bender 3d ed.).

Legal Topics:

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

Civil ProcedureSanctionsContemptGeneral Overview

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35.14 Distinction Between Civil and Criminal Contempt Depends on Penalty.

35.14[1] Contempt Is Civil If Purpose Is Remedial. If the purpose of the contempt citation is remedial, that is, to compensate for the costs of the contemptuous conduct or to coerce future compliance with the court's order, the contempt order is civil [*Kirkland v. Legion Ins. Co. (9th Cir 2003) 343 F3d 1135, 1140*]. Civil penalties must either be compensatory or designed to coerce compliance [*Knupfer v. Lindblade (9th Cir 2003) 322 F3d 1178, 1192* ; *F.J. Hanshaw Enters. v. Emerald River Dev., Inc. (9th Cir 2001) 244 F3d 1128, 1137-1138*].

A contempt sanction is civil if the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order [*Hicks v. Feiock (1988) 485 US 624, 635 n7, 108 S Ct 1423, 99 L Ed2d 721*].

35.14[2] Contempt Is Criminal If Purpose Is Punitive. A criminal contempt sentence is punitive, and vindicates the authority of the court by punishing past acts of disobedience [*International Union, UMW v. Bagwell (1994) 512 US 821, 827-828, 114 S Ct 2552, 129 L Ed2d 642*]. A criminal contempt sanction is fixed and unconditional; it does not terminate on compliance with the court's order [*International Union, UMW v. Bagwell (1994) 512 US 821, 828-829, 114 S Ct 2552, 129 L Ed2d 642*].

Criminal contempt proceedings, unlike civil proceedings, require Constitutional protections [*International Union, UMW v. Bagwell (1994) 512 US 821, 846, 114 S Ct 2552, 129 L Ed2d 642*].

Distinguish:

Whether contempt is civil or criminal depends on the purpose and character of the sanction imposed [*Kirkland v. Legion Ins. Co. (9th Cir 2003) 343 F3d 1135, 1140*]. The distinction is important because orders of civil contempt entered against a party during the course of a pending civil action are not appealable until final judgment, while criminal contempt orders are immediately appealable [*see Kirkland v. Legion Ins. Co. (9th Cir 2003) 343 F3d 1135, 1140*].

35.14[3] Imprisonment and Monetary Fines Are Available in Both Civil and Criminal Contempt Proceedings. Imprisonment and monetary fines are available in both civil and criminal contempt proceedings. A

contempt fine or sentence is considered civil and remedial if it either coerces the person into compliance with the court order or compensates the complainant for the losses sustained [*see International Union, UMW v. Bagwell (1994) 512 US 821, 829, 114 S Ct 2552, 129 L Ed2d 642*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptPenalties

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35.15 Civil Contempt.

35.15[1] Civil Contempt Sanctions Punish Failure to Obey Court Order. Civil contempt is characterized by the court's desire to compel a party's obedience to a specific and definite court order after the party has failed to take all reasonable steps within the party's power to comply [*Knupfer v. Lindblade (9th Cir 2003) 322 F3d 1178, 1197* ; *McCoy v. Southwest Airlines Co. (CD Cal 2002) 208 FRD 617, 621*].

Example:

One of the paradigmatic civil contempt sanctions is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order [*see United States v. Ayres (9th Cir 1999) 166 F3d 991, 995*].

35.15[2] Contemnor May Purge Contempt by Affirmative Act. Civil contempt sanctions are only appropriate where the contemnor is able to purge the contempt by his own affirmative act and "carries the keys of his prison in his own pocket" [*International Union, UMW v. Bagwell (1994) 512 US 821, 828, 114 S Ct 2552, 129 L Ed2d 642* ; *United States v. Ayres (9th Cir 1999) 166 F3d 991, 997*].

35.15[3] Civil Contempt Proceedings Are Trials; No Right to Jury Trial. Civil contempt proceedings are considered "trials" within the meaning of *Fed R Civ P 43(a)*, which requires the taking of oral testimony in open court (rather than a hearing on a motion within the meaning of *Fed R Civ P 43(c)*) unless otherwise provided by rule. Hence, the issues may generally not be tried on the basis of affidavits [*see Fed R Civ P 43(a)*; *Shillitani v. United States (1966) 384 US 364, 370-371, 86 S Ct 1531, 16 L Ed2d 622* ; *Pennwalt Corp. v. Durand-Wayland, Inc. (9th Cir 1983) 708 F2d 492, 495*].

However, a person cited for civil contempt does not have a right to a jury trial [*see Fed R Civ P 43(a)*; *Shillitani v. United States (1966) 384 US 364, 370-371, 86 S Ct 1531, 16 L Ed2d 622*].

Cross Reference:

Discussion of jury trial right in contempt proceedings, see 8 Moore's Federal Practice, *§§ 38.33[5]*, 43.02 (Matthew Bender 3d ed.).

35.15[4] No Civil Contempt If Violation Is Based on Good Faith and Reasonable Interpretation of Order. Although a civil contempt need not be willful, and there is no "good-faith" exception to the requirement of obedience to a court order, a person should not be held in contempt if his or her action appears to be based on a good faith and reasonable interpretation of the court's order [*Go-Video v. Motion Picture Ass'n of Am. (9th Cir 1993) 10 F3d 693, 695*].

35.15[5] Moving Party Must Show Clear and Convincing Evidence of Violation of Court Order. The moving party in a motion for civil contempt must show clear and convincing evidence that the other party violated the order beyond substantial compliance, and that the violation was not based on a good faith and reasonable interpretation of the order [*Wolfard Glassblowing Co. v. Vanbragt (9th Cir 1997) 118 F3d 1320, 1322*].

In a civil contempt proceeding, the movant must establish by clear and convincing evidence that (1) a court order was in effect, (2) the order required specified conduct by the respondent, and (3) the respondent failed to comply with the court's order [*United States v. City of Jackson (5th Cir 2004) 359 F3d 727, 731*].

Legal Topics:

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

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35.16 Motion for Civil Contempt.

35.16[1] Motion Must State Specific Grounds for Contempt and Relief Sought. An aggrieved party can move for an order holding the offending party in contempt and for sanctions under the court's inherent power [*see, e.g.*, Rousseau v. 3 Eagles Aviation, Inc. (ED La 2004) 2004 US Dist LEXIS 1262, at *3]. A motion for contempt must state specifically the court order that has not been obeyed [*see Fed R Civ P 7(b)(1)(B)*].

The motion must also state the relief sought [*Fed R Civ P 7(b)(1)(C)*].

Counsel should specifically state claims for damages resulting from the misconduct, which may include reasonable attorney's fees [*see, e.g.*, *United States v. United Mine Workers (1947) 330 US 258, 303-304, 67 S Ct 677, 91 L Ed 884*].

35.16[2] Alleged Contemnor Entitled to Notice, Opportunity to Be Heard. Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections are required than for criminal contempt [*International Union, UMW v. Bagwell (1994) 512 US 821, 831, 114 S Ct 2552, 129 L Ed2d 642*]. Civil contempt may be imposed in an ordinary civil proceeding on notice and an opportunity to be heard; neither a jury trial nor proof beyond a reasonable doubt is required [*International Union, UMW v. Bagwell (1994) 512 US 821, 827, 114 S Ct 2552, 129 L Ed2d 642*].

Finding a party in civil contempt without a full-blown evidentiary hearing does not deny due process of law to a contemnor [*United States v. Ayres (9th Cir 1999) 166 F3d 991, 995-996* ; *Thomas, Head & Greisen Employees Trust v. Buster (9th Cir 1996) 95 F3d 1449, 1459*].

A district court ordinarily should not impose contempt sanctions solely on the basis of affidavits [*Peterson v. Highland Music, Inc. (9th Cir 1998) 140 F3d 1313, 1324*]. However, where the affidavits offered in support of a finding of contempt are uncontroverted, a district court's decision not to hold a full-blown evidentiary hearing does not violate due process [*see United States v. Ayres (9th Cir 1999) 166 F3d 991, 995-996*].

Example:

If one party is seeking a contempt adjudication against another party based on the violation of an injunction, the following discrete steps may satisfy procedural due-process requirements, but are not necessary per se [*see Thomas, Head & Greisen Employees Trust v. Buster (9th Cir 1996) 95 F3d 1449, 1458* (finding, however, that combining motion and OSC proceedings were proper in this case)]:

- A motion for an order to show cause re contempt.
- A hearing on the motion.
- A resultant issuance of a show-cause order.
- A hearing on the order to show cause.
- Determination, resulting in imposition of contempt sanctions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureSanctionsContemptCivil Contempt

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35.17 Compliance with Underlying Order Purges Civil Contempt.

A civil contempt order that fines or imprisons the contemnor is purged on performance of the act ordered by the court [*International Union, UMW v. Bagwell (1994) 512 US 821, 827, 114 S Ct 2552, 129 L Ed2d 642*].

Legal Topics:

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

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35.18 Civil Contempt Order Not Appealable Until Final Judgment.

Orders of civil contempt entered against a party during the course of a pending civil action are not appealable until final judgment [*Kirkland v. Legion Ins. Co. (9th Cir 2003) 343 F3d 1135, 1140*].

Distinguish:

Criminal contempt orders, on the other hand, are immediately appealable [*Kirkland v. Legion Ins. Co. (9th Cir 2003) 343 F3d 1135, 1140*].

Cross Reference:

19 Moore's Federal Practice, *§ 202.11[9]* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

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35.19 Criminal Contempt.

35.19[1] Criminal Contempt Requires Willful Conduct. A party's disobedience of a court order must be willful to constitute a basis for criminal contempt sanctions [*see Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 772* (criminal contempt sanction not available because, among other things, evidence failed to show that party was guilty of willful disobedience of district court's order)].

35.19[2] Federal Courts Have Criminal Contempt Authority Under 18 USC § 401. A court of the United States must have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as [*18 USC § 401*]:

- Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice [*18 USC § 401(1)*; *see United States v. Rrapi (9th Cir 1999) 175 F3d 742, 753 , cert. denied, 528 US 912 (1999)*];
- Misbehavior of any of its officers in their official transactions [*18 USC § 401(2)*];
- Disobedience or resistance to its lawful writ, process, order, rule, decree, or command [*18 USC § 401(3)*].

35.19[3] Due Process Is Required. Any person who commits criminal contempt may be punished for that contempt after prosecution on notice [*Fed R Crim P 42*; *see also 18 USC § 401*]. The court must give the person notice in open court, in an order to show cause, or in an arrest order; the notice must [*Fed R Crim P 42(a)(1)*]:

- State the time and place of the trial;
- Allow the defendant a reasonable time to prepare a defense; and
- State the essential facts constituting the charged criminal contempt and describe it as such.

Distinguish--Summary Disposition:

A judge (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies. The contempt order must recite the facts, be signed by the judge, and filed with the clerk [*Fed R Crim P 42(b)*].

The right to jury trial exists when punishment exceeds six months [*Bloom v. Illinois (1968) 391 US 194, 206 n8, 88 S Ct 1477, 20 L Ed2d 522*].

Cross Reference:

Jury trial in criminal contempt proceedings, see 27 Moore's Federal Practice, § 642.05 (Matthew Bender 3d ed.)

35.19[4] Criminal Contempt Proceeding Is Separate From Original Action. A criminal contempt proceeding is a separate and independent proceeding at law that is not part of the original action. A court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated [*Cooter & Gell v. Hartmarx Corp. (1990) 496 US 384, 396, 110 S Ct 2447, 110 L Ed2d 359* ; *see Fed R Crim P 42(a)* (procedural requirements for criminal contempt)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCriminal ContemptCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptElementsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptProceedingsCourt's Power to PunishCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptProceedingsDue ProcessCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptProceedingsSummary Proceedings

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35.20 Responding to and Opposing Allegations of Contempt.

35.20[1] Responding to and Opposing Allegations of Civil Contempt.

35.20[1][a] Purge Contempt by Affirmative Act. A party held in civil contempt can purge the contempt by obeying the court order [*International Union, UMW v. Bagwell (1994) 512 US 821, 828, 114 S Ct 2552, 129 L Ed2d 642* (the contemnor "carries the keys of his prison in his own pocket"); *United States v. Ayres (9th Cir 1999) 166 F3d 991, 997*].

35.20[1][b] Assert Good Faith and Reasonable Interpretation of Order. Inadvertence is a defense to contempt if the person who has violated a court order has interpreted the order in a reasonable manner and in good faith [*see Go-Video v. Motion Picture Ass'n of Am. (9th Cir 1993) 10 F3d 693, 695* (judgment of contempt vacated because plaintiff substantially complied with a reasonable interpretation of the protective order)].

35.20[1][c] Impossibility of Compliance Is Defense If Not Self Created. A person subject to civil contempt can raise impossibility of compliance as a defense. A party's inability to comply with a judicial order constitutes a defense to a charge of civil contempt, unless it is the intended result of his or her own conduct [*FTC v. Affordable Media, LLC (9th Cir 1999) 179 F3d 1228, 1239*].

An alleged contemnor may defend against an allegation of contempt by demonstrating a present inability to comply. Once a prima facie showing of contempt is made, the burden shifts to the alleged contemnor to produce evidence explaining his noncompliance. Ability to comply is the crucial inquiry; and a court will weigh all the evidence properly before it determines whether or not there is actually a present ability to obey [*see United States v. Ayres (9th Cir 1999) 166 F3d 991, 994*].

A party petitioning for an adjudication that another party is in civil contempt does not have the burden of showing that the other party has the capacity to comply with the court's order. Rather, the party asserting the impossibility defense must show categorically and in detail why he or she is unable to comply [*FTC v. Affordable Media, LLC (9th Cir 1999) 179 F3d 1228, 1240-1241*].

35.20[2] Nature or Severity of Penalties Requires Criminal Due Process. The imposition of penalties under the procedure for civil contempt may be opposed on the ground that the nature of the penalty was so severe that it amounted to a penalty for criminal contempt; and therefore that the contemnor was deprived of due process applicable to criminal contempt procedure [*see International Union, UMW v. Bagwell (1994) 512 US 821, 834, 114 S Ct 2552, 129 L Ed2d 642* ; *NLRB v. Ironworkers Local 433 (9th Cir 1999) 169 F3d 1217, 1220*].

35.20[3] Responding to and Opposing Allegations of Criminal Contempt.

35.20[3][a] Motion to Discharge Order to Show Cause. An alleged contemnor may move to discharge an order to show cause citing for contempt [*see United States v. United Mine Workers (1947) 330 US 258, 267-268 n14, 67 S Ct 677, 91 L Ed 884*].

Cross Reference:

17 Bender's Federal Practice Forms, Form CrR42:3 (Matthew Bender).

35.20[3][b] Absence of Willfulness. An alleged contemnor may raise the absence of willfulness in defense of allegations of criminal contempt; A party's disobedience of a court order must be willful to constitute a basis for criminal contempt sanctions [*see Falstaff Brewing Corp. v. Miller Brewing Co. (9th Cir 1983) 702 F2d 770, 772* (criminal contempt sanction not available because, among other things, evidence failed to show that party was guilty of willful disobedience of district court's order)].

35.20[3][c] Violation of Due Process. The alleged contemnor may assert that the criminal contempt proceeding violates due process required under *Fed R Crim P 42(a)*, e.g., by lack of notice or denial of a jury trial when one is allowed. Criminal contempt penalties may not be imposed unless the contemnor has been afforded the constitutional protections of a criminal proceeding [*see Hicks v. Feiock (1988) 485 US 624, 632, 108 S Ct 1423, 99 L Ed2d 721* ; *see, e.g., Macias v. McGrath (9th Cir 2006) 439 F3d 1141*].

35.20[3][d] Summary Criminal Contempt Unavailable. Summary criminal contempt is justified only in extraordinary circumstances when the judge both witnesses the contumnacious conduct and needs to immediately assert judicial authority to restore the orderly operation of the judicial system [*United States v. Glass (9th Cir 2004) 361 F3d 580, 586-588*]. Summary criminal contempt may be opposed on the ground that the conduct in question did not occur in open court, or that the conduct was not of the type for which summary criminal contempt is available.

Summary contempt is not appropriate in the following circumstances:

- Any misconduct cited did not occur in court [*see Pounders v. Watson (1997) 521 US 982, 988, 117 S Ct 2359, 138 L Ed2d 976*].

- Any misconduct cited did not occur in the judge's presence [*see Pounders v. Watson (1997) 521 US 982, 988, 117 S Ct 2359, 138 L Ed2d 976*].

- The alleged contemnor's actions did not create or threaten any disturbance, violence, or physical obstruction in open court [*see Pounders v. Watson (1997) 521 US 982, 988, 117 S Ct 2359, 138 L Ed2d 976*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptPenaltiesCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptProceedingsDue ProcessCriminal Law & ProcedureCriminal OffensesMiscellaneous

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35.21 Notice of Motion and Motion for Civil Contempt.

_____ [*attorney's name and California Bar number*]
_____ [*attorney's street address*]
_____ [*city, state, and zip code*]
_____ [*phone number*]
_____ [*fax number*]
_____ [*attorney's e-mail address*]
Attorney for _____ [*party's status and name*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
	)	Civil Action No. _____
_____ [*name*],	)	
Plaintiff	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR CIVIL
_____ [*name*],	)	CONTEMPT
Defendant	)	
	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Courtroom No. _____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on _____ [*date*] at _____ [*time of day*], or as soon thereafter as the parties may be heard, _____ [*party's status and name*] will move this Court, at the United States Courthouse located at _____ [*address*], Courtroom _____ [*courtroom number*], for:

(a) An order pursuant to _____ [*set forth authority for contempt, e.g.,* the court's inherent authority], holding _____ [*party designation and name of party sought to be held in contempt*] in civil contempt for _____ [*set forth basis for contempt, e.g., failure to obey a specified order*];

(b) An order pursuant to _____ [*set forth authority for contempt, e.g.,* the court's inherent authority], awarding costs and attorney's fees to the movant incident to any finding of civil contempt entered against _____ [*party designation and name of party sought to be held in contempt*]; and

(c) An order granting _____ [*name of moving party*] such other incidental relief as may be appropriate.

[*If required by local rule (e.g., CD Cal Civ LR 7-3), include statement re prior conference of counsel.*]

[*If required by local rule (e.g., ND Cal Civ LR 7-2(b), 7-4), include supporting points and authorities in the same document as the notice of motion and motion; otherwise, present points and authorities in a separate memorandum.*]

This motion is based on this Notice of Motion and Motion, the accompanying _____ [affidavit *or* declaration] of _____ [*name*], [*add, if appropriate:* the accompanying Memorandum of Points and Authorities,] and the pleadings and papers on file in this action.
Dated: _____

Respectfully submitted,

_____ [*signature of attorney*]

_____ [*typed or printed name of attorney*]

_____ [*firm name, if applicable*]

Attorney for _____ [*party's status and name*]

[*Attach any supporting affidavits or declarations and exhibits to those affidavits or declarations.*]

[*Attach certificate of service.*]

NOTES.

Authority:

United States v. United Mine Workers (1947) 330 US 258, 303-304, 67 S Ct 677, 91 L Ed 884

Discussion:

See *§ 35.16*

Related Forms of Motion:

See 12 Bender's Federal Practice Forms, Form CTMPT: 1-7 (Matthew Bender)

Related Form of Affidavit:

See 12 Bender's Federal Practice Forms, Form CTMPT: 20 (Matthew Bender)

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35.22 Judgment of Civil Contempt.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff	)	Civil Action No. _____
vs.	)	
_____ [*name*],	)	JUDGMENT OF CONTEMPT
Defendant	)	
	)	
	)	

This cause came on to be heard on the motion of _____ [*name of moving party*] for a judgment in contempt against _____ [*name of contemnor*]. The Court has considered the motion, the papers submitted in support of and in opposition to the motion, the testimony taken and exhibits entered into evidence at the hearing of the motion, the arguments of counsel, and the authorities cited by counsel. The Court has made its Findings of Fact and Conclusions of Law and filed them as of _____ [*date*]. In accordance with those Findings,

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. _____ [*Name of contemnor*] is in contempt of this Court for having failed and refused to obey the Court's _____ [order *or* decree *or* injunction] of _____[date].

2. _____ [*Name of contemnor*] may purge _____ [himself *or* herself] of this contempt of the court by taking the following action:

a. _____ [*Set forth required action, e.g.,* Fully complying with all of the provisions of the Court's order of July 6, 2004 from this day forward];

b. Ceasing and desisting from _____ [*describe ongoing contemptuous conduct*];

c. Filing with this court and with plaintiff, within five days after the entry of this judgment of contempt, a sworn statement setting forth in detail the steps taken to comply with this judgment;

d. Agreeing and consenting to show the court that _____ [he *or* she] has complied with the terms of this judgment, in person, before the court on _____ [*date*], at _____ [*time*], and at all further times and places as the court may direct; and

e. Reimbursing _____ [*name of moving party*] for all costs of this litigation, including costs of investigation, preparation for, and conduct of this proceeding, reporting fees, and reasonable attorney's fees, within _____ [*number*] days after service of a copy of this judgment on counsel for _____ [*name of contemnor*] of the costs as taxed and the computation of _____ [*name of moving party*]'s expenses and counsel fees in connection with this proceeding, as approved by the court.
Dated: _____

_____ [*signature*]

UNITED STATES DISTRICT JUDGE

NOTES.

Authority:

United States v. United Mine Workers (1947) 330 US 258, 304, 67 S Ct 677, 91 L Ed 884

Related Motion:

See *§ 35.21*

Related Forms of Judgment and Order:

See 12 Bender's Federal Practice Forms, Forms CTMPT: 31, 39 (Matthew Bender)

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A-1 ABSTENTION DOCTRINES (

See JURISDICTION, subhead: Abstention doctrines)

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