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Witkin California Procedure, Fifth Edition

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CHAPTER II - Courts

Witkin Summary of California Law

I. INTRODUCTION

A. Judges.

1. Qualification.

2 *Witkin Cal. Proc. Courts* § 1

[§ 1] Qualification.

(1) *Former Law: Length of Practice.* The California Constitution originally provided that judges of reviewing courts and superior courts must have been admitted to practice before the Supreme Court for at least 5 years immediately preceding election or appointment. (See *Bowring v. Dominguez* (1935) 3 C.2d 167, 169, 44 P.2d 299 [not sufficient merely to have practiced 5 years before assuming office]; *Johnson v. State Bar* (1937) 10 C.2d 212, 216, 73 P.2d 1191 [suspension from practice within 5-year period immediately preceding election automatically disqualified candidate].)

(2) *Former Law: Residency.* The Legislature established additional qualifications, mainly relating to residence. But the attempt to add to the constitutionally specified qualifications was declared unconstitutional (see *Wallace v. Superior Court* (1956) 141 C.A.2d 771, 781, 298 P.2d 69; *People v. Chessman* (1959) 52 C.2d 467, 500, 341 P.2d 679), and the statutes were repealed in 1967.

In *People v. Bowen* (1991) 231 C.A.3d 783, 283 C.R. 35, the court pointed out that Govt.C. 69502, requiring a superior court judge to reside within the county for which the judge was elected or appointed, was not repealed. (231 C.A.3d 788.) However, the court, after discussing *Wallace* and *Chessman*, found it unnecessary to pass on the constitutionality of the unrepealed statute because the proper way to challenge a judge's right to hold office is by a quo warranto proceeding. (231 C.A.3d 789, 791.) Govt.C. 69502 was repealed in 2000. (See 78 Ops. Cal. Atty. Gen. 204 (1995) (Opinion No. 95-301) [Govt.C. 69502 is unenforceable].)

(3) *Current Law.* The sole qualification for the office of a judge "of a court of record" is membership in the State Bar, or service as a judge of a court of record in California, for 10 years immediately preceding selection. (Cal. Const., Art. VI, §15.) For this purpose, attorneys who are enrolled, at their request, as inactive members of the State Bar are members. (B. & P.C. 6006.) (See 71 A.L.R.3d 498 [constitutional or statutory provisions making legal knowledge or experience a condition of eligibility]; 12 West L.A. L. Rev. 17 [preinvestiture training and selection in other countries].)

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I. INTRODUCTION

A. Judges.

2. Selection.

a. Reviewing Courts.

1. In General.

2 *Witkin Cal. Proc. Courts* § 2

[§ 2] In General.

(1) *Election.* The selection of reviewing court judges is governed by Cal. Const, Art. VI, §16. Judges of the Supreme Court and Courts of Appeal are elected at general elections "at the same time and places as the Governor." Supreme Court judges are chosen at large; judges of the Courts of Appeal are elected in districts. (Cal. Const., Art. VI, §16(a).)

(2) *Term of Office.* Except for newly created Court of Appeal districts or divisions, in which first elective terms of 4, 8, and 12 years must be provided (see *Govt.C. 69107*), the term of office of Supreme Court and Court of Appeal judges is 12 years, which begins on the Monday after January 1 following the election. (Cal. Const., Art. VI, §16(a).)

(3) *Vacancy: Election or Appointment.* Vacancies in reviewing courts are filled by gubernatorial appointment. (a) When a judge's term expires and the judge does not file a declaration of candidacy, the Governor nominates a candidate, whose name goes on the ballot in the same manner as that of an incumbent. (See *infra*, §3.) (b) Other vacancies are filled by temporary appointments. However, all executive appointments and nominations are subject to approval by the Commission on Judicial Appointments. (Cal. Const., Art. VI, §16(d).)

(4) *Commission on Judicial Appointments.* Appointments of appellate judges must be approved by a constitutionally established body, the Commission on Judicial Appointments. (Cal. Const., Art. VI, §7.) A majority (two members) of the Commission may confirm an appointment. (*Brown v. Superior Court* (1982) 137 C.A.3d 778, 783, 187 C.R. 324 [upholding authority of Commission to act with only two members sitting].) (On State Bar agency established to assist in evaluating potential judicial appointees, see *infra*, §5.)

A confirmation by the Commission becomes effective when approved by the Commission, which must promptly file written notice of confirmation with the Secretary of State. (*Govt.C. 68121.*)

Guidelines for the Commission, covering membership and staff, powers, procedures, and access to files, were adopted in 1999. The guidelines are available at the judicial branch website: www.courtinfo.ca.gov.

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A. Judges.

2. Selection.

a. Reviewing Courts.

2. Confirmation Election.

2 *Witkin Cal. Proc. Courts* § 3

[§ 3] Confirmation Election.

(1) *In General.* Despite fixed terms (see *supra*, §2), incumbents in effect are given the opportunity of securing life tenure; because they run on their records with no opposition, the ballot merely presents the question whether the candidate "shall be elected." (Cal. Const., Art. VI, §16(d).) (See 28 *Santa Clara L. Rev.* 333 [Supreme Court Retention Elections in California]; 28 *Santa Clara L. Rev.* 357 [panel discussion on judicial retention elections]; 61 *So. Cal. L. Rev.* 1555 et seq. [symposium on judicial election, selection, and accountability].)

(2) *Ballot Explanation.* Under *Elec.C.* 9083, the ballot pamphlet in a confirmation election must explain the confirmation process:

"If the ballot contains a question as to the confirmation of a justice of the Supreme Court or a court of appeal, the Secretary of State shall include in the state ballot pamphlet a written explanation of the electoral procedure for justices of the Supreme Court and the courts of appeal. The explanation shall state the following:"

"Under the California Constitution, justices of the Supreme Court and the courts of appeal are subject to confirmation by the voters. The public votes 'yes' or 'no' on whether to retain each justice."

"These judicial offices are nonpartisan."

"Before a person can become an appellate justice, the Governor must submit the candidate's name to the Judicial Nominees Evaluation Commission, which is comprised of public members and lawyers. The commission conducts a thorough review of the candidate's background and qualifications, with community input, and then forwards its evaluation of the candidate to the Governor."

"The Governor then reviews the commission's evaluation and officially nominates the candidate, whose qualifications are subject to public comment before examination and review by the Commission on Judicial Appointments. That commission consists of the Chief Justice of California, the Attorney General of California, and a

senior Presiding Justice of the Courts of Appeal. The Commission on Judicial Appointments must then confirm or reject the nomination. Only if confirmed does the nominee become a justice."

"Following confirmation, the justice is sworn into office and is subject to voter approval at the next gubernatorial election, and thereafter at the conclusion of each term. The term prescribed by the California Constitution for justices of the Supreme Court and courts of appeal is 12 years. Justices are confirmed by the Commission on Judicial Appointments only until the next gubernatorial election, at which time they run for retention of the remainder of the term, if any, of their predecessor, which will be either four or eight years."

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I. INTRODUCTION

A. Judges.

2. Selection.

b. Superior Court.

2 *Witkin Cal. Proc. Courts* § 4

[§ 4] Superior Court.

(1) *Number of Judges.* The Legislature is required to prescribe the number of superior court judges in each county. (Cal. Const., Art. VI, §4; see *Govt.C. 69580* et seq.; *infra*, §209.)

(2) *Term of Office.* The term of office for superior court judges is 6 years, which begins on the Monday after January 1 following the election. (Cal. Const., Art. VI, §16(c).)

(3) *Election.* Judges of the superior court are chosen in their counties at general elections. (Cal. Const., Art. VI, §16(b).) Where only the incumbent has filed nomination papers, the incumbent's name does not appear on the ballot unless a write-in campaign petition is filed. If the incumbent's name does not appear, the incumbent is declared reelected by the appropriate elections official on the day of the general election. (*Elec.C. 8203*; see *People v. Robinson* (1987) 190 C.A.3d 334, 337, 235 C.R. 369 [for purposes of this statute, "incumbent" means "officeholder"; unopposed judge who filed nomination papers but resigned before primary election was not "incumbent" and could not be declared reelected].)

(4) *Appointment.* The special method of selecting appellate court judges by appointment or nomination of the Governor (*supra*, §2) may be made applicable to the superior court in the manner authorized by statute (*Elec.C. 8220* et seq.) in counties approving the plan by majority vote of the electors. (Cal. Const., Art. VI, §16(d).)

(5) *Vacancy.* A vacancy on the superior court is filled by election to a full term at the next general election after the second January 1 following the vacancy, but the Governor may make a temporary appointment until the elected judge's term begins. (Cal. Const., Art. VI, §16(c); see *Anderson v. Phillips* (1975) 13 C.3d 733, 740, 119 C.R. 879, 532 P.2d 1247 [appointee holds office until successor is elected]; *Zecher v. Cory* (1975) 13 C.3d 743, 745, 119 C.R. 885, 532 P.2d 1253 [same].)

When an office becomes vacant during the final year of an incumbent's term but after another person has qualified as a candidate for the office, Cal. Const., Art. VI, §16(b), requires that a successor be elected in the regular manner. Cal. Const., Art. VI, §16(c), is applicable only if the full elective process cannot be conducted or if a vacancy occurs and an

appointee assumes the office prior to qualification of a candidate or candidates for the office. (*Stanton v. Panish* (1980) 28 C.3d 107, 112, 167 C.R. 584, 615 P.2d 1372.)

A new judicial office is created January 1 of the year following enactment of the authorizing legislation, and a general election to fill the "vacancy" is one held following the *next* January 1 (1 year after the creation date). (*Fields v. Eu* (1976) 18 C.3d 322, 326, 333, 134 C.R. 367, 556 P.2d 729.)

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I. INTRODUCTION

A. Judges.

2. Selection.

c. Commission on Judicial Nominees Evaluation.

2 *Witkin Cal. Proc. Courts* § 5

[§ 5] Commission on Judicial Nominees Evaluation.

(1) *Object and Nature of Commission.* The Commission on Judicial Nominees Evaluation, an agency of the State Bar, evaluates potential judicial appointees and nominees of the Governor. (*Govt.C. 12011.5*; see *11 Pacific L. J.* 621.) The Commission is intended to provide the Governor with "as much information and valued judgment regarding the judicial qualifications of a candidate as is possible prior to the time such appointment or nomination takes effect." (Stats. 1979, Chap. 534, §1.) Before the Governor may appoint or nominate a candidate for any vacant judicial office (see *supra*, §§2, 4), the Governor must first submit the names of all potential candidates to the Commission. (*Govt.C. 12011.5(a)*.)

(2) *Composition of Commission.* The Commission has the same ratio of lawyers to public members as the Board of Governors of the State Bar. (*Govt.C. 12011.5(b)*.) It must also be broadly representative of the ethnic, gender, and racial diversity of the population, and must include persons of a variety of backgrounds, abilities, interests, and opinions. (*Govt.C. 12011.5(b)*, adopting standards of *Govt.C. 11140, 11141*.)

(3) *90-Day Evaluation Period.* No candidate may be appointed until the Commission has reported, or failed to report, within 90 days of submission of the candidate's name for evaluation. Even where the vacancy occurs within 90 days of the expiration of the Governor's term, the Governor must still submit the names to permit a timely evaluation if this is possible. (*Govt.C. 12011.5(k)*.) (See *11 Pacific L. J.* 623 [constitutional questions raised by restrictions on appointive power].)

(4) *Evaluation of Candidates.* Unless a name is sooner withdrawn under *Govt.C. 12011.5(j)*, the Commission must report to the Governor, within 90 days of submission of the name, whether the person is (a) exceptionally well qualified, (b) well qualified, (c) qualified, or (d) not qualified, giving reasons for the evaluation. (*Govt.C. 12011.5(c)*.) Criteria include "industry, judicial temperament, honesty, objectivity, community respect, integrity, health, ability, and legal experience." (*Govt.C. 12011.5(d)*.) However, the statute is not to be construed as imposing additional qualifications for the office of judge. (*Govt.C. 12011.5(l)*.)

(5) *Rules.* The State Bar has adopted rules and procedures for conducting investigations. (See *Govt.C. 12011.5(e)*; Rules and Procedures of the Commission on Judicial Nominees Evaluation.)

(6) *Confidentiality*. Proceedings are confidential. The governing rules must establish "appropriate, confidential methods" for disclosure of adverse allegations to the candidate which, unless rebutted, are "determinative of the candidate's unsuitability for judicial office." (*Govt.C. 12011.5(e)*.) Nothing may be done to disclose the source of information, and all communications are "absolutely privileged." (*Govt.C. 12011.5(e), (f), (g)*.) The Legislature intended, by these provisions, to encourage full and honest disclosure to the Commission, and to assure qualified candidates that they will not be subjected to undue risk of adverse publicity or criticism. (Stats. 1979, Chap. 534, §1.) These features were deemed so important that they were excepted from the general severability provision in *Govt.C. 12011.5(o)*.

(7) *Authorized Disclosures*. When the Governor appoints to a trial court a person found not qualified, the State Bar may make that fact public after giving the appointee notice of its intent to do so. (*Govt.C. 12011.5(g)*.) If the Governor appoints or nominates a person to the Supreme Court or the Court of Appeal, the Commission on Judicial Appointments (*supra*, §2) may invite, or the Board of Governors or the Commission on Judicial Nominees Evaluation may submit, the Commission's recommendation and its reasons. (*Govt.C. 12011.5(h)*.) But that disclosure does not constitute a waiver of privilege or a breach of confidentiality with respect to communications of or to the State Bar concerning the qualifications of the appointee or nominee. (*Govt.C. 12011.5(g), (h)*.)

(8) *Publication by News Media*. Although the evaluation is to be kept confidential, a news media publication of a finding that the applicant is not qualified may be protected from tort liability by the First Amendment privilege to make a truthful report of newsworthy matters concerning a public figure. (See *Nicholson v. McClatchy Newspapers* (1986) 177 C.A.3d 509, 513, 515, 517, 223 C.R. 58.)

(9) *Limitation on Other Evaluation*. The State Bar may not authorize or participate in an evaluation of judges of the Supreme Court and Courts of Appeal other than as authorized by *Govt.C. 12011.5*, "without prior review and statutory authorization by the Legislature." This restriction, however, does not prevent members of the State Bar from participating in judicial evaluations in their individual capacity. (*Govt.C. 12011.5(m)*.)

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A. Judges.

2. Selection.

d. Local Bar Association Evaluation.

2 *Witkin Cal. Proc. Courts* § 6

[§ 6] Local Bar Association Evaluation.

In several California counties the local bar association conducts judicial evaluation inquiries and publishes its opinion for the information of voters. In *Botos v. Los Angeles County Bar Assn.* (1984) 151 C.A.3d 1083, 199 C.R. 236, the publication was held to be proper comment and not defamatory. Plaintiff, a practicing attorney, became a candidate for judge of the superior court of Los Angeles County. He refused to provide the biographical information requested by defendant bar association and rejected an offer to discuss his tentative bad rating with the association's judicial evaluation committee. The committee completed its investigation and defendant released for publication the evaluation of "not qualified." Plaintiff was defeated in the election, and brought this action for defamation. *Held*, judgment for defendant on demurrer affirmed.

(a) The question is one of first impression in California, but an Illinois court held that comments of the Chicago Bar Association were not libelous. (151 C.A.3d 1088.)

(b) The committee's evaluation was its collective opinion, and opinions on the fitness of an individual for public office are not libelous. By seeking an elective office, plaintiff "subjected himself to evaluative comment, not only from the local bar association, but also from any and all interested persons." (151 C.A.3d 1089, citing and quoting *Eva v. Smith* (1928) 89 C.A. 324, 264 P. 803, and *Desert Sun Publishing Co. v. Superior Court* (1979) 97 C.A.3d 49, 158 C.R. 519, 5 Summary (10th), *Torts*, §622.) And "a local bar association has a vested interest in aiding the public to form sound judgments concerning the quality of judicial candidates." (151 C.A.3d 1090.) (On attorney's obligation of honesty in evaluating judicial candidates, see A.B.A. Model Rules of Professional Conduct, Rule 8.2.)

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I. INTRODUCTION

A. Judges.

2. Selection.

e. Reform in Judicial Selection.

2 *Witkin Cal. Proc. Courts* § 7

[§ 7] Reform in Judicial Selection.

(1) *Need for Reform.* The need to improve existing procedures for selecting judges has been a subject of long-standing concern to those connected with the administration of justice. To this end, a number of states have replaced traditional elective and unrestricted appointive systems with "merit plans." Though the details of these plans differ, their fundamental purpose is to provide for the selection of judges on the basis of individual ability rather than political influence. (See 34 *Loyola L.A. L. Rev.* 1353 et seq. [symposium on improving judicial selection]; 8 *Pepperdine L. Rev.* 255 [need for systematic evaluation of judges' performance]; 4 *San Fernando Valley L. Rev.* 109 [methods of judicial selection]; 28 *Santa Clara L. Rev.* 333 [Supreme Court Retention Elections in California]; 28 *Santa Clara L. Rev.* 357 [panel discussion on judicial retention elections]; 61 *So. Cal. L. Rev.* 1555 et seq. [symposium on judicial election, selection, and accountability].)

(2) *Nature of Merit Plans.* Existing merit plan systems derive in large measure from a proposal approved in 1937 by the American Bar Association (A.B.A.). This proposal contemplated appointment of judges by the state's chief executive from a list submitted by an independent agency or commission staffed by a number of jurists and other eminent members of the community. Provision was made for a further clearance of appointments, where appropriate, by some form of legislative confirmation process. (See 74 *Judicature* 128; 10 *Pacific L. J.* 683; 36 *So. Cal. L. Rev.* 41.)

An adaptation of the A.B.A. plan was put into effect in 1940 in Missouri. This program calls for gubernatorial appointment from a list of three persons named by either a trial or appellate court commission. Membership of each commission consists of jurists, lawyers, and laymen, but the trial court group differs in number and manner of selection from that of the commission nominating appellate court judges. Once appointed, judges serve a specified term, after which they run for reelection against their records, without opposition and without party sanction or support, on a ballot that reads in substance: Shall the judge be retained, yes or no?

(3) *Proposed California Merit Plan.* Merit plans were considered by the State Bar on several occasions. (See 36 *So. Cal. L. Rev.* 19.) In 1962 the Board of Governors appointed a committee to review the matter, and a plan drafted as a result of its efforts was endorsed by the board in 1966. With some modification this plan was embodied in a proposed constitutional amendment supported by the Governor and the State Bar, but it failed to receive legislative approval and

did not reach the ballot.

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I. INTRODUCTION

A. Judges.

3. Compensation.

a. Sitting Judges.

2 Witkin Cal. Proc. Courts § 8

[§ 8] Sitting Judges.

(1) *Former Law.* The California Constitution originally specified the salaries of Supreme Court and Court of Appeal justices, and also stated that the salaries of superior court judges could not be increased or decreased during their terms of office. A later amendment provided that the compensation of judges of all courts of record should be fixed by the Legislature. (Former Cal. Const., Art. VI, §§11, 17.) The effect of this amendment was to give the Legislature plenary power over the salaries of appellate justices and trial court judges. Hence, salaries could be raised or lowered by statute during a judge's term of office. (See *Sevier v. Riley* (1926) 198 C. 170, 176, 244 P. 323 [upholding act raising salary of superior court judge during term]; *Wilson v. Walters* (1941) 19 C.2d 111, 118, 119 P.2d 340; *Crawford v. Payne* (1936) 12 C.A.2d 485, 487, 55 P.2d 1240 [upholding act lowering salary of municipal court judge during term].)

(2) *Current Law.* "The Legislature shall prescribe compensation for judges of courts of record." (Cal. Const., Art. VI, §19.)

(3) *Base Salaries.* The statutory base salaries are:

(a) *Chief Justice of California:* \$ 93,140. (Govt.C. 68200.)

(b) *Associate Justices of Supreme Court:* \$ 88,818. (Govt.C. 68201(a).)

(c) *Court of Appeal Justices:* \$ 83,268. (Govt.C. 68201(b).)

(d) *Superior Court Judges:* \$ 72,763. (Govt.C. 68202.)

(4) *Cost-of-Living Increases.* Members of these courts are entitled to automatic yearly increases in salary, based on California consumer price index figures. (Govt.C. 68203.) Increases are measured "by multiplying the then current salary of each justice or judge by the average percentage salary increase for the current fiscal year for California State employees." (Govt.C. 68203(a).) However, any dollar limitation the Legislature places on salary increases for state employees in any year must also apply to judges in comparable wage categories. (Govt.C. 68203(a).)

(5) *Adjusted Salaries*. Judges have received several additional salary increases. (See *Govt.C. 68203*.) In 2007, the adjusted salaries were as follows:

(a) *Chief Justice of California*: \$ 228,505.

(b) *Associate Justices of Supreme Court*: \$ 209,521.

(c) *Court of Appeal Justices*: \$ 196,428.

(d) *Superior Court Judges*: \$ 171,648.

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(2) *Current Law*. See *Sturgeon v. Los Angeles* (2008) 167 C.A.4th 630, 642, 84 C.R.3d 242 [employee benefits and professional development allowance provided by county to superior court judges were elements of compensation but were not prescribed by Legislature and thus, were impermissible under Cal. Const., Art. VI, §19].



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I. INTRODUCTION

A. Judges.

3. Compensation.

b. Retired Judges.

2 *Witkin Cal. Proc. Courts* § 9

[§ 9] Retired Judges.

(1) *Judges' Retirement Law*. A two-tiered retirement plan was adopted in 1994. The Judges' Retirement System (*Govt.C. 75000* et seq.) applies to judges elected or appointed to office before November 9, 1994. The Judges' Retirement System II (*Govt.C. 75500* et seq.) applies to judges elected or appointed to office on or after November 9, 1994. (See *Govt.C. 75502*.) These statutes provide retirement allowances at certain ages, or in case of disability, for all judges except those of the former justice court. (See *Olson v. Cory* (1980) 27 C.3d 532, 542, 178 C.R. 568, 636 P.2d 532 [computation of cost-of-living increases for judges who retired before January 1, 1977].)

(2) *Community Property Interest in Judge's Retirement Benefits*. *Govt.C. 75050* et seq. provide for the division of judicial retirement benefits subject to a community property interest in the event of dissolution or legal separation. (See 11 *Summary* (10th), *Community Property*, §§95, 96.)

(3) *Pension to Judge Convicted of Felony*. In *Willens v. Commission on Judicial Qualifications* (1973) 10 C.3d 451, 110 C.R. 713, 516 P.2d 1, plaintiff, a municipal court judge, became a candidate for the superior court and was unopposed in the primary election. Before the general election he was indicted for criminal conspiracy and bribery, and became automatically disqualified from serving as a judge (see *infra*, §70). On November 3, at the general election, he was defeated; and on the same date he applied for retirement, with adequate supporting medical affidavits. The Commission on Judicial Performance refused the request, the trial court issued mandamus to compel approval, and the Supreme Court affirmed.

(a) There appears to be no legislative intent to deprive a judge with a mental or physical disability from retirement benefits solely because at the time of the request, he has been charged with a criminal offense. (10 C.3d 456.) The analogy of a healthy judge is persuasive: A charge of felony disqualifies him from acting, but without loss of salary; a disabled judge should be entitled to receive the equivalent of salary--retirement benefits. (10 C.3d 456, 457.)

(b) During the appeal the judge was convicted; nevertheless the disability benefits must continue for his lifetime (or until recovery from his disability). Pension benefits are vested rights, and once a person becomes eligible the rights cannot be forfeited as a result of removal from office for misconduct. (10 C.3d 458.) (See 2 *Pepperdine L. Rev.* 204.)

(4) *Retired Judges Sitting by Assignment.* Retired judges assigned to courts of record (see *infra*, §11 et seq.) are entitled to compensation as follows:

(a) A judge retired under the Judges' Retirement System or the Judges' Retirement System II is entitled to compensation under *Govt.C. 68543.7* (daily rate equivalent to 92% of compensation of a judge of the court to which the retired judge is assigned) without loss of retirement benefits. (*Govt.C. 68543.5(a).*)

(b) The 8% difference in compensation is paid to the Judges' Retirement Fund or the Judges' Retirement System II Fund. (*Govt.C. 68543.5(b).*)

(c) Judges are entitled to expenses for travel and board and, when assigned in a county other than the judge's county of residence, expenses for lodging. (*Govt.C. 68543.5(c), (d).*)

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A. Judges.

3. Compensation.

c. Compensation Suspended for Delay in Deciding Cases.

2 *Witkin Cal. Proc. Courts* § 10

[§ 10] Compensation Suspended for Delay in Deciding Cases.

"A judge of a court of record may not receive the salary for the judicial office held by the judge while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision." (Cal. Const., Art. VI, §19, based on former Cal. Const., Art. VI, §24.) The judge must execute an affidavit of compliance. (*Govt.C. 68210*.) (On delay in deciding cases as basis for discipline, see *infra*, §75.)

The mandatory language in the original constitutional provision was given a directory effect in the Supreme Court by the practice of "resubmission," and by construing the term "submitted" to mean the court's order of submission, which may be entered at any time after argument and before the decision is filed. (See 9 *Cal. Proc.* (5th), *Appeal*, §§773, 774.) The effect of the provision was also limited to its precise words: The judge was merely prohibited from receiving a salary *until* he or she decided all cases pending 90 days or longer. But the salary was not forfeited, and the delinquent judge was not civilly liable to a party involved in a pending case. (*Wyatt v. Arnot* (1907) 7 *C.A.* 221, 228, 94 *P.* 86 [superior court judge].) (See *Hassanally v. Firestone* (1996) 51 *C.A.4th* 1241, 1244, 59 *C.R.2d* 625 [delay in deciding case is not ground for new trial].)

A nonjury case is considered submitted "when all of the evidence has been received and all briefs or memoranda authorized to be filed after trial have been received." (*Mardikian v. Commission on Judicial Performance* (1985) 40 *C.3d* 473, 477, footnote 2, 220 *C.R.* 833, 709 *P.2d* 852.) And, although neither Cal. Const., Art. VI, §19, nor *Govt.C. 68210* mandates that cases be decided within 90 days of their submission, the two provisions "reflect the judgment of the Legislature and the electorate that this period affords a reasonable time within which to expect a trial judge to carry out the basic responsibility of a judge to decide cases." (*Mardikian v. Commission on Judicial Performance*, *supra*, 40 *C.3d* 477, footnote 4.)

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A. Judges.

4. Assignment of Judges by Chief Justice.

a. Constitutional Basis of Power.

2 Witkin Cal. Proc. Courts § 11

[§ 11] Constitutional Basis of Power.

"The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court." (Cal. Const., Art. VI, §6(e).) (See *Fay v. District Court of Appeal* (1927) 200 C. 522, 539, 254 P. 896 [holding that, under restrictive language of former constitutional provision eliminated in 1966, three superior court judges could not be assigned to act as separate division of Court of Appeal]; *Metropolitan Water Dist. of Southern Calif. v. Adams* (1942) 19 C.2d 463, 469, 122 P.2d 257.)

Thus, consent is required for the assignment of a retired judge, or for the assignment of an active judge to a court of lower jurisdiction (Cal. Const., Art. VI, §6(e)); but an active judge assigned to a court of "like or higher jurisdiction" must accept the assignment. (*Govt.C. 68548*.)

The fact that the Chief Justice is disqualified from deciding the merits of a case does not preclude the exercise of administrative responsibilities in assigning judges to replace disqualified Supreme Court justices. (*Mosk v. Superior Court* (1979) 25 C.3d 474, 482, 159 C.R. 494, 601 P.2d 1030.) (On power of Chief Justice to assign interim justices to fill vacancies on Supreme Court, see 17 *Pacific L. J.* 1045; 32 *Stanf. L. Rev.* 433; 20 *U.S.F. L. Rev.* 1.)

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A. Judges.

4. Assignment of Judges by Chief Justice.

b. Manner of Selection of Judges.

2 *Witkin Cal. Proc. Courts* § 12

[§ 12] Manner of Selection of Judges.

(1) *Discretion of Chief Justice.* "The manner, method, or criteria for selection of duly qualified assigned judges is within the inherent power of the Supreme Court and within the discretion of the Chief Justice. ... Selection ... by lot is a proper method ... to avoid charges of bias, prejudice, or favoritism in making the selection." (*Mosk v. Superior Court* (1979) 25 C.3d 474, 483, 159 C.R. 494, 601 P.2d 1030; see *Bach v. McNelis* (1989) 207 C.A.3d 852, 869, 255 C.R. 232 [Chief Justice's "sweeping power of assignment" is necessarily limited by judicial eligibility criteria in Cal. Const., Art. VI, §15 (supra, §1)].)

(2) *Blanket Assignment.* The *blanket assignment* of all municipal court judges of designated courts to the Superior Court of Los Angeles County was upheld in *People v. Najera* (1979) 88 C.A.3d 930, 152 C.R. 124. A blanket assignment does not unlawfully delegate power to the presiding judges of the superior and municipal courts. "Flexibility in administration on a day-to-day basis is needed and permitted by the constitutional provision." (88 C.A.3d 934.) (See *People v. Swain* (1995) 33 C.A.4th 499, 502, 39 C.R.2d 422 [following *People v. Najera* and upholding blanket assignment appointing 24 municipal court judges as superior court judges; hearing of felony charges by judge so appointed did not violate defendant's constitutional rights]; *People v. Kwolek* (1995) 40 C.A.4th 1521, 1528, 48 C.R.2d 325 [blanket assignment of municipal court judges to sit as superior court judges].)

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c. Judge Assigned.

2 Witkin Cal. Proc. Courts § 13

[§ 13] Judge Assigned.

(1) *In General.* Most assignments are made for the purpose of relieving congestion in metropolitan areas, but substitute judges are also assigned for those disqualified or unable to act. (See *In re Trombley* (1948) 31 C.2d 801, 810, 193 P.2d 734; *People v. Ferguson* (1932) 124 C.A. 221, 230, 12 P.2d 158, 160; *Gialdini v. Russell* (1933) 134 C.A. 524, 527, 25 P.2d 845; *Sears v. Superior Court* (1933) 133 C.A. 704, 708, 24 P.2d 842.) And a court must notify the Chief Justice promptly whenever, because of the condition of the calendar, the court may be required to dismiss a case so as not to violate the defendant's speedy trial right. (P.C. 1050(j); see *Sigle v. Superior Court* (1954) 125 C.A.2d 747, 748, 271 P.2d 526; 5 Cal. Crim. Law (3d), *Criminal Trial*, §313.)

(2) *Designation of Assigned Judge.* Formerly the assigned judge was called a "Judge Pro Tem." But this term was also used to refer to an attorney selected to act as the judge in a particular case and to a judge assigned to a different court. The constitutional revision of 1966 eliminated the confusion. A judge assigned from out of county or to a higher court is called an "assigned judge." An attorney selected to act in a particular case is called a "temporary judge" (see *infra*, §348).

(3) *Who Is Retired Judge.* For purposes of assignment, a judge "whose position is terminated by court annexation, merger, closure, or consolidation, or who retires or resigns from office, ... shall be deemed a retired judge," provided that he or she has a vested interest in the judges' retirement system and has either been a State Bar member for at least 5 years or has served as a judge of a court of record. (*Govt.C. 68549(b).*) But a judge who is defeated in an election for his or her office and retires early or elects to leave his contributions in the retirement fund is not deemed a retired judge for purposes of Cal. Const., Art. VI, §6. (*Govt.C. 68549(a).*)

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5. Termination of Service.

a. In General.

2 Witkin Cal. Proc. Courts § 14

[§ 14] In General.

(1) *Acts and Events Resulting in Termination.* A judge's position is terminated by a variety of circumstances and conditions. (See *Govt.C. 1770* [listing events making an "office" vacant].) The following are illustrative:

(a) *Express resignation.* (*Govt.C. 1770(c).*)

(b) *Implied resignation on accepting another office.* (Cal. Const., Art. VI, §17 [acceptance of other public office is resignation from office of judge]; see *Zecher v. Cory* (1975) 13 C.3d 743, 745, 119 C.R. 885, 532 P.2d 1253 [elevation to Court of Appeal]; on holding other office, see *infra*, §63.)

(c) *Expiration of term.* (On power of judge after expiration of term, see *infra*, §16.)

(d) *Retirement for age or disability.* (See *infra*, §§15, 79.)

(e) *Removal for misconduct.* (*Govt.C. 1770(c)*; see *infra*, §76 et seq.)

(f) *Abandonment.* (See *Walter v. Adams* (1952) 110 C.A.2d 484, 489, 243 P.2d 21 [*Govt.C. 1770* is not exclusive; office may be abandoned].)

(g) *Death.* (*Govt.C. 1770(a)*; see *Anderson v. Phillips* (1975) 13 C.3d 733, 738, 119 C.R. 879, 532 P.2d 1247.)

(h) *Recall.* All elective judges are subject to recall by popular vote, pursuant to Cal. Const., Art. II, §13. (See 22 So. Cal. L. Rev. 252; on recall procedure, see *Elec.C. 11000* et seq.)

(i) *Impeachment.* Although rarely invoked, the traditional method of removing judges for misconduct in office is impeachment. (See Cal. Const., Art. IV, §18; *Govt.C. 3020*; 22 So. Cal. L. Rev. 250; 28 So. Cal. L. Rev. 61; 36 So. Cal. L. Rev. 72.) (On impeachment of federal judges, see 67 Cal. L. Rev. 659; 1 Western State L. Rev. 1.)

(2) *Exception: Judicial Sabbatical.* The Judicial Council may grant a judge an uncompensated leave of absence not

to exceed 1 year for the purpose of study that will benefit the administration of justice and the performance of judicial duties, on a finding that the absence will not be detrimental to the court. (*Govt.C. 68554.*)

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b. Voluntary Retirement for Age or Disability.

2 Witkin Cal. Proc. Courts § 15

[§ 15] Voluntary Retirement for Age or Disability.

(1) *Constitutional Basis.* "The Legislature shall provide for retirement, with reasonable allowance, of judges of courts of record for age or disability." (Cal. Const., Art. VI, §20.)

(2) *Retirement for Age.* Govt.C. 75025 et seq. set forth age and service qualifications for judicial retirement. (See *Rittenband v. Cory* (1984) 159 C.A.3d 410, 205 C.R. 576 [early retirement statutes do not violate constitutional guarantees of equal protection].) (On assignment of retired judge by Chief Justice, see *supra*, §11.)

(3) *Retirement for Disability.* Govt.C. 75060 provides for voluntary retirement of a judge "unable to discharge efficiently the duties of his or her office by reason of mental or physical disability that is or is likely to become permanent." The statute calls for a physician's or psychiatrist's statement of disability, and approval by the Commission on Judicial Performance (*infra*, §71) and the Chief Justice. (See *Willens v. Commission on Judicial Qualifications* (1973) 10 C.3d 451, 455, 110 C.R. 713, 516 P.2d 1 [sufficiency of medical evidence]; on involuntary retirement for disability, see Cal. Const., Art. VI, §18, *infra*, §79.)

(4) *Reinstatement of Judge No Longer Incapacitated.* The Commission on Judicial Performance may require an incapacitated judge under the age of 65 to undergo a medical examination to determine whether he or she is still incapacitated, physically or mentally, for service as a judge. The Commission may not require a medical examination more often than once every 2 years. A judge who is found to be not incapacitated must be reinstated as a judicial officer under assignment to a court. (Govt.C. 75060.6.) The discretion to inquire into the continuance of the disabling condition rests solely with the Commission. The retired judge has no right to compel consideration of his or her eligibility for reinstatement to perform standby duties as an assigned judge. (*Davis v. Commission on Judicial Qualifications* (1977) 73 C.A.3d 818, 822, 141 C.R. 75.)

(5) *Senior Judge Status.* At one time, retired judges meeting specified conditions could apply for senior judge status. A senior judge received full compensation (but not retirement benefits) and served full-time as assigned. The senior judge program ended in 1996. (See Govt.C. 75028.1 et seq.)

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6. Invalid Selection or Holding Over: De Facto Judge.

a. General Rule.

2 *Witkin Cal. Proc. Courts* § 16

[§ 16] General Rule.

Where a person holds an office "under color of a known appointment or election," and performs the duties of the office, his or her acts may be valid and binding on third parties even though the person did not take the office lawfully. This theory of the *de facto officer* has been applied in many cases dealing with public officers (see *Oakland Paving Co. v. Donovan* (1912) 19 C.A. 488, 493, 126 P. 388; 9 So. Cal. L. Rev. 189) and corporate officers (see 9 *Summary* (10th), *Corporations*, §111).

In the case of judicial officers, the rule is that, while the right to hold the office may be challenged by an appropriate proceeding (e.g., quo warranto), the judgments or other judicial acts of a *de facto* judge are not subject to collateral attack. (See *People v. Sassovich* (1866) 29 C. 480, 485; *In re Danford* (1910) 157 C. 425, 431, 108 P. 322; *In re Trombley* (1948) 31 C.2d 801, 810, 193 P.2d 734 [applying doctrine to irregular assignment of judge of justice court to sit as substitute for another]; *Ensher, Alexander & Barsoom v. Ensher* (1965) 238 C.A.2d 250, 256, 47 C.R. 688; 46 *Am.Jur.2d* (2006 ed.), *Judges* §231 et seq.)

The doctrine has also been applied to the acts of a former de jure judge who holds over for a brief period after the expiration of his or her term. (*Merced Bank v. Rosenthal* (1893) 99 C. 39, 46, 31 P. 849, 33 P. 732 [judge mistakenly thought his term included one more day]; see 9 So. Cal. L. Rev. 200.) But other cases ignore the de facto doctrine and mechanically apply the rule that the powers of the judge cease on expiration of the term. (See *Broder v. Conklin* (1893) 98 C. 360, 362, 33 P. 211; *Jackson v. Dolan* (1925) 72 C.A. 51, 236 P. 319 [judge's order granting new trial after term expired was void]; cf. *Reimer v. Firpo* (1949) 94 C.A.2d 798, 800, 212 P.2d 23 [trial judge's position was terminated on his appointment to appellate bench].)

Supplementing the practical justification for the general de facto doctrine is the useful distinction between the court and the judge (infra, §21). The particular judge, invalidly selected or irregularly holding the office, has no jurisdiction to act, and a prompt challenge may prevent the judge from doing so. But the court has jurisdiction of the subject matter and the parties, and, upon proper objection, a qualified judge could have been procured to render the judgment. The rendition of the judgment or order is therefore not an act wholly void for lack of jurisdiction of the subject matter (no competent court), but is simply an act in excess of the jurisdiction of a court having jurisdiction of the subject matter;

and collateral attack on judgments merely in excess of jurisdiction is undesirable. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §§332, 337.)

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b. Exceptions.

2 *Witkin Cal. Proc. Courts* § 17

[§ 17] Exceptions.

(1) *Invalid Office*. Most courts limit the application of the de facto doctrine to situations where the office itself is de jure. Hence, there must be a validly created judicial office in order that the invalidly selected officer may be deemed a de facto judge. (*People v. Toal* (1890) 85 C. 333, 338, 24 P. 603 ["There cannot be a de facto judge of a court that has no existence"]; cf. *Martello v. Superior Court* (1927) 202 C. 400, 407, 261 P. 476 [temporary abolition of constitutional authority for judge pro tempore deprived judge of jurisdiction to render judgment in case previously tried].)

(2) *Compensation*. The majority view does not apply the de facto doctrine to compensation of an officer. The compensation is conceived to be "annexed to an office" and is an incident to the legal or de jure right to the office, not recoverable by a de facto judge. (*Legerton v. Chambers* (1917) 32 C.A. 601, 604, 163 P. 678; see 9 So. Cal. L. Rev. 222.)

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7. Authority of Successor Judge.

a. What Successor Cannot Do.

2 *Witkin Cal. Proc. Courts* § 18

[§ 18] What Successor Cannot Do.

"No proceeding in any court of justice, in an action or special proceeding pending therein, shall be affected by a vacancy in the office of all or any of the judges or justices thereof." " (C.C.P. 184.) This declaration was placed in the original Code of Civil Procedure, among other "miscellaneous provisions," without comment by the Code Commissioners; it has been seldom cited and never definitively construed. It purports to state an important principle, consistent with the distinction between the court and judge (infra, §21) to the effect that the death, resignation, retirement, or expiration of the term of a judge does not destroy jurisdiction over a pending cause, and that a successor judge who takes the same judicial office may carry on the trial or other proceeding to a conclusion. But the cases on successor judges show that, whatever C.C.P. 184 was intended to mean, it does not have any such broad effect.

If a judge tries a case without a jury, and, before the completion of the trial, a successor takes the position, the latter cannot (except by the consent of the parties) complete the trial. The same is true where the trial is completed but the judgment determining the issues has not yet been rendered. The governing principle is that the judge who decides the case must hear the witnesses; it would violate constitutional due process to allow the new judge to render a decision after having heard less than all of the evidence.

In *Broder v. Conklin* (1893) 98 C. 360, 33 P. 211, the trial, findings, and conclusions were for the plaintiff with directions to prepare an interlocutory judgment to be followed by a reference for an accounting. Later the judge signed a formal judgment, but his term expired before the judgment was filed. *Held*, the clerk's entry was void and the judgment was properly set aside. (98 C. 362.) (See *Connolly v. Ashworth* (1893) 98 C. 205, 206, 33 P. 60 ["the trial of a cause by the court is not concluded until the decision is filed with the clerk; and when the term of office of the judge who tried the case expires before such decision is filed, the fact that it was signed by him and ordered by his successor in office to be filed with the clerk, and was so filed, is not sufficient to sustain the judgment entered thereon"].)

A number of other decisions are illustrative. (See *McAllen v. Souza* (1937) 24 C.A.2d 247, 250, 74 P.2d 853 [successor judge properly set aside interlocutory judgment, case to be tried de novo]; *Reimer v. Firpo* (1949) 94 C.A.2d 798, 801, 212 P.2d 23 [successor judge has no power to sign findings]; *Ross v. Murphy* (1952) 113 C.A.2d 453, 454, 248 P.2d 122 [decendent judge signed findings, conclusions, and judgment, but failed to file them; successor could not

order them filed]; *David v. Goodman* (1952) 114 C.A.2d 571, 577, 250 P.2d 704 [interlocutory judgment; reversal for failure of successor judge to order trial de novo]; *Armstrong v. Picquelle* (1984) 157 C.A.3d 122, 127, 203 C.R. 552 [trial judge retired after making tentative findings, which were entered in minutes; presiding judge could not sign statement of decision and enter judgment]; 41 Harv. L. Rev. 538 [suggesting desirability of exception where transcript of prior testimony is available]; 51 A.L.R.5th 747 [authority of successor to vacate, set aside, or annul judgment entered by predecessor]; 84 A.L.R.5th 399 [power of successor to render decision or enter judgment in civil case heard by predecessor]; see generally 46 Am.Jur.2d (2006 ed.), Judges §29 et seq.)

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b. What Successor Can Do.

2 *Witkin Cal. Proc. Courts* § 19

[§ 19] What Successor Can Do.

(1) *Succession by Same Judge.* The succession to office by the same judge, either by election or reappointment after an interval of nonjudicial activity, fully meets the test of a decision by the judge who heard the evidence (*supra*, §18). Hence, the judge may carry the interrupted proceeding to a conclusion. (*Bartholomae Oil Corp. v. Superior Court* (1941) 18 C.2d 726, 729, 117 P.2d 674 [interlocutory decree, judge defeated in election, reappointed to position, and cause reassigned to him by presiding judge]; *Western Sierra v. Ramos* (1979) 97 C.A.3d 482, 486, 158 C.R. 753 [retired judge, reappointed to settle findings, conclusions, and judgment in case he tried before retirement, may conclude case].)

(2) *Ministerial Act of Entry.* If final judgment has been actually *rendered* by the first judge, its subsequent *entry* may be a mere ministerial act, which can often be performed by the clerk alone; hence, the participation of the successor judge is not improper. (See *Crim v. Kessing* (1891) 89 C. 478, 489, 26 P. 1074 [judgment rendered by first judge who made findings of fact; entry by clerk under direction of successor judge was proper]; *Broder v. Conklin* (1893) 98 C. 360, 364, 33 P. 211, *supra*, §18 [dictum: "when a judgment has been rendered, the subsequent act of the clerk in entering it is only ministerial, and may be done by him even after the expiration of the term of office of the judge by whom the judgment was rendered"]; *Wells v. Coca Cola Bottling Co. of Fresno* (1956) 140 C.A.2d 218, 221, 294 P.2d 955 [original judge announced decision, prepared findings and conclusions; successor could enter judgment nunc pro tunc]; 7 *Cal. Proc.* (5th), *Judgment*, §49 et seq.)

(3) *Trial After Interlocutory Judgment.* If a trial is held and an interlocutory judgment (e.g., directing an accounting) is rendered by the first judge, a successor judge may try the issue *de novo*. And, where the evidence justifies it, the successor may make findings differing from those made by the first judge. (*Lacey v. Bertone* (1952) 109 C.A.2d 107, 110, 240 P.2d 395.)

(4) *Motion for New Trial or To Vacate Judgment.* A motion for a new trial must be heard by the judge who tried the case unless he or she is absent or unable to act. (C.C.P. 661.) As liberally construed by the Supreme Court, this section allows the motion to be determined by a successor after the death of the trial judge. (*Telefilm v. Superior Court* (1949) 33 C.2d 289, 295, 201 P.2d 811; see 22 *So. Cal. L. Rev.* 316.) A similar provision applies to a motion to vacate a judgment under C.C.P. 663. (C.R.C., Rule 3.1602.)

(5) *Other Situations.* In *Cocke v. MacLeod* (1927) 85 C.A. 63, 258 P. 980, an action to establish a trust in real property was tried in the superior court, an interlocutory judgment was rendered, and a referee was appointed to fix a boundary line. Then the judge retired, and prohibition was sought to prevent further hearings by the referee, on the theory that his powers ceased with those of the appointing judge. The writ was denied. "It is clear that the order is not one merely personal to the judicial officer of the court, but is an order by the court itself and as such unaffected by the retirement of the judge who made it. Were it otherwise, no judge, other than the one making the appointment of a receiver or a referee, even in a condemnation proceeding, would be authorized to receive and act upon the report of such appointee; and a similar situation might result in an action, arising from the death or retirement of a judge who theretofore had made an order appointing a notary public or commissioner to take a deposition." (85 C.A. 68.) (See *Bartholomae Oil Corp. v. Superior Court*, *supra*, 18 C.2d 728 [approving result in *Cocke*, and referring to authorities generally on proposition that "there are many acts which a successor judge may perform where the trial judge leaves the bench"].)

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8. Judges' Lists.

2 *Witkin Cal. Proc. Courts* § 20

[§ 20] Judges' Lists.

The names of judges currently holding positions on the California courts are listed in the following places:

- (1) *Supreme Court*. Front of each volume of California Reports and California Reporter.
- (2) *Courts of Appeal*. Front of each volume of California Reports, California Appellate Reports, and California Reporter.
- (3) *Appellate Division of Superior Court*. Appendix to California Appellate Reports.
- (4) *Superior Court*. Front of each volume of California Reports and California Reporter.

Biographical data on trial judges and appellate judges will be found in California Courts and Judges Handbook (James Publishing).

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B. The Court and the Judge.

1. Distinction Between Court and Judge.

2 *Witkin Cal. Proc. Courts* § 21

[§ 21] Distinction Between Court and Judge.

(1) *Judge*. The term "judge" is broadly used to cover judges of the Supreme Court, the Courts of Appeal, and the superior courts. (See, e.g., *Govt.C. 75002* [Judges' Retirement Law].) Nevertheless, in conventional terminology reviewing court judges (Supreme Court and Court of Appeal) are sometimes referred to as "justices," while trial court judges (superior court) are referred to as "judges." (See, e.g., *Cal. Const. Art. VI, §§2, 3; C.C.P. 165*.)

(2) *Court*. A court is "a tribunal presided over by one or more judges, for the exercise of such judicial power as has been conferred upon it by law." (*Von Schmidt v. Widber* (1893) 99 C. 511, 512, 34 P. 109.) "A time when, place where, and the persons by whom judicial functions are to be exercised are essential to complete the idea of a court." (*Hamblin v. Superior Court* (1925) 195 C. 364, 368, 233 P. 337.) Whenever a judge "is present at the place designated for the transaction of judicial business, and there assumes to transact such business, his acts may be considered as the acts of the court of which he is a judge." (*Von Schmidt v. Widber*, supra, 99 C. 514.)

In *Von Schmidt*, a written order was signed by the judge while in the courtroom engaged in the trial of another cause, and was filed with the clerk, though not entered in the minutes. *Held*, it was nevertheless an order of the court. "The term 'court,' as used in the Code of Civil Procedure, means sometimes the place where the court is held, sometimes the tribunal itself, and sometimes the individual presiding over the tribunal, and in many cases is used synonymously, as well as interchangeably, with 'judge.'" (99 C. 513.) (See *Newby v. Bacon* (1922) 58 C.A. 337, 339, 208 P. 1005 [terms "court" and "judge" are often construed as synonymous]; 20 *Am.Jur.2d* (2005 ed.), *Courts* §1 et seq.)

(3) *Magistrate*. Another distinction is made in criminal cases between a court or judge and a magistrate. Judges of the trial and appellate courts are magistrates, exercising special statutory powers of the office, e.g., conducting a preliminary examination of a person charged with a felony by information. (See P.C. 808; 4 *Cal. Crim. Law* (3d), *Introduction to Criminal Procedure*, §44.) When sitting as a magistrate, the judge is not acting as a court or judge, and has only those special statutory powers. (*People v. Brite* (1937) 9 C.2d 666, 683, 72 P.2d 122; *Fursdon v. Los Angeles* (1950) 100 C.A.2d Supp. 845, 850, 223 P.2d 520 ["whatever may be the inherent powers of the court from which a magistrate comes to conduct a preliminary examination, those powers do not inhere in him while he is acting as such magistrate"]; *People v. Columbia Research Corp.* (1980) 103 C.A.3d Supp. 33, 38, 163 C.R. 455 [municipal court judge, ruling on demurrer to felony charge, acts as magistrate, not as court or judge]; on nature and historical development of

office of magistrate, see *Frazier v. Moffatt* (1951) 108 C.A.2d 379, 383, 239 P.2d 123.)

(4) *Temporary Judge*. A cause may be heard by stipulation and court order before a "temporary judge," who is not a judge but an attorney chosen for the particular proceeding. (See *infra*, §348.)

(5) *Assigned Judge*. The Chief Justice may assign both active and retired judges to serve on various courts. (See *supra*, §11 et seq.)

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B. The Court and the Judge.

2. Powers of Judge in Court.

2 *Witkin Cal. Proc. Courts* § 22

[§ 22] Powers of Judge in Court.

Older cases, relying on earlier law, placed considerable stress on the distinction between the court and the judge (*supra*, §21). It was said to be the general rule "that all judicial business must be transacted in court, and the authority to transact such business out of court is exceptional and does not exist unless expressly authorized by statute." (*Carpenter v. Nutter* (1899) 127 C. 61, 64, 59 P. 301 [applying this rule so strictly as to hold defective a complaint in a malicious prosecution action alleging that a criminal information had been dismissed by "Hon. J. H. Budd, Judge of the Superior Court," instead of by the *court*].) In accordance with this rule, the judge in chambers or elsewhere outside of court had no greater powers than the judge had in vacation under the former terms of court, and only incidental procedural matters were determined in chambers. (See *Von Schmidt v. Widber* (1893) 99 C. 511, 513, 34 P. 109.)

Another distinction was that an order of *court* could only be made on notice, with an opportunity for a hearing, while an order in *chambers* could be made *ex parte*. (*United Railroads of San Francisco v. Superior Court* (1925) 197 C. 687, 691, 242 P. 701; *Finkle v. Superior Court* (1925) 71 C.A. 97, 100, 234 P. 432.) (See also *Thompson v. Municipal Court* (1958) 162 C.A.2d 676, 677, 328 P.2d 514 [power to order reference is in court; hence, telephoned order by judge appointing clerk as referee was nullity].)

Although the distinction has lost much of its significance in connection with the validity of orders made in chambers or out of the county (*infra*, §23 et seq.), it may still be usefully employed in reaching a practical solution of the jurisdictional problems arising from acts of a disqualified judge (*infra*, §94 et seq.), a judge of the wrong department (*infra*, §222 et seq.), a successor or substitute judge (*supra*, §19), or a *de facto* judge (*supra*, §16).

The principle that jurisdiction is in the court and not a particular judge was applied in *People v. Osslo* (1958) 50 C.2d 75, 103, 323 P.2d 397. The trial judge, granting probation to a convicted defendant, imposed certain conditions for a 10-year period, and attempted to impose the further condition that *he* retained jurisdiction throughout the period and that no other department or judge could modify the order without notice to him. *Held*, this part of the order should be stricken. "An individual judge (as distinguished from a court) is not empowered to retain jurisdiction of a cause. The cause is before the court, not the individual judge of that court, and the jurisdiction which the judge exercises is the jurisdiction of the court, not of the judge. Rules of court which provide that post-trial proceedings in a cause shall be heard by the judge who tried the matter are entirely proper, but the individual judge cannot order that such proceedings

must be heard by him." (50 C.2d 104.) (See *People v. Batt* (1994) 24 C.A.4th 1044, 1048, 30 C.R.2d 109, citing the text [motion to withdraw plea need not be heard by judge who took plea]; *People v. Madrigal* (1995) 37 C.A.4th 791, 795, 43 C.R.2d 498, *infra*, §229 [quoting *People v. Osslo*]; 5 Cal. Crim. Law (3d), *Criminal Trial*, §1.)

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3. Powers of Judge in Chambers.

a. In General.

2 Witkin Cal. Proc. Courts § 23

[§ 23] In General.

(1) *Definition*. "Chambers" includes "any place, either in or out of the court-room, at which a judge may hear applications or make orders while the court is not in session, in matters pending in that court." (*Von Schmidt v. Widber* (1893) 99 C. 511, 513, 34 P. 109; see *People v. Valenzuela* (1968) 259 C.A.2d 826, 831, 66 C.R. 825, *infra*, §25; C.C.P. 165 [chambers powers of appellate justices], *infra*, §326; *Am.Jur.2d* (2005 ed.), *Courts* §18 et seq.)

(2) *Statutory Powers in Chambers*. A trial judge may do the following in chambers:

(a) *Ex parte matters*. Grant, hear, and dispose of all orders and writs that are usually granted on an *ex parte* application. (C.C.P. 166(a)(1).)

(b) *Probate matters*. (1) Appoint referees, (2) require and receive inventories and accounts to be filed, (3) order notice of settlement of supplemental accounts, (4) suspend the powers of personal representatives, guardians and conservators, (5) appoint special administrators, (6) grant letters of temporary guardianship or conservatorship, (7) approve or reject claims, and (8) direct the issuance of writs and process necessary in the exercise of probate powers. (C.C.P. 166(a)(1).)

(c) *Motions for new trial or to vacate judgment*. Hear and determine motions for new trial (C.C.P. 657) or to vacate judgment (C.C.P. 663). (C.C.P. 166(a)(2).) A judge may not only hear but also *decide* a motion for a new trial in chambers. (*Hackel v. Los Angeles Ry. Corp.* (1939) 31 C.A.2d 228, 232, 88 P.2d 178 [oral direction to clerk was sufficient; contrary holding in *United Railroads of San Francisco v. Superior Court* (1925) 197 C. 687, 691, 242 P. 701, was nullified by C.C.P. 166].)

(d) *Uncontested matters*. Hear and determine all uncontested actions, proceedings, demurrers, motions, petitions, applications, and other matters pending before the court, except (1) actions for dissolution, legal separation, or judgment of nullity, and (2) applications for confirmation of sale of real property in probate proceedings. (C.C.P. 166(a)(3).)

(e) *Tax costs*. Hear and determine motions to tax costs of enforcing judgments. (C.C.P. 166(a)(4).)

(f) *Bonds*. Approve bonds and undertakings. (*C.C.P. 166(a)(5)*.)

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b. Direction to Clerk.

2 *Witkin Cal. Proc. Courts* § 24

[§ 24] Direction to Clerk.

The ministerial act of instructing the clerk to enter any order may be validly performed in chambers. In *Simmons v. Superior Court* (1959) 52 C.2d 373, 341 P.2d 13, a demurrer was sustained with leave to amend, plaintiff failed to amend, and defendant moved to dismiss. The motion came on for hearing and petitioner elected to stand on the pleadings. The judge said he would check the file, and later, in chambers, instructed the clerk that the motion to dismiss was granted. The clerk entered the order in the minutes that same day and did not give plaintiff or his counsel notice. Plaintiff, alleging that he did not learn about the dismissal until 5 months after the time to appeal, petitioned for certiorari to review the order of dismissal. He contended (and two dissenting justices agreed) that the court acted in excess of jurisdiction in entering the order in this manner, because this is not one of the orders specified in *C.C.P.* 166.

The court first held that certiorari did not lie because the order was appealable. (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §42.) But as an alternative ground the court held that the limitations of *C.C.P.* 166 did not apply. The motion was *heard* in open court, and the only chambers act was the instruction to the clerk to enter the order in the minutes. Because a written order signed by the judge in chambers is valid, the same is true of an order entered in the minutes by direction. "The crucial question in determining the proper procedure for rendition of an order that has been heard in open court, is whether a written record of the disposition of the motion is made by the court. The act of instructing the clerk to enter the order in the minutes, whether in chambers or on the bench, followed by entry in the minutes is the equivalent of signing a formal order and filing it with the clerk." (52 C.2d 378.) (See 7 *Cal. Proc.* (5th), *Judgment*, §54.)

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c. Hearing With Consent.

2 *Witkin Cal. Proc. Courts* § 25

[§ 25] Hearing With Consent.

Powers other than those listed in *C.C.P.* 166 (*supra*, §23) may be exercised in chambers with the consent of the parties.

In *Gibson v. Southern Pac. Co.* (1955) 137 C.A.2d 337, 290 P.2d 347, counsel for defendant, during a recess in his argument, asked permission to make a motion outside the presence of the jury. Because there were no available facilities for the jury except in the courtroom, the judge directed counsel, the clerk, and the reporter to come into his chambers. There defendant's motion for a directed verdict was made and argued by both sides without objection by counsel for plaintiff, and denied. On appeal from a judgment for defendant notwithstanding the verdict, plaintiff's counsel contended that no valid motion for a directed verdict (at that time a prerequisite to such a judgment; see 7 *Cal. Proc.* (5th), *Trial*, §438) had been made. *Held*: (a) Assuming that ordinarily a motion for directed verdict cannot be heard in chambers, the procedure was a nonprejudicial irregularity and not a jurisdictional defect; hence, the error was waived by failure to object. (See *infra*, §220.) (b) Moreover, though the proceeding took place in chambers, there was in effect a full court session with all counsel and court officers present. (137 C.A.2d 343.) The opinion quotes the dictum in *People v. Pompa* (1923) 192 C. 412, 221 P. 198, *infra*, §220, and thereby stresses both theories--waiver of defect and actual court session. The court did not squarely decide that, against objection, a court session may properly be held in chambers when it is inconvenient to use the courtroom.

People v. Valenzuela (1968) 259 C.A.2d 826, 66 C.R. 825, takes a similar view. Defendant was charged with felonious assault on a police officer. In chambers, with counsel and defendant present, the deputy district attorney moved to dismiss the second count. The judge granted the motion. Then defendant's counsel withdrew his request for a jury, and defendant personally stated his desire for a court trial, which was had. On appeal the contention was made that a jury trial had not been waived "in open court." *Held*, judgment affirmed.

(a) "In open court" means simply in a "public trial" guaranteed by the Constitution; i.e., one in which the doors of the courtroom are open and the public is entitled to be admitted, with due regard to the size of the courtroom. (259 C.A.2d 831.)

(b) If the court is in session, the judicial action is taken in court, not in chambers. Here, the parties were present; the court was in session in the judge's chambers; he did not declare a recess or private hearing, and there was no evidence that the door was closed. Hence, the presumption was that the court accepted the waiver of jury trial in open court. (259 C.A.2d 832.)

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d. Distinction: Judge at Home.

2 *Witkin Cal. Proc. Courts* § 26

[§ 26] Distinction: Judge at Home.

In *Richmond v. Shipman* (1976) 63 C.A.3d 340, 133 C.R. 742, plaintiff's attorney had a complaint for personal injuries ready for filing on the evening of the last day of the 1-year limitations period. Because the clerk's office was closed, he went to the judge's home, and presented it to him with the filing fee, at 8:45 p.m. The judge accepted the complaint and marked it "filed." *Held*, this was not a valid filing, and the action was barred by the statute of limitations.

(a) Under *C.C.P. 166(b)*, a judge may exercise anywhere in the state, and therefore at home, all the powers conferred upon "a judge as contradistinguished from the court." (See *infra*, §27.) And, under *C.C.P. 167*, an act to be performed by the clerk of the court may be performed by a judge of the court. However, *C.C.P. 411.10* directs that complaints be filed "with the court." Hence, accepting a complaint for filing is not a function that a judge may perform at home. (63 C.A.3d 343.)

(b) This conclusion is supported by early cases holding that a clerk may not accept a paper for filing except at the clerk's office. (63 C.A.3d 343.) "If a clerk may only perform his duties of accepting and filing papers when he is present in his officially designated office, it follows that a judge performing the function of a clerk should have no greater authority." (63 C.A.3d 344.)

(c) "The requirements of orderly administration of judicial business point in the same direction. A central place of filing is an essential component of an efficient and error-free court filing system. Allowing judges to accept papers for filing throughout the county or state is to invite disputes as to priorities of filing and uncertainty as to whether available remedies have been waived by the lapse of allowed filing times." (63 C.A.3d 344.)

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4. Powers of Judge Out of County.

2 *Witkin Cal. Proc. Courts* § 27

[§ 27] Powers of Judge Out of County.

(1) *Powers in Chambers.* Judges are authorized anywhere within the state to exercise the powers and perform the functions and duties of a judge in chambers. (*C.C.P. 166(b)*); on powers in chambers, see *C.C.P. 166(a)*, *supra*, §23.)

(2) *Hearing With Consent.* A trial judge may hear a motion for a new trial, a motion to vacate and enter a different judgment, or a motion for judgment notwithstanding the verdict, at any place within the state, "with the written consent of all parties concerned." (*Govt.C. 69741.1.*)

(3) *Judge Assigned Out of County.* A superior court judge, assigned to sit in another county (*supra*, §13), may take under submission a motion for a new trial, return to his or her own county, and there decide the motion. If the judge makes and signs the order within the 60-day period prescribed by *C.C.P. 660* (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §72), it is valid and effective even though it is not received or filed in the records of the court until after the period has passed. (*Willis v. Superior Court* (1932) 214 C. 603, 605, 7 *P.2d* 303.) But the judge cannot render a valid order outside the territorial limits of the state. (See *Ertman v. Municipal Court* (1945) 68 *C.A.2d* 143, 146, 155 *P.2d* 908 [leaving open question of validity of order signed by judge while in state but delivered to clerk with instructions not to file it until a date when judge was outside state].)

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C. Court Proceedings.

1. In General.

2 *Witkin Cal. Proc. Courts* § 28

[§ 28] In General.

A variety of statutes and court rules regulate court facilities and the conduct of judicial proceedings. The following topics are illustrative:

- (1) *Use of English.* (See *infra*, §29.)
- (2) *Use of recycled paper.* (See *infra*, §30.)
- (3) *Avoidance of gender or other bias.* (See *infra*, §31.)
- (4) *Accommodation of persons with disabilities.* (See *infra*, §32.)
- (5) *Publicity of court proceedings.* (See *infra*, §33 et seq.)
- (6) *Place of holding court.* (See *infra*, §219 et seq.)
- (7) *Sessions and departments.* (See *infra*, §217 et seq.)
- (8) *Judicial days and holidays.* (See *infra*, §45 et seq.)
- (9) *Discovery.* (See 2 *Cal. Evidence* (4th), *Discovery*, §1 et seq.)
- (10) *Court's control over witnesses.* (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §47 et seq.)
- (11) *Order of presenting case and priority of issues.* (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §44 et seq.)
- (12) *Introduction of evidence.* (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §147 et seq.)
- (13) *Interference with proceeding as contempt.* (See 7 *Cal. Proc.* (5th), *Trial*, §172.)
- (14) *Proceedings in criminal cases.* (See 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §1 et seq.)

(15) *Robe*. "Every judge of a court of this state shall, in open court during the presentation of causes before him or her, wear a judicial robe, which the judge shall furnish at his or her own expense." (*Govt.C. 68110*; see C.R.C., Rule 10.505.)

(16) *Smoking*. Smoking is prohibited in all court facilities. (C.R.C., Rule 10.504.)

(17) *Self-represented litigants*. Courts are required to fund the operation of self-help centers to provide assistance to self-represented litigants under guidelines and procedures developed by the Administrative Office of the Courts. (C.R.C., Rule 10.960.)

(18) *Children's waiting room*. "Each court should endeavor to provide a children's waiting room located in the courthouse for the use of minors under the age of 16 who are present on court premises as participants or who accompany persons who are participants in court proceedings. The waiting room should be supervised and open during normal court hours. If a court does not have sufficient space in the courthouse for a children's waiting room, the court should create the necessary space when court facilities are reorganized or remodeled or when new facilities are constructed." (Standards of Judicial Administration, Standard 10.24.)

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2. Use of English.

2 *Witkin Cal. Proc. Courts* § 29

[§ 29] Use of English.

(1) *Proceedings in English.* "Every written proceeding in a court of justice in this state shall be in the English language, and judicial proceedings shall be conducted, preserved, and published in no other." (*C.C.P. 185(a)*; see *People v. Thomas* (1933) 135 C.A. 654, 660, 27 P.2d 765 [proper to refuse instruction containing, without explanation, term "res gestae"]; *Stevens v. Kobayshi* (1912) 20 C.A. 153, 154, 128 P. 419 [plaintiff in libel action may plead English translation of article in another language]; 94 A.L.R.5th 537 ["English only" requirements]; on interpreter for witness who does not understand English, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §29; *infra*, §387.)

(2) *Protective Orders in Other Languages.* The Judicial Council must, as it deems appropriate, make forms available in languages other than English for domestic violence protective orders under *C.C.P. 527.6* and *527.8*, *Family C. 6200* et seq., and *P.C. 136.2*. (*C.C.P. 185(b)*.) In addition, courts may provide unofficial translations of these orders. (*C.C.P. 185(a)*.) The Judicial Council has adopted translated versions of a number of forms, primarily dealing with protective orders, domestic violence, and child custody. Various forms are in Chinese, Cambodian, Hmong, Korean, Russian, Spanish, and Vietnamese and are identified by C, Cam, H, K, R, S, or V added to the form number. (See Judicial Council Form Nos. CR-160; DV-100 et seq.)

(3) *Summons in English and Spanish and Additional Foreign Language.* In recognition of the difficulties facing defendants who are not literate in English, *C.C.P. 412.20* requires a warning in Spanish in a civil action summons (*C.C.P. 412.20(a)*), and authorizes a county by ordinance to require the warning notation in any additional language (*C.C.P. 412.20(b)*). (See Judicial Council Form No. SUM-100 et seq.; 3 *Cal. Proc.* (5th), *Actions*, §986.)

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3. Use of Recycled Paper.

2 *Witkin Cal. Proc. Courts* § 30

[§ 30] Use of Recycled Paper.

(1) *In General.* All courts must use recycled paper except for uses for which recycled paper is not practically available. (C.R.C., Rule 10.503.) Recycled paper is required for all original papers filed with the courts and all copies of papers, documents, and exhibits, whether filed or served. (C.R.C., Rule 1.22(a).) All forms and copies of forms filed with the court must be on recycled paper. (C.R.C., Rules 2.131, 10.614(7) [local court forms and copies].) (See *Pub.Contr.C.* 12209 [requirements for recycled products]; C.R.C., Rule 1.6(22) ["recycled" defined].)

(2) *Appellate Courts.* Recycled paper is required for documents in the appellate courts. (See C.R.C., Rule 8.144(a) [record on appeal]; C.R.C., Rule 8.204(b) [briefs on appeal]; C.R.C., Rule 8.40(a) [documents filed with reviewing courts].)

(3) *Superior Courts.* Recycled paper is required for (a) original papers filed and copies of papers, documents, and exhibits, whether filed or served, and (b) original records on appeal from limited civil cases, briefs filed in the appellate division, and copies of these documents, whether filed or served. (C.R.C., Rules 2.101(a), 8.883(c), 8.928(c).)

(4) *Certification.* By filing or serving a document required to be on recycled paper, the person filing or serving the document certifies that recycled paper has been used. (C.R.C., Rules 1.22(b), 2.101(b).)

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4. Avoidance of Gender or Other Bias.

2 Witkin Cal. Proc. Courts § 31

[§ 31] Avoidance of Gender or Other Bias.

(1) *Court's Duty To Prohibit Bias.* Standard 10.20 of the Standards of Judicial Administration provides as follows:

"(a) *General.* To preserve the integrity and impartiality of the judicial system, each judge should:"

"(1) *Ensure fairness.* Ensure that courtroom proceedings are conducted in a manner that is fair and impartial to all of the participants."

"(2) *Refrain from and prohibit biased conduct.* In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."

"(3) *Ensure unbiased decisions.* Ensure that all orders, rulings and decisions are based on the sound exercise of judicial discretion and the balancing of competing rights and interests and are not influenced by stereotypes or biases."

"(b) *Creation of local committees on bias.* Each court should establish a local committee with local bar associations to assist in maintaining a courtroom environment free of bias or the appearance of bias. Courts within one or more counties may choose to form a single committee. The local committee should:"

"(1) Be composed of representative members of the court community, including but not limited to judges, lawyers, court administrators, and representatives and individuals from minority, women's, and gay and lesbian bar associations and from organizations that represent people with disabilities;"

"(2) Sponsor or support educational programs designed to eliminate bias within the court and legal communities, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation; and"

"(3) Develop and maintain an informal procedure for receiving complaints relating to bias in the courtroom, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation."

"(c) *Minimum components of a complaint procedure.* An informal complaint procedure developed and maintained by a local committee on bias should:"

"(1) Contain a provision specifying that the intent of the procedure is to educate with the purpose of ameliorating the problem rather than disciplining the person who is the subject of the complaint;"

"(2) Accommodate local needs and allow for local flexibility;"

"(3) Apply to all participants in courtroom proceedings;"

"(4) Apply only to complaints as to which the identity of the complainant is known;"

"(5) To the extent possible and unless disclosure is required by law, protect the confidentiality of the complainant, the person who is the subject of the complaint, and other interested persons;"

"(6) Relate to incidents of behavior or conduct occurring in courtroom proceedings;"

"(7) Apply to incidents of bias whether they relate to race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status;"

"(8) Contain a provision that exempts activities constituting legitimate advocacy when matters of race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status are relevant to issues in the courtroom proceeding;"

"(9) Focus on incidents that do not warrant discipline but that should be corrected;"

"(10) With respect to those incidents that if substantiated would warrant discipline, advise the complaining party of the appropriate disciplinary authority;"

"(11) Contain a provision specifying that nothing in the procedure in any way limits the ability of any person to submit a complaint of misconduct to the appropriate disciplinary body; and"

"(12) To the extent possible and unless disclosure is required by law, prohibit retention of written records of complaints received but permit collection of data on types of complaints or underlying anecdotes that might be useful in educational programs."

"(d) *Application of local rules.* The existence of the local committee, its purpose, and the features of the informal complaint procedure should be memorialized in the applicable local rules of court."

The Judicial Council has published a pamphlet entitled *Guidelines for Judicial Officers: Avoiding the Appearance of Bias*. (On avoidance of gender and other bias in court appointments, see *infra*, §342.)

(2) *Use of Gender-Neutral Language.* Gender-Neutral language is required in jury instructions and in local rules, forms, and documents. (See C.R.C., Rule 2.1058 [jury instructions]; C.R.C., Rule 10.612 [local rules, forms, and documents].)

(3) *Commentary and Case Law.* Gender bias has been the subject of extensive study and commentary, but relatively little case law. (See 7 *Cal. Proc.* (5th), *Trial*, §246; 45 *Stanf. L. Rev.* 2143 [Report of the Ninth Circuit Gender Bias Task Force]; 45 *Stanf. L. Rev.* 2177 [resolution on eliminating gender bias in the Ninth Circuit]; 45 *Stanf. L. Rev.* 2179 [Western Women Lawyers]; 45 *Stanf. L. Rev.* 2187 [Studying Gender Bias in the Courts]; 45 *Stanf. L. Rev.* 2195 [Gender Bias: From Classes to Courts]; 34 *U.S.F. L. Rev.* 1 [gender equity in legal profession]; Rothman, *California Judicial Conduct Handbook* 3d, §2.11.)

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5. Accommodation of Persons With Disabilities.

2 Witkin Cal. Proc. Courts § 32

[§ 32] Accommodation of Persons With Disabilities.

(1) *In General.* C.R.C., Rule 1.100 provides for the accommodation by the judicial system of persons with disabilities. (See 32 *U.S.F. L. Rev. 1* [accommodating individuals with disabilities in California courts]; Rothman, California Judicial Conduct Handbook 3d, §§2.12, 6.30.)

(2) *Policy.* "It is the policy of the courts of this state to ensure that persons with disabilities have equal and full access to the judicial system." (C.R.C., Rule 1.100(b).) For this purpose, the term "persons with disabilities" means persons covered by C.C. 51 et seq. (Unruh Civil Rights Act), the Americans With Disabilities Act (42 *U.S.C.*, §12101 et seq.), and other applicable state and federal laws, and includes "persons who have a physical or mental impairment that limits one or more of the major life activities, have a record of such an impairment, or are regarded as having such an impairment." (C.R.C., Rule 1.100(a)(1).) The Rule is not intended to limit or invalidate rights, remedies, or procedures accorded to persons with disabilities under state or federal law. Each court must designate an ADA Coordinator to address accommodation requests. (C.R.C., Rule 1.100(b).)

(3) *Nature of Accommodation.* Under C.R.C., Rule 1.100(a)(3), "accommodations" means "actions that result in court services, programs, or activities being readily accessible to and usable by persons with disabilities." Accommodation may include the following:

- (a) Making reasonable modifications in policies, practices, and procedures.
- (b) Furnishing auxiliary aids and services, such as equipment, devices, material in alternative formats, interpreters, and readers, at no charge.
- (c) Relocating services to accessible facilities or providing services at alternative sites. Altering existing facilities may be an accommodation but alteration is not required where other actions are effective in providing access.
- (4) *Request for Accommodation.* A lawyer, party, witness, juror, or other individual with an interest in attending a court proceeding ("applicant") may present a request for accommodation ex parte on a Judicial Council form, in another written format, or orally. (C.R.C., Rule 1.100(c)(1).) (See Judicial Council Form No. MC-410 [Request for

Accommodations by Persons With Disabilities and Response].) The application must describe the accommodation sought and state the impairment necessitating the accommodation. The court may require additional information about the impairment. (C.R.C., Rule 1.100(c)(2).) The application must be made as far in advance as possible, but no less than 5 court days before the requested implementation date, although the court may waive this requirement. (C.R.C., Rule 1.100(c)(3).) Information about an accommodation request, including medical information about the applicant and communications from the applicant, must be kept confidential, unless confidentiality is waived in writing or disclosure is required by law. (C.R.C., Rule 1.100(c)(4).)

(5) *Grant or Denial of Request.* The court must inform the applicant in writing, and in an alternative format if applicable, that the request is granted or denied in whole or in part (and the reasons for denial) or that an alternative accommodation is granted, and the nature and duration of any accommodation. (C.R.C., Rule 1.100(e).) The accommodation is effective for the period specified in the notice of accommodation, but the court may grant accommodation for an indefinite period or for a particular matter or appearance. (C.R.C., Rule 1.100(h).) A request may be denied only where the court determines that the applicant failed to satisfy the requirements of C.R.C., Rule 1.100, the requested accommodation would "create an undue financial or administrative burden," or the requested accommodation would "fundamentally alter the nature of the service, program, or activity." (C.R.C., Rule 1.100(f).)

(6) *Review of Determination.* The applicant or any participant in a proceeding may seek review of an accommodation determination by nonjudicial court personnel by a written request for review submitted to the presiding judge or a designated judicial officer within 10 days of the date of the response. Review of a determination made by a judicial officer is by a petition for extraordinary relief in a court of superior jurisdiction. (C.R.C., Rule 1.100(g).)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Grant or Denial of Request.* C.R.C., Rule 1.100(e) was amended in 2009. The rule now provides that the response must be in writing if the request is denied in whole or in part, and that the court may provide an additional response in an alternative format at the request of the applicant.

See *In re Marriage of James M.C. & Christine J.C.* (2008) 158 C.A.4th 1261, 1274, 70 C.R.3d 715 [denying ADA request for continuance by pro. per. litigant suffering from bipolar disorder and breast cancer was reversible error where none of three grounds listed in C.R.C., Rule 1.100(f) for denying accommodation request was present]. (6) *Review of Determination.* The review procedure was revised in 2009. Where the determination to grant or deny a request for accommodation is made by nonjudicial court personnel, the applicant or any participant in the proceeding may submit a written request to review the determination to the presiding judge or a designated judicial officer within 10 days after the response to the request is given or sent. Where the determination is made by a judicial officer, the applicant or any participant may file a petition for a writ of mandamus in the appropriate appellate court within 10 days after the response is given or sent. (C.R.C., Rule 1.100(g), as amended in 2009.)



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6. Public Proceedings.

a. General Requirement.

2 Witkin Cal. Proc. Courts § 33

[§ 33] General Requirement.

(1) *Purposes of Public Proceedings.* Publicity of court proceedings is a highly regarded common law practice, its chief purposes being (a) to deter witnesses from testifying falsely; (b) to obtain disclosure of other evidence from spectators; (c) to improve the conduct of judge, jury, and counsel by subjecting them to public observation; (d) to allow third persons to determine the effect of litigation on their own interests; and (e) to educate people generally on the operation of the judicial system. (See 6 Wigmore (Chadbourn Rev.) §1834 et seq.; *Wrather-Alvarez Broadcasting v. Hewicker* (1957) 147 C.A.2d 509, 512, 305 P.2d 236; *Cembrook v. Sterling Drug* (1964) 231 C.A.2d 52, 59, 41 C.R. 492, citing the text; 30 So. Cal. L. Rev. 340; 4 U.C.L.A. L. Rev. 475.)

(2) *Scope of Statutory Requirement.* Except as otherwise provided, "the sittings of every court shall be public." (C.C.P. 124.) (See *NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 C.4th 1178, 86 C.R.2d 778, 980 P.2d 337, 7 Summary (10th), *Constitutional Law*, §423 [under First Amendment and C.C.P. 124, civil trials are generally open to the public; here, there was insufficient showing of prejudice to fair trial to justify (a) excluding public and media except when jury was present, and (b) sealing transcript until after trial].) Important limitations apply in Family Code proceedings (*infra*, §34) and criminal cases (see 5 Cal. Crim. Law (3d), *Criminal Trial*, §351 et seq.).

(3) *Qualifications.* The rule of public trial is qualified in the following circumstances:

(a) *Separation of Witnesses.* The court may exclude from the court- room any witness who is not at the time under examination, except a party or (for a party other than a natural person) an officer or employee designated by its attorney. (Ev.C. 777; see 3 Cal. Evidence (4th), *Presentation at Trial*, §73 et seq.)

(b) *View of the Scene.* Members of the public are rarely in a position to attend this part of the proceeding, where the judge or jury, and parties and counsel, view the scene. (See 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §25 et seq.)

(c) *Control Over Publicity.* Judicial control over trial publicity, especially in criminal proceedings, is the subject of continuing litigation and commentary. (See 39 A.L.R.5th 103 [propriety of exclusion of press or other media

representatives from civil trial]; *40 San Diego L. Rev.* 115 [court secrecy]; C.E.B., 1 Civil Proc. During Trial 3d, §2.36 et seq.; *infra*, §35; on recording and broadcasting of court proceedings, see *infra*, §36 et seq.; on control of publicity in criminal trials, see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §361 et seq.; on constitutional problems involved in control of pretrial and trial publicity, see 7 *Summary* (10th), *Constitutional Law*, §413 et seq.; on standards and procedure for sealing court records, see *infra*, §41 et seq.)

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b. Exception for Family Law Proceedings.

2 Witkin Cal. Proc. Courts § 34

[§ 34] Exception for Family Law Proceedings.

The rule requiring public trials in civil cases is, by statute, limited in family law proceedings:

(1) *Family Code Proceedings*. Except as otherwise provided by the Family Code or by court rule, the court may, in the interests of justice and the persons involved, direct the trial of an issue of fact in a proceeding under the Family Code to be private, and may exclude all persons except court officers, parties, witnesses, and counsel. (*Family C. 214*; see 10 *Summary* (10th), *Parent and Child*, §284.)

In re Marriage of Lechowick (1998) 65 C.A.4th 1406, 77 C.R.2d 395, involved an attempt by a free-lance journalist to gain access to sealed records in a marital dissolution case and to open further proceedings to the public. *Held*, trial court order denying access reversed and case remanded for further proceedings.

(a) *Family C. 214* authorizes the closing of court proceedings under some circumstances. It is intended to govern proceedings from which the court may exclude the public in a family law case. (65 C.A.4th 1411.) "It is not generally applicable to the issue of sealing court files." (65 C.A.4th 1413, following *Green v. Uccelli* (1989) 207 C.A.3d 1112, 255 C.R. 315.) There is an exception, however. When part of a family law proceeding is closed to the public, unless the court's order is to the contrary, exhibits and transcripts deriving from that proceeding should be considered confidential. (65 C.A.4th 1413.)

(b) "In general, court files in family law cases should be treated no differently than the court files in any other cases for purposes of considering the appropriateness of granting a motion to seal any of those files." (65 C.A.4th 1414.) On remand, the principles of *Champion v. Superior Court* (1988) 201 C.A.3d 777, 247 C.R. 624, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §151, provide guidance on a motion to seal documents. (65 C.A.4th 1415.)

(2) *Juvenile Court Proceedings*. Unless requested by the minor and any parent or guardian present, the public is not admitted to a juvenile court hearing. But the judge or referee may admit persons deemed to have a "direct and legitimate interest" in the particular case or the work of the court. (Welf.C. 676(a); see 10 *Summary* (10th), *Parent and Child*, §588.) And the public must be admitted, on the same basis as in criminal trials, to hearings under Welf.C. 602 for

specified serious and violent crimes. (Welf.C. 676(a); on delinquency hearing under Welf.C. 602, see 10 *Summary* (10th), *Parent and Child*, §731.) However, during the testimony of certain witnesses or on motion of the district attorney, such hearings are closed where specified sex crimes are involved. (Welf.C. 676(b).)

In vesting the judge with discretion to admit persons having a "direct and legitimate interest," it was the purpose of the Legislature to allow press attendance at a juvenile hearing. Hence, where past media coverage of the case was neither excessive nor sensational, and the jury pool in the jurisdiction was large, it was not error to deny a minor's petition for an order barring press representatives from his fitness hearing. (*Brian W. v. Superior Court* (1978) 20 C.3d 618, 623, 143 C.R. 717, 574 P.2d 788.) (On right to report juvenile proceedings, see *Smith v. Daily Mail Publishing Co.* (1979) 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399, 7 *Summary* (10th), *Constitutional Law*, §413.)

Welf.C. 676(a) reflects the legislative intent that fitness hearings should be open, unless the minor establishes a reasonable likelihood of substantial prejudice to his or her right to a fair trial. Where a motion for closure is made, the court must consider all alternatives to closure and must permit the public and press an opportunity to overcome the minor's showing of probable prejudice. (*Tribune Newspapers West v. Superior Court* (1985) 172 C.A.3d 443, 451, 460, 218 C.R. 505.)

(3) *Adoption Proceedings*. All persons are excluded except court officers, parties, witnesses, counsel, and representatives of official agencies. (*Family C. 8611*; see 10 *Summary* (10th), *Parent and Child*, §95.)

(4) *Family Conciliation Court Proceedings*. All persons are excluded except court officers, parties, witnesses, and counsel. (*Family C. 1818(a)*; see 11 *Summary* (10th), *Husband and Wife*, §91.)

(5) *Custody Proceedings*. The court in its discretion may exclude the public from hearings in which the custody of a minor is at issue. (*Family C. 3041*; see 10 *Summary* (10th), *Parent and Child*, §284.)

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c. Distinctions: Publications and Publicity.

2 Witkin Cal. Proc. Courts § 35

[§ 35] Distinctions: Publications and Publicity.

(1) *Right To Publish Report*. Probably the same considerations that demand a trial open to the public (*supra*, §33) call for freedom of newspapers and broadcasters to report the proceedings, subject to liability for contempt if justice is obstructed. (See *Estate of Hearst* (1977) 67 C.A.3d 777, 785, 136 C.R. 821, 14 Summary (10th), *Wills and Probate*, §349 [power to temporarily restrict public access to court records]; *Mary R. v. B. & R. Corp.* (1983) 149 C.A.3d 308, 196 C.R. 871, 1 Cal. Proc. (5th), *Attorneys*, §260 [validity of stipulation for gag order sealing court records in molestation case]; *KGTV Channel 10 v. Superior Court* (1994) 26 C.A.4th 1673, 32 C.R.2d 181, 10 Summary (10th), *Parent and Child*, §812 [release of name of juvenile in delinquency proceeding]; C.E.B., 1 Civil Proc. During Trial 3d, §§2.42, 2.43 [protective orders]; 6 *Golden Gate L. Rev.* 101; 63 *Harv. L. Rev.* 840; 4 *Stanf. L. Rev.* 101; 84 *A.L.R.3d* 598 [restricting public access to state court records].) (On constitutional problems in controlling publicity, see 7 Summary (10th), *Constitutional Law*, §413 et seq.)

In re Shortridge (1893) 99 C. 526, 34 P. 227, involved a valid order excluding the public during the trial of a divorce suit, and an additional order that the testimony not be published. Petitioner published some of the testimony in his newspaper and was adjudged guilty of contempt. *Held*, judgment of contempt annulled. (a) Regardless of any lower court order against publication, an article obstructing justice would be punishable as a contempt, but this publication had no such effect. (99 C. 533 et seq.) (b) The applicable statute (former C.C.P. 125) allowed the exclusion of spectators, but neither in terms nor in purpose did it justify suppression of a report of the proceeding. "The assumption that the object of the statute was to protect the public from the contaminating influence of prurient revelations often made in actions of divorce, seduction, and criminal conversation is unwarranted. The object of the act is palpable. It was to secure decorum in the conduct of trials involving the relation of the sexes and to protect witnesses of refined sensibilities from the ordeal which they might otherwise have to pass through in giving testimony of a delicate or filthy nature in the presence of a crowd of vulgar or curious spectators." (99 C. 531.)

(2) *No Right to Publicity*. In *Cembrook v. Sterling Drug* (1964) 231 C.A.2d 52, 41 C.R. 492, plaintiff alleged long-continued use of a common brand-name drug, in reliance on advertising of its safety, and ulcers and other internal injuries resulting from its use. On appeal from a judgment on a verdict for defendant, plaintiff showed that there had been little mention of the trial in public news media, and argued that this "publicity blackout," designed to protect a

heavy advertiser, had a "bad psychological effect" on the jurors in minimizing the importance of plaintiff's claims. *Held*, judgment affirmed. The charge of "conspiracy" between defendant and the news media was not supported by evidence. (231 C.A.2d 61.) And the contention that the guarantee of a public trial carries with it the right to compel publicity was absurd. (231 C.A.2d 60.)

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1. Former Prohibition.

2 Witkin Cal. Proc. Courts § 36

[§ 36] Former Prohibition.

Taking photographs in the courtroom, and broadcasting the proceedings, were prohibited by the original A.B.A. Canons of Judicial Ethics and the original California Canons. (See 43 A.B.A.J. 419; 46 A.B.A.J. 840, 1295; 22 So. Cal. L. Rev. 246; 32 So. Cal. L. Rev. 281.) The 1972 A.B.A. Code of Judicial Conduct stated a general prohibition against broadcasting, televising, recording, or taking photographs, with the usual exceptions for ceremonial proceedings, instructional purposes, and appropriate use of electronic or photographic methods of presenting evidence or perpetuating a record. (See 60 A.B.A.J. 294 [Justice in Living Color: The Case for Courtroom Television]; 64 A.B.A.J. 545 [Cameras in the Courtroom: A Dialogue].) The 1990 A.B.A. Model Code of Judicial Conduct and the 1992 California Code of Judicial Conduct do not address the issue.

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2. Scope of Current Restrictions.

2 Witkin Cal. Proc. Courts § 37

[§ 37] Scope of Current Restrictions.

(1) *In General.* Photographing, recording, and broadcasting in the courtroom are governed by C.R.C., Rule 1.150. (See 34 *Pepperdine L. Rev.* 123 [televised proceedings and First Amendment right of access]; 28 West L.A. L. Rev. 293 [cameras in the courtroom]; 14 *A.L.R.4th* 121 [validity of media broadcasting, recording, or photographing court proceedings]; on problem in criminal cases, see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §§367, 368.) The Judicial Council has published a booklet entitled *Photographing, Recording, and Broadcasting in the Courtroom: Guidelines for Judicial Officers*.

(2) *Policy Statement and General Rule.* "The judiciary is responsible for ensuring the fair and equal administration of justice. The judiciary adjudicates controversies, both civil and criminal, in accordance with established legal procedures in the calmness and solemnity of the courtroom. Photographing, recording, and broadcasting of courtroom proceedings may be permitted as circumscribed in this rule if executed in a manner that ensures that the fairness and dignity of the proceedings are not adversely affected. This rule does not create a presumption for or against granting permission to photograph, record, or broadcast court proceedings." (C.R.C., Rule 1.150(a).) Except as provided by the rule, court proceedings may not be photographed, recorded, or broadcast. (C.R.C., Rule 1.150(c); on exception for judicial education and closed-circuit broadcast by court personnel, see C.R.C., Rule 1.150(c).)

(3) *Personal Recording Devices.* Personal sound recording devices may be used with advance permission of the judge solely for personal notes. (C.R.C., Rule 1.150(d).)

(4) *Media Coverage.* Media coverage may be permitted only on written order of the judge, who has discretion to permit, refuse, limit, or terminate media coverage. The rule does not otherwise restrict "the right of the media to cover and report court proceedings." (C.R.C., Rule 1.150(e).) "Media coverage" is defined as "photographing, recording, or broadcasting of court proceedings by the media using television, radio, photographic, or recording equipment." (C.R.C., Rule 1.150(b)(1); for definition of "media," see C.R.C., Rule 1.150(b)(2).)

(5) *Request and Order for Media Coverage.* The media may request permission for media coverage. A request must

be filed at least 5 court days before the proceeding unless good cause is shown. The request must be on Judicial Council Form No. MC-500 [Media Request to Photograph, Record, or Broadcast] and must be accompanied by a proposed order on Judicial Council Form No. MC-510 [Order on Media Request to Permit Coverage]. The clerk must promptly notify the parties that the request has been filed, and the assigned judge rules on the request. (C.R.C., Rule 1.150(e)(1).) (On factors to be considered in ruling on request, see C.R.C., Rule 1.150(e)(3).) The order may incorporate a local rule or order regulating media activity and may require payment of "increased court-incurred costs resulting from the permitted media coverage (for example, for additional court security or utility service)." (C.R.C., Rule 1.150(e)(4).) (On modification of order, see C.R.C., Rule 1.150(e)(5).)

(6) *Equipment and Personnel*. Unless otherwise ordered, the following restrictions apply: (a) only one television camera and one still photographer are permitted; (b) equipment may not "produce distracting sound or light," and signal lights or devices may not be visible; (c) modification of existing courtroom sound and lighting systems must be accomplished without public expense or the disruption of proceedings, and microphones and wiring must be operated by one person in unobtrusive places approved by the judge; (d) operators may not move equipment or enter or leave while court is in session, "or otherwise cause a distraction"; (e) equipment and clothing may not bear media insignia or markings. The court may require proof that proposed personnel and equipment comply with the rule, and "may specify the placement of media personnel and equipment to permit reasonable media coverage without disruption of the proceedings." (C.R.C., Rule 1.150(e)(7).) If two or more media agencies of the same type request coverage of a proceeding, they must file a statement of agreed arrangements. If they are unable to agree, the judge may deny coverage. (C.R.C., Rule 1.150(e)(9).) (For definition of "media agency," see C.R.C., Rule 1.150(b)(2).)

(7) *Prohibited Coverage*. Media coverage is not permitted of proceedings held in chambers, closed proceedings, jury selection, jurors or spectators, or conferences between attorneys, clients, witnesses, aides, and the court. (C.R.C., Rule 1.150(e)(6).)

(8) *Sanctions*. A violation of the rule or an order is "an unlawful interference with the proceedings of the court." It may be a basis for an order terminating media coverage, a contempt citation, or an order for monetary or other sanctions. (C.R.C., Rule 1.150(f).)

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3. Order Limiting Coverage.

2 *Witkin Cal. Proc. Courts* § 38

[§ 38] Order Limiting Coverage.

In *KFMB-TV Channel 8 v. Municipal Court* (1990) 221 C.A.3d 1362, 271 C.R. 109, media representatives requested and obtained court permission pursuant to former C.R.C., Rule 980 (now C.R.C., Rule 1.150) to cover the preliminary hearing in a celebrated murder case. The court qualified its orders by prohibiting broadcasts of witnesses' statements without further court authorization. Three television stations sought extraordinary relief. *Held*, mandamus issued directing the court to vacate its order.

(a) Although the public and press have both a statutory and constitutional right to attend the preliminary hearing, that right has not been "extended to include the right of the press to electronically record and broadcast the hearing." (221 C.A.3d 1363.)

(b) "California has taken a deliberate and thoughtful approach to accommodate the competing interests of the parties' rights to privacy and a fair trial and the public's right to scrutinize court proceedings. ... Notwithstanding their awareness of the importance of the considerations underlying the First Amendment, California's promulgation of rule 980 reflects a commitment to the court's inherent right to control access." (221 C.A.3d 1366.)

(c) Although the rule leaves the threshold determination about access by the electronic media to the court's discretion, once the proceedings have been recorded there is nothing in the rule authorizing the court to refuse, limit, or terminate the later broadcasting of those proceedings. "In short, the rule does not authorize a judge to become the editor of a television station's news broadcasts of a previously recorded judicial proceeding." (221 C.A.3d 1367.)

(d) "Because rule 980 does not require a statement of reasons, we are unwilling to mandate that requirement in every case. Nonetheless we cannot ignore the important role the electronic media play in disseminating public information. Rule 980 recognizes that media access should be granted except where to do so will interfere with the rights of the parties, diminish the dignity of the court, or impede the orderly conduct of the proceedings. Accordingly, in exercising its discretion whether to grant access, the court must consider the rule's criteria. If the court decides to deny access after evaluating the relevant factors, it would be helpful if it could explain its ruling so that any later challenge

could be objectively analyzed. A silent record is of little assistance to an appellate court in determining the correctness of an order in this type of case. We therefore urge the trial court to briefly explain on the record why access is being denied. We believe the benefit to the justice system from this procedure will substantially offset any inconvenience to the trial court." (221 C.A.3d 1368, 1369.)

(e) Here, the television stations did not waive the legal infirmities in the order by proceeding to record with full knowledge of the limitation; as soon as they became aware of the restriction, they promptly advised the court of their position. However, this does not mean that waiver is never applicable. If the media voluntarily and knowingly acquiesce to an order restricting their rights of coverage, they will be bound by their bargain. The rule requires a request for media coverage to be filed a reasonable time before the portion of the proceeding to be covered. "Where it can be reasonably accomplished the media must give the court adequate notice to allow the court sufficient time for a reasoned decision on whether access should be granted and if so, what restrictions, if any, should be imposed. Conversely, with timely application the media will have the opportunity to either consent to the court-imposed restrictions or object before the proceeding starts, permitting prompt and meaningful appellate review." (221 C.A.3d 1369, 1370.)

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e. Public Access to Evidence.

2 Witkin Cal. Proc. Courts § 39

[§ 39] Public Access to Evidence.

In *Nixon v. Warner Communications* (1978) 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570, former President Nixon's tapes of conversations in his offices were produced in response to subpoenas duces tecum for use in criminal trials in the district court for the District of Columbia. Respondents sought permission to copy, broadcast, and sell to the public portions of the tapes played at the trial. The district court judge denied the request. *Held*, affirmed.

(a) There is a common law right to inspect and copy public records, including judicial records. It is not dependent on a proprietary interest in the document or on a need for it as evidence; the interest may be a citizen's desire to observe the workings of public agencies or a newspaper's intention to publish information concerning the operation of government. (98 S.Ct. 1311, 55 L.Ed.2d 579.)

(b) The right is subject to a court's supervisory power over its own records and files, and access has been denied where the records are sought for improper purposes, such as private spite, public scandal, or as sources of libelous statements or business information that might harm a litigant's competitive standing. (98 S.Ct. 1312, 55 L.Ed.2d 580.) The relatively few cases do not furnish a clear rule, but stress the sound discretion of the trial court. (98 S.Ct. 1312, 55 L.Ed.2d 580.)

(c) Petitioner Nixon advanced a number of arguments, such as a proprietary right in his own voice (distinct from the tapes or transcripts), his right of privacy, and the impropriety of permitting commercialization of the tapes. But the normal task of weighing the interests advanced by the parties need not be undertaken; the Presidential Recordings Act provides an administrative procedure for processing, and releasing to the public, all of petitioner's materials of historic interest. (98 S.Ct. 1315, 55 L.Ed.2d 583, discussing *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867.) This alternative means of public access "tips the scales in favor of denying release." (98 S.Ct. 1316, 55 L.Ed.2d 585.)

(d) There is no merit in the argument that release is required by the First Amendment. *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, 7 Summary (10th), *Constitutional Law*, §430, is not controlling. The issue here is not whether the press must be permitted access to public information to which the public

is guaranteed access, but whether the tapes to which the public never had physical access must be made available for broadcasting. The First Amendment does not give the press a right to information about a trial superior to that of the general public. (98 S.Ct. 1318, 55 L.Ed.2d 587.)

KNSD Channels 7/39 v. Superior Court (1998) 63 C.A.4th 1200, 74 C.R.2d 595, involved public access to evidence in a criminal case. Plaintiff television station sought access to an audiotape that had been introduced into evidence and played in open court. *Held*, plaintiff was entitled to the tape.

(a) Public access to court proceedings is grounded in both common law and the constitutional freedoms of speech and press. Records from judicial proceedings, including evidence, are also subject to a public right of access "as a continuation of the common law right to inspect and copy judicial records." (63 C.A.4th 1203.) California "recognizes the presumption of accessibility of judicial records in criminal cases and allows a trial court limited authority to preclude such access." (63 C.A.4th 1203, citing *Craemer v. Superior Court* (1968) 265 C.A.2d 216, 71 C.R. 193.)

(b) Public access must be balanced against any countervailing public policy, most often a criminal defendant's due process right to a fair trial. While excessive publicity is a legitimate concern, the evidence here has already been presented to the jury and the public's interest in access is "particularly clear." (63 C.A.4th 1204.) "[A]bsent a showing that providing access would create a significant risk of impairment of the integrity of the evidence, the court must make evidence previously presented to a jury in open court reasonably available to the public." (63 C.A.4th 1205.) (Cf. *Oziel v. Superior Court* (1990) 223 C.A.3d 1284, 273 C.R. 196, 4 Cal. Crim. Law (3d), *Introduction to Criminal Procedure*, §49 [limiting disclosure to news media of videotape made during search].)

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f. Public Access to Electronic Trial Court Records.

2 Witkin Cal. Proc. Courts § 40

[§ 40] Public Access to Electronic Trial Court Records.

C.R.C., Rule 2.500 et seq. govern public access to trial court records in electronic form.

(1) *Nature and Scope.* C.R.C., Rule 2.500 et seq. are intended to provide the public with "reasonable access" to trial court records that are maintained in electronic form while protecting privacy interests. (C.R.C., Rule 2.500(a).) The rules are not intended to give the public a right of access to records that are not otherwise available for public access and do not create a right of access to records that are sealed by court order or confidential as a matter of law. (C.R.C., Rule 2.500(c).) The rules apply only to trial court records (C.R.C., Rule 2.501(a)) and only to access by the public (C.R.C., Rule 2.501(b)). The rules do not limit access by a party or attorney for a party or by other persons or entities entitled to access by statute or rule. (C.R.C., Rule 2.501(b).)

(2) *Definitions.* The following definitions apply:

(a) *Court record.* A court record is any document, paper, or exhibit filed by a party, an order or judgment of the court, and any item listed in *Govt.C. 68151(a)* (infra, §374). However, the term does not include a reporter's transcript for which the reporter is entitled to receive a fee for a copy or the "personal notes or preliminary memoranda" of judicial branch personnel. (C.R.C., Rule 2.502(1).)

(b) *Electronic record.* An electronic record is a computerized court record, including both a document filed electronically and an electronic copy of a record filed in paper form. The term does not include a record maintained only on microfiche, paper, or a medium that can be read without the use of an electronic device. (C.R.C., Rule 2.502(2).)

(c) *Public.* The term "public" means an individual, group, or entity, including print and electronic media, or the representative of an individual, group, or entity. (C.R.C., Rule 2.502(3).)

(d) *Electronic access.* Unless otherwise specified, electronic access means computer access to court records available to the public both through public terminals at the courthouse and remotely. (C.R.C., Rule 2.502(4).)

(3) *General Right of Access.* "All electronic records must be made reasonably available to the public in some form,

whether in electronic or in paper form, except those that are sealed by court order or made confidential by law." (C.R.C., Rule 2.503(a).)

(4) *Electronic Access "To Extent Feasible."* A court that maintains records in electronic form must provide electronic access to them "to the extent it is feasible to do so." (C.R.C., Rule 2.503(b), (c).) This means that the court is required to provide electronic access to the extent the court determines that it has the resources and technical capacity to do so. (C.R.C., Rule 2.503(d).)

(5) *Records Available at Courthouse Only.* In specified cases, if the court maintains records in electronic form, electronic access may be provided only at the courthouse, although remote access in these cases may be provided to the register of actions, calendars, and indexes. (C.R.C., Rule 2.503(c).) The courthouse restriction applies to the following proceedings:

- (a) Proceedings under the Family Code. (C.R.C., Rule 2.503(c)(1).)
- (b) Juvenile court proceedings. (C.R.C., Rule 2.503(c)(2).)
- (c) Guardianship and conservatorship proceedings. (C.R.C., Rule 2.503(c)(3).)
- (d) Mental health proceedings. (C.R.C., Rule 2.503(c)(4).)
- (e) Criminal proceedings. (C.R.C., Rule 2.503(c)(5).)
- (f) Civil harassment proceedings. (C.R.C., Rule 2.503(c)(6).)
- (g) Workplace violence prevention proceedings. (C.R.C., Rule 2.503(c)(7).)
- (h) Elder or dependent adult abuse prevention proceedings. (C.R.C., Rule 2.503(c)(8).)

(6) *Records Available Remotely.* If the court maintains records in electronic form, electronic access may be provided remotely and at the courthouse to the register of actions, calendars, and indexes, and to records in civil cases other than those listed in C.R.C., Rule 2.503(c). (C.R.C., Rule 2.503(b).) (On remote access in extraordinary criminal cases, see C.R.C., Rule 2.503(e); on information included in and excluded from electronically accessible court calendars, indexes, and registers of actions, see C.R.C., Rule 2.507.)

(7) *Case-by-Case Restriction.* Electronic access may be provided only on a case-by-case basis and only when the record is identified by the number of the case, the caption, or the name of a party. However, this limitation does not apply to the court's electronic records of a register of actions, calendars, and indexes. (C.R.C., Rule 2.503(f).) Bulk distribution is authorized only for the register of actions, calendars, and indexes. (C.R.C., Rule 2.503(g).)

(8) *Records That Become Inaccessible.* If an electronic record is made inaccessible to the public by court order or operation of law, the court is not required to take action with respect to copies made by the public before that time. (C.R.C., Rule 2.503(h).)

(9) *Electronic Record Is Not Official Record.* Unless electronically certified by the court, a record available by electronic access is not the official record of the court. (C.R.C., Rule 2.504(b).)

(10) *Conditions of Use.* The court may condition electronic access on the user's consent to access records only as instructed and on the user's consent to the court's monitoring of access. Members of the public who fail to comply with either of these conditions may be denied access. (C.R.C., Rule 2.504(c).) (On notices to persons accessing records, see C.R.C., Rule 2.504(d), (e).)

(11) *Fees.* The court may impose fees for the cost of providing public access to electronic records, under *Govt.C.*

68150(h) (infra, §375). (C.R.C., Rule 2.506.)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Records Available at Courthouse Only.*(i) *(New)* Proceedings to compromise the claims of a minor or a person with a disability. (C.R.C., Rule 2.503(c)(9), added in 2009.)



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CHAPTER II - Courts

Witkin Summary of California Law

I. INTRODUCTION

C. Court Proceedings.

7. Sealed Records.

a. In General.

2 Witkin Cal. Proc. Courts § 41

[§ 41] In General.

(1) *Nature and Scope of Rules.* Extensive Rules of Court govern sealed records. C.R.C., Rule 8.160 applies to reviewing court records. C.R.C., Rules 2.550 and 2.551 apply to trial court records. The Advisory Committee Comments to the rules make the following points:

(a) The rules provide a standard and procedure for the courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 C.4th 1178, 86 C.R.2d 778, 980 P.2d 337, 7 Summary (10th), *Constitutional Law*, §423.

(b) The rules recognize the First Amendment right of access to documents used at trial as a basis for adjudication.

(c) The rules apply to both civil and criminal cases.

(2) *Records Confidential by Law.* The rules do not apply to records kept confidential by law. (C.R.C., Rules 2.550(a)(2), 8.160(a).) The Advisory Committee Comments list applications to proceed in forma pauperis, records of the family conciliation court, and sealed search warrant affidavits as examples of confidential records to which public access is restricted by law.

(3) *Definitions.* The following definitions apply to sealed records:

(a) *Record.* Unless the context requires otherwise, "record" means all or part of a document, paper, exhibit, transcript, or thing filed or lodged with the court. (C.R.C., Rules 2.550(b)(1), 8.160(b)(1).)

(b) *Sealed.* A "sealed" record is a record that by court order is not open to public inspection. (C.R.C., Rules 2.550(b)(2), 8.160(b)(2).)

(c) *Lodged.* A "lodged" record is a record that is temporarily placed or deposited with the court, but not filed. (C.R.C., Rules 2.550(b)(3), 8.160(b)(3).)

(4) *Disclosure in Public Records*. Public court records may not disclose material contained in a sealed record, a record conditionally under seal, or a record subject to a pending motion or application to seal. (C.R.C., Rules 2.551(c), 8.160(g).) (On ex parte access of Commission on Judicial Performance to nonpublic court records (including sealed records) relevant to the performance of judicial officers, and the procedure for public disclosure, see *Govt.C. 68756*.)

(5) *Special Procedure in Family Law Cases*. In proceedings for dissolution or nullity of marriage or for legal separation, Social Security numbers may be redacted in documents that are part of the public file, except documents created to collect support payments. (*Family C. 2024.5*.) Documents that list financial assets and liabilities and provide identifying information about them, including marital settlement agreements, may be sealed. (*Family C. 2024.6*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature and Scope of Rules*. In 2009, C.R.C., Rule 8.160 was renumbered C.R.C., Rule 8.46. The subdivisions of the rule cited in the text were not changed.



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I. INTRODUCTION

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7. Sealed Records.

b. Sealed Records in Trial Courts.

1. In General.

2 Witkin Cal. Proc. Courts § 42

[§ 42] In General.

(1) *Scope of Rules.* C.R.C., Rules 2.550 and 2.551 apply to trial court records sealed or proposed to be sealed by court order. They do not apply to discovery motions and records in discovery proceedings, but do apply to discovery materials used at trial or submitted for adjudication of matters other than discovery proceedings. (C.R.C., Rule 2.550(a).) An alternate set of rules governs filing False Claims Act records under seal. (See C.R.C., Rule 2.570 et seq.) (On sealing criminal records, see 2 Cal. Crim. Practice 3d, §23:5 et seq.)

(2) *Records Are Presumed To Be Open.* "Unless confidentiality is required by law, court records are presumed to be open." (C.R.C., Rule 2.550(c).)

(3) *Findings Required To Seal Records.* The court may order that a record be filed under seal only if it expressly finds facts that establish all of the following:

(a) "There exists an overriding interest that overcomes the right of public access to the record." (C.R.C., Rule 2.550(d)(1).)

(b) "The overriding interest supports sealing the record." (C.R.C., Rule 2.550(d)(2).)

(c) "A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed." (C.R.C., Rule 2.550(d)(3).)

(d) "The proposed sealing is narrowly tailored." (C.R.C., Rule 2.550(d)(4).)

(e) "No less restrictive means exist to achieve the overriding interest." (C.R.C., Rule 2.550(d)(5).)

(4) *What Constitutes "Overriding Interest."* The Advisory Committee Comment to C.R.C., Rule 2.550 notes that the rule leaves the determination of what constitutes an "overriding interest" to case law and that, in appropriate circumstances, courts have found various statutory privileges, trade secrets, and privacy interests to be "overriding

interests."

(5) *Court Approval Is Required.* A record may not be filed under seal without a court order or based solely on the agreement or stipulation of the parties. (C.R.C., Rule 2.551(a).)

(6) *Motion or Application To Seal Record.* Sealing a record is requested by a motion or application for an order sealing the record, supported by a memorandum and a declaration of facts sufficient to justify sealing. (C.R.C., Rule 2.551(b)(1).) If necessary to prevent disclosure, the motion or application and supporting and opposing documents may be filed in a public redacted version and lodged in a complete version conditionally under seal. (C.R.C., Rule 2.551(b)(5).) A copy of the motion or application must be served on all parties who have appeared. A party who already possesses copies of the records to be placed under seal must be served with both a complete unredacted version and a redacted version. (C.R.C., Rule 2.551(b)(2).) (See *Savaglio v. Wal-Mart Stores (2007) 149 C.A.4th 588, 598, 57 C.R.3d 215* [party waived right to file belated motion in trial court to seal documents filed conditionally under seal by failing to follow mandatory procedure, including timely motion and supporting documentation].)

(7) *Lodging Records "Conditionally Under Seal."* When the motion or application is made, the record is lodged "conditionally under seal" unless the record has previously been lodged or good cause exists for not lodging it. (C.R.C., Rule 2.551(b)(4).) A record that may be filed under seal is lodged with the court in a sealed envelope or container labeled "conditionally under seal" with a cover sheet containing the information required on a caption page and stating that the record is subject to a motion or application to file the record under seal. The clerk endorses the cover sheet with the date of receipt and retains the record without filing. (C.R.C., Rule 2.551(d).)

(8) *Procedure for Confidential Documents.* A party who files or intends to file documents disclosed during discovery that are subject to a confidentiality agreement or a protective order but does not intend to request sealing must (a) lodge the unredacted records and other documents that disclose their contents conditionally under seal, (b) file redacted copies that do not disclose the contents, and (c) give written notice to the party who produced the records that the records and documents lodged under seal will be placed in the public court file unless that party files a motion or application to seal the records. (C.R.C., Rule 2.551(b)(3)(A).) Within 10 days, the party who receives the notice may file a motion or application to seal the records or to extend the time to file. If the party does so, the documents remain conditionally under seal until the court rules on the application or motion. If the party does not do so, the clerk "promptly" places the documents in the public file. (C.R.C., Rule 2.551(b)(3)(B).)

(9) *Contents of Order.* The order sealing a record must "specifically state the facts that support the findings" and "[d]irect the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal." All other portions of the documents must be placed in the public file. (C.R.C., Rule 2.550(e).) The order must state whether the order itself, the register of actions, any other court records, or any other records in the case are to be sealed and whether any person other than the court is authorized to inspect the record. (C.R.C., Rule 2.551(e)(2), (e)(3).) Unless the sealing order provides otherwise, the parties may not disclose the contents of any sealed materials in subsequently filed records or papers. (C.R.C., Rule 2.551(e)(4).)

(10) *Grant of Motion or Application.* If the motion or application is granted, the clerk replaces the cover sheet with a file-endorsed copy of the court's order and labels the record "sealed by order of the court on (date)." (C.R.C., Rule 2.551(e)(1).)

(11) *Denial of Motion or Application.* If the court denies the motion or application, the clerk returns the lodged record to the requesting party and does not place it in the case file unless that party notifies the clerk in writing within 10 days after denial that the record is to be filed. (C.R.C., Rule 2.551(b)(6).)

(12) *Custody of Sealed Records.* Sealed records are securely filed and kept separate from the public file in the case. (C.R.C., Rule 2.551(f).) Where voluminous records in the possession of a public agency are to be sealed, the order may direct the agency to maintain the records in a secure fashion. (C.R.C., Rule 2.551(g).)

(13) *Motion, Application, or Petition To Unseal Record.* A sealed record may not be unsealed except by court order. (C.R.C., Rule 2.551(h)(1).) A party or a member of the public may move, apply, or petition to unseal a record, and the court may do so on its own motion. Notice of the motion, application, or petition must be filed and served on the parties. The motion, application, or petition, any opposition and reply, and supporting documents must be filed in a public redacted version and a sealed complete version. (C.R.C., Rule 2.551(h)(2).) (On notice and response where court acts on its own motion, see C.R.C., Rule 2.551(h)(3).)

(14) *Order Unsealing Record.* An order unsealing a record must state whether the record is unsealed entirely or in part. If a record is unsealed only in part, the order must specify the particular records to be unsealed. If a record is unsealed only as to certain persons, the order must specify the particular persons who are to have access. If the court has previously sealed the sealing order, the register of actions, or other records related to the case, the unsealing order must state whether these additional records are also unsealed. (C.R.C., Rule 2.551(h)(5).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Scope of Rules.* In *Mercury Interactive Corp. v Klein* (2007) 158 C.A.4th 60, 70 C.R.3d 88, the issue was whether the presumption of C.R.C., Rule 2.550 that court records are public applied to discovery documents that were produced and designated confidential pursuant to a protective order, but were later attached as sealed exhibits to a filed pleading that was not used at trial or to adjudicate a material controversy. The trial court granted the motion of media representatives to unseal the documents. *Held*, reversed. The sealing rules are not applicable to discovery documents that are not used at trial or submitted as a basis for adjudication.

(a) *Standard of review.* Appellate courts have used an abuse of discretion standard to review orders unsealing records when examining the trial court's conclusion that the party with the burden of proof failed to establish facts sufficient to justify sealing. Here, however, the issue is whether the sealed records rules apply without restriction to discovery documents. That determination is a question of law requiring the interpretation of the Rules of Court governing sealing and the case law on which they are based, for which de novo review in the appellate court is appropriate. (158 C.A.4th 71.)

(b) *Scope of discovery exception.* Both *NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 C.4th 1178, 86 C.R.2d 778, 980 P.2d 337, 7 Summary (10th), *Constitutional Law*, §423, setting forth the principles governing public access to trial court records, and C.R.C., Rule 2.550, codifying those principles, refer to documents filed or used "as a basis for adjudication." Broadly interpreted, this phrase could mean that the right of public access applies to any discovery document filed with the court, with the sole exception of documents filed in connection with discovery proceedings. Narrowly interpreted, the phrase could mean that a discovery document filed with the court is subject to public access and governed by the sealing rules only when used by the court as a basis for adjudication. The narrow interpretation is correct; a discovery document is not automatically submitted "as a basis for adjudication" and thus, does not become accessible to the public simply by being made part of the court file. (158 C.A.4th 89, 90.) Discovery has traditionally been a private matter between civil litigants and often produces documents only marginally relevant to the underlying cause of action. (158 C.A.4th 97, 98.) A presumed right of access to any discovery document filed with the court would invite "discovery skirmishes" whenever a party is asked to produce a document it considers confidential and add to the burden of litigation by "creating unnecessary disincentives to the resolution of discovery controversies." (158 C.A.4th 99.)



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b. Sealed Records in Trial Courts.

2. Review of Sealing Orders.

2 Witkin Cal. Proc. Courts § 43

[§ 43] Review of Sealing Orders.

In re Providian Credit Card Cases (2002) 96 C.A.4th 292, 116 C.R.2d 833, examined the sealing rules and their operation. These consolidated class actions involved a dispute over methods of soliciting credit card customers. A protective order in the trial court allowed the parties, during discovery, to designate confidential documents to be filed under seal. Defendants filed a large number of documents under seal, contending that the documents contained confidential and proprietary information and trade secrets. The documents at issue were generally either telemarketing scripts to be used for credit card solicitations or internal memoranda dealing with marketing strategies and proposals. Plaintiffs moved to unseal the documents. *Held*, the trial court did not abuse its discretion in ordering the documents unsealed.

(a) *Standard of review.* If a decision involves the exercise of the trial court's discretion, review for an abuse of discretion, rather than de novo review, is proper. Here, abuse of discretion was the standard for sealing records before the adoption of the sealing rules. Former C.R.C., Rule 243.1(d) (now C.R.C., Rule 2.550(d)) uses the traditional language of a discretionary power, and nothing in the history of the rules suggests that a different standard was intended. (96 C.A.4th 299, 300.) Further, whether information constitutes a trade secret has traditionally been a question of fact, and the trial court's determination of a factual issue is upheld on appeal if supported by substantial evidence. Thus, the appropriate standard of review for sealing and unsealing orders is whether the trial court abused its discretion in making the order. (96 C.A.4th 300, 301.)

(b) *Burden of proof.* Here, defendants have the burden of proving the existence of trade secrets and of overcoming the presumption in favor of public access expressed in former C.R.C., Rule 243.1(c) (now C.R.C., Rule 2.550(c)). Moreover, the trial court was entitled to consider the entire record and was not obligated to accept defendants' declarations about the documents. "If the trial court found the declarations conclusory or otherwise unpersuasive, it could conclude, as it did, that defendants had failed to demonstrate" the "overriding interest" required to overcome the right of public access. (96 C.A.4th 301.)

(c) *Review of order.* Review of an order to seal involves two steps: (1) Examining the express findings of fact

required by former C.R.C., Rule 243.1(d) (now C.R.C., Rule 2.550(d)), to determine if they are supported by substantial evidence on the basis of the entire record. (2) Determining whether, in light of the findings, the trial court abused its discretion in ordering a document sealed. Review of an order to unseal is different. Former C.R.C., Rule 243.2(h) (now C.R.C., Rule 2.551(h)) does not require express findings and there is no basis to impose that requirement. However, granting a motion to unseal is functionally equivalent to denying a motion to seal. In doing so, the trial court is impliedly determining that no overriding interest overcomes the right of public access. Lacking express written findings, review on appeal is whether findings inferred in support of the order to unseal are supported by substantial evidence on the basis of the entire record. (96 C.A.4th 302, 303.)

(d) *Abuse of discretion.* Here, there was no abuse of discretion in unsealing the documents. The documents ordered unsealed were not trade secrets either because of the subject matter, because they had already been disclosed, or because defendants did not take reasonable steps to protect them. (96 C.A.4th 308.) Further, defendants, by opposing redaction of the documents, framed the issue on an all-or-nothing basis and did not satisfy the requirements of the rule that the proposed sealing be "narrowly tailored" or that no "less restrictive means" be available to achieve an overriding interest. (96 C.A.4th 309.)

C.R.C., Rule 2.551(h)(4) now requires the court, in determining whether to unseal a record, to consider the matters addressed in C.R.C., Rule 2.550(c)-(e). (See *supra*, §42.)

People v. Jackson (2005) 128 C.A.4th 1009, 27 C.R.3d 596, involved a criminal prosecution against a celebrity defendant. The trial judge sealed the grand jury transcript, the indictment, and numerous search warrant affidavits, and later denied a motion to unseal these records. Various news organizations appealed the denial on First Amendment grounds. *Held*, order sealing indictment reversed and order sealing other documents affirmed.

(a) *Standard of review.* In *re Providian Credit Card Cases*, *supra*, applied an abuse of discretion standard in reviewing a trial court order to unseal records containing trade secrets. Under that standard, the trial judge's decision not to unseal the records here was not an abuse of discretion. However, although *Providian* may be persuasive when reviewing an order to unseal documents relating to trade secrets, an abuse of discretion standard is not the appropriate standard when reviewing an order to seal the type of documents involved here. (128 C.A.4th 1020.) Appellant news organizations correctly contend that *Bose Corp. v. Consumers Union of United States* (1984) 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502, 5 Summary (10th), *Torts*, §612, requires the appellate court to make an independent examination of the record. In *re George T.* (2004) 33 C.4th 620, 16 C.R.3d 61, 93 P.3d 1007, relied on *Bose* in concluding that cases implicating First Amendment rights are subject to independent review. (128 C.A.4th 1021.)

(b) *Balancing test.* The resolution of sealing disputes involves the balancing of the right to free speech and the right to a fair trial. The principles used in doing so are set forth in *NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 C.4th 1178, 86 C.R.2d 778, 980 P.2d 337, 7 Summary (10th), *Constitutional Law*, §423, and codified in the *Rules of Court*. (128 C.A.4th 1022.)

(c) *Overriding interest supporting sealing.* The search warrant affidavit contains graphic and detailed descriptions of the defendant's alleged sexual misconduct with minors. Release of that information to the public is likely to be embarrassing or devastating to the minors and would result in public dissemination of evidence that may or may not be admissible at trial. Here, the minors' interest in privacy and the defendant's interest in protection from the dissemination of inaccurate information or inadmissible evidence override the public's right to access. (128 C.A.4th 1023.) In addition, the prosecution's compelling interest in the protection of its continuing investigation justifies sealing the additional search warrant affidavits. (128 C.A.4th 1024.)

(d) *Prejudice in absence of sealing.* There must be a substantial probability that the overriding interests will be prejudiced in the absence of sealing. Here, this requirement is met. The highly prejudicial details of the alleged crimes and the celebrity of the defendant have created a "torrent of pretrial publicity" and intense media scrutiny, and news sources from around the world are "saturated with information (or disinformation) about the case." (128 C.A.4th 1025.)

(e) *Narrowly tailored rule.* The sealing order must be narrowly tailored. Here, appellants are unable to suggest a workable alternative. "The trial court and the parties made Herculean efforts to redact documents so that the less prejudicial aspects of the case could be revealed to the public. But redacting individual facts from the search warrant affidavit is impossible. Benign information is inextricably intertwined with prejudicial information." (128 C.A.4th 1026.)

(f) *Least restrictive means.* There must be no less restrictive means to achieve the overriding interests. Here, appellants suggest redacting only the names of the minor victims and providing jury instructions and admonitions. However, the presumption that instructions and admonitions are adequate is rebutted by the exceptionally prejudicial nature of the evidence and the potential intensity of media coverage. The pretrial disclosure of child molestation allegations could lead to public condemnation of the defendant before trial, and potential jurors would be hard pressed to ignore it. (128 C.A.4th 1026, 1027.)

(g) *Conclusion.* The search warrant affidavits were properly sealed. The trial judge sealed the grand jury transcript on the same grounds as the search warrant affidavits. The transcript contains information irrelevant to the present case, which, if disclosed, could be highly prejudicial to the defendant. It also contains testimony about criminal allegations against numerous unindicted purported coconspirators, whose privacy interests would be violated by disclosure. Attempts to redact the transcript would yield unintelligible paragraphs at best. Thus, the transcript was also properly sealed. (128 C.A.4th 1027, 1028.) However, any prejudice arising from unsealing the indictment can be cured by appropriate admonitions to the jury. The indictment summarizes the alleged acts that form the basis for the prosecution, and the prosecutor revealed details of those acts at the open hearing on the defendant's motion to dismiss the indictment. Thus, the sealing order relating to the indictment is reversed with instructions to release the indictment, redacting only the names of the unindicted coconspirators. (128 C.A.4th 1028, 1029.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Sealed Records in Reviewing Courts.

2 Witkin Cal. Proc. Courts § 44

[§ 44] Sealed Records in Reviewing Courts.

(1) *Scope of Rule.* C.R.C., Rule 8.160 applies to records sealed or proposed to be sealed on appeal and in original proceedings. It does not apply to records "required to be kept confidential by law." (C.R.C., Rule 8.160(a).)

(2) *Records Sealed by Trial Court.* If a record sealed in the trial court is part of the record before the reviewing court, it is filed under seal in the reviewing court and remains sealed unless the reviewing court orders otherwise. (C.R.C., Rule 8.160(c)(1).) The reviewing court may examine the record. (C.R.C., Rule 8.160(c)(3).) The record on appeal must include the motion or application to seal, supporting and opposing documents, and the sealing order. (C.R.C., Rule 8.160(c)(2).)

(3) *Records Not Sealed by Trial Court.* A record that was filed or lodged publicly in the trial court and not ordered sealed by the trial court may not be filed under seal in the reviewing court. (C.R.C., Rule 8.160(d).) A record not previously filed in the trial court may be ordered filed under seal by the reviewing court. C.R.C., Rule 8.160(e) specifies a procedure for sealing reviewing court records similar to that provided by C.R.C., Rule 2.551 for sealing trial court records. (See *supra*, §42.) (On briefs in Supreme Court where Court of Appeal has ordered briefs sealed, see C.R.C., Rule 8.212(c).)

(4) *Motion, Petition, or Application To Unseal Record.* A sealed record may only be unsealed by order of the reviewing court. (C.R.C., Rule 8.160(f)(1).) Any person or entity may file a motion, petition, or application to unseal a record. If necessary to preserve confidentiality, the motion, opposition, and supporting documents are filed in a public redacted version and a sealed complete version. (C.R.C., Rule 8.160(f)(2).) If the court proposes to unseal a record on its own motion, it must give notice to the parties. A party may file opposition within 10 days after the notice is mailed or as the court specifies, and any other party may file a response within 5 days after the opposition is filed. (C.R.C., Rule 8.160(f)(3).) In determining whether to unseal a record, the court considers the matters addressed in C.R.C., Rule 2.550(c)-(e) (*supra*, §42). (C.R.C., Rule 8.160(f)(4).) An unsealing order may unseal only part of a record or may unseal a record only as to certain persons. (C.R.C., Rule 8.160(f)(5).)

(5) *Nondisclosure Requirement.* A public record in the reviewing court may not disclose material in a record that is

sealed, lodged conditionally under seal, or subject to a pending motion to seal. (C.R.C., Rule 8.160(g).)

(6) *Procedure for Resolving Sealing Issues. Universal City Studios v. Superior Court* (2003) 110 C.A.4th 1273, 2 C.R.3d 484, involved the application of former C.R.C., Rule 12.5(e) (now C.R.C., Rule 8.160(e)). Defendant sought to compel the trial court to seal documents related to an arbitration dispute, and lodged the documents conditionally under seal with the Court of Appeal. *Held*, sealing request denied.

(a) In order to authorize conditionally sealed documents to be sealed, the Court of Appeal must, under former C.R.C., Rule 12.5(e)(6) (now C.R.C., Rule 8.160(e)(6)), make findings under former C.R.C., Rule 243.1(d) (now C.R.C., Rule 2.550(d)) (*supra*, §42). Under the rule and *NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 C.4th 1178, 86 C.R.2d 778, 980 P.2d 337, 7 Summary (10th), *Constitutional Law*, §423, the party seeking sealing must identify an interest supporting sealing that overrides the right of public access and show a "substantial probability" that the interest will be prejudiced if sealing is not authorized. (110 C.A.4th 1283.)

(b) Here, defendant's contractual obligation not to disclose the terms of a settlement agreement could constitute an overriding interest. However, defendant failed to show any prejudice to a legitimate commercial interest. The documents lodged conditionally under seal either have been heavily redacted to remove financial information (110 C.A.4th 1284), or include extensive pleadings and orders that have nothing to do with the settlement agreement (110 C.A.4th 1285), or contain information that has already been made public in other filings (110 C.A.4th 1286).

Huffy Corp. v. Superior Court (2003) 112 C.A.4th 97, 4 C.R.3d 823, involved an "ordinary coverage dispute" over third-party insurer liability for environmental damage at a superfund site. A number of documents were deemed confidential by the parties. The parties stipulated and the trial court ordered that any law and motion papers that referred to a document the parties had deemed confidential be filed under seal. Defendant insured filed a petition for mandamus in the Court of Appeal including over 2,500 pages of sealed exhibits (later narrowed to specified documents). *Held*, none of the documents filed in the Court of Appeal could be sealed.

(a) *Scope of holding.* The issue here is not the validity of the trial court's sealing order but whether the exhibits in the Court of Appeal on the mandamus petition should be ordered unsealed under former C.R.C., Rule 12.5(f) (now C.R.C., Rule 8.160(f)). On this issue, the trial court's order "is entitled to no weight." In ordering sealing, the trial court failed to make findings as required by *NBC Subsidiary (KNBC-TV)*, and the effect of its order was to seal thousands of pages of routine documents. (112 C.A.4th 105.)

(b) *No basis for sealing.* Defendant seeks to seal the following documents: (1) a settlement agreement with a confidentiality clause (with an express exception where disclosure is ordered by a court), (2) papers revealing the source of payments to settle pollution claims, (3) documents containing admissions that defendant may have violated federal and state pollution laws, (4) papers revealing the identity of witnesses to possible violations of pollution laws, and (5) documents that disclose the identity of other entities that may have violated pollution laws. Under the standards articulated in *Universal City Studios*, defendant has failed to show a "substantial probability" that any interest will be prejudiced if these documents are ordered unsealed and has not identified an overriding public interest requiring the information to be sealed. The settlement agreement is largely "routine verbiage" and allows for disclosure by court order. No privilege in the source of payments documents has been identified, and any privilege in the identity of witnesses has been waived. (112 C.A.4th 108, 109.)

(c) *Appropriate procedure.* The Rules of Court do not address "the procedure to be followed when a document filed under seal in the trial court is ordered unsealed on appeal. This is therefore a matter of discretion. We conclude the judicious course under these circumstances is to return the entirety of the sealed records to defendant. Within 10 days of the filing date of this opinion, defendant may file whatever documents [the rule] permits to be filed. ... If the public or any journalist desires to see the currently sealed documents, they are located in the superior court file. Any motion to unseal those documents should first be filed in the respondent court." (112 C.A.4th 110.)

In *H.B. Fuller Co. v. Doe* (2007) 151 C.A.4th 879, 60 C.R.3d 501, plaintiff corporation sought to discover, by a discovery subpoena, the identity of an anonymous defendant who allegedly posted plaintiff's confidential information on the Internet. The trial court denied defendant's motion to quash the subpoena, relying in part on allegedly confidential documents filed under seal pursuant to a stipulated order of the trial court. Defendant moved in the appellate court to unseal the documents. *Held*, motion to unseal documents in the appellate court granted. (a) The discovery exception of C.R.C., Rule 2.550(a) (*supra*, §42) is not applicable. Defendant's motion to quash the discovery subpoena is not preliminary to any larger litigation but central to the purpose of the case, and the information sought on discovery is invested with substantial constitutional interest (defendant's First Amendment right to speak anonymously on the Internet). (151 C.A.4th 891.) (b) Plaintiff's sealed documents are generally vague and conclusory and contain some information that is manifestly not private, and plaintiff cannot identify any specific confidential facts sought to be withheld or harm that would result to it from unsealing the documents. (151 C.A.th 894.) (c) Following the procedure suggested in *Huffy*, the documents are ordered unsealed 15 days from the date of the order, unless plaintiff earlier identifies documents it wishes to be stricken from the record. (151 C.A.4th 900.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Scope of Rule.* In 2009, C.R.C., Rule 8.160 was renumbered C.R.C., Rule 8.46. The subdivisions of the rule cited in the text were not changed. C.R.C., Rule 8.46 also governs records proposed to be sealed in the appellate division of the superior court. (C.R.C., Rule 8.119, added in 2009.)



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8. Judicial Days and Holidays.

a. Judicial Days.

2 *Witkin Cal. Proc. Courts* § 45

[§ 45] Judicial Days.

(1) *No Terms of Court.* Before the adoption of the California Constitution of 1879 there were fixed terms of court, and any judicial act done by a court after its term had ended was void. Under the present Constitution there are no terms of court. (See *Von Schmidt v. Widber* (1893) 99 C. 511, 513, 34 P. 109.)

(2) *Supreme Court and Courts of Appeal.* The Chief Justice may convene the Supreme Court at any time (Cal. Const., Art. VI, §2) and the Supreme Court and the Courts of Appeal "may transact business at any time" (C.C.P. 41).

(3) *Other Courts.* C.C.P. 133 et seq., govern judicial days and holidays. Courts "may be held and judicial business transacted on any day" except as otherwise provided for holidays. (C.C.P. 133.)

(4) *Adjournments.* Adjournments of courts from day to day or from time to time are construed as recesses in the sessions, and do not prevent the court from sitting at any time. (C.C.P. 42 [Supreme Court and Courts of Appeal]; C.C.P. 74 [superior courts].)

(5) *Evening Hours.* One or more departments of the superior court may remain open at any hour of the day or night for the transaction of any business within its civil or criminal jurisdiction, as the judges of the court prescribe. (C.C.P. 134(c).)

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b. Judicial Holidays.

1. What Are Holidays.

2 *Witkin Cal. Proc. Courts* § 46

[§ 46] What Are Holidays.

(1) *General Holidays.* The following days are declared by *Govt.C. 6700* to be holidays:

- (a) Every Sunday.
- (b) January 1st (New Year's Day).
- (c) The third Monday in January (Dr. Martin Luther King, Jr. Day), if adopted by a city, county, or district.
- (d) February 12th (Lincoln Day).
- (e) The third Monday in February (Presidents Day).
- (f) March 31st (Cesar Chavez Day), if adopted by a city, county, or district.
- (g) The last Monday in May (Memorial Day).
- (h) July 4th (Independence Day).
- (i) The first Monday in September (Labor Day).
- (j) September 9th (Admission Day).
- (k) The second Monday in October (Columbus Day).
- (l) November 11th (Veterans Day).
- (m) December 25th (Christmas Day).

(n) Good Friday from 12 noon until 3 p.m.

(o) Every day appointed by the President or Governor for a public fast, thanksgiving, or holiday, if adopted by a city, county, or district.

(2) *Judicial Holidays*. Full holidays designated in *Govt.C. 6700*, including Thanksgiving Day, but excluding Admission Day and any other day appointed by the President but not by the Governor, are judicial holidays. The day after Thanksgiving is also a judicial holiday. (*C.C.P. 135*.)

(3) *Saturday*. Saturday afternoon (from noon to midnight) is a general holiday. (*Govt.C. 6702*; see *In re Dal Porte* (1926) 198 C. 216, 219, 244 P. 355; *Lancel v. Postlethwaite* (1916) 172 C. 326, 331, 156 P. 486.) Saturday is also a judicial holiday. (*C.C.P. 135*.)

(4) *Good Friday*. The statutory provision for Good Friday was held to violate the Establishment Clause of the United States Constitution and the Free Exercise Clause of the California Constitution. (See *Mandel v. Hodges* (1976) 54 C.A.3d 596, 619, 127 C.R. 244, 7 Summary (10th), *Constitutional Law*, §556 [Governor's order giving state employees time off with pay was invalid].)

(5) *Election Day*. Election day is not a judicial holiday under *Govt.C. 6700*. Thus, courts are open. (See *Govt.C. 24261* [superior courts must be open on election day if county offices are open].)

(6) *Holiday Falling on Saturday or Sunday*. When specified holidays (January 1st, July 4th, etc.) fall on Sunday, the following Monday is a holiday. When Veterans Day falls on a Saturday, the preceding Friday is a holiday. If other general holidays fall on a Saturday, the county board of supervisors may provide for an alternate holiday for county employees other than court attaches. (*Govt.C. 6701*.) If a judicial holiday designated in *Govt.C. 6700* falls on a Saturday or Sunday, the Judicial Council may designate an alternative day. (*C.C.P. 135*.)

(7) *Furlough Days*. *Govt.C. 68108* authorizes a county to close the courts on unpaid furlough days. In *Superior Court v. Mendocino* (1996) 13 C.4th 45, 51 C.R.2d 837, 913 P.2d 1046, the statute was challenged under the separation of powers doctrine as a wrongful usurpation of judicial power by the Legislature. *Held*, the statute is constitutional on its face, as a reasonable regulation affecting a court's inherent powers. The Legislature has historically designated legal holidays and other days on which the courts are closed, and the exercise of that power does not threaten the integrity or independence of the judicial process. (13 C.4th 57, 60, 66.)

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b. Judicial Holidays.

2. General Rule: No Judicial Business.

2 Witkin Cal. Proc. Courts § 47

[§ 47] General Rule: No Judicial Business.

(1) *Statutory Prohibition.* Subject to specified exceptions, the courts are "closed for the transaction of judicial business on judicial holidays." (*C.C.P. 134(a)*; for exceptions, see *infra*, §48; on judicial holidays, see *supra*, §46.) Officers and employees of the courts may observe only judicial holidays established under *C.C.P. 135*. (*C.C.P. 135*.) (See generally *73 Am.Jur.2d* (2001 ed.), *Sundays and Holidays* §66 et seq.)

(2) *Effect of Proceeding on Holiday.* The effect of prohibited proceedings on a holiday is probably excess of jurisdiction and not mere error. If a timely objection is made, the proceedings may be held void; but if they are taken without objection, the defect, which does not go to jurisdiction of the subject matter, is waived. This analysis is supported in principle by *People v. Browning* (1933) 132 C.A. 136, 22 P.2d 784, where the court said: "The holiday does not oust the court of jurisdiction, and the right to be relieved of the necessity of transacting judicial business on such days may be waived." (132 C.A. 145.) Although the court described the conduct of judicial business on a holiday as an "irregularity," its concession that a judgment of conviction pronounced on a holiday over the defendant's objection would be *void* makes it clear that jurisdiction to act is involved. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §285 et seq.; 85 *A.L.R.2d* 595 [validity of court's judgment rendered on Sundays and holidays].)

(3) *Computing Time.* Even though a court is open on a judicial holiday, the day is not considered a "nonholiday" for purposes of computing the time required for the conduct of any proceeding or the performance of any act. A paper lodged with a court open on a judicial holiday must be filed on the next day that is not a holiday, if it meets the appropriate criteria for filing. (*C.C.P. 134(d)*.)

(4) *Holding Court.* "If a day appointed for the holding or sitting of a court, or to which it is adjourned, falls on a judicial holiday, it shall be deemed appointed for or adjourned to the next day." (*C.C.P. 136*.)

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3. Exceptions.

2 Witkin Cal. Proc. Courts § 48

[§ 48] Exceptions.

Exceptions to the general prohibition of judicial business on judicial holidays are recognized:

(1) *Jury Instructions and Verdict.* Trial courts may remain open on judicial holidays (a) to give instructions to a jury during deliberations, and (b) to receive a verdict or discharge the jury. (C.C.P. 134(a)(1), (a)(2).)

(2) *Powers of Magistrate.* Trial courts may remain open on judicial holidays to "exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature." (C.C.P. 134(a)(3).)

(3) *Arraignments.* Trial courts may remain open on judicial holidays to conduct arraignments. (C.C.P. 134(a)(3).)

(4) *Injunctions and Prohibition.* Courts may remain open to issue and serve injunctions and writs of prohibition on any day. (C.C.P. 134(b).)

(5) *Small Claims Court.* Small claims courts may conduct sessions on Saturday. (C.C.P. 134(a)(4).)

(6) *Legal Process.* Legal process or written instruments issued, filed, served, executed, or recorded on Saturday are valid. (Govt.C. 6702.) And it has been held that no statute prohibits the service of process on a holiday. (*Strange v. Coryell* (1935) 3 C.A.2d 635, 636, 40 P.2d 289; see 63 A.L.R.3d 423 [service on Sunday or holiday].)

(7) *Judges' Election To Remain Open.* One or more departments of the superior court may remain open on a judicial holiday for the transaction of any business within its civil or criminal jurisdiction, as the judges of the court prescribe. (C.C.P. 134(c).)

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c. Special Holidays.

2 *Witkin Cal. Proc. Courts* § 49

[§ 49] Special Holidays.

Special holidays have occasionally been proclaimed for particular purposes different from those underlying general holidays. A notable example was the bank holiday of 1933, designed to prevent the hoarding of money. (See *Vidal v. Barks* (1933) 218 C. 99, 105, 21 P.2d 952 [judicial business was properly transacted during that period].)

Govt.C. 6705 now covers the subject: "A special or limited holiday is a holiday applying only to a special class or classes of business, or a special class or classes of persons, and not appointed to be generally observed throughout the State by all classes of business and all classes of persons. On any special or limited holiday appointed by the President or Governor, all courts ... shall be open and function in their normal and usual manner."

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8. Judicial Days and Holidays.

d. Extension of Time by Holiday.

1. Where Last Day Is Holiday.

2 *Witkin Cal. Proc. Courts* § 50

[§ 50] Where Last Day Is Holiday.

(1) *In General.* If the last day to do an act falls on a general holiday, the time is extended to the *next day* that is not a holiday. (*C.C.P.* 12, 12a; *Govt.C.* 6707, 6800; see *Alford v. Industrial Acc. Com.* (1946) 28 *C.2d* 198, 200, 169 *P.2d* 641; *Tilden Lumber Co. v. Perino* (1934) 2 *C.A.2d* 133, 134, 37 *P.2d* 466; *Tran v. Fountain Valley Community Hosp.* (1997) 51 *C.A.4th* 1464, 1466, 60 *C.R.2d* 91; *Gans v. Smull* (2003) 111 *C.A.4th* 985, 990, 4 *C.R.3d* 353 [*C.C.P.* 12a applies to acts "provided or required by law to be performed within a specified period," not to acts governed solely by contractual provisions, e.g., exercise of option to extend lease].)

The Rules of Court make the statutory extension applicable to judicial proceedings, usually by cross-reference to the Code of Civil Procedure. (See *C.R.C.*, Rule 1.10 [superior court]; *C.R.C.*, Rule 8.60(a) [appellate courts].)

The closing of a public office for the whole of any day makes that day a holiday for computing time under *C.C.P.* 12 and 12a. (*C.C.P.* 12b.) (See *Bennett v. Suncloud* (1997) 56 *C.A.4th* 91, 98, 65 *C.R.2d* 80 [courthouse closed because of earthquake].)

(2) *Nature of Extension.* The extension statutes contemplate an act to be done *within* a specified time. (*In re Rodriguez* (1964) 60 *C.2d* 822, 826, 36 *C.R.* 609, 388 *P.2d* 881.) Thus, in election cases, involving statutory requirements for filing papers "not less" or "not later" than a given number of days before a specified time, it has been held that a holiday on the last day does not extend the time. (*Steele v. Bartlett* (1941) 18 *C.2d* 573, 574, 116 *P.2d* 780.)

In *DeLeon v. Bay Area Rapid Transit Dist.* (1983) 33 *C.3d* 456, 458, 460, 189 *C.R.* 181, 658 *P.2d* 108, the trial court, relying on *Steele* and *Griffin v. Dingley* (1896) 114 *C.* 481, 46 *P.* 457, held *C.C.P.* 12a inapplicable to *Govt.C.* 945.6, which requires that an action against a public entity be filed "not later than six months" after service of notice of denial of a claim. *Held*, reversed.

(a) *Steele* and *Griffin* dealt with statutes that "counted backward from a given date--election day" to permit time to print ballots. *Govt.C.* 945.6 "is forward-looking," limiting the time to file a lawsuit so that claims are not stale and

evidence is available. "The holiday extension would not interfere with the purpose of the statute since such a brief extension would be innocuous to the availability of witnesses and evidence." (33 C.3d 459.)

(b) *C.C.P. 12a* states a general rule for computation of time and is applicable generally to statutes of limitation. An exception to the rule will not be found unless a different method of computation is clearly provided for. (33 C.3d 460, 461.)

(3) *Saturday Is Holiday*. Formerly, Saturday did not come within the rule of extension, for only the afternoon of Saturday was a holiday, and judicial business could be transacted in the morning. (See *Lancel v. Postlethwaite* (1916) 172 C. 326, 331, 156 P. 486.) All day Saturday is now a holiday for purposes of extension of time. (*C.C.P. 12a*; see *C.C.P. 13b* [an act required to be performed on a particular day or within a specified period "may be performed (but is not hereby required to be performed) on a Saturday, with like effect as if performed on a day which is not a holiday"]; *Govt.C. 6707* [when last day for filing document with state agency falls on Saturday, act may be performed on next business day].)

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d. Extension of Time by Holiday.

2. No Extension by Intervening Holiday.

2 *Witkin Cal. Proc. Courts* § 51

[§ 51] No Extension by Intervening Holiday.

The time for performing required acts is not extended by an intervening holiday. In 1933, at the time of the national bank holidays, *C.C.P. 12a* was enacted to provide that, if a holiday occurred within the period in which the act was to be done, it was excluded from the computation of the total time allowed; i.e., each intervening holiday gave an extra day of performance. (See *Estate of Harker* (1948) 88 C.A.2d 6, 10, 198 P.2d 51; 1 *Stanf. L. Rev.* 564.) The language of the statute was interpreted to apply only to the extremely limited class of "irregular" general holidays appointed by the President or the Governor (the dates of which are not known in advance), and time was not extended by either the fixed statutory general holidays or by special holidays. (See *Millsap v. Hooper* (1949) 34 C.2d 192, 195, 208 P.2d 982; *Lynch v. Harrell* (1941) 44 C.A.2d 863, 866, 113 P.2d 261; *Francis v. Superior Court* (1945) 68 C.A.2d 643, 645, 157 P.2d 23.) *C.C.P. 12a* was amended in 1951 to eliminate entirely the extension of time by intervening holidays.

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II. JUDICIAL CONDUCT AND DISCIPLINE

A. Code of Judicial Ethics.

1. Development and Adoption.

2 *Witkin Cal. Proc. Courts* § 52

[§ 52] Development and Adoption.

(1) *A.B.A. Code of Judicial Conduct*. The original Canons of Judicial Ethics were adopted by the American Bar Association (A.B.A.) in 1924. (See 62 A.B.A. Rep. 1123; 74 A.B.A. Rep. 548; 22 So. Cal. L. Rev. 240; 24 So. Cal. L. Rev. 10.) They were replaced by a new Code of Judicial Conduct in 1972. (See 58 A.B.A.J. 1207 [Code and Commentary]; 9 San Diego L. Rev. 785 [background and discussion of proposed code].) A revised A.B.A. Model Code of Judicial Conduct was adopted in 1990, consisting of five canons with accompanying commentary. (See 74 Judicature 124; 31 San Diego L. Rev. 617 [quasi-judicial activity and the 1990 A.B.A. Code].) The Code is available at the A.B.A. website: www.abanet.org.

(2) *California Code of Judicial Conduct*. The Conference of California Judges (now the California Judges Association) adopted its first set of Canons in 1949. (See 24 So. Cal. L. Rev. 10.) In 1975, the California Judges Association adopted a new California Code of Judicial Conduct, based on the 1972 A.B.A. Code. In 1992, the Association adopted a revised California Code of Judicial Conduct, based on the 1990 A.B.A. revision.

(3) *California Code of Judicial Ethics*. A constitutional amendment in 1994 imposed the responsibility for rules of judicial conduct on the Supreme Court. The court is required to make rules, referred to as the Code of Judicial Ethics, "for the conduct of judges, both on and off the bench, and for judicial candidates in the conduct of their campaigns." (Cal. Const., Art. VI, §18(m).) In implementing this requirement, the Supreme Court appointed an Advisory Committee on Judicial Ethics to review the Code of Judicial Conduct and recommend revisions, and adopted the Code of Judicial Conduct as a transitional code. Effective January 15, 1996, the Supreme Court adopted a new California Code of Judicial Ethics. The preface to the 1996 Code explains the development and adoption of the A.B.A. Code and the California Code. (See generally C.E.B., 2 Civil Proc. During Trial 3d, §§16.53 et seq., 16.130 et seq.)

(4) *Administrative Adjudication Code of Ethics*. Under Govt.C. 11475 et seq., entitled Administrative Adjudication Code of Ethics, portions of the Code of Judicial Ethics apply to administrative law judges and specified presiding officers in administrative proceedings. (See Ethical Standards for Administrative Law Judges, 26 Cal. Law Rev. Com. Reports, p. 335; 9 Cal. Proc. (5th), *Administrative Proceedings*, §60.)

(5) *Judicial Conduct Handbook*. The California Judicial Conduct Handbook, by David M. Rothman, is a

comprehensive manual and source book on the subject of judicial conduct. The third edition was published in 2007.

West's Key Number Digest, Judges 11(2)

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II. JUDICIAL CONDUCT AND DISCIPLINE

A. Code of Judicial Ethics.

2. Structure.

2 *Witkin Cal. Proc. Courts* § 53

[§ 53] Structure.

(1) *In General.* The Code of Judicial Ethics consists of six numbered canons, stating broad rules governing judicial conduct. Detailed lettered and numbered sections expand the statements of the canons. The code also includes the following:

(a) A preface explaining the development and adoption of the A.B.A. Code and the California Code. (See *supra*, §52.)

(b) A preamble explaining the nature and scope of the Code. (See *infra*, §54.)

(c) A terminology section defining significant terms used in the Code.

(d) Advisory committee commentary explicating and illustrating the operation of the canons.

(2) *The Canons.* The Canons read as follows:

Canon 1: "A judge shall uphold the integrity and independence of the judiciary."

Canon 2: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."

Canon 3: "A judge shall perform the duties of judicial office impartially and diligently."

Canon 4: "A judge shall so conduct the judge's quasi-judicial and other extrajudicial activities as to minimize the risk of conflict with judicial obligations."

Canon 5: "A judge or judicial candidate shall refrain from inappropriate political activity."

Canon 6: "Compliance with the Code of Judicial Ethics" (specifying who must comply with the Code).

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II. JUDICIAL CONDUCT AND DISCIPLINE

A. Code of Judicial Ethics.

3. Nature and Scope.

2 Witkin Cal. Proc. Courts § 54

[§ 54] Nature and Scope.

(1) *Preamble.* The preamble to the Code reads as follows:

"Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible member of government under the rule of law."

"The Code of Judicial Ethics ('Code') establishes standards for ethical conduct of judges on and off the bench and for candidates for judicial office. The Code consists of broad declarations called Canons, with subparts, and a Terminology section. Following each Canon is a Commentary section prepared by the Supreme Court Advisory Committee on the Code of Judicial Ethics. The Commentary, by explanation and example, provides guidance as to the purpose and meaning of the Canons. The Commentary does not constitute additional rules and should not be so construed. All members of the judiciary must comply with the Code. Compliance is required to preserve the integrity of the bench and to ensure the confidence of the public."

"The Canons should be read together as a whole, and each provision should be construed in context and consistent with every other provision. They are to be applied in conformance with constitutional requirements, statutes, other court rules, and decisional law. Nothing in the Code shall either impair the essential independence of judges in making judicial decisions or provide a separate basis for civil liability or criminal prosecution."

"The Code governs the conduct of judges and judicial candidates and is binding upon them. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, requires a reasoned application of the text and consideration of such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system."

(2) *Conduct Not Covered by Specific Canon.* Conduct may be unethical even though not covered by any specific canon. In *Zinn v. Ex-Cell-O Corp.* (1957) 148 C.A.2d 56, 306 P.2d 1017, the trial judge, with the knowledge of defense

counsel, engaged one of plaintiff's counsel to represent him in disqualification proceedings in a pending criminal case. Although no reversible error was found in the main civil case, the judge's conduct was strongly criticized: "It certainly was highly irregular for a judge before whom a case was being tried, to employ as his attorney in another matter one of the attorneys in that matter. Although here that employment was open and not surreptitious, that fact does not detract from the impropriety of the action." (148 C.A.2d 87.) (See Rothman, California Judicial Conduct Handbook 3d, §1.20 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER II - Courts

Witkin Summary of California Law

II. JUDICIAL CONDUCT AND DISCIPLINE

A. Code of Judicial Ethics.

4. Judicial Integrity and Independence (Canon 1).

2 *Witkin Cal. Proc. Courts* § 55

[§ 55] Judicial Integrity and Independence (Canon 1).

(1) *In General.* Canon 1 states: "A judge shall uphold the integrity and independence of the judiciary." The section provides: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective. A judicial decision or administrative act later determined to be incorrect legally is not itself a violation of this Code." (See Rothman, *California Judicial Conduct Handbook* 3d, §§2.01 et seq., 8.00 et seq.; 72 *So. Cal. L. Rev.* 311 [symposium on judicial independence and accountability].)

(2) *Objective Standard.* Former Canons 1 and 2, similar to present Canons 1 and 2 (*infra*, §56), were invoked in *Geiler v. Commission on Judicial Qualifications* (1973) 10 *C.3d* 270, 110 *C.R.* 201, 515 *P.2d* 1, *infra*, §77. The court observed that these two canons emphasize the importance of appraising judicial misconduct objectively rather than subjectively: "It is immaterial that the conduct concerned was probably lawful, albeit unjudicial, or that petitioner may have perceived his offensive and harassing conduct as low-humored horseplay." (10 *C.3d* 281.)

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A. Code of Judicial Ethics.

5. Impropriety (Canon 2).

2 Witkin Cal. Proc. Courts § 56

[§ 56] Impropriety (Canon 2).

(1) *In General.* Canon 2 states: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." (See Rothman, California Judicial Conduct Handbook 3d, §8.00 et seq.; 24 So. Cal. L. Rev. 12.)

(2) *Promoting Public Confidence.* "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." (Canon 2A.)

(3) *Use of Prestige of Judicial Office.* "A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge." (Canon 2B(1).)

"A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written or oral communication, to advance the pecuniary or personal interests of the judge or others." (Canon 2B(2).) Canon 2B(2) does not prohibit the following:

(a) "A judge may testify as a character witness, provided the judge does so only when subpoenaed." (Canon 2B(2)(a).)

(b) "A judge may, without a subpoena, provide the Commission on Judicial Performance with a written communication containing (i) factual information regarding a matter pending before the commission, or (ii) information related to the character of a judge who has a matter pending before the commission, provided that any such factual or character information is based on personal knowledge. In commission proceedings, a judge shall provide information responsive to a subpoena or when officially requested to do so by the commission." (Canon 2B(2)(b).)

(c) "A judge may provide factual information in State Bar disciplinary proceedings and shall provide information responsive to a subpoena or when officially requested to do so by the State Bar." (Canon 2B(2)(c).)

(d) "A judge may respond to judicial selection inquiries, provide recommendations (including a general character reference, relating to the evaluation of persons being considered for a judgeship) and otherwise participate in the process of judicial selection." (Canon 2B(2)(d).)

(e) "A judge may serve as a reference or provide a letter of recommendation only if based on the judge's personal knowledge of the individual. These written communications may include the judge's title and be written on stationery that uses the judicial title." (Canon 2B(2)(e).)

"A judge shall not initiate communications with a sentencing judge or a probation or corrections officer, but may provide them with information for the record in response to an official request. A judge may initiate communications with a probation or corrections officer concerning a member of the judge's family, provided the judge is not identified as a judge in the communication." (Canon 2B(3).)

(4) *Membership in Organizations.* "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation." (Canon 2C.)

"This Canon does not apply to membership in a religious organization or an official military organization of the United States. So long as membership does not violate Canon 4A, this Canon does not bar membership in a nonprofit youth organization." (Canon 2C.) (On Canon 4, see *infra*, §58.)

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II. JUDICIAL CONDUCT AND DISCIPLINE

A. Code of Judicial Ethics.

6. Conduct of Judicial Proceedings (Canon 3).

2 Witkin Cal. Proc. Courts § 57

[§ 57] Conduct of Judicial Proceedings (Canon 3).

(1) *In General.* Canon 3 states: "A judge shall perform the duties of judicial office impartially and diligently." Canon 3A provides: "All of the judicial duties prescribed by law shall take precedence over all other activities of every judge. In the performance of these duties, the following standards apply." (See Rothman, California Judicial Conduct Handbook 3d, §§2.01 et seq., 4.00 et seq., 5.00 et seq.; 34 Southwestern U. L. Rev. 607 [sexual orientation bias against criminal defendants].)

(2) *Adjudicative Responsibilities.* Canon 3B sets forth a judge's adjudicative responsibilities:

(a) Hear and decide all matters assigned except those in which the judge is disqualified. (Canon 3B(1).)

(b) Be faithful to the law, "regardless of partisan interests, public clamor, or fear of criticism," and maintain professional competence. (Canon 3B(2).)

(c) Require order and decorum in proceedings. (Canon 3B(3).)

(d) Be patient, dignified, and courteous to those with whom the judge deals in an official capacity, and require similar conduct of lawyers, court staff, and personnel under the judge's direction and control. (Canon 3B(4).)

(e) Perform judicial duties without bias or prejudice and refrain from speech, gestures, or other conduct that would reasonably be perceived as sexual harassment or bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. (Canon 3B(5).)

(f) Require lawyers in proceedings before the judge to refrain from manifesting bias or prejudice. (Canon 3B(6).)

(g) Accord a full right to be heard to every person having a legal interest in the proceeding, but refrain from initiating, permitting, or considering ex parte communications except as authorized. (Canon 3B(7) [setting forth scope of permissible communications].)

(h) Dispose of all judicial matters fairly, promptly, and efficiently, and "manage the courtroom in a manner that

provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law." (Canon 3B(8).)

(i) Refrain from making public comment about pending proceedings, or nonpublic comment that might substantially interfere with a fair trial or hearing (not including, however, statements made in the course of official duties or proceedings in which the judge is a litigant in a personal capacity). (Canon 3B(9).)

(j) Refrain from commending or criticizing jurors for their verdicts other than in a court order or opinion. (Canon 3B(10).)

(k) Refrain from disclosing or using nonpublic information acquired in a judicial capacity for any purpose unrelated to judicial duties. (Canon 3B(11).)

(3) *Administrative Responsibilities.* Canon 3C sets forth a judge's administrative responsibilities:

(a) Diligently discharge the judge's administrative responsibilities without bias or prejudice; maintain professional competence in judicial administration; cooperate with other judges and court officials in the administration of court business. (Canon 3C(1).)

(b) Require staff and court personnel under the judge's direction and control to observe "appropriate standards of conduct" and refrain from manifesting bias or prejudice in performing official duties. (Canon 3C(2).)

(c) Take reasonable measures to assure the prompt disposition of matters and the proper performance of other judicial responsibilities by other judges under his or her supervisory authority. (Canon 3C(3).)

(d) Refrain from making unnecessary court appointments, exercise the power of appointment impartially and on merit, and avoid nepotism and favoritism; not approve compensation above the reasonable value of services rendered. (Canon 3C(4).)

(e) Perform administrative duties without bias or prejudice and refrain from speech, gestures, or other conduct that would reasonably be perceived as sexual harassment or bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. (Canon 3C(5).)

(4) *Disciplinary Responsibilities.* Canon 3D sets forth a judge's disciplinary responsibilities:

(a) "Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, the judge shall take or initiate appropriate corrective action, which may include reporting the violation to the appropriate authority." (Canon 3D(1).)

(b) "Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action." (Canon 3D(2).)

(c) "A judge shall promptly report in writing to the Commission on Judicial Performance when he or she is charged in court by misdemeanor citation, prosecutorial complaint, information, or indictment, with any crime in the United States as specified below. Crimes that must be reported are: (1) all crimes other than those that would be considered misdemeanors not involving moral turpitude or infractions under California law; and (2) all misdemeanors involving violence (including assaults), the use or possession of controlled substances, the misuse of prescriptions, or the personal use or furnishing of alcohol. A judge also shall promptly report in writing on conviction of such crimes." (Canon 3D(3) [also specifying reporting requirements of retired judges sitting by assignment and subordinate judicial officers].)

(5) *Disqualification.* Canon 3E sets forth a judge's responsibility for disqualification:

(a) A judge must disqualify himself or herself when disqualification is required by law. (Canon 3E(1).)

(b) In trial court proceedings, a judge must disclose on the record information that is "reasonably relevant" to the question of disqualification under *C.C.P. 170.1*, "even if the judge believes there is no actual basis for disqualification." (Canon 3E(2).)

(c) Ownership of corporate bonds issued by a party is disqualifying if the fair market value exceeds \$ 1,500. Ownership of Government bonds issued by a party is disqualifying only if the outcome of the proceeding could substantially affect the value of the judge's bonds. Ownership of mutual or common investment funds that hold bonds is not disqualifying. (Canon 3E(3).)

(d) Canon 3E(4) and 3E(5) set forth in detail circumstances in which disqualification of an appellate justice is required.

(6) *Courtesy*. A judge's obligation to be courteous in judicial proceedings (now Canon 3B(4)) has been the subject of a number of decisions. (See *Etzel v. Rosenbloom* (1948) 83 C.A.2d 758, 765, 189 P.2d 848; *Germ v. San Francisco* (1950) 99 C.A.2d 404, 415, 222 P.2d 122; *People v. Black* (1957) 150 C.A.2d 494, 501, 310 P.2d 472 [court severely criticized trial judge's "captious attitude" toward defendant's counsel and "obvious bias" in favor of complaining witness; rudeness exhibited in quotations from record was "far removed from the standards of conduct resting upon trial judges"]; *People v. Campbell* (1958) 162 C.A.2d 776, 786, 329 P.2d 82 [judge's continual interruption of direct examination was harmless].)

(7) *Ex Parte Communications Between Judges*. In *People v. Hernandez* (1984) 160 C.A.3d 725, 206 C.R. 843, after defendant had pleaded guilty to robbery, the trial judge had a conversation with another judge about that judge's use of sentencing criteria in a similar case. *Held*, the conversation did not violate former Canon 3A(4) (now Canon 3B(7)).

(a) The commentary to the Canon states: "The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities." (160 C.A.3d 739.)

(b) The burdens placed on the trial judge by the volume of cases demonstrate the need for assistance from either another judge or a law clerk. "History and logic recognize the value of certain types of discussion between judges and, in our present society, the demands of the judicial function require it." (160 C.A.3d 739.) Thus, the commentaries recognize that "discourse between judges such as occurred in the instant case is not inconsistent with public expectations of the decision-making process or erosive of public confidence in the judiciary." (160 C.A.3d 739.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Administrative Responsibilities*. The first portion of Canon 3C(1) was revised in 2009 to require the judge to diligently discharge the judge's administrative responsibilities impartially, on the basis of merit, without bias or prejudice, free of conflict of interest, and in a manner that promotes public confidence in the integrity of the judiciary.



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A. Code of Judicial Ethics.

7. Conduct of Other Activities (Canon 4).

2 *Witkin Cal. Proc. Courts* § 58

[§ 58] Conduct of Other Activities (Canon 4).

(1) *In General.* Canon 4 states: "A judge shall so conduct the quasi-judicial and extrajudicial activities as to minimize the risk of conflict with judicial obligations." Canon 4A provides: "A judge shall conduct all of the judge's extrajudicial activities so that they do not (1) cast reasonable doubt on the judge's capacity to act impartially; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties." (See Rothman, *California Judicial Conduct Handbook* 3d, §§3.30 et seq., 9.00 et seq.)

(2) *Quasi-Judicial and Avocational Activities.* "A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this Code." (Canon 4B.) (See 28 *Loyola L.A. L. Rev.* 795 [symposium on extrajudicial speech].)

(3) *Governmental, Civic, and Charitable Activities.* Canon 4C regulates a judge's participation in governmental activities not related to the law, the legal system, the administration of justice, or the judge's personal interest; service on governmental commissions; participation in public events; service as an officer, director, trustee, or nonlegal advisor of an organization or governmental agency; and fund-raising and membership solicitation for organizations.

(4) *Financial Activities.* Canon 4D restricts a judge's financial and business dealings and investments; use of the judge's name for the promotion of a business or product; service as an officer, director, manager, or employee of a business affected with a public interest (including a financial institution, insurance company, or public utility); and the acceptance of gifts, bequests, favors, and loans. (See 24 *So. Cal. L. Rev.* 15 [use of name in connection with business venture or commercial advertising program].)

(5) *Fiduciary Activities.* Canon 4E restricts a judge's service and activities as an executor, administrator, personal representative, trustee, guardian, attorney in fact, or other fiduciary.

(6) *Legal and Judicial Activities.* A judge may not practice law (Canon 4G), and may not act as an arbitrator or mediator or perform judicial functions in a private capacity unless expressly authorized by law (Canon 4F). (On prohibition of law practice, see *infra*, §62.)

(7) *Compensation and Reimbursement.* Canon 4H governs compensation and reimbursement for extrajudicial activities. (For restrictions on gifts, honoraria, and travel expenses, see *infra*, §65.)

SUPPLEMENT: [This section is current through the latest supplement]



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II. JUDICIAL CONDUCT AND DISCIPLINE

A. Code of Judicial Ethics.

8. Political Activity (Canon 5).

2 *Witkin Cal. Proc. Courts* § 59

[§ 59] Political Activity (Canon 5).

(1) *In General.* Canon 5 states: "A judge or judicial candidate shall refrain from inappropriate political activity." The section provides: "Judges are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, avoid political activity which may create the appearance of political bias or impropriety. Judicial independence and impartiality should dictate the conduct of judges and candidates for judicial office." (See Rothman, *California Judicial Conduct Handbook* 3d, §11.00 et seq.; 65 *So. Cal. L. Rev.* 1639 [election conduct]; 40 *Stanf. L. Rev.* 449 [disqualification of elected judges from cases involving campaign contributors].)

(2) *Restrictions.* The following restrictions apply:

(a) A judge or candidate for election to judicial office shall not act as a leader or hold office in a political organization. (Canon 5A(1).)

(b) A judge or candidate for election to judicial office shall not make speeches for a political organization or candidate for nonjudicial office or publicly endorse or oppose such a candidate. (Canon 5A(2).)

(c) A judge or candidate for election to judicial office shall not personally solicit funds for a political organization or nonjudicial candidate or make contributions to a political party or organization or to a nonjudicial candidate in excess of \$ 500 per year per party or organization or candidate, or in excess of an aggregate of \$ 1,000 per year for all parties or organizations or candidates. (Canon 5A(3).)

(d) "A candidate for election or appointment to judicial office shall not (1) make statements to the electorate or the appointing authority that commit the candidate with respect to cases, controversies, or issues that could come before the courts, or (2) knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, present position, or any other fact concerning the candidate or his or her opponent." (Canon 5B.)

(e) "Candidates for judicial office may speak to political gatherings only on their own behalf or on behalf of another candidate for judicial office." (Canon 5C.) (See 35 *U.C.L.A. L. Rev.* 207 [constitutionality of restrictions on campaign

speech by candidates for judicial office]; for restrictions on content of judicial candidates' statements to voters, see *Elec.C. 13308* [references to other candidates, or their qualifications, character, or activities are prohibited].)

(f) A judge may engage in political activity on behalf of measures concerning the improvement of the law, the legal system, or the administration of justice. (Canon 5D.) (On suggestions for legislation in appellate opinions, see 9 *Cal. Proc.* (5th), *Appeal*, §802.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Restrictions.* See 122 *Harv. L. Rev.* 1511 [promises by candidates for judicial office].



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A. Code of Judicial Ethics.

9. Compliance With Code (Canon 6).

2 Witkin Cal. Proc. Courts § 60

[§ 60] Compliance With Code (Canon 6).

"Anyone who is an officer of the state judicial system and who performs judicial functions, including, but not limited to, a subordinate judicial officer, a magistrate, court-appointed arbitrator, judge of the State Bar Court, temporary judge, special master, is a judge within the meaning of this Code. All judges shall comply with this Code" except as provided in Canon 6. (Canon 6A.) (See Rothman, California Judicial Conduct Handbook 3d, §1.32 et seq.)

Canons 6B and 6C list those provisions of the Code not applicable to retired judges. Canon 6D lists the provisions of the Code applicable to temporary judges, referees, and court-appointed arbitrators. Under Canon 6E, candidates for judicial office are subject to Canon 5 (*supra*, §59). Canon 6F governs the time for compliance with the Code.

In *Cannon v. Commission on Judicial Qualifications* (1975) 14 C.3d 678, 122 C.R. 778, 537 P.2d 898, *infra*, §78, the court said that, in reviewing disciplinary proceedings against judges, "we acknowledge the applicability of the code to any conduct we as judges participate in after its effective date." (14 C.3d 707, footnote 22.)

In *Fremont Indem. Co. v. Work. Comp. App. Bd.* (1984) 153 C.A.3d 965, 200 C.R. 762, the court, noting that the Code by its terms applies to any "officers of a judicial system performing judicial functions," held that Workers' Compensation Appeals Board referees are subject to the provisions of the Code. (153 C.A.3d 973, 974.)

Under *Govt.C. 11475* et seq. (the Administrative Adjudication Code of Ethics), added in 1998, portions of the Code of Judicial Ethics apply to administrative law judges and specified presiding officers in administrative proceedings. (See Ethical Standards for Administrative Law Judges, 26 Cal. Law Rev. Com. Reports, p. 335; 9 Cal. Proc. (5th), *Administrative Proceedings*, §60.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Code of Judicial Ethics.

10. Sanctions for Violation.

2 *Witkin Cal. Proc. Courts* § 61

[§ 61] Sanctions for Violation.

There are no direct means of enforcing the rules of judicial ethics. But appellate court opinions criticizing the conduct of trial judges, and sometimes reversing judgments for misconduct, are powerful indirect sanctions. (See *Offutt v. United States* (1954) 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11; *People v. McKay* (1951) 37 C.2d 792, 799, 236 P.2d 145; *Wuest v. Wuest* (1942) 53 C.A.2d 339, 345, 127 P.2d 934; *Germ v. San Francisco* (1950) 99 C.A.2d 404, 415, 222 P.2d 122; *Zinn v. Ex-Cell-O Corp.* (1957) 148 C.A.2d 56, 87, 306 P.2d 1017; *People v. Black* (1957) 150 C.A.2d 494, 496, 310 P.2d 472; *People v. Campbell* (1958) 162 C.A.2d 776, 786, 329 P.2d 82.) (On application of the Canons in disciplinary proceedings against judges, see *supra*, §54.)

Where a lower court judge disobeys a valid order of a reviewing court, he or she is technically guilty of contempt (see *C.C.P. 1209(a)(11)*), but the usual practice is to treat the act as an honest mistake of law and not an act of contempt. (See *Lapique v. Superior Court* (1924) 68 C.A. 418, 420, 229 P. 1014.)

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SUPPLEMENT: [This section is current through the latest supplement]



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II. JUDICIAL CONDUCT AND DISCIPLINE

B. Other Restrictions.

1. Practicing Law.

2 *Witkin Cal. Proc. Courts* § 62

[§ 62] Practicing Law.

(1) *In General.* A judge of a court of record may not practice law. (Cal. Const., Art. VI, §17; *Govt.C. 68082*; Code of Judicial Ethics, Canon 4; see *State Bar v. Superior Court* (1929) 207 C. 323, 335, 278 P. 432; *In re Craig* (1938) 12 C.2d 93, 96, 82 P.2d 442; *Lungren v. Davis* (1991) 234 C.A.3d 806, 810, 285 C.R. 777, *infra*, §63.) Under *Govt.C. 68082*, practicing law includes "being in partnership or sharing fees, commissions, or expenses in the practice of law with any person acting as an attorney in this state." In addition, a judge may not "act as attorney, agent, or solicitor in the prosecution of any claim or application for lands, pensions, patent rights, or other proceedings before any department of the state or general government or courts of the United States." (*Govt.C. 68082*.) (On what constitutes practice of law, see 1 *Cal. Proc.* (5th), *Attorneys*, §397 et seq.)

(2) *Commentary.* The prohibition has been the subject of commentary. (See Rothman, *California Judicial Conduct Handbook* 3d, §8.80; 24 *So. Cal. L. Rev.* 24, 36; 89 *A.L.R.2d* 886 [propriety and permissibility of judge practicing law]; 17 *A.L.R.4th* 829 [validity and application of state statute prohibiting judge from practicing law]; on former exception for justice court judges, see *Christopher v. State Bar* (1945) 26 C.2d 663, 666, 161 P.2d 1 [violation of prohibition is offense against profession of the law, and offending attorney is subject to disciplinary proceedings by State Bar]; cf. *Connecticut Mut. Life Ins. Co. v. Most* (1940) 39 C.A.2d 634, 638, 103 P.2d 1013 [violation of prohibition is only offense against judicial office and does not affect right of attorney to represent client].)

SUPPLEMENT: [This section is current through the latest supplement]



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II. JUDICIAL CONDUCT AND DISCIPLINE

B. Other Restrictions.

2. Holding Other Office.

2 Witkin Cal. Proc. Courts § 63

[§ 63] Holding Other Office.

(1) *Constitutional Prohibition.* During the term for which a judge of a court of record was selected, the judge "is ineligible for public employment or public office other than judicial employment or judicial office." (Cal. Const., Art. VI, §17 [providing exception for part-time teaching outside normal judicial hours]; see *Abbott v. McNutt* (1933) 218 C. 225, 229, 22 P.2d 510 [construing former provision]; *People v. Rapsey* (1940) 16 C.2d 636, 641, 107 P.2d 388 [judge of court not of record may not hold two incompatible offices; improper to hold offices of city attorney and city judge at same time]; 46 Am.Jur.2d (2006 ed.), Judges §43.)

Judges are also subject to the general constitutional provision that no person holding a lucrative office under the United States, or any other power, is eligible for any civil office of profit. (Cal. Const., Art. VII, §7.) (See 24 So. Cal. L. Rev. 19.)

(2) *Leave of Absence To Run for Office.* A trial judge of a court of record may become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy. Acceptance of the public office is a resignation from the office of judge. (Cal. Const., Art. VI, §17.)

Alex v. Los Angeles (1973) 35 C.A.3d 994, 111 C.R. 285, sustained the constitutional deprivation of pay during the leave of absence, against constitutional challenges of denial of equal protection and uncertainty. After extensive quotations from the Hatch Act case (*United States Civil Service Com. v. National Assn. of Letter Carriers, AFL-CIO* (1973) 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796, 7 Summary (10th), *Constitutional Law*, §253), the court said: "A *fortiori*, if political restraints placed by the Hatch Act on a letter carrier in the executive branch of the federal Government are constitutional, why then would not such restrictions, as embraced in section 17, also be constitutional when placed on judges in the judicial branch of government in a sovereign state whose decisions affect the lives and property of its citizens? We hold they are." (35 C.A.3d 1004.)

(3) *Elected Judge Who Does Not Assume Office.* In *Lungren v. Davis* (1991) 234 C.A.3d 806, 285 C.R. 777, M was elected judge of the superior court for a 6-year term to commence in January 1989, but resigned after commencing his term. In November 1989, S was appointed to fill the vacancy; S assumed the office, filed for election, and was elected to a 6-year term to commence on January 7, 1991. In the meantime, L was elected to the office of Attorney General and

announced that he would appoint S his chief deputy, and S announced that he would resign from the office of superior court judge and would not commence the 6-year term for which he had been elected. D, the Controller, refused to issue warrants for S's salary, relying on Cal. Const., Art. VI, §17. L and S petitioned for mandamus. *Held*, writ granted; S was eligible. After an elaborate review of the constitutional and statutory history and the case law, the court concluded that one who is temporarily appointed to fill the office of superior court judge until an elected judge can assume the office is not appointed to a term as a superior court judge and is not ineligible under Cal. Const., Art. VI, §17, for other public office or employment. The disqualification provisions "accrue upon the assumption of office for an elective term as superior court judge . . . Since Judge [S] resigned during his temporary tenure and did not assume office as an elected judge, he is not disqualified from serving as chief deputy attorney general. In view of this conclusion it is unnecessary to determine the actual period of ineligibility for public office which accrues when an elected judge assumes office and then resigns." (234 C.A.3d 831.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Other Restrictions.

3. Gratuities for Solemnizing Marriages.

2 Witkin Cal. Proc. Courts § 64

[§ 64] Gratuities for Solemnizing Marriages.

In some circumstances, a judge may accept a gratuity for solemnizing a marriage. Under Cal. Const., Art. VI, §17, "[a] judicial officer may not receive fines or fees for personal use," and under P.C. 94, the receipt of gratuities for official acts is prohibited. However, the California Code of Judicial Ethics has no canon dealing with fees for performing marriages, and it appears to be a reasonable conclusion that the solemnization of a marriage is not a judicial act, and thus, that the acceptance of a fee for doing so is not a violation of these prohibitions. In addition, a fee received for performing a marriage is recognized by *C.C.P. 170.9(i)*, which excludes the fee from the general restrictions on gifts and honoraria. (See *infra*, §65.) (See Rothman, *California Judicial Conduct Handbook* 3d, §9.80 et seq.)

Nevertheless, a judge may not accept a fee for a ceremony performed on a judicial day. Under P.C. 94.5, a judge or justice who accepts money or a thing of value for performing the marriage is guilty of a misdemeanor. It is immaterial whether performance is conditioned on the fee, and no criminal intent is required. However, the statute does not apply to a marriage performed on a Saturday, Sunday, or legal holiday, or to a marriage performed by a retired judge or justice who is not sitting on assignment to a court.

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B. Other Restrictions.

4. Gifts, Honoraria, and Travel Expenses.

2 *Witkin Cal. Proc. Courts* § 65

[§ 65] Gifts, Honoraria, and Travel Expenses.

(1) *Nature and Scope of Limitations.* *C.C.P. 170.9* imposes limitations on the acceptance of gifts, honoraria, and travel expenses by trial and appellate judges. The statute is enforced by the Commission on Judicial Performance. (*C.C.P. 170.9(m)*.) It is not to be construed to authorize gifts that would otherwise be prohibited by the Code of Judicial Ethics (see *supra*, §52 et seq.) or any other provision of law. (*C.C.P. 170.9(a)*.) (See Rothman, California Judicial Conduct Handbook 3d, §§9.24 et seq., 9.30 et seq.)

(2) *Gifts.* A judge may not accept gifts from a single source in a calendar year worth more than \$ 250. (*C.C.P. 170.9(a)*.) This limit is to be readjusted biennially by the Commission on Judicial Performance to reflect changes in the Consumer Price Index. (*C.C.P. 170.9(d)*.) The limit is currently \$ 350.

"Gift" means "any payment to the extent that consideration of equal or greater value is not received." It includes a rebate or discount unless made to the public in the regular course of business. Any person, other than a criminal defendant, who claims that a payment is not a gift by reason of consideration received has the burden of proving that the consideration received is of greater or equal value. (*C.C.P. 170.9(l)*.)

The following items are not gifts or are excluded from the restrictions:

(a) Informational material such as books, reports, pamphlets, calendars, periodicals, cassettes, or discs, or free or reduced-price admission, tuition, or registration for informational seminars or conferences. (*C.C.P. 170.9(l)(1)*.)

(b) Unused gifts which, within 30 days after receipt, are returned to the donor or given to a charitable organization without being claimed as a charitable contribution for tax purposes. (*C.C.P. 170.9(l)(2)*.)

(c) Gifts from designated family members, unless the donor is acting as an intermediary for a nonfamily member. (*C.C.P. 170.9(l)(3)*.)

(d) Campaign contributions required to be reported under *Govt.C. 84100* et seq. (*C.C.P. 170.9(l)(4)*.)

(e) Devises and inheritances. (*C.C.P. 170.9(l)(5)*.)

(f) Plaques and trophies individually worth under \$ 250. (*C.C.P. 170.9(l)(6).*)

(g) Admission, food, and beverages at events hosted by state or local bar associations or judges associations, when attendance does not require travel. (*C.C.P. 170.9(l)(7).*)

(h) Wedding gifts and gifts exchanged between individuals on birthdays and similar occasions if the gifts exchanged are not substantially disproportionate in value. (*C.C.P. 170.9(b)(2).*)

(i) A gift, bequest, favor, or loan from a person whose preexisting relationship with the judge would prevent the judge from hearing a case involving that person, under the Code of Judicial Ethics. (*C.C.P. 170.9(b)(3).*)

(3) *Honoraria*. A judge may not accept an honorarium. (*C.C.P. 170.9(g).*) "Honorarium" means a payment in consideration for giving a speech, writing an article, or attending a public or private meeting or gathering. (*C.C.P. 170.9(h).*) The term does not include (a) income earned for personal services customarily provided in connection with a business, trade, or profession, such as teaching or writing for a publisher, or (b) a fee received for performing a marriage. (*C.C.P. 170.9(i).*) For purposes of *C.C.P. 170.9*, "teaching" includes the presentation of educational information to lawyers in events qualifying for MCLE credit, to students in educational institutions, and to associations or groups of judges. (*C.C.P. 170.9(i).*) The prohibition on honoraria does not apply to unused honoraria which, within 30 days after receipt, are returned to the donor or given to the Controller for deposit in the General Fund without being claimed as a deduction from income for tax purposes. (*C.C.P. 170.9(k).*)

(4) *Travel Expenses*. "Payments, advances, or reimbursements" for travel and related lodging and subsistence are ordinarily subject to the \$ 250 gift limitation of *C.C.P. 170.9(a)*. (*C.C.P. 170.9(f), (j).*) However, under *C.C.P. 170.9(b)(1)* and (e), expenses "reasonably related to a judicial or governmental purpose, or to an issue of state, national, or international public policy" are not prohibited or limited if any of the following conditions apply:

(a) The travel is in connection with a speech, demonstration, or discussion in which the judge participates, the travel is within the United States, and the lodging and subsistence expenses are limited to the day before, the day of, and the day after the activity. (*C.C.P. 170.9(e)(1).*)

(b) The travel is provided by a government, government agency, foreign government, foreign bar association, international service organization, tax-exempt public or private educational institution, tax-exempt charitable or religious organization, or foreign domiciliary that substantially satisfied federal requirements for tax-exempt status. (*C.C.P. 170.9(e)(2).*)

(c) The travel is provided by a state or local bar association or judges' association in connection with testimony before a governmental body or attendance at a professional function hosted by the association, and the lodging and subsistence expenses are limited to the day before, the day of, and the day after the activity. (*C.C.P. 170.9(e)(3).*)

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B. Other Restrictions.

5. Communications Between Judges.

2 *Witkin Cal. Proc. Courts* § 66

[§ 66] Communications Between Judges.

Govt.C. 68070.5 restricts communications between judges as follows:

(1) "When a case is appealed, there shall be no communication direct or indirect between the judge or judicial officer who heard the case and any judge of the reviewing court concerning the facts or merits of the case." (*Govt.C. 68070.5(a).*)

(2) "When a petition for an original writ names a court as a party, there shall be no communication direct or indirect between any judge hearing the writ and the judge or judicial officer of the court named as a party." (*Govt.C. 68070.5(b).*)

(3) These prohibitions do not apply to a written communication with a copy to all the parties. (*Govt.C. 68070.5(c).*)

Unauthorized ex parte communications violate Canon 3B(7) of the Code of Judicial Ethics. (See *supra*, §57.) (See Rothman, *California Judicial Conduct Handbook* 3d, §5.00 et seq.)

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C. Disciplinary Proceedings.

1. In General.

a. Commentary and National Development.

2 *Witkin Cal. Proc. Courts* § 67

[§ 67] Commentary and National Development.

(1) *Commentary.* Judicial misconduct and disability have received extensive attention. (See 49 *A.B.A.J.* 166; 75 *Cal. L. Rev.* 1071 [Judicial Misconduct and Politics in the Federal System]; 8 *Hastings Const. L. Q.* 843 [discipline of federal judges]; 46 *Hastings L. J.* 639 [federal judicial impeachment and due process]; 67 *Judicature* 18 [federal judicial discipline]; 10 *Loyola L.A. L. Rev.* 192; 36 *So. Cal. L. Rev.* 72; 62 *So. Cal. L. Rev.* 1263 [Judicial Disciplining of Federal Judges Is Constitutional]; 38 *U.C.L.A. L. Rev.* 1209 [federal impeachment of judges]; 3 *U.S.F. L. Rev.* 244; 53 *A.L.R.3d* 882 [power of court to remove or suspend judge]; on grounds for disciplining judge, see 43 *A.L.R.4th* 1062 [sexual misconduct]; 76 *A.L.R.4th* 982 [abuse of contempt power]; 82 *A.L.R.4th* 567 [ex parte communication with attorney, party or witness]; 87 *A.L.R.4th* 727 [neglect or failure to perform judicial duties]; 89 *A.L.R.4th* 278 [abusive or intemperate language or conduct toward attorneys, court personnel, parties, or witnesses]; 15 *A.L.R.5th* 923 [consorting with criminal figure].)

(2) *Nationwide Development.* By constitution, statute, or rule, nearly all states have some type of judicial inquiry and disciplinary procedure. (See *Landmark Communications v. Virginia* (1978) 435 U.S. 829, 98 S.Ct. 1535, 1539, 56 L.Ed.2d 1, 7, *infra*, §68 [listing statutes in appendix].)

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1. In General.

b. Publication of Confidential Matters.

2 Witkin Cal. Proc. Courts § 68

[§ 68] Publication of Confidential Matters.

In *Landmark Communications v. Virginia* (1978) 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1, the Virginia Judicial Inquiry and Review Commission was investigating the conduct of a judge. A newspaper owned by appellant Landmark published a truthful account of the inquiry, naming the judge, and stating that no formal complaint had been filed against him. The Virginia statute made it a crime to divulge this confidential information, and appellant was indicted and convicted under the statute. *Held*, reversed.

(a) *Confidentiality of judicial disciplinary proceedings.* All the statutes except that of Puerto Rico provide for confidentiality of proceedings, although in most cases only to the point of filing of a formal complaint. (98 S.Ct. 1539, 56 L.Ed.2d 7.) The requirement of confidentiality is thought to encourage filing complaints and willing participation of witnesses by providing protection against retaliation or recrimination, and to protect judges and the judiciary from the results of publication of unexamined or groundless complaints. (98 S.Ct. 1539, 56 L.Ed.2d 8.) Also, it facilitates the work of the commissions by making it more likely that judges voluntarily resign or retire to avoid the publicity. (98 S.Ct. 1540, 56 L.Ed.2d 8.)

(b) *Criminal sanctions against third parties who publish confidential information.* The power of the Commission to punish participants in the proceeding who divulge confidential information is not challenged; but the interests advanced by the state are insufficient to justify the encroachment on First Amendment free speech rights of third persons who are strangers to the inquiry.

(1) The operation of the courts and the judicial conduct of judges are matters of utmost public concern, and the work of the Virginia Commission is likewise a matter of public interest. (98 S.Ct. 1541, 56 L.Ed.2d 10.) *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, 7 Summary (10th), *Constitutional Law*, §430, did not reach the question involved here--whether the publication of truthful information withheld by law from the public domain is privileged. (98 S.Ct. 1542, 56 L.Ed.2d 11.)

(2) It may be assumed that confidentiality of the proceedings serves legitimate state interests, but the state has offered only assertion and conjecture to support its claim that criminal sanctions are necessary; and 40 states with

similar commissions have not found them so. (98 S.Ct. 1542, 56 L.Ed.2d 12.) And, even if criminal sanctions do in fact enhance the guarantee of confidentiality, injury to the official reputation of judges is an insufficient reason for repressing free speech, and the institutional reputation of the courts is entitled to no greater weight. (98 S.Ct. 1543, 56 L.Ed.2d 12.)

(3) The Virginia court relied on the clear and present danger test. "Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed." (98 S.Ct. 1543, 56 L.Ed.2d 13.) The Virginia court, acknowledging that the record was devoid of "actual facts" of danger, held that the legislature had made the requisite finding; but deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. (98 S.Ct. 1544, 56 L.Ed.2d 13.) The contempt cases reject the argument that publication of comment on pending cases or grand jury investigations constitutes a clear and present danger to the administration of justice, and establish the principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. These cases are controlling. "The threat to the administration of justice posed by the speech and publications in *Bridges*, *Pennekamp*, *Craig*, and *Wood* was, if anything, more direct and substantial than the threat placed by Landmark's article. If the clear and present danger test could not be satisfied in the more extreme circumstances of those cases, it would seem to follow that the test cannot be met here." (98 S.Ct. 1544, 56 L.Ed.2d 14.) (For full discussion of these cases, see 7 *Summary* (10th), *Constitutional Law*, §§407, 412; on confidentiality of California proceedings, see *infra*, §90.)

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C. Disciplinary Proceedings.

1. In General.

c. Nature and Scope of California System.

2 *Witkin Cal. Proc. Courts* § 69

[§ 69] Nature and Scope of California System.

(1) *No Discipline by State Bar.* Judges are not subject to discipline by the State Bar for judicial misconduct. (See *State Bar v. Superior Court* (1929) 207 C. 323, 337, 278 P. 432; 18 Cal. L. Rev. 50; 22 So. Cal. L. Rev. 248, 254.)

(2) *Early Development of Disciplinary System.* Originally, judges could be removed from office by the Supreme Court for crimes involving moral turpitude. (Former Cal. Const., Art. VI, §10a; see *In re Tindall* (1963) 60 C.2d 469, 470, 34 C.R. 849, 386 P.2d 473.) The basic structure of our present system of judicial discipline was adopted in 1960. Former Cal. Const., Art. VI, §§1b and 10b, created the Commission on Judicial Qualifications, and provided for (a) retirement for disability, on recommendation by the Commission, and (b) removal for wilful misconduct or failure to perform duties, on recommendation by the Commission. In the constitutional revision of 1966, the former provisions were replaced by Cal. Const., Art. VI, §§8 and 18, which additionally provided for censure, on recommendation by the Commission. (See 3 U.S.F. L. Rev. 251.) Amendments in 1976 (a) changed the name of the body to the Commission on Judicial Performance, (b) authorized private admonishment, and (c) provided for a tribunal of Court of Appeal justices to review a recommendation against a Supreme Court justice.

(3) *Constitutional Revision of 1994.* Proposition 190, adopted by the voters at the November 1994 general election, made extensive changes in the constitutional provisions governing judicial discipline and the Commission on Judicial Performance, effective March 1, 1995. (See Rothman, California Judicial Conduct Handbook 3d, §12.00 et seq.; 88 Cal. L. Rev. 1233 [effectiveness of Commission on Judicial Performance]; 35 Santa Clara L. Rev. 3 [Proposition 190].) The most significant changes include the following:

(a) *Commission Membership.* The composition of the Commission was changed to reduce the number of judicial members and increase the number of public members. (See Cal. Const., Art. VI, §8(a), *infra*, §71.)

(b) *Scope of Commission's Authority.* The Commission now has authority to remove, retire, suspend, censure, admonish, and bar from further service, rather than merely recommend discipline to the Supreme Court. In addition, public admonishment is now authorized. (See Cal. Const., Art. VI, §18(d), *infra*, §70.)

(c) *Public Proceedings.* Formal Commission proceedings are no longer confidential. (See Cal. Const., Art. VI, §18(j), *infra*, §90.)

(d) *Review of Commission's Determination.* Determinations by the Commission are subject to discretionary review by the Supreme Court. (See Cal. Const., Art. VI, §18(d), *infra*, §91.)

(e) *Action Against Commission.* The Supreme Court has exclusive jurisdiction in an action by a judge against the Commission. It must act on a request for injunctive relief or a provisional remedy within 90 days of the request. (Cal. Const., Art. VI, §18(g).) The Commission and its employees are "absolutely immune" from suit for conduct in the course of their official duties. (Cal. Const., Art. VI, §18(h).)

(f) *Rules.* The Commission on Judicial Performance, not the Judicial Council, makes rules implementing Cal. Const., Art. VI, §18. (See Cal. Const., Art. VI, §18(i), *infra*, §80.)

(4) *Former Judges.* The Commission's jurisdiction extends to former judges. (See Cal. Const., Art. VI, §18(d), effective March 1, 1995; *Rosasco v. Commission on Judicial Performance* (2000) 82 C.A.4th 315, 318, 98 C.R.2d 111 [Commission lacks jurisdiction to discipline judge who retired before effective date of constitutional amendment].)

(5) *Subordinate Judicial Officers.* The Commission's jurisdiction extends to subordinate judicial officers, subject to the same standards and review applicable to judges under Cal. Const., Art. VI, §18. (Cal. Const., Art. VI, §18.1, added by Proposition 221 at the June 1998 primary election.) (On procedure for complaints against subordinate judicial officers, see C.R.C., Rule 10.703.)

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1. In General.

d. Authorized Discipline and Disqualification.

2 Witkin Cal. Proc. Courts § 70

[§ 70] Authorized Discipline and Disqualification.

(1) *Constitutional Authority.* The following levels of discipline are authorized by Cal. Const., Art. VI, §18:

(a) *Admonishment.* (See *infra*, §72.)

(b) *Censure.* (See *infra*, §73 et seq.)

(c) *Removal.* (See *infra*, §76 et seq.)

(d) *Retirement.* (See *infra*, §79.)

(2) *Disqualification While Criminal Action Is Pending.* While an indictment or information is pending charging a judge with a crime punishable as a felony under California or federal law, the judge is disqualified from acting as a judge, without loss of salary. (Cal. Const., Art. VI, §18(a)(1).)

If the judge pleads guilty or no contest or is found guilty of a crime punishable as a felony under California or federal law or a crime involving moral turpitude, the Commission must suspend the judge without salary. If the conviction is reversed, the suspension is terminated and the judge is entitled to his or her salary for the period of suspension. If the conviction becomes final, the Commission must remove the judge from office. (Cal. Const., Art. VI, §18(c).)

(3) *Disqualification While Commission Proceeding Is Pending.* The Commission may disqualify a judge from acting as a judge, without loss of salary, on notice of formal proceedings by the Commission charging the judge with misconduct or disability. (Cal. Const., Art. VI, §18(b).)

(4) *Disqualification While Supreme Court Review Is Pending.* The judge is disqualified from acting as a judge, without loss of salary, while a petition to review a determination to remove or retire a judge is pending. (Cal. Const., Art. VI, §18(a)(2).)

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1. In General.

e. Commission on Judicial Performance.

2 Witkin Cal. Proc. Courts § 71

[§ 71] Commission on Judicial Performance.

(1) *Membership.* Cal. Const., Art. VI, §8(a), establishes the Commission on Judicial Performance. It is composed of the following persons serving 4-year terms:

(a) *Judges.* One Court of Appeal judge and two superior court judges, each appointed by the Supreme Court.

(b) *Lawyers.* Two members of the State Bar with at least 10 years' practice, each appointed by the Governor.

(c) *Public members.* Six public members who are not judges, retired judges, or lawyers, two appointed by the Governor, two appointed by the Senate Rules Committee, and two appointed by the Speaker of the Assembly.

Commission membership terminates if a member ceases to hold the position that qualified the member for appointment, and a vacancy is filled by the appointing power for the remainder of the term. (Cal. Const., Art. VI, §8(b).) A member may not serve more than two 4-year terms, or for more than a total of 10 years if appointed to fill a vacancy. (Cal. Const., Art. VI, §8(a).)

(2) *Assistance.* The Commission is assisted as follows:

(a) The Commission may employ officers and assistants. (*Govt.C. 68702.*)

(b) The Commission may request the Supreme Court to appoint special masters (judges of courts of record) to take evidence and report to the Commission. (Commission Rule 121.) (See *infra*, §85.)

(c) The Attorney General, on request, acts as counsel for the Commission, but the Commission may also employ special counsel. (*Govt.C. 68702.*)

(d) The counsel designated by the Commission to gather and present evidence with respect to the charges against a judge is called the "examiner." (Commission Rule 138(f).)

(e) State and local public bodies, officers, and employees must cooperate in the Commission's investigations and proceedings. (*Govt.C. 68725.*)

(f) The Chief Justice, the presiding justice, the administrative presiding justice, or the presiding judge must report a judge's substantial failure to perform judicial duties to the Commission. (C.R.C., Rule 10.603(c)(4) [trial courts]; C.R.C., Rule 10.1016 [reviewing courts].)

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2. Grounds for Discipline.

a. Admonishment.

2 *Witkin Cal. Proc. Courts* § 72

[§ 72] Admonishment.

The Commission may publicly or privately admonish a judge or former judge for "improper action or dereliction of duty." (Cal. Const., Art. VI, §18(d).) (See Rothman, *California Judicial Conduct Handbook* 3d, §12.87; on procedure for admonishment, see *infra*, §83.)

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2. Grounds for Discipline.

b. Censure.

1. In General.

2 Witkin Cal. Proc. Courts § 73

[§ 73] In General.

(1) *Constitutional Authority.* The Commission may censure a judge or former judge for "willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The improper conduct must have occurred not more than 6 years prior to the commencement of the judge's current term or the former judge's last term. A former judge who has been censured may be barred "from receiving an assignment, appointment, or reference of work from any California state court." (Cal. Const., Art. VI, §18(d).) (See Rothman, California Judicial Conduct Handbook 3d, §12.88.)

(2) *Decisions Authorizing Censure.* The following decisions resulted in censure:

In re Chargin (1970) 2 C.3d 617, 87 C.R. 709, 471 P.2d 29 [remarks in juvenile court proceeding reflecting adversely on youth's family and ethnic group].

In re Glickfeld (1971) 3 C.3d 891, 92 C.R. 278, 479 P.2d 638 [insulting and intemperate comments regarding victim of alleged crimes and other aspects of pending criminal charges].

In re Sanchez (1973) 9 C.3d 844, 109 C.R. 78, 512 P.2d 302 [blank signed orders for release on bail furnished to bail bondsman, in violation of court rule, and after warnings and promise to cease; "severely censured"].

In re Chavez (1973) 9 C.3d 846, 109 C.R. 79, 512 P.2d 303 [similar conduct].

In re Jensen (1978) 24 C.3d 72, 154 C.R. 503, 593 P.2d 200 [superior court judge's repeated failure to decide cases submitted within 90-day period constituted persistent failure to perform duties].

In re Stevens (1981) 28 C.3d 873, 172 C.R. 676, 625 P.2d 219 [judge's vulgar conversations (before and after elevation to bench) with married couple, despite their objections, constituted prejudicial misconduct].

In re Stevens (1982) 31 C.3d 403, 183 C.R. 48, 645 P.2d 99 [judge's repeated use of racial and ethnic epithets and stereotypes constituted prejudicial misconduct, despite judge's performance of judicial duties fairly, equitably, and without bias].

Roberts v. Commission on Judicial Performance (1983) 33 C.3d 739, 190 C.R. 910, 661 P.2d 1064 [impermissible personal involvement in litigation; improper treatment of litigants, witnesses, and counsel; misdemeanor conviction for obstruction of public officers; and impermissible communication to appellate court justice].

In re Youngblood (1983) 33 C.3d 788, 191 C.R. 171, 662 P.2d 108 [judge ordered persons to appear before him under false pretenses, caused incarceration of one person without cause, and took improper ex parte actions in case involving party with whom judge was involved in litigation].

Gubler v. Commission on Judicial Performance (1984) 37 C.3d 27, 207 C.R. 171, 688 P.2d 551 [improper methods of obtaining payment to county from criminal defendants for cost of legal representation by public defender, including ordering appearances by defendants, making fee orders appear as conditions of probation, and ordering fees payable ahead of fines to prolong availability of sanctions for nonpayment].

In re Rasmussen (1987) 43 C.3d 536, 538, 236 C.R. 152, 734 P.2d 988 [numerous violations of Code of Judicial Conduct in dealing with counsel and parties; "severe public censure" following Commission's recommendation].

Fitch v. Commission on Judicial Performance (1995) 9 C.4th 552, 37 C.R.2d 581, 887 P.2d 937 [pattern of misconduct involving inappropriate and offensive remarks to court staff and attorneys, and nonconsensual touchings of women working under his supervision, that brought judicial office into disrepute].

In re Gordon (1996) 13 C.4th 472, 53 C.R.2d 788, 917 P.2d 627 [sexually suggestive and demeaning remarks].

In re Whitney (1996) 14 C.4th 1, 56 C.R.2d 705, 922 P.2d 868 [failure to consider release on own recognizance, probation, and concurrent sentencing at arraignments; failure to appoint counsel for indigents at arraignments].

Broadman v. Commission on Judicial Performance (1998) 18 C.4th 1079, 1093, 77 C.R.2d 408, 959 P.2d 715 [wilful misconduct in inducing criminal defendant and counsel to waive time for sentencing without disclosing purpose for doing so; prejudicial misconduct in making public comment on pending cases and in attempting to influence outcome of civil action pending before another judge].

(3) *Censure Recommendation Rejected*. The Commission's recommendation of censure was rejected in *Dodds v. Commission on Judicial Performance* (1995) 12 C.4th 163, 178, 48 C.R.2d 106, 906 P.2d 1260 [rudeness, prejudgment in handling cases, and interference with investigation constituted prejudicial conduct; but talented judge was sought out for ability to settle cases].

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2. Grounds for Discipline.

b. Censure.

2. Removal Recommendation Rejected.

2 Witkin Cal. Proc. Courts § 74

[§ 74] Removal Recommendation Rejected.

In *McCartney v. Commission on Judicial Qualifications* (1974) 12 C.3d 512, 116 C.R. 260, 526 P.2d 268, the court rejected a recommendation of removal on a consideration of mitigating factors.

(a) *Wilful or prejudicial misconduct cause for discipline.* Petitioner was found guilty of the following:

(1) Angry criticism of public defenders for filing lawful affidavits of prejudice. (12 C.3d 531, 532.)

(2) Repeated and flagrant abdication of judicial functions; e.g., benchside sentencing conferences with bailiff, who participated in the sentencing process. (12 C.3d 533.)

(3) Periodic assumption of the role of an advocate in extended examinations of witnesses. "Perhaps the most flagrant instance was his embarcation in one disturbing-the-peace case upon an argumentative dialogue devoted to a wholly irrelevant inquiry about the testifying defendant's illegitimate children and her attitude toward him as a judge." (12 C.3d 533.)

(4) Taking the stand as a witness in a case before him with no advance information to counsel, and testifying in narrative form without a presiding officer to rule on objections. (12 C.3d 534.)

(5) Intemperate language in dealings with court personnel, defendants in criminal cases, and attorneys; e.g., in a welfare fraud case he angrily told a pro. per. defendant's wife to "shut up," and called the defendant a "liar," "cheat," and "deadbeat." He threatened to hold the court clerk in contempt, and discharged her in a violent manner. (12 C.3d 534.)

(b) *Undesirable conduct not cause for discipline.* Some of petitioner's other acts were improper but not sufficiently reflective of bad faith or diminution in public esteem as to require censure: (1) Calling on the presiding judge with a demand for an explanation of the transfer of a preliminary hearing of a murder case from his courtroom, in the presence of court personnel and counsel (isolated incident). (2) Muttering profanity, humming and whistling on the bench during hearings (unintentional, almost unconscious emotional release). (3) Chronic delay in handling hearings and trials (effort

to attain unrealistic degree of studiousness). (12 C.3d 535, 536.)

(c) *Mitigating factors.* The following reasons justify ordering censure rather than removal: (1) Petitioner, unlike the judge in *Geiler v. Commission on Judicial Qualifications* (1973) 10 C.3d 270, 110 C.R. 201, 515 P.2d 1, *infra*, §77, was an inexperienced judicial officer who had been on the bench barely more than a year and a half before being accused. (2) He was extremely careful in attempting to "do justice" in cases before him, particularly in arraignments. (3) He strove for fundamental fairness in sentencing, avoiding unduly harsh treatment of first offenders and persons employed; and he sought opportunities for rehabilitative treatment of alcoholics. (12 C.3d 539, 540.)

(d) *Conclusion.* "We therefore conclude that the recommendation of the Commission should be rejected, and that censure is the appropriate result. We cannot stress too strongly that were it not for the redeeming qualities which we have mentioned we would be inclined to agree with the Commission's recommendation of removal. But upon our review of the record as a whole we are satisfied that censure is appropriate in this case. Accordingly, we hereby enter an order of censure ... and admonish him to desist from engaging in such misconduct." (12 C.3d 540.)

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b. Censure.

3. Delay in Deciding Cases.

2 Witkin Cal. Proc. Courts § 75

[§ 75] Delay in Deciding Cases.

In *Mardikian v. Commission on Judicial Performance* (1985) 40 C.3d 473, 482, 220 C.R. 833, 709 P.2d 852, the court, "with reservations," concluded that petitioner's failure to decide cases within 90 days of submission was conduct prejudicial to the administration of justice warranting public censure.

Petitioner failed to decide 14 cases within 90 days of their submission, as required by Cal. Const., Art. VI, §19, and Govt.C. 68210 (supra, §10). He made orders resubmitting some of the cases and executed salary affidavits in conformity with Govt.C. 68210. During this period, petitioner suffered health and family problems, and was acknowledged to be a hardworking, diligent judge who worked nights, weekends, and during his vacation on an overburdened and understaffed court. The Commission concluded that his delay in deciding the 14 cases constituted prejudicial conduct and recommended public censure. *Held*, recommendation adopted.

(a) Failure to decide cases within 90 days of submission is a basis for removal or censure only if the delay is avoidable. (40 C.3d 482.) It is "manifestly unreasonable" to discipline "a competent judge whose workload and/or temporary disability made prompt decision of all matters submitted to him impossible. While delay in deciding cases may well cause criticism and bring the judicial office into disrepute, when that delay is the product of an overburdened and underfunded court the trial judges who are the backbone of the judicial system must not be forced to assume responsibility for a situation which is not of their making or within their control. To the extent that an intolerably burdensome workload makes prompt decision impossible even for the most conscientious judge, the answer to the problem must lie elsewhere than in judicial discipline." (40 C.3d 482, 483.)

(b) However, a trial judge whose workload prevents prompt decision of all cases can minimize the impact of the delay by assigning priorities that consider the time necessary to decide and the effect of delay in particular matters. (40 C.3d 483.) Petitioner here apparently failed to establish priorities, and there is no explanation why some cases were tried after, but decided before, the resubmitted cases. (40 C.3d 483, 484.)

(c) Petitioner's physical and emotional difficulties may serve as mitigation, but cannot justify the delays. His

judicial conduct must be evaluated on the basis of objective criteria applicable to all similarly situated judges. (40 C.3d 485.)

(d) The extraordinary delay in deciding these cases, and petitioner's practice of routinely resubmitting the cases, warrant public censure as conduct prejudicial to the administration of justice. "Subject to the reservations we have expressed, we adopt the Commission's recommendation. This opinion will serve as the appropriate sanction." (40 C.3d 485.)

Two justices dissented, arguing that petitioner is being made "the scapegoat for the twin plagues of judicial overload and backlog" (40 C.3d 485), and that no prior decision had made it clear that failure to establish priorities in such a situation would subject a judge to discipline (40 C.3d 487). "Trial judges--no less than other mortals--need to know what rules apply and should not be disciplined for failing to follow rules before they are promulgated." (40 C.3d 487.)

Several other decisions have censured judges for delay. (See *In re Jensen* (1978) 24 C.3d 72, 154 C.R. 503, 593 P.2d 200 [superior court judge's repeated failure to decide cases submitted within 90-day period constituted persistent failure to perform duties]; *In re Creede* (1986) 42 C.3d 1098, 1099, 233 C.R. 1, 729 P.2d 79 [adopting recommendation of censure of judge (by publication of memorandum opinion), but adding following comment: "He did not, however, knowingly falsify the salary affidavits, and did not intentionally or maliciously disregard his adjudicative responsibilities. There was no credible evidence of actual prejudice from the delays, which were partially attributable to an excessive workload and inadequate support staff"]; *In re McCullough* (1987) 43 C.3d 534, 535, 236 C.R. 151, 734 P.2d 987 [adopting recommendation of censure for failing to decide case for 3 years and 9 months].)

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1. In General.

2 *Witkin Cal. Proc. Courts* § 76

[§ 76] In General.

(1) *Constitutional Authority.* The Commission may remove a judge for "willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The improper conduct must have occurred not more than 6 years prior to the commencement of the judge's current term. (Cal. Const., Art. VI, §18(d).) (See Rothman, *California Judicial Conduct Handbook* 3d, §12.88.)

If a judge pleads guilty or no contest or is found guilty of a crime punishable as a felony under California or federal law or a crime involving moral turpitude, once the conviction becomes final, the Commission must remove the judge from office. (Cal. Const., Art. VI, §18(c).)

(2) *Effect of Removal.* A judge removed by the Commission is ineligible for judicial office and, pending further order of the court, is suspended from practicing law. (Cal. Const., Art. VI, §18(e).) (On denial of retirement benefits, see *Govt.C. 75033.1* [removal from office], *Govt.C. 75033.2* [felony involving moral turpitude or committed in course and scope of performance of judicial duties].)

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2. Nature of Grounds.

2 Witkin Cal. Proc. Courts § 77

[§ 77] Nature of Grounds.

In *Geiler v. Commission on Judicial Qualifications* (1973) 10 C.3d 270, 110 C.R. 201, 515 P.2d 1, the court analyzed the two chief grounds and made its first order of removal.

(a) *Serious and less serious charges.* "Wilful misconduct in office," part of the original section before the 1966 constitutional revision, "connotes something graver" than the "conduct prejudicial" ground. "The more serious charge should be reserved for unjudicial conduct which a judge acting in his judicial capacity commits *in bad faith*, while the lesser charge should be applied to conduct which a judge undertakes *in good faith* but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." (10 C.3d 283, 284.) The lesser charge would also apply to wilful misconduct out of office, i.e., by a judge not then acting in a judicial capacity. (10 C.3d 284, footnote 11.)

(b) *Charge of wilful misconduct sustained.* Petitioner was found guilty of prodding a deputy public defender with a "dildo," making remarks with the intent of curtailing cross-examination of witnesses, and reprimanding two court employees in a profane and abusive manner. (10 C.3d 284; see 10 C.3d 277, setting forth findings in detail.)

(c) *Charge of prejudicial conduct sustained.* Petitioner was also found guilty of crude behavior and use of vulgar language in dealing with professional associates, employees, and officers of the court; of lustful references to a female clerk in the presence of others; and of a vulgar discourse on salacious evidence with two female attorneys. (10 C.3d 284; see 10 C.3d 277, setting forth findings in detail.) One other finding of prejudicial conduct was sustained, but with a partially mitigating explanation. Petitioner relieved deputy public defenders in eight cases, actions characterized as unjudicial and unlawful, and found by the Commission to be taken "in bad faith." Although this conduct was an expression of "petty animosity toward public defenders," there was no showing of ill will toward the individual defendants and none of them suffered actual prejudice. "Petitioner's bad faith was directed towards our legal system itself; his arbitrary substitutions of counsel because of his personal beliefs as to the defendants' guilt and his personal hostility to their counsel smacks of an inquisitorial intent to serve imagined truth at the expense of justice." (10 C.3d 286.)

(d) *Order of removal.* The court, adopting the findings of the Commission and its general conclusions (10 C.3d 281), ordered the judge removed from office, but added: "We recognize that petitioner's removal from office is required more by the high standards of judicial office than by his personal failings. Much evidence was adduced before the Commission of petitioner's diligence in the work of the law, and his unjudicial conduct cannot be said to amount to moral turpitude, dishonesty or corruption. ... We therefore further order that despite his removal from judicial office [petitioner] shall if otherwise qualified be permitted to practice law in the State of California." (10 C.3d 287.)

In *Doan v. Commission on Judicial Performance* (1995) 11 C.4th 294, 45 C.R.2d 254, 902 P.2d 272, the court ordered removal of a municipal court judge, pursuant to the Commission's recommendation, for wilful misconduct in office, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and persistent failure or inability to perform her duties. In so doing, the court defined these types of misconduct.

(a) *Wilful misconduct.* Wilful misconduct sufficient to warrant discipline means "unjudicial conduct which a judge acting in his judicial capacity commits in bad faith. ... 'Bad faith' on the part of a judge entails *either* an intent, motivated by 'actual malice,' to commit an act that he knows or should know is beyond his lawful power *or* an intent to commit an act, even within his lawful power, 'for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties.'" (11 C.4th 311.) Language in earlier cases (see *infra*, §78) is disapproved to the extent the cases support the view that intent to commit an act for a corrupt purpose does not constitute "bad faith" if that act is within the judge's lawful power. (11 C.4th 319.)

(b) *Conduct prejudicial to administration of justice.* Conduct prejudicial to the administration of justice means *either* "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office" *or* "wilful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity." (11 C.4th 312.) Although it is sufficient that "actual observers," rather than "objective observers," view the first type of conduct to be prejudicial to the administration of justice, it is not necessary. Language in earlier cases (see *infra*, §78) is disapproved to the extent the cases suggest that it is necessary that the "actual observers" view the conduct in question for it to be prejudicial to the administration of justice. (11 C.4th 325.)

(c) *Persistent nonperformance of duties.* "Persistent nonperformance of duties entails a pattern of legal or administrative omissions or inadequacies in the performance of a judge's duties. ... It does *not* entail any intentional disregard of such duties." (11 C.4th 312.)

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3. Illustrative Decisions Ordering Removal.

2 Witkin Cal. Proc. Courts § 78

[§ 78] Illustrative Decisions Ordering Removal.

In *Spruance v. Commission on Judicial Qualifications* (1975) 13 C.3d 778, 119 C.R. 841, 532 P.2d 1209, the proven charges were sufficient to warrant removal. "Taken as a whole the record indicates that petitioner engaged in a pervasive course of conduct of overreaching his judicial authority by deciding cases for reasons other than the merits, by improperly influencing another judge, and by using the judicial process to gain special favors for friends and political supporters. The record also shows that petitioner has under color of judicial office repeatedly committed petty, vindictive, vulgar and otherwise unjudicial acts." (13 C.3d 795.) Evidence in mitigation was unpersuasive. (13 C.3d 800.) Accordingly, censure was deemed insufficient, and removal was ordered; but, in view of petitioner's prior unblemished record as an attorney, it was ordered that he be permitted, if otherwise qualified, to practice law. (13 C.3d 803.)

In *Cannon v. Commission on Judicial Qualifications* (1975) 14 C.3d 678, 122 C.R. 778, 537 P.2d 898, the court summarized its reasons for ordering removal as follows: "We conclude that petitioner has engaged in twenty-one acts constituting 'wilful misconduct in office' and in eight other acts constituting 'conduct prejudicial to the administration of justice that brings the judicial office into disrepute.' Although some of the specific acts charged and found may overlap as arising out of a particular course of conduct, the totality of petitioner's judicial misconduct nevertheless presents a compelling case against her. We deem to be particularly egregious the bad faith and maliciousness with which petitioner arbitrarily ordered the immediate incarcerations of deputy public defenders who displeased her, and denied the effective right of counsel to their clients who were required to defend against charges in on-going criminal proceedings with substituted counsel who were afforded no reasonable opportunity to prepare. As we find nothing to excuse or mitigate Judge Cannon's conduct we adopt the Commission's recommendation and order that she be removed from office." (14 C.3d 681.)

In *Wenger v. Commission on Judicial Performance* (1981) 29 C.3d 615, 175 C.R. 420, 630 P.2d 954, the court found that removal was warranted by nine findings of wilful misconduct and one finding of prejudicial conduct based on the following patterns of conduct: (a) Instead of honoring peremptory disqualifications of himself, the judge intruded into matters that had become another judge's responsibility and denounced the disqualification as an affront; (b) when

annoyed by a party's conduct, he groundlessly pried into counsel's advice or attempted to dissuade counsel from representing the party; (c) he interfered with law practice by threatening or purporting to exclude attorneys from his courtroom or sentencing the attorney to jail for appropriate advice to the client; (d) he overstepped limits on his power to resolve civil disputes by attempting to punish nonobedience to his informal directions as contempt and unilaterally investigating facts; (e) he disregarded or violated contempt procedural rules. (29 C.3d 653.) The judge's claimed inexperience and ultimate acknowledgment of his mistakes were rejected as mitigating factors. (29 C.3d 653.) "Mitigation of wrongdoing requires more than an unfulfilled intent to reform." (29 C.3d 654.)

In *Gonzalez v. Commission on Judicial Performance* (1983) 33 C.3d 359, 188 C.R. 880, 657 P.2d 372, the court ordered removal on the basis of 18 findings of wilful misconduct and 2 findings of prejudicial conduct. The judge (a) improperly interceded in criminal matters on behalf of friends and benefactors; (b) acted improperly and arbitrarily in bail matters; (c) made comments from the bench and in chambers impugning the character and competence of his judicial colleagues; (d) engaged in a continuous course of overreaching and abuse of judicial authority; (e) conducted court business in violation of proper procedures, to the detriment of the fair administration of justice; and (f) made personal verbal attacks, ethnic slurs, and indelicate sexual comments, both in open court and private communications. (33 C.3d 378.)

In *Furey v. Commission on Judicial Performance* (1987) 43 C.3d 1297, 240 C.R. 859, 743 P.2d 919, the court made 8 findings of wilful misconduct and 10 findings of prejudicial conduct, based on the judge's actions in abusing his contempt power, failing to disqualify himself, improperly injecting himself into the adversarial process, and taking reprisals against someone who complained of his conduct to the *Commission*. (43 C.3d 1318, 1319.) Evidence offered in mitigation (industrious, inexperienced) was unpersuasive. (43 C.3d 1319.) Accordingly, removal was proper; but because the misconduct did not amount to grounds for disbarment or suspension from practice, it was ordered that petitioner be permitted to continue to practice law, if otherwise qualified, subject to passing the Professional Responsibility Examination within 1 year. (43 C.3d 1320.)

In *McCullough v. Commission on Judicial Performance* (1989) 49 C.3d 186, 260 C.R. 557, 776 P.2d 259, four acts of wilful misconduct and one act of persistent failure justified removal. "He deprived criminal defendants of their constitutional rights, used his office to benefit a personal friend, and failed to perform the most basic of judicial duties." (49 C.3d 199.)

In *Kloepfer v. Commission on Judicial Performance* (1989) 49 C.3d 826, 939, 264 C.R. 100, 782 P.2d 239, 5 acts of wilful misconduct and 20 acts of conduct prejudicial to the administration of justice justified removal. (See 17 *Pepperdine L. Rev.* 1130, 1132; 89 A.L.R.4th 278 [*Kloepfer* case: Disciplinary action against judge on ground of abusive or intemperate language or conduct toward attorneys, court personnel, parties, or witnesses].)

In *Kennick v. Commission on Judicial Performance* (1990) 50 C.3d 297, 267 C.R. 293, 787 P.2d 591, the Commission recommended removal based on findings of wilful misconduct, prejudicial conduct, and persistent failure or inability to perform the judge's duties. Following the recommendation, the judge retired and contended that retirement made the proceedings moot. The court ordered the judge removed on the sole ground of persistent failure or inability to perform his judicial duties and censured him for wilful misconduct and conduct prejudicial to the administration of justice.

(a) *Proceeding is not moot.* The judge's retirement did not make the proceeding moot. While his election to retire eliminated any possibility of his continuing in the judicial office he was holding at the time of the Commission's recommendation, it did not foreclose his future eligibility to serve as a judge or resolve the question whether he should be suspended from the practice of law pending further order of the court. (50 C.3d 309, 310.) Nor does mootness result from the judge's willingness to stipulate to his ineligibility for judicial office and to the entry of an order suspending him from the practice of law. The judge's offer does not preclude the possibility that he will seek reinstatement to practice. "A necessary foundation to any such proceeding would be a record of the reasons for petitioner's suspension, which necessarily would inhere in the reasons for the event giving rise to the suspension, i.e., his removal from judicial office.

There appears no practicable way to create such a record except to go forward with the present proceeding." (50 C.3d 311.)

(b) *Prejudicial conduct and wilful misconduct.* The following actions by the judge constituted prejudicial conduct: (1) rudeness and failure to cooperate with officers in connection with his arrest for driving under the influence of alcohol (50 C.3d 317); (2) attempting to obtain preferential treatment following his arrest (50 C.3d 319); (3) using "sweetie," "sweetheart," etc., in addressing women attorneys, clerks, and detectives (50 C.3d 325); (4) being rude and failing to listen to criminal defendants (50 C.3d 325); (5) abusively screaming at a deputy city attorney and rebuffing her attempt to make a bail motion (50 C.3d 326, 327); (6) being rude and intimidating toward witnesses (50 C.3d 327); (7) showing favoritism toward several attorneys in appointing them as counsel for indigent defendants and engaging in ex parte conversations in chambers with them (50 C.3d 327, 331, 332); and (8) improperly suggesting to a waitress not to worry about her drunk driving arrest (50 C.3d 333). And the judge's demeaning, rude, impatient, and abusive treatment toward a deputy district attorney constituted wilful misconduct in office as well as prejudicial conduct. (50 C.3d 324.) "[O]ur findings of his willful misconduct and prejudicial conduct are insufficient to warrant removal even though they clearly support the lesser discipline of censure." (50 C.3d 337.) His conduct is not significantly more egregious than the misdeeds found in *Roberts v. Commission on Judicial Performance* (1983) 33 C.3d 739, 190 C.R. 910, 661 P.2d 1064, and *Gubler v. Commission on Judicial Performance* (1984) 37 C.3d 27, 207 C.R. 171, 688 P.2d 551, supra, §73, to require only censure, and "falls short" of showings in cases such as *Furey*, supra, that have led to removal. (50 C.3d 339.)

(c) *Persistent failure or inability to perform duties.* The judge's "excessive absences from work in 1985 and 1986 and his cessation of work altogether at the beginning of 1987 ... constituted persistent failure or inability to perform his judicial duties." (50 C.3d 337.) His "failure to work since the beginning of 1987 without any explanation other than vague references to current medical treatment, and without any evidence that he might or could resume his duties thereafter, is alone sufficient to establish this ground for his removal." (50 C.3d 341.) (On neglect or failure to perform judicial duties, see 87 A.L.R.4th 727 [note on *Kennick* case].)

In *Adams v. Commission on Judicial Performance* (1995) 10 C.4th 866, 42 C.R.2d 606, 897 P.2d 544, the court, agreeing with the Commission's recommendation, held that removal from office was the appropriate discipline for a judge who "engaged in successive extrajudicial transactions that extended over a significant period of time, creating an appearance of serious impropriety and thereby tending to diminish the public esteem of the judiciary--a consequence petitioner either deliberately ignored or was unable to appreciate." (10 C.4th 914.) A variety of charges were supported by clear and convincing evidence:

(a) The judge engaged in seven separate instances of prejudicial conduct in transactions with a litigant, four of which involved the litigant's attorney, who frequently appeared before the judge. This conduct could be construed, by an objective observer, as improperly using the judicial office to advance the judge's personal interest, and permitting the appearance of special influence. (10 C.4th 884.)

(b) The judge twice engaged in prejudicial conduct in accepting gifts or financial benefits from attorneys or law firms whose interests had come and were likely to come before the judge, and in four separate instances the judge assisted or otherwise communicated with members of a law firm regarding matters pending before the court. (10 C.4th 899.)

(c) The judge made material misstatements or omissions to the Commission in four instances. These charges, in particular, warranted the judge's removal from office. (10 C.4th 909.)

A dissenting justice argued that the judge, despite these improprieties off the bench, had properly performed his judicial functions during a long tenure, and that the appropriate discipline was not removal but public censure. (10 C.4th 915.)

In *Fletcher v. Commission on Judicial Performance* (1998) 19 C.4th 865, 81 C.R.2d 58, 968 P.2d 958, seven commissioners recommended removal and three recommended severe public censure. The court found that removal was warranted by two acts of wilful misconduct and multiple acts of prejudicial misconduct extending over petitioner's entire term in office, involving ex parte communications with parties and witnesses, improper reactions to disqualification motions, and mishandling of criminal cases. These acts reflected a pervasive pattern of misconduct and a manifest lack of judicial temperament. (19 C.4th 918.)

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d. Retirement.

2 *Witkin Cal. Proc. Courts* § 79

[§ 79] Retirement.

The Commission may retire a judge "for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent." (Cal. Const., Art. VI, §18(d).) A judge retired by the Commission is considered to have retired voluntarily. (Cal. Const., Art. VI, §18(e).)

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3. Proceedings Before Commission.

a. In General.

2 *Witkin Cal. Proc. Courts* § 80

[§ 80] In General.

(1) *Governing Statutes and Rules.* *Govt.C. 68701* et seq. govern the Commission and its proceedings. The Commission is required to promulgate rules. (Cal. Const., Art. VI, §18(i); see Commission Rule 101 et seq.) The Commission has also approved Policy Declarations. The preamble to the declarations provides in part: "These policy declarations are to reflect internal procedural detail neither duplicative of nor inconsistent with constitutional mandate or statute or Commission Rules. These policy declarations are based upon concepts of utility, experience, and fair hearing of matters before the commission." The Policy Declarations include a Code of Ethics for Commission Members. The Commission's rules and Policy Declarations are available on the Commission's website: <http://cjp.ca.gov>. (On Supreme Court review of Commission decisions, see C.R.C., Rule 9.60, *infra*, §91.) (See Rothman, California Judicial Conduct Handbook 3d, §12.10 et seq.)

(2) *Powers of Commission and Masters.* The Commission and masters may (a) administer oaths, (b) order the inspection of books and records, and (c) issue subpoenas for the attendance of witnesses and the production of documents. (*Govt.C. 68750*.) (See *Govt.C. 68752* [attendance of witnesses and production of documents]; *Govt.C. 68754* [witness fees].) (On Commission's ex parte access to nonpublic court records (including sealed records) relevant to the performance of judicial officers, and the procedure for public disclosure, see *Govt.C. 68756*.)

(3) *Process and Orders.* The Commission's process extends statewide (*Govt.C. 68751*), and sheriffs and marshals must serve process and execute orders (*Govt.C. 68726*).

(4) *Discovery.* Discovery procedures are governed by Commission Rule 122 and *Govt.C. 68753*.

(5) *Extension of Time.* In specified circumstances, the Chairperson of the Commission may grant extensions of time. (See Commission Rule 108.)

(6) *Privileged Statements.* Making statements to the Commission, filing papers with the Commission or the Supreme Court, and giving testimony before the Commission or special masters in Commission proceedings are privileged. "No other publication of such statements, papers or proceedings shall be privileged." (Commission Rule

103.)

(7) *Participation Prohibited.* Judges who are members of the Commission or of the Supreme Court may not participate in proceedings involving themselves. (Commission Rule 101.)

(8) *Use and Retention of Commission Records.* The records of a complaint against a judge may not be used for any purpose if the complaint related to actions occurring more than 6 years before the beginning of the judge's current term and did not result in an advisory letter, admonishment, censure, or removal. (Commission Rule 117.)

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3. Proceedings Before Commission.

b. Nature of Proceeding.

2 Witkin Cal. Proc. Courts § 81

[§ 81] Nature of Proceeding.

(1) *Constitutionality of Procedure for Removal of Supreme Court Justices.* Under former Cal. Const., Art. VI, §18(e), as amended in 1976, a Commission recommendation for the censure, removal, or retirement of a Supreme Court judge was determined by a tribunal of seven Court of Appeal judges selected by lot. (For comparable current procedure, see Cal. Const., Art. VI, §18(f), *infra*, §91.) The procedure for removal of Supreme Court justices was challenged on a number of grounds but was held valid in *McComb v. Commission on Judicial Performance* (1977) 19 C.3d Spec. Trib. Supp. 1, 8, 12, 138 C.R. 459, 564 P.2d 1. The court rejected the contention that impeachment was the exclusive constitutional procedure for removal. The procedures authorized by Cal. Const., Art. VI, §§8 and 18, provide "a constitutional alternative to the impeachment process." (19 C.3d Spec. Trib. Supp. 8.) Because the proceedings are not criminal in nature, and the Commission's findings must be reviewed by a tribunal of judges, the presence of two nonlawyers on the Commission does not deny a judge involuntarily retired or removed due process or equal protection. (19 C.3d Spec. Trib. Supp. 1, 11, 12.)

(2) *Proceeding Is Civil.* In *McComb v. Commission on Judicial Performance*, *supra*, petitioner contended that the removal procedure was a criminal prosecution carrying with it the ordinary procedural safeguards, because removal from office may be a criminal sanction under P.C. 15 (see 1 Cal. Crim. Law (3d), *Introduction to Crimes*, §4). In rejecting the contention the court said: "[P]etitioner is not charged with unlawful acts which constitute criminal offenses. Nor is the proceeding designed to convict petitioner of a crime or to punish him for criminal acts. Rather, this proceeding is limited to an inquiry and determination whether petitioner is physically and mentally capable of performing his judicial duties, or whether he has wilfully and persistently failed to perform those duties, or whether he has engaged in conduct prejudicial to the court and the administration of justice. These grounds for retirement or removal of a judge do not require proof of criminal misconduct. The ultimate objective is to protect the judicial system and the public which it serves from judges who are unfit to hold office." (19 C.3d Spec. Trib. Supp. 9.)

In *McComb v. Superior Court* (1977) 68 C.A.3d 89, 137 C.R. 233, petitioner refused to appear for the taking of his deposition by the Commission, contending that Govt.C. 68753, authorizing the Commission to order depositions, as applied to him, violated his constitutional privilege against self-incrimination. *Held*, the proceedings, analogous to State Bar disciplinary proceedings, are noncriminal in nature; hence, he was required to respond as a witness and testify. (68

C.A.3d 97, 98.)

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c. Preliminary Investigation.

2 *Witkin Cal. Proc. Courts* § 82

[§ 82] Preliminary Investigation.

(1) *Written Statement.* A Commission action may commence by a written statement alleging grounds for judicial discipline. The Commission may (a) dismiss the proceeding, if it determines that the statement is "obviously unfounded or frivolous," (b) make a staff inquiry to determine whether a preliminary investigation is warranted, or (c) conduct a preliminary investigation to determine whether formal proceedings are warranted. (Commission Rule 109(a).)

(2) *Commission's Own Motion.* In the absence of a written statement, the Commission may commence a staff inquiry or preliminary investigation on its own motion. (Commission Rule 109(b).) (On investigation on Commission's own motion, see *Geiler v. Commission on Judicial Qualifications* (1973) 10 C.3d 270, 273, 110 C.R. 201, 515 P.2d 1, supra, §77.)

(3) *Notice of Staff Inquiry and Results.* During the course of a staff inquiry, the Commission may determine that the judge's conduct does not warrant further proceedings and may terminate the inquiry by issuing a confidential advisory letter. If the inquiry does not warrant a confidential advisory letter or further proceedings, the Commission must terminate the inquiry and notify the judge in writing. Before an advisory letter is issued, the judge must be notified of the inquiry and the nature of the charge. The judge is entitled to respond within 20 days after an inquiry letter is mailed, unless the time is extended for good cause. (Commission Rule 110.)

(4) *Notice of Preliminary Investigation and Results.* If a preliminary investigation is commenced, the judge must be notified of the investigation and the nature of the charge, and must be afforded "a reasonable opportunity in the course of the preliminary investigation to present such matters as the judge may choose." The judge is entitled to respond within 20 days after a preliminary investigation letter is mailed, unless the time is extended for good cause. If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the Commission terminates the inquiry and notifies the judge in writing. An investigation may also be terminated by a confidential advisory letter. (Commission Rule 111.) Termination of an investigation may be deferred not longer than 2 years for observation and review of the judge's conduct. (Commission Rule 112.)

(5) *Notice of Disposition at Judge's Request.* On the request of a judge subject to a proceeding before the

Commission, the Commission must notify the judge in writing of the disposition of the proceeding if (a) the request describes the underlying incident giving rise to the proceeding, (b) the pendency of the proceeding has become generally known to the public, or (c) the judge has received written notice of the proceeding from someone not associated with the Commission. (Commission Rule 109.)

(6) *Medical Examination.* The judge must submit to a medical examination on a finding of good cause made by seven members of the Commission. The examination must be limited to the conditions stated in the finding of good cause. A psychiatric examination may not be required without the judge's consent. (Commission Rule 105.)

(7) *Representation by Counsel.* The judge is entitled to be represented by counsel in all Commission proceedings. (Commission Rule 106.)

(8) *Duty To Cooperate.* The judge must cooperate with the Commission in all proceedings. Cooperation or lack of cooperation may be considered in determining the appropriate disciplinary sanction or disposition or further proceedings. The judge must file responses and documents within the prescribed time and must comply with the other requirements of Commission proceedings, including discovery requirements. (Commission Rule 104.)

(9) *Validity of Advisory Letter Procedure.* In *Oberholzer v. Commission on Judicial Performance* (1999) 20 C.4th 371, 84 C.R.2d 466, 975 P.2d 663, the Commission, after a preliminary investigation, issued a confidential advisory letter that "strongly disapproved" of petitioner's dismissal of a criminal case, but determined that no further proceedings were warranted. In this original writ proceeding, petitioner challenged the Commission's authority to issue the letter and its procedure in doing so. *Held*, although advisory letters are authorized and the Commission's procedure was permissible, the letter was not appropriate in this case.

(a) The Commission's long-standing practice of issuing advisory letters has been codified by the rules governing the Commission, and recognized by Cal. Const., Art. VI, §18.5, which characterizes advisory letters as "disciplinary action," and permits their release in certain circumstances. Because advisory letters may be considered by the Commission in subsequent proceedings, and because confidentiality is no longer assured, they are properly characterized as "disciplinary" in nature. (20 C.4th 389.) Under Commission Rule 110, notice of the inquiry and the nature of the charge and a reasonable opportunity to respond are prerequisites to an advisory letter. Due process requires no more. An advisory letter provides an informal, less severe alternative to more formal discipline, and additional procedural protections, such as a hearing, the confrontation of witnesses, and judicial review, "appear paradoxical and unduly onerous." (20 C.4th 394.)

(b) In limited circumstances, the Commission may issue an advisory letter based on perceived legal error. However, legal error alone is insufficient to support a finding that a judge has violated the Code of Judicial Ethics and thus should be disciplined. "[A] judge must be free not only to make the correct ruling for the proper reasons, but also to make an incorrect ruling, believing it to be correct." (20 C.4th 398.) While legal error that "clearly and convincingly" reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or a purpose other than the faithful discharge of judicial duties is subject to investigation, "[m]ere legal error, without more" is not. (20 C.4th 398.) Here, there is no evidence that petitioner's act in dismissing the criminal case was motivated by any of these factors. Thus, it was not sanctionable. (20 C.4th 400.)

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d. Admonishment.

2 *Witkin Cal. Proc. Courts* § 83

[§ 83] Admonishment.

(1) *Private Admonishment.* If the preliminary investigation discloses good cause, the Commission issues a notice of intended private admonishment by certified mail. It must include "a statement of facts found by the commission and the reasons for the proposed admonishment." (Commission Rule 113.)

(2) *Public Admonishment.* If the preliminary investigation discloses good cause, the Commission issues a notice of intended public admonishment by certified mail. It must include "a statement of facts found by the commission and the reasons for the proposed admonishment." (Commission Rule 115.)

(3) *Judge's Response and Commission's Action.* Within 30 days after the notice is mailed, the judge may (a) accept the admonishment, (b) file a demand for formal proceedings, or (c) file written objections, waive formal proceedings, and demand an appearance before the Commission to contest the admonishment. After the time set for the appearance, the Commission may (a) close the matter without disciplinary action, (b) close the matter with a confidential advisory letter, or (c) issue a private admonishment. (Commission Rules 114, 116.)

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e. Notice of Formal Proceeding and Answer.

2 *Witkin Cal. Proc. Courts* § 84

[§ 84] Notice of Formal Proceeding and Answer.

(1) *Notice.* If, after a preliminary investigation, the Commission concludes that formal proceedings should be instituted, it must "without delay" give written notice to the judge, by personal service (or by mail if personal service is waived or cannot be accomplished by reasonable effort for 10 days). "The notice shall specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based," and must advise the judge of the duty to answer within 20 days. Within 5 days after service of the announcement, the Commission must make the notice public and announce that formal proceedings have been instituted. (Commission Rule 118.)

(2) *Answer.* The judge must serve and file an answer within 20 days after service of the notice. The answer must be verified and must conform in style to C.R.C., Rule 8.204(b) (see 9 *Cal. Proc.* (5th), *Appeal*, §697). "The notice of formal proceedings and answer shall constitute the pleadings. No further pleadings shall be filed and no motion or demurrer shall be filed against any of the pleadings." (Commission Rule 119.)

In *McComb v. Commission on Judicial Performance* (1977) 19 C.3d Spec. Trib. Supp. 1, 138 C.R. 459, 564 P.2d 1, petitioner contended that former C.R.C., Rule 906 (comparable to Commission Rule 119) denied due process because it precluded objections to the jurisdiction of the Commission and the sufficiency of the facts alleged in the notice. The court rejected this contention. The apparent purpose of the rules is to require the judge to state objections in the answer. "The rule, however, did not preclude petitioner from moving to dismiss the proceeding for lack of jurisdiction since that objection, if based on lack of jurisdiction of the subject matter, can be made at any time. Petitioner in fact objected to the Commission's jurisdiction, and thus he was not prejudiced by the lack of a rule providing for objection to the Commission's jurisdiction. Because petitioner was given proper notice of the proceeding and a complete hearing on the charges, with full opportunity to question any alleged fact, he was not denied procedural due process." (19 C.3d Spec. Trib. Supp. 12.)

(3) *Failure To Answer.* The proceedings continue "whether or not the judge has filed an answer or appears at the hearing." Failure to answer or appear, however, standing alone, may not be taken as evidence of the truth of the facts alleged to constitute grounds for discipline. (Commission Rule 123.)

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f. Hearing.

2 *Witkin Cal. Proc. Courts* § 85

[§ 85] Hearing.

(1) *Time and Notice.* The Commission sets a time and place for the hearing, and gives 20 days' mailed notice to the judge. (Commission Rule 121.)

(2) *Commission or Masters.* The hearing may be held before the Commission itself. (Commission Rule 121.) In that case not fewer than six members must be present when the evidence is produced. (Commission Rule 123.) The Commission may, however, request the Supreme Court to appoint three special masters--judges of courts of record--to hear the evidence and report to the Commission; but not more than two of them may be retired judges. With the consent of the judge involved and the approval of seven members of the Commission, a single master may be requested. (Commission Rule 121.) (On hearings before masters under former rule, see *In re Chargin* (1970) 2 C.3d 617, 87 C.R. 709, 471 P.2d 29; *In re Glickfeld* (1971) 3 C.3d 891, 92 C.R. 278, 479 P.2d 638.)

(3) *Report of Proceedings.* The proceedings are reported. (Commission Rule 123.) The judge may have the testimony transcribed at the judge's expense, or, if the Commission orders a transcript, a copy must be made available on request at the judge's expense. (Commission Rule 126.)

(4) *Procedural Rights of Judge.* The judge has the right to be represented by counsel, to present evidence and cross-examine witnesses, and to compel the production of witnesses and evidence. (Commission Rule 126.)

(5) *No Right to Jury Trial.* Because the proceedings are not criminal in nature (see *supra*, §81) and were unknown at common law, there is no right to a jury trial. (*McComb v. Commission on Judicial Performance* (1977) 19 C.3d Spec. Trib. Supp. 1, 10, 138 C.R. 459, 564 P.2d 1.)

(6) *Conservator.* If the judge is adjudged insane or incompetent, or it appears to the Commission that the judge is not competent to act, a conservator must be appointed (preference being given when possible to members of the judge's immediate family). The conservator has all the rights and privileges of the judge. (Commission Rule 126.)

(7) *Dismissal.* In specified circumstances, charges in a notice of formal proceedings may be dismissed before final

disposition. (Commission Rule 128(b).)

(8) *Discipline by Consent.* The judge and the examiner may negotiate an agreement, evidenced by an affidavit of consent, that admits specified charges in exchange for a stated sanction. The agreement may be accepted or rejected by the Commission. (Commission Rule 127.)

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g. Evidence.

2 Witkin Cal. Proc. Courts § 86

[§ 86] Evidence.

(1) *In General.* The California Evidence Code is applicable to hearings before the Commission or masters, and oral evidence may be taken only on oath or affirmation. The examiner or the judge may propose to the other party an agreed statement in place of all or part of the testimony, but an agreed statement does not foreclose argument to the Commission or masters. (Commission Rule 125.)

(2) *Prior Disciplinary Action.* A prior disciplinary action may be received in evidence to prove that conduct is persistent or habitual, or to determine what action should be taken regarding discipline. (Commission Rule 125.)

(3) *Effect of Failure To Answer or Appear.* "The failure of the judge to answer the charges or to appear at the hearing shall not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for censure, removal, retirement or public or private admonishment." (Commission Rule 123.)

(4) *Exercise of Privilege.* Under *Ev.C. 913* (see 2 *Cal. Evidence (4th)*, *Witnesses*, §96), no inference may be drawn, as to any matter in issue or to the judge's credibility, from the exercise of the privilege not to respond on self-incrimination grounds, or from the exercise of any other Evidence Code or other recognized privilege. In accordance with *Ev.C. 413* (see 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §115), the Commission may consider the judge's failure to explain or deny evidence or facts in the case, or wilful suppression of evidence, unless the failure to respond is due to the judge's exercise of any legally recognized privilege. (Commission Rule 123.)

(5) *Quantum of Proof.* The requirement is the same as that imposed in State Bar disciplinary proceedings (see 1 *Cal. Proc. (5th)*, *Attorneys*, §614): "proof by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty." (*Geiler v. Commission on Judicial Qualifications* (1973) 10 C.3d 270, 275, 110 C.R. 201, 515 P.2d 1, *supra*, §77.) (See *McComb v. Commission on Judicial Performance* (1977) 19 C.3d Spec. Trib. Supp. 1, 11, 138 C.R. 459, 564 P.2d 1 [because there is no charge of commission of a crime and no threat of confinement in a mental institution, due process and equal protection do not require proof beyond a reasonable doubt].)

(6) *Protection of Witnesses.* "No civil action may be maintained against a person, or adverse employment action

taken against a person, by any employer, public or private, based on statements presented by the person to the commission." (Cal. Const., Art. VI, §18(h).)

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h. Masters' Report.

2 Witkin Cal. Proc. Courts § 87

[§ 87] Masters' Report.

Commission Rule 129 governs the report of the masters:

(1) On completion of the hearing, a transcript must be prepared. A copy is mailed to the masters, the examiner, and the judge.

(2) Within 30 days after the mailing, the examiner and the judge must submit proposed findings of fact and conclusions of law, unless the masters waive submission.

(3) Within 60 days after mailing of the transcript or within 30 days after submission of proposed findings and conclusions, whichever occurs later, the masters must submit a final report to the Commission. During that period, the masters may require additional briefing and argument.

(4) The report must contain findings of fact, conclusions of law, an analysis of the evidence, and the reasons for the findings and conclusions. The report may not contain a recommendation as to discipline.

(5) The Commission promptly mails a copy of the report to the examiner and the judge.

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i. Determination by Commission.

2 Witkin Cal. Proc. Courts § 88

[§ 88] Determination by Commission.

(1) *Briefs*. Objections to the masters' report are set forth in formal briefs to the Commission. Opening briefs may be filed within 15 days after the report is mailed. Responses may be filed within 10 days after opening briefs are filed, and replies may be filed within 5 days after responses are filed. (Commission Rule 130.)

(2) *Hearing*. The Commission may order a hearing for taking additional evidence. If masters were appointed, the hearing of additional evidence may be before them or before the Commission; and all hearings must be in conformity with the rules governing original hearings. (Commission Rule 133.) The examiner and the judge must be given an opportunity to be heard orally before the Commission. (Commission Rule 132.) (See *Ryan v. Commission on Judicial Performance* (1988) 45 C.3d 518, 530, 247 C.R. 378, 754 P.2d 724 [limiting oral argument before Commission to 45 minutes was reasonable; judge could address charges in detail in brief].)

(3) *Scope of Review*. The Commission should give weight to the findings of the masters but it, not the masters, has ultimate power to recommend; and it may disregard the report and prepare its own findings and conclusions, subject to the clear and convincing evidence rule (*supra*, §86). (*Geiler v. Commission on Judicial Qualifications* (1973) 10 C.3d 270, 275, 110 C.R. 201, 515 P.2d 1, *supra*, §77.)

(4) *Required Vote*. Where the hearing is before masters, Commission action requires the affirmative vote of six members of the Commission who considered the record and report of the masters and were present at any oral hearing before the Commission. Where the hearing is before the Commission without masters, Commission action requires the affirmative vote of six members of the Commission who considered the record, at least four of whom were present when the evidence was produced. (Commission Rule 134.)

(5) *Record of Proceedings*. The Commission must keep records of its actions. The determination is entered in the record and a copy is sent to the judge. In formal proceedings, the Commission prepares a transcript of the testimony and the proceedings and makes written findings of fact and conclusions of law. (Commission Rule 135.)

(6) *Notice of Determination*. Notice of any disciplinary determination and notice of any disqualification are mailed

to the judge. (Commission Rule 135.)

(7) *Disqualification While Formal Proceedings Are Pending.* The Commission may disqualify a judge from acting as a judge, without loss of salary, on notice of formal proceedings charging the judge with judicial misconduct or disability. (Cal. Const., Art. VI, §18(b); see Commission Rule 120.)

(8) *Finality.* A Commission determination to impose discipline following formal proceedings is final 30 days after the date of the order regarding the disciplinary determination. (Commission Rule 136.)

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j. Confidentiality.

1. Former Law.

2 Witkin Cal. Proc. Courts § 89

[§ 89] Former Law.

(1) *Preliminary Investigation: Private.* Under our original procedure, the Commission's preliminary investigation was confidential. (Former Cal. Const., Art. VI, §18(h).) However, the Commission could issue explanatory statements at the investigatory stage when the subject matter was generally known to the public. (Former Cal. Const., Art. VI, §18(g).)

Confidentiality at the preliminary stage was upheld in *Ryan v. Commission on Judicial Performance* (1988) 45 C.3d 518, 247 C.R. 378, 754 P.2d 724, decided under the original procedure. In *Ryan*, all witnesses at the preliminary hearing were admonished to speak to no one about the investigation of Judge R, and 4 of the over 100 witnesses were specifically admonished not to speak to Judge R. *Held*, the admonishments did not deny Judge R due process.

(a) A judge's right to conduct a defense attaches only after formal proceedings have been initiated. "Simply stated, a judge does not have the right to defend against a proceeding that has not yet been brought." (45 C.3d 528.)

(b) Hence, the issue is limited to whether the admonishments prevented Judge R from conducting reasonable discovery *after* the initiation of formal proceedings. Accordingly, the burden was on him to prove which witnesses were admonished, which of them refused to speak to him *because* of the admonishments, and how their refusals prejudiced his preparation for the hearing. He failed to meet this burden. He never used the procedural tools that were available once formal proceedings were initiated, i.e., subpoenaing witnesses who were reluctant to speak and compelling depositions and testimony. In addition, he was offered a continuance to interview witnesses, but he refused the offer. (45 C.3d 529.)

(2) *Most Formal Proceedings: Confidential.* At one time, papers and proceedings were confidential until a record was filed by the Commission in the Supreme Court. (Former Cal. Const., Art. VI, §18(h); former C.R.C., Rule 902(a).) However, the judge could require that formal proceedings be public, the Commission could issue public statements in the interests of justice, and proceedings could be public if the charges involved moral turpitude, dishonesty, or corruption. (Former Cal. Const., Art. VI, §18(f).) (See *McCartney v. Commission on Judicial Qualifications* (1974) 12 C.3d 512, 519, 116 C.R. 260, 526 P.2d 268; *Mosk v. Superior Court* (1979) 25 C.3d 474, 499, 159 C.R. 494, 601 P.2d

1030 [former rule authorizing *public* investigations in defined circumstances violated constitutional provision requiring confidentiality].)

(3) *Charges Involving Moral Turpitude, Dishonesty, or Corruption: Public.* The nature and scope of the provision authorizing public hearings were addressed in *Adams v. Commission on Judicial Performance* (1994) 8 C.4th 630, 34 C.R.2d 641, 658, 882 P.2d 358. The Commission filed various formal charges against Judge A, and, because some of them involved moral turpitude, dishonesty, or corruption, determined to hold public proceedings. By petition for a writ of mandamus, Judge A challenged the determination on the nature of the charges and sought to maintain confidentiality. The Court of Appeal determined that the Commission had authority to hold a public hearing only on those charges that necessarily involved moral turpitude, dishonesty, or corruption, and that the hearing on the remaining charges should remain confidential. *Held*, reversed. The Commission could order a single public hearing on all charges.

In a subsequent stage of the proceeding, the court, following the recommendation of the Commission, ordered that Judge A be removed from office. (See *Adams v. Commission on Judicial Performance* (1995) 10 C.4th 866, 42 C.R.2d 606, 897 P.2d 544, *supra*, §78.) In doing so, the court resolved two preliminary issues:

(a) The Commission's combined roles as investigator, prosecutor, and adjudicator, as well as litigation adversary in proceedings challenging the Commission's decision to hold open hearings, did not create an unacceptable risk of actual bias by the Commission so as to deny Judge A his right to due process. (10 C.4th 881.)

(b) The Commission's vigorous opposition to the judge's attempt to vacate the open-hearing order, using as legal counsel the same attorneys who were prosecuting the charges, did not inevitably prejudice the Commission against him with respect to the merits of the charges, so as to create a strong probability of bias against him in violation of due process requirements. (10 C.4th 882.)

(4) *Petition for Supreme Court Review: Private.* In *Gubler v. Commission on Judicial Performance* (1984) 37 C.3d 27, 207 C.R. 171, 688 P.2d 551, the Commission recommended public censure; and, on filing the record with the court, disseminated a press release and copies of its findings, conclusions, and recommendation. In response to petitioner's challenge, the court examined the question whether public disclosure should be restricted beyond the point of filing of the record, and approved confidentiality until the judge filed a petition for review or the time for filing the petition expired. (37 C.3d 62.)

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j. Confidentiality.

2. Current Law.

2 Witkin Cal. Proc. Courts § 90

[§ 90] Current Law.

(1) *General Rule: Informal Proceedings Are Confidential.* The Commission may provide for the confidentiality of complaints and investigations. (Cal. Const., Art. VI, §18(i)(1).) Generally, the papers and proceedings of the Commission before formal proceedings are confidential. (Commission Rule 102(a).) (See Rothman, California Judicial Conduct Handbook 3d, §12.40 et seq.)

(2) *Authorized Disclosures.* The following disclosures are authorized:

(a) Explanatory statements. (See Cal. Const., Art. VI, §18(k); Commission Rule 102(c).)

(b) Statements of clarification, if public reports result in substantial unfairness to the judge. (See Commission Rule 102(d).)

(c) Disclosures to a person complaining about the judge. (See Commission Rule 102(e).)

(d) Disclosures for purposes of public safety or criminal prosecution. (See Commission Rule 102(f), (g).)

(e) Disclosure at the request or with the consent of the judge. (See Commission Rule 102(h).)

(f) Disclosures to judicial appointment authorities. (See Cal. Const., Art. VI, §18.5; Commission Rule 102(i), (j).)

(g) Disclosures on retirement or resignation. (See Commission Rule 102(k).)

(3) *Formal Proceedings Are Public.* Once the Commission institutes formal proceedings, papers and proceedings are public. (See Cal. Const., Art. VI, §18(j) [notice of charges, answer, and all subsequent papers and proceedings are public]; Commission Rule 102(b) [notice of formal proceedings, subsequent papers, stipulations, findings of fact, conclusions of law, disciplinary determinations, and formal hearings before masters and Commission are public]; 5 A.L.R.4th 730 [confidentiality of proceedings and reports]; 8 Hastings Const. L. Q. 11 [propriety of public hearings]; on

film or electronic coverage of hearings, see Commission Rule 124.)

(4) *Public Announcement.* Within 5 days after service of the notice of formal proceedings, the Commission must issue a public announcement that formal proceedings have been instituted. (Commission Rule 118(d).)

(5) *Votes and Deliberations.* While the Commission is not required to conduct its deliberations in public, the individual votes of Commission members in formal proceedings must be disclosed. In *Recorder v. Commission on Judicial Performance* (1999) 72 C.A.4th 258, 85 C.R.2d 56, plaintiff newspaper challenged the Commission's practice of revealing the total vote count but not the votes of individual commissioners in formal proceedings. "[T]he vote of the members on whether or not to impose judicial discipline is such an essential and integral part of the formal proceedings of the commission perhaps the single most important act a member takes in his or her capacity as such--that it would be plainly unreasonable to accept the commission's interpretation of its authority" under Cal. Const., Art. VI, §18(j). "[W]hen California voters overwhelmingly approved a requirement that all 'proceedings' subsequent to the filing of formal disciplinary charges 'shall be open to the public' (§18(j)), they must have intended the commission to vote in public or at least to disclose the full results of its vote, including how each commission member voted." However, "like an intermediate appellate court, or an administrative agency acting in an adjudicative capacity--the commission is not required to conduct its 'deliberations' in public. ... [I]t is well settled and universally recognized that the judicial 'thought process' need not be publicly revealed." (72 C.A.4th 262.)

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4. Review in Supreme Court.

a. Procedure.

2 *Witkin Cal. Proc. Courts* § 91

[§ 91] Procedure.

(1) *Discretionary Review.* On petition by a judge or former judge, the Supreme Court may review a determination by the Commission. If the court has not acted within 120 days after granting a petition for review, the Commission's decision is final. (Cal. Const., Art. VI, §18(d).)

(2) *Disqualification While Review Is Pending.* A judge is disqualified from acting as a judge, without loss of salary, while a petition to review a determination to remove or retire the judge is pending. (Cal. Const., Art. VI, §18(a).)

(3) *Review Procedure.* C.R.C., Rule 9.60 governs Supreme Court review of determinations by the Commission:

(a) The judge files and serves a petition in the Supreme Court within 60 days after the Commission's determination. Within 45 days after service of the petition, the Commission may file and serve an answer. Within 20 days after service of the answer, the judge may file and serve a reply. (On service and extension of time, see C.R.C., Rule 9.60(a), (b).)

(b) The petition, answer, and reply must address the appropriateness of review and the merits of the Commission's determination. In the event review is granted, these documents serve as briefs on the merits. (On format, length, and attachments, see C.R.C., Rule 9.60(c).)

(c) The Commission transmits the original record to the Supreme Court. (See C.R.C., Rule 9.60(d).)

(d) Generally, the rules governing civil appeals apply. (See C.R.C., Rule 9.60(e).)

A special procedure applies where discipline involves a Supreme Court justice. The Commission's determination involving a judge or former judge of the Supreme Court is reviewed by a tribunal of seven Court of Appeal judges selected by lot. (Cal. Const., Art. VI, §18(f); see C.R.C., Rule 9.61.)

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II. JUDICIAL CONDUCT AND DISCIPLINE

C. Disciplinary Proceedings.

4. Review in Supreme Court.

b. Standard of Review.

2 Witkin Cal. Proc. Courts § 92

[§ 92] Standard of Review.

(1) *Independent Evaluation of Record.* Under our original procedure, the Commission only recommended; the ultimate decision was by the court. Accordingly, the substantial evidence rule did not apply and the court, on an independent evaluation of the evidence in the record, made findings and conclusions on which the determination was based. (*Geiler v. Commission on Judicial Qualifications* (1973) 10 C.3d 270, 276, 110 C.R. 201, 515 P.2d 1, supra, §77.) (See *McComb v. Commission on Judicial Performance* (1977) 19 C.3d Spec. Trib. Supp. 1, 13, 138 C.R. 459, 564 P.2d 1.)

In *Furey v. Commission on Judicial Performance* (1987) 43 C.3d 1297, 240 C.R. 859, 743 P.2d 919, supra, §78, the court made the following point: "As is our duty, we independently review the findings of the Commission to insure that there is clear and convincing evidence to sustain the charge to a reasonable certainty. ... We do, however, give special weight to the factual determinations by the masters, who are best able to evaluate the truthfulness of witnesses appearing before them." (43 C.3d 1304.) (See *Fitch v. Commission on Judicial Performance* (1995) 9 C.4th 552, 555, 556, 37 C.R.2d 581, 887 P.2d 937 [court first makes "an independent evaluation of the evidence before the Commission to determine whether the charges against petitioner are supported by clear and convincing evidence," and then "must determine whether the conduct that is the subject of the proceeding constitutes a basis for censure or removal, and, if so, the appropriate action"].)

Supreme Court review of a determination by the Commission is now discretionary, but the independent review standard remains. When the Supreme Court reviews a determination, "it may make an independent review of the record." (Cal. Const., Art. VI, §18(d).)

(2) *Effect of Commission's Recommendation.* In *Spruance v. Commission on Judicial Qualifications* (1975) 13 C.3d 778, 119 C.R. 841, 532 P.2d 1209, the court disposed of a new contention advanced by the examiners: that the dismissal by the Commission of certain specifications of misconduct should not have conclusive effect, and that the court, in its independent examination of the record, might find these charges proven despite the Commission's contrary view. In rejecting the argument the court reasoned as follows:

(a) The power granted the court by the Constitution is contingent on the Commission's recommendation, and it would be inconsistent with this division of functions for the court to consider allegations of misconduct other than those which formed the basis of the recommendation. "Unlike our statutory and inherent constitutional powers to control the professional conduct of members of the bar ... our shared constitutional power to censure or remove a judge for misconduct does not permit us to impose such discipline on our own motion." (13 C.3d 784, footnote 5.)

(b) The Commission performs a dual function. When considering the masters' report and making its findings and conclusions of law it acts in an adjudicatory role; but before the court the Commission acts as an adversary--the respondent to the petition for a writ of review, and the examiners appear as its attorneys. After dismissing certain specifications on its own evaluation of the record, the Commission is estopped from urging, through its counsel, a different assessment of the record. (13 C.3d 784, footnote 5.)

(c) However, the court will not give dispositive effect to the Commission's determinations of fact and law. They are merely conditions precedent to the court's consideration of the charges, and "it is solely for this court to decide not only the question of fact whether the conduct in issue occurred but also, unfettered by the characterizations of the Commission, the question of law whether the proven conduct falls within the class of conduct for which the Constitution authorizes the imposition of discipline." (13 C.3d 784, footnote 5.)

After an independent review of the record, the Supreme Court may increase or decrease the discipline recommended by the Commission. (*Broadman v. Commission on Judicial Performance* (1998) 18 C.4th 1079, 1090, 77 C.R.2d 408, 959 P.2d 715.) In most of the cases the Commission's recommendation has been adopted. (See *supra*, §§77, 78; for cases rejecting the Commission's recommendation, see *McCartney v. Commission on Judicial Qualifications* (1974) 12 C.3d 512, 116 C.R. 260, 526 P.2d 268, *supra*, §74; *Dodds v. Commission on Judicial Performance* (1995) 12 C.4th 163, 178, 48 C.R.2d 106, 906 P.2d 1260.)

(3) *Where Views of Commission and Masters Differ*. The court generally gives weight to the findings and conclusions of both the Commission and the masters. Where their views vary, special weight is given to the master's resolution of fact issues that turn on credibility of testimony, but deference is given to the Commission's inferences and conclusions, in light of its expertise and unanimity and the fact that it heard posthearing argument. (*Wenger v. Commission on Judicial Performance* (1981) 29 C.3d 615, 622, 175 C.R. 420, 630 P.2d 954, *supra*, §78.) (See *Adams v. Commission on Judicial Performance* (1995) 10 C.4th 866, 880, 42 C.R.2d 606, 897 P.2d 544, *supra*, §78 [while making independent evaluation, court must "accord great weight to the conclusions of the Commission, recognizing the expertise of the Commission in matters involving judicial conduct"]; *Doan v. Commission on Judicial Performance* (1995) 11 C.4th 294, 313, 45 C.R.2d 254, 902 P.2d 272, *supra*, §77 [when they vary, court favors *conclusions* of Commission over those of special masters due to Commission's expertise in matters of judicial conduct, but favors *findings* of special masters over those of Commission due to special masters' ability to evaluate credibility of witnesses].)

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CHAPTER II - Courts

Witkin Summary of California Law

III. DISQUALIFICATION OF JUDGE

A. Nature and Scope.

1. In General.

2 *Witkin Cal. Proc. Courts* § 93

[§ 93] In General.

(1) *Original Statutes.* The original statutes governing disqualification for cause, former C.C.P. 170 et seq., were repealed in 1984. The original peremptory challenge statute, former C.C.P. 170.5, was repealed in 1957. Some of the provisions of these statutes are substantially similar to the current statutes, and decisions under the former provisions that remain relevant are cited in the sections that follow.

(2) *Current Statutory Framework.* The following statutes govern disqualification:

(a) *C.C.P. 170* provides: "A judge has a duty to decide any proceeding in which he or she is not disqualified." (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §354.) The duty imposed by *C.C.P. 170*, to decide cases unless disqualified, is as strong as the duty not to sit when disqualified. (*United Farm Workers of America v. Superior Court* (1985) 170 *C.A.3d* 97, 100, 103, 216 *C.R.* 4, *infra*, §118.)

(b) *C.C.P. 170.1* states the grounds for disqualification. (See *infra*, §101 et seq.)

(c) *C.C.P. 170.2* specifies matters that are not grounds for disqualification. (See *infra*, §102.)

(d) *C.C.P. 170.3* governs disqualification procedure. (See *infra*, §122 et seq.)

(e) *C.C.P. 170.4* sets forth permissible acts by a disqualified judge. (See *infra*, §127.)

(f) *C.C.P. 170.5* provides definitions.

(g) *C.C.P. 170.6* governs peremptory challenges. (See *infra*, §130 et seq.)

(3) *Scope of Disqualification Statutes.* For purposes of *C.C.P. 170* et seq., the term "judge" means superior court judges, court commissioners, and referees. (*C.C.P. 170.5(a)*.) The term "proceeding" means the action, case, cause, motion, or special proceeding to be tried or heard by the judge. (*C.C.P. 170.5(f)*.) The peremptory challenge statute is similarly limited to trial courts. (See *C.C.P. 170.6*, *infra*, §132.) (See Rothman, *California Judicial Conduct Handbook* 3d, §7.00 et seq.; C.E.B., 1 *Civil Proc. During Trial* 3d, §6.26 et seq.; 69 *Cal. L. Rev.* 1445 [comparison of federal and

California systems]; 91 *A.L.R.5th* 437 [constitutionality of disqualification laws]; on disqualification of appellate justices, see *infra*, §98 et seq.; on disqualification of privately compensated temporary judges, see *infra*, §350; on disqualification of federal judges and justices, see 75 *Harv. L. Rev.* 1660; 86 *Harv. L. Rev.* 736; on disqualification of United States Supreme Court justices, see *Laird v. Tatum* (1972) 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50.)

(4) *Disqualification in Criminal Cases.* The typical grounds for disqualification for cause are principally designed for civil cases, although challenges for bias have been raised in criminal cases. (See *People v. Thomas* (1972) 8 C.3d 518, 520, 105 C.R. 366, 503 P.2d 1374, *infra*, §113, citing the text; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §§2, 3; 68 *A.L.R.3d* 509 [disqualification of judge in criminal case for bias or prejudice].) Peremptory challenges are also available in criminal cases. (See 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §4 et seq.) Criminal cases involving disqualification are cited throughout this discussion.

(5) *Effect of Disqualification.* Disqualification may have the following effects:

(a) The statutory procedure may be employed to establish the disqualification and substitute a qualified judge to try the case. (See *infra*, §122 et seq.)

(b) If the action does proceed to trial, the judgment rendered by the disqualified judge is sometimes held to be void. (See *infra*, §§94 et seq., 127.)

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III. DISQUALIFICATION OF JUDGE

A. Nature and Scope.

2. Validity of Judgment by Disqualified Judge.

a. Theory That Judgment Is Void.

2 Witkin Cal. Proc. Courts § 94

[§ 94] Theory That Judgment Is Void.

The rule is commonly declared in California decisions that a judgment or order rendered by a disqualified judge is void. (See *Meyer v. San Diego* (1898) 121 C. 113, 53 P. 1129 [interest as property owner and taxpayer in litigation involving city]; *Keating v. Keating* (1915) 169 C. 754, 760, 147 P. 974 [bias and prejudice]; *Lindsay-Strathmore Irr. Dist. v. Superior Court* (1920) 182 C. 315, 331, 187 P. 1056 [interest in subject matter]; *Hall v. Superior Court* (1926) 198 C. 373, 387, 245 P. 814 [interest as property owner in irrigation district]; *Vallejo v. Superior Court* (1926) 199 C. 408, 418, 249 P. 1084 [interest as stockholder]; *Cadenasso v. Bank of Italy* (1932) 214 C. 562, 569, 6 P.2d 944 [ownership of stock]; *Giometti v. Etienne* (1934) 219 C. 687, 689, 28 P.2d 913 [relationship to counsel]; *Solberg v. Superior Court* (1977) 19 C.3d 182, 190, 137 C.R. 460, 561 P.2d 1148, infra, §131 [order after improperly denying peremptory challenge]; *Tatum v. Southern Pac. Co.* (1967) 250 C.A.2d 40, 43, 58 C.R. 238, infra, §110 [trustee of stock]; *Noorthoek v. Superior Court* (1969) 269 C.A.2d 600, 607, 75 C.R. 61 [order by judge who had previously disqualified himself]; *T.P.B. v. Superior Court* (1977) 66 C.A.3d 881, 885, 136 C.R. 311, 10 Summary (10th), *Parent and Child*, §796 [subsequent act by judge who admitted bias would be void; thus, mistrial was "legal necessity" precluding claim of double jeopardy]; *Urias v. Harris Farms* (1991) 234 C.A.3d 415, 285 C.R. 659, infra, §124; *Betz v. Pankow* (1993) 16 C.A.4th 931, 20 C.R.2d 841, infra, §96; *Christie v. El Centro* (2006) 135 C.A.4th 767, 780, 37 C.R.3d 718 [judge's grant of motion for nonsuit was void without showing of prejudice; judge was disqualified at time of ruling because his prior conversation about case with previously disqualified judge raised reasonable doubt about impartiality]; 29 A.L.R.5th 722 [disqualification as affecting validity of decision in which other disqualified judges participated].)

The theory upon which this rule rests has not been clearly stated in these decisions, and the proposition itself is not uniformly accepted in its broadest form by all of them. (See *Giometti v. Etienne*, supra, 219 C. 689 ["this court has on several occasions pointed out that a judgment rendered by a disqualified judge is void"]; *Tatum v. Southern Pac. Co.*, supra, 254 C.A.2d 43 ["[T]he statute does not say that the judge is disqualified to decide erroneously but that he shall not decide at all."].)

Some of the cases are more cautious in their declarations of invalidity. In *Lindsay-Strathmore Irr. Dist. v. Superior Court*, supra, after trial and decision, the Supreme Court granted prohibition to restrain the judge from proceeding in an action, holding him disqualified for interest. The court said that the judgment by an interested judge was void and that

consequently there could be no consent and no estoppel to attack it "at least prior to final judgment." (182 C. 331.)

Similarly, in *Cadenasso v. Bank of Italy*, *supra*, an action in equity to vacate a judgment of a disqualified judge brought before the judgment became final, the judgment was void, and no estoppel or waiver could prevent the attack, but the court expressed no opinion whether the action might have been brought after the judgment was final. (214 C. 569.)

Noorthoek v. Superior Court, *supra*, reaffirms the strict view. A wife, seeking to enforce an alimony award, obtained an order for the examination of a judgment debtor from a judge who had declared his disqualification. *Held*, the order was void, and failure to obey the subpoena issued pursuant to it was not a punishable contempt. (a) The peremptory challenge law merely prevents the challenged judge from trying a contested matter; it does not preclude such acts as signing an order to show cause. (See *infra*, §132.) (b) But former C.C.P. 170 stated that the disqualified judge could not "sit or act as such"; and this broader disqualification deprived him of power even to make the relatively nondiscretionary examination order. (269 C.A.2d 607.) (For power of disqualified judge to act under the current law, see C.C.P. 170.4, *infra*, §127.)

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III. DISQUALIFICATION OF JUDGE

A. Nature and Scope.

2. Validity of Judgment by Disqualified Judge.

b. Rationalization in Terms of Jurisdiction.

1. Court Has Subject Matter Jurisdiction.

2 *Witkin Cal. Proc. Courts* § 95

[§ 95] Court Has Subject Matter Jurisdiction.

Little is accomplished by calling the judgment of a disqualified judge "void." (See *supra*, §94.) The real question--the effect of the judgment--is evaded by the loose application of this word of many meanings. The problem is one of jurisdiction and, despite the fact that a disqualified judge totally lacks power to hear and determine the cause, the defect should not be considered a lack of jurisdiction of the subject matter, for the following reasons:

(1) *Court Is Not Disqualified.* It is only the particular judge who is disqualified; the court is not. Another judge of the same court or a judge assigned from another court may try the case. The recognized remedy has been prohibition or mandamus to prevent the disqualified judge from acting (see *infra*, §§159, 160). If jurisdiction of the subject matter were lacking, mandamus to dismiss the action or prohibition to prevent any trial would be appropriate. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §398.) *In re Christian J.* (1984) 155 C.A.3d 276, 279, 202 C.R. 54, *infra*, §96, and *Stebbins v. White* (1987) 190 C.A.3d 769, 781, 782, 235 C.R. 656, *infra*, §96, support the view that the court retains subject matter jurisdiction.

(2) *Waiver.* Disqualification may be waived (see *infra*, §128), while jurisdiction of the subject matter cannot be conferred by waiver or estoppel. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §13.)

(3) *Collateral Attack.* To hold that jurisdiction of the subject matter is lacking would mean that all such judgments would be open to collateral attack at any time, a highly undesirable result.

(4) *Judgment Required.* A practical exception to the rules of disqualification, recognized by dicta in California cases, refutes the contention that no valid judgment can be rendered: Disqualification cannot be asserted against a tribunal where the result would be wholly to prevent any determination. (See *Johnson v. State Bar* (1935) 4 C.2d 744, 760, 52 P.2d 928 [dictum: "It might be well to add, however, that the discharge of the exclusive jurisdiction of this court cannot be prevented by the disqualification of all or a majority of its members"]; *Mosk v. Superior Court* (1979) 25 C.3d 474, 486, footnote 9, 159 C.R. 494, 601 P.2d 1030; *Nider v. Homan* (1939) 32 C.A.2d 11, 17, 89 P.2d 136 [dictum: "a judge or an officer exercising judicial functions may act in a proceeding wherein he is disqualified by interest,

relationship, or the like, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would prevent absolutely a determination of the proceeding"].)

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A. Nature and Scope.

2. Validity of Judgment by Disqualified Judge.

b. Rationalization in Terms of Jurisdiction.

2. Disqualified Judge Has No Jurisdiction To Act.

2 Witkin Cal. Proc. Courts § 96

[§ 96] Disqualified Judge Has No Jurisdiction To Act.

The court, with jurisdiction of the subject matter, may properly be held to lack jurisdiction to act while the judge is disqualified (unless the right to urge the disqualification is lost through waiver) and pending a determination of the issue of disqualification. This explanation in terms of *excess of jurisdiction* justifies the following holdings:

(1) The filing of a sufficient challenge ousts the judge of a previously existing jurisdiction unless the judge establishes his or her qualification. (See *infra*, §126.)

(2) Prohibition or mandamus may lie to prevent the disqualified judge from trying the case. (See *infra*, §§159, 160.)

(3) A motion to vacate the judgment, and an independent action in equity for relief from the judgment, despite finality and long lapse of time, are appropriate remedies. (See *infra*, §159.)

This explanation is consistent with the established rule that disqualification may be waived (*infra*, §128), and gets rid of the troublesome question of collateral attack, which should rarely be permitted in cases of mere excess of jurisdiction. (See 2 Cal. Proc. (5th), *Jurisdiction*, §§332, 337; *Solberg v. Superior Court* (1977) 19 C.3d 182, 190, 137 C.R. 460, 561 P.2d 1148, *infra*, §131 [judge subject to peremptory challenge has jurisdiction only to grant motion]; *Thompson v. Superior Court* (1962) 206 C.A.2d 702, 710, 23 C.R. 841 [judge attempting to hear matter after sufficient and timely affidavit under peremptory challenge statute]; *T.P.B. v. Superior Court* (1977) 66 C.A.3d 881, 886, 136 C.R. 311, 10 Summary (10th), *Parent and Child*, §796 [action of admittedly biased judge was not mere error of law or procedure]; *Urias v. Harris Farms* (1991) 234 C.A.3d 415, 285 C.R. 659, *infra*, §124; *In re Jenkins* (1999) 70 C.A.4th 1162, 1165, 83 C.R.2d 232 [once properly challenged, trial judge lost jurisdiction to proceed, and subsequent judgment in criminal case was void].)

In re Christian J. (1984) 155 C.A.3d 276, 202 C.R. 54, applies the theory that the judge has no jurisdiction to act. A petition was filed in the Juvenile Court alleging that a minor was an accessory after the fact to murder. The prosecution filed a motion for a peremptory challenge of Judge V, the assigned Juvenile Court judge. The minor did not object to

Judge V, and Judge V denied the motion on the erroneous ground that it was untimely. The prosecution did not seek an extraordinary writ to compel disqualification, the Juvenile Court hearing was completed, and an adjudication of wardship was made. On appeal, the minor contended that the prosecution's proper motion to disqualify automatically deprived Judge V of jurisdiction (see *infra*, §135), and that the order adjudicating wardship was therefore void. *Held*, order affirmed.

(a) By acquiescing in the exercise of jurisdiction by Judge V, the minor waived his right to appeal on the issue of an erroneous denial of the disqualification motion. (155 C.A.3d 278, 279.) Further, because the error was against the prosecution and not injurious to the minor, it could not be raised by the minor. (155 C.A.3d 281, citing the text.)

(b) In attempting to characterize the issue as jurisdictional, the minor failed to distinguish fundamental lack of jurisdiction of the subject matter from excess of jurisdiction; the latter may be waived. (155 C.A.3d 279, citing the text.) In general, the right to urge disqualification may be waived by the parties. "Consequently, the actions of a disqualified judge are not void in any fundamental sense but at most voidable if properly raised by an interested party." (155 C.A.3d 280.)

In *Stebbins v. White* (1987) 190 C.A.3d 769, 235 C.R. 656, defendant filed, but later withdrew, a peremptory challenge, and the assigned judge presided at the trial. On appeal, defendant repudiated the withdrawal, contending that the peremptory challenge was irrevocable and that the judgment was void. *Held*, judgment affirmed. Although a disqualified judge lacks power to hear and determine the cause, that defect does not constitute a lack of subject matter jurisdiction in the court. (190 C.A.3d 782, quoting the text.) As indicated in *Christian J.*, the action of a disqualified judge is not void in any fundamental sense but merely voidable if properly raised. Here, defendant waived his right to complain by consenting to the proceeding before the assigned judge. (190 C.A.3d 782.)

In *Betz v. Pankow* (1993) 16 C.A.4th 931, 20 C.R.2d 841, plaintiff appealed from a judgment confirming an arbitration award and, while the appeal was pending, moved to vacate the judgment because of the arbitrator's failure to disclose possible bias. The trial court denied the motion on the ground that it lacked jurisdiction while the appeal was pending. *Held*, affirmed; the trial court lacked jurisdiction.

(a) *Judgment void or voidable.* Under a recognized exception to the general rule, the trial court retains jurisdiction if the judgment is wholly void. "We have found no cases discussing whether an order or judgment confirming the award of a disqualified arbitrator is void or merely voidable. As to the validity of a judgment entered by a judge who is later found to be disqualified, the disqualification statutes do not prescribe a specific remedy, and there is a lack of uniformity in the cases which have addressed the issue." (16 C.A.4th 938, 939, citing *In re Christian J.*, *Urias v. Harris Farms* (1991) 234 C.A.3d 415, 285 C.R. 659, *infra*, §124, and other cases.) Under more recent cases, a court with subject matter jurisdiction may lack jurisdiction to act while the judge before whom the matter is pending is disqualified, pending determination of the issue of disqualification. The problem has been analyzed as an act in excess of jurisdiction, where the acts of the disqualified judge are at most voidable. (16 C.A. 4th 939, citing the text.) "We concur with Witkin and those cases concluding that the acts of a judge subject to disqualification for cause are voidable rather than void, and, by extension, conclude that the same rule should apply to arbitrators. Because the actions of the challenged arbitrator in the instant case were at most voidable, and not void, the trial court properly denied appellant's motion to vacate the judgment due to its pendency on appeal." (16 C.A.4th 940.)

(b) *Appropriate procedure to raise issue.* The plaintiff here first discovered evidence of disqualification while the appeal was pending. In the analogous situation of fraudulently concealed evidence, a petition for a writ of error coram vobis could issue, directing the trial court to reconsider the case in light of new evidence. The appropriate procedure here, however, is to affirm the order on the jurisdictional ground on which the trial court correctly relied. On issuance of the remittitur, the trial court will regain jurisdiction to determine the motion to vacate the judgment and the award. (16 C.A.4th 940, 941.)

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III. DISQUALIFICATION OF JUDGE

A. Nature and Scope.

3. Disqualification in Contempt Proceedings.

2 Witkin Cal. Proc. Courts § 97

[§ 97] Disqualification in Contempt Proceedings.

(1) *Direct Contempt*. The statute governing disqualification for cause was held inapplicable to direct contempts, which may be punished summarily by the judge, irrespective of alleged bias or prejudice. (*Blodgett v. Superior Court* (1930) 210 C. 1, 14, 290 P. 293 ["any such legislative purpose would be void as in violation of the inherent right of courts of justice to maintain that dignity, decency, order and respect which are essential to the proper administration of justice"]; see 20 Cal. L. Rev. 312, 317; 55 Cal. L. Rev. 61; 7 Cal. Proc. (5th), Trial, §§180, 181; 37 A.L.R.4th 1004 [disqualification in direct contempt proceeding].)

(2) *Constructive Contempt*. Constructive contempts do not require a summary procedure, and it has consequently been held that disqualification may be urged against the judge, who cannot pass on his or her own qualification. (*Briggs v. Superior Court* (1931) 211 C. 619, 630, 297 P. 3; *Turkington v. Municipal Court* (1948) 85 C.A.2d 631, 636, 193 P.2d 795; see *Donovan v. Superior Court* (1952) 39 C.2d 848, 852, 250 P.2d 246.)

In *Ungar v. Sarafite* (1964) 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921, petitioner, an attorney, was a prosecution witness in a New York criminal trial, immune from criminal liability because of his prior testimony before the grand jury. However, he was hostile to the prosecution, wrangled over the form of some questions, was unresponsive to other questions, and offered statements gratuitously. He was admonished repeatedly by the judge to confine his answers to the questions and to leave the defense to defense counsel. He persisted, however, and then claimed that he was emotionally unfit to continue because he was being "coerced and intimidated" by the judge, adding that "[t]he Court is suppressing the evidence." He was held in contempt under a statute providing for a nonsummary trial under a show cause order and hearing by the trial judge. He contended that, because his contemptuous remarks were a personal attack on the judge, the judge was necessarily biased and disqualified from presiding at the post-trial contempt hearing. *Held*, contempt judgment affirmed. "[W]e are unwilling to bottom a constitutional rule of disqualification solely upon such disobedience to court orders and criticism of its rulings during the course of a trial." (84 S.Ct. 847, 11 L.Ed.2d 928.)

A strong dissent of three justices, citing *Offutt v. United States* (1954) 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11, and *In re Murchison* (1955) 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942, 7 Cal. Proc. (5th), Trial, §168, described the case as a classic example of the situation where the judge who cites a person for contempt should not preside over the contempt trial. "An impartial judge, not caught up in the cross-currents of emotions enveloping the contempt charge, is the only

one who can protect all rights and determine whether the case is either one of judicial nerves on edge or of judicial tyranny." (84 S.Ct. 856, 11 L.Ed.2d 938.) (See 69 Harv. L. Rev. 162; 44 Cal. L. Rev. 425.)

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III. DISQUALIFICATION OF JUDGE

A. Nature and Scope.

4. Disqualification of Appellate Justice.

a. Procedure.

2 *Witkin Cal. Proc. Courts* § 98

[§ 98] Procedure.

(1) *Statutory Disqualification Procedure Does Not Apply.* In *Giometti v. Etienne* (1934) 219 C. 687, 689, 28 P.2d 913, the court observed that appellate justices are subject to the rules of disqualification that apply to judges generally. But the implication that the statutory disqualification *procedure* applies to appellate justices was repudiated in *Kaufman v. Court of Appeal* (1982) 31 C.3d 933, 184 C.R. 302, 647 P.2d 1081. Nine proceedings were pending in the Court of Appeal involving the Agricultural Labor Relations Board as a respondent. Counsel for the board and the United Farm Workers filed declarations seeking disqualification of Associate Justice K on the ground of bias. The clerk of the court sent a written request to the Chairperson of the Judicial Council (Chief Justice) for appointment of a judge to hear and determine the question of disqualification, and retired Supreme Court Justice B was assigned "to assist the Court of Appeal ... as a Justice thereof." Justice B issued orders commanding that Justice K "not sit or act" in the nine proceedings because "[i]t has been made to appear probable that, by reasons of bias and prejudice ... , a fair and impartial hearing cannot be had before him." *Held*, orders of disqualification annulled.

(a) *Statute is not applicable to appellate judges.* Under former C.C.P. 170 (now C.C.P. 170.3(c)(5), *infra*, §125), if the parties failed to agree on a judge to determine the question of disqualification, the Chairperson of the Judicial Council assigned a judge. The statutory language, however, made it clear that the statute was designed for trial judges, and the procedure specified is inappropriate for a proceeding to disqualify an appellate justice. (31 C.3d 938.) In 50 years of operation, the statute in its present form has never been applied to appellate judges; hence, the statutory provisions "affect trial judging only." (31 C.3d 939.) The brief observation in *Giometti v. Etienne*, *supra*, refers to the *grounds* for disqualification, not the procedures. (31 C.3d 937.)

(b) *No other law justifies the disqualification orders.* The argument of counsel that the court having jurisdiction should adopt a "suitable process or mode of proceeding" under C.C.P. 187 (*infra*, §185) is untenable. The only court with jurisdiction of the nine cases is the Court of Appeal, and it did not "adopt" Justice B's "mode of proceeding." (31 C.3d 939.) And the problems of appellate disqualification "are too comprehensive and too complex" for procedural rulemaking by courts. (31 C.3d 940.)

(c) *Appropriate procedure.* The federal rule allows appellate judges to decide for themselves whether the facts

require recusal, subject to the power of a higher court to hold that, because of bias, the appellate proceeding in which the judge participated became illegally and prejudicially unfair. (31 C.3d 939.) This has also been the California view and is here reaffirmed. "Absent new legislation, that means that neither one's colleagues nor a judge or panel agreed on may assume jurisdiction. Further, in this court the sole question would be: 'Because of his bias, did the appellate proceeding wherein a justice participated become illegally and prejudicially unfair?' " (31 C.3d 940.)

The exclusion of appellate justices from the statutory disqualification procedure is confirmed by C.C.P. 170.5(a), defining "judge" as used in C.C.P. 170.1 et seq. to mean superior court judges, court commissioners, and referees.

(2) *Certificate of Interested Entities or Persons.* To assist justices of the Courts of Appeal in determining whether to disqualify themselves, C.R.C., Rule 8.208 provides as follows:

(a) *Requirement.* The rule applies in appeals in civil cases other than family, juvenile, guardianship, and conservatorship cases. (C.R.C., Rule 8.208(b).) A party who files a motion, application, or opposition in the Court of Appeal before filing its principal brief must serve and file a Certificate of Interested Entities or Persons with that document and must include a copy of the certificate in its principal brief. A party who does not file a motion, application, or opposition must include the certificate in its principal brief. The certificate must appear after the cover and before the tables. (C.R.C., Rule 8.208(d)(1).) The certificate must be signed by appellate counsel or by an unrepresented party. (C.R.C., Rule 8.208(c)(1).) (On filing certificate under seal, see C.R.C., Rule 8.208(d)(1).)

(b) *What is entity.* For purposes of the certificate requirement, the term "entity" means a corporation, partnership, firm, or any other association, but does not include a natural person or a governmental entity or agency. (C.R.C., Rule 8.208(c)(2).)

(c) *Content of certificate.* If an entity is a party, the certificate must list any other entity or person known to have an ownership interest in the party of 10% or more. (C.R.C., Rule 8.208(e)(1).) If a party knows of a person or entity with a financial or other interest in the outcome that the party reasonably believes the justices should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics (see supra, §57), the certificate must identify the person or entity and the nature of the interest. (C.R.C., Rule 8.208(e)(2).) If the party knows no entity or person that must be disclosed, the certificate must so state. (C.R.C., Rule 8.208(e)(3).) For purposes of the certificate, ownership of securities or bonds of an entity by a mutual or common investment fund does not constitute a financial interest in the entity. Further, an interest in the outcome does not arise solely because an entity or person is in the same industry, field of business, or regulatory category and the case might establish a precedent. (C.R.C., Rule 8.208(e)(2).)

(d) *Supplemental information.* A party who learns of changed or additional information that must be disclosed must promptly serve and file a supplemental certificate. (C.R.C., Rule 8.208(f).)

(e) *Failure to comply.* If a party fails to file a certificate as required, the clerk must give notice by mail that failure to file within 15 days after the notice is mailed may result in sanctions. If the party fails to comply with the notice, the court may impose sanctions. If the party is the appellant, the court may strike the document or dismiss the appeal. If the party is the respondent, the court may strike the document or decide the appeal on the record, the opening brief, and any oral argument by the appellant. (C.R.C., Rule 8.208(d)(2), (d)(3).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Certificate of Interested Entities or Persons.*

(a) *Requirement.* The provision on filing the certificate under seal was renumbered C.R.C., Rule 8.208(d)(2) in 2008. (c) *Content of certificate.* C.R.C., Rule 8.208(e)(2) was amended in 2008 to add that a party's insurer does not have a financial interest for purposes of the certificate solely on the basis of its status as an insurer for that party.



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4. Disqualification of Appellate Justice.

b. Disqualification Required by Due Process Clause.

2 *Witkin Cal. Proc. Courts* § 99

[§ 99] Disqualification Required by Due Process Clause.

In *Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823, Alabama Supreme Court Justice E authored a per curiam opinion, affirming a jury award that included punitive damages against an insurer for bad faith refusal to pay a claim. The insurer, on learning that Justice E had filed two similar actions against insurers, including one class action on behalf of all state employees, moved for rehearing and for recusal of all the justices. The motions were denied. *Held*, reversed.

(a) All the issues here, including the issue of the proof necessary to permit punitive damages, were also present in Justice E's class action. His opinion "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case," his interest was direct, personal, substantial, and pecuniary, and by participating in this case he acted as a judge in his own case. (106 S.Ct. 1586, 89 L.Ed.2d 834.) His participation therefore violated the insurer's due process rights. (106 S.Ct. 1587, 89 L.Ed.2d 835.)

(b) The other justices, however, had no knowledge of the class action before the original opinion, and their interest was too speculative and contingent to require disqualification. (106 S.Ct. 1588, 89 L.Ed.2d 836.)

(c) Because this was a 5-4 decision in which Justice E's vote was decisive, and he wrote the opinion, the appearance of justice requires that the decision be vacated and remanded for further proceedings. (106 S.Ct. 1588, 1589, 89 L.Ed.2d 836, 837.)

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2 *Witkin Cal. Proc. Courts* § 100

[§ 100] Effect of Action Against Justices.

In *First Western Dev. Corp. v. Superior Court* (1989) 212 C.A.3d 860, 261 C.R. 116, a vexatious litigant (see 3 *Cal. Proc.* (5th), *Actions*, §365 et seq.) filed suit against the justices of the Court of Appeal alleging a conspiracy to discriminate against him, and then moved to disqualify the panel. The court denied the motion. "The courts of this state cannot permit a litigant to 'shop' for a judge through the device of filing a lawsuit against those judges who enter rulings adverse to the litigant. Such procedure would make it possible for a litigant who obtains an unfavorable decision from a trial court or from an appellate court to cause that court to become disqualified or to recuse itself merely by filing a lawsuit naming the judicial officers as defendants. ... Further, the rule relating to disqualification of an appellate judge is that each appellate judge himself decides whether recusal is required." (212 C.A.3d 867, citing *Kaufman v. Court of Appeal* (1982) 31 C.3d 933, 184 C.R. 302, 647 P.2d 1081, *supra*, §98.)

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B. Disqualification for Cause.

1. Grounds for Disqualification.

a. In General.

1. Statutory Grounds.

2 Witkin Cal. Proc. Courts § 101

[§ 101] Statutory Grounds.

A number of grounds for disqualification exist. (See Rothman, California Judicial Conduct Handbook 3d, §7.16 et seq.; C.E.B., 1 Civil Proc. During Trial 3d, §6.32 et seq.; 50 Proof of Facts 3d 449 [disqualification of trial judge for cause].) The following grounds are specified by statute:

- (1) Status as a party to the proceeding. (See *infra*, §103.)
- (2) Personal knowledge of disputed facts. (See *infra*, §104.)
- (3) Personal or financial interest in the proceeding. (See *infra*, §105 et seq.)
- (4) Relationship to a party or attorney. (See *infra*, §111.)
- (5) Prior representation or advice. (See *infra*, §§112, 113.)
- (6) Bias or prejudice. (See *infra*, §114 et seq.)
- (7) Trial judge during and after appeal. (See *infra*, §119.)
- (8) Physical disability. (See *infra*, §120.)
- (9) Dispute resolution conflict. (See *infra*, §121.)

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1. Grounds for Disqualification.

a. In General.

2. What Are Not Grounds.

2 Witkin Cal. Proc. Courts § 102

[§ 102] What Are Not Grounds.

(1) *Statutory Specification.* The following are not grounds for disqualification:

(a) *Membership in group.* That the judge is or is not a member of a "racial, ethnic, religious, sexual or similar group" and the proceeding involves the rights of that group. (*C.C.P. 170.2(a)*.) (See 41 *Hastings L. J.* 695 [Is Sexual Orientation Cause in California?]; 75 *A.L.R.3d* 1021 [membership in fraternal or social club or order].)

(b) *Expression of view on issues.* That the judge has "in any capacity" expressed a view on a legal or factual issue presented in the proceeding, except as provided in *C.C.P. 170.1(a)(2)*, (b), or (c). (*C.C.P. 170.2(b)*.) (See *infra*, §§112, 119.)

(c) *Participation in statutory drafting or advocacy.* That the judge has, as a lawyer or a public official, "participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect or application of which is in issue" unless the judge "believes that his or her prior involvement was so well known as to raise a reasonable doubt in the public mind as to his or her capacity to be impartial." (*C.C.P. 170.2(c)*.)

(2) *Former Statutory Grounds Not Retained.* The following grounds under former *C.C.P. 170* were not continued in the statutory revision of 1984:

(a) *Indebtedness to party or agent.* A judge was disqualified when indebted to a party, or to an attorney, counsel, or partner of a party, or to an officer of a corporation or unincorporated association party. (Former *C.C.P. 170(a)(3)*.)

(b) *Local judge in action involving local agencies.* A local judge was disqualified where an action or proceeding concerning real property was brought by or against certain public agencies dealing with water. (Former *C.C.P. 170(h)*, (i).)

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b. Party to Proceeding.

2 *Witkin Cal. Proc. Courts* § 103

[§ 103] Party to Proceeding.

A judge who is a party to a proceeding is disqualified. (*C.C.P. 170.1(a)(4)*.) In a case decided on another ground, the Supreme Court declared that the former statute on disqualification of a party referred to a real party, and that joinder of a judge in bad faith by a sham pleading would be a ground for disciplinary action against the attorney. (*Younger v. Superior Court* (1902) 136 C. 682, 685, 69 P. 485 ["It evidently was not intended that a plaintiff could make all the superior judges in the state save one parties, and thus select his own judge"].)

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1. Grounds for Disqualification.

c. Personal Knowledge of Facts.

2 Witkin Cal. Proc. Courts § 104

[§ 104] Personal Knowledge of Facts.

A judge with "personal knowledge of disputed evidentiary facts concerning the proceeding" is disqualified. (*C.C.P. 170.1(a)(1)(A).*) A judge is deemed to have personal knowledge "if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge's knowledge likely to be a material witness in the proceeding." (*C.C.P. 170.1(a)(1)(B).*) For this purpose the third degree of relationship is calculated according to the "civil law system." (*C.C.P. 170.5(d).*) (See *People v. Williams (1997) 16 C.4th 635, 652, 66 C.R.2d 573, 941 P.2d 752* [nephew of judge's son-in-law was not within third degree of relationship]; *C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.14.*)

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1. Grounds for Disqualification.

d. Interest in Proceeding.

1. In General.

2 *Witkin Cal. Proc. Courts* § 105

[§ 105] In General.

(1) *Nature of Prohibition.* A judge's personal or financial interest in the subject matter has long been a ground for disqualification. In *Meyer v. San Diego* (1898) 121 C. 102, 53 P. 434, *infra*, §108, the court declared that the statutory disqualification for interest "is but an expression of the ancient maxim that no man ought to be a judge in his own cause, a maxim which appeals with such force to one's sense of justice that it is said by Lord Coke to be a natural right so inflexible that an act of parliament seeking to subvert it would be declared void. ... It is a principle whose strict observance is dictated both by natural justice and an enlightened public policy. For it is not enough that a judicial decision be sound. It is of next importance that the tribunal rendering it be free from the charge of interest or the taint of partiality, else public confidence will be destroyed and judicial usefulness gravely impaired." (121 C. 104.)

(2) *Scope of Disqualification.* A judge who "has a financial interest in the subject matter in a proceeding or in a party to the proceeding" is disqualified. (*C.C.P. 170.1(a)(3)(A)*; see C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.17.) A judge is deemed to have a financial interest in either of the following circumstances:

(a) A spouse or minor child living in the household has a financial interest. (*C.C.P. 170.1(a)(3)(B)(i)*.)

(b) The judge or the spouse of the judge is a fiduciary who has a financial interest. (*C.C.P. 170.1(a)(3)(B)(ii)*.) For this purpose, "fiduciary" includes an executor, trustee, guardian, or administrator. (*C.C.P. 170.5(g)*.) (On special statute applicable in probate proceedings, see *infra*, §106.)

(3) *Duty To Keep Informed.* "A judge has a duty to make reasonable efforts to inform himself or herself about his or her personal and fiduciary interests and those of his or her spouse and the personal financial interests of children living in the household." (*C.C.P. 170.1(a)(3)(C)*.)

(4) *What Constitutes Financial Interest.* The term "financial interest" means (a) ownership of more than a 1 percent legal or equitable interest in a party, (b) a legal or equitable interest in a party of a fair market value in excess of \$ 1,500, or (c) a relationship as a director, advisor, or other active participant in the affairs of a party. (*C.C.P. 170.5(b)*);

see Code of Judicial Ethics, Canon 3E(3), *supra*, §57 [ownership of corporate bonds issued by party is disqualifying if fair market value exceeds \$ 1,500; ownership of government bonds issued by party is disqualifying only if outcome could substantially affect value of judge's bonds].) (See Rothman, California Judicial Conduct Handbook 3d, §7.30 et seq.; 10 A.L.R.2d 1307, 1313 [nature of disqualifying interest]; 25 A.L.R.3d 1331 [disqualification of judge based on ownership of stock of corporation involved in litigation]; 56 A.L.R.5th 783 [disqualification based on ownership interest in litigation]; 46 Am.Jur.2d (2006 ed.), Judges §92 et seq.)

(5) *What Does Not Constitute Financial Interest.*

(a) "Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in those securities unless the judge participates in the management of the fund." (C.C.P. 170.5(b)(1); see Code of Judicial Ethics, Canon 3E(3), *supra*, §57 [ownership of mutual or common investment funds that hold bonds is not disqualifying].)

(b) "An office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in securities held by the organization." (C.C.P. 170.5(b)(2).)

(c) "The proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a 'financial interest' in the organization only if the outcome of the proceeding could substantially affect the value of the interest." (C.C.P. 170.5(b)(3).)

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d. Interest in Proceeding.

2. Interested Probate Judge.

2 *Witkin Cal. Proc. Courts* § 106

[§ 106] Interested Probate Judge.

A judge is disqualified from acting in proceedings concerning the administration of a decedent's estate, except to transfer the proceedings to another judge under *Prob.C. 7070* et seq. (see 14 *Summary* (10th), *Wills and Probate*, §350), in any of the following circumstances:

(1) The judge is interested as a beneficiary or creditor. (*Prob.C. 7060(a)(1)*.)

(2) The judge is named as executor or trustee in the will. (*Prob.C. 7060(a)(2)*.) (See 10 *A.L.R.2d* 1307, 1335 [disqualification based on status as administrator or executor].)

(3) The judge is otherwise interested. (*Prob.C. 7060(a)(3)*.)

A judge who participated in the drafting or execution of a will, including acting as a witness, is disqualified from acting in a proceeding prior to and including the admission of the will to probate or in a proceeding involving its validity or interpretation. (*Prob.C. 7060(b)*.)

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3. Exception: Rule of Necessity.

2 Witkin Cal. Proc. Courts § 107

[§ 107] Exception: Rule of Necessity.

Olson v. Cory (1980) 27 C.3d 532, 178 C.R. 568, 636 P.2d 532, involved the right of all judges to retain a means of measurement of their annual salary increases more favorable than that provided by the current statute. "[A]ll California judges have at least an involuntary financial interest in this case. To disqualify one would disqualify all, depriving them and their surviving spouses of opportunity to litigate the case. This court as now constituted is qualified to hear and determine the issues before us." (27 C.3d 537, 560.) (See *People v. Superior Court (Mudge)* (1997) 54 C.A.4th 407, 410, 62 C.R.2d 721 [membership in California Judges Association did not disqualify appellate judges from determining validity of statute authorizing stipulation to disqualify retired judge from hearing criminal case]; 27 A.L.R.6th 403 [construction and application of rule of necessity]; on exception to disqualification where disqualification would prevent any determination, see *supra*, §95.)

In *Nevada v. Superior Court* (1974) 10 C.3d 663, 111 C.R. 568, 517 P.2d 832, an action was brought in the Nevada County superior court by the County of Nevada, challenging the validity of the Governmental Conflict of Interest Act. The court refused to exercise its jurisdiction on the ground that all superior court judges were disqualified. *Held*, mandamus granted to compel the court to hear and determine the case; the judges were not disqualified. (10 C.3d 664, citing the text.)

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d. Interest in Proceeding.

4. Former Case Law on Financial Interest.

2 *Witkin Cal. Proc. Courts* § 108

[§ 108] Former Case Law on Financial Interest.

The test of interest has been stated as follows: "[I]f the judge has an interest in the subject matter of the action, or has property which may be directly affected by the result of the judgment that may be rendered therein, the court will not consider the extent of the interest nor inquire into the effect it would have upon his rulings. It is sufficient to disqualify him if it is a certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment that may be rendered." (*Lindsay-Strathmore Irr. Dist. v. Superior Court* (1920) 182 C. 315, 329, 187 P. 1056; see *Martin v. Nelson* (1933) 217 C. 669, 20 P.2d 938 [judge was member of partnership with two parties to action]; *Carpenter v. Pacific Mut. Life Ins. Co. of Calif.* (1937) 10 C.2d 307, 323, 74 P.2d 761, *infra*, §110.)

In *Meyer v. San Diego* (1898) 121 C. 102, 104, 109, 53 P. 434, defendant city contracted to buy the system of S Water Co., the purchase to be financed by bonds. Plaintiff taxpayer sued to set aside the contract and enjoin the bond issue. The trial judge was held disqualified on the ground that he owned real property in the county, taxable for the payment of the bonds. The court was careful to add: "The disqualification does not spring from the fact that the judge is a citizen, inhabitant, and taxpayer of the city of San Diego, nor yet from the fact that the municipality is a party litigant in the action. It arises from the circumstance that he owns property within the city which may or may not be liable for the burden of a special tax for the period of forty years, as he shall decide. The validity of this tax is directly called in question. The judge himself, under the circumstances shown, could have instituted as plaintiff this identical action. ... The judgment which he renders in the case will be binding upon his rights and his property. His interest is in the outcome of the litigation, and it is a direct, measurable, pecuniary interest." (121 C. 110.)

In *Lindsay-Strathmore Irr. Dist. v. Superior Court*, *supra*, several irrigation districts joined in a representative action against defendant district, to restrain the taking of underground water. The judge owned a city lot in the area from which defendant was pumping, though he had never made use of the underground flow. *Held*, he was disqualified. (a) A judgment against the district would directly benefit him by protecting his interest in the underground water, though his use of the water was only potential and the interest was slight. (182 C. 328 et seq.) (b) In this representative action, a property owner in the position of the judge was a "quasi party" who could conceivably intervene in the action and would be bound by the decree. (182 C. 326.) A concurring opinion considered the judge's interest of such slight value as

to be only theoretical, and relied on the specific provision of former C.C.P. 170 disqualifying the judge of the county in litigation involving a public agency or district.

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5. Former Case Law on Remote Interest.

2 Witkin Cal. Proc. Courts § 109

[§ 109] Former Case Law on Remote Interest.

In *Goodspeed v. Great Western Power Co. of Calif.* (1937) 19 C.A.2d 435, 65 P.2d 1342, the court, reviewing prior authorities, stressed the point that, to serve as a ground for disqualification, the interest must relate to the pending action. "Interest in law, as applied to a judge, had and must have, a highly special and definite meaning. It means an interest direct, proximate, inherent in the instant event. It does not mean an interest in a similar suit against the same or other defendants; it does not mean an interest in a point of law as such, or in an issue of fact as such, or in any general or special phase of the case. It means a definite, material, financial stake in the direct outcome of the particular case." (19 C.A.2d 444.)

In *Lassen Irr. Co. v. Superior Court* (1907) 151 C. 357, 90 P. 709, T sued a water company for damages for alleged failure to deliver water. The chief defense of the company was that certain persons, including the trial judge, had paramount rights in the water; that these persons were claiming that the company was taking more than it was entitled to take; and that a complete determination of the issues could not be had without bringing in the paramount owners as parties. On the basis of this defense the company sought to disqualify the judge. *Held*, the judge was qualified. (a) The paramount owners were not necessary parties; the right of T against the company could be determined without litigating or affecting the claims of those owners. Hence, the judgment could not affect his property rights. (b) It might be necessary at the trial to show the extent of the trial judge's paramount right and the amount of water he had taken pursuant to that right. "It may be conceded that in weighing such evidence the judge might not be entirely unprejudiced." (151 C. 361.) However, though these circumstances might have been relevant in support of a charge of bias or prejudice (clearly insufficient for that purpose here), they did not establish a disqualifying interest. "A mere sentimental interest, or an interest in the facts which the issues make it necessary for him to determine, which may tend to induce him to give more weight to the evidence for one party than to the evidence for the other, respecting such facts, is not the interest which will disqualify him." (151 C. 361.)

A judge's direct interest as a taxpayer may be a ground for disqualification. (See *Meyer v. San Diego* (1898) 121 C. 102, 110, 53 P. 434, *supra*, §108.) However, if the interest is too remote, the judge is not disqualified. In *Los Angeles v. Pomeroy* (1901) 133 C. 529, 531, 65 P. 1049, the city sued to condemn land. Defendant landowners attacked the judge's

qualifications on the ground that he owned land within the city and, in the event of a large condemnation award, his land might be subject to increased taxation. *Held*, this remote contingency did not meet the test of a disqualifying interest.

In *Cuyamaca Water Co. v. Superior Court* (1924) 193 C. 584, 226 P. 604, a city sued a water company to quiet title to water rights as the successor to a former pueblo. The company sought to disqualify all of the superior court judges who resided in the city on the ground that, if the city's claim were upheld, it would hold the water rights as trustee for its inhabitants, and each judge would thereby have a vested right in his or her proportionate share. The court held that the alleged interest "is neither separate, severable, individual nor defined; that it is not a direct pecuniary or direct property interest or one involving an individual right or privilege whereby a liability or pecuniary gain would occur on the event of the suit, and that the alleged interest is too remote and conjectural to operate as a disqualification." (193 C. 591.)

In *Central & West Basin Water Replenishment Dist. v. Wong* (1976) 55 C.A.3d 191, 127 C.R. 448, Judge W was one of some 10.5 million homeowners who might benefit as a taxpayer or ratepayer in a pending class action if rates for other users of water supplied by the Metropolitan Water District were increased. *Held*, the interest was too remote to disqualify. The test that emerges from *Pomeroy*, *Cuyamaca*, and other cases is that a judge's decision must have "a direct and ascertainable impact" upon the judge or his or her property. "Such an impact will not be deemed to exist unless the effect of his decision on his interest can be predicted in advance with assurance." (55 C.A.3d 195.) Here, the water district's board had "entirely independent discretion" in determining how any increase in its revenues might be used, and even if rates were generally reduced, that reduction might not be passed on to the homeowner-user by the *City of Los Angeles*. (55 C.A.3d 195, 196.)

The relationship of debtor and creditor does not by itself result in disqualification; hence, a judge may try a case involving a bank as a party, even though the judge is a depositor. (*Central Pac. Ry. Co. v. Superior Court* (1931) 211 C. 706, 718, 296 P. 883; on effect of probate judge being creditor of estate, see *supra*, §106.)

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6. Former Case Law on Securities Holdings.

2 *Witkin Cal. Proc. Courts* § 110

[§ 110] Former Case Law on Securities Holdings.

Early cases held that the ownership of stock in a corporation that was a party, or that had a direct financial interest in the outcome of the action, was a disqualifying fact under the general interest provision of former C.C.P. 170. (*Adams v. Minor* (1898) 121 C. 372, 373, 53 P. 815; *Vallejo v. Superior Court* (1926) 199 C. 408, 418, 249 P. 1084 [condemnation action; judge was stockholder in bank that, though not party, held deed of trust on land involved].)

The statute was amended in 1929 to provide for ownership of stock or other securities as a separate ground for disqualification. As amended, the statute disqualified a judge in any action or proceeding in which he or she is interested "as the holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation." (See *Central Pac. Ry. Co. v. Superior Court* (1931) 211 C. 706, 717, 296 P. 883 [stock ownership may not be disqualifying circumstance if its effect is too remote]; 19 Cal. L. Rev. 452; 5 So. Cal. L. Rev. 174.)

Carpenter v. Pacific Mut. Life Ins. Co. of Calif. (1937) 10 C.2d 307, 74 P.2d 761, a proceeding to liquidate an insurance company, involved a conflict of interest between life policyholders and noncancellable accident policyholders. *Held*, the trial judge, the holder of a life policy, was disqualified. "We can see no material legal difference between ownership of a policy entitling the recipient to dividends, and ownership of stock in a corporation." (10 C.2d 323.)

The disqualification of a judge for stock ownership was strictly applied, regardless of consequences, in *Tatum v. Southern Pac. Co.* (1967) 250 C.A.2d 40, 58 C.R. 238. Plaintiff sued defendant Southern Pac. Co. for personal injury damages. Judgment was given for defendant. On plaintiff's motion for a new trial, the judge recalled that, as a trustee for his children and nieces, he had a portfolio of 19 stocks recommended by investment counsel, including 400 shares of Southern Pac. Co. *Held*, a motion to vacate the judgment was properly granted. (a) The words "holder or owner" would be superfluous if only ownership were intended; hence, holding as a trustee disqualifies. (250 C.A.2d 41.) (b) The judge's unawareness of his stock holding and the possibility that he might, on the death of a decedent, become the owner of stock without his knowledge are immaterial; the purpose of the statute is to insure public confidence by requiring a disinterested judge. (250 C.A.2d 42.)

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1. Grounds for Disqualification.

e. Relationship to Party or Attorney.

2 Witkin Cal. Proc. Courts § 111

[§ 111] Relationship to Party or Attorney.

(1) *Relationship to Party*. A judge is disqualified if the judge, or the judge's spouse, "or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party." (C.C.P. 170.1(a)(4).) For this purpose the third degree of relationship is calculated according to the "civil law system." (C.C.P. 170.5(d).) (See C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.18; 46 Am.Jur.2d (2006 ed.), Judges §112 et seq.; 10 A.L.R.2d 1307, 1332 [disqualification of judge based on status as officer, director, or trustee of corporation].)

Case law under the former statute, which was similar, may be instructive. (See *Favorite v. Superior Court* (1919) 181 C. 261, 267, 184 P. 15 [relationship to corporate stockholder did not disqualify; stockholder is neither party to corporation's action, nor officer of corporate party]; *Caminetti v. Pacific Mut. Life Ins. Co. of Calif.* (1943) 22 C.2d 386, 392, 139 P.2d 930 [disqualification was assumed to result from fact that judge's sister was stockholder in insurance company, where stockholders' committee actually intervened, so that sister became party by representation]; *Lynip v. Alturas School Dist. of Modoc County* (1915) 29 C.A. 158, 160, 155 P. 109 [judge was disqualified by relationship to officer of corporation that was real party in interest, even though action was brought in name of another]; *Vilardo v. Sacramento* (1942) 54 C.A.2d 413, 420, 129 P.2d 165 [relationship to county purchasing agent did not disqualify judge in action involving county; county is not corporation within meaning of statute, and plaintiff failed to show that purchasing agent was actually agent of county in connection with matters involved in litigation].)

(2) *Relationship to Attorney*. A judge is disqualified if a lawyer in the proceeding or the lawyer's spouse is "the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding." (C.C.P. 170.1(a)(5); see C.C.P. 170.5(e), *infra*, §112 [definition of "private practice of law"].) (See Rothman, California Judicial Conduct Handbook 3d, §7.37 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.19; 50 A.L.R.2d 143 [relationship to attorney as disqualifying judge]; 65 A.L.R.4th 73 [political association or relation to attorney as disqualifying judge]; 85 A.L.R.4th 700 [previous legal association with attorney as disqualifying judge].)

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1. Grounds for Disqualification.

f. Previous Representation or Advice.

1. In General.

2 *Witkin Cal. Proc. Courts* § 112

[§ 112] In General.

(1) *Disqualifying Conditions.* A judge is disqualified if (a) the judge served as a lawyer in the proceeding, or (b) in another proceeding involving the same issues, the judge "served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding upon any matter involved in the action or proceeding." (*C.C.P. 170.1(a)(2)(A).*) (See *In re Arthur S.* (1991) 228 C.A.3d 814, 818, 820, 279 C.R. 69 [discussing when separate proceedings involve same issues]; *In re Steven O.* (1991) 229 C.A.3d 46, 52, 279 C.R. 868 [former prosecutor in juvenile proceeding resulting in probation order was disqualified as pro tem. judge in probation revocation hearing]; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.16; 72 A.L.R.2d 443 [prior activity as attorney as disqualifying judge].)

(2) *When Judge Is Lawyer in Proceeding.* A judge is deemed to have served as a lawyer in the proceeding if, within the past 2 years:

(a) A party or an officer, director, or trustee of a party was a client of the judge when the judge was in private practice or a client of a lawyer with whom the judge was associated in private practice. (*C.C.P. 170.1(a)(2)(B)(i).*)

(b) A lawyer in the proceeding was associated in private practice with the judge. (*C.C.P. 170.1(a)(2)(B)(ii).*)

A judge who served as a lawyer for or an officer of a public agency that is a party is deemed to have served as a lawyer in the proceeding if the judge personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding. (*C.C.P. 170.1(a)(2)(C).*) An "officer of a public agency" does not include a member of the Legislature or a state or local agency official acting in a legislative capacity. (*C.C.P. 170.5(c).*)

(3) *Practice of Law.* For purposes of disqualification, "private practice of law" includes "a fee for service, retainer, or salaried representation of private clients or public agencies," but excludes "lawyers as full-time employees of public agencies or lawyers working exclusively for legal aid offices, public defender offices, or similar nonprofit entities whose clientele is by law restricted to the indigent." (*C.C.P. 170.5(e).*)

(4) *Judge's Duty To Check Conflicts*. The responsibility for ascertaining a judge's former clients for purposes of disqualification lies with the judge, not with the parties or their attorneys. Especially where the judge is recently appointed and comes from a large firm with a diverse client base, it is prudent for the judge to obtain from the firm a list of clients represented by the firm during the 2 years preceding the judge's appointment. (*Horsford v. Board of Trustees of Calif. State University* (2005) 132 C.A.4th 359, 383, 33 C.R.3d 644, citing *Urias v. Harris Farms* (1991) 234 C.A.3d 415, 285 C.R. 659, *infra*, §124.)

(5) *Illustrative Decisions*. Decisions under the prior statute, which was similar, are instructive. (See *O.A. Graybeal Co. v. Cook* (1936) 16 C.A.2d 231, 234, 60 P.2d 525 [allegations of disqualification were insufficient where assertion was merely that judge was formerly attorney for M Bank (not a party) of which M Holding Corp., the party, was an agent]; *Muller v. Muller* (1965) 235 C.A.2d 341, 344, 45 C.R. 182 [where defendant defaults, thus raising no issue, disqualification cannot later be urged, on motion to vacate judgment, on ground that previous action involved same issues].)

In *Mayo v. Beber* (1960) 177 C.A.2d 544, 2 C.R. 405, plaintiff's affidavit alleged that the judge was the attorney for defendant doctor in a prior malpractice action settled about a year before. At the hearing, it appeared that he had been a member of a large firm of defense counsel, that the doctor's case was handled by another member, and that he had never met defendant. Nevertheless, although the court held that the right to challenge was waived by delay (see *infra*, §128), the opinion intimates that the ground was good: "We may assume that when one member of a firm is so engaged, each member thereof is an attorney or counsel so retained or employed." (177 C.A.2d 549.)

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f. Previous Representation or Advice.

2. Former Prosecutor or Public Defender.

2 *Witkin Cal. Proc. Courts* § 113

[§ 113] Former Prosecutor or Public Defender.

In *People v. Thomas* (1972) 8 C.3d 518, 105 C.R. 366, 503 P.2d 1374, defendant contended that the trial judge, who within 2 years prior to the action had been an assistant district attorney for the county, was disqualified to try a vehicle felony charge against him. *Held*, conviction affirmed; the judge was not disqualified.

(a) The crime was not committed until after he became a judge; hence, he would not have obtained any personal knowledge of it while in the district attorney's office. (8 C.3d 520.)

(b) "[I]t would be unreasonable to assume that his prior representation in Los Angeles County of such an artificial and generalized party as the 'People' would result in a conscious or unconscious bias on his part for two years in all criminal cases in that county." (8 C.3d 520.)

(c) A public defender elevated to the bench would have represented individual defendants and would not be disqualified from sitting for 2 years in all criminal cases in the county. (8 C.3d 520, footnote 4.) (See C.C.P. 170.5(e), *supra*, §112 [lawyers working for "public defender offices" are excluded from definition of "private practice of law"].) (See 85 A.L.R.5th 471 [prior activity as prosecutor as disqualifying judge].)

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1. Grounds for Disqualification.

g. Bias or Prejudice.

1. Former Statute and Case Law.

aa. In General.

2 Witkin Cal. Proc. Courts § 114

[§ 114] In General.

(1) *Nature of Ground.* Under former C.C.P. 170(a)(5), a judge was disqualified "[w]hen it is made to appear probable that, by reason of bias or prejudice ... a fair and impartial trial cannot be had" before that justice or judge. (See *Calhoun v. Superior Court* (1958) 51 C.2d 257, 260, 331 P.2d 648, *infra*, §117; *Blackman v. MacCoy* (1959) 169 C.A.2d 873, 878, 338 P.2d 234; *People v. Winters* (1959) 171 C.A.2d Supp. 876, 888, 342 P.2d 538 [bias against prosecution]; *Adoption of Richardson* (1967) 251 C.A.2d 222, 232, 59 C.R. 323, *infra*, §115; *In re Morelli* (1970) 11 C.A.3d 819, 843, 91 C.R. 72; *Develop-Amatic Engineering v. Republic Mortg. Co.* (1970) 12 C.A.3d 143, 91 C.R. 193; *Pacific & Southwest Annual Conference of the United Methodist Church v. Superior Court* (1978) 82 C.A.3d 72, 86, 147 C.R. 44, *infra*, §§115, 159.)

In re Marriage of Fenton (1982) 134 C.A.3d 451, 184 C.R. 597, involved a wife's motion to assign an out-of-county judge to hear a marriage dissolution proceeding, on the ground that the husband was a leading attorney in the county who had obtained bar association support for the judges, and that it would therefore be impossible for any local judge to provide a fair and impartial trial. In upholding the denial of the motion, the court pointed out that bias must be shown by declarations indicating personal bias. "No precedent, or authority, of which we are aware would justify us in holding that the prominence of husband, or his role in the local bar, established disqualification of all Monterey County judges as a matter of law." (134 C.A.3d 457, citing the text.)

(2) *No Distinction Between Jury and Court Trials.* Several cases suggested that the qualifications of a judge, with respect to bias and prejudice, are similar to those of a juror. (See *Briggs v. Superior Court* (1932) 215 C. 336, 345, 10 P.2d 1003; on bias or prejudice of juror, see 7 *Cal. Proc.* (5th), *Trial*, §132.) The court in *Briggs*, in likening the qualifications of the judge to those of a juror, noted that the proceeding before it, a trial for constructive contempt without a jury, was one in which "the trial judge acts as the trier of both the facts and the law." (215 C. 345.) Whether this opinion suggests that a different *test* of bias or prejudice applies in jury and court trials is hard to determine. It is clear, however, that the *ground* is a basis for disqualification in each type of case, and later cases give no indication that the test is different. Thus, in *McKay v. Superior Court* (1950) 98 C.A.2d 770, 220 P.2d 945, petitioners were charged

with murder of deputy sheriffs. They challenged the trial judge on a showing that he had been personally friendly with the victims, and that his own father, while a sheriff, had been murdered. The judge admitted the possibility of unfairness in passing on questions of fact if the trial were by the court, but denied disqualification to rule on questions of law in a jury trial. *Held*, his remarks established his disqualification; "the fundamental right of every litigant to a fair and impartial trial applies with equal solemnity" to both kinds of trial. (98 C.A.2d 777.)

(3) *Bias Against Nonparties*. It has been said that the objectionable bias must be against a party, and that it is not enough to show, e.g., prior derogatory expressions concerning the party's witness (*Evans v. Superior Court* (1930) 107 C.A. 372, 379, 290 P. 662) or attorney (*Higgins v. San Diego* (1899) 126 C. 303, 313, 58 P. 700; *Shakin v. Board of Med. Examiners* (1967) 254 C.A.2d 102, 116, 62 C.R. 274). (See *Woolley v. Superior Court* (1937) 19 C.A.2d 611, 626, 66 P.2d 680 [bias against party or attorney only].)

In re Henry C. (1984) 161 C.A.3d 646, 207 C.R. 751, repudiates the theory of the *Evans* and *Woolley* cases. The statute "is not limited to a judge's bias or prejudice against a party. A judge's bias or prejudice toward a party's witness would clearly impair his impartiality and sway his judgment as to the party and the case." (161 C.A.3d 653.)

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1. Grounds for Disqualification.

g. Bias or Prejudice.

1. Former Statute and Case Law.

bb. Fixed Opinion on Particular Issue.

2 *Witkin Cal. Proc. Courts* § 115

[§ 115] Fixed Opinion on Particular Issue.

In *Adoption of Richardson* (1967) 251 C.A.2d 222, 59 C.R. 323, a deaf-mute husband and deaf wife, otherwise highly qualified, sought to adopt a hearing child. The uncontradicted evidence of many witnesses supported their petition, but the judge denied it. The decision could have rested on a clear abuse of discretion (see 251 C.A.2d 237), but the court also held that the judge was biased and should have declared his disqualification. This conclusion was based on the disclosure of a letter he had written to the Bureau of Adoptions asserting that "this adoption should be nipped in the bud," and on his remarks at the hearing indicating that he would not approve the adoption of a hearing child by deaf mutes under any circumstances. (251 C.A.2d 232.)

Pacific & Southwest Annual Conference of the United Methodist Church v. Superior Court (1978) 82 C.A.3d 72, 147 C.R. 44, was a class action for \$ 266 million in damages against several church organizations for alleged failure to carry out life care contracts with elderly persons. Judge T, the law and motion judge, had pending before him various pretrial matters including a motion to quash, a motion for discovery, a motion for class certification, and an application for a preliminary injunction. At this stage he wrote counsel a letter stating that he believed that the complaint was meritorious, that the plaintiffs would probably prevail at the trial and receive "enormous" damages, that the defendants "should consider offering some of their abundant means" to resolve the problem, and that the parties should "re-examine their respective positions" and confer again because continued litigation "may prove devastating to all concerned." Defendants moved to disqualify Judge T and the presiding judge denied the motion. *Held*, mandamus issued to compel the superior court to disqualify Judge T from further proceedings.

(a) *Bias established as matter of law.* Judge T, by publicly announcing prejudgments of issues in a complex case, demonstrated bias within the tests set forth in *Adoption of Richardson*. "He appears to have prejudged the outcome of the specific pretrial matter before him long before any judge is authorized to 'tote up' or to commence his conclusionary thinking. In so doing, he has broken a prime ground rule of the judge's craft." (82 C.A.3d 87.)

(b) *Kreling case distinguished.* Respondent court, invoking *Kreling v. Superior Court* (1944) 25 C.2d 305, 312, 153

P.2d 734, *infra*, §116, argued that Judge T's statements were in discharge of his official duties and constituted opinions formed at the pretrial hearings. This is unsound. The opinion of Judge M in *Kreling* was expressed only after the judge had heard all the evidence and the parties had rested; here, the evidence-taking had not ended and neither party had submitted the matter for decision. "Thus this midstream gratuitous blast was not of the genre of interim decisions a trial court must make based upon the evidence then received on a preliminary question requiring answer before the trial can proceed." (82 C.A.3d 84.)

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g. Bias or Prejudice.

1. Former Statute and Case Law.

cc. Nondisqualifying Opinions.

2 *Witkin Cal. Proc. Courts* § 116

[§ 116] Nondisqualifying Opinions.

(1) *Prior Information Without Hostility.* Some prior knowledge or opinions on the background of a case, such as any informed member of the community might have, do not disqualify where there is no showing of actual hostility or ill will. (*Goodspeed v. Great Western Power Co. of Calif.* (1937) 19 C.A.2d 435, 447, 65 P.2d 1342.)

Even a prior favorable opinion of one of the litigants does not necessarily imply bias. In *Rohr v. Johnson* (1944) 65 C.A.2d 208, 150 P.2d 5, an action was brought to recover personal property transferred to defendant while allegedly occupying a fiduciary relationship to plaintiff, an alleged incompetent. After the evidence was in, the trial judge declared that he knew defendant, thought him "a high minded, intelligent, honorable citizen," and did not doubt his good faith. Judgment was for defendant, and plaintiff, on a motion for a new trial, charged bias. *Held*, the judge was qualified. The appeal was on an agreed statement, without a transcript of the evidence, and it was impossible to tell whether the trial judge had any issue before him involving defendant's honesty; hence, the effect of any bias implied in the judge's statement could not be determined. If the judge's knowledge and belief, "standing alone, were held to be sufficient to establish prejudicial bias many judges would be of small use in their home counties. The mere fact that a judge entertains a general belief in the honesty of someone he knows is neither unusual nor indicates that he has such a fixed opinion as to impair his ability to weigh any evidence involving the acts of that person." (65 C.A.2d 211.)

(2) *Erroneous Opinion Formed at Trial.* Where the charge of bias is made because of a prior ruling of the judge against a party, in the same or a related trial, it will usually fail. A judge may not properly try a case where he has formed partisan opinions from outside sources, but a trial judge will normally and properly form opinions on the law, the evidence, and the witnesses, from the presentation of the case. These opinions and expressions of them may be critical or disparaging to one party's position, but they are reached after a hearing in the performance of the judicial duty to decide the case, and do not constitute a ground for disqualification. (*Kreling v. Superior Court* (1944) 25 C.2d 305, 310, 312, 153 P.2d 734; see *People v. Yeager* (1961) 55 C.2d 374, 391, 10 C.R. 829, 359 P.2d 261 [opinion based on testimony does not disqualify]; *Wampler v. Muller* (1953) 121 C.A.2d 396, 399, 262 P.2d 853 [trial judge, expecting to be out of county at time motion for new trial would be heard, filed memorandum criticizing verdict and stating that

motion had more than usual merit, then returned in time to hear motion]; *Taliaferro v. Taliaferro* (1962) 203 C.A.2d 642, 648, 21 C.R. 864; *Haldane v. Haldane* (1965) 232 C.A.2d 393, 395, 42 C.R. 828, quoting the text; *People v. Reyes* (1976) 62 C.A.3d 53, 68, 132 C.R. 848 [trial judge took dim view of defendant's "sweeping claim of innocence," made on witness stand with knowledge that he had been convicted of bookmaking; judge's anger was based on evidence, was not communicated to jury, and did not disqualify].)

This rule is particularly applicable where the alleged bias appears in a positive and erroneous view on a question of law. In *Ryan v. Welte* (1948) 87 C.A.2d 888, 198 P.2d 351, the judge sustained a general demurrer to plaintiff's complaint, and told plaintiff's attorney that he could not state a cause of action within the court's jurisdiction. Under the authorities, the judge was clearly in error. Plaintiff filed an amended complaint and, before the hearing on the new demurrer to the complaint, sought to disqualify the judge. *Held*, the challenge was unfounded. "[A] wrong opinion on the law of a case does not disqualify a judge, nor is it any evidence of bias or prejudice." Otherwise, "no judge who is reversed by a higher court on any ruling or decision would ever be qualified to proceed further in the particular case." (87 C.A.2d 893.) The proper remedy, of course, was an appeal from the erroneous ruling. (See *Estate of Buchman* (1955) 132 C.A.2d 81, 104, 281 P.2d 608.)

The *Kreling* decision, *supra*, must not be given too broad an application. Although the case involved a series of four actions, the parties had stipulated that the result reached in the first should govern the others; hence, in effect there was but one trial. It was on this basis that the court distinguished *Evans v. Superior Court* (1930) 107 C.A. 372, 380, 290 P. 662, where the judge's remarks in a prior case disqualified him from handling subsequent cases that, though related, involved dissimilar facts and no stipulation. (25 C.2d 313.) (See *Chastain v. Superior Court* (1936) 14 C.A.2d 97, 104, 57 P.2d 982, *infra*, §117; *Pacific & Southwest Annual Conference of the United Methodist Church v. Superior Court* (1978) 82 C.A.3d 72, 83, 84, 147 C.R. 44, *supra*, §115 [distinguishing *Kreling*].)

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1. Former Statute and Case Law.

dd. Bias Is Question of Law Where Evidence Is Not in Conflict.

2 *Witkin Cal. Proc. Courts* § 117

[§ 117] Bias Is Question of Law Where Evidence Is Not in Conflict.

Where the evidence is not in conflict and the facts are undisputed, the question of bias is one of law. In that case the judge's personal belief and his own affidavit or testimony as to his impartiality are of little or no weight.

In *Briggs v. Superior Court* (1932) 215 C. 336, 10 P.2d 1003, a proceeding for constructive contempt was brought against newspaper publishers and editors. They filed a statement charging that C, the trial judge, had, orally and in writing, taken a position on the merits of the case. Judge C had himself sworn as a witness and, in open court, declared repeatedly that petitioners' statement was wholly and unqualifiedly "false" in every respect. In his answering affidavit, the judge asserted that he used the expression simply as a denial of petitioners' allegations, and did not *intend* to imply that they had knowingly made false statements. Judge W, assigned to determine the issue, ruled that in the absence of contrary proof as to Judge C's intent the issue must be resolved in his favor. *Held*, Judge C was disqualified as a matter of law. The only reasonable meaning of his testimony, in view of the circumstances and manner of expression, was that petitioners had knowingly made false statements. Having expressed such an opinion, it was improbable that, in a proceeding in which petitioners would be their own principal witnesses, he would have the necessary impartiality to pass upon their credibility. (215 C. 345.)

In *Chastain v. Superior Court* (1936) 14 C.A.2d 97, 57 P.2d 982, a personal injury action was tried twice, with verdicts for defendants in both trials. Each time the trial judge granted a new trial on the express ground that defendants and their witnesses had deliberately perjured themselves. Before the third trial defendants filed a formal objection, but another judge determined that, despite his fixed opinion, the challenged judge was not biased or unable to conduct a fair trial. *Held*, prohibition should issue; a litigant is entitled to have the cause tried by a judge who has no preconceived opinion against his or her veracity. (14 C.A.2d 101.) (See *Evans v. Superior Court* (1930) 107 C.A. 372, 383, 290 P. 662 [judge, in prior related action, made harsh attack on character of petitioners].)

In *Keating v. Superior Court* (1955) 45 C.2d 440, 289 P.2d 209, F sued K and received a large award, which was reversed on appeal for a retrial of the issue of damages. Defendant K then sought to disqualify the trial judge who, in the

first trial (without a jury), said that K had given false testimony and that he would have no confidence in his books. The judge struck the petition from the record. *Held*, prohibition issued to restrain him from retrying the case. A judge who states his belief that a party has wilfully given false testimony is disqualified from hearing a retrial of the case, whether it is the entire case or a single issue such as damages. (45 C.2d 446, citing the text.)

In *Calhoun v. Superior Court* (1958) 51 C.2d 257, 331 P.2d 648, petitioner was convicted of a crime, obtained a reversal on appeal, and filed an affidavit to disqualify the trial judge on the retrial. The affidavit set forth the judge's voluntary affidavit filed with the District Attorney, opposing defendant's application for bail on appeal on the ground that he was guilty and that the appeal was taken for delay. The judge filed no answer. *Held*, prohibition issued to restrain the judge from retrying the case. Unanswered statements must be taken as true, and these clearly showed bias and prejudice against the defendant as to the issues of fact to be tried. (51 C.2d 260, 262.)

SUPPLEMENT: [This section is current through the latest supplement]



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III. DISQUALIFICATION OF JUDGE

B. Disqualification for Cause.

1. Grounds for Disqualification.

g. Bias or Prejudice.

2. Current Statute.

2 Witkin Cal. Proc. Courts § 118

[§ 118] Current Statute.

(1) *Nature of Ground.* A judge is disqualified in any of the following circumstances:

(a) The judge believes recusal would "further the interests of justice." (*C.C.P. 170.1(a)(6)(A)(i).*)

(b) The judge believes there is "substantial doubt as to his or her capacity to be impartial." (*C.C.P. 170.1(a)(6)(A)(ii).*)

(c) A person aware of the facts "might reasonably entertain a doubt" that the judge would be able to be impartial. (*C.C.P. 170.1(a)(6)(A)(iii).*)

Bias or prejudice toward a lawyer in the proceeding may be ground for disqualification. (*C.C.P. 170.1(a)(6)(B)*; see 54 *A.L.R.5th* 575 [disqualification for bias against counsel].)

(2) *Illustrative Decisions.* A number of decisions have considered the nature and scope of former C.C.P. 170.1(a)(6)(C) (now *C.C.P. 170.1(a)(6)(A)(iii)*). (See *In re Scott* (2003) 29 *C.4th* 783, 817, 129 *C.R.2d* 605, 61 *P.3d* 402 [disqualification statutes are applicable to superior court judge acting as referee in habeas corpus proceeding; no basis for disqualification was shown even though capital murder defendant's trial counsel had appeared before same judge in unrelated capital murder case and ineffective assistance claims were made in both cases]; *Sincavage v. Superior Court* (1996) 42 *C.A.4th* 224, 230, 49 *C.R.2d* 615 [judge in criminal prosecution, who as deputy district attorney had participated in prosecution of cases against defendant charged as prior convictions, was disqualified]; *Christie v. El Centro* (2006) 135 *C.A.4th* 767, 780, 37 *C.R.3d* 718 [judge was disqualified at time of ruling on motion for nonsuit because his prior conversation about case with previously disqualified judge raised reasonable doubt about impartiality]; 25 *A.L.R.4th* 923 [assault on or threat against judge by party or person associated with party as ground for disqualification]; 85 *A.L.R.5th* 547 [disqualification of judge for having decided another case against litigant]; 46 *Am.Jur.2d* (2006 ed.), *Judges* §127 et seq.; 15 *Am.Jur.* P.P. Forms (2005 ed.), *Judges*, §13 et seq.)

In *Housing Authority of Monterey County v. Jones* (2005) 130 C.A.4th 1029, 30 C.R.3d 676, a superior court judge who had ruled on a contested pretrial motion in a limited civil case was part of the appellate division panel assigned to review the subsequent judgment in the same case. *Held*, disqualification was required. C.C.P. 170.1(b) (infra, §119), which disqualifies the judge before whom a proceeding was tried from participating in "appellate review of that proceeding," was not applicable here because the determination of the pretrial motion was not the same "proceeding" as the subsequent judgment. (130 C.A.4th 1040.) However, disqualification was required under former C.C.P. 170.1(a)(6)(C) (now C.C.P. 170.1(a)(6)(A)(iii)). Because the judge decided a contested matter related to an issue on appeal, "it would be difficult, if not impossible, to avoid the appearance of impropriety if that judge were to participate in the appellate review." (130 C.A.4th 1042.)

(3) *Objective Test.* Former C.C.P. 170.1(a)(6)(C) (now C.C.P. 170.1(a)(6)(A)(iii)) was analyzed and applied in *United Farm Workers of America v. Superior Court* (1985) 170 C.A.3d 97, 216 C.R. 4. Plaintiff sued defendant union for damages arising from a strike. Trial before the court without a jury began 6 years after the strike and continued for 32 days, when the trial judge remembered and first told defendant's counsel that the judge's wife had worked 2 or 3 days as a replacement worker for plaintiff during the strike. Defendant's motion to disqualify the judge was referred to another judge, who denied the motion, and defendant sought mandamus. *Held*, writ denied.

(a) The statute requires disqualification whenever the judge's impartiality might reasonably be questioned, whereas the original statute required bias in fact. (170 C.A.3d 103.) The statutory standard for disqualification "is fundamentally an objective one. ... [T]he issue is not limited to the existence of an actual bias. Rather, if a reasonable man would entertain doubts concerning the judge's impartiality, disqualification is mandated." (170 C.A.3d 104.) "While this objective standard clearly indicates that the decision on disqualification not be based on the judge's personal view of his own impartiality, it also suggests that the litigants' necessarily partisan views not provide the applicable frame of reference." (170 C.A.3d 104.) Rather, the appropriate question is how the "average person on the street" would view the judge's participation in a given case. (170 C.A.3d 104.)

(b) Various factors may affect the average person's view. For example, the need for disqualification is less when a judge's rulings relate strictly to legal matters, as opposed to factual matters. (170 C.A.3d 104, 105.) Also, the determination concerning partiality "must be considered as of the time the motion is brought." (170 C.A.3d 105.)

(c) The issue in this case is very close. On one hand, the judge is suspected not because of his own activity, but because of his wife's activity. Also, there is no continuing relationship between plaintiff and the judge's wife. (170 C.A.3d 105.) On the other hand, the judge is the factfinder in this case, and, by virtue of his wife's actions, his experience with the strike was perhaps more personal than others. (170 C.A.3d 106.) Finally, the judge's "conduct of the trial until now must be considered as evidence of his impartiality." (170 C.A.3d 106.) Despite 32 days of trial, defendant cannot cite a single instance of his conduct suggesting partiality. (170 C.A.3d 106, 107.) A reasonable person "would be much less likely to question a judge's impartiality if they knew the judge had already impartially presided over eight weeks of trial." (170 C.A.3d 107.)

In *Stanford University v. Superior Court* (1985) 173 C.A.3d 403, 219 C.R. 40, the court adopted and applied the analysis of the *United Farm Workers* case. Plaintiff's action against the university related to management of its land and physical facilities. Her motion to disqualify the judge was based on his prominent involvement in law school alumni activities 13 years before the action. The court, noting that the "judge's character and reputation for impartiality are among facts the average person on the street" would consider, held that the judge's earlier activities were so remote and so unrelated to the issues in litigation as to raise no doubt concerning his impartiality. (173 C.A.3d 408.) (See *McCartney v. Superior Court* (1990) 223 C.A.3d 1334, 1340, 273 C.R. 250 [statement that temporary judge is graduate of defendant university is not legal ground for disqualification].)

In *Flier v. Superior Court* (1994) 23 C.A.4th 165, 28 C.R.2d 383, the prosecution challenged the disqualification of the trial judge in a criminal case involving a black defendant on the ground of racial bias. The disqualification was based on the judge's use of the phrase "good boy" with reference to a black defendant in another case. *Held*, writ of

mandamus granted to set aside the disqualification; no person aware of the facts "would reasonably entertain a doubt" that the judge would be impartial.

(a) The standard of disqualification is objective. (23 C.A.4th 170, citing *United Farm Workers*.) And, where the facts are undisputed, disqualification becomes a question of law. (23 C.A.4th 171.)

(b) In the earlier action, the defendant pleaded guilty and submitted to sentencing before the judge without challenge. (23 C.A.4th 172.) The disqualification order here is premised on the conclusion that words spoken in the earlier proceeding would cause a person to reasonably entertain a doubt about the trial judge's impartiality toward any other black male. Even if the words "good boy" taken out of context could be construed to raise a doubt about the judge's ability to be impartial in the earlier case, to uphold disqualification in the later case would make the judge unable to sit on any case involving a black party. (23 C.A.4th 172.) (See *Catchpole v. Brannon* (1995) 36 C.A.4th 237, 245, 42 C.R.2d 440, 7 Cal. Proc. (5th), Trial, §246 [judgment set aside for judicial gender bias, using objective standard for determining bias in disqualification cases under former C.C.P. 170.1(a)(6)(C) (now C.C.P. 170.1(a)(6)(A)(iii)), as construed in *United Farm Workers*].)

(4) *Different Standard Is Applicable in Administrative Proceedings*. The reasonable doubt standard for judicial disqualification for bias set forth in former C.C.P. 170.1(a)(6)(C) (now C.C.P. 170.1(a)(6)(A)(iii)) does not apply in administrative proceedings, which generally require a showing of actual bias for disqualification. (*Gai v. Selma* (1998) 68 C.A.4th 213, 230, 79 C.R.2d 910 [alleged bias of city personnel commissioner].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Ground*. See *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. ___, 129 S.Ct. 2252, 2263, 173 L.Ed.2d 1208, 1222 ["serious risk of actual bias" required recusal; party made significant and disproportionate campaign contributions to appellate justice while appeal was pending].



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1. Grounds for Disqualification.

h. Trial Judge During and After Appeal.

2 *Witkin Cal. Proc. Courts* § 119

[§ 119] Trial Judge During and After Appeal.

A trial judge is disqualified in further proceedings in the same case as follows:

(1) *Appellate Review*. The judge before whom a proceeding was tried or heard is disqualified from participating in any appellate review of that proceeding. (*C.C.P. 170.1(b)*.) It has been held that there is nothing improper in the justice remaining seated on the bench during oral argument of an appeal, after having noted the fact of his disqualification. (*Bracey v. Gray* (1945) 71 *C.A.2d* 206, 209, 162 *P.2d* 314.)

(2) *Postreview Proceedings*. A reviewing court may disqualify the trial judge from acting in proceedings after the determination of the appeal. Under *C.C.P. 170.1(c)*, an appellate court, at the request of a party or on its own motion, "shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court." (See *People v. Gulbrandsen* (1989) 209 *C.A.3d* 1547, 1562, 258 *C.R. 75* [reason for *C.C.P. 170.1(c)* is that "a judge who has had his determinations reversed might not undertake a retrial with total objectivity"]; *People v. Superior Court (Dorsey)* (1996) 50 *C.A.4th* 1216, 1231, 58 *C.R.2d* 165 [request for disqualification denied; "mere judicial error is not conclusive evidence of bias or grounds for disqualification"]; *Blakemore v. Superior Court* (2005) 129 *C.A.4th* 36, 59, 27 *C.R.3d* 877 [trial judge's erroneous rulings did not justify appointment of different judge on remand in absence of comment or conduct suggesting bias]; 60 *A.L.R.3d* 176 [disqualification of original trial judge to sit on retrial after reversal or mistrial].) (On peremptory challenge where case is assigned for new trial after reversal on appeal, see *infra*, §151.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Disqualification for Cause.

1. Grounds for Disqualification.

i. Physical Disability.

2 Witkin Cal. Proc. Courts § 120

[§ 120] Physical Disability.

A judge is disqualified if, "[b]y reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding." (*C.C.P. 170.1(a)(7)*.) (See C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.21.)

The rule of waiver of disqualification by failure to assert it at the earliest practicable opportunity (see *infra*, §128) applies to this ground. (*People v. Pratt* (1962) 205 C.A.2d 838, 844, 846, 23 C.R. 469 [asserted blindness of the judge].)

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1. Grounds for Disqualification.

j. Dispute Resolution Conflict.

2 Witkin Cal. Proc. Courts § 121

[§ 121] Dispute Resolution Conflict.

A judge is disqualified if the judge has a current arrangement concerning prospective employment or compensated service as a "dispute resolution neutral," or is participating in discussions concerning prospective employment or service as a dispute resolution neutral, or has participated in those discussions or engaged in employment or service within the past 2 years, and any of the following conditions applies:

(1) The discussion, prior employment, or arrangement was with a party. (*C.C.P. 170.1(a)(8)(A)(i).*)

(2) The matter before the judge includes issues related to the enforcement of an alternative dispute resolution agreement or an award or final decision by a dispute resolution neutral. (*C.C.P. 170.1(a)(8)(A)(ii).*)

(3) The judge directs the parties to participate in an alternate dispute resolution process in which the dispute resolution neutral will be an individual or entity with whom the judge has or had a discussion, prior employment or service, or an arrangement. (*C.C.P. 170.1(a)(8)(A)(iii).*)

(4) The judge will select a dispute resolution neutral or entity from among a group including an individual or entity with whom the judge has or had a discussion, prior employment or service, or an arrangement. (*C.C.P. 170.1(a)(8)(A)(iv).*)

For this purpose, "dispute resolution neutral" means an arbitrator, mediator, temporary judge, referee, special master, neutral evaluator, settlement officer, or settlement facilitator. (*C.C.P. 170.1(a)(8)(B)(iii).*) The term "party" includes the parent, subsidiary, or affiliate of an entity party involved in the transaction, contract, or facts that gave rise to the issues in the proceeding. (*C.C.P. 170.1(a)(8)(B)(ii).*) (See *C.C.P. 170.1(a)(8)(B)(i)* [defining "participating in discussions"].)

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B. Disqualification for Cause.

2. Procedure.

a. Judge's Voluntary Declaration of Disqualification.

2 Witkin Cal. Proc. Courts § 122

[§ 122] Judge's Voluntary Declaration of Disqualification.

(1) *Judge's Ethical Duty To Declare Disqualification.* The Code of Judicial Ethics (supra, §57) sets forth a judge's responsibility for disqualification:

(a) A judge must disqualify himself or herself when disqualification is required by law. (Canon 3E(1).) (On similar duty under 28 U.S.C., §455(a), see *Liljeberg v. Health Services Acquisition Corp.* (1988) 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855; *Liteky v. United States* (1994) 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474.)

(b) In trial court proceedings, a judge must disclose on the record "information that is reasonably relevant to the question of disqualification ... , even if the judge believes there is no actual basis for disqualification." (Canon 3E(2).) (See C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.22 et seq.; 33 *Pepperdine L. Rev.* 575 [recusal and disqualification based on friendship]; Rothman, California Judicial Conduct Handbook 3d, §7.02 et seq.)

(2) *Notice.* A judge who determines himself or herself to be disqualified must notify the presiding judge of the court of his or her recusal and may not further participate in the proceeding, except as provided in C.C.P. 170.4 (infra, §127), unless the disqualification is waived. (C.C.P. 170.3(a)(1).) (On waiver, see infra, §128.) If the disqualified judge is the only judge or the presiding judge of the court, the notice must be sent to the person having authority to assign another judge to replace the disqualified judge. (C.C.P. 170.3(a)(2).) (See C.E.B., 1 Civil Proc. During Trial 3d, §6.40; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.3 et seq.; 46 *Am.Jur.2d* (2006 ed.), Judges §168 et seq.; 15 *Am.Jur.* P.P. Forms (2005 ed.), Judges, §9.)

(3) *Effect of Statement.* The judge's statement is a binding determination of disqualification. In *Noorthoek v. Superior Court* (1969) 269 C.A.2d 600, 75 C.R. 61, decided under the prior statute, the judge, after declaring his disqualification, nevertheless made an order for the examination of a judgment debtor by another judge. *Held*, any further proceedings based on that order were void. (See supra, §94.) In addition, disqualification is not limited to one phase of a proceeding or to one defendant. Hence, where the judge disqualified himself for bias as to a codefendant at an earlier stage of the proceedings, he could not act in a later proceeding to sentence defendant. (269 C.A.2d 606.) (*People v. Bridges* (1982) 132 C.A.3d 234, 238, 183 C.R. 118 [decided under prior statute].)

(4) *Effect of Prior Ruling in Case*. If the grounds for disqualification "are first learned of or arise after the judge has made one or more rulings in a proceeding but before the judge has completed judicial action in a proceeding," the judge must disqualify himself or herself, unless the disqualification is waived, but in the absence of good cause, rulings made up to that time may not be set aside by the judge who replaces the disqualified judge. (C.C.P. 170.3(b)(4).)

(5) *Failure To Disqualify Is Not Crime*. In *Boags v. Municipal Court* (1987) 197 C.A.3d 65, 242 C.R. 681, petitioner, a municipal court judge, was charged with the misdemeanor of violation of Govt.C. 1222 (wilful omission to perform duty enjoined by law) by "willfully failing to disqualify himself" in proceedings in which disqualification was mandatory. *Held*, petitioner's demurrer should have been sustained; as applied to judicial officers in the performance of their judicial functions, Govt.C. 1222 violates the California constitutional separation of powers. "Under Section 1222 as the prosecution asks us to construe this provision, the executive would be given discretion to commence a criminal action against a judge whenever it considered he had failed to properly perform his judicial duties. Hence the executive would be able to charge a judge with a misdemeanor merely for the erroneous exercise of the judicial powers vested in him by the Constitution." (197 C.A.3d 69.)

West's Key Number Digest, Judges 51(1)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Effect of Prior Ruling in Case*. See *Hernandez v. Vitamin Shoppe Industries* (2009) 174 C.A.4th 1441, 1450, 95 C.R.3d 734 [judge's ruling at hearing was valid even though comments that led to prospective disqualification for appearance of bias were made at that hearing].



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2. Procedure.

b. Party's Statement of Disqualification.

2 Witkin Cal. Proc. Courts § 123

[§ 123] Party's Statement of Disqualification.

(1) *Verified Statement.* If a judge who should disqualify himself or herself refuses or fails to do so, any party may file a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification. (*C.C.P. 170.3(c)(1)*; see *Hollingsworth v. Superior Court* (1987) 191 C.A.3d 22, 25, 236 C.R. 193 [declaration under penalty of perjury satisfies verification requirement]; *McCartney v. Superior Court* (1990) 223 C.A.3d 1334, 1340, 273 C.R. 250 [statement in reply to opposition to motion mailed to court does not satisfy notice requirement]; C.E.B., 1 Civil Proc. During Trial 3d, §6.43 et seq.; 2 Cal. Crim. Practice 3d, §26:2; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.33 et seq.; 15 Am.Jur. P.P. Forms (2004. ed.), Judges, §4 et seq.; 70 A.L.R.3d 797 [affidavit or motion for disqualification as contempt]; 92 A.L.R.2d 1110 [intervenor's right to disqualify]; on sanction for frivolous challenge, see *Estate of Di Grazia* (1993) 13 C.A.4th 681, 16 C.R.2d 621.)

The statute is silent on this practical question: When there are several parties, what is the effect of a challenge made by one on grounds applicable to all? A strong dictum in *Turkington v. Municipal Court* (1948) 85 C.A.2d 631, 193 P.2d 795, involving the prior statute, suggests that the affidavit will redound to the benefit of the others: "It is not difficult to spell out of such language a purpose to disqualify the judge from presiding over the proceeding once the showing of disqualification is made by anyone having the right to raise the issue, i.e., by any party. It is the fact of disqualification that is important, not who raises it, as long as it is raised as provided in the section." (85 C.A. 2d 639.)

Decisions under the former statute deal with the requirement that the statement set forth facts, not merely the conclusions of the pleader. (See *Ephraim v. Superior Court* (1941) 42 C.A.2d 578, 109 P.2d 378; *People v. Rojas* (1963) 216 C.A.2d 819, 825, 31 C.R. 417 [mere assertion that judge held erroneous opinions on probation and sentence was insufficient statement; these legal matters are within judge's discretion]; *Ensher, Alexander & Barsoom v. Ensher* (1964) 225 C.A.2d 318, 323, 37 C.R. 327 [allegation that trial judge appointed to executive post while case was pending on appeal delayed his resignation at respondent's request to dispose of issues following remittitur]; *In re Morelli* (1970) 11 C.A.3d 819, 843, 91 C.R. 72 [exhaustive review of cases on sufficient and insufficient showing; papers were properly stricken].)

(2) *Service of Copies.* Copies of the statement are served on each party who has appeared (or his or her attorney)

and must be personally served on the judge (or the clerk) provided that the judge is present in the courthouse or in chambers. (C.C.P. 170.3(c)(1).)

(3) *Time for Presenting Statement.* The statement must be presented at the "earliest practicable opportunity" after discovery of the facts constituting the ground for disqualification. (C.C.P. 170.3(c)(1).) (See *Hollingsworth v. Superior Court*, *supra*, 191 C.A.3d 28 [disqualification statement filed as soon as plaintiffs knew which judge would hear case was timely]; *In re Steven O.* (1991) 229 C.A.3d 46, 53, 279 C.R. 868 [challenge raised for first time on appeal was not timely]; *People v. Scott* (1997) 15 C.4th 1188, 1207, 65 C.R.2d 240, 939 P.2d 354 [challenge raised for first time on appeal was not timely; defendant knew all facts pertinent to issue of impartiality months before trial but did not seek disqualification]; *North Beverly Park Homeowners Assn. v. Bisno* (2007) 147 C.A.4th 762, 769, 54 C.R.3d 644 [statement of disqualification filed after final judgment was not timely; procedural scheme governing disqualification for cause is directed at pending proceedings and may not be used retroactively].) (On waiver by delay in objecting, see *infra*, §128.)

(4) *Failure To File Statement.* Failure to file a disqualification statement constitutes waiver of the defendant's right to challenge the judge's refusal to recuse himself or herself. (*People v. Bryant* (1987) 190 C.A.3d 1569, 1573, 236 C.R. 96.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Time for Presenting Statement.* See *Tri Counties Bank v. Superior Court* (2008) 167 C.A.4th 1332, 1337, 84 C.R.3d 835 [statement of disqualification filed 7 months after facts justifying disqualification were known was not timely; petitioner waited until after adverse resolution of class certification motion by appellate court].



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2. Procedure.

c. Judge's Consent or Answer.

2 *Witkin Cal. Proc. Courts* § 124

[§ 124] Judge's Consent or Answer.

(1) *Request That Another Judge Participate.* Without conceding disqualification, a judge whose impartiality has been challenged by a written statement may request another judge agreed on by the parties to act in his or her place. (*C.C.P. 170.3(c)(2).*) (See *C.E.B.*, 1 Civil Proc. During Trial 3d, §6.55.)

(2) *Consent or Answer.* Within 10 days after filing or service, whichever is later, the judge may (a) file a consent to disqualification and notify the presiding judge or the person authorized to appoint a replacement, or (b) file a written verified answer admitting or denying the allegations contained in the statement and setting forth any additional facts material or relevant to disqualification. The clerk transmits a copy of the judge's answer to each party who has appeared (or his or her attorney). (*C.C.P. 170.3(c)(3).*) (See *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.38.) (On authority to strike defective statement, see *C.C.P. 170.4(b)*, *infra*, §127.)

(3) *Failure To Consent or Answer.* A judge who fails to file a consent or answer within the time allowed is deemed to have consented to disqualification. The clerk must notify the presiding judge or the person authorized to appoint a replacement. (*C.C.P. 170.3(c)(4).*)

In *Urias v. Harris Farms* (1991) 234 C.A.3d 415, 285 C.R. 659, a newly appointed trial judge granted summary judgment in favor of defendant. A week later plaintiff discovered that the judge's former law firm had recently represented defendant, and plaintiff filed a statement seeking to disqualify the judge and a motion to set aside the summary judgment. The judge did not file a response or strike the statement of disqualification, and a new judge appointed by the Chairperson of the Judicial Council granted the request for disqualification. Defendant petitioned for mandamus to vacate the order disqualifying the trial judge, and plaintiff appealed from the summary judgment. *Held*, petition denied, and judgment reversed.

(a) Prior to 1981, automatic disqualification occurred only if the statement of disqualification was legally sufficient and timely. If the statement was insufficient on its face, the judge could either ignore it and try the case or strike the statement from the files. (234 C.A.3d 421, citing the text.) Under the current statute, a judge who does not strike the statement but wants to contest disqualification must file an answer within the 10-day period prescribed by *C.C.P.*

170.3(c)(3). (234 C.A.3d 421.) Having failed to respond or strike the statement, the trial judge was properly deemed to have consented to his disqualification. (234 C.A.3d 421, 422.)

(b) The summary judgment rendered by the disqualified judge was voidable and must be reversed.

(1) A number of California cases state that a judgment or order rendered by a disqualified judge is void. (234 C.A.3d 423; see *supra*, §94.) "The theory upon which the rule rests is not clearly stated in the decisions, and the proposition itself is not uniformly accepted in its broadest form by all of them." (234 C.A.3d 423, citing the text.) "While the disqualified judge totally lacks power to hear and determine the cause, the court itself is not without jurisdiction. ... But the court, with subject matter jurisdiction, may properly be held to lack jurisdiction to act while the judge is disqualified. The problem is more accurately one of excess of jurisdiction. ... '[T]he actions of a disqualified judge are not void in any fundamental sense but at most voidable if properly raised by an interested party.'" (234 C.A.3d 424, citing the text and *In re Christian J.* (1984) 155 C.A.3d 276, 202 C.R. 54, *supra*, §96.)

(2) "The matter of disqualification should be raised when the facts constituting the grounds for disqualification are first discovered and, in any event, before the matter involved is submitted for decision. ... This rule applies, however, only when the facts constituting the disqualification are discovered before a case is submitted for decision." (234 C.A.3d 424.) If they are not discovered until after judgment is entered, the statement is timely if submitted at the "earliest practicable opportunity" after the facts are discovered. (234 C.A.3d 425.) And neither a party nor counsel is required to investigate to ascertain a judge's former clients; the responsibility lies with the judge, "especially when he is recently appointed to the bench." (234 C.A.3d 425.)

(3) Plaintiff's statements of disqualification were sufficient under C.C.P. 170.1(a)(2) (*supra*, §112). They allege that within the last 2 years defendant was a client of the judge's former law firm and partner. And plaintiff raised the issue in a timely manner before the judgment was final. Hence, the judgment was voidable on plaintiff's objection, and must be reversed. (234 C.A.3d 426.)

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d. Determination of Question of Disqualification.

2 Witkin Cal. Proc. Courts § 125

[§ 125] Determination of Question of Disqualification.

(1) *In General.* "A judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party." (*C.C.P. 170.3(c)(5).*) (See *C.E.B.*, 1 Civil Proc. During Trial 3d, §6.56; on authority of challenged judge to strike defective or repetitive statements, see *infra*, §127.)

(2) *Selection of Another Judge.* The question of disqualification must be heard and determined by another judge agreed on by all parties who have appeared or, if they are unable to agree within 5 days of notification of the judge's answer, by a judge selected by the Chairperson of the Judicial Council. The clerk notifies the executive officer of the Judicial Council of the need for a selection. The selection must be made as expeditiously as possible. No challenge under *C.C.P. 170.3(c)* (*supra*, §123) or *C.C.P. 170.6* (*infra*, §130 et seq.) may be made against the judge selected to decide the question of disqualification. (*C.C.P. 170.3(c)(5).*) (See *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.44.)

(3) *Procedure.* The judge deciding the question of disqualification may decide on the basis of the statement of disqualification, the answer, and "any written arguments as the judge requests." Alternatively, the judge may set the matter for hearing. If a hearing is ordered, the parties and the judge alleged to be disqualified must be allowed to argue the question of disqualification. For good cause shown, the judge must hear evidence on any disputed issue of fact. (*C.C.P. 170.3(c)(6).*) Under the former statute, the judge could proceed *ex parte* and make the decision without notice to counsel. (See *Bixby v. Hotchkis* (1945) 72 C.A.2d 368, 374, 164 P.2d 808; *Garcia v. Superior Court* (1984) 156 C.A.3d 670, 680, 203 C.R. 290, citing the text [*ex parte* procedure does not violate due process].)

(4) *Appointment of Replacement Trial Judge.* If disqualification is appropriate, the judge deciding the question of disqualification notifies the presiding judge or the person having the authority to appoint a replacement for the disqualified judge. (*C.C.P. 170.3(c)(6).*) (See *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.36.)

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1. General Rule: Limited Power To Act.

2 *Witkin Cal. Proc. Courts* § 126

[§ 126] General Rule: Limited Power To Act.

Except as provided in *C.C.P. 170.4* (see *infra*, §127), a disqualified judge has no power to act in a proceeding after his or her disqualification or after a statement of disqualification is filed "until the question of his or her disqualification has been determined." (*C.C.P. 170.4(d)*); on validity of judge's rulings prior to disqualification, see *supra*, §122.) (See *Stephens v. Superior Court* (2002) 96 *C.A.4th* 54, 64, 116 *C.R.2d* 616, *infra*, §152 [questioning whether *C.C.P. 170.4(d)* applies to peremptory challenges and holding that statute did not prevent challenged judge from acting once another judge who had granted original disqualification motion later rescinded that order and struck challenge].) (For cases under prior statute, see *Miller & Lux v. Superior Court* (1937) 19 *C.A.2d* 628, 633, 66 *P.2d* 689; *Rosenfield v. Vosper* (1945) 70 *C.A.2d* 217, 222, 160 *P.2d* 842; *Turkington v. Municipal Court* (1948) 85 *C.A.2d* 631, 638, 193 *P.2d* 795 ["until such question is decided, the challenged judge is without jurisdiction to proceed"]; *In re Harrington* (1948) 87 *C.A.2d* 831, 835, 197 *P.2d* 783 [convicted petitioner released on habeas corpus; judge "was without jurisdiction to hear the cause"].)

In *Geldermann v. Bruner* (1991) 229 *C.A.3d* 662, 280 *C.R.* 264, Judge S tried a case and issued a 38-page tentative decision which was to become a statement of decision. Several months later, Judge S entered into an agreement to sell his home to plaintiffs' attorney, and defendant then moved to disqualify him. After some proceedings on the motion, Judge S, by a minute order, ruled that the interests of justice would best be served by another judge determining new post-trial issues. But he then adopted his tentative decision as the statement of decision and, without a hearing, entered a judgment. *Held*, reversed.

(a) The statutes do not permit "limited, partial or conditional recusal. ... Nor is the process of moving from tentative decision to statement of decision 'in effect a ministerial act,' since the tentative decision is not binding on the court ... , and in this case there were objections and proposals to be ruled upon." (229 *C.A.3d* 665.)

(b) The case had taken several years to get to trial and had been tried for 16 days; the judge was attempting to help the parties reach a conclusion to the litigation without the expense of another trial; and for these reasons he sought to finalize the substantive issues, all of which he had heard and carefully considered. But, however admirable his intent,

his act was precluded by the statute. (229 C.A.3d 666.)

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2. Powers of Disqualified Judge.

2 Witkin Cal. Proc. Courts § 127

[§ 127] Powers of Disqualified Judge.

(1) *Authorized Proceedings.* Notwithstanding disqualification, a disqualified judge may perform specified acts. (See C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.29.) The judge may do the following:

(a) Take any action or issue any order necessary to maintain the jurisdiction of the court pending the assignment of a judge who is not disqualified. (C.C.P. 170.4(a)(1).)

(b) Request another judge agreed on by the parties to act in his or her place. (C.C.P. 170.4(a)(2).)

(c) Hear and determine purely default matters. (C.C.P. 170.4(a)(3).)

(d) Issue an order for possession prior to judgment in eminent domain proceedings. (C.C.P. 170.4(a)(4).)

(e) Set proceedings for trial or hearing. (C.C.P. 170.4(a)(5).)

(f) Conduct settlement conferences. (C.C.P. 170.4(a)(6).)

(2) *Authority To Strike Defective Statement of Disqualification.* Notwithstanding the prohibition on a judge passing on his or her own disqualification (C.C.P. 170.3(c)(5); supra, §125), "if a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken." (C.C.P. 170.4(b).) (See *PBA, LLC v. KPOD, Ltd.* (2003) 112 C.A.4th 965, 972, 5 C.R.3d 532 [judge could strike statement of disqualification under C.C.P. 170.4(b) even though he had earlier answered statement under C.C.P. 170.3(c)(3) (supra, §124); provisions are not mutually exclusive].) (On authority to strike or disregard defective statement under former statute, see *Neblett v. Pacific Mut. Life Ins. Co. of Calif.* (1943) 22 C.2d 393, 401, 139 P.2d 934 [statement stricken]; *People v. Nolan* (1932) 126 C.A. 623, 628, 14 P.2d 880 [statement stricken]; *People v. Hooper* (1936) 16 C.A.2d 704, 707, 61 P.2d 370 [statement disregarded]; *Ephraim v. Superior Court* (1941) 42 C.A.2d 578, 109 P.2d 378 [statement disregarded]; *People v. McCullough* (1950) 100 C.A.2d 101, 109, 223 P.2d 37 [disregarding statement and disapproving remarks in *Collins v. Nelson* (1938) 26 C.A.2d 42, 78 P.2d 758, to effect that sufficiency of

affidavit is immaterial]; *Mackie v. Dyer* (1957) 154 C.A.2d 395, 399, 316 P.2d 366 [statement disregarded]; *Taliaferro v. Taliaferro* (1962) 203 C.A.2d 642, 646, 648, 21 C.R. 864, citing the text; *In re Morelli* (1970) 11 C.A.3d 819, 843, 91 C.R. 72 [exhaustive review of cases on sufficient and insufficient showing; papers were properly stricken].)

(3) *Authority To Strike Repetitive Statements of Disqualification*. "A party may file no more than one statement of disqualification against a judge unless facts suggesting new grounds for disqualification are first learned of or arise after the first statement of disqualification was filed. Repetitive statements of disqualification not alleging facts suggesting new grounds for disqualification shall be stricken by the judge against whom they are filed." (C.C.P. 170.4(c)(3).)

(4) *Authority To Continue Trial Already Commenced*. If a statement of disqualification is filed after a trial or hearing has commenced (a) by the start of voir dire, (b) by the swearing of the first witness, or (c) by the submission of a motion for decision, the judge whose impartiality has been questioned may order the trial or hearing to continue. The issue of disqualification is referred to another judge for decision. If it is determined that the judge is disqualified, orders and rulings made after the filing of the statement are vacated. (C.C.P. 170.4(c)(1).) For this purpose, if (a) a proceeding is filed in a single judge court or is assigned to a single judge for a comprehensive disposition, and (b) the proceeding has been set for trial or hearing 30 or more days in advance before a judge whose name was known at the time, the trial or hearing is deemed to have commenced 10 days prior to the date scheduled for trial or hearing as to any grounds for disqualification known before that time. (C.C.P. 170.4(c)(2).) (See *Eckert v. Superior Court* (1999) 69 C.A.4th 262, 266, 81 C.R.2d 467 [trial commenced for purposes of C.C.P. 170.4(c)(1) when motions in limine were submitted; thus, trial judge was not required to stay trial while disqualification motion was pending].)

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f. Waiver of Disqualification.

2 *Witkin Cal. Proc. Courts* § 128

[§ 128] Waiver of Disqualification.

(1) *Procedure for Express Waiver.* A judge who determines himself or herself to be disqualified after disclosing the basis for disqualification on the record may ask the parties and their attorneys whether they wish to waive the disqualification. (*C.C.P. 170.3(b)(1)*.) The judge may not seek to induce a waiver and must avoid any effort to discover which lawyers or parties favored or opposed a waiver. (*C.C.P. 170.3(b)(3)*.) The waiver must recite the basis for disqualification. It is effective only when signed by all parties and their attorneys and filed in the record. (*C.C.P. 170.3(b)(1)*.) (See *C.E.B.*, 1 Civil Proc. During Trial 3d, §6.41 et seq.; 15 *Am.Jur. P.P. Forms* (2005 ed.), Judges, §60 et seq.)

(2) *When Waiver Is Prohibited.* Disqualification may not be waived where the basis for disqualification is that the judge (a) has personal bias or prejudice concerning a party, (b) served as an attorney in the matter, or (c) has been a material witness concerning the matter. (*C.C.P. 170.3(b)(2)*.) (See *People v. Barrera* (1999) 70 *C.A.4th* 541, 82 *C.R.2d* 755, *infra*, §160 [nonwaivable disqualification results in voidable judgment subject to requirement of timely writ review under *C.C.P. 170.3(d)*].)

(3) *Waiver by Delay in Objecting.* The statement of disqualification must be filed at the "earliest practicable opportunity" after the grounds for disqualification are discovered. (*C.C.P. 170.3(c)(1)*, *supra*, §123.) (See *Horsford v. Board of Trustees of Calif. State University* (2005) 132 *C.A.4th* 359, 384, 33 *C.R.3d* 644 [waiver by 2-year delay in raising objections]; 73 *A.L.R.2d* 1238 [time for asserting disqualification and waiver]; 24 *A.L.R.4th* 870 [waiver or loss of right by participation in proceedings--modern state civil cases]; 27 *A.L.R.4th* 597 [same--modern state criminal cases].)

The purpose of the requirement was emphasized in a number of decisions decided under the prior statute. The following quotation from *Woolley v. Superior Court* (1937) 19 *C.A.2d* 611, 66 *P.2d* 680, is typical: "Courts must guard against the possibility of a party, who claims the trial judge is biased or prejudiced, refraining from raising that question, trusting to get a favorable verdict, and thereafter raise the question to deprive the trial judge of his statutory duty to pass upon a motion for new trial, thereby using [the statute] as a tool to enable one to keep the benefit of a favorable verdict before a biased and prejudiced judge, and at the same time prevent that judge from passing upon a motion for a new

trial." (19 C.A.2d 619.) (See *Caminetti v. Pacific Mut. Life Ins. Co. of Calif.* (1943) 22 C.2d 386, 390, 139 P.2d 930 [express waiver in one action, waiver by delay in related action]; *Sacramento & San Joaquin Drainage Dist. v. Jarvis* (1959) 51 C.2d 799, 802, 336 P.2d 530; *Mayo v. Beber* (1960) 177 C.A.2d 544, 550, 2 C.R. 405; *People v. Bogart* (1970) 7 C.A.3d 257, 267, 86 C.R. 737 [declaration stricken where defendant delayed more than 2 months from time disqualification was known].)

No useful test was devised for determining timeliness ("the earliest practicable opportunity") in these situations. In most of the cases holding the challenge too late, the emphasis was not so much on the duration of time that elapsed as on the obvious fact that the party, with knowledge of the disqualifying facts, kept the challenge in reserve until the time of the unfavorable judgment or ruling on the merits. (See *Woolley v. Superior Court*, *supra*, 19 C.A.2d 619; *Caminetti v. Pacific Mut. Life Ins. Co.*, *supra*, 22 C.2d 391; *Reichert v. General Ins. Co. of America* (1968) 68 C.2d 822, 838, 69 C.R. 321, 442 P.2d 377; *Develop-Amatic Engineering v. Republic Mortg. Co.* (1970) 12 C.A.3d 143, 91 C.R. 193.)

On the other hand, the statement was held timely when presented promptly on learning that, after reversal, the case was again to be set for trial before the same judge. (*Keating v. Superior Court* (1955) 45 C.2d 440, 447, 289 P.2d 209, *supra*, §117; *Baker v. Civil Service Com.* (1975) 52 C.A.3d 590, 594, 125 C.R. 162.)

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C. Peremptory Challenge.

1. Nature and Validity of Statute.

a. Original Statute Unconstitutional.

2 *Witkin Cal. Proc. Courts* § 129

[§ 129] Original Statute Unconstitutional.

Former C.C.P. 170.5, enacted in 1937, provided for the peremptory challenge of a judge in the superior or municipal court, resulting in automatic disqualification without any showing of cause. The party or attorney filed the challenge in writing, served it on the opposite party, and thereupon "without any further act or proof," a new judge had to be assigned. The prosecution in a criminal case was denied the right. (See *11 So. Cal. L. Rev.* 5.)

The section was held unconstitutional in *Daigh v. Shaffer* (1937) 23 C.A.2d 449, 73 P.2d 927, on two grounds: (a) The statute gave power to a private citizen or his attorney arbitrarily and without cause to remove a judge who possessed all of the constitutional qualifications and was free from bias. This was said to be in conflict with the constitutional power given the Chairperson of the Judicial Council to appoint or designate qualified judges to act in a case. (23 C.A.2d 452.) (b) The section violated the doctrine of separation of powers, and discriminated in favor of defense attorneys and against the prosecution in criminal cases. (23 C.A.2d 454.)

The statute was again condemned in *Austin v. Lambert* (1938) 11 C.2d 73, 77 P.2d 849: "But to put in the hands of a litigant uncontrolled power to dislodge without reason or for an undisclosed reason, an admittedly qualified judge from the trial of a case in which forsooth the only real objection to him might be that he would be fair and impartial in the trial of the case would be to characterize the statute not as a regulation but as a concealed weapon to be used to the manifest detriment of the proper conduct of the judicial department." (11 C.2d 79.) (See *26 Cal. L. Rev.* 702; *51 Harv. L. Rev.* 1118; *11 So. Cal. L. Rev.* 517.)

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1. Nature and Validity of Statute.

b. New Statute Upheld.

2 Witkin Cal. Proc. Courts § 130

[§ 130] New Statute Upheld.

A new peremptory challenge statute, designed to overcome the constitutional objections to the old section, was enacted in 1957 as *C.C.P. 170.6*. Broadly speaking, it permits a party, by a simple charge supported by a formal affidavit, to disqualify a judge, commissioner, or referee deemed to be prejudiced. (For detailed provisions of the statute and their construction, see *infra*, §132 et seq.; see generally *C.E.B.*, 1 Civil Proc. During Trial 3d, §6.57 et seq.; Rutter Group, Civil Trials and Evidence §3:164 et seq.)

The new statute was upheld in *Johnson v. Superior Court* (1958) 50 C.2d 693, 329 P.2d 5, distinguishing *Austin v. Lambert* (1938) 11 C.2d 73, 77 P.2d 849, *supra*, §129, disapproving some of the language of *Daigh v. Shaffer* (1937) 23 C.A.2d 449, 73 P.2d 927, *supra*, §129, and pointing out that similar legislation has been sustained in other states.

(a) "The Legislature, in our opinion, also acted within its power to adopt reasonable regulations when it provided that, for the limited purposes of section 170.6, prejudice may be established by the filing of an affidavit sworn to by a party or his attorney, without judicial determination of the existence of the fact. It is important, of course, not only that the integrity and fairness of the judiciary be maintained, but also that the business of the courts be conducted in such a manner as will avoid suspicion of unfairness. ... Prejudice, being a state of mind, is very difficult to prove, and, when a judge asserts that he is unbiased, courts are naturally reluctant to determine that he is prejudiced. In order to insure confidence in the judiciary and avoid the suspicion which might arise from the belief of a litigant that the judge is biased in a case where it may be difficult or impossible for the litigant to persuade a court that his belief is justified, the Legislature could reasonably conclude that a party should have an opportunity to obtain the disqualification of a judge for prejudice, upon a sworn statement, without being required to establish it as a fact to the satisfaction of a judicial body." (50 C.2d 697.)

(b) "We cannot properly assume that there will be a wholesale making of false statements under oath, and the fact that some persons may abuse the section is not a ground for holding the provision to be unconstitutional." (50 C.2d 697.) (See *Pappa v. Superior Court* (1960) 54 C.2d 350, 354, 5 C.R. 703, 353 P.2d 311, *infra*, §138; *Solberg v. Superior Court* (1977) 19 C.3d 182, 137 C.R. 460, 561 P.2d 1148, *infra*, §131; *McCauley v. Superior Court* (1961) 190 C.A.2d 562, 564, 12 C.R. 119 ["The right conferred ... is a substantial right which is now part of the system of due process and

judicial fair play in this state"]; *Journey v. Superior Court* (1975) 47 C.A.3d 408, 411, 120 C.R. 897 [rejecting separation of powers argument, following *Johnson*, and refusing to consider equal protection and due process arguments not raised by real parties in interest].)

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1. Nature and Validity of Statute.

c. Constitutionality Reaffirmed.

2 *Witkin Cal. Proc. Courts* § 131

[§ 131] Constitutionality Reaffirmed.

In *Solberg v. Superior Court* (1977) 19 C.3d 182, 137 C.R. 460, 561 P.2d 1148, the court restated in great detail the nature, scope, and effect of the statute, and examined and rejected old and new challenges to its validity. Criminal complaints charging defendants with soliciting acts of prostitution came before Judge M of the San Francisco municipal court. The prosecution made several motions to disqualify Judge M, which she denied. The prosecution then petitioned the superior court for mandamus or prohibition; the matter was assigned to Judge P, and the defendants in the criminal actions moved to disqualify Judge P. He denied the motions, determined that Judge M was disqualified, and ordered issuance of a peremptory writ restraining her from acting in the criminal cases. Judge M and the municipal court appealed from this judgment, and two of the defendants petitioned for mandamus or prohibition to compel Judge P to vacate his order denying their motion to disqualify him. *Held*, Judge P was disqualified, and the statute is constitutional.

(a) *Writ proceeding: disqualification of Judge P.*

(1) *Not "appellate" hearing.* Judge P's first contention was that in hearing the prosecution's petition for a writ he was acting in an "appellate capacity" and hence did not come under the terms of *C.C.P. 170.6*. This is unsound. Although he was "reviewing" the order of Judge M, the proceeding was a matter within the original jurisdiction of the superior court, and the statute refers to "any civil or criminal action or special proceeding of any kind or character." (19 C.3d 189.)

(2) *Standing.* Judge P's second contention was that the criminal defendants had no standing to make the motion. This also is unsound. The judge or court is ordinarily a neutral party in these writ proceedings, and the real party in interest may make the motion. (19 C.3d 189, 190.)

(3) *Disqualification required.* Because the motion to disqualify was proper and timely, Judge P had no jurisdiction but to grant it and recuse himself; hence, mandamus lies to compel him to vacate his order denying the motion. (19 C.3d 190.) All orders made thereafter by Judge P, including the judgment directing issuance of a writ to compel Judge M to disqualify herself, were void. (19 C.3d 190.)

(b) *Appeal: constitutionality of C.C.P. 170.6.* Judge M and amici curiae (22 trial judges) challenged the validity of the statute on a number of grounds, all found insubstantial.

(1) *Reasoning of Johnson case.* *Johnson v. Superior Court* (1958) 50 C.2d 693, 329 P.2d 5, supra, §130, restated the settled rule that the procedure of courts may be prescribed by the Legislature, and that the method adopted in C.C.P. 170.6 was reasonable. The court there held the affidavit procedure reasonable not because it establishes prejudice "as a fact," but rather because it expresses the "belief of a litigant" that he or she cannot have a fair trial before the assigned judge. Thus, *Johnson* does not rest on the "fiction" that the affidavit proves actual prejudice, nor does the opinion create an "irrebuttable presumption" of actual prejudice from the mere filing of the affidavit. The statute grants the right to disqualify if the attorney "cannot or believes that he cannot" have a fair trial; "in order to preserve public confidence in the impartiality of the courts, the belief alone will justify disqualification." (19 C.3d 193.)

(2) *Alleged abuse of "judge-shopping."* It is contended that litigants have persistently sought to remove judges on grounds other than prejudice, such as their views on the law, or objectionable personality traits; that the statute has also been invoked for tactical advantages, such as delay, or removal of a judge sitting in a particular department; that these wholly improper uses of the peremptory challenge reduce the pool of qualified judges, discourage judicial creativity, and abridge the neutrality of the judiciary; and that widespread and persistent abuses during the two decades since *Johnson* was decided warrant a reconsideration of the issue. (19 C.3d 194, 195.) "We do not condone such practices, nor do we underestimate their effect on the operation of our trial courts." (19 C.3d 195.) Nevertheless, assuming that the charges are true, they do not call for a reconsideration of *Johnson*:

First, the *Johnson* court was aware of abuses in sister states with similar statutes. Hence, *Johnson* cannot be distinguished on the ground that it merely sustained the facial validity of C.C.P. 170.6. (19 C.3d 196.)

Second, some of the abuses may be self-limiting; e.g., a lawyer who invokes the statute improperly in one or more cases risks antagonizing the judge before whom he or she may appear in other cases. And the limitation to only one motion in each case is a substantial safeguard. (19 C.3d 196, 197.) Moreover, the fact that some false affidavits will be made "does not mean the requirement is a hollow formality, or that substantial numbers of members of the bar are so neglectful of their personal and professional honor that they repeatedly perjure themselves merely to gain an uncertain advantage in litigation." (19 C.3d 197.)

Third, the courts have required strict compliance with the statutory conditions of timely motion, only one motion for each side, only one motion in any action, and no motion after the trial has commenced. (19 C.3d 197, 198.)

(3) *Proposed alternative constructions of statute.* (a) It is suggested that C.C.P. 170.6 be construed to create a rebuttable presumption shifting the burden of proof to the challenged judge, but allowing the judge to prove that the motion is based on improper considerations. This would be contrary to the express language of the statute and would be wholly impractical in operation, requiring the judge to prove facts on a subject beyond his or her knowledge. (19 C.3d 198.) (b) It is further suggested that the federal practice, calling for facts and reasons in the affidavit of prejudice, be adopted. This also would require rewriting the statute, and would spread details of the charges on the public record without an opportunity for refutation, with the inevitable effects of diminution in public respect for the bench, needless friction between judges and attorneys, and delays in trial. (19 C.3d 199, 200.) (c) The Oregon practice, allowing the judge to question the good faith of the moving party, would similarly call for revision of the statute, and would have the same objectionable results as the federal procedure. (19 C.3d 200, 201.)

(4) *Abuse of "blanket challenges."* The contention that *Johnson* only upheld the statute in a civil setting, and that criminal cases are sufficiently different to call for a different result, is based on the "institutionalization" of some of the abuses, particularly the "blanket challenge." "The practice occurs when as a matter of office policy a district attorney or a public defender instructs his deputies to disqualify a certain disfavored judge in all criminal cases of a particular nature--such as those involving prostitution or illegal narcotics--or in all criminal cases to which he is assigned. The former policy will prevent the judge from hearing any cases of that type, while the latter policy will force his removal

from the criminal bench and his reassignment to a civil department." (19 C.3d 202.) This contention differs only in degree from the arguments rejected in *Johnson*:

First, the self-limiting aspects of abuse are operative. A district attorney or public defender who engages in this practice risks antagonizing the remaining judges of the court and the presiding judge who must assign the new judge. "Moreover, the delay attendant on such a substitution should not commend itself to the prosecutor whose duty and self-interest urge prompt disposition of pending cases, or to any defense counsel whose client has not been released on bail and for that or other reasons benefits from speedy trial requirements." (19 C.3d 202.)

Second, in *McCartney v. Commission on Judicial Qualifications* (1974) 12 C.3d 512, 116 C.R. 260, 526 P.2d 268, supra, §74, "we strongly disapproved of the practice of 'blanket challenges,' and we reaffirm that position." (19 C.3d 203.) But the practice does not vitiate the statute, nor does it make the *Johnson* holding inapplicable. (19 C.3d 204.)

(5) *Conclusion*. "We conclude that to the extent that abuses persist in the utilization of section 170.6 they do not, in our judgment, 'substantially impair' or 'practically defeat' the exercise of the constitutional jurisdiction of the trial courts. Rather, it may be helpful to view them as a relatively inconsequential price to be paid for the efficient and discreet procedure provided in section 170.6. The statute thus remains a reasonable--and hence valid--accommodation of the competing interests of bench, bar and public on the subject of judicial disqualification. We do not doubt that should future adjustments to this sensitive balance become necessary or desirable, the Legislature will act with due regard for the rights of all concerned." (19 C.3d 204.)

A single justice, concurring and dissenting, thought that Judge M acted correctly in denying the motion on the ground of bad faith. (19 C.3d 207.) (See 69 Cal. L. Rev. 1469; *Autoland v. Superior Court* (1988) 205 C.A.3d 857, 862, 252 C.R. 662 [suggesting that court reexamine *Solberg*, and require, at the very least, that person making challenge state facts and reasons for believing judge is biased].)

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C. Peremptory Challenge.

2. Scope: Courts and Proceedings.

2 Witkin Cal. Proc. Courts § 132

[§ 132] Scope: Courts and Proceedings.

(1) *All Trial Courts.* The peremptory challenge was designed for trial courts. It is available against judges, commissioners, and referees of the superior court. (*C.C.P. 170.6(a)(1).*) (See *Autoland v. Superior Court* (1988) 205 C.A.3d 857, 859, 252 C.R. 662 [statute is applicable to discovery referee].)

(2) *No Appellate Courts.* The challenge is inappropriate in appellate courts, and has not been invoked against justices of the Supreme Court or the Courts of Appeal. (See *People v. Gonzalez* (1990) 51 C.3d 1179, 1247, footnote 4, 275 C.R. 729, 800 P.2d 1159 [referee appointed by Supreme Court to review and report on claims in habeas corpus petition is not subject to challenge under *C.C.P. 170.6*].) *C.C.P. 170.6* does not apply to judges serving on the appellate division of the superior court. (*C.C.P. 170.7*.)

(3) *Actions and Proceedings.* The challenge may be made in (a) any civil or criminal action or special proceeding "of any kind or character," or (b) at a trial or hearing of "any matter therein that involves a contested issue of law or fact." (*C.C.P. 170.6(a)(1)*; see *Pappa v. Superior Court* (1960) 54 C.2d 350, 354, 5 C.R. 703, 353 P.2d 311, *infra*, §138; *Solberg v. Superior Court* (1977) 19 C.3d 182, 137 C.R. 460, 561 P.2d 1148, *supra*, §131; *McCauley v. Superior Court* (1961) 190 C.A.2d 562, 564, 12 C.R. 119 [challenge to justice court judge holding preliminary hearing as magistrate]; *Lyons v. Superior Court* (1977) 73 C.A.3d 625, 627, 140 C.R. 826 [hearing on conditional plea bargain].) The statute also applies in juvenile court proceedings. (See *Pamela H. v. Superior Court* (1977) 68 C.A.3d 916, 918, 137 C.R. 612.)

A challenge may be made after preliminary proceedings before a main action, or after a main action before supplementary proceedings. (See *McClenny v. Superior Court* (1964) 60 C.2d 677, 681, 36 C.R. 459, 388 P.2d 691, *infra*, §154.)

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3. Procedure.

a. Motion Without Notice.

2 Witkin Cal. Proc. Courts § 133

[§ 133] Motion Without Notice.

(1) *Who May Challenge.* Any party or attorney appearing in the action or proceeding may make the challenge based on prejudice against a party or attorney by "an oral or written motion without notice." (C.C.P. 170.6(a)(1), (a)(2); see *People v. Superior Court (Tony S.)* (1975) 44 C.A.3d 904, 908, 119 C.R. 125 [district attorney, representing probation officer in juvenile proceeding]; C.E.B., 1 Civil Proc. During Trial 3d, §6.58 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.50 et seq.)

A nonparty may not make the challenge. (See *Avelar v. Superior Court* (1992) 7 C.A.4th 1270, 1277, 9 C.R.2d 536 [nonparty witness under subpoena lacks standing to file peremptory challenge; here, police department and its records custodian, as respondents in proceeding for discovery of police records, were not parties to criminal action].)

(2) *Affidavit or Oral Statement.* Prejudice may be "established" in one of two ways:

(a) *Affidavit.* An affidavit or declaration under penalty of perjury may be filed stating in general terms that the judge, commissioner, or referee is prejudiced against a party or attorney or the interest of a party or attorney "so that the party or attorney cannot or believes that he or she cannot have a fair and impartial trial or hearing" before the judge, commissioner, or referee. (C.C.P. 170.6(a)(2).)

A statutory form for the challenge has been adopted. (See C.C.P. 170.6(a)(5); *McCauley v. Superior Court* (1961) 190 C.A.2d 562, 565, 12 C.R. 119 [form is sufficient even though it does not state place of execution]; *Retes v. Superior Court* (1981) 122 C.A.3d 799, 807, 176 C.R. 160 [form is sufficient despite attorney's inadvertent failure to sign declaration, particularly if attorney offers to sign in open court]; 13 *Pacific L. J.* 601.)

(b) *Oral statement.* The requirement of an affidavit proved to be burdensome and time-wasting in situations where the judge's identity was not known in advance of the time of trial. The statute was amended in 1961 to allow the alternative of an oral statement under oath. (C.C.P. 170.6(a)(2).) The oral statement or declaration must contain "substantially the same contents as the affidavit." (C.C.P. 170.6(a)(6); see *People v. Jones* (1991) 53 C.3d 1115, 1129, 1130, 282 C.R. 465, 811 P.2d 757 [statement by defendant represented by counsel that he intended to file affidavit of

prejudice, after which attorney said he would prepare the paper, but no document was filed, was insufficient under *C.C.P. 170.3* and *170.6*].)

In *People v. Whitfield* (1986) 183 C.A.3d 299, 305, 306, 228 C.R. 82, the trial judge denied the motion as untimely, without giving defendant, who represented himself, an opportunity either to make a statement under oath or to file an affidavit. On appeal, the court rejected the argument that the motion was defective in form due to lack of a statement or affidavit, and thus had been properly denied.

(3) *Promptness*. Time limits for the motion are specified. (See *infra*, §140 et seq.) A continuance will not be granted because of the motion unless required for the convenience of the court or on a showing of good cause. If granted, the continuance must be limited so that the matter may be promptly heard. (*C.C.P. 170.6(a)(4)*.)

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3. Procedure.

b. Automatic Reassignment.

2 Witkin Cal. Proc. Courts § 134

[§ 134] Automatic Reassignment.

If a motion is duly presented and an affidavit is properly filed or a statement is properly made, "thereupon and without any further act or proof," the judge supervising the master calendar, if any, assigns another judge, commissioner, or referee. If there is no master calendar, the matter is assigned or transferred to another judge, commissioner, or referee of the court in which the matter is pending. (*C.C.P. 170.6(a)(3)*.) When there is no other judge, commissioner, or referee of the court qualified, the clerk notifies the Chairperson of the Judicial Council (*C.C.P. 170.8*), who then assigns another judge, commissioner, or referee (*C.C.P. 170.6(a)(3)*). (See *Nail v. Osterholm* (1970) 13 C.A.3d 682, 686, 91 C.R. 908, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §402; *Davcon v. Roberts & Morgan* (2003) 110 C.A.4th 1355, 1359, 2 C.R.3d 782 [timely filed disqualification motion in proper form "takes effect instantaneously"; thus, peremptory challenge was not pending and did not toll time for deciding motion for new trial, even though new judge ruled that challenge was improper and returned matter to original judge].)

The assigned judge hears the action or proceeding at the time fixed. However, if no time has been fixed or good cause for changing the time exists, the assigned judge fixes a time for hearing and hears the action at that time. (*C.C.P. 170.8*.)

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4. Effect of Challenge.

a. In General.

2 Witkin Cal. Proc. Courts § 135

[§ 135] In General.

(1) *Challenged Judge Has No Jurisdiction To Act.* A judge, commissioner, or referee may not try or hear a matter when prejudice has been duly established by motion and an affidavit or oral statement. (*C.C.P. 170.6(a)(1)*; see *Solberg v. Superior Court* (1977) 19 C.3d 182, 137 C.R. 460, 561 P.2d 1148, supra, §131; *Journey v. Superior Court* (1975) 47 C.A.3d 408, 411, 120 C.R. 897 [good faith belief in prejudice is sufficient; proof of actual prejudice is not required]; *Zilog v. Superior Court* (2001) 86 C.A.4th 1309, 1323, 104 C.R.2d 173, infra, §142, citing the text [where disqualification motion is erroneously denied, subsequent proceedings by disqualified judge are void]; *Geddes v. Superior Court* (2005) 126 C.A.4th 417, 426, 23 C.R.3d 857 [where disqualification motion is erroneously granted, newly assigned judge may review disqualified judge's ruling on disqualification motion because disqualified judge has no authority to rule and is thus unavailable].)

If, after a proper and timely motion, the judge fails to disqualify himself or herself, the judge's subsequent orders and judgment are void. (*Solberg v. Superior Court*, supra; *Estate of Cuneo* (1963) 214 C.A.2d 381, 384, 29 C.R. 497; *Woodman v. Selvage* (1968) 263 C.A.2d 390, 394, 69 C.R. 687; *People v. Hall* (1978) 86 C.A.3d 753, 759, 150 C.R. 412; *In re Robert P.* (1981) 121 C.A.3d 36, 43, 175 C.R. 252.)

(2) *Distinction: Authority To Determine Timeliness of Motion.* Because the challenged judge must rule on the timeliness of a peremptory challenge, a party seeking reconsideration of a challenge as untimely must apply to that judge; no other judge of the court has jurisdiction to reconsider and make a different ruling. (*Micro/Vest Corp. v. Superior Court* (1984) 150 C.A.3d 1085, 1089, 198 C.R. 404.)

(3) *Distinction: Authority To Conduct Settlement Conference.* A settlement conference (see 7 Cal. Proc. (5th), Trial, §53) is not a proceeding at which the judge will hear a matter involving a contested issue of law or fact; hence, a judge disqualified by a challenge under C.C.P. 170.6 may conduct the conference. (*Mezzetti v. Superior Court* (1979) 94 C.A.3d 987, 991, 993, 156 C.R. 802.)

(4) *Challenge May Not Be Rescinded.* In *Brown v. Superior Court* (1981) 124 C.A.3d 1059, 177 C.R. 756, an action was assigned to Judge R to hear a motion, but defendant's attorney disqualified Judge R under C.C.P. 170.6, and the

motion was heard by the supervising judge. Later, a demurrer and another motion came on for hearing before Judge R. Plaintiff's attorney reminded the judge of the disqualification, but defendant's attorney stated that he wished to proceed before Judge R, who then conducted the hearing. *Held*, mandamus issued to vacate the rulings on the demurrer and motion. Disqualification of a judge under *C.C.P. 170.6* is not limited to a particular motion or issue, but deprives the judge of jurisdiction in all further contests in that action. The fact that a party who disqualifies a judge later wishes the judge to hear another matter in the same case does not alter the fact of disqualification. (124 C.A.3d 1061.)

Once exercised, a peremptory challenge takes effect immediately and cannot be rescinded; it terminates irrevocably the judge's authority to act in the case. Thus, the subsequent dismissal of the party who asserts the challenge does not rescind the challenge. (See *Louisiana-Pac. Corp. v. Philo Lumber Co.* (1985) 163 C.A.3d 1212, 1219, 1221, 210 C.R. 368; *Moreira v. Superior Court* (1989) 215 C.A.3d 42, 44, 45, 265 C.R. 437.)

Louisiana-Pac. Corp. v. Philo Lumber Co., *supra*, and *Brown v. Superior Court*, *supra*, were distinguished in *Stebbins v. White* (1987) 190 C.A.3d 769, 235 C.R. 656, *supra*, §96, holding that a single defendant who withdrew his peremptory challenge and consented to proceedings before the assigned judge waived his right to complain on appeal. (190 C.A.3d 782.) (See *Andrisani v. Saugus Colony, Ltd.* (1992) 8 C.A.4th 517, 10 C.R.2d 444, *infra*, §158 [implied waiver of challenge].)

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4. Effect of Challenge.

b. Challenge by Cross-Defendant.

2 *Witkin Cal. Proc. Courts* § 136

[§ 136] Challenge by Cross-Defendant.

In *H.K. Sunkyong Trading Ltd. v. Superior Court* (1992) 9 C.A.4th 282, 11 C.R.2d 504, an action was filed and assigned to a trial judge. More than a year later a cross-complaint was filed against a new party, and the new cross-defendant filed a peremptory challenge. The judge, because of his familiarity with the case, severed the pleading, transferring for reassignment only the part involving the cross-defendant, and retaining the remainder of the action. *Held*, mandamus issued, directing transfer of the entire case.

(a) Although the filing of a cross-complaint is for some purposes treated as the commencement of a new action, the cross-complaint statute is designed to have all matters in dispute relating to the transaction or property be determined in a single action and by a single judgment. (9 C.A.4th 288; see 5 Cal. Proc. (5th), *Pleading*, §1167.)

(b) The contention that permitting severance furthers judicial economy and prevents abuse of the peremptory challenge procedure does not justify interpreting "action" within the meaning of C.C.P. 170.6 as synonymous with "complaint" or "cross-complaint" against a particular party. (9 C.A.4th 289.)

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C. Peremptory Challenge.

5. Limitations on Right.

a. One Challenge In Any One Action.

2 Witkin Cal. Proc. Courts § 137

[§ 137] One Challenge In Any One Action.

(1) *Statutory Rule.* A party or attorney may not make more than one motion for disqualification "in any one action or special proceeding." (*C.C.P. 170.6(a)(3).*) (See *Truck Ins. Exchange v. Superior Court* (1998) 67 C.A.4th 142, 146, 78 C.R.2d 721 [party's peremptory challenge to second judge was proper despite "one motion" rule where challenge to first judge had been dismissed as untimely and he was later removed by retirement, not by peremptory challenge]; *C.E.B.*, 1 Civil Proc. During Trial 3d, §6.60.)

(2) *Second Challenge After Appeal and Remand.* In *Matthews v. Superior Court* (1995) 36 C.A.4th 592, 42 C.R.2d 521, plaintiff successfully exercised one peremptory challenge to the initial trial judge. The second trial judge granted a summary judgment motion for defendants, which was partially reversed on appeal. On remand, the case was reassigned to the second trial judge, who denied plaintiff's second peremptory challenge, and plaintiff petitioned for a writ of mandamus. *Held*, petition denied. Under the one action rule, the challenge to the second trial judge was not permitted.

(a) *Trial on remand is continuation of same action.* *C.C.P. 170.6* prohibits more than one peremptory challenge in an action. Thus, a second peremptory challenge may not be interposed when a subsequent proceeding is a continuation of an earlier action. A subsequent proceeding is a continuation, rather than a separate and independent action, if it involves substantially the same issues, and matters necessarily relevant and material to the issues, involved in the original action. Here, following reversal and remand, exactly the same issues were to be heard in the trial court. (36 C.A.4th 596.)

(b) *Statute authorizing challenge after reversal on appeal does not permit second challenge.* Although *C.C.P. 170.6* permits peremptory challenges following reversal on appeal if the same trial judge in the prior proceeding is assigned to conduct a new trial (see *infra*, §151), the amendment adding that provision did not supersede the long-standing prohibition against filing more than one peremptory challenge in any one action. The amendment permitted the filing of the peremptory challenge following reversal and reassignment. Nowhere in the amendment or in legislative reports is there any mention of superseding the absolute prohibition against filing more than one peremptory challenge in any one action. (36 C.A.4th 597.)

(c) *No equal protection violation.* The trial court's denial of plaintiff's second peremptory challenge did not result in a denial of equal protection or lead to an absurd result. Plaintiff's argument rests on her contention that parties who have previously exercised a peremptory challenge are similarly situated to those who have not. However, *C.C.P. 170.6* provides only a limited right and is not a vehicle for disqualifying judges in all situations in which there is a potential for bias. Once the right is exercised, a party is not similarly situated to a party who has yet to exercise the right. Rather, the party who has exercised the right at any stage in the proceedings has exhausted the statutory remedy provided by *C.C.P. 170.6*. That party may still challenge a judge for bias under *C.C.P. 170.3* (*supra*, §122 et seq.). (36 *C.A.4th* 598.)

The result in *Matthews v. Superior Court* has been changed by statute. Following reversal on appeal of a trial court's final judgment, the party who filed the appeal may make a disqualification motion "regardless of whether that party or side has previously done so." (*C.C.P. 170.6(a)(2)*.)

(3) *Application of Rule in Criminal Proceedings.* The one-action limitation does not deny equal protection to a codefendant. (*Welch v. Superior Court* (1974) 41 *C.A.3d* 50, 52, 115 *C.R.* 729.) Further, a criminal defendant is not entitled to exercise one peremptory challenge at the preliminary hearing and another at the trial in the same criminal action. (*Le Louis v. Superior Court* (1989) 209 *C.A.3d* 669, 683, 257 *C.R.* 458.) And, a retrial in a criminal action is not a new action, for a criminal action is defined by P.C. 683 as a proceeding by which the defendant is brought to trial and punishment. (*Pappa v. Superior Court* (1960) 54 *C.2d* 350, 353, 5 *C.R.* 703, 353 *P.2d* 311, *infra*, §138.)

(4) *Distinction: Prior Competency Hearing.* In *Waldon v. Superior Court* (1987) 196 *C.A.3d* 809, 241 *C.R.* 123, Judge L presided at a hearing to determine defendant's competency to stand trial for murder, after defendant had exercised a peremptory challenge to the judge originally assigned. Defendant was found competent and Judge L was assigned to preside at the trial. Defendant then filed a peremptory challenge to Judge L, which was denied. *Held*, defendant's exercise of a peremptory challenge in the competency proceeding did not preclude a second peremptory challenge in the criminal action; the two proceedings were distinct and did not constitute one action for purposes of *C.C.P. 170.6*. (196 *C.A.3d* 814.)

(5) *Distinction: Two Successive Actions.* In *Solberg v. Superior Court* (1977) 19 *C.3d* 182, 137 *C.R.* 460, 561 *P.2d* 1148, Judge M rejected the prosecution's motion to disqualify her on the ground that the prosecution had previously "accepted" her on the same issues. This would have been a proper position if the acceptance had been at an earlier stage of the same prosecution; but here it took place in an earlier, separate prosecution of similar charges against other defendants. By negative implication from the statute, "in two successive actions a party may move to disqualify in each, or may disqualify in the later action without waiving that right by failing to so move in the earlier." In other words, the doctrine of collateral estoppel does not apply. (19 *C.3d* 190, footnote 6.) (See *Hanford v. Superior Court* (1989) 208 *C.A.3d* 580, 593, 256 *C.R.* 274 [citing *Solberg*]; *Nissan Motor Corp. v. Superior Court* (1992) 6 *C.A.4th* 150, 155, 7 *C.R.2d* 801 [quoting *Hanford*]; *Bravo v. Superior Court* (2007) 149 *C.A.4th* 1489, 1494, 57 *C.R.3d* 910 [although two actions involved employment discrimination claims by same employee against same employer, second action was not continuation of first action for purposes of peremptory challenge statute where second action arose from later events distinct from those in first action].)

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5. Limitations on Right.

b. One Challenge For Each Side.

2 *Witkin Cal. Proc. Courts* § 138

[§ 138] One Challenge For Each Side.

In an action or proceeding in which there is more than one plaintiff "or similar party," or more than one defendant "or similar party," only one motion "for each side" may be made. (*C.C.P. 170.6(a)(3)*.) (See *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.85 et seq.)

In *Pappa v. Superior Court* (1960) 54 *C.2d* 350, 5 *C.R.* 703, 353 *P.2d* 311, P and her codefendant F were charged with murder and conspiracy to commit murder. The prosecution challenged Judge W under *C.C.P. 170.6*. Judge N was assigned and was challenged by defendant F. At a trial before Judge E, the jury disagreed, and a mistrial was declared. On the retrial before Judge D, P challenged him. The motion was denied, and P sought prohibition. *Held*, writ denied.

(a) Ordinarily there are two sides, but there may be more if codefendants have substantially adverse interests. (54 *C.2d* 353, 354.) Because F had used one challenge, P had the burden of showing that her interests were substantially adverse to F, but her showing was insufficient. They differed on procedural matters (e.g., change of venue and separate trial), but how or why this was important did not appear; they were represented by separate counsel but that did not necessarily mean that their interests were substantially adverse. (54 *C.2d* 355.)

(b) The right of an attorney to challenge does not permit evasion of the one-to-each-side limitation. "Otherwise, a party who exercised a challenge could continue to obtain disqualifications endlessly by the simple expedient of changing attorneys." (54 *C.2d* 355.)

A vigorous dissent argued as follows: (a) To require a defendant to disclose a possible conflict of interest before trial is necessarily to require disclosure of elements of the defense before the prosecution has put on its case, and such a burden of proof is unconstitutional in a criminal case. (54 *C.2d* 358, 359.) (b) The statute should not be construed so that the challenge the Legislature deemed important is used up in an abortive proceeding (mistrial) and cannot be exercised in the trial where guilt or innocence is determined. (54 *C.2d* 359.) (c) The attorney's right to challenge for prejudice against him, alleged here, should be recognized; the challenging attorneys thereby place their client on a different side. (54 *C.2d* 361.) (d) The showing made did demonstrate adverse interests, substantial enough for any criminal case; and in a capital case, due process required that P have an opportunity of challenge equal to that of F and

the prosecution. (54 C.2d 362.) (See *People v. Escobedo* (1973) 35 C.A.3d 32, 41, 110 C.R. 550 [following *Pappa*; no conflict of interest was shown]; *Welch v. Superior Court* (1974) 41 C.A.3d 50, 53, 115 C.R. 729.)

A sufficient showing was made in *Avital v. Superior Court* (1981) 114 C.A.3d 297, 170 C.R. 588. Codefendants A and Z were charged with two murders under circumstances that would subject them to the death penalty. Z disqualified Judge L, and the case was assigned to Judge M. A challenged her on a sworn statement that the two defendants' interests were "totally adverse," and at the hearing stated his position as "I didn't do it but the codefendant did do it." Counsel also offered to state facts at an in camera hearing if desired. *Held*, the motion to disqualify Judge M should have been granted.

(a) The interests were substantially adverse because A sought to avoid conviction by placing responsibility on his codefendant. (114 C.A.3d 302, discussing *Johnson v. Superior Court* (1958) 50 C.2d 693, 329 P.2d 5, *supra*, §130.)

(b) Lack of factual detail in counsel's statement and argument did not render the showing inadequate, because the court was aware of the nature of the conflict and counsel offered to provide additional details at an in camera hearing, and because counsel in a capital case is understandably reluctant to reveal his version of the facts or probable defense until necessary. (114 C.A.3d 302.)

In *Home Insurance Co. v. Superior Court* (2005) 34 C.4th 1025, 22 C.R.3d 885, 103 P.3d 283, plaintiff insured joined its primary and excess insurers in a single action, and the excess insurer filed a disqualification motion after an earlier motion by the primary insurer had been granted. The Court of Appeal determined that the two insurers were on different sides for purposes of C.C.P. 170.6(a)(3) because "more often than not" the two types of insurers have substantially adverse interests. *Held*, reversed. The interests of primary and excess insurers are not inherently substantially adverse. The question whether the two insurers are on the same side for disqualification purposes is a factual one. (34 C.4th 1036.) A potential conflict between the two insurers "did not and could not" establish that they were on different sides, in lieu of a factual demonstration of substantially adverse interests, which the excess insurer here was unable to make. (34 C.4th 1037.)

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c. Challenge Motivated by Racial Bias.

2 Witkin Cal. Proc. Courts § 139

[§ 139] Challenge Motivated by Racial Bias.

A peremptory challenge that is based on racial grounds is itself subject to challenge on constitutional grounds. In *People v. Superior Court (Williams)* (1992) 8 C.A.4th 688, 10 C.R.2d 873, the prosecutor filed a peremptory challenge against the assigned judge. Defendant, noting that the judge was black, claimed that the challenge was based on impermissible group bias. A mistrial previously had been declared in the case because of the prosecutor's use of peremptory challenges to exclude black women from the jury. (On group bias as an improper basis for peremptory challenges to jurors, see 5 Cal. Crim. Law (3d), *Criminal Trial*, §495 et seq.) A hearing was held before another judge, who asked the prosecutor for an explanation of the challenge. The prosecutor said that he had tried cases in which the challenged judge, then an attorney, represented criminal defendants. From that experience, he had formed an opinion about the judge's abilities as a lawyer, and he believed that the prosecution would not receive fair treatment in evidentiary rulings or on instructions. The judge hearing the issue ruled that this explanation was insufficient to overcome the prima facie showing of invidious discrimination that he believed had been established, and the challenge was disallowed. The prosecution then petitioned for prohibition and mandamus. *Held*, writ of mandamus granted.

(a) The prejudice required by the disqualification statute is established by an oral or written affidavit, timely filed, in which the party or attorney for the party declares a good faith belief that a fair and impartial trial cannot be had before the challenged judge. Earlier cases have established the rule that the belief of bias alone is sufficient, and that the law assumes that the disqualifying party acts in good faith. (8 C.A.4th 699.) The federal *Batson* rule (see 5 Cal. Crim. Law (3d), *Criminal Trial*, §496) and the state *Wheeler* rule (see 5 Cal. Crim. Law (3d), *Criminal Trial*, §495) are limited to group bias challenges against jurors, and there is no compelling analogy to the challenge of a judge. (8 C.A.4th 703.)

(b) The case presents an issue of first impression: "whether the state, by enacting a statute affording a party one 'no questions asked' peremptory challenge to a judge ... can preclude inquiry into the possibility that such a challenge has been exercised for group bias." (8 C.A.4th 706.) Here, the "prima facie burden of proof rules" established in other contexts are appropriate. (8 C.A.4th 708.)

(c) A party who claims that a peremptory challenge was filed to disqualify a judge on the basis of group bias bears the initial burden of establishing a prima facie case of invidious discrimination. If that is done, the other party assumes

the burden of demonstrating that the challenge was not predicated on group bias alone. If a race-neutral basis is offered for the challenge, the trial court must determine whether the charging party has established purposeful discrimination. (8 C.A.4th 708.)

(d) To prevail, the charging party must establish that the challenge was exercised "to remove a judge who is a member of a cognizable racial group, and then by showing facts and any other relevant circumstances which raise an inference that the prosecutor excluded the judge on account of his race." (8 C.A.4th 708, 709.)

(e) As in cases of peremptory challenges of prospective jurors, a reviewing court normally would afford "considerable deference" to a trial court's finding that a prima facie case had been established. But deference was not appropriate here, because a prima facie showing sufficient to require the prosecutor to give an explanation had not been made. The challenged judge was black, but the only other basis for the trial court's conclusion that a prima facie case had been made was the fact that a successful *Wheeler* motion had been granted by another judge because of the prosecutor's use of jury peremptory challenges. The judge hearing the motion to invalidate the peremptory challenge of the judge had not ruled on the *Wheeler* motion or reviewed a transcript of the earlier proceeding. No other circumstance of group bias was shown. (8 C.A.4th 709, 712.)

(f) The argument that discriminatory purpose was shown because the challenged judge was the only black judge sitting in the trial department of the court was not presented to the trial court and hence cannot be considered on appeal. Nothing in the record indicates that the prosecutor, who was from an adjacent county, was aware that he was excluding the only black judge. (8 C.A.4th 710, footnote 3.)

(g) In rejecting the prosecutor's explanation for the challenge, the trial court stated that it lacked sufficient particularity. While the trial court is generally in the best position to determine whether an explanation is genuine or pretextual, "any demand for greater detail must be tempered by recognition of the understandable reluctance of attorneys publicly to disparage judges. Unlike prospective jurors, attorneys will likely encounter the same judges again and again in the practice of their profession. ... It is an understatement to say that judges have vastly more power over an attorney's pursuit of his livelihood than prospective jurors who have virtually none." (8 C.A.4th 713.) A successful *Wheeler* motion results in dismissal of the venire, and the attorney who engaged in discriminatory conduct is unlikely to have to deal with them again. But a peremptory challenge of a judge results in recusal only for that one case. If it is unsuccessful, the judge will continue to preside in the case "fully aware of the reasons given by counsel in support of an unsuccessful challenge. These realities exact too high a cost to justify a demand for even greater particularity than provided here in counsel's statement of reasons for challenge." (8 C.A.4th 713.)

(h) Because the defendant as the charging party had failed to establish a prima facie showing that the prosecutor had exercised a peremptory challenge on the basis of race, it was error to require the prosecutor to state reasons for exercising the challenge; the reasons given were race neutral and far from so inadequate as to make up for the deficiency in the charging party's showing. Consequently, the challenge should have been allowed. (8 C.A.4th 713.)

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d. Time for Motion.

1. General Rule and Limitations.

2 Witkin Cal. Proc. Courts § 140

[§ 140] General Rule and Limitations.

The proper time for making a disqualification motion under *C.C.P. 170.6* has been the subject of controversy, and the cases interpreting and applying the statute have not been consistent in referring to the general rule and its exceptions. While it is generally stated that the motion must be made before the hearing or trial commences (see *infra*, §141), the following exceptions and limitations are recognized:

(1) *10-day/5-day rule*. If the judge, commissioner, or referee is known at least 10 days before the trial or hearing date, the motion must be made at least 5 days before that date. (*C.C.P. 170.6(a)(2)*; see *infra*, §142.)

(2) *All purpose assignment*. If a judge has been assigned for all purposes, the motion must be made within 10 days after notice of the all purpose assignment, or if the party has not yet appeared, within 10 days after the appearance. (*C.C.P. 170.6(a)(2)*; see *infra*, §146.)

(3) *Master calendar assignment*. If there is a master calendar, the motion must be made not later than the time the cause is assigned for trial. (*C.C.P. 170.6(a)(2)*; see *infra*, §147.)

(4) *One judge court*. If the action is pending in a court authorized to have no more than one judge, the motion must be made within 30 days from the date of the first appearance of the party for whom the motion is made. (*C.C.P. 170.6(a)(2)*; see *infra*, §149.)

(5) *Coordination judge*. If the action is before a coordination judge, the motion must be submitted within 20 days after service of the order assigning the judge. (*C.R.C.*, Rule 3.516; see *infra*, §150.)

(6) *New trial after appeal*. If a trial court's decision is reversed on appeal and the original trial judge is assigned to conduct a new trial, the motion may be made within 60 days after notification of the assignment. (*C.C.P. 170.6(a)(2)*; see *infra*, §151.)

(7) *Time limits may not be waived*. Where a disqualification motion under *C.C.P. 170.6* is untimely, the judge may

not waive the time limitations and disqualify himself or herself. To do so would be inconsistent with the duty of judges, under *C.C.P. 170* (supra, §93), to decide proceedings in which they are not disqualified. (*Briggs v. Superior Court* (2001) 87 C.A.4th 312, 318, 104 C.R.2d 445.)

(8) *Challenge is not permitted in absence of pending hearing or trial.* *Grant v. Superior Court* (2001) 90 C.A.4th 518, 108 C.R.2d 825, addressed the question whether there is a time before which a peremptory challenge may not be made, and held that a challenge may be too early. The general rule set forth in *People v. Superior Court (Lavi)* (1993) 4 C.A.4th 1164, 17 C.R.2d 815, 847 P.2d 1031, infra, §148, that, subject to the statutory exceptions, a peremptory challenge may be made at any time before the commencement of a trial or hearing, "is sometimes misconstrued to allow a peremptory challenge at any time during the course of litigation." On the contrary, a "peremptory challenge cannot be filed or accepted at any time." The plain language of *C.C.P. 170.6* "limits a peremptory challenge to those times when either a trial or hearing involving a contested issue of law or fact is pending on the trial court's calendar." The all purpose assignment rule provides the only exception, permitting a peremptory challenge to an all purpose assignment judge expected to preside at trial even though the trial date has not been set. (90 C.A.4th 525.) The court disagreed with decisions that might be construed to allow a challenge in the absence of a pending trial or hearing or an all purpose assignment. (90 C.A.4th 526, citing *Pedus Services v. Superior Court* (1999) 72 C.A.4th 140, 84 C.R.2d 771, infra, §142.)

(9) *Comparable procedure in other cases.* In trials or hearings not specifically provided for by *C.C.P. 170.6(a)(2)*, the procedure specified in the statute "shall be followed as nearly as may be." (*C.C.P. 170.6(a)(2)*.) (See generally C.E.B., 1 Civil Proc. During Trial 3d, §6.64; Rutter Group, Civil Trials and Evidence §3:195 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §7.61 et seq.)

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d. Time for Motion.

2. Before Commencement.

2 Witkin Cal. Proc. Courts § 141

[§ 141] Before Commencement.

(1) *Commencement of Trial.* A judge, commissioner, or referee may not entertain a motion made (a) after the drawing of the name of the first juror, or (b) if there is no jury, after the plaintiff's opening statement, or (c) if there is no opening statement, after the first witness is sworn or any evidence is given, or trial of the cause is otherwise commenced. (*C.C.P. 170.6(a)(2).*)

Under the Rules of Court, a juvenile wardship jurisdictional hearing may be bifurcated into a preliminary hearing phase and an adjudicatory phase. For purposes of *C.C.P. 170.6*, the trial in a juvenile proceeding commences with the adjudicatory phase of the jurisdictional hearing. (*In re Abdul Y. (1982) 130 C.A.3d 847, 856, 857, 182 C.R. 146.*)

(2) *Commencement of Hearing.* If the motion is directed to a hearing (other than the trial of a cause), the motion must be made not later than the commencement of the hearing. (*C.C.P. 170.6(a)(2).*) (See *Schorr v. Superior Court (1980) 105 C.A.3d 568, 570, 164 C.R. 478* [conference in chambers "effectively commenced" hearing on motions for modification of custody and support orders].)

The rule is often stated that a motion is timely if made before a hearing is commenced on a contested issue. (See *Estate of Cuneo (1963) 214 C.A.2d 381, 384, 29 C.R. 497*; *Oksner v. Superior Court (1964) 229 C.A.2d 672, 689, 40 C.R. 621*; *Woodman v. Salvage (1968) 263 C.A.2d 390, 395, 69 C.R. 687* [only prior proceeding was noticing of date to hear motion].)

In *Mayr v. Superior Court (1964) 228 C.A.2d 60, 64, 39 C.R. 240*, a wife filed a complaint for divorce, alleging that the parties had agreed that the husband would have custody of the children. The husband did not file an answer and his default was taken. However, at a later ex parte hearing, with the wife alone present, the judge ordered the probation officer to investigate the custody matter, and when the report was filed, notified the husband's attorney of the time for further hearing or opposition. The husband's attorney moved to disqualify, and the judge struck the motion. *Held*, prohibition granted. Although the hearing had commenced, and the husband was charged with knowledge of the law giving the judge the power to determine custody regardless of the agreement of the parties, the proceeding, commenced

without contest, had turned into a custody contest when the judge acted on his own motion to question the agreement. Thus, the motion to disqualify was made as soon as possible after a contested issue of fact arose. (228 C.A.2d 64.)

On the other hand, in *Michaels v. Superior Court* (1960) 184 C.A.2d 820, 824, 7 C.R. 858, the cause was assigned, petitioner appeared on a so-called special appearance, argued several matters of substance and received an adverse ruling, and then filed the affidavit of prejudice. *Held*, it was properly stricken.

In *Swartzman v. Superior Court* (1964) 231 C.A.2d 195, 200, 41 C.R. 721, the judge heard contested motions to amend the complaint and to specially set, a demurrer, a motion to strike, and a motion to reconsider his prior ruling. *Held*, a challenge by defendants after that time was too late. (See *McClenny v. Superior Court* (1964) 60 C.2d 677, 683, 36 C.R. 459, 388 P.2d 691, *infra*, §154; *Conservatorship of Durham* (1988) 205 C.A.3d 548, 553, 252 C.R. 414, *infra*, §155 [motion made after contested appointment of conservator was not timely]; but cf. *People v. Hunter* (1977) 71 C.A.3d 634, 638, footnote 2, 139 C.R. 560 [noting that *Swartzman* was decided before 1965 amendment to C.C.P. 170.6, and holding that judge's ruling on prior contested motion to amend information did not bar later challenge made before jury was impaneled]; on distinction where action is not on merits, see *infra*, §156.)

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d. Time for Motion.

3. Judge Known Before Trial.

aa. 10-Day/5-Day Rule.

2 Witkin Cal. Proc. Courts § 142

[§ 142] 10-Day/5-Day Rule.

If the trial or hearing judge (other than a judge assigned for all purposes), commissioner, or referee is known at least 10 days before the trial or hearing date, the motion must be made at least 5 days before that date. (*C.C.P.* 170.6(a)(2); see *Spector v. Superior Court* (1961) 55 C.2d 839, 843, 13 C.R. 189, 361 P.2d 909; *Hospital Council of Northern Calif. v. Superior Court* (1973) 30 C.A.3d 331, 339, 106 C.R. 247 [intervenors became parties on order authorizing intervention, and time ran from that date, not from later date of filing formal petition in intervention]; *People v. Richard* (1978) 85 C.A.3d 292, 297, 149 C.R. 344 [litigant may not extend period by bad faith conduct that results in delay of trial]; *People v. Superior Court (Gonzales)* (1991) 228 C.A.3d 1588, 1590, 279 C.R. 679; *Reygoza v. Superior Court* (1991) 230 C.A.3d 514, 518, 281 C.R. 390; C.E.B., 1 Civil Proc. During Trial 3d, §6.67; on effect of assignment to particular department without named judge, see *infra*, §143; on application of *C.C.P.* 12, computing time by excluding first day and including last day during period in which an act must be done, see *Pamela H. v. Superior Court* (1977) 68 C.A.3d 916, 919, 137 C.R. 612.)

A challenge within the statutory time limit is good despite the violation of a local court rule designed to promote effective calendar management. (*Sambrano v. Superior Court* (1973) 31 C.A.3d 416, 419, 107 C.R. 274.)

In *Pedus Services v. Superior Court* (1999) 72 C.A.4th 140, 84 C.R.2d 771, defendant filed a peremptory challenge to a discovery referee after the court had accepted the referee's report. *Held*, the challenge was timely for purposes of additional discovery proceedings.

(a) Although *C.C.P.* 170.6 governs a peremptory challenge to a discovery referee, the time for the disqualification motion is not explicitly stated in the statute. If appointment of the referee is analogous to assignment of a judge for all purposes, the motion must be made within 10 days after notice of the assignment. If the appointment is not analogous to an all purpose assignment, the motion is governed by the 10-day/5-day rule. (72 C.A.4th 146.)

(b) Under *People v. Superior Court (Lavi)* (1993) 4 C.4th 1164, 17 C.R.2d 815, 847 P.2d 1031, *infra*, §148, an all

purpose assignment is one that will "instantly pinpoint" the trial judge who will process the case "in its totality." Because a discovery referee holds hearings and makes recommendations but does not try the case, the referee is not acting in the manner of an all purpose judge. Thus, requiring a disqualification motion within 10 days after the discovery referee is appointed is not appropriate. (72 C.A.4th 145, disagreeing with a contrary conclusion in *Autoland v. Superior Court* (1988) 205 C.A.3d 857, 252 C.R. 662.) Here, because the appointment of the discovery referee was known at least 10 days before additional discovery proceedings were scheduled, the disqualification motion was timely under the 10-day/5-day rule. (72 C.A.4th 146.) (See *Grant v. Superior Court* (2001) 90 C.A.4th 518, 526, 108 C.R.2d 825, supra, §140 [disagreeing with *Pedus Services* to extent that case may be construed to allow peremptory challenge in absence of either pending trial or hearing or all purpose assignment].)

A challenge made after appearance at a probation revocation hearing is timely under the 10-day/5-day rule where the trial judge summarily revokes probation and sets a later date to hear the revocation petition, but does not determine a contested issue of fact. (*Depper v. Superior Court* (1999) 74 C.A.4th 15, 18, 87 C.R.2d 563.)

In *Zilog v. Superior Court* (2001) 86 C.A.4th 1309, 104 C.R.2d 173, a case subject to the Trial Court Delay Reduction Act, plaintiff filed a peremptory challenge to a judge assigned for all purposes except trial. The challenge was filed more than 5 days before the hearing on a motion for summary adjudication but also more than 15 days after the judge had been assigned. *Held*, the challenge was timely.

(a) *Govt.C. 68616(i)* (infra, §262) provides two rules for peremptory challenges in a Delay Reduction Act case. In a direct calendar court, the challenge must be exercised within 15 days after the assignment or the challenging party's first appearance. In a master calendar court, *C.C.P. 170.6* governs the challenge. (86 C.A.4th 1317.)

(b) The issue here is whether an assignment for all purposes *except* trial is a direct calendar system or a master calendar system. Although these terms are not defined in the Government Code, and the legislative history of the Delay Reduction Act is silent on their meaning, appellate decisions and common usage indicate that a direct calendar court is one in which the judge is assigned for all purposes, *including* trial. Because the trial court here is not a direct calendar court within the meaning of *Govt.C. 68616(i)*, the 15-day time limit of that statute is not applicable. (86 C.A.4th 1318, 1319.)

(c) Under *C.C.P. 170.6*, the master calendar rule is not applicable here because the case was not assigned to the judge for trial, and the all purpose assignment rule is not applicable because the case was not assigned to the judge for all purposes. Thus, the 10-day/5-day rule governs the motion, and under that rule, the motion was timely. (86 C.A.4th 1319, 1320.)

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bb. Effect of Assignment to Department.

2 Witkin Cal. Proc. Courts § 143

[§ 143] Effect of Assignment to Department.

(1) *Department Without Named Judge.* *In re Jose S.* (1978) 78 C.A.3d 619, 144 C.R. 309, examined the statutory scheme and emphasized the uncertainty inherent in the practice of assigning a cause to a particular department but not to a named judge. The court held that the underlying purpose of the statute--to give the litigant a single reasonable opportunity to disqualify a *known* trial judge--must be given effect, and that, where a hearing date is set but postponed, a disqualification motion filed 5 days before the postponed date is timely. (78 C.A.3d 627.) (See *People v. Richard* (1978) 85 C.A.3d 292, 298, 149 C.R. 344 [questioning *In re Jose S.* in light of holding in *People v. Wilks* (1978) 21 C.3d 460, 466, 146 C.R. 364, 578 P.2d 1369]; *People v. Hall* (1978) 86 C.A.3d 753, 758, 150 C.R. 412 [six trial date continuances granted by different judges; rejecting contention that challenge is required before original trial date; it "would unfairly countenance an element of chance tending to subvert the underlying statutory purpose"]; *In re Robert P.* (1981) 121 C.A.3d 36, 40, 175 C.R. 252 [judge of department was unknown until 4 days before hearing because of annual reassignment of judges; challenge at time of hearing was timely].)

In *People v. Superior Court (Hall)* (1984) 160 C.A.3d 1081, 1086, 207 C.R. 131, the court, following the *Jose S.* line of cases, held that assignment to a particular department, rather than to the judge permanently assigned to that department, is not an assignment to a judge "for all purposes," because contingencies may arise and reassignments may occur. Hence, a motion filed within 5 days prior to the last scheduled trial date is timely. (See *Mackey v. Superior Court* (1990) 221 C.A.3d 1124, 1126, 270 C.R. 905 [following *Hall*]; on relationship among 10-day/5-day rule, all purpose rule, and master calendar rule, see *People v. Superior Court (Lavi)* (1993) 4 C.4th 1164, 17 C.R.2d 815, 847 P.2d 1031, *infra*, §148.)

In *Kaiser Foundation Hosp. v. Superior Court* (1987) 190 C.A.3d 721, 235 C.R. 630, a local rule provided for discovery of the court's tentative ruling on law and motion matters and a hearing on request after the tentative ruling. *Held*, a motion to disqualify the regularly assigned judge in the department in which the motion was noticed made at the time set for hearing was untimely. "We hold that the 10-day/5-day rule may be followed in jurisdictions having a tentative ruling procedure where motions are set in a department which has a regularly assigned judge. If, however, the

regularly assigned judge does not, in fact, rule on the motion or if the regular assignment has been changed without sufficient notification to the parties, the tentative ruling system must give way to the parties' right to exercise the section 170.6 challenge. A local rule may not deprive a party of its right to challenge under section 170.6. ... In such a situation, the challenge must be allowed at the time of hearing despite the challenging party's knowledge of a tentative ruling." (190 C.A.3d 725.)

(2) *Excusable Mistake About Identity of Judge*. In *People v. Bonds* (1988) 200 C.A.3d 1018, 248 C.R. 5, defendants' case was assigned from the master calendar department to Department Six, in which Judge H regularly presided. The master calendar judge did not state the name of the sitting judge, but counsel, on questioning the master calendar department clerk, were told that it was Judge H. In fact Judge H had been replaced by Judge M, assigned from another county. When they discovered this fact, counsel conferred with their clients and exercised their peremptory challenge. *Held*, the motion was timely. Counsel were not negligent. "[T]hey did everything reasonably possible both to ascertain the identity of the judge in the department to which the case had been assigned, and to challenge the sitting judge as soon as his true identity became known." (200 C.A.3d 1024.)

(3) *Department With Named Judge Who May Reassign Case*. In *Retes v. Superior Court* (1981) 122 C.A.3d 799, 176 C.R. 160, defendant's motion for summary judgment was scheduled in a particular department before a named judge more than 10 days before the hearing date. Under local policy and practice, the named judge did not always hear matters designated to be heard by him, and some matters were reassigned to other judges. On the date set for hearing, plaintiff filed a motion to disqualify the judge under C.C.P. 170.6, the motion was denied as untimely, and plaintiff petitioned for mandamus or prohibition. *Held*, the motion was timely. Assignment of the matter to the particular department before the named judge of that department indicated only the probability, not the certainty, that the named judge would hear the matter. Under the rule of *Bouchard v. Insona* (1980) 105 C.A.3d 768, 772, 164 C.R. 505, the assignment was not an assignment to a *known* judge within the meaning of C.C.P. 170.6. (122 C.A.3d 805.)

Bouchard and *Retes* were strongly criticized and their holdings rejected in *Thomas Realty Co. v. Superior Court* (1988) 199 C.A.3d 91, 244 C.R. 733. The issue was: "When a party files a motion and calendars it for hearing in a specified department of the superior court, is the judge's identity 'known' " for purposes of the 5-day rule? (199 C.A.3d 92.) In answering "yes," the court declared that the *Bouchard* decision was "unprecedented," and that *People v. Roerman* (1961) 189 C.A.2d 150, 10 C.R. 870, states the preferable rule.

(a) "*Bouchard* and *Retes* would in effect eradicate the five-day rule for all pretrial motions except those few assigned in advance to a designated judge." (199 C.A.3d 95.)

(b) "*Bouchard* and *Retes* impose an unreasonable and wasteful burden on the judges of the superior court, by requiring study of the parties' moving and opposition papers by a judge whom one of the parties secretly intends to disqualify. ... *Bouchard* and *Retes* make it difficult for the superior court to hear and decide a motion at the time scheduled because they permit last-minute disqualification of the one judge who is prepared to hear it." (199 C.A.3d 95.)

(c) The time limitations of the statute "reflect a legislative accommodation of the conflicting needs of litigant and court." Rather than accommodate these interests, *Bouchard* "abandons the court's interest and capitulates to that of the litigant, by authorizing him, at the court's expense, to delay filing his challenge in hopes that a last-minute reassignment or illness may achieve the same result without necessitating use of the challenge." (199 C.A.3d 96.) (See *Lawrence v. Superior Court* (1988) 206 C.A.3d 611, 617, 253 C.R. 748 [following *Thomas Realty Co.*]; *Moreira v. Superior Court* (1989) 215 C.A.3d 42, 45, 265 C.R. 437.)

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4. All Purpose Assignment.

aa. Case Law Development.

2 *Witkin Cal. Proc. Courts* § 144

[§ 144] Case Law Development.

In *Augustyn v. Superior Court* (1986) 186 C.A.3d 1221, 231 C.R. 298, the matter was assigned "for all purposes" to Judge L on May 9, 1986. On July 25, 1986, Judge L ruled against petitioner on a motion for declaratory relief, and on August 8, 1986, petitioner filed a peremptory challenge, which was denied as untimely. *Held*, affirmed.

(a) *Zdonek v. Superior Court* (1974) 38 C.A.3d 849, 852, 113 C.R. 669, appears to be the only case to have considered the timeliness of a challenge of an all purpose assignment. The majority there concluded that the 10-day/5-day rule, but not the master calendar exception (*infra*, §147), applies. "We disagree with that conclusion." (186 C.A.3d 1227.)

(b) The time limitations of C.C.P. 170.6 "have in common the requirement that the litigant make his challenge as soon as possible after he knows *with some reasonable certainty* who the actual trial judge will be." (186 C.A.3d 1228.) The statute does not require a party to use his or her challenge against a judge who "may not sit on the actual fact-finding decision; rather, the idea is to permit challenge to the crucial fact finder *when his identity is known*." (186 C.A.3d 1228.)

(c) An all purpose assignment "instantly pinpoints and establishes for all purposes the identity of the judge in the matter. The litigant does not need any further information to know who will try the case. There is no policy reason to allow further postponement of the decision whether to challenge." (186 C.A.3d 1228.) And, as the dissent in *Zdonek* pointed out, "to allow such postponement frustrates the entire purpose of an all-purpose assignment, to expedite complex matters by permitting one judge to handle the entire matter from start to finish, acquiring an expertise regarding the factual and legal issues involved which will expedite the process." (186 C.A.3d 1228.)

(d) As in the case of a master calendar assignment, the matter belongs to the particular judge from the time of an assignment for all purposes. All proceedings thereafter constitute one matter or hearing within the meaning of the statute. (186 C.A.3d 1228.) Hence, consistent with the master calendar exception, an all purpose assignment should "be

challenged at the earliest reasonable opportunity, namely, when the judge's identity is known." (186 C.A.3d 1229.)

(e) Petitioner, by agreeing to the appointment of a judge for all purposes and suggesting Judge L, implicitly agreed that the judge would oversee the matter from beginning to end, and that petitioner would not challenge him. (186 C.A.3d 1229.) The "only interpretation consistent with common sense" is that the assignment by the presiding judge controlling the master calendar was governed by the master calendar exception, and that a challenge could be made only at the time of assignment to Judge L for all purposes. (186 C.A.3d 1229.)

In *Woodman v. Superior Court* (1987) 196 C.A.3d 407, 241 C.R. 818, *Zdonek* was repudiated by the division that decided it. The court analyzed its earlier majority opinion in the light of the cases relied on (196 C.A.3d 416, 417), quoted at length from the dissenting opinion (196 C.A.3d 418), and followed *Augustyn* in applying the master calendar rule (196 C.A.3d 419).

West's Key Number Digest, Jury 137(1)

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bb. Exception: Local Delay Reduction Rule.

2 Witkin Cal. Proc. Courts § 145

[§ 145] Exception: Local Delay Reduction Rule.

In *International Union of Operating Engineers, Local 12 v. Superior Court* (1989) 207 C.A.3d 340, 254 C.R. 782, plaintiff contractor brought an action against defendant union for damages and injunctive relief, alleging illegal interference by its business agents with plaintiff's employees and their work activities. On October 6, 1988, plaintiff applied ex parte for a temporary restraining order, and filed its complaint on October 7. The case was immediately assigned to Judge K in the court's statutory delay reduction project (*Govt.C. 68600* et seq., *infra*, §257), which was implemented by the local Trial Court Delay Reduction Rules adopted pursuant to *Govt.C. 68612* (*infra*, §259). Counsel for defendants had been alerted to the anticipated time of the hearing on a temporary restraining order (TRO), and appeared at the courthouse where they had 30 to 40 minutes to consider plaintiff's pleadings and moving papers. The hearing lasted 30 minutes, and Judge K issued the TRO and set October 19 for the hearing on an order to show cause for a preliminary injunction. On October 13, the date set for filing opposition papers, defendants filed papers and moved to disqualify Judge K under *C.C.P. 170.6*. Judge K denied the motion as untimely, on the theory that the statute required the assertion of the challenge immediately on learning of Judge K's identity. Defendants, contending that they had 10 days to make the challenge under Local Rule 1104.1, sought prohibition. *Held*, writ granted; the challenge was timely.

(a) The assignment of the case to Judge K for all purposes immediately upon filing made this a "New Case" under Local Rule 1101.2; and under Local Rule 1104.1, defendants had 10 days after their first appearance in the action to make a determination regarding a 170.6 challenge. "In providing this fixed 10-day period the drafters of the Local Rules obviously were attempting to adjust the need to give counsel and the parties, *on each side*, a fair opportunity to reflect and consider on the issue of a challenge to the assigned judge while minimizing the risk that a particular trial judge might invest considerable time in a case only to be subsequently removed by a late-filed challenge." (207 C.A.3d 347.) The brief 10-day period is particularly important to a defendant who first appears in an action by responding on 24-hour notice to an ex parte application for a TRO. (207 C.A.3d 347.)

(b) Under the statute, a challenge is ordinarily permitted any time before the beginning of a trial or hearing, but there are two exceptions to this rule: (1) The 10-day/5-day rule; where a judge's identity is known at least 10 days

before the date set for trial or hearing, the motion must be made at least 5 days before that date. (2) The master calendar rule; the party must assert a challenge not later than the time the cause is assigned for trial. (207 C.A.3d 348.) The statute does not specifically refer to an assignment for "all purposes," but states that in cases not specifically provided for, the procedure shall be "followed as nearly as may be." (207 C.A.3d 348.)

(c) Three decisions deal with an all-purpose assignment: *Zdonek v. Superior Court* (1974) 38 C.A.3d 849, 852, 113 C.R. 669, supra, §144, holding that this was not a master calendar assignment requiring prompt assertion of a challenge, and that the 10-day/5-day rule applied; *Augustyn v. Superior Court* (1986) 186 C.A.3d 1221, 231 C.R. 298, supra, §144, holding that the master calendar rule did apply; *Woodman v. Superior Court* (1987) 196 C.A.3d 407, 241 C.R. 818, supra, §144, following *Augustyn* and repudiating *Zdonek*. (207 C.A.3d 348, 349.)

(d) Plaintiff contends that, under the statute as construed in *Augustyn* and *Woodman*, defendants' challenge was too late; but their contention overlooks the significance of the legislative grant of wide procedural latitude in development of rules and procedures to implement the Trial Court Delay Reduction Act. "That legislation clearly represented a fundamental change in the approach to the problem of court congestion. It embraced the principle of active judicial management which required that trial judges aggressively monitor and manage litigation from the filing of the first pleading until final disposition. This effort to transfer control of the pace and timing of litigation from the lawyers to the trial judge was a major departure from long-accepted traditional practice." (207 C.A.3d 350.) And the authority given to the Judicial Council to adopt standards (*Govt.C. 68603*), together with the direction given to project trial courts to adopt local rules (*Govt.C. 68612*), "necessarily recognized that some conflict might arise with procedures and time limits contained in either the rules of court or in statutes." (207 C.A.3d 350.)

(e) "We therefore hold that a project rule, duly adopted under the mandate of *Government Code* section 68612, and not expressly prohibited thereby, which either imposes a procedural requirement not authorized by statute or shortens the time specified by statute for performance of an act, will control, to the extent reasonably necessary to carry out and further the provisions and goals of the Act, in those cases to which the project rules apply. Thus, the provisions of Local Rule 1104.1, which impose the procedural requirement that a challenge under section 170.6 against a project judge must be made within a fixed period of 10 days following a defendant's appearance in the action, apply in this case. The rule endorsed by *Augustyn* and *Woodman* imposing the master calendar rule on all-purpose assignments, thereby requiring an immediate assertion of a challenge, will not apply in project cases where, as here, duly adopted project rules expressly provide otherwise." (207 C.A.3d 353.)

(f) Defendants' participation in the TRO hearing did not bar the assertion of their otherwise timely challenge. *C.C.P. 170.6* preserves the right to challenge notwithstanding the fact that a judge has heard an earlier demurrer, motion, or other matter not involving "contested fact issues" relating to the merits. (207 C.A.3d 354.) In *Landmark Holding Group v. Superior Court* (1987) 193 C.A.3d 525, 238 C.R. 475, the court held that an ex parte hearing on a TRO does not involve the determination of a contested fact issue, and that decision is dispositive of the issue raised here. (207 C.A.3d 354, 355.)

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cc. Codification.

2 Witkin Cal. Proc. Courts § 146

[§ 146] Codification.

The judicially declared requirement of challenge "at the earliest reasonable opportunity" following an all purpose assignment (see *supra*, §144) was codified by a 1989 amendment. When a judge has been assigned "for all purposes," the motion must be made "to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance." (*C.C.P.* 170.6(a)(2).)

This amendment clarified divergent decisions respecting the use of the master calendar exception in cases involving all purpose assignments. (See *supra*, §144.)

The amendment does not affect the holding of *People v. Superior Court (Hall)* (1984) 160 C.A.3d 1081, 207 C.R. 131, *supra*, §143, that matters assigned to a particular *department*, rather than to a particular *judge*, are subject to the 10-day/5-day rule (*supra*, §142). (*Mackey v. Superior Court* (1990) 221 C.A.3d 1124, 1127, 270 C.R. 905.) (See *Flores v. Superior Court* (1991) 226 C.A.3d 797, 799, 277 C.R. 90 [felony action in superior court is commenced by filing information in that court, not by filing complaint with magistrate, and defendant enters appearance at arraignment; hence, challenge could be made within 10 days after arraignment]; *Reygoza v. Superior Court* (1991) 230 C.A.3d 514, 522, 523, 281 C.R. 390 [local court policy for criminal cases adopted in attempt to override *Hall* and *Mackey* was invalid]; *Shipp v. Superior Court* (1992) 5 C.A.4th 147, 152, 6 C.R.2d 685 [distinguishing *Reygoza*; local court policy for family law matters assigning case to particular judge for all purposes was assignment for all purposes under *C.C.P.* 170.6 and peremptory challenge beyond the 10-day limit was untimely]; on relationship among 10-day/5-day rule, all purpose rule, and master calendar rule, see *People v. Superior Court (Lavi)* (1993) 4 C.4th 1164, 17 C.R.2d 815, 847 P.2d 1031, *infra*, §148.)

In *Fight for the Rams v. Superior Court* (1996) 41 C.A.4th 953, 48 C.R.2d 851, a case subject to the Trial Court Delay Reduction Act, plaintiff filed a peremptory challenge to a judge assigned for all purposes within 10 days of the assignment but after the assigned judge had heard and ruled on defendant's demurrer and various motions. *Held*, the

challenge was timely.

(a) *Govt.C. 68616(i)* requires a peremptory challenge in a Delay Reduction Act case in a direct calendar court to be exercised within 15 days of the challenging party's first appearance. (See *infra*, §262.) If the direct calendar assignment is made more than 15 days after the complaint is filed, the plaintiff's first appearance for this purpose "coincides" with the direct calendar assignment. (41 C.A.4th 958.)

(b) Making the challenge after the hearing was not fatal. *C.C.P. 170.6* specifically provides that the judge's participation in a pretrial proceeding not involving a "determination of contested fact issues relating to the merits" does not preclude an otherwise timely challenge (see *infra*, §156). (41 C.A.4th 958.)

In *School Dist. of Okaloosa County v. Superior Court* (1997) 58 C.A.4th 1126, 68 C.R.2d 612, a complex case involving multiple defendants, the trial judge had denied various motions by out-of-state defendants to quash service of summons for lack of minimum contacts. An additional out-of-state defendant was then served, and that defendant filed a similar motion to quash and a disqualification motion. *Held*, the disqualification motion was timely.

(a) The new defendant first appeared when it filed its disqualification motion, and under the plain statutory language authorizing a motion within 10 days after appearance, the motion was timely. (58 C.A.4th 1131.) Despite plaintiffs' contention, a motion to quash, like most pretrial motions in civil cases, does not involve a determination of facts related to the merits of the case and is not a bar to a disqualification motion. (58 C.A.4th 1133.)

(b) Plaintiffs also contended that the motion was untimely under the portion of the statute allowing only one motion for each side, because the time within which the defense could have made the motion had expired long before the new defendant first appeared. This construction ignores the 10-day rule. "Where, as here, no other defendant has exercised its right to disqualify a judge, a late-appearing defendant may do so within 10 days after its appearance. ... But where another defendant on the same 'side' has exercised its right to disqualify a judge, the late-appearing defendant has no right to challenge the then-current judge because the side has used its one challenge." (58 C.A.4th 1134.)

In *Cybermedia v. Superior Court* (1999) 72 C.A.4th 910, 82 C.R.2d 126, a case under the Trial Court Delay Reduction Act, Judge B, the calendar judge in a designated department, had been assigned for all purposes. Petitioner's law firm later received a general notice that Judge A had replaced Judge B as the calendar judge. At a subsequent hearing on petitioner's motions, petitioner learned that Judge A was presiding. Counsel argued the motions, but Judge A deferred ruling for additional briefing on specified issues. Three days later, petitioner moved for disqualification. *Held*, the motion was untimely as to the pending motions but timely as to subsequent proceedings.

(a) Under *Govt.C. 68616(i)* (*infra*, §262), a peremptory challenge to a calendar judge in a Delay Reduction Act case must be made within 15 days of the party's first appearance, but the statute does not indicate a time limit where there is a change in the calendar judge after the first appearance. Under *C.C.P. 170.6*, a challenge to an assignment for all purposes after a party has appeared must be made within 10 days after notice of the assignment. Harmonizing these provisions, "we determine that where, as here, a party has already appeared in the action, it must file its challenge within 15 days of receiving notice of a change in the individual calendar judge assigned to the case." (72 C.A.4th 913.)

(b) Here, the general notice received by petitioner's firm was not addressed to counsel assigned to the case and did not include the case name or number. Thus, it was not sufficient to trigger the 15-day period. With respect to the pending motions, however, the challenge should have been filed before the hearing commenced. Thus, on remand, the trial court should rule on those matters before granting the disqualification motion. (72 C.A.4th 914.)

C.C.P. 1013 (extending time for 5 days where service within California is made by mail; see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §30) extends the 10-day period within which to challenge an all purpose assignment by 5 days. The notice required by *C.C.P. 170.6* is the notice prescribed by *C.C.P. 1010* et seq., and under *C.C.P. 1020* those provisions, including *C.C.P. 1013*, apply to notices required by law to be given to a party. A court order for an all purpose assignment is such a notice. (*California Business Council v. Superior Court* (1997) 52 C.A.4th 1100, 1104, 62

C.R.2d 7.)

If the judge assigned for all purposes is reassigned, the time for filing a peremptory challenge to the new judge begins to run when the parties have notice of the reassignment. (See *Motion Picture & Television Fund Hosp. v. Superior Court* (2001) 88 C.A.4th 488, 494, 105 C.R.2d 872 [purported local practice delaying challenge until newly assigned judge is actually hearing cases is invalid].)

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aa. In General.

2 Witkin Cal. Proc. Courts § 147

[§ 147] In General.

A motion directed to the trial of a cause where there is a master calendar must be made not later than the time the cause is assigned for trial. (*C.C.P. 170.6(a)(2)*; see *People v. Wilks* (1978) 21 C.3d 460, 466, 146 C.R. 364, 578 P.2d 1369 [challenge untimely]; *Los Angeles County Dept. of Public Social Services v. Superior Court* (1977) 69 C.A.3d 407, 413, 138 C.R. 43 [no master calendar in juvenile court, and exception does not apply]; C.E.B., 1 Civil Proc. During Trial 3d, §6.68.)

People v. Escobedo (1973) 35 C.A.3d 32, 110 C.R. 550, gives a definitive and narrow construction to the exception, distinguishing between a "master calendar department" and a "master calendar."

(a) The purpose of the general time limitation (10-day/5-day; see *supra*, §142) is to effect a compromise between the rights of the litigant and the efficient operation of the court. The litigant, on assignment to a particular department (i.e., a particular judge regularly sitting in that department), has a few days to assess his position, and the court has a few days to make the necessary adjustment after a disqualification. (35 C.A.3d 38.)

(b) The master calendar exception was made necessary because, in counties with three or more judges, former C.R.C., Rule 223 required that civil cases be placed on a master calendar composed of all cases set for trial on that day, to be transferred to any available department. Under this system, with the trial department ready to proceed, it would be impracticable to allow 5 days for a challenge. Hence, the challenge must be made in the master calendar department, immediately on announcement of the assignment. The master calendar judge may then make an immediate assignment to another department and assign the challenged judge to another pending case. (35 C.A.3d 38.)

(c) Under former C.R.C., Rule 248 (applicable in Los Angeles and San Francisco), there was a "Master Calendar Department" for criminal cases, but the department could elect (1) to assign criminal cases to departments for future trial or (2) to hold them for master calendar assignment. When a case is assigned for future trial, the litigant is entitled to challenge within the 10-day/5-day period. (35 C.A.3d 39.)

(d) Thus, the master calendar exception, requiring immediate challenge by motion to the judge supervising the master calendar, applies only where the case is assigned from a *master calendar*; where the assignment is merely from the *master calendar department*, to another department for future trial, a challenge is timely if made more than 5 days in advance of the hearing. (35 C.A.3d 39.)

The same conclusion was reached in *Villarruel v. Superior Court* (1973) 35 C.A.3d 559, 110 C.R. 861, with a strong statement of the policy involved: "It appears to be the theory of the respondent court that any case which has been assigned by a master calendar department has been assigned from a 'master calendar.' That theory is irreconcilable with the concept of a master calendar, as the term has been used in the Judicial Council rules, and subverts the legislative policy of allowing the litigant to make his motion five days before the trial. In every multi-judge court it is necessary to have some procedure whereby a presiding judge or supervising judge transfers and retransfers cases in order to distribute the business of the court. It is common to refer to the department of the presiding judge or the supervising judge as the 'master calendar department.' But section 170.6 cannot be construed as meaning that whenever a case is transferred from the presiding or supervising judge to another department, the motion to disqualify must be made at that time or be forever barred. When the case is assigned for future trial, the reasons for the special 'master calendar' provision in section 170.6 do not exist." (35 C.A.3d 563.)

To the same effect are *Zdonek v. Superior Court* (1974) 38 C.A.3d 849, 852, 113 C.R. 669 [following *Escobedo* and *Villarruel*] and *People v. Hunter* (1977) 71 C.A.3d 634, 638, 139 C.R. 560 [department to which case is assigned for trial, which retransfers to another department, does not act as master calendar department]. (On relationship among 10-day/5-day rule, all purpose rule, and master calendar rule, see *People v. Superior Court (Lavi)* (1993) 4 C.4th 1164, 17 C.R.2d 815, 847 P.2d 1031, *infra*, §148.)

The master calendar exception does not apply to a telephone assignment by the court clerk. (*Stevens v. Superior Court* (1997) 52 C.A.4th 55, 59, 60 C.R.2d 397.)

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bb. What Constitutes All Purpose Assignment.

2 Witkin Cal. Proc. Courts § 148

[§ 148] What Constitutes All Purpose Assignment.

In *People v. Superior Court (Lavi)* (1993) 4 C.4th 1164, 17 C.R.2d 815, 847 P.2d 1031, the master calendar department assigned a case to a "long cause" criminal trial department for "trial setting." The issue was which, if any, of the timeliness requirements for a motion under C.C.P. 170.6 (the master calendar rule, the all purpose assignment rule, or the 10-day/5-day rule) applied. "We hold that because respondent court's master calendar department did not operate as a true master calendar, the master calendar rule did not apply. We also hold that petitioner's section 170.6 challenge was timely under either of the remaining rules." (4 C.4th 1170.) In its preliminary statement the court also pointed out that, as a general rule, a challenge of a judge is permitted under C.C.P. 170.6 any time before the commencement of a trial or hearing (see *supra*, §141), but there are three exceptions to the general rule: (1) the master calendar rule, (2) the all purpose assignment rule, and (3) the 10-day/5-day rule. (4 C.4th 1172.)

(a) *The master calendar rule.*

(1) This rule requires the filing of disqualification motions "not later than the time the cause is assigned for trial" by a master calendar. (4 C.4th 1172.) The Court of Appeal, relying on *Augustyn v. Superior Court* (1986) 186 C.A.3d 1221, 231 C.R. 298, and *Woodman v. Superior Court* (1987) 196 C.A.3d 407, 241 C.R. 818, *supra*, §144, held that a C.C.P. 170.6 challenge must be made as soon as the assigned judge's identity is known with reasonable certainty, and that it was known here. (4 C.4th 1173.)

(2) *Woodman* and *Augustyn* are inapplicable, because despite its label, the master calendar department was not managing a true master calendar by assigning ready cases to departments for trial. (4 C.4th 1174, 1177.) In *People v. Escobedo* (1973) 35 C.A.3d 32, 110 C.R. 550, *supra*, §147, the court held that, because the case was effectively assigned out by the master calendar department only for *future* trial, it was not a master calendar assignment. (4 C.4th 1176.) Similarly, the master calendar department assigned the present case to a trial department before a trial date had been selected, and the case was not ready for trial on the day it was assigned. "For the master calendar rule to apply, there must be a true master calendar assignment of a ready case to a ready courtroom." (4 C.4th 1177.) And, to the extent that

Woodman and *Augustyn* can be read to eliminate the readiness component of the master calendar rule in situations other than all purpose assignments, they have been abrogated by the *Legislature*. (4 C.4th 1178.)

(b) *The all purpose assignment rule.*

(1) *C.C.P. 170.6* does not specifically address the situation in which a master calendar department assigns a case to a "long cause" trial department for trial setting. (4 C.4th 1178.) However, as noted in *Zdonek v. Superior Court* (1974) 38 C.A.3d 849, 852, 113 C.R. 669, "[t]he reason for an 'all purpose' assignment lies in the pragmatic value of having all matters arising in a complicated and potentially long drawn-out case to be heard by one judge, so that the time of litigants, counsel and the superior court need not be wasted in the repetitive education of successive judges in the intricacies of that kind of case." (4 C.4th 1179.)

(2) "Thus, for a case assignment to be an all purpose assignment, two prerequisites must be met. First, the method of assigning cases must 'instantly pinpoint' the judge whom the parties can expect to ultimately preside at trial. Second, the same judge must be expected to process the case 'in its totality,' ... from the time of the assignment, thereby 'acquiring an expertise regarding the factual and legal issues involved, which will accelerate the legal process.'" (4 C.4th 1180.)

(3) Both prongs of the test appear to have been met here. "The assignment in this case identified Judge [T], with reasonable certainty, as the judge who would ultimately preside at trial. In addition, it is clear that this was a 'long cause' matter with significant issues remaining to be resolved. It appears that Judge [T] would process the proceeding from the time of the assignment through final disposition. Thus, we believe an all purpose assignment occurred, giving petitioner 10 days from the time of the assignment in which to file a section 170.6 challenge. Because the motion was made on the same day as the assignment, we conclude that it was timely." (4 C.4th 1182.)

(c) *The 10-day/5-day rule.*

(1) *C.C.P. 170.6* provides that where the judge (other than one assigned for all purposes) is known at least 10 days before the date set for trial, the motion must be made at least 5 days before that date. Hence, even if an all purpose assignment did not really occur in this case, the 10-day/5-day rule would apply, rendering petitioner's motion timely, because petitioner had actual as well as constructive knowledge of Judge T's identity, and exercised his challenge at least 5 days before the trial date. (4 C.4th 1182.)

(2) Application of this rule has caused considerable confusion among the lower courts. Much of this confusion concerns the degree of certainty with which a judge must be "known." When a case is sent to a court for a trial to begin in the future, the possibilities of transfer, a judge's illness, or a judge's retirement make it uncertain which judge will ultimately hear the case. The confusion is accentuated when a case is assigned to a department by number rather than to a judge. (4 C.4th 1183; see *supra*, §143.)

(3) However, whether a judge is identified by name or department, and whether there is an all purpose assignment, an assignment from a master calendar department, an assignment to a known judge, "or any other type of assignment," a particular judge may not ultimately hear a case for a variety of reasons. (4 C.4th 1183.)

(4) "Thus, when section 170.6 speaks of a 'known judge,' it does not require that the 'known judge,' with absolute certainty, will ultimately preside over the trial. The realities of the litigation process dictate that, at best, in applying the 10-day/5-day rule to the judge known by the parties to have been assigned to the case, there be reasonable assurance that the judge will in fact hear the case." (4 C.4th 1183.) That assurance appeared here, for the case was assigned to department 104 in which Judge T regularly sits. (4 C.4th 1184.)

(d) *Conclusion.*

(1) "We hold that for the master calendar rule to apply, a trial-ready case must be assigned to a court that is ready

and able to hear the case. Whether the master calendar rule can be fairly applied when there is an assignment to a department by number, rather than to a judge by name, is a fact-specific inquiry, but, generally speaking, litigants may be charged with knowledge of which judges regularly preside in the various departments of the court system in which they are litigating." (4 C.4th 1185.)

(2) "When the master calendar rule requirements are not met, either the all purpose assignment rule or the 10-day/5-day rule may apply. When a litigant shows that a case assignment instantly identifies the judge who is reasonably certain to preside over substantial remaining matters from that point forward, including the trial, thereby allowing the judge to gain familiarity and expertise on the complex issues involved, the all purpose assignment rule governs. When neither the master calendar rule nor the all purpose assignment rule controls, a litigant may invoke the 10-day/5-day rule as soon as the case is assigned to a known judge. If no reasonable certainty exists as to the trial judge's identity, however, then the general rule of section 170.6, that a challenge may be made any time before trial, applies." (4 C.4th 1185.)

A number of decisions are illustrative. (See *Grant v. Superior Court* (2001) 90 C.A.4th 518, 525, 108 C.R.2d 825, supra, §140 [peremptory challenge may not be filed or accepted in absence of either pending trial or hearing or all purpose assignment; statement in *People v. Superior Court (Lavi)* that, subject to statutory exceptions, challenge may be made at any time before commencement of trial or hearing is "misconstrued to allow a peremptory challenge at any time during the course of litigation"]; *Ruiz v. Appellate Div. of the Superior Court* (2004) 119 C.A.4th 282, 290, 14 C.R.3d 190 [master calendar rule did not apply to "direct set" pretrial court, even though assistant supervising judge of district assigned trial-ready cases to ready courtrooms within district, in absence of notice that pretrial court was acting as master calendar; thus, peremptory challenge filed in actual trial court after transfer was timely]; *Daniel V. v. Superior Court* (2006) 139 C.A.4th 28, 40, 42 C.R.3d 471 [purported assignment of juvenile court proceeding for all purposes, made in clerk's notice of petition pursuant to informal, unwritten local practice, was not valid assignment for all purposes under C.C.P. 170.6; all purpose assignment requires order from judge or written local rule of court]; *Jonathon M. v. Superior Court* (2006) 141 C.A.4th 1093, 1101, 46 C.R.3d 798 [presiding judge's posted order assigning all even-numbered cases to particular department was valid assignment for all purposes, but challenge 3 days after first appearance (when counsel would have seen posted order) was timely under C.C.P. 170.6(a)(2)].)

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6. One-Judge Court.

2 Witkin Cal. Proc. Courts § 149

[§ 149] One-Judge Court.

(1) *In General.* When the action is pending in a court authorized to have no more than one judge, a motion challenging that judge must be made within 30 days from the date of the first appearance of the party for whom the motion is made. (*C.C.P. 170.6(a)(2).*) (See *People v. Superior Court (Smith)* (1987) 190 C.A.3d 427, 429, 235 C.R. 482 [30-day period runs from date of first appearance of party, not first appearance of party or his attorney].)

(2) *Change of Venue.* In *Brown v. Swickard* (1985) 163 C.A.3d 820, 209 C.R. 844, the court considered the operation of the 1982 amendment to *C.C.P. 170.6*, specifying the deadline for a disqualification motion in a one-judge court, in change of venue cases. In September 1981, plaintiffs filed an action in the superior court of Merced County. In December 1981, defendants' motion for change of venue to Lassen County was granted, and the Lassen superior court assumed jurisdiction in January 1982. The 1982 amendment, requiring that a disqualification motion in a one-judge court be made within 30 days from the date of the party's first appearance, became effective on January 1, 1983. In March 1983, more than 30 days after their first appearance in the Lassen superior court, but within the 10-day/5-day provision otherwise applicable (see *supra*, §142), plaintiffs filed a peremptory challenge. The judge denied the motion as untimely, and granted summary judgment to defendants. *Held*, reversed.

(a) Because *C.C.P. 170.6* does not define "appearance," the generally accepted definition, that a party's first appearance is when the party submits to the jurisdiction of the court, will be used. (163 C.A.3d 826, citing the text.) Here, plaintiffs first appeared in the Merced superior court in September 1981 and in the Lassen superior court in January 1982. (163 C.A.3d 827.) Because the 1982 amendment did not become effective until January 1, 1983, any application of the 30-day rule would be retroactive. (163 C.A.3d 827.)

(b) Defendants argued that the statute should be given partial retroactivity, requiring that the motion be made within 30 days from the effective date of the amendment. However, nothing in the statute or in the legislative history suggests this intent (163 C.A.3d 828), and considerations of fairness and adequate notice weigh against retroactive application (163 C.A.3d 829, 830). Hence, the preamendment 10-day/5-day provisions are applicable here. (163 C.A.3d 830.)

(c) Since its original enactment, *C.C.P. 170.6* has stated that "the procedure herein specified shall be followed as nearly as may be" in trials or hearings not specifically provided for. (*163 C.A.3d 828, 829.*) When a case is transferred on a change of venue motion from a court with two or more judges to a one-judge court, literal compliance with the 30-day rule is normally impossible. Hence, in such a case, a disqualification motion in the one-judge court must be made within 30 days from the noticed date of the party's first appearance in that court. (*163 C.A.3d 829.*)

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7. Coordination Judge.

2 Witkin Cal. Proc. Courts § 150

[§ 150] Coordination Judge.

C.R.C., Rule 3.516 governs peremptory challenges to a coordination judge. A motion or affidavit of prejudice must be submitted to the assigned judge in writing within 20 days after service of the order assigning the judge in the coordination proceeding. For purposes of *C.C.P. 170.6*, all plaintiffs or "similar parties" in the coordinated actions constitute a side and all defendants or "similar parties" constitute a side. (On coordination proceedings; see 4 *Cal. Proc.* (5th), *Pleading*, §352.)

C.C.P. 1013 (extending time for 5 days where service is made by mail; see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §30) applies in coordination proceedings. Its application is particularly important in view of the necessity of consultation among similarly situated parties and the fact that a notice of assignment of a coordination judge will be served by mail in nearly all cases. (*Citicorp North America v. Superior Court* (1989) 213 C.A.3d 563, 568, 571, 261 C.R. 668; for full discussion of *Citicorp*, see 4 *Cal. Proc.* (5th), *Pleading*, §355.)

Added-on parties (see 4 *Cal. Proc.* (5th), *Pleading*, §372) may not make a peremptory challenge. These parties are obviously unable to meet the 20-day time limit. The prohibition is reasonable; the trial judge may have participated in the case for years, and a late challenge could be based on reasons unrelated to bias or prejudice. (*Industrial Indem. Co. v. Superior Court* (1989) 214 C.A.3d 259, 263, 264, 262 C.R. 544; for full discussion of *Industrial Indem Co.*, see 4 *Cal. Proc.* (5th), *Pleading*, §355.)

A challenge within the 20-day period is timely even though the coordinated action includes cases in which the challenged judge previously decided contested issues. The governing rule contains neither an express nor an implied exception for such challenges. (*Farmers Ins. Exchange v. Superior Court* (1992) 10 C.A.4th 1509, 1511, 13 C.R.2d 449.)

The coordination statutes and rules contemplate separate assignments of the coordination *trial* judge and the coordination *motion* judge, and those assignments may be of different persons. Thus, the 20-day period to challenge a specific assignment begins on the date of assignment for that specific purpose, even if the judge assigned as the

coordination motion judge is also assigned as the coordination trial judge. (*Stone v. Superior Court* (1994) 25 C.A.4th 1144, 1147, 31 C.R.2d 56.)

In *Philip Morris v. Superior Court* (1999) 71 C.A.4th 116, 83 C.R.2d 671, a coordination proceeding, the plaintiff in one of the coordinated cases had exercised a peremptory challenge under C.C.P. 170.6 before the cases were coordinated. After coordination, another plaintiff exercised a peremptory challenge to the coordination judge under former C.R.C., Rule 1515 (now C.R.C., Rule 3.516). *Held*, the second challenge was proper. The rule governs peremptory challenges in coordination proceedings notwithstanding the limitation of one challenge per side in C.C.P. 170.6. Because the rule took effect only when the coordination petition was filed, the challenge made before that time in the independent proceeding did not constitute a challenge by a "side" in a "coordination proceeding" under the rule. Thus, the challenge to the coordination judge was permissible as the first challenge by a side under the rule. (71 C.A.4th 123.)

The 20-day period of C.R.C., Rule 3.516 does not preclude a disqualification motion under C.C.P. 170.6(a)(2) (*infra*, §151) where the original coordination judge is assigned to conduct a trial after reversal of a summary judgment motion. The two provisions address different objectives and are not incompatible. (*Jane Doe 8015 v. Superior Court* (2007) 148 C.A.4th 489, 497, 498, 55 C.R.3d 708.)

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8. New Trial After Reversal.

2 Witkin Cal. Proc. Courts § 151

[§ 151] New Trial After Reversal.

(1) *In General.* Where a trial court's decision is reversed on appeal and the original trial judge is assigned to conduct a "new trial," a disqualification motion may be made within 60 days after notification of the assignment. (*C.C.P.* 170.6(a)(2); see 17 *Pacific L. J.* 629.)

(2) *What Constitutes New Trial.* "The term 'new trial' is intended to cover situations where the case is to be re-tried and not merely remanded with instructions to perform some specific task (e.g., recalculate interest)." (*Stegs Inv. v. Superior Court* (1991) 233 *C.A.3d* 572, 576, 284 *C.R.* 495 [quoting Assembly Committee Analysis].) In *Stegs*, the court held that the disqualification motion could be made after a reversal on appeal for a hearing on a limited issue; i.e., the question is not whether the issues to be resolved on remand are limited, but what the court must do to resolve them. If the court must conduct an actual retrial, even on only one issue, the judge may be disqualified. (233 *C.A.3d* 576.)

In *Henderson v. Superior Court* (1993) 20 *C.A.4th* 860, 24 *C.R.2d* 645, a judgment was reversed on appeal and remanded for an evidentiary hearing and the determination of a factual issue. The case was reassigned to the commissioner who presided at the original trial. Defendant's peremptory challenge was rejected on the ground that the proceeding was not a "new trial" and thus, the motion was untimely. *Held*, the remand called for a "new trial" within the meaning of *C.C.P.* 170.6.

(a) Under *Stegs*, remand for a partial trial on a limited issue is a new trial for purposes of a peremptory challenge. "Our remand to the trial court was not for the purpose of causing it to perform a ministerial act, such as the execution of a mathematical calculation. It was, instead, for the purpose of receiving evidence and resolving a factual issue. ... The purpose of the 1985 amendment is served by recognizing its application to this situation, in which the trial judge might be perceived as holding a bias against the party that had successfully pressed the appeal that led to reversal of the earlier judgment. That purpose would be thwarted by a construction that renders the statute inapplicable to the trial on remand." (20 *C.A.4th* 864.)

(b) While "new trial" is not defined in *C.C.P.* 170.6, *C.C.P.* 656 defines the term as "a re-examination of an issue of

fact in the same court after a trial and decision." The term should receive a similar broad construction here. (20 C.A.4th 865.)

(3) *Illustrations: New Trial.* The following decisions have held that the subsequent proceeding was a new trial for purposes of C.C.P. 170.6:

Stubblefield Const. Co. v. Superior Court (2000) 81 C.A.4th 762, 765, 97 C.R.2d 121 [trial after partial reversal of summary judgment].

People v. Superior Court (Maloy) (2001) 91 C.A.4th 391, 397, 109 C.R.2d 897 [trial after reversal of pretrial dismissal orders].

Pfeiffer Venice Properties v. Superior Court (2003) 107 C.A.4th 761, 767, 132 C.R.2d 400 [remand to consider attorneys' fee award requiring factual findings].

Jane Doe 8015 v. Superior Court (2007) 148 C.A.4th 489, 495, 55 C.R.3d 708 [trial of legal or factual issue after reversal of summary judgment in coordinated proceedings].

(4) *Illustrations: Not New Trial.* The following decisions have held that the subsequent proceeding was not a new trial for purposes of C.C.P. 170.6:

State Farm Mut. Auto. Ins. Co. v. Superior Court (2004) 121 C.A.4th 490, 501, 17 C.R.3d 146 [remand for trial following resolution on mandamus of in limine motion to determine choice of law issue was not new trial; decision on motion was not trial, did not reach merits, and did not terminate action].

Paterno v. Superior Court (2004) 123 C.A.4th 548, 559, 20 C.R.3d 282 [remand to determine damages was not new trial; "new trial" requires reopening or reconsideration of some issue of law or fact litigated in prior proceeding].

Geddes v. Superior Court (2005) 126 C.A.4th 417, 424, 23 C.R.3d 857 [distinguishing *Stubblefield Const. Co.*; reversal of grant of summary judgment and remand to allow trial judge to prepare statement of reasons was not new trial; remand was not for reconsideration of merits].

Burdusis v. Superior Court (2005) 133 C.A.4th 88, 91, 34 C.R.3d 575 [remand to reconsider motion for class certification in light of new decisions was not new trial; trial court proceeding did not address merits or terminate action and thus was not trial].

Karlsen v. Superior Court (2006) 139 C.A.4th 1526, 1530, 43 C.R.3d 738 [remand to prepare statement of decision].

(5) *Reversal on Writ Proceeding.* In *Overton v. Superior Court* (1994) 22 C.A.4th 112, 27 C.R.2d 274, the Court of Appeal issued a writ of mandamus compelling the trial court to declare a mistrial and relieve defendant's original trial counsel after an extraordinary delay due to counsel's illness. After the remittitur issued, defendant's new counsel filed a peremptory challenge. The motion was denied as untimely. *Held*, for purposes of C.C.P. 170.6, "appeal" includes "writ proceedings."

(a) "Although we have found no case on point, the concern that a trial judge might be biased against a party who succeeds in obtaining a new trial is obviously just as substantial in a writ proceeding as it is in an appeal." (22 C.A.4th 115, citing *Stegs*.)

(b) A new trial granted as the result of a writ proceeding is "exceedingly rare." (22 C.A.4th 115.) "No mischief will arise from construing the term 'appeal' to include writ proceedings resulting in a new trial, and extending to litigants who obtain reversals in those proceedings the same protection afforded successful appellants." (22 C.A.4th 116.)

(6) *Reversal of Final Judgment.* A disqualification motion may also be made where a trial court's "final judgment" is reversed on appeal. In that instance, the party that filed the appeal may make the motion "regardless of whether that party or side has previously done so." (C.C.P. 170.6(a)(2).)

(7) *Challenge After Jury Verdict.* A peremptory challenge is available under C.C.P. 170.6(a)(2) regardless of whether the judgment originated from a judge's decision or a jury verdict. The term "trial court's decision" does not limit the statute to court trials. (*Pandazos v. Superior Court* (1997) 60 C.A.4th 324, 326, 70 C.R.2d 669.)

(8) *Who May Exercise Challenge.* A peremptory challenge is available under C.C.P. 170.6(a)(2) to any party, regardless of which party prevailed on appeal. (*Pfeiffer Venice Properties v. Superior Court, supra*, 107 C.A.4th 764 [unsuccessful respondent who did not exercise challenge earlier in proceeding was entitled to do so after reversal on appeal].)

(9) *Relationship Between "One Challenge" Rule and "New Trial" Exception.* The new trial exception to the one challenge rule allows a successful appellant who has used a preappeal peremptory challenge to exercise another challenge on remand if the prior trial judge is assigned to conduct the new trial. However, under the one challenge rule, where a successful appellant exercises his or her first peremptory challenge postappeal, that challenge is the one challenge and the appellant may not subsequently exercise a second challenge. (*Casden v. Superior Court* (2006) 140 C.A.4th 417, 422, 44 C.R.3d 474.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Illustrations: New Trial.* The following decision held that the subsequent proceeding was a new trial:

Keith R. v. Superior Court (2009) 174 C.A.4th 1047, 1058, 96 C.R.3d 298 [remand to conduct new trial on permanent child custody and move-away order under "best interests" standard rather than "changed circumstances" standard].

(4) *Illustrations: Not New Trial.* The following decision held that the subsequent proceeding was not a new trial:

C.C. v. Superior Court (2008) 166 C.A.4th 1019, 1022, 83 C.R.3d 225 [remand in juvenile dependency proceeding to enter order denying reunification services and set permanent plan hearing under Welf.C. 366.26].



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2 Witkin Cal. Proc. Courts § 152

[§ 152] General Rule.

In *Jacobs v. Superior Court* (1959) 53 C.2d 187, 1 C.R. 9, 347 P.2d 9, a contest between a father and grandparents over child custody, two proceedings were had before Judge R. Then the grandparents filed a motion to disqualify Judge R, who denied it. *Held*, prohibition denied; "since the motion must be made before the trial has commenced, it cannot be entertained as to subsequent hearings which are a part or a continuation of the original proceedings." (53 C.2d 190.) This rule is particularly necessary in guardianship and custody proceedings. If disqualification were permitted, the original judge, ordinarily in the best position to pass on the questions involved, would be disqualified from hearing applications for modification, injunction, or change of custody, thus allowing litigants to gamble on a favorable decision and, if unfavorable, to seek another judge's ruling on substantially the same issues. (53 C.2d 191.)

The *Jacobs* rule has been restated and applied in various subsequent cases. (See *Stafford v. Russell* (1962) 201 C.A.2d 719, 721, 20 C.R. 112; *People v. Rojas* (1963) 216 C.A.2d 819, 824, 31 C.R. 417; *Oak Grove School Dist. of Santa Clara v. City Title Ins. Co.* (1963) 217 C.A.2d 678, 699, 32 C.R. 288; *McClenny v. Superior Court* (1964) 60 C.2d 677, 684, 36 C.R. 459, 388 P.2d 691, *infra*, §154 ["a proceeding is a continuation of the original action out of which it arises if it involves 'substantially the same issues' as the original action"]; *Astourian v. Superior Court* (1990) 226 C.A.3d 720, 724, 276 C.R. 657 [following *Jacobs* and *McClenny*].)

In *People v. Paramount Citrus Assn.* (1960) 177 C.A.2d 505, 511, 2 C.R. 216, appellant obtained a partial reversal on appeal to receive evidence supplementing that previously taken, then sought to disqualify the judge. *Held*, the challenge did not lie; otherwise, there would have to be a trial de novo, for one judge without consent or waiver cannot decide a case on evidence taken before another judge.

A new proceeding involving different issues is distinguishable. *Andrews v. Joint Clerks Port Labor Relations Committee, San Francisco* (1966) 239 C.A.2d 285, 294, 48 C.R. 646, in which the subsequent proceeding challenged the validity of an order of the court made in the first action, was distinguished in *Hanford v. Superior Court* (1989) 208 C.A.3d 580, 591, 256 C.R. 274, in which the suit was a new action that did not affect the validity or enforceability of any order made in the original action: "The paramount questions presented by the two cases are different, and the

relationship of the issues in the two cases is not as direct as in the cases where the second proceeding involves the very validity of the first order or enforcement proceedings based on the original order." (208 C.A.3d 593.)

Stephens v. Superior Court (2002) 96 C.A.4th 54, 116 C.R.2d 616, involved the application of the rule to a trust administration proceeding of indefinite duration involving multiple and successive proceedings and causes. On one beneficiary's petition to remove cotrustees while an appeal was pending from an earlier order, another beneficiary, appearing for the first time, exercised a peremptory challenge to the judge, who had been assigned for all purposes and had determined contested issues on the merits in the previous proceeding. *Held*, because the proceeding was a continuation of the proceeding in which the judge had ruled on the merits, the challenge was barred.

(a) Under C.C.P. 170.6, a late-appearing party in a case assigned to a judge for all purposes may exercise a peremptory challenge within 10 days after appearing, subject to two exceptions: The challenge may not be exercised after the commencement of trial or after the judge has decided a contested issue on the merits. Both exceptions apply to a proceeding that is a continuation of proceedings in which they apply. Thus, a late-appearing party is precluded from making a peremptory challenge if a judge assigned for all purposes has decided a contested issue on the merits and the party appears in a continuation of the proceeding in which the judge determined the issue, even if the determination was made before the party appeared. (96 C.A.4th 60, 61.)

(b) The statute contemplates a typical action involving a pretrial conference, pretrial motions, and a single trial. However, cases like the trust administration proceeding here are of "indefinite duration and potentially include multiple, distinct proceedings involving unrelated evidentiary hearings, contested fact determinations and trials of causes involving different issues and even different parties." In this kind of ongoing case, if a new contested proceeding does not involve substantially the same issues as an earlier finalized proceeding, a party first appearing in the new proceeding should not be barred from exercising a peremptory challenge. (96 C.A.4th 61.)

(c) The petition to remove the trustees here was a continuation of an earlier proceeding in which an issue on the merits was determined. While the parties who participated were not exactly the same as in the earlier proceeding, the interested parties were the same, the broad issue in both proceedings was the propriety of the conduct of the trustees, and the petition presented matters relevant and material to the issues in the previous proceeding. Thus, the proceeding was a continuation and the peremptory challenge was barred. (96 C.A.4th 62, 63.)

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2. Illustrations: Criminal Law.

2 *Witkin Cal. Proc. Courts* § 153

[§ 153] Illustrations: Criminal Law.

In *People v. Rojas* (1963) 216 C.A.2d 819, 31 C.R. 417, defendants were tried and convicted of receiving stolen property. Probation was granted to one and not the other, and two reversals were had for error of law in the probation proceedings. After the second reversal defendants moved to disqualify. *Held*, the motion was too late; the probation and sentence hearings were a continuation of the original proceedings. The interruption of the two appeals did not make them separate; the Supreme Court's reversals ordered only a resumption of the original cause. (216 C.A.2d 824.) (See *People v. Barnfield* (1975) 52 C.A.3d 210, 215, 123 C.R. 859 [revocation of probation is continuation of plea bargaining proceeding that resulted in sentencing and probation; distinguishing *Fraijo v. Superior Court* (1973) 34 C.A.3d 222, 225, 109 C.R. 909]; *Smith v. Municipal Court* (1977) 71 C.A.3d 151, 154, 139 C.R. 121 [sentencing after acceptance of guilty plea pursuant to plea bargain is continuation of original action]; *People v. Richard* (1978) 85 C.A.3d 292, 299, 149 C.R. 344 [retrial after mistrial is continuation of first trial].)

A hearing on an order to show cause issued in response to a petition for a writ of habeas corpus is a continuation of the criminal trial, where the claims made in the petition are that the petitioner was mentally incompetent to plead guilty and that he received ineffective assistance of counsel. (*Yokley v. Superior Court* (1980) 108 C.A.3d 622, 624, 166 C.R. 657.)

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3. Illustrations: Family and Juvenile Law.

2 Witkin Cal. Proc. Courts § 154

[§ 154] Illustrations: Family and Juvenile Law.

In *McClenny v. Superior Court* (1964) 60 C.2d 677, 36 C.R. 459, 388 P.2d 691, plaintiff wife sued for divorce. Judge M held various hearings and made decisions on alimony, receivership, and custody and support of the children. After the interlocutory decree in favor of the wife, defendant husband moved to modify the custody award of one of the children. Plaintiff then obtained two contempt orders to show cause based on defendant's violation of the visitation period and the receivership order. Defendant sought to disqualify Judge M, who denied the motion. *Held*, prohibition denied.

(a) The issues involved in the prior proceedings and the contempt proceeding were similar, and Judge M was in the best position to pass on them. (60 C.2d 684.)

(b) The remaining question was whether a contempt proceeding was necessarily separate because of its "quasi-criminal" character. The proper approach is to evaluate the function performed by the contempt proceeding. In domestic relations cases this is simply enforcement of the judge's orders, and he must exercise a continuing jurisdiction over the parties and subject matter. "Acceptance of defendant's position would permit litigants to obtain, by repeated cycles of a contemptuous act and a motion based upon section 170.6, a perpetually fresh forum for testing disadvantageous decisions. We cannot ignore in defendant's position the potentiality for abuse of section 170.6. We cannot permit a device intended for spare and protective use to be converted into a weapon of offense and thereby to become an obstruction to efficient judicial administration." (60 C.2d 689.)

In *Antonio G. v. Superior Court* (1993) 14 C.A.4th 422, 17 C.R.2d 522, plaintiff minor had been made a ward of the court. In a subsequent hearing on a supplemental petition under Welf.C. 777 alleging violation of the terms of his probation, plaintiff sought to disqualify the judge. *Held*, the hearing was a continuation of the original proceeding. "[A]lthough the original focus of a section 777 hearing is upon newly alleged misconduct, the ultimate disposition of the minor depends upon an analysis of his original problems and his history on probation. We believe it is most beneficial to the effort to achieve consistent and wise administration of the wardship of wayward juveniles that the same judge preside at recurrent hearings which review their progress." (14 C.A.4th 427.)

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4. Illustrations: Conservatorship.

2 *Witkin Cal. Proc. Courts* § 155

[§ 155] Illustrations: Conservatorship.

In *Conservatorship of Durham* (1988) 205 C.A.3d 548, 252 C.R. 414, a probate court proceeding, Judge L, on January 13, appointed W as D's conservator over D's objection that a hostile relationship existed between them. On March 6, D's attorney, S, obtained a temporary restraining order in family law court prohibiting W from coming within 50 yards of D's home. On May 28, D petitioned Judge L to remove W as conservator and, at a hearing on June 18, Judge L accepted W's resignation. On June 10, W sought an order for sanctions against the conservator of the estate and against S under C.C.P. 128.5 (see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §55) on the ground that the temporary restraining order proceeding was a frivolous action. D moved to disqualify Judge L, arguing that the motion was timely because he had not presided over any proceeding involving the temporary restraining order, and the issue of sanctions was not raised at the beginning of the conservatorship proceeding. *Held*, the motion was properly denied as untimely.

(a) The temporary restraining order proceeding was a continuation of the conservatorship proceeding. It involved the same parties and the same paramount issue, i.e., D's immediate welfare. It was simply an alternative maneuver to prevent W from acting as conservator. (205 C.A.3d 554, citing *Jacobs v. Superior Court* (1959) 53 C.2d 187, 1 C.R. 9, 347 P.2d 9, *supra*, §152.)

(b) By his maneuver, Attorney S attempted to circumvent the probate court's jurisdiction to refuse to terminate W as conservator. Hence, the sanctions against S were a method of implementing the probate court's supervisory and enforcing functions. (205 C.A.3d 554, citing *McClenny v. Superior Court* (1964) 60 C.2d 677, 36 C.R. 459, 388 P.2d 691, *supra*, §154.)

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CHAPTER II - Courts

Witkin Summary of California Law

III. DISQUALIFICATION OF JUDGE

C. Peremptory Challenge.

5. Limitations on Right.

e. No Challenge in Continuation of Proceeding.

5. Distinction: Prior Action Not on Merits.

2 Witkin Cal. Proc. Courts § 156

[§ 156] Distinction: Prior Action Not on Merits.

(1) *Case Law Development.* In *Thompson v. Superior Court* (1962) 206 C.A.2d 702, 23 C.R. 841, Judge W gave petitioner wife an interlocutory divorce decree with custody of the children. The husband thereafter sought modification to award custody to him, and Judge P, presiding in the domestic relations department designated to hear orders to show cause, retained the matter for hearing before him. Petitioner filed an affidavit under C.C.P. 170.6, which was denied on the theory that Judge P had previously made a number of orders in the case without challenge. *Held*, prohibition granted to prevent Judge P from hearing the matter. The court made these distinctions:

(a) The proceeding to modify the custody provisions of the decree was a continuation of the original trial, and if the same judge were hearing it the affidavit would be too late under the rule enunciated in *Jacobs v. Superior Court* (1959) 53 C.2d 187, 1 C.R.9, 347 P.2d 9, *supra*, §152. (206 C.A.2d 706.) Also, if in any of the prior proceedings Judge P had been subject to disqualification, the affidavit would be too late. (206 C.A.2d 707.)

(b) But the statute does not permit disqualification to be asserted unless in connection with a *trial or a hearing*, i.e., a proceeding in which there is a contested issue of law or fact. (206 C.A.2d 707.) Here, all of the previous orders of Judge P were on ex parte applications or stipulation; hence, the affidavit was timely because it was filed before this judge had made any ruling on a contested matter. (206 C.A.2d 710.)

(2) *Codification.* The theory of the *Thompson* case was codified and expressly applied to the pretrial conference in 1965. "The fact that a judge, court commissioner, or referee has presided at or acted in connection with a pretrial conference or other hearing, proceeding, or motion prior to trial and not involving a determination of contested fact issues relating to the merits shall not preclude the later making of the motion." (C.C.P. 170.6(a)(2).)

(3) *Illustrations.* The following cases hold that a prior motion or activity did not involve a determination of contested fact issues relating to the merits, and thus did not render a subsequent disqualification motion untimely:

(a) *Motion to set aside indictment.* (See *Kohn v. Superior Court* (1966) 239 C.A.2d 428, 431, 48 C.R. 832 [motion

to set aside indictment under P.C. 995 seeks only determination whether there is probable cause to indict; though it relates to contested issues of fact, it does not resolve them].)

(b) *Motion for judgment on the pleadings.* (See *Hospital Council of Northern Calif. v. Superior Court* (1973) 30 C.A.3d 331, 337, 106 C.R. 247.)

(c) *Motion to overrule demurrer.* (See *Zdonek v. Superior Court* (1974) 38 C.A.3d 849, 852, 113 C.R. 669.)

(d) *Motion for continuance and to transfer to another department.* (See *Los Angeles County Dept. of Public Social Services v. Superior Court* (1977) 69 C.A.3d 407, 417, 138 C.R. 43.)

(e) *Motion to amend information.* (See *People v. Hunter* (1977) 71 C.A.3d 634, 638, footnote 2, 139 C.R. 560.)

(f) *In chambers conference without factual determination.* (See *In re Jose S.* (1978) 78 C.A.3d 619, 628, 144 C.R. 309.)

(g) *Plea bargaining conference.* (See *People v. Montalvo* (1981) 117 C.A.3d 790, 794, 173 C.R. 51.)

(h) *Motion for summary judgment.* (See *Bambula v. Superior Court* (1985) 174 C.A.3d 653, 657, 220 C.R. 223 [listing cases holding pretrial motions not to involve determination of contested fact issues].)

(i) *Motion to disqualify attorney as incompetent.* (See *People v. Whitfield* (1986) 183 C.A.3d 299, 304, 305, 228 C.R. 82.)

(j) *Ex parte hearing on temporary restraining order.* (See *Landmark Holding Group v. Superior Court* (1987) 193 C.A.3d 525, 528, 238 C.R. 475.)

(k) *Preliminary hearing in criminal case.* (See *Barrett v. Superior Court* (1999) 77 C.A.4th 1, 6, 91 C.R.2d 116 [recusal was proper where determination at preliminary hearing (sufficient evidence to hold criminal defendant to answer) did not involve resolution of contested fact issues].)

On the other hand, motions to suppress evidence have been held to be on the merits. (See *In re Abdul Y.* (1982) 130 C.A.3d 847, 859, 182 C.R. 146 [motion to suppress confession involved determination of consequence to criminal defendant's guilt or innocence and thus was determination related to merits]; *Briggs v. Superior Court* (2001) 87 C.A.4th 312, 318, 104 C.R.2d 445 [hearing on motion to exclude evidence from probable cause hearing was on merits; following *In re Abdul Y.*].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Illustrations.*(l) *(New) Motion for discovery.* See *Guardado v. Superior Court* (2008) 163 C.A.4th 91, 95, 77 C.R.3d 149 [finding on motion under C.C. 3295(c) for pretrial punitive damages discovery was not determination on merits for purposes of later peremptory challenge]; *Swift v. Superior Court* (2009) 172 C.A.4th 878, 883, 91 C.R.3d 504 [finding on motion to compel discovery responses did not require determination of factual issues *relating to the merits of the action* for purposes of later peremptory challenge].



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6. Exception: New Judge.

2 *Witkin Cal. Proc. Courts* § 157

[§ 157] Exception: New Judge.

In *People v. Smith* (1961) 196 C.A.2d 854, 17 C.R. 330, defendant was convicted of a vehicle felony and was granted probation by Judge R. Subsequently he was brought before Judge C (Judge R was no longer sitting in the criminal department) on charges of violation of the terms of probation. His affidavit to disqualify Judge C was stricken on the theory that this was a continuation of the original trial. *Held, Jacobs v. Superior Court* (1959) 53 C.2d 187, 1 C.R. 9, 347 P.2d 9, supra, §152, involved the same judge and is distinguishable; here, defendant made his first attempt to utilize the statute in a timely manner on his first appearance before a new judge. "[W]here a litigant has not previously exercised his privilege under 170.6 he may do so in a proceeding supplemental to the original action as to a judge other than any judge who has previously heard any phase of the matter, provided that he does so before the commencement of the hearing of the supplemental proceedings by such judge and within the time limitations specified in the section." (196 C.A.2d 859.) (See *Thompson v. Superior Court* (1962) 206 C.A.2d 702, 707, 23 C.R. 841, supra, §156.)

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f. Implied Waiver of Disqualification.

2 Witkin Cal. Proc. Courts § 158

[§ 158] Implied Waiver of Disqualification.

In *Andrisani v. Saugus Colony, Ltd.* (1992) 8 C.A.4th 517, 10 C.R.2d 444, plaintiff filed a peremptory challenge against Judge S, and the matter was ordered transferred to a different department of the superior court. But the order was somehow overlooked, and plaintiff continued to participate in hearings on motions before Judge S, without mentioning the disqualification. In the present appeal by plaintiff from an order dismissing his complaint for failure to post security after a finding that he was a vexatious litigant, the Court of Appeal affirmed the judgment of dismissal.

(a) Although a proper peremptory challenge becomes effective when made (see *supra*, §134), a challenge may be waived (see *In re Christian J.* (1984) 155 C.A.3d 276, 202 C.R. 54, *supra*, §96, and *Stebbins v. White* (1987) 190 C.A.3d 769, 783, 235 C.R. 656, *supra*, §96). (8 C.A.4th 525.)

(b) "The instant case presents the issue whether the same result will inure to a party who does not expressly waive his right to enforce his own section 170.6 peremptory challenge, but whose total acquiescence in the assumption of jurisdiction by the challenged judge may be considered an implied waiver. We hold that where the party asserting disqualification of a judge by peremptory challenge fails to bring the issue to the attention of the trial court, any right to assert the disqualification on appeal is waived. The same result obtains whether the waiver is express or implied." (8 C.A.4th 526.)

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D. Review of Determination by Mandamus.

1. Case Law Development.

2 Witkin Cal. Proc. Courts § 159

[§ 159] Case Law Development.

Various methods to review a determination of the issue of disqualification were employed in the absence of statutory provisions.

(1) *Appeal*. If the judge to whom the matter was submitted found the challenged judge qualified, the order, though not directly appealable, could be reviewed on appeal from an unfavorable judgment or order in the main proceeding. (See *Keating v. Keating* (1915) 169 C. 754, 147 P. 974; *Rosenfield v. Vosper* (1945) 70 C.A.2d 217, 160 P.2d 842; *Estate of Cuneo* (1963) 214 C.A.2d 381, 383, 29 C.R. 497; *Baker v. Civil Service Com.* (1975) 52 C.A.3d 590, 595, 125 C.R. 162.)

(2) *Prohibition*. The "remedy" of trial before a disqualified judge, with the object of later nullifying the judgment on appeal, was neither speedy nor adequate. For that reason, the typical remedy was a writ of prohibition to restrain the disqualified judge from proceeding. (See *Briggs v. Superior Court* (1932) 215 C. 336, 341, 10 P.2d 1003; *Chastain v. Superior Court* (1936) 14 C.A.2d 97, 104, 57 P.2d 982, supra, §117; *Keating v. Superior Court* (1955) 45 C.2d 440, 289 P.2d 209, supra, §117; *Calhoun v. Superior Court* (1958) 51 C.2d 257, 331 P.2d 648, supra, §117.)

(3) *Motion or Action Attacking Judgment*. If the ground of disqualification was not known until after judgment, the procedure to obtain a qualified judge was no longer useful, and disqualification then became a basis for attack on the judgment itself. (See *Cadenasso v. Bank of Italy* (1932) 214 C. 562, 570, 6 P.2d 944 [action in equity to set aside judgment]; *Giometti v. Etienne* (1934) 219 C. 687, 28 P.2d 913 [motion to set aside Supreme Court order granting hearing]; *Tatum v. Southern Pac. Co.* (1967) 250 C.A.2d 40, 43, 58 C.R. 238, supra, §110 [motion to vacate judgment].)

(4) *Mandamus*. The writ of mandamus was frequently used to accomplish the same effect as prohibition; i.e., instead of issuing prohibition to restrain the disqualified judge from proceeding, the reviewing court could issue mandamus to compel the respondent superior court to disqualify the judge. (See 45 A.L.R.2d 937 [mandamus as remedy to compel recusal of disqualified judge]; 56 A.L.R. Fed. 494 [mandamus as remedy to compel disqualification of federal judge].)

In *Pacific & Southwest Annual Conference of the United Methodist Church v. Superior Court* (1978) 82 C.A.3d 72,

78, 147 C.R. 44, the court approved the use of mandamus as follows:

(a) The remedy on appeal from a final judgment is inadequate; petitioners should not be required to suffer the expense and delay of a complicated trial before a biased judge. (82 C.A.3d 79; see 8 Cal. Proc. (5th), *Extraordinary Writs*, §131.)

(b) Where under the undisputed facts the judge has disregarded a duty expressly enjoined by the law (to declare his or her disqualification), the writ will lie to correct this abuse of discretion. (82 C.A.3d 81; see 8 Cal. Proc. (5th), *Extraordinary Writs*, §100.)

(c) The aggrieved party here was not required to exhaust the remedy of peremptory challenge under C.C.P. 170.6 (supra, §132). (1) It was too late for a peremptory challenge, for Judge T had already conducted a hearing on a pretrial motion involving contested issues of fact. (82 C.A.3d 79.) (2) Even if the remedy of peremptory challenge were available, that remedy need not be exhausted. C.C.P. 170.6 provides an "ace in the hole"--a method of disqualification without factual proof of prejudice. "Its purpose would be undercut by now requiring petitioner to exhaust, in reality forfeit, that separate and distinct right before seeking vindication of the right to disqualify a demonstrably biased judge." (82 C.A.3d 80.)

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D. Review of Determination by Mandamus.

2. Statutory Procedure.

2 Witkin Cal. Proc. Courts § 160

[§ 160] Statutory Procedure.

(1) *In General*. "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding." The petition for the writ must be filed and served within 10 days after service of written notice of entry of the court's order determining the question of disqualification. However, if the notice is served by mail, the time is extended as provided by *C.C.P. 1013(a)* (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §30). (*C.C.P. 170.3(d)*.) (See *People v. Jenkins* (1987) 196 *C.A.3d* 394, 404, 241 *C.R.* 827, citing the text.)

(2) *Review of Unsuccessful Challenge*. The statute was construed in *Guedalia v. Superior Court* (1989) 211 *C.A.3d* 1156, 260 *C.R.* 99.

(a) *C.C.P. 170.3(d)* provides the exclusive remedy for review of the denial of a motion to disqualify a judge. (211 *C.A.3d* 1159.) "An aggrieved litigant can expeditiously request appellate assistance to secure his right to an impartial judge." And the statute applies whether the challenge is peremptory or for cause. (211 *C.A.3d* 1163.)

(b) The 10-day period commences to run at the time the party has "notice" of the decision. Unlike many other statutes, it does not specify "written notice," and thus indicates that actual notice will start the time running. (211 *C.A.3d* 1164, 1165.) Here, petitioner had actual notice when the court orally announced to the parties that petitioner's motion was denied. (211 *C.A.3d* 1165.) (See *People v. Broxson* (1991) 228 *C.A.3d* 977, 979, 278 *C.R.* 917 [following *Guedalia*].) In 2006, *C.C.P. 170.3(d)* was amended to require written notice.

In *People v. Hull* (1991) 1 *C.4th* 266, 2 *C.R.2d* 526, 820 *P.2d* 1036, the court resolved a split of authority in the Courts of Appeal about whether *C.C.P. 170.3(d)* applies to both challenges for cause and peremptory challenges or only to challenges for cause. *Woodman v. Superior Court* (1987) 196 *C.A.3d* 407, 241 *C.R.* 818, held that the statute applies only to challenges for cause. *Guedalia* disagreed. In *Hull*, the Supreme Court, on a careful analysis of the statutory language and the public policy considerations, followed *Guedalia*. (1 *C.4th* 271, 272.)

(a) "[I]f a peremptory challenge were an appealable order, the party requesting such a challenge might be given an 'intolerable windfall.' If the ultimate judgment were favorable to the moving party, the disqualification issue would be

moot. However, if the ultimate judgment were unfavorable, the moving party would receive a second 'bite at the apple,' i.e., a second opportunity to win the merits of the case. ... There is no justifiable reason to presume that the Legislature would have granted a speedy and fundamentally fair avenue to litigants who make a for-cause challenge and yet require parties who make a peremptory challenge to suffer possible delay, waste, and the relitigation of issues." (1 C.4th 273, quoting *Guedalia*.)

(b) Defendant maintains that if a peremptory challenge cannot be challenged on appeal, there will be no satisfactory method of appellate review. Mandamus is not an effective remedy because continuances are disfavored. But the adequacy of the mandamus remedy is not in issue here. "The Legislature, through section 170.3(d), has specifically determined that a writ of mandate shall be the exclusive means of challenging a denial of a motion to disqualify a judge. A party who is denied a peremptory challenge can file a petition for a writ of mandate and a request for a stay with the Court of Appeal. If the Court of Appeal determines that the petition has merit, the court will likely grant a stay until the substantive issue is resolved. For this reason, a party who unsuccessfully makes a peremptory challenge is not exclusively subject to posttrial mandamus. Indeed, the immediate pendency of the trial may be a strong factor the court will consider in favor of granting a stay." (1 C.4th 275.)

One justice dissented, arguing that the majority's holding has no support in the statutory scheme. (1 C.4th 276.) (See *People v. Brown* (1993) 6 C.4th 322, 333, 24 C.R.2d 710, 862 P.2d 710 [following *Hull*]; *People v. Webb* (1993) 6 C.4th 494, 523, 24 C.R.2d 779, 862 P.2d 779 [applying *Hull* retroactively].)

A number of decisions illustrate the operation of the statute. (See *People v. Williams* (1997) 16 C.4th 635, 652, 66 C.R.2d 573, 941 P.2d 752 [challenge on appeal was not timely; defendant "personally and expressly" agreed to have judge hear case and did not seek mandamus]; *Roth v. Parker* (1997) 57 C.A.4th 542, 547, 67 C.R.2d 250 [order denying motion to recuse trial judge was not appealable; constitutional challenge was waived by failure to seek writ review of order]; *PBA, LLC v. KPOD, Ltd.* (2003) 112 C.A.4th 965, 970, 5 C.R.3d 532 [disqualification claim was waived by failure to seek writ review of orders striking or denying disqualification statements; orders are not reviewable by motion in trial court or by appeal following final judgment]; *Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 C.A.4th 1342, 1348, 32 C.R.3d 717 [unsuccessful peremptory challenge could not be reviewed on appeal and circumstances did not warrant treating appeal as petition for mandamus].)

(3) *Review of Successful Challenge.* In *re Sheila B.* (1993) 19 C.A.4th 187, 23 C.R.2d 482, applied the reasoning of *People v. Hull*, *supra*, to a review of the granting of a motion for a peremptory challenge. Defendant successfully moved to disqualify Judge E under C.C.P. 170.6 and plaintiff challenged the motion. *Held*, the order granting the motion was not appealable. (a) *People v. Hull* determined that C.C.P. 170.3(d) applies to peremptory challenges under C.C.P. 170.6 as well as challenges for cause under C.C.P. 170.1. (19 C.A.4th 194.) (b) In enacting C.C.P. 170.3(d), the Legislature determined that an appellate court should have an opportunity to redress an incorrectly decided disqualification motion before the issue in the case is decided on the merits. (c) C.C.P. 170.3(d) is equally applicable to grants of peremptory challenges as to denials. Thus, the order granting the motion is not appealable. (19 C.A.4th 195.)

(4) *Review of Nonwaivable Disqualification.* In *People v. Barrera* (1999) 70 C.A.4th 541, 82 C.R.2d 755, the assigned trial commissioner, a former public defender, had briefly represented defendant at the arraignment and was thus disqualified on the basis of former representation under C.C.P. 170.1(a)(2). Although C.C.P. 170.3(b)(2) (*supra*, §128) prohibits waiver of disqualification on this basis, the parties purported to do so. On appeal following conviction, defendant challenged the waiver. *Held*, the waiver was not reviewable on appeal, but only by writ of mandamus. The issue here is whether a nonwaivable disqualification results in a void judgment or is merely voidable and subject to the requirement of timely writ review under C.C.P. 170.3(d). (70 C.A.4th 548.) *Hull*, and other cases hold that writ review is the exclusive means for reviewing a statutory judicial disqualification claim. While none of these cases involved nonwaivable disqualification, the statutory purpose of speedy review is persuasive. "Were we to permit review on appeal in this matter, a defendant such as appellant would be able to waive the disqualification and permit the judge to preside over the entire case, secure in the knowledge that, if any portion of the result were unfavorable to him, he could appeal and obtain a reversal of the judgment." (70 C.A.4th 551.)

(5) *Judge May Not Challenge Disqualification.* In *Curle v. Superior Court* (2001) 24 C.4th 1057, 103 C.R.2d 751, 16 P.3d 166, the trial judge was disqualified for cause and petitioned for a writ of mandamus to overturn the disqualification order. *Held*, the trial judge lacked standing to do so. C.C.P. 170.3(d) provides the exclusive appellate remedy for a disqualification order and restricts review of the order to the "parties to the proceeding." The clear intent of the statute is to apply to the litigants in the underlying action. The disqualified judge is not a party for this purpose and thus may not challenge the disqualification order. (24 C.4th 1071.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Carl v. Superior Court* (2007) 157 C.A.4th 73, 75, 68 C.R.3d 566, Supp., *infra*, §173 [10-day period provided by C.C.P. 170.3(d) could not be extended by "notice of unavailability" filed by petitioner's attorney; no authority supports filing such notice in appellate court].



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IV. THE JUDICIAL SYSTEM IN CALIFORNIA

A. Constitutional Courts.

1. Development of System.

2 Witkin Cal. Proc. Courts § 161

[§ 161] Development of System.

(1) *Constitution of 1849.* Under the Constitution of 1849, the judicial power of the state was vested in a Supreme Court, district courts, county courts, probate courts, justices of the peace, and in such other inferior courts as the Legislature might establish in any incorporated city or town.

(2) *Constitution of 1879.* Under Article VI of the Constitution of 1879, prior to 1950, the constitutional courts were (a) the Senate, sitting as a court of impeachment; (b) the Supreme Court; (c) district courts of appeal; (d) superior courts; (e) such municipal courts as might be established in a city or city and county; and (f) such inferior courts as the Legislature might establish in any incorporated city or town, township, county, or city and county.

(3) *Inferior Court Revision in 1950.* Constitutional amendments in 1950 were designed to make possible the inferior court revision (see *infra*, §164). Article VI was amended to delete the language referring to various types of inferior courts and to substitute the single phrase "and justice courts." The purpose was to provide for only one type of court inferior to the municipal court, and thus to deprive the Legislature of power to create other inferior courts.

(4) *Revision of Article VI in 1966.* The California Constitution Revision Commission, organized in 1963, submitted its proposal for a revised Article VI in 1966, and it was adopted in the general election of that year. The new version eliminated unnecessary procedural requirements and provided a greater degree of flexibility in the constitutional system. It also changed the name of "district courts of appeal" to "Courts of Appeal" (*infra*, §331) and uses the term "judge" to refer to reviewing court justices as well as lower court judges (*supra*, §2). (For a discussion of the objectives and scope of the revision and annotations to the revised provisions, see Judicial Council 1967 Annual Report, p. 65; and see generally 22 *Hastings L. J.* 121 [surveying development in historical perspective].)

(5) *Equalization of Municipal and Justice Court Jurisdiction.* Legislation enacted in 1976 radically changed the lower court system by giving justice courts the same jurisdiction as municipal courts, by making the same provisions for an appellate department of the superior court, and by establishing the same grounds for appeal from justice courts as those applicable to appeals from municipal courts. (See 8 *Pacific L. J.* 242.) Justice courts and municipal courts were consolidated in 1995. (See *infra*, §165.)

(6) *Other Tribunals*. Two additional tribunals exercise judicial power:

(a) The Public Utilities Commission. (Cal. Const., Art XII, §6; see 8 *Summary* (10th), *Constitutional Law*, §1084 et seq.)

(b) The Workers' Compensation Appeals Board. (*Lab.C. 111*; see 2 *Summary* (10th), *Workers' Compensation*, §13 et seq.)

(7) *Commission on the Future of the Courts*. The Commission on the Future of the Courts, including judges, lawyers, academics, and others, was formed in 1991 to survey trends likely to affect the California courts in the 21st Century and to make recommendations. Papers prepared for the Commission were published in July 1993, under the collective title *20/20 Vision: A Plan for the Future of California Courts*. (See 66 *So. Cal. L. Rev.* 1751 et seq.) The Commission's final report, entitled *Justice in the Balance 2020*, was published in 1993. Excerpts were also published in the Judicial Council's 1994 Annual Report, p. 37 et seq. The Commission's research on appellate justice was the subject of a special report in the *Hastings Law Journal* in 1994. (See 45 *Hastings L. J.* 419 et seq.)

Judicial reform has been the subject of considerable commentary. (See 32 *Loyola L.A. L. Rev.* 63 [proposal to reduce number of nonmeritorious appeals]; 46 *Stanf. L. Rev.* 1283 [symposium on civil justice reform].)

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A. Constitutional Courts.

2. Courts of Record.

2 *Witkin Cal. Proc. Courts* § 162

[§ 162] Courts of Record.

"Court of record" is defined in *Ex parte Thistleton* (1877) 52 C. 220, 225, quoting from a Massachusetts case: "[A] judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law."

"The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." (Cal. Const., Art. VI, §1.) The Senate, when sitting as the court of impeachment, is also a court of record. (*Govt.C.* 3020.5; on impeachment, see Cal. Const., Art. IV, §18; *Govt.C.* 3020 et seq.)

The distinction between courts of record and not of record had little practical value in California. (See *Hahn v. Kelly* (1868) 34 C. 391, 411.) At one time, justice courts and inferior courts were courts not of record. A significant incident of this concept was the presumption of jurisdiction: (a) A court of record is a court of "general jurisdiction," and, on collateral attack, its jurisdiction is presumed; i.e., unless lack of jurisdiction appears on the face of the record, the judgment is safe from collateral attack. (See *Adolph M. Schwartz v. Burnett Pharmacy* (1931) 112 C.A. Supp. 781, 787, 295 P. 508; 20 *Am.Jur.2d* (2005 ed.), *Courts* §10 et seq.) (b) A court not of record is one of special and limited jurisdiction, and formerly its judgments were not protected by the presumption. (See *Schuler-Knox Co. v. Smith* (1943) 62 C.A.2d 86, 92, 144 P.2d 47; *Jarrett v. Redman* (1926) 79 C.A. 482, 485, 250 P. 183.) However, in 1967 the Evidence Code eliminated the distinction, and the jurisdiction of an inferior court was presumed. (*Ev.C.* 666; see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §16.)

West's Key Number Digest, Courts 48, 49

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IV. THE JUDICIAL SYSTEM IN CALIFORNIA

A. Constitutional Courts.

3. Unification of Trial Courts.

a. Early Inferior Courts.

2 *Witkin Cal. Proc. Courts* § 163

[§ 163] Early Inferior Courts.

Prior to 1950 a number of distinct types of inferior courts were established by statute or local charter, pursuant to constitutional authority. The important ones were: (1) Township justices' courts, the typical justice of the peace courts sitting in "townships" of a county, the boundaries of which were fixed by county ordinance. (See *In re Romero* (1929) 207 C. 341, 345, 278 P. 430.) (2) City justices' courts, in cities of several classes. (See *Platnauer v. Board of Supervisors* (1924) 65 C.A. 666, 669, 225 P. 12.) (3) Police and "municipal" courts, established by charter provision in cities with freeholders charters; these "municipal" courts were distinct from the municipal courts of larger jurisdiction. (See *In re Lovall* (1929) 207 C. 544, 279 P. 452; *Robertson v. Langford* (1928) 95 C.A. 414, 273 P. 150.) (4) City (recorder's) courts, established under legislative authority in cities not having freeholders charters. (See *In re Jacobson* (1936) 16 C.A.2d 497, 60 P.2d 1001.) (On the origin of the justice of the peace system, and the reasons for use of nonlawyer judges, see *Gordon v. Justice Court* (1974) 12 C.3d 323, 327, 115 C.R. 632, 525 P.2d 72.)

Before 1929 the jurisdictional monetary limit of \$ 300 applied to all justices' and similar inferior courts. In 1929 increased jurisdiction was given to justices' courts in townships and cities having a population of 30,000 or more. In 1933 the courts with increased jurisdiction were designated as "Justices' courts of Class A," and the others as "Justices' courts of Class B," with different kinds of jurisdiction in Class A and Class B courts. (See *Van Horn v. Justice's Court* (1932) 216 C. 235, 13 P.2d 704 [on 1929 amendments]; *McAuliffe v. Kane* (1942) 54 C.A.2d 288, 128 P.2d 932 [on 1933 amendments].)

The general purpose of the 1933 changes was twofold: (a) To retain in the Class B courts the old jurisdiction of justices' courts in small communities, with the monetary limit of \$ 300, and without any important enlargement of jurisdiction. (b) To give to justices' courts of larger communities (Class A courts) an enlarged monetary jurisdiction (\$ 1,000) and a considerable amount of equity jurisdiction. The Class A and Class B courts were not new courts of a distinct type. The inferior courts created by statutes and charters remained the same, and the classification as Class A or Class B merely added an additional designation to the existing courts to indicate the nature and extent of their jurisdiction. (See *McAuliffe v. Kane*, *supra*, 54 C.A.2d 295.)

Under this system, jurisdiction as between the two kinds of justices' courts was dependent at first upon the *fact* of

population, either judicially noticed or ascertained by a referee. (See *Los Angeles v. Justice's Court* (1929) 208 C. 429, 281 P. 611; *People v. Tossetti* (1930) 107 C.A. 7, 289 P. 881.) As the result of subsequent amendments, population was determined either (1) by a mandamus proceeding or (2) by the last preceding federal census, whichever was later. (See *Shea v. Kerr* (1934) 1 C.2d 604, 606, 36 P.2d 189; *In re Mize* (1938) 11 C.2d 22, 25, 77 P.2d 472; *People v. Dorius* (1942) 49 C.A.2d 259, 263, 121 P.2d 508.)

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A. Constitutional Courts.

3. Unification of Trial Courts.

b. Justice Courts and Municipal Courts.

2 *Witkin Cal. Proc. Courts* § 164

[§ 164] Justice Courts and Municipal Courts.

(1) *Original Municipal Courts.* The creation of municipal courts in cities with a population of more than 40,000 was first authorized by 1924 amendments to the Constitution and by the former Municipal Court Act of 1925. This Act authorized establishment of these courts by charter amendment or majority vote of the electors. (See 21 *Cal. L. Rev.* 117.) In 1934, the Constitution was amended to authorize the Legislature to provide for these courts by general law; but the Act of 1925 remained unchanged and creation of the courts was left to local option. The original 1924 amendment and the Act of 1925 specified the jurisdiction of the court. A 1934 amendment deleted the provisions on jurisdiction and gave the Legislature full power to deal with the subject. Early in its history the court was declared to be a "court of general jurisdiction" and a "court of record," with the usual presumptions of jurisdiction. (*Adolph M. Schwartz v. Burnett Pharmacy* (1931) 112 C.A. Supp. 781, 789, 295 P. 508.)

(2) *Constitutional Amendments of 1950.* The former Justice Court system was criticized as involving too many kinds of inferior tribunals with much duplication of operation and conflict and confusion of jurisdiction. The inferior court revision plan in 1950 included a number of constitutional changes: (a) The Legislature was directed to divide each county into judicial districts. (b) Each district with more than 40,000 inhabitants was to have a municipal court and each district with fewer than 40,000 inhabitants was to have a justice court. (c) The new municipal and justice courts replaced all other types of inferior courts. (d) The Legislature had complete authority over the organization and jurisdiction of these courts. (See 37 *Cal. L. Rev.* 645.) Carrying out the constitutional plan, the Legislature repealed the statute defining Class A and Class B courts, and substituted the new names of the court and judge ("justice court," "judge of a justice court") for the old "justice's court" and "justice of the peace." (See *People v. Williams* (1954) 124 C.A.2d 32, 36, 268 P.2d 156; 3 *Pacific L. J.* 439 [Qualification of California Justice Court Judges: A Dual System].)

(3) *Municipal and Justice Court Act of 1949.* A new statute comprehensively covered the organization and operation of the court, including formation of judicial districts, and selection, qualification, and compensation of judges, clerks, and other officers. (See 37 *Cal. L. Rev.* 645.) In 1951 many detailed amendments were made and clarifying changes were made in many sections of the Code of Civil Procedure by insertion of the term "judicial district" in conformity with the new method of creating municipal courts. In 1953 the law was placed in *Govt.C. 71001* et seq. and 72000 et seq. These provisions were repealed in 2002.

(4) *Subsequent Changes*. Former Cal. Const., Art. VI, §5, governing the structure of the municipal and justice courts, was adopted in 1966. The provision was amended in 1994 as part of the consolidation of justice courts with municipal courts (*infra*, §165) and was repealed in 2002.

Former Govt.C. 71040 et seq., provided for the creation and alteration of judicial districts for municipal and justice courts. (See *Whittaker v. Superior Court* (1968) 68 C.2d 357, 362, footnote 4, 66 C.R. 710, 438 P.2d 358 [notice and hearing required for consolidation of districts]; *Madera v. Superior Court* (1974) 39 C.A.3d 665, 671, 114 C.R. 283 [consolidation of justice court districts].) When municipal and justice courts were consolidated, preexisting judicial districts were preserved for purposes of publication within a judicial district. (See Govt.C. 71042.5; Govt.C. 71043 [determining population of district].)

(5) *Jurisdiction*. Originally, justice court jurisdiction differed from municipal court jurisdiction not only in monetary limit (\$ 1,000 or less in the justice court; \$ 5,000 or less in the municipal court) but in territorial restriction to the limits of the township. (See *Van Horn v. Justice's Court* (1932) 216 C. 235, 241, 13 P.2d 704.) A 1933 amendment removed the local territorial limit, and civil jurisdiction became statewide. (See *Cambra v. Justice's Court* (1935) 4 C.2d 445, 446, 49 P.2d 1121; *People v. Mulholland* (1940) 16 C.2d 62, 65, 104 P.2d 1045; 9 So. Cal. L. Rev. 240; 29 Cal. L. Rev. 71.) A 1976 revision made the jurisdiction of municipal and justice courts the same. The monetary limits for both were raised to \$ 15,000 in 1979 and to \$ 25,000 in 1985. (See 8 *Pacific L. J.* 242.)

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c. Consolidation of Justice and Municipal Court.

2 Witkin Cal. Proc. Courts § 165

[§ 165] Consolidation of Justice and Municipal Court.

Senate Constitutional Amendment No. 3 (SCA 3) of the 1993-1994 Legislature would have eliminated the existing trial court system of superior, municipal, and justice courts and substituted a single-level trial court. In 1993, the California Law Revision Commission issued a tentative recommendation concerning implementation of SCA 3, entitled Trial Court Unification: Constitutional Revision (SCA 3). (24 Cal. Law Rev. Com. Reports, p. 1.) (On unification generally, see *21 U.C.L.A. L. Rev. 1081*; 11 Southwestern U. L. Rev. 1295.) The 1993 Legislature enacted an uncoded finding and declaration that the efficiencies resulting from the enactment of SCA 3 "would yield substantial cost savings to both counties and the state" (Stats. 1993, Chap. 70, §10), but the 1994 Legislature defeated the measure. (See *25 Pacific L. J. 239*.)

However, at the November 1994 general election, the voters approved Senate Constitutional Amendment No. 7, effective January 1, 1995, which consolidated the justice and municipal courts. SCA 7 eliminated various constitutional references to the justice court. Under former Cal. Const., Art VI, §5(b), existing justice courts became municipal courts, and the number, qualifications, and compensation of judges, officers, attache's, and employees continued until changed by the Legislature.

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d. Consolidation of Municipal and Superior Court.

2 *Witkin Cal. Proc. Courts* § 166

[§ 166] Consolidation of Municipal and Superior Court.

(1) *Constitutional Authorization.* The unification of trial courts was proposed by Senate Constitutional Amendment No. 4 of the 1995-1996 Legislature, which authorized the unification of the municipal and superior court within a county by a vote of the municipal and superior court judges. The measure appeared on the ballot as Proposition 220 and was approved by the voters on June 2, 1998. Former Cal. Const., Art. VI, §5(e), provided in part: "[T]he municipal and superior courts shall be unified upon a majority vote of superior court judges and a majority vote of municipal court judges within the county. In those counties, there shall only be a superior court." Following unification in all counties, this provision was repealed at the November 2002 general election.

(2) *Transitional Provisions.* Former Cal. Const., Art. VI, §23, *Govt.C.* 70200 et seq., and former C.R.C., Rules 701 et seq. provide transitional provisions, governing issues such as voting procedure, judicial positions and terms, court personnel and records, and pending cases. C.R.C., Rule 701 et seq. were repealed in 2001. Cal. Const., Art. VI, §23, expired on January 1, 2007.

(3) *Conforming Statutory Changes.* As part of the unification, changes in many statutes were made in 1998, largely to correct terminology and clarify existing law. The changes are explained in the California Law Revision Commission's Report, Trial Court Unification: Revision of Codes (28 Cal. Law Rev. Com. Reports, p. 51 et seq.). Significant changes were made in these areas:

- (a) Distinguishing between civil causes (the "limited civil case"). (See *infra*, §241.)
- (b) Appellate jurisdiction of the Court of Appeal. (See *infra*, §335.)
- (c) Appellate division of the superior court. (See *infra*, §339.)
- (d) Small claims appeals. (See *infra*, §316.)

(4) *Conforming Rule Changes.* In 2000 and 2002, the Judicial Council made changes in the Rules of Court to reflect the unification of trial courts. Separate rules for the municipal court (former C.R.C., Rule 501 et seq.) were

repealed. The Trial Court Rules (C.R.C., Rule 2.1 et seq.) now apply to all cases in the superior courts unless otherwise specified by a rule or statute. (C.R.C., Rule 2.2.)

(5) *Meaning of "Judicial District."* C.C.P. 38, added in 1998, eliminates uncertainty in the use of the term "judicial district." Unless the provision or context otherwise requires, a statutory reference to a judicial district means the following:

- (a) As it relates to a Court of Appeal, the Court of Appeal district. (C.C.P. 38(a).)
- (b) As it relates to a superior court, the county. (C.C.P. 38(b).)

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B. Legislative Power Over Jurisdiction.

1. Constitutional Jurisdiction Cannot Be Enlarged.

2 Witkin Cal. Proc. Courts § 167

[§ 167] Constitutional Jurisdiction Cannot Be Enlarged.

The *original jurisdiction* of the Supreme Court and Courts of Appeal is stated in Cal. Const., Art. VI, §10 (see *infra*, §§330, 337). The original jurisdiction of the superior court is stated in Cal. Const., Art. VI, §10 (see *infra*, §210 et seq.). *Appellate jurisdiction* of the various courts is set forth in Cal. Const., Art. VI, §11. (See *infra*, §329 [Supreme Court]; §§335, 336 [Courts of Appeal]; §341 [superior courts].)

The rule is well established that the constitutional provisions are not only a grant but a limitation. Accordingly, with certain exceptions as to appellate jurisdiction of superior courts and Courts of Appeal (see *infra*, §169), the constitutional jurisdiction cannot be enlarged by the Legislature. (See *Camron v. Kenfield* (1881) 57 C. 550, 554 [Legislature cannot enlarge constitutional scope of writ of prohibition by making it available against ministerial officer]; *People v. McKamy* (1914) 168 C. 531, 532, 143 P. 752 ["That the legislature has no power to confer upon the courts jurisdiction beyond that given or authorized to be given them by the constitution has long been settled"]; *Martello v. Superior Court* (1927) 202 C. 400, 405, 261 P. 476; *Standard Oil Co. of Calif. v. State Bd. of Equalization* (1936) 6 C.2d 557, 562, 59 P.2d 119 [Legislature cannot enlarge constitutional scope of writ of certiorari by making it available to review acts of nonjudicial board]; *In re McGee* (1951) 36 C.2d 592, 226 P.2d 1 [Legislature cannot give superior court jurisdiction over election contest for Assembly seat; Constitution gives Legislature power to determine qualifications of members]; *Tex-Cal Land Management v. Agricultural Lab. Rel. Bd.* (1979) 24 C.3d 335, 347, 156 C.R. 1, 595 P.2d 579, 8 Cal. Proc. (5th), *Extraordinary Writs*, §13; *McClintock v. Abel* (1937) 21 C.A.2d 11, 17, 68 P.2d 273; *Frazier v. Moffatt* (1951) 108 C.A.2d 379, 386, 239 P.2d 123; *Northridge Park County Water Dist. v. McDonell* (1958) 158 C.A.2d 123, 125, 322 P.2d 25, quoting the text.)

In *Modern Barber Colleges v. California Emp. Stabilization Com.* (1948) 31 C.2d 720, 192 P.2d 916, *infra*, §170, the court summarized the holding of *Maurer v. Mitchell* (1878) 53 C. 289, as follows: "Thus, the opinion stands for the incontrovertible propositions that the jurisdiction to issue a writ of prohibition is a particular kind of jurisdiction, the meaning of which was long established at the time the Constitution was adopted; that, in using the term 'prohibition' in the Constitution, the framers conferred this particular kind of jurisdiction on certain courts; and that this particular kind of jurisdiction consisted of the power to restrain the acts of a lower *judicial* tribunal." (31 C.2d 730.)

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B. Legislative Power Over Jurisdiction.

2. Constitutional Jurisdiction Cannot Be Curtailed.

2 Witkin Cal. Proc. Courts § 168

[§ 168] Constitutional Jurisdiction Cannot Be Curtailed.

It has been declared that the constitutional grant of jurisdiction cannot be curtailed by legislation, and that the Supreme Court, Courts of Appeal, and superior court may exercise their constitutional jurisdiction without regard to attempted legislative restrictions. A few cases expressly so hold. (See *Great Western Power Co. v. Pillsbury* (1915) 170 C. 180, 182, 149 P. 35 [attempt to prevent Supreme Court from using certiorari to review workers' compensation award, by giving exclusive jurisdiction over review to superior court]; *In re Sutter-Butte By-Pass Assessment Number Six of the Sacramento & San Joaquin Drainage Dist.* (1923) 190 C. 532, 536, 213 P. 974 [attempt to deprive Supreme Court of appellate jurisdiction].)

Usually, however, this proposition has been stated by dictum as an obvious corollary of the rule against enlargement of jurisdiction. *Modern Barber Colleges v. California Emp. Stabilization Com.* (1948) 31 C.2d 720, 192 P.2d 916, *infra*, §170, gives the following illustration: "[I]f the Legislature repealed section 1102 of the Code of Civil Procedure and the other statutes dealing with mandamus, and substituted a statute providing that *no ministerial action* by officers of any court could be compelled, this legislation would necessarily fall as an unconstitutional curtailment of the constitutional power to issue mandamus to compel performance of ministerial duty." (31 C.2d 731.)

But the rule against curtailment is subject to some qualifications. (See *infra*, §169.) And, a grant of jurisdiction may be specifically limited. For example, Cal. Const., Art. III, §6(b), declares English to be the official language of the state and Cal. Const., Art. III, §6(c), authorizes actions to enforce its provisions. Under Cal. Const., Art. III, §6(d), courts of record have jurisdiction to hear cases brought to enforce the provision, but the Legislature "may provide reasonable and appropriate limitations on the time and manner" of enforcement actions.

Petitions concerning general-circulation newspapers are matters over which the superior court has original jurisdiction. Under Cal. Const., Art. VI, §11(a), the Courts of Appeal, subject to limited exceptions, have appellate jurisdiction where superior courts have original jurisdiction. *Govt.C. 6026*, purporting to confer appellate jurisdiction over general-circulation petitions on the Supreme Court, was held void as an abridgement of the appellate jurisdiction constitutionally vested in the Courts of Appeal. (See *In re Establishment of Perris City News* (2002) 96 C.A.4th 1194, 1197, 118 C.R.2d 38.)

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B. Legislative Power Over Jurisdiction.

3. Exception: Legislative Enlargement of Appellate Jurisdiction.

2 *Witkin Cal. Proc. Courts* § 169

[§ 169] Exception: Legislative Enlargement of Appellate Jurisdiction.

(1) *Courts of Appeal*. Except in death cases (where appellate jurisdiction is in the Supreme Court) the Courts of Appeal have appellate jurisdiction "when superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995" (e.g., unlimited civil cases and felony cases) "and in other causes prescribed by statute." (Cal. Const., Art. VI, §11(a); see *infra*, §335.) "When appellate jurisdiction in civil cases is determined by the amount in controversy, the Legislature may change the appellate jurisdiction of the courts of appeal by changing the jurisdictional amount in controversy." (Cal. Const., Art. VI, §11(a).)

(2) *Superior Courts*. Except as provided by Cal. Const., Art. VI, §11(a), "the appellate division of the superior court has appellate jurisdiction in causes prescribed by statute." (Cal. Const., Art. VI, §11(b).)

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B. Legislative Power Over Jurisdiction.

4. Distinction: Limitation on Substantive Right.

2 Witkin Cal. Proc. Courts § 170

[§ 170] Distinction: Limitation on Substantive Right.

In practical effect, the constitutional jurisdiction of the Supreme Court, Courts of Appeal, and superior courts may be curtailed indirectly by abolition of or limitation on the right involved. This was made clear in the important case of *Modern Barber Colleges v. California Emp. Stabilization Com. (1948) 31 C.2d 720, 192 P.2d 916*. Respondent Commission made findings that petitioner had employees and owed contributions under the Unemployment Insurance Act. Petitioner applied to the superior court for mandamus to compel the Commission to vacate the findings and cancel the charges, though the statute provided that neither injunction nor mandamus should issue to prevent collection of the tax. Petitioner's theory, fully stated in the dissenting opinion, was that this provision was an unconstitutional curtailment of jurisdiction to issue the writ. *Held*, the statute was valid.

(a) Subject to constitutional limitations, the Legislature has the power to create or abolish rights of individuals and to regulate and circumscribe the methods of enjoying them. Thus: (1) The superior court formerly had jurisdiction "in all civil cases," but the Legislature could abolish the right of action for breach of promise. (2) Though the Constitution formerly gave the superior court "original jurisdiction in all cases in equity," the Legislature could determine the grounds for equitable relief and forbid injunctions in certain kinds of cases. (3) The Constitution formerly gave the Supreme Court and Courts of Appeal "appellate jurisdiction on appeal from the Superior Court," but the Legislature could declare what orders are appealable. (4) The Constitution gives the superior court power to issue habeas corpus, but P.C. 1506 prevents release of a prisoner pending an appeal from a superior court's order of discharge. (*31 C.2d 727.*)

(b) "But where the Legislature has not sought either to enlarge or curtail the jurisdiction to issue the writ, nor to change its nature or function, there is nothing unconstitutional in its regulation either of the procedure for invoking the writs or of the substantive rights of parties and the remedies available for their enforcement. The legislative enactment of reasonable procedural conditions precedent to invoking a particular remedy, or the substitution of one remedy (such as an action at law in the superior court) for another (such as a proceeding in mandamus), cannot be considered an interference with the jurisdiction over such remedies vested in courts by the Constitution." (*31 C.2d 731.*) (See *infra*, §212.)

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C. Legislative Power Over Procedure.

1. Procedure Subject to Legislative Control.

2 *Witkin Cal. Proc. Courts* § 171

[§ 171] Procedure Subject to Legislative Control.

The Legislature has broad power to prescribe the procedure under which courts exercise their constitutional or statutory jurisdiction. (See *Ex parte Harker* (1875) 49 C. 465, 467 [abolition of writ of ne exeat (civil arrest)]; *Wright v. Superior Court* (1903) 139 C. 469, 473, 73 P. 145 ["From the beginning, in this state, the practice, pleadings, and proceedings in equity, as well as at common law, have been regulated by statute"]; *In re Garner* (1918) 179 C. 409, 412, 177 P. 162 [regulation of punishment for contempt]; *Sacramento & San Joaquin Drainage Dist. v. Superior Court* (1925) 196 C. 414, 432, 238 P. 687 [action limited to particular court]; *Southern Service Co. v. Los Angeles* (1940) 15 C.2d 1, 11, 97 P.2d 963 [repeal of statutory remedy]; *Modern Barber Colleges v. California Emp. Stabilization Com.* (1948) 31 C.2d 720, 725, 192 P.2d 916, supra, §170 [limiting remedies in tax proceedings]; *Johnson v. Superior Court* (1958) 50 C.2d 693, 697, 329 P.2d 5, supra, §130 [regulations concerning disqualification of judges]; *People v. Sica* (1953) 116 C.A.2d 59, 61, 253 P.2d 75 [restriction on issuance of writ of error coram nobis].)

Constitutional recognition of this power appears in Cal. Const., Art. VI, §6(d), stating that the Judicial Council may adopt rules for court administration, practice, and procedure not "inconsistent with statute."

A significant exercise of the power was the enactment in 1933 of former C.C.P. 34 on uniformity of procedure in trial courts: "The provisions of this code relating to the commencement and prosecution of, and the practice, procedure, and enforcement of judgments and decrees in, actions and proceedings in trial courts, shall apply to all such courts, except where special provision is made for particular courts, or where a general provision is not applicable by reason of jurisdictional limitations."

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See *Irvine v. Southern Calif. Assn. of Governments* (2009) 175 C.A.4th 506, 522, 96 C.R.3d 78, citing the text [trial court lacked jurisdiction to review propriety of allocation of housing units under regional housing needs assessment; repeal of statute authorizing judicial review of allocation by administrative mandamus reflects legislative intent to preclude judicial remedies because interruption of lengthy and extensive administrative process by litigation would disrupt local planning].



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C. Legislative Power Over Procedure.

2. Limitations on Legislative Power.

2 *Witkin Cal. Proc. Courts* § 172

[§ 172] Limitations on Legislative Power.

(1) *Equal Protection Clause*. The Equal Protection Clause of the United States Constitution prevents discriminatory procedural legislation. The cases dealing with statutes authorizing the award of attorneys' fees to successful plaintiffs in certain types of actions are illustrative of the problem, although usually the classification is found to be reasonable and the statute is upheld. (See *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.* (1942) 20 C.2d 684, 693, 128 P.2d 529; *Veriddo v. Renaud* (1950) 35 C.2d 263, 266, 217 P.2d 647 [requirement of filing claim]; 8 *Summary* (10th), *Constitutional Law*, §794.)

(2) *Due Process Clause*. Legislative regulation of procedure must be consistent with procedural due process. (See 7 *Summary* (10th), *Constitutional Law*, §637 et seq.) The most important cases are those dealing with retroactive changes in remedy, and the governing principle is that the statute may change the procedure retroactively provided that it leaves a reasonably efficient remedy. (See 7 *Summary* (10th), *Constitutional Law*, §630 et seq.; *Hogan v. Ingold* (1952) 38 C.2d 802, 814, 243 P.2d 1 [new law on costs and attorneys' fees may be applied to pending action]; *Casey v. Katz* (1952) 114 C.A.2d 391, 393, 250 P.2d 291 [new statute requiring filing of claim against estate of decedent tortfeasor was applicable to cause of action that arose prior to enactment].) (For illustrations of statutory procedure held unconstitutional, see *Sniadach v. Family Finance Corp. of Bay View* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, 7 *Summary* (10th), *Constitutional Law*, §646; *Blair v. Pitchess* (1971) 5 C.3d 258, 96 C.R. 42, 486 P.2d 1242, 6 *Cal. Proc.* (5th), *Provisional Remedies*, §246; *Randone v. Appellate Dept.* (1971) 5 C.3d 536, 96 C.R. 709, 488 P.2d 13, 6 *Cal. Proc.* (5th), *Provisional Remedies*, §50.)

(3) *Contract Clause*. The same principle is applied where the Contract Clause of the United States Constitution is invoked. (See *Simons Brick Co. v. Eagle Indem. Co.* (1930) 110 C.A. 676, 684, 294 P. 1075; 8 *Summary* (10th), *Constitutional Law*, §1287 et seq.)

(4) *Separation of Powers*. Procedural legislation may also be attacked as in conflict with the doctrine of separation of powers. (See 7 *Summary* (10th), *Constitutional Law*, §143.) An interesting application of this principle was made to statutes purporting to place unreasonably short time limits on the determination of a cause. *In re Shafter-Wasco Irr. Dist.* (1942) 55 C.A.2d 484, 487, 130 P.2d 755, involved a statute dealing with dissolution of irrigation districts, which required a determination of an appeal within 3 months after taking it. Pointing out that the time allowed was inadequate

for proper consideration, the opinion states the question as follows: "May the Legislature divest this court of its constitutional jurisdiction over the case and its duty to decide it by limiting the time in which a decision must be rendered, to a period within which it is impracticable, if not impossible, to decide the issues?" *Held*, to sustain the statute, the mandatory time provision would be construed as "directory," for the court's constitutional powers "may not be so restricted by unreasonable rules as to virtually nullify them." (55 C.A.2d 487.) Construing language clearly mandatory in form as "directory" is, of course, equivalent to holding the actual regulation void. (See *Garrison v. Rourke* (1948) 32 C.2d 430, 436, 196 P.2d 884 [similar construction of mandatory language in Elections Code to prevent divestment of court's jurisdiction by implication]; 17 So. Cal. L. Rev. 241, note 210 [discussing former P.C. 1252, which purported to require calendaring of criminal appeal in 30 days, before briefs were filed, but was uniformly disregarded by appellate courts].)

(5) *Local or Special Laws*. Former Cal. Const., Art. IV, §2, contained a prohibition against local or special laws with several specific recitals in the field of court procedure: Third ["Regulating the practice of courts of justice"]; Fourth ["Providing for changing the venue in civil or criminal actions"]; Eighth ["Summoning and impaneling grand and petit juries, and providing for their compensation"]; Thirty-second ["For limitation of civil or criminal actions"]. (See *Mojave River Irr. Dist. v. Superior Court* (1927) 202 C. 717, 726, 262 P. 724 [special law held void]; *Gridley v. Fellows* (1914) 166 C. 765, 768, 138 P. 355 [venue statute; classification upheld]; *Martin v. Superior Court* (1924) 194 C. 93, 100, 227 P. 762 [jury selection statute; classification upheld]; *Glashoff v. Glashoff* (1942) 57 C.A.2d 108, 113, 134 P.2d 316 [statute of limitations; classification upheld]; *Superior Wheeler Cake Corp. v. Superior Court* (1928) 203 C. 384, 388, 264 P. 488 [denial of plaintiff's right to appeal from small claims court judgment; classification upheld].)

The specific recitals were eliminated in 1966, and the following general statement was substituted, with the same purpose and effect: "A local or special statute is invalid in any case if a general statute can be made applicable." (Cal. Const., Art. IV, §16(b); see 8 *Summary* (10th), *Constitutional Law*, §706.)

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1. Nature of Inherent Powers.

2 *Witkin Cal. Proc. Courts* § 173

[§ 173] Nature of Inherent Powers.

The "inherent power" of a court is a concept that involves more than one idea. The term is usually employed to describe a power that exists without any statutory provision. It may, however, have the independent meaning of a power that is exclusively judicial in nature and therefore cannot be taken away by the Legislature. A practical distinction may also be drawn between inherent powers of trial courts and inherent powers of reviewing courts. And the Legislature may to some extent act in the field of the court's inherent powers by confirming a power, by expanding or limiting it, or by specifying the procedure for exercising it. (See *Rice v. Superior Court* (1982) 136 C.A.3d 81, 89, 93, 185 C.R. 853, citing the text [C.C.P. 36(a), granting trial preference to persons 70 years old, does not infringe inherent power of trial courts to regulate court business].)

In *Millholen v. Riley* (1930) 211 C. 29, 293 P. 69, upholding the power of a Court of Appeal to appoint a law secretary and fix the salary for the position, the theory of inherent powers was explained as follows: "A court set up by the Constitution has within it the power of self-preservation, indeed, the power to remove all obstructions to its successful and convenient operation. This arises from the fact that it is part of and belongs to one of the three independent departments set up by the Constitution." (211 C. 33.) (See *Bloniarz v. Roloson* (1969) 70 C.2d 143, 147, 74 C.R. 285, 449 P.2d 221 [distinguishing such powers ("primarily of an administrative nature") from equity powers of a court of general jurisdiction]; *Hart Bros. Co. v. Los Angeles* (1938) 31 C.A.2d Supp. 766, 771, 82 P.2d 221 [following *Millholen*, and upholding power of municipal court to order meals, lodging, and transportation for criminal jury]; *Wisniewski v. Clary* (1975) 46 C.A.3d 499, 504, 120 C.R. 176, *infra*, §201; *Venice Canals Resident Home Owners Assn. v. Superior Court* (1977) 72 C.A.3d 675, 680, 140 C.R. 361, 8 Cal. Proc. (5th), *Extraordinary Writs*, §317, citing the text [inherent power to condition statutory stay order on furnishing bond to protect real parties in interest]; *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 C.A.3d 272, 287, 245 C.R. 873; *Topa Ins. Co. v. Fireman's Fund Ins. Cos.* (1995) 39 C.A.4th 1331, 1344, 46 C.R.2d 516, citing the text; 20 *Am.Jur.2d* (2005 ed.), *Courts* §39 et seq.)

Various powers of courts and judicial officers are recognized by statute. (See *infra*, §175.)

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(New) *Notice of unavailability is not authorized:* "It has apparently become common practice in the trial courts for litigants to file a 'notice of unavailability' The notice purports to advise the other parties to the action--as well as the

court--that the deliverer will not be available for a prescribed period of time and that no action may be taken during that period which adversely affects the unavailable party. To the extent this practice attempts to put control of the court's calendar in the hands of counsel--as opposed to the judiciary--it is an impermissible infringement of the court's inherent powers. ... There is no authority, moreover, for the filing of such a notice in an appellate court." (*Carl v. Superior Court* (2007) 157 C.A.4th 73, 74, 75, 77, 68 C.R.3d 566.)



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2. What Courts May Exercise Inherent Powers.

2 Witkin Cal. Proc. Courts § 174

[§ 174] What Courts May Exercise Inherent Powers.

C.C.P. 128(a) refers to "every court," and *C.C.P. 177* recites the powers of "every judicial officer." (See *infra*, §175.) Does this mean that *every court* has these inherent powers?

(1) *Probate Court*. Under former law, it was clear that the probate court, despite its limited statutory jurisdiction, was a court of record, and had the inherent powers of the superior court. (See *Heydenfeldt v. Superior Court* (1897) 117 C. 348, 351, 49 P. 210 [inherent power to restore estate property distributed under decree later reversed on appeal]; *Estate of De Barry* (1941) 43 C.A.2d 715, 726, 111 P.2d 728 [inherent power over representatives and attorneys, exercised by summary direction to attorney to return extraordinary fees taken without court order]; *Estate of Merrill* (1947) 81 C.A.2d 102, 108, 183 P.2d 300 [following *Estate of De Barry* on somewhat similar facts].) The Probate Code now provides that the probate court is a court of general jurisdiction, with the same power and authority as the superior court. (*Prob.C. 7050(b)*; see 14 *Summary* (10th), *Wills and Probate*, §348.)

(2) *Justice Court*. Under former law, it was not clear that the justice court had inherent powers of the same scope as those of the superior or municipal court. The statutory language and the practical necessities indicated that a justice court judge had whatever inherent power was essential to insure the orderly conduct of proceedings. (See *Ex parte Latimer* (1873) 47 C. 131, 133.) But other inherent powers were traditionally regarded as confined to courts of record. (See *Bloniarz v. Roloson* (1969) 70 C.2d 143, 147, 74 C.R. 285, 449 P.2d 221 ["every court of record has powers requisite to its proper functioning as an independent constitutional department of government"].)

(3) *Small Claims Court*. It has been held that a small claims court has inherent power to appoint an interpreter at public expense for an indigent litigant who does not speak or understand English. (*Gardiana v. Small Claims Court* (1976) 59 C.A.3d 412, 421, 130 C.R. 675; see *Jara v. Municipal Court* (1978) 21 C.3d 181, 185, 145 C.R. 847, 578 P.2d 94, 3 Cal. Proc. (5th), *Actions*, §422 [*Gardiana* holding limited to small claims court; other trial courts have no such inherent power].) (On statutory power to appoint interpreters, see 3 Cal. *Evidence* (4th), *Presentation at Trial*, §26 et seq.)

(4) *Magistrate*. A judge sitting merely as a magistrate in a criminal proceeding does not have the same inherent powers as he or she does when acting as a court or judge. (See *Fursdon v. Los Angeles* (1950) 100 C.A.2d Supp. 845,

850, 223 P.2d 520.)

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3. Illustrations.

2 Witkin Cal. Proc. Courts § 175

[§ 175] Illustrations.

Various inherent powers of courts and judicial officers are recognized by statute or case law. All of the important inherent powers are considered elsewhere in this work and in *California Evidence* as special topics, and the brief listing here is merely intended to indicate the broad scope of the subject:

(a) *Powers in connection with court operations, e.g.:*

- (1) Power to preserve and enforce order. (*C.C.P. 128(a)(1)*, (a)(2), (a)(3); *C.C.P. 177(1)*.)
- (2) Power over the admission and discipline of attorneys. (See 1 *Cal. Proc. (5th)*, *Attorneys*, §340.)
- (3) Power to order the substitution of attorneys. (*Echlin v. Superior Court (1939)* 13 *C.2d* 368, 372, 90 *P.2d* 63 [dictum].)
- (4) Power to permit a party to proceed *in forma pauperis*. (See 3 *Cal. Proc. (5th)*, *Actions*, §416 et seq.)
- (5) Power to punish contempt. (*C.C.P. 178*; see 7 *Cal. Proc. (5th)*, *Trial*, §168).
- (6) Power to compel obedience to judgments, process, and orders. (*C.C.P. 128(a)(4)*; *C.C.P. 177(2)*.)
- (7) Power to amend and control process and orders. (*C.C.P. 128(a)(8)*.)
- (8) Power to control and prevent abuse of process. (*Oil Workers Int. Union, CIO v. Superior Court (1951)* 103 *C.A.2d* 512, 569, 230 *P.2d* 71; *Arc Inv. Co. v. Tiffith (1958)* 164 *C.A.2d Supp.* 853, 856, 330 *P.2d* 305, *infra*, §248.)
- (9) Power to adopt court rules. (See *infra*, §181 et seq.)
- (10) Power to transfer a case outside the special jurisdiction of one department to the proper department. (*People v. Superior Court (San Bernardino) (1930)* 104 *C.A.* 276, 281, 285 *P.* 871.)
- (11) Power to control court's ministerial officers and others connected with a proceeding. (*C.C.P. 128(a)(5)*;

Rappaport v. Payne (1934) 139 C.A. 772, 775, 35 P.2d 183 [court reporter]; *Whitlow v. Superior Court* (1948) 87 C.A.2d 175, 182, 196 P.2d 590 [court reporter]; *Cal Pak Delivery v. United Parcel Service* (1997) 52 C.A.4th 1, 8, 60 C.R.2d 207, 1 Cal. Proc. (5th), *Attorneys*, §127 [power to disqualify plaintiff's attorney, who offered to dismiss class action in exchange for large payment to attorney personally, with class receiving nothing]; *Cates v. California Gambling Control Com.* (2007) 154 C.A.4th 1302, 1314, 65 C.R.3d 513 [authority to compel plaintiff to return confidential documents allegedly misappropriated while employed by California Department of Justice].)

(12) Power to appoint employees and fix their compensation. (*Millholen v. Riley* (1930) 211 C. 29, 33, 293 P. 69.)

(13) Power to compel the appropriation or expenditure of funds for judicial purposes. (See *supra*, §173.)

(14) Power to impose standards of personal appearance or attire. (See 1 Cal. Proc. (5th), *Attorneys*, §502.)

(b) *Powers in connection with evidence and trial*, e.g.:

(1) Power to control the amount of evidence. (3 Cal. Evidence (4th), *Presentation at Trial*, §6.)

(2) Power to call and examine witnesses. (3 Cal. Evidence (4th), *Presentation at Trial*, §80 et seq.)

(3) Power to compel the attendance of witnesses. (C.C.P. 128(a)(6); 177(3).)

(4) Power to determine the order of proof and the priority of issues. (3 Cal. Evidence (4th), *Presentation at Trial*, §22.)

(5) Power to order the plaintiff to submit to a physical examination. (2 Cal. Evidence (4th), *Discovery*, §140 et seq.)

(6) Power to allow the plaintiff's expert to inspect physical evidence. (*Clark v. Tulare Lake Dredging Co.* (1910) 14 C.A. 414, 437, 112 P. 564 [machine that allegedly caused death of victim].)

(7) Power to control the time of taking a deposition. (*Hays v. Superior Court* (1940) 16 C.2d 260, 264, 105 P.2d 975; 2 Cal. Evidence (4th), *Discovery*, §29 et seq.)

(8) Power to designate defense counsel to schedule discovery for defendants in complex litigation. (*Asbestos Claims Facility v. Berry & Berry* (1990) 219 C.A.3d 9, 267 C.R. 896, *infra*, §240.)

(9) Power to appoint an interpreter. (3 Cal. Evidence (4th), *Presentation at Trial*, §26.)

(10) Power to regulate and control court business by denying a continuance despite a statutory provision allowing it. (*Lorraine v. McComb* (1934) 220 C. 753, 756, 32 P.2d 960.)

(11) Power to order meals, lodging, and transportation for jurors. (*Hart Bros. Co. v. Los Angeles* (1938) 31 C.A.2d Supp. 766, 771, 82 P.2d 221.)

(c) *Powers in connection with judgments*, e.g.:

(1) Power to correct clerical errors in the judgment or record. (See 7 Cal. Proc. (5th), *Judgment*, §67.)

(2) Power to order restitution after a reversal of judgment. (See 9 Cal. Proc. (5th), *Appeal*, §900 et seq.)

(3) Power to set aside a judgment void on its face. (See 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §9.)

(4) Power to take steps to enforce a judgment. (*Security Trust & Savings Bank v. Southern Pac. R. Co.* (1935) 6 C.A.2d 585, 588, 45 P.2d 268; see 8 Cal. Proc. (5th), *Enforcement of Judgment*, §1 et seq.)

(5) Power of reviewing court to recall remittitur. (See 9 *Cal. Proc.* (5th), *Appeal*, §847 et seq.)

(6) Power to remand a mandamus proceeding for further proceedings before an administrative body whose decision is challenged. (*Keeler v. Superior Court* (1956) 46 *C.2d* 596, 600, 297 *P.2d* 967.)

(d) *Miscellaneous powers, e.g.:*

(1) Power to create a remedy for a wrong in the absence of a statutory provision. (See 3 *Cal. Proc.* (5th), *Actions*, §3 et seq.)

(2) Power to devise a procedure to carry out the court's jurisdiction. (*C.C.P.* 187; see *infra*, §§185, 186.)

(3) Power to take and certify affidavits, depositions, acknowledgments of written instruments, and acknowledgments of satisfaction of judgments. (*C.C.P.* 179.)

(4) Power to administer oaths. (*C.C.P.* 128(a)(7), 177(4).)

(5) Power to restrain a creditor from repeatedly attaching exempt wages of a debtor. (*Arc Inv. Co. v. Tiffith* (1958) 164 *C.A.2d Supp.* 853, 857, 330 *P.2d* 305, *infra*, §248.)

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4. Inherent Powers Denied.

2 Witkin Cal. Proc. Courts § 176

[§ 176] Inherent Powers Denied.

(1) *Personal Attendance*. Although personal attendance of a witness may be compelled, a court has no inherent power to compel a party in a civil action to appear personally rather than by attorney, or to have the party arrested under a bench warrant for failure to appear. (*Silvagni v. Superior Court* (1958) 157 C.A.2d 287, 291, 321 P.2d 15, 2 Cal. Proc. (5th), *Jurisdiction*, §200.)

(2) *Cost of Transcript*. *Barwis v. Superior Court* (1978) 87 C.A.3d 239, 242, 150 C.R. 758, involving a shorthand reporter's duty to transcribe an administrative hearing, held that the court had no inherent power to set the price for preparing the transcript.

(3) *Juror's Employment*. In *People v. Kwee* (1995) 39 C.A.4th 1, 46 C.R.2d 230, the trial judge ordered a juror's employer to excuse him from working normally scheduled weekend shifts and to pay him for those weekend days he did not work. *Held*, the judge lacked inherent authority to do so. Had the juror been unable to attend trial during the week because of weekend work, the court would have had grounds to excuse him. (39 C.A.4th 6.)

(4) *Invalidation of Contract With Strangers to Action*. In *Killian v. Millard* (1991) 228 C.A.3d 1601, 279 C.R. 877, plaintiffs filed a complaint for breach of a contract to transfer to plaintiffs an interest in a corporation owned by defendant. Unable to personally finance their action, plaintiffs syndicated it by creating 50 "units" for sale to investors at \$ 10,000 per unit, and a number of investors entered into a "Recovery Participation Agreement" with plaintiffs under which they received the right to a percentage share in the net profits of the action. When defendant learned of the syndication, he filed a motion to have the syndication contract declared void as against public policy. The trial court granted the motion and ordered plaintiffs to repay with interest the money they received. *Held*, reversed.

(a) Defendant had no substantive right in the syndication contract. Hence, he was not a real party in interest, and lacked standing to void it. (228 C.A.3d 1605.) Because he could not attack the contract by either a complaint or cross-complaint, he could not do so by a simple motion. (228 C.A.3d 1605, 1606.)

(b) A trial court has inherent power to control the proceedings to ensure that the prosecution of the action is not tainted by outside pressures. "Accordingly, the trial court here had the power to compel the attorneys to choose between

refunding the money or disqualification if, for example, it determined that because the Investors were paying them, they owed a duty to the Investors which conflicted with the duty owed to their clients. Further, the court had the power to dismiss the matter as frivolous or on the grounds of nonjusticiability, had it determined that the case was brought not because of any belief in its merits but purely as an investment." (228 C.A.3d 1606.)

(c) "There is no authority, however, by which a court's incidental powers extend so far as to permit it to void an agreement between a party to the action and a stranger on the grounds of public policy. ... If a contract violates public policy, the remedy is to decline to enforce it. If there is a matter which taints a trial, the remedy is to decline to go forward until the taint has been removed or, if it cannot be removed, to decline to go forward at all." (228 C.A.3d 1607.)

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5. Imposition of Money Sanctions.

2 *Witkin Cal. Proc. Courts* § 177

[§ 177] Imposition of Money Sanctions.

(1) *Case Law Development.* In *Santandrea v. Siltec Corp.* (1976) 56 C.A.3d 525, 128 C.R. 629, plaintiff brought an action for fraud and breach of contract. The trial court granted defendant's motion for summary judgment. Then plaintiff made a motion to reconsider, with no new information furnished. The judge denied the motion and ordered plaintiff to pay \$ 100 to defendant. *Held*, the order was a proper exercise of discretion, for the meritless motion wasted the time of the court and opposing counsel. (56 C.A.3d 529.)

The holding of *Santandrea*, that a monetary sanction was proper, in the absence of express authorization by statute or rule, as an exercise of the court's inherent power, was disapproved in *Bauguess v. Paine* (1978) 22 C.3d 626, 639, 150 C.R. 461, 586 P.2d 942, 7 Cal. Proc. (5th), Trial, §226, which held that a \$ 700 attorneys' fee award as an alternative to a contempt citation was not a proper exercise of inherent power. (See *Fabricant v. Superior Court* (1980) 104 C.A.3d 905, 908, 163 C.R. 894 [following *Bauguess*; no power to award fees to attorneys unnecessarily subpoenaed as witnesses by pro. per. defendant]; *Yarnell & Associates v. Superior Court* (1980) 106 C.A.3d 918, 921, 923, 165 C.R. 421 [following *Bauguess*; no power to award fees as sanctions for expense of resisting motion to quash service]; *Bryan v. Bank of America* (2001) 86 C.A.4th 185, 199, 103 C.R.2d 148 [inherent power of appellate court to impose sanctions on attorney for misrepresentations]; 9 Cal. Proc. (5th), Appeal, §983; 7 *Pepperdine L. Rev.* 195 [*Bauguess*].)

(2) *Statutory Authorization.* The holding in *Bauguess* was nullified by the adoption of C.C.P. 128.5, which permitted the trial court, in proceedings initiated before 1995, to order a party, the party's attorney, or both, to pay reasonable expenses, including attorneys' fees, incurred by another party as a result of frivolous or bad faith actions or tactics. (See 7 Cal. Proc. (5th), Trial, §227.) C.C.P. 128.7 governs monetary sanctions in proceedings initiated after 1994. (See 7 Cal. Proc. (5th), Trial, §237 et seq.)

C.C.P. 177.5 authorizes a judicial officer to impose reasonable money sanctions, up to \$ 1,500, payable to the court for any violation of a lawful court order by a witness, a party, or a party's attorney, committed without good cause or substantial justification. (See *Caldwell v. Samuels Jewelers* (1990) 222 C.A.3d 970, 977, 272 C.R. 126 [order imposing sanctions under C.C.P. 177.5 was reversed for failure to recite in detail facts justifying award]; *Seykora v. Superior Court* (1991) 232 C.A.3d 1075, 1081, 283 C.R. 857 [due process requirements of notice and hearing]; 20th Century Ins. Co. v. *Choong* (2000) 79 C.A.4th 1274, 1278, 94 C.R.2d 753 [trial court did not abuse discretion in imposing additional

monetary sanction on attorney who failed to pay original sanction]; *In re Woodham* (2001) 95 C.A.4th 438, 446, 115 C.R.2d 431 [upholding sanction against Board of Prison Terms for delay in processing inmate's administrative appeal in knowing violation of order without good cause or justification]; 14 *Pacific L. J.* 515; 29 A.L.R.4th 160 [judge's power to impose monetary or other sanctions on attorney for failure to appear at trial].) C.C.P. 177.5 applies to criminal as well as civil proceedings. (*People v. Tabb* (1991) 228 C.A.3d 1300, 1310, 279 C.R. 480.)

C.R.C., Rule 2.30 authorizes sanctions for the violation of the Rules of Court in civil proceedings generally. (See 7 *Cal. Proc.* (5th), *Trial*, §59.) C.C.P. 575.2 authorizes sanctions for the violation of local rules. (See 7 *Cal. Proc.* (5th), *Trial*, §60.) Govt.C. 68608 authorizes sanctions for failure to comply with delay reduction procedures. (See *infra*, §264.)

(3) *Restriction on Punitive Sanctions.* In *Andrews v. Superior Court* (2000) 82 C.A.4th 779, 98 C.R.2d 426, the trial court ordered plaintiff's attorney to pay plaintiff's share of a discovery referee's fee. *Held*, the order was invalid. Under *Bauguess v. Paine*, punitive monetary sanctions are not authorized by C.C.P. 128 (*supra*, §175) or by the inherent powers of the court. Further, the payment here was not based on either C.C.P. 128.5 or 128.7, although there may be circumstances under which this kind of payment is appropriate as a monetary sanction under other statutory authority. (82 C.A.4th 783.)

(4) *Reversal for Abuse of Discretion.* In *Bergman v. Rifkind & Sterling* (1991) 227 C.A.3d 1380, 278 C.R. 583, G, the attorney for defendants, prepared a motion for summary judgment with a 23-page supporting memorandum of points and authorities, although a local court rule imposed a limit of 15 pages except by permission of the trial judge. G, on advice of the clerk in Judge Z's department, requested permission to file his memorandum, and the clerk accepted the application. Judge S was moved to Judge Z's department, and Judge S denied the motion for summary judgment and issued a lengthy minute order imposing sanctions on G. The order stated that defendants and their attorneys had violated the local rule; that G and his firm are ordered to pay \$ 650 to the clerk; and that G and his firm "are further ordered to show a copy of this minute order to all judicial officers from whom they may in the future seek an order permitting the filing of a memorandum in excess of 15 pages in this case." (227 C.A.3d 1385.) G moved for relief, and Judge S, denying relief, issued another order asserting that there was no legitimate reason for "the extreme length" of the memorandum, and that "counsel simply made the judgment to submit an excessively long memorandum ... and thereby imposed on the public at large, on other litigants and counsel, and on the court." " (227 C.A.3d 1385.) *Held*, orders reversed.

(a) The memorandum was filed with the trial court's permission and therefore complied with the 15-page rule. Implicit in the two orders is the suggestion that G should have obtained Judge S's imprimatur on papers previously filed with Judge Z's permission. "We need no authority to conclude that this is wrong and unfair." (227 C.A.3d 1386.)

(b) Although a judge may raise the issue of sanctions on his or her own motion under former C.R.C., Rule 227 (now C.R.C., Rule 2.30) or C.C.P. 177.5, due process requires that the judge give notice of his or her intent and offer an opportunity to respond. Here, Judge S made his findings before his review of G's explanation. (227 C.A.3d 1387.)

(c) "We find most disturbing" Judge S's effort to affect subsequent decisions by other trial judges by ordering G and all attorneys at his firm to show copies of the sanction order to other judicial officers. "The order is wholly inappropriate and offensive." (227 C.A.3d 1387.)

(5) *Due Process.* In *Barrientos v. Los Angeles* (1994) 30 C.A.4th 63, 35 C.R.2d 520, a personal injury action, the trial judge imposed sanctions of \$ 1,500 on the attorneys for both parties after they had appeared at a final status conference unprepared to treat it as a mandatory settlement conference, as previously ordered, and allegedly engaged in improper behavior during a conference in the judge's chambers. *Held*, reversed; the sanctions order violated due process and was an abuse of discretion. The sanctions (a) were imposed without sufficient notice and an opportunity to be heard, and (b) constituted an inappropriate attempt to punish counsel because of their inability to settle the case.

(a) Due process mandates adequate notice and an opportunity to be heard before the imposition of sanctions against

attorneys. The trial judge may raise the issue of sanctions on his or her own motion but, in doing so, must give notice of an intent to impose sanctions. That notice must be given before findings are made and at a time before the trial judge decides whether, in fact, to impose sanctions. The adequacy of notice should be determined on a case-by-case basis to satisfy basic due process requirements. The act or circumstances giving rise to the imposition of expenses must be considered together with the potential dollar amount. (30 C.A.4th 70.)

(b) Here, the trial judge did not give counsel notice or an opportunity to be heard before ordering the sanctions, the amount of which was not only financially significant but was required to be reported to the State Bar. Although, before the conference in chambers, the judge alluded to the possible intent to impose sanctions, one of the attorneys was not present, and the remark neither adequately conveyed the judge's intent nor granted counsel the opportunity to respond. It was not clear that the judge gave notice of his intent in the course of the conference, and, when sanctions were subsequently imposed, neither counsel was given an opportunity to respond. (30 C.A.4th 70.)

(c) In addition, the underlying motive for the sanctions order--to punish counsel for failing to settle the case--was improper, particularly because it generated a personal and financial incentive for counsel to reach a settlement. Although the trial court may direct litigants to engage in settlement negotiations, it may not compel litigants to settle. (30 C.A.4th 72.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statutory Authorization.* See *People v. Hundal* (2008) 168 C.A.4th 965, 969, 86 C.R.3d 166 [summary, oral sanction for ex parte communication was invalid; no violation of court order, no written statement of reasons, and no notice or hearing before imposition]; *Vidrio v. Hernandez* (2009) 172 C.A.4th 1443, 1454, 92 C.R.3d 178 [no statutory authority for imposition of sanctions against nonparty insurer for failure to participate in good faith at mandatory settlement conference]; *People v. Ward* (2009) 173 C.A.4th 1518, 1530, 93 C.R.3d 871 [defense attorney used term "prosecutorial misconduct" in front of jury after court ordered him not to do so; monetary sanction did not interfere with attorney's duty of advocacy and was appropriate under C.C.P. 177.5; reversed with directions to enter sanction order reciting in detail circumstances justifying order]; *Conservatorship of Becerra* (2009) 175 C.A.4th 1474, 1482, 96 C.R.3d 910 [sanction for purported violation of Rules of Professional Conduct was invalid; no violation of court order, no written statement of reasons, inadequate notice; disciplinary authority for violation of Rules of Professional Conduct is in State Bar Court].



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E. Trial Court Funding.

1. State Funding.

2 Witkin Cal. Proc. Courts § 178

[§ 178] State Funding.

State funding of trial court operations is intended to provide all citizens with "equal and ready access to trial courts" and end "disparities in the availability of the courts for the resolution of disputes and the dispensation of justice." (*Govt. C. 77100*.) State funding is governed by *Govt. C. 77000* et seq. For purposes of the statutes, *Govt. C. 77003* defines "court operations" and C.R.C., Rule 10.810 specifies costs included in court operations.

California's "unprecedented fiscal crisis" prompted the 1991 Legislature to accelerate the state's commitment to funding trial court operations by adding and amending numerous code sections involving the imposition and collection of fines and penalties, the operation of trial courts, and the expenditure of state funds. (See Stats. 1991, Chap. 90; Stats. 1991, Chap. 189; Stats. 1991, Chap. 331; statement of legislative intent, Stats. 1991, Chap. 189, §45.)

The 1992, 1993, 1994, and 1997 Legislatures increased various fees and made additional changes in the state funding provisions. (See *Govt.C. 68085, 68502.5*; Stats. 1997, Chap. 850 [legislative intent to cap county contributions at the 1994-95 fiscal year amount, with state responsibility for growth in the cost of trial court operations thereafter]; 22 *Hastings Const. L. Q.* 557 [Crisis in California: Constitutional Challenges to Inadequate Trial Court Funding].)

The state is now responsible for court facilities. (See *Govt.C. 69202* et seq. [appellate courts]; *Govt.C. 70301* et seq. [trial courts].) (On public access to trial court budget and management information, see C.R.C., Rules 10.802, 10.803; *Orange County Employees Assn. v. Superior Court* (2004) 120 C.A.4th 287, 292, 297, 15 C.R.3d 201 [petition alleging violation of rule must be filed in superior court and heard by out-of-district appellate justice].)

SUPPLEMENT: [This section is current through the latest supplement]

Public access to trial court budget and management information: C.R.C., Rule 10.802 was repealed in 2009. Comparable provisions are now in C.R.C., Rules 10.500 and 10.501.



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IV. THE JUDICIAL SYSTEM IN CALIFORNIA

E. Trial Court Funding.

2. County Funding.

2 Witkin Cal. Proc. Courts § 179

[§ 179] County Funding.

At one time, to the extent trial court funding was not provided in the state budget, the county board of supervisors was required to provide for court rooms, chambers, attendants, furniture, equipment, and supplies for the transaction of business in the trial courts. If the board failed to do so after suitable notice, the courts could direct appropriate county officers to provide funding. (Former Govt.C. 68073.)

The origin, nature, and scope of Govt.C. 68073 were examined in *Mallett v. Superior Court* (1992) 6 C.A.4th 1853, 8 C.R.2d 829. Petitioners, judges of the Stockton Municipal Court, concluded that the services of C, the elected marshal, were inadequate. After making an unsuccessful request of the Board of Supervisors, petitioners issued an order relieving C of his duties relating to court security, and directing the sheriff to assume those duties. C filed an action for declaratory relief, contending that petitioners exceeded the scope of their authority under Govt.C. 68073. Petitioners moved for summary judgment, the trial court denied the motion, and petitioners sought mandamus to compel the trial court to grant summary judgment. "The central issue we are asked to decide is whether the judges' determination under section 68073 that the services of its marshal are inadequate compels the granting of summary judgment in their favor as a matter of law, or whether the marshal's declaration disputing this conclusion raises a triable issue of material fact as to the adequacy of those services." (6 C.A.4th 1858.) *Held*, the judges' determination was subject to review for abuse of discretion, and they were not entitled to summary judgment.

(a) The history of Govt.C. 68073 leads to the conclusion that orders made pursuant to it are reviewable. "The authority granted by that statute is limited in both its scope, as circumscribed by the items enumerated in the statute, and its depth, as indicated by the requirement of a finding of unsuitability or insufficiency and of necessity prior to its exercise. ... As revealed by the comments of the Judicial Council in 1983, the primary source of control over the use of the power set forth in section 68073 has resided in the courts themselves which have exercised it sparingly." (6 C.A.4th 1864, 1866.)

(b) The 1984 amendment to Govt.C. 68073 for the first time conditioned court orders on notice to the board of its "particular needs," with authorization to order the provision of those needs "[i]f the board then fails to provide anything necessary to the conduct of the court's functions." (6 C.A.4th 1867.) "The statute's use of each of these value-laden terms necessarily implies that discretion is being exercised and that a judgment of what is adequate and necessary is

being made." (6 C.A.4th 1868.)

(c) There is nothing so unique about orders issued pursuant to a court's authority under *Govt.C. 68073* that would justify eliminating them from review; a variety of orders "arguably of equal importance to the judiciary issued pursuant to the court's asserted inherent powers are subject to review." (6 C.A.4th 1871, citing the text.)

(d) The doctrine of judicial immunity from personal liability for performance of judicial acts does not preclude review of the legal validity of such acts. "The specter of reversal on appeal will hardly subvert either the efficiency or the independence of the judiciary, except perhaps for that unwanted 'independence' which would rule without regard to the law. Courts must exercise their discretion in innumerable matters on a daily basis. To apply the concept of judicial immunity as a standard of review to these matters would effectively insulate a wide range of decisions from judicial review. We decline to adopt this dangerous stance. The better position, as recognized by the trial court, is to defer to the courts' discretion except on a showing of abuse." (6 C.A.4th 1873.)

(e) "The exercise of discretion under section 68073 must be based on a finding of unsuitability or insufficiency and necessity which is supported by a reasonable factual foundation. By and large, courts should be the best judges of the adequacy of services provided for the transaction of their business. If, however, the facts underlying the court's determination are inaccurate, that conclusion is without substance and goes beyond the bounds of reason. A challenge to the accuracy of this conclusion thus raises a material issue of fact. In view of the conflicting affidavits on the specific facts underlying petitioners' conclusion of inadequacy here, the trier of fact must determine whether petitioners had a reasonable factual basis for concluding that [C]'s services during his tenure as marshal were inadequate to support the exercise of their discretion under section 68073 or whether that discretion was abused." (6 C.A.4th 1874.)

Govt.C. 68073 was substantially revised in 1997, as part of the continued state funding of trial court operations. In 2002, it was amended and renumbered *Govt.C. 70311*. The statute now provides as follows:

(1) Beginning July 1, 1997, counties are not responsible for funding "court operations." (*Govt.C. 70311(a)*.)

(2) Beginning July 1, 1996, counties are responsible for providing "necessary and suitable facilities" for judicial and court support positions created before that date. (*Govt.C. 70311(b)*.) The county's responsibility continues until the facility is transferred from the county to the Judicial Council. (*Govt.C. 70312*.)

(3) If the county fails to provide facilities after notice of the deficiency, the court may direct county officers to provide facilities, to be paid for by the general fund. (*Govt.C. 70311(c)*.)

(4) Before the alteration of existing facilities or the construction of new facilities, the county must solicit the review and comment of the judges of the relevant court, which may not be disregarded without "reasonable grounds." (*Govt.C. 70311(d)*.)

The state is now responsible for court facilities. (See *Govt.C. 69202* et seq. [appellate courts]; *Govt.C. 70301* et seq. [trial courts].)

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IV. THE JUDICIAL SYSTEM IN CALIFORNIA
F. Court Fees.

2 *Witkin Cal. Proc. Courts* § 180

[§ 180] Court Fees.

(1) *Uniform Civil Fees.* A comprehensive system of uniform civil fees in the superior court was adopted in 2005 as *Govt.C. 70600* et seq. (Uniform Civil Fees and Standard Fee Schedule Act of 2005). (See 4 *Cal. Proc. (5th), Pleading*, §25.) Although the fees are intended to be uniform statewide, surcharges for court construction are authorized in several counties. (See *Govt.C. 70603*.) In addition, fees are prohibited in some circumstances. (See *Govt.C. 70633*.)

(2) *Probate Code Proceedings.* As part of the comprehensive enactment of uniform civil filing fees in 2005, the fees for proceedings under the Probate Code were restated in *Govt.C. 70650* et seq. (See 14 *Summary* (10th), *Wills and Probate*, Supp., §380A.)

(3) *Family Code Proceedings.* As part of the comprehensive enactment of uniform civil filing fees in 2005, the fees for proceedings under the Family Code were restated in *Govt.C. 70670* et seq. (See 11 *Summary* (10th), *Husband and Wife*, Supp., §12A.)

(4) *Small Claims Proceedings.* Uniform fees in small claims court proceedings were adopted in 2005. (See *C.C.P. 116.230*; *infra*, §290.)

(5) *Administrative Proceedings on Appeal to Superior Court.* The fees for specified agency decisions tried de novo in the superior court (e.g., local agency fines and penalties; parking violations) are set forth in *Govt.C. 70615*. (See 4 *Cal. Proc. (5th), Pleading*, §26.)

(6) *Fees of Court Reporters.* The fees of court reporters are set forth in *Govt.C. 69947* et seq. (See *infra*, §384.)

(7) *Miscellaneous Court Products and Services.* Unless a fee is otherwise prohibited, courts may charge a reasonable fee for providing designated products and services, e.g., forms and publications, discs and tapes, postage and shipping, faxing, and training programs. (*Govt.C. 70631*; *C.R.C., Rule 10.815*.)

(8) *Proceedings in Reviewing Courts.* Fees in proceedings in the Courts of Appeal and the Supreme Court are set forth in *Govt.C. 68926* et seq. (See 9 *Cal. Proc. (5th), Appeal*, §556 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Uniform Civil Fees.* A number of civil filing fees were increased in 2008. As part of the legislation, the Legislature imposed a moratorium on further increases through 2011. Nevertheless, in response to an "economic crisis," the Legislature increased the first paper filing fee in 2009. (See *Govt.C. 70602*, adopted in 2008 and amended in 2009.)



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V. RULES OF COURT

A. Nature of Rule Making Power.

1. In General: Formal Rules of Court.

a. Rules Must Be Consistent With Statute.

2 *Witkin Cal. Proc. Courts* § 181

[§ 181] Rules Must Be Consistent With Statute.

"Every court may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council." (*Govt.C. 68070(a)*.) This section confirms the power thought to be inherent in courts (see *supra*, §173) to make rules of procedure that do not conflict with constitutional or statutory provisions or with Judicial Council rules of general statewide application. (See *People v. Jordan* (1884) 65 C. 644, 647, 4 P. 683 ["The power of courts to establish a system of procedure by means of which parties may seek the exercise of their jurisdiction, at least when a system has not been established by legislative authority, is inherent"]; *McKay v. Superior Court* (1890) 86 C. 431, 25 P. 10 [superior court rule on time of filing record on appeal from justice court]; *Helbush v. Helbush* (1930) 209 C. 758, 763, 290 P. 18; *Adams v. Sharp* (1964) 61 C.2d 775, 777, 40 C.R. 255, 394 P.2d 943, *infra*, §207; *Hayden v. Superior Court* (1913) 22 C.A. 23, 133 P. 26 [superior court rule on notice of motion to set case for trial]; *Wisniewski v. Clary* (1975) 46 C.A.3d 499, 504, 120 C.R. 176, *infra*, §201; *In re Jeanette H.* (1990) 225 C.A.3d 25, 34, 275 C.R. 9, 2 *Cal. Evidence* (4th), *Witnesses*, §147 [invoking rule-making power to support juvenile court order requiring parties to submit witness lists shortly before trial]; *Rutherford v. Owens-Illinois* (1997) 16 C.4th 953, 968, 67 C.R.2d 16, 941 P.2d 1203 [questioning but not deciding validity of local order shifting burden in asbestos litigation]; 20 *Am.Jur.2d* (2005 ed.), *Courts* §48 et seq.; on similar power of administrative agencies to make regulations, see 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §37; on effect of rules in conflict with statute, see *infra*, §203 et seq.)

The practice of making general rules of procedure by individual courts, pursuant to *Govt.C. 68070*, has lost much of its importance because the Judicial Council has occupied most of the field. (See *infra*, §§187 et seq., 390.) The power of the Judicial Council is derived from Cal. Const., Art. VI, §6(d), which authorizes the Council to "adopt rules for court administration, practice and procedure" that are not "inconsistent with statute." Thus, local court rules are subordinate to rules adopted by the Judicial Council, and Judicial Council rules are subordinate to statutes.

The Constitution formerly referred to "rules of practice and procedure." The revised provision, adding the words "court administration," makes it clear that the Council may regulate such matters as the distribution of trial court business (see *infra*, §§235, 238), photographing, recording, and broadcasting in the courtroom (see *supra*, §37), and legal forms (see *infra*, §398 et seq.). It is also the basis for the innovation of recommended Standards of Judicial

Administration (see *infra*, §198).

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A. Nature of Rule Making Power.

1. In General: Formal Rules of Court.

b. Broad Rule-Making Power.

2 *Witkin Cal. Proc. Courts* § 182

[§ 182] Broad Rule-Making Power.

A different meaning of the term "rule-making power" is often used to describe the complete authority of courts (or judicial councils) to promulgate rules of procedure superseding statutory systems. (See 65 *Harv. L. Rev.* 234; 66 *Harv. L. Rev.* 28; 69 *Harv. L. Rev.* 857; 20 *Stanf. L. Rev.* 673 [U.S. Supreme Court rule-making power and Federal Rules of Evidence].) This power was granted in the drafting of the following rules:

- (1) Federal Rules. (See 4 *Federal Practice & Procedure* (Wright & Miller) §1001.)
- (2) California appellate rules. (See 17 *So. Cal. L. Rev.* 79, 80; 35 *Cal. L. Rev.* 477; 9 *Cal. Proc.* (5th), *Appeal*, §8 et seq.)
- (3) California pretrial rules. (*C.C.P.* 575.)
- (4) California rules for Family Code proceedings. (*Family C.* 211; see 5 *Cal. Proc.* (5th), *Pleading*, §885.)

Thus, for example, *Family C. 211* states: "Notwithstanding any other provision of law, the Judicial Council may provide by rule for the practice and procedure in proceedings under" the Family Code. (See *In re Marriage of Dover* (1971) 15 *C.A.3d* 675, footnote 3, 678, 93 *C.R.* 384 ["We must thus look to these Family Law Rules of Court before looking to the laws applicable to civil actions generally to determine the appropriate practice and procedure"]; *In re Marriage of McKim* (1972) 6 *C.3d* 673, 678, footnote 4, 100 *C.R.* 140, 493 *P.2d* 868, citing the text [practical effect of statute is to remove "any restraints of statutory consistency on the Judicial Council's rules of practice and procedure under the Family Law Act"].)

Notwithstanding a grant of broad rule-making power, the Legislature has the power to enact a subsequent statute with the effect of amending an existing Judicial Council rule. (*Stockton Theatres v. Palermo* (1956) 47 *C.2d* 469, 476, 304 *P.2d* 7.)

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2. Unwritten Practice or Usage.

a. Practices Equivalent to Rules.

2 *Witkin Cal. Proc. Courts* § 183

[§ 183] Practices Equivalent to Rules.

Seldom will all of the procedural law be found in statutes and formally adopted rules. *People v. Jordan* (1884) 65 C. 644, 4 P. 683, after tracing the development of procedure in the English courts, states: "Long usage in the practice of the courts, or of a particular court, may be considered the common law of the court; for the acquiescence in constant proceedings, as well by the judges as its experienced officers, denotes that it is reasonable, and has not been found objectionable, because if it had it would soon have produced an immediate change; the judges of each court have implied power to alter any inconvenient practice when they think fit." (65 C. 646.)

This "common law of the court" at one time constituted a large and troublesome part of our procedure. Sometimes it is to be found in reported decisions of appellate courts that construe, amplify, or modify provisions of existing statutes or rules, or that create a new rule to fill a complete gap. (See *People v. Jordan*, supra, 65 C. 651 [creating new procedure and declaring that it will henceforth be followed]; *Hicks v. Sanders* (1940) 40 C.A.2d 211, 215, 104 P.2d 549 [although C.C.P. 473 does not provide for notice to adverse party, courts have always required it]; *Albermont Petroleum, Ltd. v. Cunningham* (1960) 186 C.A.2d 84, 89, 9 C.R. 405, infra, §205 [rule of law and motion department, published daily in legal newspapers, but not part of local superior court rules].) Sometimes it is merely the unpublished practice of a particular court, discoverable only by inquiry among those familiar with the practice. (For examples of this practice held invalid, see infra, §203 et seq.)

The preparation of the Judicial Council appellate rules (infra, §195) afforded an excellent opportunity to study the distribution of procedure among constitutional provisions, statutes, formal rules, judicial precedents, and unwritten court practices. (See 17 So. Cal. L. Rev. 79.) Two chief reasons for the persistence of unwritten practices were made clear: First, the belief of some judges that matters of "internal court administration" are not suitable for fixed rules; and second, the belief of some judges and lawyers that the best procedural system calls for relatively few rules, general and flexible in nature, leaving details to be worked out by local rules, decisions, and usage. (See Draftsman's Comment, 17 So. Cal. L. Rev. 81, note 5: "The practical effect of setting forth a few general rules is to drive procedure underground, burying it under a mass of decisions and local practices familiar only to experts.")

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2. Unwritten Practice or Usage.

b. The "Better Practice."

2 Witkin Cal. Proc. Courts § 184

[§ 184] The "Better Practice."

An even more nebulous type of rule is recognized when courts observe that, while a certain method of doing a thing does not conflict with statute or express rule, the "better practice" is to do it differently. Such remarks amount to much more than a rebuke to counsel; they may influence the court to find reversible error in the particular case, and in time may give rise to actual unwritten rules. (*Timm v. McCartney* (1935) 9 C.A.2d 230, 233, 49 P.2d 315; *Macmillan Petroleum Corp. v. Griffin* (1950) 99 C.A.2d 523, 526, 222 P.2d 69 [though ex parte application was proper, better practice calls for notice].)

Relatively stable and easily discoverable directives are in the Rules of Professional Conduct (see 1 *Cal. Proc.* (5th), *Attorneys*, §409 et seq.) and the Code of Judicial Ethics (*supra*, §52 et seq.). Other sources are the various practice works cited throughout this treatise.

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A. Nature of Rule Making Power.

3. Procedure Devised for Particular Case.

a. Nature of Power.

2 *Witkin Cal. Proc. Courts* § 185

[§ 185] Nature of Power.

Most rules, whether formally assembled in a list, or developed as part of the unwritten usage of the courts, have one common characteristic: They are established in advance under the traditional rule making power for the handling of a class of cases. (See *supra*, §181 et seq.) A different but highly important power is that allowing the creation or recognition of a new form of procedure in a particular pending case. The latter power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function. Moreover, it is generally conceived to be more than a power, being described in terms of a duty to exercise jurisdiction by devising a procedure that will permit of its exercise. Both concepts--power and duty--are stated in *C.C.P. 187*: "When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." (For discussion of related principle that "for every wrong there is a remedy," see 3 *Cal. Proc. (5th), Actions*, §5.)

One of the best discussions of this inherent power, without mention of *C.C.P. 187*, appears in *People v. Jordan* (1884) 65 C. 644, 4 P. 683: "But when a certain jurisdiction has been conferred on this or any court, it is the duty of the court to exercise it; a duty of which it is not relieved by the failure of the legislature to provide a mode for its exercise. In the absence of any rules of practice enacted by the legislative authority, it is competent for the courts of this State to establish an entire Code of procedure in civil cases, and an entire system of procedure in criminal cases." (65 C. 646.)

Later decisions affirm the power. (See *Citizens Util. Co. of Calif. v. Superior Court* (1963) 59 C.2d 805, 813, 31 C.R. 316, 382 P.2d 356 [affirming inherent power of courts to adopt "any suitable method of practice ... if the procedure is not specified by statute or by rules adopted by the Judicial Council"]; *Buchwald v. Katz* (1972) 8 C.3d 493, 502, 105 C.R. 368, 503 P.2d 1376, 9 *Cal. Proc. (5th), Appeal*, §259 ["Absent an applicable rule of court covering such proceedings, the superior court, in exercise of its inherent power to adopt any suitable method of practice ... may call up the pleadings or other papers or documents by which the parties presented their respective claims and defenses before the Labor Commissioner or may require the parties to present such claims and defenses in more formal pleadings"]; *People v. Risenhoover* (1966) 240 C.A.2d 233, 236, 49 C.R. 526, 6 *Cal. Crim. Law (3d), Criminal Judgment*, §114

[judicial processes "must remain supple in order to adapt to changing conditions in the law"]; *James H. v. Superior Court* (1978) 77 C.A.3d 169, 175, 143 C.R. 398, quoting the text; *First State Ins. Co. v. Superior Court* (2000) 79 C.A.4th 324, 329, 94 C.R.2d 104 [in complex litigation case, trial court contravened summary judgment statute by issuing case management order that precluded parties from filing motion for summary judgment before resolution of choice of law issues; however, court had inherent power to defer hearing on motion until resolution of those issues].)

The standards governing exercise of the power are the broadest possible: "Although the question we must answer is one of first impression there is no novelty in the considerations that enter into the exercise of judicial discretion. In matters in which there is no settled procedure the court seeks to chart a course that conforms to the orderly and proven standards of practice best suited to accomplish the most satisfactory trial and decision of the issues. There can be no set formula for adopting the proper procedure to the facts of the particular case." (*Weissman v. Lakewood Water & Power Co.* (1959) 173 C.A.2d 652, 657, 343 P.2d 776.)

Nevertheless, the power is not unlimited. In *Triplett v. Farmers Ins. Exchange* (1994) 24 C.A.4th 1415, 29 C.R.2d 741, plaintiff prevailed in a personal injury action, and the court then ordered defendant's insurer added as a defendant and sanctioned it for failure to settle. *Held*, the court lacked jurisdiction over the insurer. Although C.C.P. 187 allows flexibility in proceedings, it does not authorize imposing liability on an entity that was never a party. Here, the insurer could be added after trial only if it (a) were the alter ego of defendant, and (b) it controlled the litigation. (24 C.A.4th 1420, 1421.) (See *Tokio Marine & Fire Ins. Corp. v. Western Pac. Roofing Corp.* (1999) 75 C.A.4th 110, 116, 89 C.R.2d 1 [C.C.P. 187 does not authorize naming party's nonparty insurer as judgment debtor; following *Triplett*].)

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b. Illustrations.

2 *Witkin Cal. Proc. Courts* § 186

[§ 186] Illustrations.

The following decisions illustrate situations in which courts have devised appropriate procedures:

Roche v. Superior Court (1916) 30 C.A. 255, 259, 157 P. 830 [procedure for notice in election contest].

Barnes v. District Court of Appeal (1918) 178 C. 500, 504, 173 P. 1100 [procedure for disbarment].

Byers v. Smith (1935) 4 C.2d 209, 213, 47 P.2d 705 [procedure for stay pending appeal taken from statute previously held unconstitutional, grounds of unconstitutionality no longer existing].

Swift v. Superior Court (1952) 39 C.2d 358, 364, 247 P.2d 6 [procedure for jury trial where will is contested before probate].

People v. Chessman (1959) 52 C.2d 467, 476, 341 P.2d 679 [procedure for preparation of reporter's transcript where reporter dies].

Strangman v. Duke (1956) 140 C.A.2d 185, 192, 295 P.2d 12 [no statutory procedure for creditor's sale where undivided interest was subject to homestead; trial judge created one procedure, and appellate court devised another].

Citizens Util. Co. of Calif. v. Superior Court (1963) 59 C.2d 805, 812, 31 C.R. 316, 382 P.2d 356 [procedure to value water system for condemnation purposes].

People v. Risenhoover (1966) 240 C.A.2d 233, 236, 49 C.R. 526, 6 Cal. Crim. Law (3d), *Criminal Judgment*, §114 [recognizing appeal from order denying new trial on guilt and sanity to take care of hiatus created by separate trials of guilt, sanity, and penalty in murder prosecution].

James H. v. Superior Court (1978) 77 C.A.3d 169, 175, 176, 143 C.R. 398, 10 Summary (10th), *Parent and Child*, §839 [Juvenile Court Law does not provide for hearing on minor's competency to stand trial and cooperate with counsel; court has inherent power to hold hearing similar to that required in criminal cases].

Dow Jones Co. v. Avenel (1984) 151 C.A.3d 144, 148, 198 C.R. 457, citing the text [amendment of judgment to add additional judgment debtors pursuant to alter ego doctrine]; *Hall, Goodhue, Haisley & Barker v. Marconi Conference Center Bd.* (1996) 41 C.A.4th 1551, 1555, 49 C.R.2d 286 [same].

In re Marriage of Johnson-Wilkes & Wilkes (1996) 48 C.A.4th 1569, 1578, 56 C.R.2d 323 [procedure to quash earnings assignment order for support, improvidently served on insurer to recover disability benefits that were exempt from enforcement].

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V. RULES OF COURT

B. Statewide Rules.

1. In General.

2 Witkin Cal. Proc. Courts § 187

[§ 187] In General.

(1) *Adoption and Scope.* The Judicial Council has long had constitutional authority to adopt statewide rules of court. (See Cal. Const., Art. VI, §6(d).) Under *Govt.C. 68070(b)*, the Judicial Council is encouraged to adopt rules "to provide for uniformity in rules and procedures throughout all courts in a county and statewide."

(2) *Compilation.* In 1962 the Judicial Council compiled all of the separate rules in one publication under the title *California Rules of Court*, with all rules classified under Titles, Divisions, Chapters, and Parts. In succeeding years, the Judicial Council made extensive changes in the numbering and arrangement of the Rules of Court. Generally, the original rules were numbered in a continuous sequence, using whole numbers and some decimal numbers.

(3) *Reorganization.* The Judicial Council began an extensive reorganization of the Rules of Court in 1999, which was completed in 2007. The rules are now numbered using a decimal numbering system in which the title number is indicated before the decimal point.

(4) *Titles.* The current rules are arranged in the following titles:

Title 1: Rules Applicable to All Courts. (See *infra*, §189.)

Title 2: Trial Court Rules. (See *infra*, §190.)

Title 3: Civil Rules. (See *infra*, §191.)

Title 4: Criminal Rules. (See *infra*, §192.)

Title 5: Family and Juvenile Rules. (See *infra*, §193.)

Title 6: [Reserved].

Title 7: Probate Rules. (See *infra*, §194.)

Title 8: Appellate Rules. (See *infra*, §195.)

Title 9: Rules on Law Practice, Attorneys, and Judges. (See *infra*, §196.)

Title 10: Judicial Administration Rules. (See *infra*, §197.)

(5) *Effective Dates*. Titles 1, 2, and 3 became effective January 1, 2007. Title 4 became effective January 1, 2001. Title 5 became effective January 1, 2003. Former Title 6 became effective January 1, 1999, and was renumbered Title 10 effective January 1, 2007. Currently, Title 6 is reserved for future use. Title 7 became effective January 1, 2000. Titles 8, 9, and 10 became effective January 1, 2007. (See generally C.R.C., Rule 1.4.)

(6) *Comments and Notes*. Many of the Rules of Court are followed by advisory committee comments or drafter's notes, which explain various changes in the rules.

(7) *Additional Elements*. The numbered titles of the Rules of Court are followed by five additional elements (see *infra*, §198). These are:

(a) Standards of Judicial Administration.

(b) Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

(c) Appendix A: Judicial Council Legal Forms List.

(d) Appendix B: Liability Limits of a Parent or Guardian Having Custody and Control of a Minor for Torts of a Minor.

(e) Appendix C: Guidelines for the Operation of Family Law Information Centers and Family Law Facilitator Offices.

(8) *Construction*. As used in the rules, "must" is mandatory, "may" is permissive, "should" indicates a nonbinding recommendation and "will" expresses a future contingency or predicts action in the ordinary course of events, but does not signify a mandatory duty. (C.R.C., Rule 1.5(b).)

(9) *Sanctions for Violating Rules*. C.R.C., Rule 2.30 authorizes sanctions for failure to comply with the Rules of Court in civil cases. It applies to the rules relating to general civil cases, unlawful detainer, probate proceedings, civil proceedings in the appellate division, and small claims cases. (C.R.C., Rule 2.30(a).) The court may order a person to pay "reasonable monetary sanctions" to the court or to an aggravated person, or both. For this purpose, "person" means a party, attorney, witness, or an insurer or other individual or entity whose consent is necessary to the disposition of the case. If the failure to comply with the rules is the responsibility of counsel, the penalty must be imposed on counsel and may not "adversely affect the party's cause of action or defense." (C.R.C., Rule 2.30(b).) (On award of attorneys' fees and costs, see C.R.C., Rule 2.30(d), on notice and procedure, see C.R.C., Rule 2.30(c).)

West's Key Number Digest, Courts 81-

SUPPLEMENT: [This section is current through the latest supplement]

(7) *Additional Elements*.

(f) *(New) Appendix D: Judicial Council Governance Policies*. (Added to Rules of Court in 2009.)



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B. Statewide Rules.

2. Filing, Publication, and Effective Date.

2 Witkin Cal. Proc. Courts § 188

[§ 188] Filing, Publication, and Effective Date.

(1) *In General.* The procedure for adopting or amending the Rules of Court is specified in C.R.C., Rule 10.20 et seq. The procedure includes proposals from the public and interested parties, review and recommendation by advisory committees, and circulation for public comment.

(2) *Judicial Council and Appellate Court Rules.* Rules adopted by the Judicial Council, the Supreme Court, and the Courts of Appeal take effect on the date fixed in the order of adoption or 60 days after adoption if no date is fixed. (*Govt.C. 68072.*) Under C.R.C., Rule 8.13, an amendment to the Appellate Rules must be "published in the advance pamphlets of the Official Reports" and takes effect on the date ordered by the Judicial Council. (On effective date of local rules, see *Govt.C. 68071*, *infra*, §200.)

(3) *Sources of Published Rules.* The adoption, amendment, and repeal of Judicial Council rules are published in the advance sheets of the California Reports and the California Reporter, in Deering's Advance Legislative Service, and in West's California Legislative Service. The collected, up-to-date rules are available under the title *California Rules of Court* in Deering's California Codes Annotated, Deering's California Civil Practice Codes, West's Annotated California Codes, and West's California Rules of Court. Judicial Council rules and local rules of the Courts of Appeal are also available at: www.courtinfo.ca.gov.

SUPPLEMENT: [This section is current through the latest supplement]



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B. Statewide Rules.

3. Rules Applicable to All Courts.

2 *Witkin Cal. Proc. Courts* § 189

[§ 189] Rules Applicable to All Courts.

Title 1, entitled *Rules Applicable to All Courts*, has the following structure:

Chapter 1. Preliminary Rules. (C.R.C., Rules 1.1 to 1.6.)

Chapter 2. Timing and Holidays. (C.R.C., Rules 1.10 to 1.11.)

Chapter 3. Service and Filing. (C.R.C., Rules 1.20 to 1.22.)

Chapter 4. Judicial Council Forms. (C.R.C., Rules 1.30 to 1.45.)

Chapter 5. Accommodations. (C.R.C., Rule 1.100.)

Chapter 6. Public Access to Court Proceedings. (C.R.C., Rule 1.150.)

Chapter 7. Form and Format of Papers. (C.R.C., Rule 1.200.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Statewide Rules.

4. Trial Court Rules.

2 *Witkin Cal. Proc. Courts* § 190

[§ 190] Trial Court Rules.

Title 2, entitled *Trial Court Rules*, has the following structure:

Division 1. General Provisions. (C.R.C., Rules 2.1 to 2.30.)

Chapter 1. Title and Application. (C.R.C., Rules 2.1 to 2.2.)

Chapter 2. Definitions and Scope of Rules. (C.R.C., Rules 2.3 to 2.10.)

Chapter 3. Timing. (C.R.C., Rule 2.20.)

Chapter 4. Sanctions. (C.R.C., Rule 2.30.)

Division 2. Papers and Forms to be Filed. (C.R.C., Rules 2.100 to 2.150.)

Chapter 1. Papers. (C.R.C., Rules 2.100 to 2.119.)

Chapter 2. General Rules on Forms. (C.R.C., Rules 2.130 to 2.141.)

Chapter 3. Other Forms. (C.R.C., Rule 2.150.)

Division 3. Filing and Service. (C.R.C., Rules 2.200 to 2.306.)

Chapter 1. General Provisions. (C.R.C., Rules 2.200 to 2.210.)

Chapter 2. Filing and Service by Electronic Means. (C.R.C., Rules 2.250 to 2.261.)

Chapter 3. Filing and Service by Fax. (C.R.C., Rules 2.300 to 2.306.)

Division 4. Court Records. (C.R.C., Rules 2.400 to 2.585.)

Chapter 1. General Provisions. (C.R.C., Rule 2.400.)

Chapter 2. Public Access to Electronic Trial Court Records. (C.R.C., Rules 2.500 to 2.507.)

Chapter 3. Sealed Records. (C.R.C., Rules 2.550 to 2.551.)

Chapter 4. Records in False Claims Act Cases. (C.R.C., Rules 2.570 to 2.573.)

Chapter 5. Other Sealed or Closed Records. (C.R.C., Rules 2.580 to 2.585.)

Division 5. Venue and Sessions.

Chapter 1. Venue. [Reserved]

Chapter 2. Sessions. [Reserved]

Division 6. Appointments by the Court or Agreement of the Parties. (C.R.C., Rules 2.810 to 2.894.)

Chapter 1. Court-Appointed Temporary Judges. (C.R.C., Rules 2.810 to 2.819.)

Chapter 2. Temporary Judges Requested by the Parties. (C.R.C., Rules 2.830 to 2.834.)

Chapter 3. Referees. [Reserved]

Chapter 4. Court Interpreters. (C.R.C., Rules 2.890 to 2.894.)

Division 7. Proceedings. (C.R.C., Rules 2.900 to 2.958.)

Chapter 1. General Provisions. (C.R.C., Rule 2.900.)

Chapter 2. Records of Proceedings. (C.R.C., Rules 2.950 to 2.958.)

Division 8. Trials. (C.R.C., Rules 2.1000 to 2.1058.)

Chapter 1. Jury Service. (C.R.C., Rules 2.1000 to 2.1010.)

Chapter 2. Conduct of Trial. (C.R.C., Rule 2.1030.)

Chapter 3. Testimony and Evidence. (C.R.C., Rule 2.1040.)

Chapter 4. Jury Instructions. (C.R.C., Rules 2.1050 to 2.1058.)

Division 9. Judgments. (C.R.C., Rule 2.1100.)

SUPPLEMENT: [This section is current through the latest supplement]

Division 4. Court Records.

Chapter 5. Name Change Proceedings Under Address Confidentiality Program. Chapter 5 was added in 2009. It includes C.R.C., Rules 2.575 to 2.577.

Chapter 5. Other Sealed or Closed Records. Chapter 5 was renumbered Chapter 6 in 2009.

Division 6. Appointments by the Court or Agreement of the Parties.

Chapter 2. Temporary Judges Requested by the Parties. Chapter 2 now includes C.R.C., Rules 2.830 to 2.835.



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B. Statewide Rules.

5. Civil Rules.

2 *Witkin Cal. Proc. Courts* § 191

[§ 191] Civil Rules.

Title 3, entitled *Civil Rules*, has the following structure:

Division 1. General Provisions. (C.R.C., Rules 3.1 to 3.37.)

Chapter 1. Preliminary Rules. (C.R.C., Rule 3.1.)

Chapter 2. Scope of the Civil Rules. (C.R.C., Rules 3.10 to 3.20.)

Chapter 3. Attorneys. (C.R.C., Rules 3.35 to 3.37.)

Division 2. Waiver of Fees and Costs. (C.R.C., Rules 3.50 to 3.63.)

Division 3. Filing and Service. (C.R.C., Rules 3.100 to 3.254.)

Chapter 1. Filing. (Rule 3.100.)

Chapter 2. Time for Service. (Rule 3.110.)

Chapter 3. Papers to be Served. (Rules 3.220 to 3.222.)

Chapter 4. Miscellaneous. (Rules 3.250 to 3.254.)

Division 4. Parties and Actions. (C.R.C., Rules 3.300 to 3.550.)

Chapter 1. [Reserved]

Chapter 2. Joinder of Parties. [Reserved]

Chapter 3. Related Cases. (Rule 3.300.)

Chapter 4. Consolidated Cases. (Rule 3.350.)

Chapter 5. Complex Cases. (Rules 3.400 to 3.403.)

Chapter 6. Coordination of Noncomplex Actions. (Rule 3.500.)

Chapter 7. Coordination of Complex Actions. (Rules 3.501 to 3.550.)

Article 1. General Provisions. (Rules 3.501 to 3.506.)

Article 2. Procedural Rules Applicable to All Complex Coordination Proceedings. (C.R.C., Rules 3.510 to 3.516.)

Article 3. Petitions and Proceedings for Coordination of Complex Actions. (C.R.C., Rules 3.520 to 3.532.)

Article 4. Pretrial and Trial Rules for Complex Coordinated Actions. (C.R.C., Rules 3.540 to 3.545.)

Article 5. Administration of Coordinated Complex Actions. (Rule 3.550.)

Division 5. Venue. [Reserved]

Division 6. Proceedings. (C.R.C., Rules 3.650 to 3.670.)

Chapter 1. General Provisions. [Reserved]

Chapter 2. Stay of Proceedings. (Rule 3.650.)

Chapter 3. Hearings, Conferences, and Proceedings. (Rule 3.670.)

Division 7. Civil Case Management. (C.R.C., Rules 3.700 to 3.771.)

Chapter 1. General Provisions. (C.R.C., Rule 3.700.)

Chapter 2. Differential Case Management. (C.R.C., Rules 3.710 to 3.715.)

Chapter 3. Case Management. (C.R.C., Rules 3.720 to 3.735.)

Chapter 4. Management of Collections Cases. (C.R.C., Rules 3.740 to 3.741.)

Chapter 5. Management of Complex Cases. (C.R.C., Rules 3.750 to 3.751.)

Chapter 6. Management of Class Actions. (C.R.C., Rules 3.760 to 3.771.)

Division 8. Alternative Dispute Resolution. (C.R.C., Rules 3.800 to 3.878.)

Chapter 1. General Provisions. (C.R.C., Rule 3.800.)

Chapter 2. Judicial Arbitration. (C.R.C., Rules 3.810 to 3.830.)

Chapter 3. General Rules Relating to Mediation of Civil Cases. (C.R.C., Rules 3.850 to 3.868.)

Article 1. [Reserved]

Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases. (C.R.C., Rules 3.850 to 3.868.)

Chapter 4. Civil Action Mediation Program Rules. (C.R.C., Rules 3.870 to 3.878.)

Division 9. References. (C.R.C., Rules 3.900 to 3.927.)

Chapter 1. Reference by Agreement of the Parties Under Code of Civil Procedure Section 638. (C.R.C., Rules 3.900 to 3.910.)

Chapter 2. Court-Ordered Reference Under Code of Civil Procedure Section 639. (C.R.C., Rules 3.920 to 3.927.)

Division 10. Discovery. (C.R.C., Rules 3.1000 to 3.1030.)

Chapter 1. Format of Discovery. (Rule 3.1000.)

Chapter 2. Conduct of Discovery. (Rule 3.1010.)

Chapter 3. Discovery Motions. (Rules 3.1020 to 3.1030.)

Division 11. Law and Motion. (C.R.C., Rules 3.1100 to 3.1370.)

Chapter 1. General Provisions. (Rules 3.1100 to 3.1109.)

Chapter 2. Format of Motion Papers. (Rules 3.1110 to 3.1116.)

Chapter 3. Provisional and Injunctive Relief. (Rules 3.1130 to 3.1184.)

Article 1. General Provisions. (Rule 3.1130.)

Article 2. Writs. (Rules 3.1140 to 3.1142.)

Article 3. Injunctions. (Rules 3.1150 to 3.1153.)

Article 4. Receiverships. (Rules 3.1175 to 3.1184.)

Chapter 4. Ex Parte Applications. (Rules 3.1200 to 3.1207.)

Chapter 5. Noticed Motions. (Rules 3.1300 to 3.1312.)

Chapter 6. Particular Motions. (Rules 3.1320 to 3.1362.)

Article 1. Pleading and Venue Motions. (Rules 3.1320 to 3.1326.)

Article 2. Procedural Motions. (Rules 3.1330 to 3.1335.)

Article 3. Motions to Dismiss. (Rules 3.1340 to 3.1342.)

Article 4. Summary Judgment Motions. (Rules 3.1350 to 3.1354.)

Article 5. Miscellaneous Motions. (Rules 3.1360 to 3.1362.)

Chapter 7. Other Civil Petitions. (Rule 3.1370.)

Division 12. Settlement. (C.R.C., Rules 3.1380 to 3.1385.)

Division 13. Dismissal of Actions. (C.R.C., Rule 3.1390.)

Division 14. Pretrial. [Reserved]

Division 15. Trial. (C.R.C., Rules 3.1540 to 3.1591.)

Chapter 1. General Provisions. [Reserved]

Chapter 2. Consolidation or Bifurcation of Cases for Trial. [Reserved]

Chapter 3. Nonjury Trials. [Reserved]

Chapter 4. Jury Trials. (Rule 3.1540.)

Chapter 5. Testimony and Evidence. [Reserved]

Chapter 6. Expert Witness Testimony. [Reserved]

Chapter 7. Jury Instructions. (Rule 3.1560.)

Chapter 8. Special Verdicts. (Rule 3.1580.)

Chapter 9. Statement of Decision. (Rules 3.1590 to 3.1591.)

Division 16. Post-Trial. (C.R.C., Rules 3.1600 to 3.1602.)

Division 17. Attorney's Fees and Costs. (C.R.C., Rules 3.1700 to 3.1702.)

Division 18. Judgments. (C.R.C., Rules 3.1800 to 3.1806.)

Division 19. Postjudgment and Enforcement of Judgments. (C.R.C., Rule 3.1900.)

Division 20. Unlawful Detainers. (C.R.C., Rule 3.2000.)

Division 21. Rules for Small Claims Actions. (C.R.C., Rules 3.2100 to 3.2120.)

Chapter 1. Trial Rules. (Rules 3.2100 to 3.2110.)

Chapter 2. Small Claims Advisors. (Rule 3.2120.)

SUPPLEMENT: [This section is current through the latest supplement]

Division 2. Waiver of Fees and Costs. Division 2 now includes C.R.C., Rules 3.50 to 3.58. *Division 8. Alternative Dispute Resolution.* Division 8 now includes C.R.C., Rules 3.800 to 3.898.

Chapter 3. General Rules Relating to Mediation of Civil Cases. Chapter 3 now includes C.R.C., Rules 3.850 to 3.872.

Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases. Article 2 now includes C.R.C., Rules 3.850 to 3.860.

Article 3. Requirements for Addressing Complaints About Court-Program Mediators. Article 3 was added in 2009. It includes C.R.C., Rules 3.865 to 3.872.

Chapter 4. Civil Action Mediation Program Rules. Chapter 4 now includes C.R.C., Rules 3.890 to 3.898.

Division 9. References. Division 9 now includes C.R.C., Rules 3.900 to 3.932.

Chapter 1. Reference by Agreement of the Parties Under Code of Civil Procedure Section 638. Chapter 1 now includes C.R.C., Rules 3.900 to 3.907.

Chapter 2. Court-Ordered Reference Under Code of Civil Procedure Section 639. Chapter 2 now includes C.R.C., Rules 3.920 to 3.926.

Chapter 3. Rules Applicable to References Under Code of Civil Procedure Section 638 or 639. Chapter 3 was added in 2009. It includes C.R.C., Rules 3.930 to 3.932.

Division 10. Discovery. Division 10 now includes C.R.C., Rules 3.1000 to 3.1010.

Chapter 3. Discovery Motions. Chapter 3 was deleted in 2008. Discovery motions are now covered in Division 11, Chapter 6, Article 4.

Division 11. Law and Motion. Chapter 6. *Particular Motions.*

Article 1. Pleading and Venue Motions. Article 1 now includes C.R.C., Rules 3.1320 to 3.1327.

Article 4. Discovery Motions. Article 4 was added in 2008. It includes C.R.C., Rules 3.1345 to 3.1348.

Article 4. Summary Judgment Motions. In 2008, Article 4 was renumbered Article 5.

Article 5. Miscellaneous Motions. In 2008, Article 5 was renumbered Article 6.

Chapter 7. Petitions Under the California Environmental Quality Act. Chapter 7 was added in 2009. It includes C.R.C., Rules 3.1365 to 3.1368.

Chapter 7. Other Civil Petitions. Chapter 7 was renumbered Chapter 8 in 2009.



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B. Statewide Rules.

6. Criminal Rules.

2 *Witkin Cal. Proc. Courts* § 192

[§ 192] Criminal Rules.

Title 4, entitled *Criminal Rules*, has the following structure:

Division 1. General Provisions. (C.R.C., Rules 4.1 to 4.3.)

Division 2. Pretrial. (C.R.C., Rules 4.100 to 4.155.)

Chapter 1. Pretrial Proceedings. (C.R.C., Rules 4.100 to 4.117.)

Chapter 2. Change of Venue. (C.R.C., Rules 4.150 to 4.155.)

Division 3. Trials. (C.R.C., Rules 4.200 to 4.210.)

Division 4. Sentencing. (C.R.C., Rules 4.300 to 4.325.)

Division 5. Sentencing--Determinate Sentencing Law. (C.R.C., Rules 4.401 to 4.480.)

Division 6. Postconviction and Writs. (C.R.C., Rules 4.510 to 4.552.)

Chapter 1. Postconviction. (C.R.C., Rule 4.510.)

Chapter 2. Habeas Corpus. (C.R.C., Rules 4.550 to 4.552.)

Division 7. Miscellaneous. (C.R.C., Rule 4.601.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Statewide Rules.

7. Family and Juvenile Rules.

2 *Witkin Cal. Proc. Courts* § 193

[§ 193] Family and Juvenile Rules.

Title 5, entitled *Family and Juvenile Rules*, has the following structure:

Division 1. Family Rules. (C.R.C., Rules 5.5 to 5.375.)

Chapter 1. General Provisions. (C.R.C., Rules 5.5 to 5.71.)

Chapter 2. Procedural Rules. (C.R.C., Rules 5.100 to 5.140.)

Chapter 3. Joinder of Parties. (C.R.C., Rules 5.150 to 5.162.)

Chapter 4. Bifurcation and Appeals. (C.R.C., Rules 5.175 to 5.180.)

Chapter 5. Child Custody. (C.R.C., Rules 5.210 to 5.235.)

Chapter 6. Child and Spousal Support. (C.R.C., Rule 5.275.)

Chapter 7. Rules for Title IV-D Support Actions. (C.R.C., Rules 5.300 to 5.375.)

Division 2. Rules Applicable in Family and Juvenile Proceedings. (C.R.C., Rules 5.400 to 5.487.)

Chapter 1. Contact and Coordination. (Rules 5.400 to 5.475.)

Chapter 2. Indian Child Welfare Act. (Rules 5.480 to 5.487.)

Division 3. Juvenile Rules. (C.R.C., Rules 5.500 to 5.830.)

Chapter 1. Preliminary Provisions--Title and Definitions. (Rules 5.500 to 5.504.)

Chapter 2. Commencement of Juvenile Court Proceedings. (Rules 5.510 to 5.526.)

Chapter 3. General Conduct of Juvenile Court Proceedings. (Rules 5.530 to 5.552.)

Chapter 4. Subsequent Petitions and Modifications. (Rules 5.560 to 5.580.)

Chapter 5. Appeals and Writs. (Rules 5.585 to 5.600.)

Chapter 6. Emancipation. (Rule 5.605.)

Chapter 7. Intercounty Transfers. (Rules 5.610 to 5.616.)

Chapter 8. General Court Authority. (C.R.C., Rules 5.620 to 5.630.)

Chapter 9. Parentage. (C.R.C., Rule 5.635.)

Chapter 10. Medication, Mental Health, and Education. (C.R.C., Rules 5.640 to 5.652.)

Chapter 11. Advocates for Parties. (C.R.C., Rules 5.655 to 5.663.)

Chapter 12. Cases Petitioned Under Section 300. (Rules 5.667 to 5.740.)

Article 1. Initial Hearing. (Rules 5.667 to 5.680.)

Article 2. Jurisdiction. (C.R.C., Rules 5.682 to 5.688.)

Article 3. Disposition. (C.R.C., Rules 5.690 to 5.705.)

Article 4. Reviews, Permanent Planning. (C.R.C., Rules 5.710 to 5.740.)

Chapter 13. Cases Petitioned Under Sections 601 and 602. (C.R.C., Rules 5.752 to 5.830.)

Article 1. Initial Appearance. (C.R.C., Rules 5.752 to 5.764.)

Article 2. Fitness Hearings. (C.R.C., Rules 5.766 to 5.772.)

Article 3. Jurisdiction. (C.R.C., Rules 5.774 to 5.782.)

Article 4. Disposition. (C.R.C., Rules 5.785 to 5.805.)

Article 5. Reviews and Sealing. (C.R.C., Rules 5.810 to 5.830.)

SUPPLEMENT: [This section is current through the latest supplement]

Division 1. Family Rules.

Chapter 6. Child and Spousal Support. In 2008, Chapter 6 was renamed Certification of Statewide Uniform Guideline Support Calculators.
Division 3. Juvenile Rules.

Chapter 1. Preliminary Provisions--Title and Definitions. Chapter 1 now includes C.R.C., Rules 5.500 to 5.505.

Chapter 3. General Conduct of Juvenile Court Proceedings. Chapter 3 now includes C.R.C., Rules 5.530 to 5.553.

Chapter 5. Appeals and Writs. Chapter 5 was renamed Appellate Review in 2009. It now includes C.R.C., Rules 5.585 to 5.595.

Chapter 12. Cases Petitioned Under Section 300.

Article 4. Reviews, Permanent Planning. Article 4 now includes C.R.C., Rules 5.706 to 5.740.



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B. Statewide Rules.

8. Probate Rules.

2 *Witkin Cal. Proc. Courts* § 194

[§ 194] Probate Rules.

Title 7, entitled *Probate Rules*, has the following structure:

Chapter 1. General Provisions. (C.R.C., Rules 7.1 to 7.10.)

Chapter 2. Notices, Publication, and Service. (C.R.C., Rules 7.50 to 7.55.)

Chapter 3. Pleadings. (C.R.C., Rules 7.101 to 7.104.)

Chapter 4. Appointment of Executors and Administrators. (C.R.C., Rules 7.150 to 7.151.)

Chapter 5. Bonding of Personal Representatives, Guardians, Conservators, and Trustees. (C.R.C., Rules 7.201 to 7.207.)

Chapter 6. Independent Administration of Estates. (C.R.C., Rule 7.250.)

Chapter 7. Spousal or Domestic Partner Property Petitions. (C.R.C., Rule 7.301.)

Chapter 8. Petitions for Instructions. [Reserved]

Chapter 9. Creditors' Claims. (C.R.C., Rules 7.401 to 7.403.)

Chapter 10. Sales of Real and Personal Property. (C.R.C., Rules 7.451 to 7.454.)

Chapter 11. Inventory and Appraisal. (C.R.C., Rule 7.501.)

Chapter 12. Accounts and Reports of Executors, Administrators, Conservators, and Guardians. (C.R.C., Rules 7.550 to 7.575.)

Chapter 13. Taxes. [Reserved]

Chapter 14. Preliminary and Final Distributions. (C.R.C., Rules 7.650 to 7.652.)

Chapter 15. Compensation of Personal Representatives and Attorneys. (C.R.C., Rules 7.700 to 7.707.)

Chapter 16. Compensation in All Matters Other Than Decedents' Estates. (C.R.C., Rules 7.750 to 7.776.)

Chapter 17. Contested Hearings and Trials. (C.R.C., Rule 7.801.)

Chapter 18. Discovery. [Reserved]

Chapter 19. Trusts. (C.R.C., Rules 7.901 to 7.903.)

Chapter 20. Claims of Minors and Persons with Disabilities. (C.R.C., Rules 7.950 to 7.955.)

Chapter 21. Guardianships. (C.R.C., Rules 7.1001 to 7.1015.)

Chapter 22. Conservatorships. (C.R.C., Rules 7.1050 to 7.1063.)

Chapter 23. Court-Appointed Counsel in Probate Proceedings. (C.R.C., Rule 7.1101.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Statewide Rules.

9. Appellate Rules.

2 *Witkin Cal. Proc. Courts* § 195

[§ 195] Appellate Rules.

Title 8, entitled *Appellate Rules*, has the following structure:

Division 1. Rules Relating to the Supreme Court and Courts of Appeal. (C.R.C., Rules 8.1 to 8.642.)

Chapter 1. General Provisions. (C.R.C., Rules 8.1 to 8.68.)

Article 1. In General. (C.R.C., Rules 8.1 to 8.23.)

Article 2. Service, Filing, Form, and Number of Documents. (C.R.C., Rules 8.25 to 8.44.)

Article 3. Applications and Motions; Extending and Shortening Time. (C.R.C., Rules 8.50 to 8.68.)

Chapter 2. Civil Appeals. (C.R.C., Rules 8.100 to 8.278.)

Article 1. Taking the Appeal. (C.R.C., Rules 8.100 to 8.116.)

Article 2. Record on Appeal. (C.R.C., Rules 8.120 to 8.163.)

Article 3. Briefs in the Court of Appeal. (C.R.C., Rules 8.200 to 8.224.)

Article 4. Hearing and Decision in the Court of Appeal. (C.R.C., Rules 8.240 to 8.278.)

Chapter 3. Criminal Appeals. (C.R.C., Rules 8.300 to 8.368.)

Article 1. Taking the Appeal. (C.R.C., Rules 8.300 to 8.316.)

Article 2. Record on Appeal. (C.R.C., Rules 8.320 to 8.346.)

Article 3. Briefs, Hearing, and Decision. (C.R.C., Rules 8.360 to 8.368.)

Chapter 4. Habeas Corpus Appeals and Writs. (C.R.C., Rules 8.380 to 8.388.)

Chapter 5. Juvenile Appeals and Writs. (C.R.C., Rules 8.400 to 8.474.)

Article 1. Appeals. (C.R.C., Rules 8.400 to 8.416.)

Article 2. Writs. (C.R.C., Rules 8.450 to 8.456.)

Article 3. Hearing and Decision. (C.R.C., Rules 8.470 to 8.474.)

Chapter 6. Conservatorship Appeals. (C.R.C., Rules 8.480 to 8.482.)

Chapter 7. Miscellaneous Writs. (C.R.C., Rules 8.490 to 8.499.)

Chapter 8. Proceedings in the Supreme Court. (C.R.C., Rules 8.500 to 8.552.)

Chapter 9. Appeals from Judgments of Death. (C.R.C., Rules 8.600 to 8.642.)

Article 1. General Provisions. (C.R.C., Rules 8.600 to 8.605.)

Article 2. Record on Appeal. (C.R.C., Rules 8.610 to 8.625.)

Article 3. Briefs, Hearing, and Decision. (C.R.C., Rules 8.630 to 8.642.)

Division 2. Rules Relating to the Superior Court Appellate Division. (C.R.C., Rules 8.800 to 8.936.)

Chapter 1. General Rules Applicable to Appellate Division Proceedings. (C.R.C., Rules 8.800 to 8.816.)

Chapter 2. Appeals and Records in Limited Civil Cases. (C.R.C., Rules 8.820 to 8.842.)

Article 1. Taking Civil Appeals. (C.R.C., Rules 8.820 to 8.825.)

Article 2. Records in Civil Appeals. (C.R.C., Rules 8.830 to 8.842.)

Chapter 3. Appeals and Records in Misdemeanor Cases. (C.R.C., Rules 8.850 to 8.873.)

Article 1. Taking Appeals in Misdemeanor Cases. (C.R.C., Rules 8.850 to 8.855.)

Article 2. Records in Misdemeanor Appeals. (C.R.C., Rules 8.860 to 8.873.)

Chapter 4. Briefs, Hearing, and Decision in Limited Civil and Misdemeanor Appeals. (C.R.C., Rules 8.880 to 8.891.)

Chapter 5. Appeals in Infraction Cases. (C.R.C., Rules 8.900 to 8.929.)

Article 1. Taking Appeals in Infraction Cases. (C.R.C., Rules 8.900 to 8.904.)

Article 2. Records in Infraction Appeals. (C.R.C., Rules 8.910 to 8.923.)

Article 3. Briefs, Hearing, and Decision in Infraction Appeals. (C.R.C., Rules 8.925 to 8.929.)

Chapter 6. Writ Proceedings. (C.R.C., Rules 8.930 to 8.936.)

Division 3. Trial of Small Claims Cases on Appeal. (C.R.C., Rules 8.950 to 8.966.)

Division 4. Transfer of Appellate Division Cases to the Court of Appeal. (C.R.C., Rules 8.1000 to 8.1018.)

Division 5. Publication of Appellate Opinions. (C.R.C., Rules 8.1100 to 8.1125.)

The original rules of court governing civil and criminal appeals to the Supreme Court and Courts of Appeal were adopted in 1943, under a statutory grant of power to supersede the former Supreme Court rules and statutes governing procedure and practice on appeal. (See 22 *C.2d* 1; for detailed studies by the draftsman, see 17 *So. Cal. L. Rev.* 79, 232; 35 *Cal. L. Rev.* 477.) The implied repeal of inconsistent code provisions that occurred on the effective date of July 1, 1943, was supplemented by a comprehensive statute enacted in 1945, expressly repealing those code provisions. The rules have been frequently amended. (See 9 *Cal. Proc.* (5th), *Appeal*, §8.)

In 1999, the Judicial Council's Appellate Advisory Committee and Appellate Rules Project Task Force embarked on an extensive review and revision of the California Rules of Court governing appellate practice. The revision was intended to simplify wording, eliminate inconsistencies, remove ambiguities and obsolete provisions, and promote clarity. Extensive changes became effective in 2002, 2003, 2004, and 2005. Although most of these changes were not substantive, the rules were subdivided, rearranged, and renumbered. These changes were explained in Advisory Committee Comments. In 2007, these rules were renumbered as part of the general reorganization of the Rules of Court.

SUPPLEMENT: [This section is current through the latest supplement]

Division 1. Rules Relating to the Supreme Court and Courts of Appeal.

Chapter 1. General Provisions.

Article 2. Service, Filing, Form, and Number of Documents. Article 2 now includes C.R.C., Rules 8.25 to 8.26.

Chapter 5. Juvenile Appeals and Writs.

Article 1. General Provisions. Article 1 was added in 2010. It includes C.R.C., Rules 8.400 to 8.401.

Article 1. Appeals. Article 1 was renumbered Article 2 in 2010. It includes C.R.C., Rules 8.403 to 8.416.

Article 2. Writs. Article 2 was renumbered Article 3 in 2010.

Chapter 7. Writs of Mandate, Certiorari, and Prohibition in the Supreme Court and Courts of Appeal. Chapter 7 was added in 2008. It includes C.R.C., Rules 8.485 to 8.493.

Chapter 7. Miscellaneous Writs. In 2008, Chapter 7 was renumbered Chapter 8 and renamed Miscellaneous Writs of Review. It includes C.R.C., Rules 8.495 to 8.499.

Chapter 8. Proceedings in the Supreme Court. In 2008, Chapter 8 was renumbered Chapter 9.

Chapter 9. Appeals From Judgments of Death. In 2008, Chapter 9 was renumbered Chapter 10. *Division 2. Rules Relating to the Superior Court Appellate Division.*

Chapter 1. General Rules Applicable to Appellate Division Proceedings. Chapter 1 now includes C.R.C., Rules 8.800 to 8.819.

Chapter 2. Appeals and Records in Limited Civil Cases. Chapter 2 now includes C.R.C., Rules 8.820 to 8.843.

Article 2. Records in Civil Appeals. Article 2 now includes C.R.C., Rules 8.830 to 8.843.



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B. Statewide Rules.

10. Rules on Law Practice, Attorneys, and Judges.

2 *Witkin Cal. Proc. Courts* § 196

[§ 196] Rules on Law Practice, Attorneys, and Judges.

Title 9, entitled *Rules on Law Practice, Attorneys, and Judges*, has the following structure:

Division 1. General Provisions. (C.R.C., Rules 9.1 to 9.2.)

Division 2. Attorney Admission and Disciplinary Proceedings and Review of State Bar Proceedings. (C.R.C., Rules 9.5 to 9.31.)

Chapter 1. General Provisions. (C.R.C., Rules 9.5 to 9.6.)

Chapter 2. Attorney Disciplinary Proceedings. (C.R.C., Rules 9.10 to 9.22.) (See 1 *Cal. Proc.* (5th), *Attorneys*, §552 et seq.)

Chapter 3. Legal Education. (C.R.C., Rules 9.30 to 9.31.)

Division 3. Legal Specialists. (Rule 9.35.)

Division 4. Appearances and Practice by Individuals Who Are Not Members of the State Bar of California. (C.R.C., Rules 9.40 to 9.48.)

Division 5. Censure, Removal, Retirement, or Private Admonishment of Judges. (C.R.C., Rules 9.60 to 9.61.)

SUPPLEMENT: [This section is current through the latest supplement]

Division 6. Judicial Ethics Opinions. Division 6 was added in 2009. It includes C.R.C., Rule 9.80.



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B. Statewide Rules.

11. Judicial Administration Rules.

2 *Witkin Cal. Proc. Courts* § 197

[§ 197] Judicial Administration Rules.

Title 10, entitled *Judicial Administration Rules*, has the following structure:

Division 1. Judicial Council. (C.R.C., Rules 10.1 to 10.81.)

Chapter 1. The Judicial Council and Internal Committees. (C.R.C., Rules 10.1 to 10.22.)

Chapter 2. Judicial Council Advisory Committees and Task Forces. (C.R.C., Rules 10.30 to 10.71.)

Chapter 3. Administrative Office of the Courts. (C.R.C., Rules 10.80 to 10.81.)

Division 2. Administration of the Judicial Branch. (C.R.C., Rules 10.101 to 10.491.)

Chapter 1. Budget and Fiscal Management. (C.R.C., Rules 10.101 to 10.105.)

Chapter 2. Court Security. (C.R.C., Rules 10.170 to 10.171.)

Chapter 3. Court Facilities. (C.R.C., Rules 10.180 to 10.184.)

Chapter 4. Management of Claims and Litigation. (C.R.C., Rules 10.201 to 10.203.)

Chapter 5. Ethics Training. (C.R.C., Rule 10.301.)

Chapter 6. Management of Human Resources. (C.R.C., Rule 10.350.)

Chapter 7. Court Technology, Information, and Automation. (C.R.C., Rule 10.400.)

Chapter 8. Minimum Education Requirements, Expectations and Recommendations. (C.R.C., Rule 10.451 to 10.491.)

Division 3. Judicial Administration Rules Applicable to All Courts. (C.R.C., Rules 10.502 to 10.505.)

Division 4. Trial Court Administration. (C.R.C., Rules 10.601 to 10.960.)

Chapter 1. General Rules on Trial Court Management. (C.R.C., Rules 10.601 to 10.630.)

Chapter 2. Trial Court Management of Human Resources. (C.R.C., Rules 10.650 to 10.670.)

Article 1. Trial Court Employee Labor Relations. (C.R.C., Rules 10.650 to 10.660.)

Article 2. Other Human Resources Rules. (C.R.C., Rule 10.670.)

Chapter 3. Subordinate Judicial Officers. (C.R.C., Rules 10.700 to 10.703.)

Chapter 4. Referees. [Reserved]

Chapter 5. Temporary Judges. (C.R.C., Rules 10.740 to 10.746.)

Chapter 6. Court Interpreters. (C.R.C., Rules 10.761 to 10.762.)

Chapter 7. Qualifications of Court Investigators, Probate Attorneys, and Probate Examiners. (C.R.C., Rules 10.776 to 10.777.)

Chapter 8. Alternative Dispute Resolution Programs. (C.R.C., Rules 10.780 to 10.783.)

Chapter 9. Trial Court Budget and Fiscal Management. (C.R.C., Rules 10.800 to 10.830.)

Chapter 10. Trial Court Records Management. (C.R.C., Rules 10.851 to 10.856.)

Chapter 11. Trial Court Automation. (C.R.C., Rule 10.870.)

Chapter 12. Trial Court Management of Civil Cases. (C.R.C., Rules 10.900 to 10.910.)

Chapter 13. Trial Court Management of Criminal Cases. (C.R.C., Rules 10.950 to 10.953.)

Chapter 14. Management of Self-Help Centers. (C.R.C., Rule 10.960.)

Division 5. Appellate Court Administration. (C.R.C., Rules 10.1000 to 10.1108.)

Chapter 1. Rules Relating to the Supreme Court and Courts of Appeal. (C.R.C., Rules 10.1000 to 10.1030.)

Chapter 2. Rules Relating to the Superior Court Appellate Division. (C.R.C., Rules 10.1100 to 10.1108.)

SUPPLEMENT: [This section is current through the latest supplement]

Division 2. Administration of the Judicial Branch.

Chapter 1. Budget and Fiscal Management. Chapter 1 now includes C.R.C., Rules 10.101 to 10.107.

Chapter 2. Court Security. Chapter 2 now includes C.R.C., Rules 10.170 to 10.173.

Division 3. Judicial Administration Rules Applicable to All Courts. Division 3 now includes C.R.C., Rules 10.500 to 10.505.



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B. Statewide Rules.

12. Additional Elements.

2 Witkin Cal. Proc. Courts § 198

[§ 198] Additional Elements.

In addition to the numbered titles, the Rules of Court include the following additional elements:

(1) *Standards of Judicial Administration*. The standards, recommended by the Judicial Council, were adopted at various times, beginning in 1964. Standards are guidelines and goals recommended by the Judicial Council. The nonbinding nature of the standards is indicated by the use of "should" instead of the mandatory "must." (See C.R.C., Rule 1.5(c).) The standards were renumbered in 2007. They are now arranged in 10 numbered titles that correspond to the titles of the Rules of Court, using a decimal numbering system in which the title number is indicated before the decimal point.

(2) *Ethics Standards for Neutral Arbitrators in Contractual Arbitration*. The standards were adopted in 2002, under the authority of C.C.P. 1281.85.

(3) *Appendix A. Judicial Council Legal Forms List*. This appendix, adopted in 1999, lists forms by form number, year, and title. Mandatory forms are marked by an asterisk.

(4) *Appendix B. Liability Limits of a Parent or Guardian*. This appendix, adopted in 1997, contains a formula and instructions for calculating the liability limits of a parent or guardian for the torts of a minor set forth in C.C. 1714.1 (see 6 *Summary* (10th), *Torts*, §1229).

(5) *Appendix C. Guidelines for the Operation of Family Law Information Centers and Family Law Facilitator Offices*. This appendix was adopted in 2001.

SUPPLEMENT: [This section is current through the latest supplement]



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C. Local Rules.

1. In General.

2 *Witkin Cal. Proc. Courts* § 199

[§ 199] In General.

(1) *Nature and Validity.* Although the California Rules of Court (*supra*, §187 et seq.) include up-to-date rules of uniform statewide operation, some matters may call for local treatment. Accordingly, superior courts sometimes adopt supplementary local rules, and these are valid if they do not conflict with statutes or Judicial Council rules. (*Govt.C. 68070(a)*; see *supra*, §181; *Tiffany v. State Farm Mut. Auto. Ins. Co.* (1993) 14 C.A.4th 1763, 1769, 19 C.R.2d 264 [local rule was inconsistent with Judicial Council Rule]; *Los Angeles County Dept. of Children & Family Services v. Superior Court* (1996) 51 C.A.4th 1257, 1267, 59 C.R.2d 613, citing the text [upholding local policy and rule governing appointment of independent counsel in dependency proceedings]; on effect of local rules in conflict with statute, see *infra*, §203 et seq.)

Local rules may not (a) impose a tax, charge, or penalty on any legal proceeding or for filing any pleading allowed by law, or (b) give an allowance to any officer for services. (*Govt.C. 68070(a)*; see *Hayes v. Butler* (1914) 25 C.A. 743, 745, 145 P. 553; *Hogoboom v. Superior Court* (1996) 51 C.A.4th 653, 59 C.R.2d 254, *infra*, §203.)

A local rule or policy must also be consistent with constitutional due process. (See *McLaughlin v. Superior Court* (1983) 140 C.A.3d 473, 481, 483, 189 C.R. 479, 10 Summary (10th), *Parent and Child*, §281 [local rule authorizing mediator in custody proceeding to make recommendation without statement of basis for recommendation was invalid unless parent was guaranteed right to cross-examine mediator].)

In some circumstances, a statute may invite or require local rules. (See *Family C. 3163* [courts must develop local rules for change of mediator and general problems relating to mediation].) The same is true of the Rules of Court. (See C.R.C., Rule 3.711 [court must adopt local rule on differential case management]; C.R.C., Rule 3.1800(b) [court may, by local rule, establish schedule of attorneys' fees to be allowed in case of default judgment]; C.R.C., Rule 5.450(c) [superior court must adopt local rule for court communication protocol for domestic violence and child custody orders].)

(2) *Uniformity.* In an effort to end the confusion incidental to variances in local practices, judges of the superior courts in the Fifth Appellate District in 1968 adopted a comprehensive set of uniform rules of practice. The new rules were promulgated after careful study and analysis by a special committee and the staff of the Administrative Office of

the Courts. In 1971, uniform local rules were also adopted for all superior courts in the Third Appellate District. Although uniform rules are no longer in effect throughout these districts, uniform rules remain in effect in a number of the superior courts in the Third Appellate District.

(3) *Sanctions*. C.C.P. 575.2 authorizes sanctions, including the imposition of attorneys' fees, for failure to comply with local rules. (See 7 Cal. Proc. (5th), *Trial*, §60 et seq.) A penalty may not be imposed under C.C.P. 575.2 without notice and an opportunity to be heard. (C.C.P. 575.2(a).) Doing so is a denial of due process. (*Annex British Cars v. Parker-Rhodes* (1988) 198 C.A.3d 788, 792, 244 C.R. 48; *In re Marriage of Quinlan* (1989) 209 C.A.3d 1417, 1422, 257 C.R. 850; see 7 Cal. Proc. (5th), *Trial*, §64.)

(4) *Local Forms*. C.R.C., Rule 10.614 specifies the size and format of local court forms and requires each form to include a unique identifying number and state its effective date. Each court is required to make available local forms and lists of current forms organized by form number and form name.

(5) *Areas in Which Local Rules Are Invalid*. "The Judicial Council has preempted all local rules relating to pleadings, demurrers, ex parte applications, motions, discovery, provisional remedies, and the form and format of papers. No trial court, or any division or branch of a trial court, may enact or enforce any local rule concerning these fields. All local rules concerning these fields are null and void unless otherwise permitted or required by a statute or a rule in the California Rules of Court." (C.R.C., Rule 3.20(a).) The rule does not apply to trial and post-trial proceedings, proceedings under C.C.P. 527.6, 527.7, and 527.8 (various injunctions), criminal proceedings, eminent domain proceedings, proceedings under the Family Code, the Probate Code, the Penal Code, and the Welfare and Institutions Code. Nor are local rules under the Trial Court Delay Reduction Act preempted. (C.R.C., Rule 3.20(b).) (See *Volkswagen of America v. Superior Court* (2001) 94 C.A.4th 695, 703, 114 C.R.2d 541 [local rule providing for master pleading system for complaints in complex litigation was consistent with Rules of Court and Judicial Council guidelines governing complex litigation, and was not preempted by C.R.C., Rule 3.20].)

(6) *Local Rules and Forms of Courts of Appeal*. Each of the six divisions of the Court of Appeal has adopted local rules and internal operating practices and procedures. Typically, the rules address issues such as the content and preparation of the clerk's and reporter's transcripts, extensions of time for filing briefs, stipulations, and mediation. The Courts of Appeal may also adopt local forms, such as applications for extension of time to file briefs and transcripts, docketing statements, and mediation evaluations. These rules and forms are usually published in the sources that publish the Rules of Court and are available on the judicial branch website: www.courtinfo.ca.gov.

SUPPLEMENT: [This section is current through the latest supplement]



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C. Local Rules.

2. Adoption and Publication.

2 *Witkin Cal. Proc. Courts* § 200

[§ 200] Adoption and Publication.

(1) *Scope of Requirements.* C.R.C., Rule 10.613 applies to trial courts, and to "every rule, regulation, order, policy, form, or standard of general application adopted by a court to govern practice or procedure in that court or by a judge of the court to govern practice or procedure in that judge's courtroom." (C.R.C., Rule 10.613(a).) Generally, the rule does not apply to local rules that "relate only to the internal management of the court." (C.R.C., Rule 10.613(j).)

(2) *Proposed Rules.* Except for rules specifying the time of hearing and similar calendaring matters, proposed rules must be distributed for comment to specified individuals and organizations at least 45 days before adoption. Distribution may be by posting on the court's website, subject to notice requirements and an opportunity to obtain a printed copy. (C.R.C., Rule 10.613(g); see *C.C.P. 575.1(a)*.)

(3) *Gender-Neutral Language.* Each court must use gender-neutral language in all new local rules, forms, and documents, and must review and revise existing rules, forms, and documents to ensure that gender-neutral language is used. (C.R.C., Rule 10.612.)

(4) *Periodic Review.* Each court must periodically review its rules and repeal those that have become outdated, unnecessary, or inconsistent with statewide rules or statutes. (C.R.C., Rule 10.613(h).)

(5) *Local Inspection and Copying.* Each court is required to make its local rules available for inspection and copying at every location at which the court generally accepts the filing of papers. The court may impose a reasonable charge for copying and a reasonable page limit on copying. A notice indicating where a full set of rules may be purchased is also required. (Rule 10.613(b).) A complete set of local rules must be maintained for public inspection by the executive officer of each superior court, although the task may be delegated to the county law library in specified circumstances. The rules may be made available on the Internet if public assistance is provided. (C.R.C., Rule 10.613(e); see *C.C.P. 575.1(b)*.)

(6) *Publication.* Each court's executive officer is the official publisher of the court's local rules unless the court appoints a public agency or a private company as the official publisher. The official publisher, which may charge a reasonable fee, reproduces the local rules and makes copies available for distribution. (C.R.C., Rule 10.613(c).) (On

format, see C.R.C., Rule 10.613(f).)

(7) *Rules of Individual Judges, Branches, and Districts.* Rules applicable in an individual judge's courtroom or in a particular branch or district of a court are local rules for purposes of *C.C.P.* 575.1 and the requirements of Judicial Council rules governing adoption, publication, comment, and filing. These rules must be published as part of the general publication of rules, and the published rules must be organized so that rules on a common subject appear sequentially, whether individual, branch, district, or courtwide. (*C.C.P.* 575.1(c).)

(8) *Report to Judicial Council.* Each court must file an electronic copy of rules and amendments with the Judicial Council 30 days before the effective date. (C.R.C., Rule 10.613(d).) The court must also notify the council of changes in the official publisher or the fee for copying, and the council must annually publish information about official publishers and fees. (C.R.C., Rule 10.613(c).)

(9) *Effective Date.* Generally, a rule adopted by the superior court takes effect on January 1 or July 1, whichever comes first, following the 30th day after the rule has been filed with the Judicial Council and made available for public examination. The Judicial Council may establish, by rule, a procedure for exceptions to the effective dates. (*Govt.C.* 68071.) The Council's exemption procedure is set forth in C.R.C., Rule 10.613(i), which provides for an alternative effective date if the following conditions are met:

(a) The presiding judge submits the proposed rule to the Judicial Council with a statement showing good cause for making the rule effective on the stated date.

(b) The Chair of the Judicial Council authorizes the rule to take effect on the proposed date.

(c) The rule is available for inspection as provided by C.R.C., Rule 10.613(b) on or before the effective date.

(10) *Effect of Noncompliance.* Rules that do not comply with the requirements governing adoption and publication may be invalid. (See *Simmons v. Pasadena* (1995) 40 C.A.4th Supp. 1, 5, 47 C.R.2d 102 [dismissal under local delay reduction rules was invalid where municipal court did not comply with statutes and Rules of Court governing adoption of local rules]; *Kalivas v. Barry Controls Corp.* (1996) 49 C.A.4th 1152, 1159, 57 C.R.2d 200 [summary judgment under local courtroom rule was invalid where judge did not comply with statutes and Rules of Court governing adoption of local rules]; *Hall v. Superior Court* (2005) 133 C.A.4th 908, 915, 917, 35 C.R.3d 206, citing the text [local practice requiring all motions to be filed and heard at least 30 days before trial was invalid local rule; requirements of *C.C.P.* 575.1 and *Govt.C.* 68071 were not met and practice was inconsistent with C.R.C., Rule 4.112].)

SUPPLEMENT: [This section is current through the latest supplement]

(8) *Report to Judicial Council.* C.R.C., Rule 10.613(d) was amended in 2008 to require filing with the Judicial Council 45 days before the effective date.

(9) *Effective Date.* *Govt.C.* 68071 was amended in 2008 to extend the public examination period to 45 days.



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C. Local Rules.

3. Local Policy.

2 *Witkin Cal. Proc. Courts* § 201

[§ 201] Local Policy.

In *Wisniewski v. Clary* (1975) 46 C.A.3d 499, 120 C.R. 176, the court upheld a Los Angeles policy requiring the personal attendance of parties at mandatory settlement conferences. (See 7 Cal. Proc. (5th), *Trial*, §§53, 58, 63.)

(a) *Govt.C. 68070*, authorizing local rules, makes no reference to local policies; but former C.R.C., Rule 981 (now C.R.C., Rule 10.613; *supra*, §200), dealing with filing and availability for public inspection, refers to policies as well as rules. And *Govt.C. 68070* is not a grant of legislative power but rather a confirmation of the inherent power of the court to control its proceedings, recognized in *C.C.P. 128* and *187* (*supra*, §§174, 185). (46 C.A.3d 504.)

(b) "[I]t seems clear to us that courts which may make local rules may also make local policies--a lower and less permanent form of specification of the practices to be followed in the particular court. ... So long as those to be governed by the local policies of these courts are fully and fairly informed of their requirements in advance and particularly of the fact (when such is the fact) that these policies represent requirements rather than mere guidelines, we regard them as being as fully enforceable as court rules. These have been held to have the legal effect of procedural statutes, so long as they are not contrary to higher law." (46 C.A.3d 504, citing the text.)

(c) "We would suppose that the Los Angeles County Superior Court prescribes practices before it by policy instead of by rule whenever the judges of that court conclude that the matter at hand is more appropriately described as a policy rather than as a rule--whether because of its greater specificity, the probability of more frequent change, its use as only a guideline or for other sound reasons." (46 C.A.3d 504, footnote 4.) (See *Estate of Gilfillan* (1978) 79 C.A.3d 429, 432, 144 C.R. 862; *Shadle v. Corona* (1979) 96 C.A.3d 173, 177, 157 C.R. 624, *infra*, §205.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Local Rules.

4. Duty of Clerk To Accept Filing Inconsistent with Local Rule.

2 *Witkin Cal. Proc. Courts* § 202

[§ 202] Duty of Clerk To Accept Filing Inconsistent with Local Rule.

In *Rojas v. Cutsforth* (1998) 67 C.A.4th 774, 79 C.R.2d 292, plaintiff's mailed complaint was returned by the clerk without filing based on alleged errors in the Declaration for Court Assignment required by local rules. As a result, the statute of limitations expired. *Held*, because the clerk had no proper basis for rejecting the complaint, it was deemed filed on the date it was initially received. "It is difficult enough to practice law without having the clerk's office as an adversary. Here, paltry nit-picking took the place of common sense and fairness. Where, as here, the defect, if any, is insubstantial, the clerk should file the complaint and notify the attorney or party that the perceived defect should be corrected at the earliest opportunity." (67 C.A.4th 777.)

In *Carlson v. Department of Fish & Game* (1998) 68 C.A.4th 1268, 80 C.R.2d 601, plaintiff's complaint, in proper form under the California Rules of Court, was delivered to the superior court. The clerk returned the complaint for failure to comply with a local rule requiring a Certificate of Assignment. By the time the complaint was accepted for filing with the certificate a week later, the statute of limitations had run. *Held*, the complaint was effective on the date first presented for filing.

(a) The clerk had no authority under state law to reject the filing. Former C.R.C., Rule 201 (now C.R.C., Rule 2.118) requires the clerk to refuse to file a paper that does not comply with various format requirements in the Rules of Court, but does not direct or permit the clerk to refuse to file a paper that does not comply with a local rule. (68 C.A.4th 1272.) When a paper consistent with the rule is filed, the clerk has a ministerial duty to file it. Under *Rojas*, a paper is deemed filed when deposited with the clerk if the clerk has no proper basis for rejecting it. (68 C.A.4th 1276.)

(b) The clerk had no authority under local rule, either express or implied, to reject the filing. No local rule purported to create an exception to the clerk's ministerial duty to file, and nothing in C.C.P. 575.2, providing sanctions for the violations of local rules, authorizes the clerk to refuse to file a pleading. On the contrary, the statute expresses the Legislature's intent that cases not be foreclosed for noncompliance with local rules. (68 C.A.4th 1279, 1280.) A panoply of sanctions are available to redress local rule violations, but rejecting a conforming paper and possibly causing the statute of limitations to run is not one of them. (68 C.A.4th 1282.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Effect of Rules.

1. Conflict With Statutes.

a. Invalid Rules.

2 *Witkin Cal. Proc. Courts* § 203

[§ 203] Invalid Rules.

Under *Govt.C. 68070*, a court may make rules not inconsistent with statutes or Judicial Council rules (see *supra*, §181), and the Judicial Council must likewise exercise its constitutional power only in conformity with statute. (Cal. Const., Art. VI, §6(d), *infra*, §390.) A number of decisions have held rules invalid or ineffective when in conflict with a statutory provision. (See *People v. McClellan* (1866) 31 C. 101; *People v. Metropolitan Surety Co.* (1912) 164 C. 174, 177, 128 P. 324; *Connell v. Higgins* (1915) 170 C. 541, 546, 150 P. 769; and see generally 20 *Am.Jur.2d* (2005 ed.), *Courts* §51 et seq.; on invalidity of rule denying constitutional due process, see *McLaughlin v. Superior Court* (1983) 140 C.A.3d 473, 481, 483, 189 C.R. 479.) The following decisions are illustrative:

In re Robin M. (1978) 21 C.3d 337, 346, 146 C.R. 352, 579 P.2d 1 [former Juvenile Court Rule permitting detention of minor beyond period allowed by statute].

Elkins v. Superior Court (2007) 41 C.4th 1337, 1356, 63 C.R.3d 483, 163 P.3d 160, citing the text [local rule and order that called for written declarations in lieu of direct testimony in marital dissolution proceedings were inconsistent with hearsay rule to extent they rendered hearsay declarations admissible as basis for decision in contested trial].

Klokke Inv. Co. v. Superior Court (1919) 39 C.A. 717, 719, 179 P. 728 [superior court rule requiring registered mail is inconsistent with statute allowed ordinary mail].

Conae v. Conae (1952) 109 C.A.2d 696, 241 P.2d 266 [judge's order to show cause in divorce action called for personal service on husband; service on attorney, pursuant to C.C.P. 1015, was sufficient, and rule attempting to add requirements to statute was void].

Turlock Golf & Country Club v. Superior Court (1966) 240 C.A.2d 693, 700, 50 C.R. 70 [local rule requiring deposit of jury fees and mileage in excess of amount specified in statute].

Hebert v. Harn (1982) 133 C.A.3d 465, 467, 470, 184 C.R. 83 [local rule requiring motion and showing of good cause to obtain trial de novo after judicial arbitration, contrary to C.C.P. 1141.20 and former C.R.C., Rule 1616 (now

C.R.C., Rule 3.826), giving unconditional right to trial de novo on timely request].

Lang v. Superior Court (1984) 153 C.A.3d 510, 516, 200 C.R. 526 [local rule requiring noticed motion of requests for wage assignments for child support is in conflict with statute and former C.R.C., Rule 1285.65 permitting ex parte requests].

Iverson v. Superior Court (1985) 167 C.A.3d 544, 548, 213 C.R. 399 [local rule requiring opposition papers to be filed 5 "court" days before hearing is invalid to extent inconsistent with former wording of C.C.P. 1005, construed to require filing 5 "calendar" days before hearing].

Sadler v. Turner (1986) 186 C.A.3d 245, 249, 230 C.R. 561 [former C.R.C., Rule 325(f), requiring notice of motion to dismiss following failure to amend after demurrer is sustained is in conflict with former C.C.P. 581(c), allowing ex parte motion without notice].

Estate of Brown (1987) 193 C.A.3d 1612, 1619, 239 C.R. 147 [probate court is not bound by historical local practice for fixing commissions on sale of probate assets in conflict with commission restrictions in former Prob.C. 785].

Wells Fargo Bank v. Superior Court (1988) 206 C.A.3d 918, 923, 254 C.R. 68 [local rule effectively requiring party to file complex summary judgment motion 6 months before trial date is inconsistent with C.C.P. 437c].

California Court Reporters Assn. v. Judicial Council of Calif. (1995) 39 C.A.4th 15, 46 C.R.2d 44, *infra*, §383 [Judicial Council rules authorizing electronic record in superior court are inconsistent with statutes providing for shorthand reporters].

Kalivas v. Barry Controls Corp. (1996) 49 C.A.4th 1152, 1158, 57 C.R.2d 200 [local courtroom rule requiring joint statement of disputed facts is in conflict with C.C.P. 437c, requiring each party to file separate statement].

Trans-Action Commercial Investors, Ltd. v. Firmaterr (1997) 60 C.A.4th 352, 371, 70 C.R.2d 449, 7 Cal. Proc. (5th), *Trial*, §59, citing the text [former C.R.C., Rule 227, authorizing court to impose expenses and counsel fees "in addition to any other sanction permitted by law," is in conflict with sanctions statutes "to the extent the rule purports to allow sanctions inconsistent with the limits and conditions provided in an applicable statute"].

Lokeijak v. Irvine (1998) 65 C.A.4th 341, 344, 76 C.R.2d 429 [local policy encouraging "appropriate alternative" to summary judgment motion is in conflict with C.C.P. 437c, authorizing motion].

Pacific Trends Lamp & Lighting Products v. J. White (1998) 65 C.A.4th 1131, 1135, 76 C.R.2d 918 [local rule requiring that attorneys "meet and confer" before motion hearings and imposing sanctions for failure to do so is inconsistent with detailed statutory procedure for new trial motion and procedural requirements of sanctions statutes].

Thatcher v. Lucky Stores (2000) 79 C.A.4th 1081, 1086, 94 C.R.2d 575 [local rule authorizing court to grant summary judgment based solely on absence of opposition, without preliminary finding that moving party met initial burden of proof, is in conflict with C.C.P. 437c].

Motion Picture & Television Fund Hosp. v. Superior Court (2001) 88 C.A.4th 488, 492, 105 C.R.2d 872 [purported local practice delaying peremptory challenge to judge newly assigned for all purposes until judge is actually hearing cases is in conflict with time provisions of peremptory challenge statutes and invalid].

Boyle v. CertainTeed Corp. (2006) 137 C.A.4th 645, 653, 40 C.R.3d 501 [superior court general order authorizing expedited summary judgment motion in asbestos litigation on 60 days' notice and based solely on attorney's declaration was in conflict with C.C.P. 437c, requiring both 75 days' notice and supporting papers showing material facts; order improperly shifted moving party's burden of producing evidence].

In *Turesky v. Superior Court* (1950) 97 C.A.2d 838, 218 P.2d 784, the invalid rule was an individual judge's unwritten practice. Petitioner brought a proceeding under C.C.P. 1275 to change his name. The court put the matter over for about 6 months, pursuant to the policy of that department requiring 1 year's residence in the state before acting on a name-change petition (to enable law enforcement officers, creditors, and dependents to locate the applicant). *Held*, the policy and order thereunder were not sanctioned by the statute on continuances, and mandamus was issued to compel a hearing on the petition. "[T]he foregoing 'established policy' of respondent court is arbitrary, without warrant of law, and an abuse of the rule-making power of said court." (97 C.A.2d 840.)

In *Conservatorship of Kevin M.* (1996) 49 C.A.4th 79, 56 C.R.2d 765, 3 Cal. Proc. (5th), Actions, §104, an unwritten procedure of the superior court permitted conservatees to reserve the right to a jury trial, and to exercise it at any time during the conservatorship, despite Welf.C. 5350(d), requiring that a demand for a jury trial be made within 5 days of the hearing on the conservatorship petition. *Held*, the unwritten procedure is fatally inconsistent with the statute. Although the 5-day requirement is mandatory, not jurisdictional, the procedure and the statute cannot coexist. (49 C.A.4th 89.) The procedure ignores a mandatory time limit established by the Legislature for the conservatee to claim the jury trial right, and transfers the right from the hearing establishing the conservatorship to a rehearing on the continued existence of the conservatee's disability. (49 C.A.4th 90.)

In *Hogoboom v. Superior Court* (1996) 51 C.A.4th 653, 59 C.R.2d 254, a local rule of the Los Angeles Superior Court imposed a mediation fee in family law and domestic violence matters. *Held*, the fee is invalid.

(a) The authority to impose fees in the field of family law mediation has been preempted by statute. The statutory scheme for imposing fees is comprehensive. It authorizes a small fee in family law matters statewide, permits additional conciliation court fees in three specified counties, and prohibits counties generally from imposing fees for judicial functions due to increases in costs. Because mediation fees are completely covered by general law and thus exclusively a matter of statewide concern, a local rule imposing additional fees is preempted. (51 C.A.4th 668, 669.)

(b) The local fee here also violates *Govt.C. 68070(a)(1)*, which prohibits local trial court rules that impose charges on legal proceedings. (See *supra*, §199.) Because mediation is effectively required before issues of custody and visitation can be heard, failure to pay the mandatory fee not only bars mediation but also the conduct of further proceedings on any other issue. (51 C.A.4th 670.)

(c) Although *Family C. 3163* authorizes local rules to deal with "general problems relating to mediation," it is not an invitation to impose fees. The general problems referred to in the statute are issues relating to the relationship of the parties. (51 C.A.4th 671.)

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1. Conflict With Statutes.

b. Construction To Avoid Invalidity.

2 Witkin Cal. Proc. Courts § 204

[§ 204] Construction To Avoid Invalidity.

A characteristic approach is to modify the rule by "construction" to avoid invalidity. In *Dikkers v. Superior Court* (1948) 88 C.A.2d 816, 818, 199 P.2d 709, a rule provided that the absence of a memorandum of points and authorities could be construed as an admission of lack of merit in a demurrer, allowing summary overruling without consideration of its grounds. The court pointed out that, under former C.C.P. 434, the defect of no statement of a cause of action would not be waived even by failure to file a general demurrer; hence, the mere failure to cite authorities could not constitute a waiver of the objection. Accordingly, the court held that, to avoid invalidity, the rule would be interpreted as applicable only to *special demurrers*, grounds for which (with the exception of lack of jurisdiction) are waived by failure to demur.

Sometimes the rule, if not in plain contradiction of the statute, is upheld as an implementation or reasonable extension of the legislative enactment. (See *Helbush v. Helbush* (1930) 209 C. 758, 764, 290 P. 18; *Butterfield v. Butterfield* (1934) 1 C.2d 227, 34 P.2d 145 [requirement of points and authorities on motion for change of venue]; *Greenamyre v. Board of Lugo Elementary School Dist.* (1931) 116 C.A. 319, 323, 2 P.2d 848; *Lavore v. Industrial Acc. Com.* (1938) 29 C.A.2d 255, 258, 84 P.2d 176; *Estate of Gilfillan* (1978) 79 C.A.3d 429, 432, 437, 144 C.R. 862; *Maldonado v. Superior Court* (1984) 162 C.A.3d 1259, 1269, 209 C.R. 199 [construing rule that trial on appeal from small claims judgment must be conducted informally to permit jury trial where required by statute]; *Lammers v. Superior Court* (2000) 83 C.A.4th 1309, 1318, 100 C.R.2d 455, citing the text [local "pre-read" rule required parties in family law cases to file request for court to read designated portions of case file before hearing; rule conserves judicial time by avoiding review of files of cases that go off calendar, does not permit court to decide contested matter solely on argument without considering timely proffered evidence in record, and thus does not deny meaningful opportunity to be heard].)

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1. Conflict With Statutes.

c. Illustration: Time for Filing Opposition Papers.

2 *Witkin Cal. Proc. Courts* § 205

[§ 205] Illustration: Time for Filing Opposition Papers.

In *Albermont Petroleum, Ltd. v. Cunningham* (1960) 186 C.A.2d 84, 9 C.R. 405, plaintiff sued defendant on promissory notes, and moved for summary judgment. On the date set for hearing the motion, defendant presented counteraffidavits alleging fraud discovered immediately before making them. The trial judge, invoking a local rule of the Los Angeles Superior Court law and motion department that all points and authorities and affidavits "should be filed" by noon of the day preceding the hearing, refused to permit the filing, denied a continuance, and granted summary judgment. Defendant's motion for relief under C.C.P. 473 was likewise denied. *Held*, reversed. (a) If mandatory, the rule was in conflict with the former wording of C.C.P. 437c, the summary judgment statute, which permitted filing of counteraffidavits either before or at the hearing. (186 C.A.2d 90, 93.) (b) If the rule was not mandatory, it was an abuse of discretion for the judge to refuse permission to file. (186 C.A.2d 94.)

In *Shadle v. Corona* (1979) 96 C.A.3d 173, 157 C.R. 624, a Los Angeles policy memorandum governing law and motion proceedings required filing of the opposing party's documents not later than 3 court days prior to the hearing. Defendant moved for summary judgment and plaintiff sought to file counterdeclarations at the hearing. *Held*, the policy was valid and the lower court properly declined to permit the filing. The court distinguished and criticized *Albermont Petroleum* as follows: (a) The local policy of the law and motion department in *Albermont* was in conflict with the official rules of the Los Angeles Superior Court, and was invalid for that reason. (b) The further observation in *Albermont* that the local policy was in conflict with former C.C.P. 437c was unnecessary to the decision and unsound. "In the absence of any positive statement the presumed intent of the Legislature is that all procedural details, including filing deadlines for papers in opposition, are subject to court rule. ... The requirement that the opposing papers be filed a reasonable time in advance of the hearing helps to ensure that the court and the parties will be familiar with the facts and the issues so that meaningful argument can take place and an informed decision rendered at the earliest convenient time." (96 C.A.3d 178.)

In *Mann v. Cracchiolo* (1985) 38 C.3d 18, 210 C.R. 762, 694 P.2d 1134, defendants moved for summary judgment, and plaintiffs filed their opposition papers 2 court days before the hearing, contrary to the local rule requiring filing at least 3 court days before the hearing. The court refused to consider the opposition papers, and granted the motions. *Held*, reversed.

(a) The holding of *Albermont Petroleum*, that former C.C.P. 437c precludes local rules restricting the time for filing opposition papers, was rejected in *Shadle* and in *Kapitanski v. Von's Grocery Co.* (1983) 146 C.A.3d 29, 193 C.R. 839. "We agree with the view expressed in *Shadle* and *Kapitanski* that in the absence of legislative direction to the contrary courts may adopt local rules with the force of law and that reasonable local rules limiting the time to file opposition to the summary judgment motion were not precluded by" C.C.P. 437c. (38 C.3d 29.)

(b) In applying the criteria of C.C.P. 473, the trial judge should exercise discretion and relieve a party from late filing in violation of the local rule if the attorney's conduct was *reasonable*. This approach recognizes the preference for disposition of cases on their merits and helps to avoid expenditure of unnecessary time and money on preparation of later motions for relief under C.C.P. 473. (38 C.3d 29, 30.) The local rule here permits a trial court to exercise its discretion to permit late filing, and the trial court's refusal to consider the opposition papers was an abuse of discretion. (38 C.3d 30.)

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2. Mandatory But Not Jurisdictional.

2 *Witkin Cal. Proc. Courts* § 206

[§ 206] Mandatory But Not Jurisdictional.

A valid rule, phrased in mandatory language, is generally said to have "the force of positive law," i.e., to be as binding on the court and parties as a procedural statute. (*Brooks v. Union Trust Co. & Realty Co.* (1905) 146 C. 134, 138, 79 P. 843; *People v. Walker* (1926) 76 C.A. 192, 200, 244 P. 94; *Clinton v. Shaw* (1943) 57 C.A.2d 630, 633, 135 P.2d 172; *Kuhn v. Ferry & Hensler* (1948) 87 C.A.2d 812, 815, 197 P.2d 792; *Cantillon v. Superior Court* (1957) 150 C.A.2d 184, 187, 309 P.2d 890; see 17 So. Cal. L. Rev. 290 [time provisions in appellate rules]; 20 Am.Jur.2d (2005 ed.), Courts §50.)

It is equally true that mandatory procedural rules, like mandatory procedural statutes, are seldom *jurisdictional*. Hence a departure from the rule is ordinarily not subject to restraint by prohibition or review by certiorari, and may not even be reversible error. (See *White v. Superior Court* (1895) 110 C. 60, 67, 42 P. 480, *infra*, §227 [violation of rule governing transfer of causes between departments; no excess of jurisdiction, certiorari denied]; *Helbush v. Helbush* (1930) 209 C. 758, 764, 290 P. 18 [no prejudice shown, not reversible error].) An exception is the jurisdictional time limit for filing a notice of appeal, formerly a statutory provision, now restated as C.R.C., Rule 8.104. (See 17 So. Cal. L. Rev. 290; 35 Cal. L. Rev. 484; 9 Cal. Proc. (5th), *Appeal*, §575.)

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3. Power of Court To Deviate.

2 *Witkin Cal. Proc. Courts* § 207

[§ 207] Power of Court To Deviate.

There seems to be a general principle that rules of court are designed to accomplish the ends of justice, to protect rights, and to implement the substantive law, and that, when they would operate to defeat these purposes, the court may depart from them "in the interests of justice" to assure a fair trial or other determination "on the merits." (See *Pickett v. Wallace* (1880) 54 C. 147, 148 ["we think the rules of this Court, which would, if construed according to their terms, deprive the appellant of an opportunity to present his cause to a court competent to hear and decide it, should be suspended"]; *People v. Silva* (1898) 121 C. 668, 670, 54 P. 146 ["when the strict observance of the rule would operate to defeat or impede justice it is always within the power of the court to suspend the rule, and it is its duty to do so"]; *Mann v. Cracchiolo* (1985) 38 C.3d 18, 210 C.R. 762, 694 P.2d 1134, supra, §205; *Johnson v. Sun Realty Co.* (1934) 138 C.A. 296, 299, 32 P.2d 393 [demurrer was properly considered, disregarding rule requiring certificate of good faith and rule governing transfer of cases]; *La Bue v. Superior Court* (1977) 75 C.A.3d 264, 268, 142 C.R. 83 [under local rule, relevant facts were deemed admitted on failure to reply to Pre-Trial Statement/Request for Admissions in dissolution proceedings, but compliance was excused in view of policy favoring trial on merits].)

The principle is particularly applicable in emergencies when strict compliance with the rules is impossible or impracticable. (See *Hubert v. Hubert* (1947) 78 C.A.2d 498, 503, 178 P.2d 15 [rule requiring *registered* mailing of copy of summons disregarded; "it was clearly within the discretion of the judge to recognize the emergency created by war and to authorize the only form of mailing permitted by the post office authorities"].)

One of the broadest statements of the power to deviate is written into the Appellate Rules: "For good cause, a reviewing court may relieve a party from default for any failure to comply with these rules except the failure to file a timely notice of appeal or a timely statement of reasonable grounds in support of a certificate of probable cause." (C.R.C., Rule 8.60(d); see *Averill v. Lincoln* (1944) 24 C.2d 761, 765, 151 P.2d 119; 17 So. Cal. L. Rev. 292; 35 Cal. L. Rev. 500.)

In *Pianka v. California* (1956) 46 C.2d 208, 293 P.2d 458, the court, without discussion of the point, assumed the power to deviate from a *statutory procedure*. Defendant filed a "speaking motion" to dismiss, supported by an affidavit. The court held that this well-established practice is no longer proper because the summary judgment procedure is adequate (see 5 *Cal. Proc.* (5th), *Pleading*, §1006), and noted that the motion wholly failed to meet the requirements of

the summary judgment statute (*C.C.P. 437c*). Nevertheless, "since this is the first time the question has been decided, we have tested the propriety of the judgment under the rules laid down by the decisions involving speaking motions." (*46 C.2d 212.*)

An even more radical departure was approved in *Adams v. Sharp* (1964) *61 C.2d 775*, *40 C.R. 255*, *394 P.2d 943*. A Los Angeles superior court rule required that the oath of an executor or administrator be administered in this state. The probate judge accepted an oath administered elsewhere. (See *14 Summary* (10th), *Wills and Probate*, §446.) The Judicial Council rules were silent on this matter, and the opinion did not challenge the validity of the local rule. Instead the court stated the question involved as follows: "Does an order of the superior court in conflict with a local rule of court but expressly waiving compliance with such rule take precedence over the conflicting rule of court?" The answer was "yes," because "[r]ules of court are but a means to accomplish the ends of justice, and it is always in the power of the court to suspend its own rules, or to except a particular case from their operation, whenever the purposes of justice require." (*61 C.2d 777.*)

The disturbing element in the case is that there was no indication of the judge's reasons for deviation; i.e., there is nothing in the opinion to suggest that "the purposes of justice" were served by waiving the rule.

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VI. THE SUPERIOR COURT

A. In General.

1. Court of General Jurisdiction.

2 Witkin Cal. Proc. Courts § 208

[§ 208] Court of General Jurisdiction.

California's single trial court, with unlimited monetary and subject matter jurisdiction, is the superior court. (On organization, see *infra*, §209; on jurisdiction, see *infra*, §210 et seq.)

The superior court is a court of record (see *supra*, §162) and a court of general jurisdiction. It is, however, more than a trial court of general civil and criminal jurisdiction. It has both *original* and *appellate* jurisdiction, and, through its departments or branches, exercises two important kinds of special jurisdiction: probate and juvenile. (On appellate jurisdiction, see *infra*, §341; on criminal jurisdiction, see 4 *Cal. Crim. Law* (3d), *Jurisdiction and Venue*, §13 et seq.; on probate jurisdiction, see 14 *Summary* (10th), *Wills and Probate*, §351 et seq.; on juvenile jurisdiction, see 10 *Summary* (10th), *Parent and Child*, §449 et seq.)

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VI. THE SUPERIOR COURT

A. In General.

2. Court of Particular County.

2 *Witkin Cal. Proc. Courts* § 209

[§ 209] Court of Particular County.

Under one theory, the superior court is a state court with statewide jurisdiction, and there is only one superior court of the state. Under this theory legal papers are usually entitled "Superior Court of the State of California for the County of ____ ." (See 1 C.E.B., 1 Civil Proc. Before Trial 4th, §11.21.) And its process extends throughout the state. (*C.C.P.* 71; see 3 *Cal. Proc.* (5th), *Actions*, §965.)

Nevertheless, the common practice is to refer to the superior court of a particular county, and this practice is supported by the language of the Constitution: "In each county there is a superior court of one or more judges." (Cal. Const., Art. VI, §4; see P.C. 914.1 [referring to "the superior court of the county"]; *Dineen v. San Francisco* (1940) 38 C.A.2d 486, 490, 101 P.2d 736 ["While the superior court is, in one sense, a state court, it is also a county court"].)

The correct view, therefore, is that there are 58 superior courts in California, one in each of the 58 counties. The designation of "state court," while entirely proper, is intended to refer only to jurisdiction (see *Sacramento & San Joaquin Drainage Dist. v. Superior Court* (1925) 196 C. 414, 432, 238 P. 687) and not to organization.

However, the Legislature prescribes the number of judges for each superior court. (Cal. Const., Art. VI, §4; see *Govt.C.* 69580 et seq.) And the Legislature may also, with the consent of the counties involved, provide for the joint use of a judge. "If the governing body of each affected county concurs, the Legislature may provide that one or more judges serve more than one superior court." (Cal. Const., Art. VI, §4.)

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VI. THE SUPERIOR COURT

B. Original Civil Jurisdiction.

1. Equity.

a. In General.

2 Witkin Cal. Proc. Courts § 210

[§ 210] In General.

Prior to 1928, the Constitution expressly granted to the superior court "original jurisdiction in all cases in equity." Accordingly, if the action was one that, under the accepted tests, was equitable in nature, only the superior court had jurisdiction. (For discussion of tests and classification of cases in equity, see 3 *Cal. Proc.* (5th), *Actions*, §119 et seq.; 2 *Cal. Proc.* (5th), *Jurisdiction*, §50.) In 1928, the Constitution was amended to eliminate the language referring to equity jurisdiction and to substitute a general grant of jurisdiction in all causes except those in which the Legislature gives jurisdiction to municipal or inferior courts. Now, of course, with the unification of the trial courts, the superior court has general jurisdiction in all cases in law and equity. The constitutional provision, after setting forth original jurisdiction in writ proceedings, now reads: "Superior courts have original jurisdiction in all other causes." (Cal. Const., Art. VI, §10.)

The concept of equitable relief is still significant, however, for describing those cases that are limited civil cases. (See *infra*, §246.) In addition, there are a number of limitations on the equity jurisdiction of the superior court. (See *infra*, §§211, 212.)

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B. Original Civil Jurisdiction.

1. Equity.

b. Express Denial of Jurisdiction to Superior Court.

2 Witkin Cal. Proc. Courts § 211

[§ 211] Express Denial of Jurisdiction to Superior Court.

The superior court lacks equity jurisdiction in the following areas:

(1) *Exclusive Jurisdiction of Public Utilities Commission.* Controversies within the subject matter of the Public Utilities Commission are outside the jurisdiction of the superior court. (See *Pub.Util.C. 1759*; 8 *Summary* (10th), *Constitutional Law*, §1084 et seq.; *Miller v. Railroad Com. of Calif.* (1937) 9 C.2d 190, 195, 70 P.2d 164; *People v. Superior Court (Dyke Water Co.)* (1965) 62 C.2d 515, 518, 42 C.R. 849, 399 P.2d 385 [superior court has no jurisdiction to consider issues raised by refund plan prepared under order by Commission until plan is presented to Commission]; *Sonoma v. State Energy Resources Conservation & Dev. Com.* (1985) 40 C.3d 361, 370, 220 C.R. 114, 708 P.2d 693; *Independent Laundry v. Railroad Com. of Calif.* (1945) 70 C.A.2d 816, 821, 161 P.2d 827 [superior court has no jurisdiction in action for declaratory relief involving regulation of Commission]; *Hickey v. Roby* (1969) 273 C.A.2d 752, 765, 77 C.R. 486 [superior court has no jurisdiction to issue injunction to nullify Commission's order].)

But the court may take jurisdiction of a dispute arising under a Commission regulation, acting in aid of the Commission's jurisdiction. (*Vila v. Tahoe Southside Water Util.* (1965) 233 C.A.2d 469, 477, 43 C.R. 654.) (See *Yolo Water & Power Co. v. Superior Court* (1919) 43 C.A. 332, 339, 185 P. 195 [superior court has jurisdiction of action against public utility to enjoin public nuisance; no interference with Commission's regulatory power].) And the superior court may exercise equitable jurisdiction where the Commission has failed to act. (See *Ventura County Waterworks Dist. No. 12 v. Susana Knolls Mut. Water Co.* (1970) 7 C.A.3d 672, 679, 87 C.R. 1.)

(2) *Exclusive Jurisdiction of Workers' Compensation Appeals Board.* Matters within the jurisdiction of the Workers' Compensation Appeals Board (formerly the Industrial Accident Commission) are outside the jurisdiction of the superior court. (*Lab.C. 5955*; *Pizarro v. Superior Court* (1967) 254 C.A.2d 416, 418, 61 C.R. 923, 2 *Summary* (10th), *Workers' Compensation*, §435 [superior court has no power to issue restraining order staying execution of compensation award]; see 2 *Summary* (10th), *Workers' Compensation*, §24 et seq. [discussing rule and exceptions].)

(3) *Exclusive Jurisdiction of Alcoholic Beverage Control Appeals Board.* Controversies involving the decisions and duties of the board are outside the jurisdiction of the superior court. (*B. & P.C. 23090.5*; see *Department of Alcoholic*

Beverage Control v. Superior Court (1968) 268 C.A.2d 7, 9, 73 C.R. 671; *American Drug Stores v. Stroh* (1992) 10 C.A.4th 1446, 1451, 13 C.R.2d 432, 8 Cal. Proc. (5th), *Extraordinary Writs*, §261 [superior court has no jurisdiction in action for injunctive and declaratory relief to preclude imposition of penalty by Department of Alcoholic Beverage Control].)

(4) *Exclusive Jurisdiction of National Labor Relations Board and Agricultural Labor Relations Board*. Various labor cases are within the jurisdiction of the National Labor Relations Board or the Agricultural Labor Relations Board. (See 2 Cal. Proc. (5th), *Jurisdiction*, §48.)

(5) *Exclusive Jurisdiction of State Bar*. Attorney discipline is outside the jurisdiction of the superior court. (See 1 Cal. Proc. (5th), *Attorneys*, §552.)

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B. Original Civil Jurisdiction.

1. Equity.

c. Limitation on Substantive Right.

2 *Witkin Cal. Proc. Courts* § 212

[§ 212] Limitation on Substantive Right.

Under the original constitutional provision, the phrase "cases in equity" was interpreted to mean "all the jurisdiction in equity which was possessed by the English courts of chancery on July 4, 1776." (*Tulare Irr. Dist. v. Superior Court* (1925) 197 C. 649, 660, 242 P. 725; *Pasadena v. Superior Court* (1910) 157 C. 781, 788, 109 P. 620; see 3 *Cal. Proc.* (5th), *Actions*, §120.) Even under that language, however, it was early recognized that statutory provisions creating, limiting, or abolishing substantive rights, or placing limitations or conditions on equitable remedies, did not constitute an interference with jurisdiction. As the court declared in *Spreckels v. Hawaiian Commercial & Sugar Co.* (1897) 117 C. 377, 49 P. 353: "New rights are created under which new equities arise. These make new cases in equity, of which the courts at once take cognizance. The jurisdiction of courts of equity is not thereby enlarged. Neither is it diminished when by statutory changes some rights cease to exist and certain cases which courts of equity once entertained can no longer arise." (117 C. 381.) (See *Loftis v. Superior Court* (1938) 25 C.A.2d 346, 352, 77 P.2d 491; supra, §170.)

The distinction was illustrated in *Castle Rural County Fire Protection Dist. v. Superior Court* (1951) 105 C.A.2d 816, 820, 234 P.2d 726, a proceeding in the superior court to contest an election that created a fire protection district. The statute providing for the election was silent on contest. *Held*, the superior court had no general equity jurisdiction to hear such an action where the Legislature had deliberately omitted to provide for the right to contest.

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B. Original Civil Jurisdiction.

2. Law.

2 Witkin Cal. Proc. Courts § 213

[§ 213] Law.

Under the 1928 constitutional grant of original jurisdiction in all causes except those in which jurisdiction was given to inferior courts (see *supra*, §210), the superior court had jurisdiction of any action at law that was beyond the monetary limits of the municipal court. The test of the superior court's jurisdiction in actions at law was, therefore, ordinarily that of the amount in controversy. (On determining amount in controversy, see *2 Cal. Proc. (5th), Jurisdiction*, §22 et seq.)

In addition, there were many situations in which, regardless of the amount in controversy, the form of an action at law or a special proceeding brought it exclusively within superior court jurisdiction. This was accomplished primarily by a statutory declaration that particular proceedings (e.g., proceedings under the Family Code or the Probate Code) were within the jurisdiction of the superior court.

Now, of course, the superior court has general jurisdiction in all cases in law and equity. (See *supra*, §210.) However, the amount in controversy and the form of the action are still significant for classifying cases as limited civil cases. (See *infra*, §243 et seq.)

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3. Jurisdiction To Issue Extraordinary Writs.

a. Nature and Scope of Grant.

2 *Witkin Cal. Proc. Courts* § 214

[§ 214] Nature and Scope of Grant.

The superior court has original jurisdiction in habeas corpus proceedings and in "proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." (Cal. Const., Art. VI, §10.) (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §3.)

The superior court also has jurisdiction to determine applications for the common law writ of coram nobis, recognized without express constitutional or statutory authorization, as a means of reviewing certain kinds of errors in criminal cases. (See 6 *Cal. Crim. Law* (3d), *Criminal Judgment*, §182 et seq.; 3 *Cal. Proc.* (5th), *Actions*, §75.)

"The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction." (Cal. Const., Art. VI, §10.)

Before the constitutional revision of 1966, former Cal. Const., Art. VI, §5, limited the jurisdiction to superior courts "in their respective counties." (See *People v. Schunke* (1951) 102 C.A.2d 875, 877, 228 P.2d 620; *Carrara v. Superior Court* (1952) 113 C.A.2d 823, 248 P.2d 954; *People v. Superior Court (Crosby)* (1957) 148 C.A.2d 731, 307 P.2d 375 [Placer County court had no jurisdiction to issue habeas corpus to ward of Folsom Prison in Sacramento County].) Cal. Const., Art. VI, §10, omits this language, and the power to hear and determine a petition for writ of habeas corpus no longer depends on the petitioner's custody within the county where the petition was filed. (*Griggs v. Superior Court* (1976) 16 C.3d 341, 346, 128 C.R. 223, 546 P.2d 727 [denying petition for mandamus to compel quashing of orders to show cause on transfer of prisoners outside of county].) Unlimited territorial jurisdiction does not compel or dictate the exercise of that jurisdiction in all cases, but unless there is a substantial reason to transfer the petition, it should be entertained and resolved in the court where it is filed. (*Griggs v. Superior Court*, *supra*, 16 C.3d 346, 347 [specifying certain established rules for transfer of habeas corpus proceedings].)

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3. Jurisdiction To Issue Extraordinary Writs.

b. Limitations on Grant.

2 Witkin Cal. Proc. Courts § 215

[§ 215] Limitations on Grant.

(1) *Public Utilities Commission*. The superior court has no power to issue writs against the Public Utilities Commission. (*Pub.Util.C.* 1759; see 8 *Summary* (10th), *Constitutional Law*, §1089.)

(2) *Workers' Compensation Appeals Board*. The superior court has no power to issue writs against the Workers' Compensation Appeals Board. (*Lab.C.* 5955; see *Loustalot v. Superior Court* (1947) 30 C.2d 905, 907, 912, 186 P.2d 673; 2 *Summary* (10th), *Workers' Compensation*, §435.)

(3) *Alcoholic Beverage Control Appeals Board*. The superior court has no power to review decisions of the Department of Alcoholic Beverage Control. (*B. & P.C.* 23090.5; see *Samson Market Co. v. Kirby* (1968) 261 C.A.2d 577, 580, 68 C.R. 130.)

(4) *State Bar Court*. The superior court has no power to review disciplinary recommendations of the State Bar Court; jurisdiction is exclusively in the Supreme Court. (C.R.C., Rule 9.13; see 1 *Cal. Proc.* (5th), *Attorneys*, §613 et seq.)

(5) *Mandamus To Prevent Collection of Tax*. The superior court has no power to issue mandamus to prevent the collection of any state taxes. (Cal. Const., Art. XIII, §32; see *Modern Barber Colleges v. California Emp. Stabilization Com.* (1948) 31 C.2d 720, 723, 192 P.2d 916, supra, §170 [discussing similar provision in Unemployment Insurance Act]; *Dupuy v. Superior Court* (1975) 15 C.3d 410, 418, 124 C.R. 900, 541 P.2d 540, 9 *Summary* (10th), *Taxation*, §23 [federal constitutional restrictions on state limitation]; *Pacific Gas & Elec. Co. v. State Bd. of Equalization* (1980) 27 C.3d 277, 280, 165 C.R. 122, 611 P.2d 463, 9 *Summary* (10th), *Taxation*, §297 [constitutional limitation applies to assessment of real property].)

(6) *Coram Nobis*. A statutory limitation on the writ of coram nobis prevents its issuance by the superior court after a judgment of conviction of that court has been affirmed on appeal; the writ in that event must issue from the appellate court. (P.C. 1265; see *People v. Schunke* (1951) 102 C.A.2d 875, 877, 228 P.2d 620; *People v. Sica* (1953) 116 C.A.2d 59, 61, 253 P.2d 75; 6 *Cal. Crim. Law* (3d), *Criminal Writs*, §99.)

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3. Jurisdiction To Issue Extraordinary Writs.

c. Concurrent Jurisdiction of Appellate Court.

2 *Witkin Cal. Proc. Courts* § 216

[§ 216] Concurrent Jurisdiction of Appellate Court.

The jurisdiction of the superior court to issue the extraordinary writs is concurrent with that of the Supreme Court and the Courts of Appeal. (Cal. Const., Art. VI, §10; see *Loustalot v. Superior Court* (1947) 30 C.2d 905, 907, 186 P.2d 673.) The implication that the applicant may freely choose between the trial and appellate court is, however, misleading. A procedural rule requires that application be first made to the lower court and denied there, unless a sufficient showing is made to justify application to the reviewing court in the first instance. (C.R.C., Rule 8.490(b); see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §144.)

In re Elias (1962) 209 C.A.2d 262, 25 C.R. 739, upholds jurisdiction in an unusual setting. The superior court made an order for deposit under C.C.P. 572, defendant refused to obey, and he was adjudicated in contempt. Alleging that the order and contempt adjudication were invalid, he sought habeas corpus in the same superior court. That court refused to entertain the petition on the ground that it could not review its own order. Defendant then filed his petition in the Court of Appeal. *Held*, the superior court was in error; its constitutional power to issue the writ is the same as that of an appellate court. Habeas corpus is concerned with jurisdiction, not ordinary error, and it is immaterial that the order challenged is made by the court in which the writ is sought. Moreover, "the local court is often better able to render timely and effective relief than a court of appeal." (209 C.A.2d 264.) But then, having made it unmistakably clear that the superior court should have heard and determined the application, the appellate court proceeded to decide the merits and grant relief against the order, which it held void. (209 C.A.2d 275.)

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In 2008, the portion of C.R.C., Rule 8.490(b) discussed in the text was renumbered C.R.C., Rule 8.486(a)(1).



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C. Departments and Sessions.

1. Nature of Departments and Sessions.

2 Witkin Cal. Proc. Courts § 217

[§ 217] Nature of Departments and Sessions.

"There may be as many sessions of a superior court, at the same time, as there are judges elected, appointed or assigned thereto. The judgments, orders, and proceedings of any session of a superior court, held by any one or more of the judges sitting therein, shall be equally effectual as though all the judges of said court presided at such session." (*Govt.C. 69741.5.*)

The term "department" does not appear either in the Constitution or in the statutes. But it is commonly used to denote the numbered or named branch, division, office, or session in which a single judge may sit. (See *Steiger v. Collins* (1932) 215 C. 634, 637, 12 P.2d 426; *Schlyen v. Schlyen* (1954) 43 C.2d 361, 371, 273 P.2d 897, *infra*, §224.)

The term "session," though sometimes used interchangeably with "department," seems more appropriate to describe the actual sitting of the judge of a department as a court at a particular time and place. Each trial court determines the number of sessions of the court. (*Govt.C. 69740(a).*) (See 20 *Am.Jur.2d* (2005 *ed.*), *Courts* §22; on place of holding sessions, see *infra*, §219 et seq.)

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C. Departments and Sessions.

2. Types of Departments.

2 Witkin Cal. Proc. Courts § 218

[§ 218] Types of Departments.

The important superior court departments exercising special statutory jurisdiction are as follows:

(1) *Probate Department*. The probate department of the superior court is usually called the probate court. Its jurisdiction is wholly statutory. At one time, many difficult problems arose in defining the scope and extent of its jurisdiction. (See *Schlyen v. Schlyen* (1954) 43 C.2d 361, 375, 273 P.2d 897, *infra*, §224; *Schechter v. Superior Court* (1957) 49 C.2d 3, 9, 314 P.2d 10; *Estate of Boyd* (1963) 212 C.A.2d 634, 637, 28 C.R. 258; *Copley v. Copley* (1978) 80 C.A.3d 97, 104, 106, 145 C.R. 437.) Today, the superior court sitting in probate is a court of general jurisdiction exercising the same power and authority as the superior court generally. (*Prob.C. 800, 7050*; see 14 *Summary* (10th), *Wills and Probate*, §346 et seq.)

(2) *Juvenile Court*. The superior court, while sitting in the exercise of jurisdiction over delinquent minors and minors charged with crimes, is known as the juvenile court. (*Welf.C. 245*; see *People v. Sanchez* (1942) 21 C.2d 466, 471, 132 P.2d 810; *In re Lisa R.* (1975) 13 C.3d 636, 644, 119 C.R. 475, 532 P.2d 123, 10 *Summary* (10th), *Parent and Child*, §451 [juvenile court has jurisdiction to determine parentage when that finding is necessary to ultimate determination of issue before it]; 10 *Summary* (10th), *Parent and Child*, §447; *infra*, §§225, 231.)

(3) *Family Conciliation Court*. The "Family Conciliation Court Law" (*Family C. 1800 et seq.*) is designed to furnish a court proceeding to aid the reconciliation of spouses in the interests of children. (*Family C. 1801.*) The superior court exercising this jurisdiction is designated the "family conciliation court." (*Family C. 1810.*) This department is unique in one respect: It is not automatically created by the statute, but exists only in counties in which it is determined annually, by the majority of the judges, that "the social conditions in the county and the number of domestic relations cases in the courts" make the procedure necessary. (*Family C. 1802.*)

(4) *Other Departments*. Local rules often provide for the designation of various other departments to handle particular kinds of cases. They are not "courts" with a special statutory jurisdiction, but are ordinary numbered departments of a multiple-judge court, exercising general jurisdiction over cases divided into classes for convenience of trial and other disposition. (See *infra*, §226.)

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C. Departments and Sessions.

3. Place of Sessions.

a. In General.

2 *Witkin Cal. Proc. Courts* § 219

[§ 219] In General.

(1) *General Rule.* At one time, statutes required the court to sit at the county seat and authorized branch sessions in places outside the county seat, based on the population and the distance from the county courthouse. Now, each trial court determines the location of sessions of the court. Sessions may be held in buildings that are not courthouses. (*Govt.C. 69740(a).*) (See *Desert Turf Club v. Board of Supervisors of Riverside County* (1956) 141 C.A.2d 446, 456, 296 P.2d 882 [former requirement of holding sessions at county seat; criticizing action of San Bernardino superior court judge assigned to decide Riverside County case, but, for convenience, actually sitting in San Bernardino County].)

(2) *Sessions Outside County.* "In appropriate circumstances," in the discretion of the court, and on the agreement of the presiding judges, a session may be held outside the county, except that a criminal jury trial may not be held outside the county without the consent of the parties. Venue is deemed to be in the home county of the court where the action was filed. No party has a right to request the court to exercise its discretion. (*Govt.C. 69740(b).*)

(3) *Sessions at or Near Penal Institutions.* Ordinarily, sessions should not be held at or near state penal institutions. (See Standards of Judicial Administration, Standard 10.41; *People v. England* (2000) 83 C.A.4th 772, 777, 100 C.R.2d 63 [courtroom at prison satisfied Standards of Judicial Administration, Standard 10.41, where courtroom was outside prison fence, was physically and visually remote from prison, and was accessible to jurors, press, and public].)

(4) *Sessions of Juvenile Court.* If the juvenile hall is not located at the county seat, a majority of judges may order sessions of the juvenile court held in any place in which the juvenile hall is located. (*C.C.P. 73e.*)

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3. Place of Sessions.

b. Sessions Outside Courtroom.

2 *Witkin Cal. Proc. Courts* § 220

[§ 220] Sessions Outside Courtroom.

Assuming that the session of the court is in the proper geographical location, and a courtroom is there available, may the judge act as a court (see *supra*, §21) outside the courtroom? Three situations must be distinguished:

(1) Some kinds of hearings, and some determinations, may by statute take place in chambers. (*C.C.P. 166(a)*; see *supra*, §23 et seq.)

(2) Some determinations may by statute be made even outside the county. (*C.C.P. 166(b)*; see *supra*, §27.)

(3) In emergencies, alternative arrangements are authorized by statute. (See *Govt.C. 68115*, *infra*, §221.)

Proceedings that do not come within these exceptions must take place in the courtroom with the judge sitting as a court. But a departure is merely an irregularity, not a jurisdictional defect; and, in the absence of a showing of serious prejudice, it is not even reversible error. The situation usually arises where there is a view of the scene (see 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §25 et seq.). (See 20 *Am.Jur.2d* (2005 ed.), *Courts* §21; 18 *A.L.R.3d* 572 [place of holding sessions of trial court as affecting validity of its proceedings].)

In *People v. Pompa* (1923) 192 C. 412, 422, 221 P. 198, the jury was taken to the place where a murder had been committed, and the chief prosecution witness was allowed to answer many questions, the answers to which amounted to evidence in the case. In holding that no reversible error was shown, the opinion relied chiefly on defendant's acquiescence and active participation in the proceedings without objection, and then added this dictum: "But the record expressly discloses that during the entire proceedings attending and embracing the view of the premises the court in its completeness, including the judge, the clerk, the bailiff, the reporter, the interpreter, the jury, the defendant, and the respective counsel was at all times present, the only element absent being the walls and fittings of the courtroom wherein the court is usually convened. There is no special sacredness in the atmosphere of a courthouse or the walls or furnishings of a courtroom which requires that sessions of the court shall be held there and not elsewhere, if otherwise the forms of law governing the trial of causes are observed, which appears to have been done, though with some absence of formality, in the instant case." (192 C. 422.)

In *Union Oil Co. of Calif. v. Reconstruction Oil Co.* (1937) 20 C.A.2d 170, 178, 66 P.2d 1215, a superior court action in Los Angeles to enjoin subsurface trespass to oil lands, the trial judge and attorneys went to Orange County to examine apparatus used by surveyors who had conducted a survey by court order. While there, a Los Angeles deputy clerk swore employees of the surveying company, and they testified as to their methods and calculations. *Held*, jurisdiction was not lost, and any claim of irregularity was waived by the acquiescence of counsel. (20 C.A.2d 178.)

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3. Place of Sessions.

c. Emergency Sessions.

2 Witkin Cal. Proc. Courts § 221

[§ 221] Emergency Sessions.

Govt.C. 68115 et seq. provide alternative arrangements for emergency situations in which the session cannot be effectively conducted at the regular place. These situations are (a) war, insurrection, pestilence, or other public calamity, or (b) the destruction of or danger to the building appointed for holding court, or (c) a large influx of criminal cases resulting from a large number of arrests within a short period of time. (*Govt.C. 68115*.) In these situations, the Chairperson of the Judicial Council (Chief Justice), on the request of the presiding judge, may authorize the court to pursue one or more of the following courses of action:

- (1) Hold sessions anywhere in the county. (*Govt.C. 68115(a)*.)
- (2) Transfer civil cases pending trial to the superior court in an adjacent county, with the consent of all the parties, or on a showing of extreme or undue hardship. (*Govt.C. 68115(b)*.)
- (3) Declare the dates on which an emergency condition interferes with the ability to file papers or conduct specified criminal or juvenile proceedings to be holidays for purposes of computing time. (*Govt.C. 68115(c), (d)*.)
- (4) Extend the duration of a temporary restraining order that would otherwise expire because an emergency condition prevented the court from conducting proceedings to determine whether a permanent order should be entered. (*Govt.C. 68115(e)*.)
- (5) Extend the time within which a defendant charged with a felony offense must be taken before a magistrate from 48 hours to not more than 7 days. (*Govt.C. 68115(f)*.)
- (6) Extend the time for holding a preliminary examination in a felony prosecution from 10 to 15 days. (*Govt.C. 68115(g)*.)
- (7) Extend the mandatory time for holding criminal trials for a period not to exceed 30 days. (*Govt.C. 68115(h)*.)
- (8) Extend the time within which a minor charged with a felony must be given a detention hearing for no more than

7 days. (*Govt.C. 68115(i).*)

(9) Extend the time within which a minor charged with a felony must be given a hearing on a wardship petition for no more than 15 days. (*Govt.C. 68115(j).*)

An order under *Govt.C. 68115* takes effect immediately upon its issuance and may be revoked at any time by the Chairperson of the Judicial Council. (*Govt.C. 68116.*) The Chairperson may direct that payment of costs associated with the emergency be made from funds appropriated to the Judicial Council for that purpose. (*Govt.C. 68117.*) The statute is not to be interpreted to restrict the right of a defendant in a criminal trial to a fair and speedy trial or to permit a jury in such a case to be drawn from a panel of a court outside the county of trial. (*Govt.C. 68118.*)

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C. Departments and Sessions.

4. Jurisdictional Aspects of Division into Departments.

a. Subject Matter Jurisdiction Is Not Involved.

2 *Witkin Cal. Proc. Courts* § 222

[§ 222] Subject Matter Jurisdiction Is Not Involved.

The problem of the jurisdictional effect of the division into court departments, like that of the effect of disqualification of the judge (see *supra*, §94 et seq.), is neither clearly analyzed nor fully explored in the cases. These are some of the broad generalizations frequently encountered:

(1) The probate court has no jurisdiction over an ordinary action in equity. (See *Fisher v. Superior Court* (1937) 23 C.A.2d 528, 534, 73 P.2d 892, *infra*, §224; on jurisdiction of probate court, see *infra*, §224.)

(2) No ordinary department of the superior court has jurisdiction in a matter that is exclusively within the jurisdiction of the probate court. (See *Toland v. Earl* (1900) 129 C. 148, 151, 61 P. 914.)

(3) The criminal department has no jurisdiction over a proceeding involving a minor subject to the exclusive jurisdiction of the juvenile court, nor has the juvenile court jurisdiction over a criminal charge involving a person subject to trial in the criminal department. (*People v. Sanchez* (1942) 21 C.2d 466, 471, 132 P.2d 810, *infra*, §231 [criminal department without jurisdiction]; *People v. Superior Court (San Bernardino)* (1930) 104 C.A. 276, 280, 285 P. 871, *infra*, §225 [juvenile court without jurisdiction].)

Declarations of this sort might imply that, because the wrong "court" cannot hear or determine the cause, it lacks jurisdiction of the subject matter. But if the distinction between the court and judge is recalled (see *supra*, §21), the problem appears in a different light. There is one superior court in the county, though different judges may sit in separate departments. Any judge of the superior court of a county may, under proper circumstances, exercise any of its subject matter jurisdiction--even the special jurisdiction of a probate or juvenile court. Thus, Judge A, sitting in a civil jury department, cannot hear a probate proceeding; but if Judge A is first assigned to the probate department (a mere procedural step), he or she can hear and determine it. Similarly, Judge B, in the juvenile department, may lack power to try a criminal case; but if Judge B transfers the case to Judge C of the criminal department, the jurisdiction of the superior court is safe from attack.

Several cases tend to support this analysis and highly desirable conclusion. (See, e.g., *In re Thompson* (1894) 101

C. 349, 353, 36 P. 508, *infra*, §224; *Schlyen v. Schlyen* (1954) 43 C.2d 361, 375, 273 P.2d 897, *infra*, §224.)

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4. Jurisdictional Aspects of Division into Departments.

b. Jurisdiction To Act May Be Involved.

2 Witkin Cal. Proc. Courts § 223

[§ 223] Jurisdiction To Act May Be Involved.

Where, by statute, a distinct subject matter jurisdiction has been given to a special department or "court," e.g., probate or juvenile court, the judge sitting in that department, and that judge alone, should exercise that jurisdiction. The assumption of jurisdiction by another judge not assigned to the department would be a most serious departure from that judge's regular duties. Is the irregularity mere error, subject only to correction by appeal or by similar direct attack? A few cases so hold. (See, e.g., *People v. Sanchez* (1942) 21 C.2d 466, 470, 132 P.2d 810, *infra*, §231 ["The designation of a separate juvenile court is intended to expedite the work of the courts, but failure to transfer the case to the department specifically assigned to juvenile court work is not a jurisdictional error"]; *People v. Barbera* (1926) 78 C.A. 277, 279, 248 P. 304 [defendant charged with contributing to delinquency of minor was tried in ordinary department, not juvenile court; "whether sitting separately or together, the judges of the superior court hold but one and the same court, and the jurisdiction they exercise in any cause is that of the court and not the individual"]; *Estate of Tierney* (1944) 63 C.A.2d 295, 300, 146 P.2d 700 [orders treated as probate orders, even though made by judge of different department; division into departments "is simply for convenience and the expedition of business; the court is the same court whether it is sitting in probate, in cases of equity, or in special proceedings"] cf. *Gunn v. Giraudo* (1941) 48 C.A.2d 622, 630, 120 P.2d 177 [trial court heard connected probate and equity cases together but made separate findings; any error was harmless].)

It would seem, however, that the exercise of jurisdiction by the wrong judge in these cases is such a departure from the judge's defined powers as to constitute an act in excess of jurisdiction. The difference between the probate court and the ordinary superior court department, and between the juvenile court and the criminal department, is much greater than the difference between ordinary civil departments. (See *infra*, §226.) The probate court and juvenile court do not merely handle cases classified for reasons of trial convenience; they exercise a special statutory jurisdiction and follow a special statutory procedure. A probate judge, e.g., cannot properly decide an action in equity, because as a probate judge he or she cannot exercise general equity jurisdiction, *and* because the pleading and other procedural steps incident to an action in equity are not those which the statutes require to invoke probate jurisdiction. An examination of several instructive cases indicates that excess of jurisdiction is the most likely explanation of this defect. (See *Thomasian v. Superior Court* (1953) 122 C.A.2d 322, 333, 265 P.2d 165; *Schlyen v. Schlyen* (1954) 43 C.2d 361, 372, 273 P.2d 897,

infra, §224; *Slevats v. Feustal* (1963) 213 C.A.2d 113, 117, 28 C.R. 517, citing the text.)

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c. Illustrations.

1. Probate Court.

2 *Witkin Cal. Proc. Courts* § 224

[§ 224] Probate Court.

In re Thompson (1894) 101 C. 349, 36 P. 508, involved a petition in probate, entitled "Estate of Thompson," seeking an accounting from testamentary trustees of an estate long settled. (The proceeding was brought prior to the statutory grant of such jurisdiction to the probate court.) The matter was heard, defendant trustee filed an account, but later appealed from the decree, raising the jurisdictional question for the first time. *Held*, "technically speaking," the superior court sitting in probate had no jurisdiction over the proceeding, for the equity and probate jurisdictions are separate and distinct. But "the same tribunal exercises equity and probate jurisdiction," and the court therefore had jurisdiction of the subject matter. "The petition under these circumstances may be regarded as a bill in equity addressed to the equitable powers of the superior court, and the form of its title is immaterial." (101 C. 353, 354.) Thus, the opinion, while holding that subject matter jurisdiction existed, concedes that jurisdiction "technically" was lacking. This "technical" lack (excess of jurisdiction) was easily curable (by transfer to the proper department) and was waived by failure to object.

In *Fisher v. Superior Court* (1937) 23 C.A.2d 528, 73 P.2d 892, a will was admitted to probate. Within 6 months plaintiff, an heir, filed a *complaint* against the executor and the sole devisee, entitled "Complaint Contesting Will after Probate." A new number was given it, and a *summons* issued notifying defendants to appear in "an *action*" and "answer the *complaint*." Defendants moved to strike the complaint and dismiss the action for lack of jurisdiction. Later, after the time to contest the will expired, plaintiff moved for issuance of a probate *citation*. The trial court denied the motion to dismiss and ordered the cause consolidated with the prior probate proceeding. *Held*, defendants were entitled to a writ of prohibition to restrain the proceeding.

(a) The complaint did not follow the statutory procedure for a contest in the probate proceeding, but attempted to institute a new action in equity. It was not a petition to the same court (the superior court in probate) to revoke or annul its action, but was addressed to another jurisdiction of the court. And, assuming that the superior court had power, through the order of consolidation, to transfer the matter to the probate department, it did not do so until after the 6-month period had elapsed, and hence, after the jurisdiction over a contest had expired. (23 C.A.2d 534.)

(b) "Under our codes probate proceedings are entirely separate and distinct from actions either at law or in equity.

The fact that we have had one form of action in this state relates to legal and equitable actions but has no bearing on probate proceedings. Although one court has jurisdiction over all these matters an entirely different procedure has been provided by statute for bringing a matter within its probate jurisdiction. ... [A]fter the statutory time has elapsed the transfer or consolidation of a contest filed in that manner is ineffectual. It follows that the respondent court is without jurisdiction to entertain further proceedings in this matter." (23 C.A.2d 534.)

Because prohibition was issued to prevent *any further proceedings*, the theory of the opinion might be that jurisdiction of the subject matter was lacking. But the following analysis seems preferable: (1) Originally the badly entitled proceeding, seriously deficient in procedural steps, could not, in the face of an objection, be decided by the judge of the department in which it was filed; such excess of jurisdiction, however, could have been cured by a timely transfer or consolidation. (2) Why then was subject matter jurisdiction eventually lost? Not because the proceeding was filed in the wrong court, but because after 6 months the jurisdictional time limit for entertaining the proceeding in the proper court had expired. (See 2 Cal. Proc. (5th), *Jurisdiction*, §91.)

In *Schlyen v. Schlyen* (1954) 43 C.2d 361, 273 P.2d 897, decedent's widow and two sons were his sole heirs. The sons brought an *equity suit* to cancel joint tenancy deeds between decedent and the widow on the ground of fraud, and commenced a *contest of the will* offered for probate by the widow, on grounds of incapacity, undue influence, and fraud. On stipulation the two proceedings were consolidated for trial, with verdicts for plaintiffs. The trial judge, acting under his equitable powers, treated the equity suit verdict as advisory, and made findings in accordance with it. Thereafter the judge granted defendant widow's motion to dismiss on the ground that the "probate" court had exclusive jurisdiction of the subject matter. In reversing this order, the Supreme Court made the following observations:

(a) "In the exercise of its jurisdiction, the superior court is not required to convene as a special court in each class of cases, with the conspicuous exception of the juvenile court which by legislative enactment ... convenes as a specially designated juvenile court within the jurisdiction of the superior court." (43 C.2d 371.)

(b) "In a one-judge county the court entertains and disposes of probate cases as a superior court. The judge in such a county is not required to adjourn as a court exercising general jurisdiction and to reconvene as a probate court in order to dispose of matters in probate. He disposes of them on his calendar along with other cases, applying of necessity the rules of procedure especially applicable to probate cases. In counties having two superior court judges probate proceedings are usually entertained and determined in accordance with the mutual convenience of the judges who likewise apply to such matters the rules and regulations applicable in probate practice." (43 C.2d 371.)

(c) Even in counties with more than two judges, where one department by rule or order is devoted largely or exclusively to probate matters, the presiding judge may transfer matters for trial from the probate to another department exercising general jurisdiction. (43 C.2d 371, 372.)

(d) "Notwithstanding the abolition of 'Probate Courts' as such by the Constitution of 1879 this court continued thereafter to refer to the superior court sitting in probate as the 'probate court,' thus implying at least that it is a separate and distinct court of the state, which it is not. Such a reference has been employed by the reviewing courts of this state in cases too numerous to mention and is, of course, inaccurate. But no harm is done where it is understood that such reference is to the superior court sitting in the exercise of its probate jurisdiction. It may then be considered to be no more than a convenient way of conveying the idea of the court exercising a particular function. Such expressions are colloquially used when reference is often made to the 'Domestic Relations Court,' the 'Divorce Court,' the 'Criminal Court,' the 'Traffic Court,' and so on. But such expressions do not, of course, give those courts official status as separate courts and it should be so understood." (43 C.2d 375.)

Today, by statute, the superior court has jurisdiction of proceedings under the Probate Code concerning the administration of estates and proceedings under the Trust Law involving trusts. (See *Prob.C. 7050* [administration of estates], 14 *Summary* (10th), *Wills and Probate*, §346 et seq.; *Prob.C. 17000, 17001* [trusts], 13 *Summary* (10th), *Trusts*, §218 et seq.)

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2 Witkin Cal. Proc. Courts § 225

[§ 225] Juvenile Court.

In *People v. Superior Court (San Bernardino)* (1930) 104 C.A. 276, 285 P. 871, defendant appeared in the juvenile court and (under existing procedure) pleaded not guilty, but that court refused to try or transfer the case. The appellate court issued mandamus directing the transfer of the case "to the Superior Court" to hear and determine it. "A court acting under special powers has only the jurisdiction especially delegated. While original jurisdiction is given to the Juvenile Court, the same section ... has so limited the jurisdiction ... that it may not proceed to try a defendant who has thus pleaded 'not guilty.' " (104 C.A. 280.) Thus, the superior court of the county had subject matter jurisdiction, but lacked jurisdiction to proceed without a transfer to the criminal department.

People v. Barbera (1926) 78 C.A. 277, 248 P. 304, supra, §223, is contra, but seems erroneous. The correct holding should have been that jurisdiction to act was lacking, but was waived by failure to object in the trial court or to attack it by prohibition. (Cf. *In re Thompson* (1894) 101 C. 349, 36 P. 508, supra, §224; *Fisher v. Superior Court* (1937) 23 C.A.2d 528, 73 P.2d 892, supra, §224.) The misconceptions in the *Barbera* case were unfortunately approved by dicta in *People v. Sanchez* (1942) 21 C.2d 466, 470, 132 P.2d 810, but the latter case was properly decided on a different jurisdictional principle. (See infra, §231.)

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1. Proper Transfer of Case.

2 *Witkin Cal. Proc. Courts* § 226

[§ 226] Proper Transfer of Case.

The probate and juvenile departments (see *supra*, §§224, 225) are "courts" exercising special statutory subject matter jurisdiction. The creation of ordinary departments for the convenient disposition of classes of cases does not, on any theory, involve a distribution of subject matter jurisdiction. A judge of the "civil non-jury" department tries cases without juries, not because the judge would be acting in excess of jurisdiction in presiding over a jury trial, but because the cases that are assigned are those in which the parties are not entitled to a jury trial or have not taken proper steps to obtain a jury. In a small county the same judge may handle many types of business, while in a large county several judges (in numbered "departments") may handle one type of business. But all these judges have concurrent jurisdiction over civil actions and special proceedings. (See *White v. Superior Court* (1895) 110 C. 60, 67, 42 P. 480 ["The jurisdiction of causes is vested by the constitution in the court, not in any particular judge or department thereof. ... The division into departments is purely imaginary, and for the conveniences of business and of designation"]; *Brown v. Campbell* (1895) 110 C. 644, 648, 43 P. 12 ["The assignment of causes to different departments does not take place until after the court has acquired jurisdiction of the cause, and is made in order to expedite the business of the court. ... [N]either the judge to whom it has been assigned, nor the department over which he presides, has any jurisdiction over the cause distinct from that of the court in which the action is pending"]; *Tubby v. Tubby* (1927) 202 C. 272, 276, 260 P. 294 ["There is only one superior court in the city and county of San Francisco. ... Jurisdiction is vested by the constitution in the court, not in a particular judge or department. ... Whether sitting separately or together, the judges hold but one and the same court"].)

The apparently contrary case of *In re Johnson* (1929) 101 C.A. 110, 281 P. 435, is distinguishable. A divorce action was pending, but had not yet been assigned to a department for trial. While thus pending, guardianship petitions were filed and heard, and a guardian was appointed for the child. Jurisdiction of the department that made the guardianship award was upheld, the opinion declaring that, because the divorce action had not been assigned for trial, no departmental jurisdiction was being infringed by the guardianship proceedings, and that no objection was made to the proceedings. The additional observation, that the exercise of the authority of one department by another is merely an irregularity, was unnecessary to the decision. (101 C.A. 120.)

It follows that the authorized and procedurally sufficient transfer or reassignment of a cause that has been set for trial or hearing, to another department, is not a transfer of jurisdiction but merely a convenient means of securing a speedy determination. (See *Tubby v. Tubby*, supra [no new statutory notice of time of trial was required]; C.R.C., Rule 10.603(c) [cases assigned to any department may be reassigned by the presiding judge to any other department as convenience or necessity requires].)

Nor does transfer or reassignment, or the termination of office of a judge of one department, affect the validity of prior proceedings or orders. In *People v. Carantan* (1909) 11 C.A. 561, 105 P. 768, a criminal jury was drawn in a case before Department 2. A new judge was elected and, deeming himself disqualified, transferred the case to Department 1, which proceeded with the trial. "If it be true that the court is but a single entity and that it is divided into departments simply for convenience and the expedition of business, it necessarily follows that department 1 had the same jurisdiction to try the cause as department 2, and that it must proceed with it just as it finds it when the transfer was made. ... The situation is exactly the same in principle as though the judge of department 1 had been called into department 2 to try the case." (11 C.A. 566.)

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2 *Witkin Cal. Proc. Courts* § 227

[§ 227] Improper Transfer of Case.

Whether the transfer is to the wrong department, or is to the right department without the proper notice, or is otherwise improper, the result is the same so far as jurisdiction is concerned. As between ordinary departments of the superior court, trial or hearing in the "wrong" department is a procedural irregularity only. And, if this is so, assignment to the right department without complying with some procedural rule governing transfer is similarly a nonjurisdictional error.

This proposition is most emphatically asserted in *White v. Superior Court* (1895) 110 C. 60, 42 P. 480. A divorce decree was granted in Department 1, and the proceeding was thereafter transferred by the presiding judge to Department 4 without complying with the procedural requirements of the local court rule. The judge sitting in Department 4 adjudged petitioner guilty of contempt for interfering with a receiver, and petitioner sought certiorari. *Held*, the order was valid, despite the violation of the rule. "The power to distribute and regulate the business of the court resting with the presiding judge, though it be exercised in a grossly unfair and arbitrary manner, is not an excess of power, but an abuse of it. The remedy for such abuse rests in the hands of the judges of that court, since they have the power to remove that functionary at their pleasure and substitute another in his stead. And, possibly, in an instance where the violation of the rules of the court by the judge, without notice to a party litigant, worked the latter an injury by depriving him of some substantial right, the act would amount to an irregularity which could be corrected on appeal. ... But we do not understand that, after a cause has been once assigned, it may not be reassigned or transferred, even irregularly, without jeopardizing the jurisdiction of the court." (110 C. 67.)

To the same effect is *Bradley v. Van Nostrand* (1922) 189 C. 457, 208 P. 690, where a judge of one department made the order of transfer to another department. Conceding that the presiding judge had the sole authority to transfer, the court denied prohibition. "Whether it gets into a department of the court regularly or irregularly, after the court has acquired jurisdiction, is not a matter which we can determine in this proceeding." (189 C. 459.) (See *Williams v. Superior Court* (1939) 14 C.2d 656, 663, 96 P.2d 334; *Stern v. Stern* (1948) 83 C.A.2d 608, 616, 189 P.2d 536.)

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2 *Witkin Cal. Proc. Courts* § 228

[§ 228] Pendency of Two Similar Actions.

In *Brown v. Campbell* (1895) 110 C. 644, 43 P. 12, two actions involving the same subject matter and parties were separately tried and differently decided in two departments of the San Francisco superior court. In answer to the contention that the filing of the first action gave priority of jurisdiction to the department in which it was pending, the court said: "That rule rests upon comity and the necessity of avoiding a conflict in the execution of judgments rendered by independent courts, either of distinct or concurrent jurisdiction. But the rule itself, as well as the reason for its exercise, has no existence in a case where the actions are brought in the same court, and the judgments are rendered by the same tribunal. ... When, therefore, a suit is commenced in that court upon a cause of action which is then pending before it in another suit, or which has already been carried into judgment, the procedure to be observed is the same as if the two actions were in a court with but a single judge before whom all causes therein were to be tried. If the defense of a pending suit, or the estoppel of a former judgment, is not pleaded when such defense is available to the defendant, he cannot, after an adverse judgment, avail himself of this defense." (110 C. 648.) (See *Kromm v. Kromm* (1948) 84 C.A.2d 523, 528, 191 P.2d 115; for discussion of principles governing priority of jurisdiction between different courts, see 2 *Cal. Proc.* (5th), *Jurisdiction*, §427 et seq.)

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1. Ordinary Departments.

2 *Witkin Cal. Proc. Courts* § 229

[§ 229] Ordinary Departments.

The situation described in the preceding sections changes radically when a case has been assigned to one department and the judge of that department is proceeding to hear it. The judge must of course be allowed to exercise exclusive jurisdiction over that case until its determination, free from unwarranted interference by the judge of another department. The problem is analogous to that arising where two distinct *courts* have concurrent jurisdiction over a class of cases, and the first court to assume jurisdiction over a particular case has a *prior exclusive jurisdiction*. But the conflict between departments is not quite the same as a conflict between courts. Where distinct courts are involved, the conflict is sometimes held to affect subject matter jurisdiction. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §427 et seq.) Where the conflict is merely between judges of different departments of the same court, it would seem that subject matter jurisdiction is not affected and that the objection is one of excess of jurisdiction on the part of the interfering judge.

In *Williams v. Superior Court* (1939) 14 *C.2d* 656, 96 *P.2d* 334, a case was tried in Department 12 of the Los Angeles Superior Court, appeal was taken, and R, the reporter, was delinquent in preparing the transcript. The appellant applied for an order to show cause. The presiding judge assigned it to Department 34, and the judge of that department issued (a) an order to show cause why R should not perform or be suspended as official reporter, and (b) a later order to show cause why he should not be adjudged guilty of contempt. Thereupon R obtained an order from the trial judge (Department 12) declaring void the prior order of Department 34. *Held*, on certiorari, the trial judge (Department 12) exceeded his jurisdiction. "[W]here a proceeding has been duly assigned for hearing and determination to one department of the superior court ... , it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. ... In other words, while one department is exercising the jurisdiction vested by the Constitution in the superior court of that county, the other departments thereof are as distinct therefrom as other superior courts. ... If such were not the law, conflicting adjudications of the same subject-matter by different departments of the one court would bring about an anomalous situation and doubtless lead to much confusion." (14 *C.2d* 662.)

In *Shane v. Superior Court* (1984) 160 *C.A.3d* 1237, 207 *C.R.* 210, two lawsuits arising out of the same transaction were pending in different branches of the Los Angeles Superior Court. In the first (Los Angeles action), K was a

defendant and S a cross-defendant; in the second (Van Nuys action), S was a defendant and K a cross-defendant. K entered a settlement in the Los Angeles action, then filed a motion in that action pursuant to *C.C.P.* 877.6 (see 5 *Summary* (10th), *Torts*, §83 et seq.), seeking a determination that the settlement was in good faith and barred S's claims in the Van Nuys action. The Los Angeles court granted the motion and entered its order that S's claims in the Van Nuys action were barred. S petitioned for mandamus. *Held*, the order, to the extent it sought to adjudicate the Van Nuys claims, was in excess of the court's jurisdiction.

(a) Where a determination is made under *C.C.P.* 877.6 that a settlement has been entered in good faith, the settling tortfeasor has a right under *C.C.P.* 877.6(c) to be discharged from liability for indemnity to a concurrent tortfeasor. (160 *C.A.3d* 1245.) *C.C.P.* 877.6 does not provide a procedure for implementing this right, but various mechanisms (motion for summary judgment, motion for judgment on the pleadings, general demurrer, or motion to dismiss cross-complaint) are available. (160 *C.A.3d* 1245, 1246.) All these mechanisms share "the features of a final adjudication made by the court before which the indemnity claim or action is pending for determination." (160 *C.A.3d* 1246.) Because the question whether a settlement was in good faith differs from the question whether a particular claim is barred by the settlement, it is important that the latter question be specifically adjudicated. (160 *C.A.3d* 1246.)

(b) *C.C.P.* 877.6 does not confer authority to declare that particular actions or claims are barred by a settlement. Therefore, the Los Angeles court's order barring the Van Nuys cross-complaint was in excess of the jurisdiction granted by the statute and void. (160 *C.A.3d* 1248.)

(c) A second jurisdictional defect is that the Van Nuys action was not before the Los Angeles court for adjudication. Although the procedural posture here differs from that in *Williams v. Superior Court*, *supra*, the jurisdictional principles and policies in *Williams* are controlling. (160 *C.A.3d* 1249.) Because the Van Nuys action was pending in a separate branch of the superior court and had not been transferred to the Los Angeles court, the Los Angeles trial judge was not vested with the superior court's jurisdiction over the Van Nuys action. (160 *C.A.3d* 1250.)

(d) K has remedies by which to assert the effect, if any, of his good faith settlement on S's Van Nuys claims. The proper place to pursue these remedies is in the Van Nuys court, where those claims are pending. (160 *C.A.3d* 1250.) Absent consolidation of the two actions, "the Los Angeles action was not and is not the proper forum for adjudication of the sufficiency of pleadings or defenses in the Van Nuys action." (160 *C.A.3d* 1251.)

Later cases are in accord. (See *Ford v. Superior Court* (1986) 188 *C.A.3d* 737, 740, 741, 233 *C.R.* 607 [following *Williams v. Superior Court*, *supra*; action in one department of superior court to enjoin execution of judgment in case pending in another department was dismissed for lack of jurisdiction]; *New Tech Dev. v. Bank of Nova Scotia* (1987) 191 *C.A.3d* 1065, 1069, 1070, 236 *C.R.* 746 [distinguishing *Ford*; permanent judge had authority to dissolve preliminary injunction granted by temporary judge who was unavailable]; *In re Marriage of Schenck* (1991) 228 *C.A.3d* 1474, 279 *C.R.* 651, 11 *Summary* (10th), *Husband and Wife*, §69 [continuing jurisdiction of family law department over deferred sale of community home precluded order of sale in law and motion department to enforce support judgment]; *Elsea v. Saberi* (1992) 4 *C.A.4th* 625, 631, 5 *C.R.* 742 [quoting *Ford*]; *Glade v. Glade* (1995) 38 *C.A.4th* 1441, 1449, 1450, 45 *C.R.2d* 695, *infra*, §232 [quoting *Ford*].)

In *People v. Madrigal* (1995) 37 *C.A.4th* 791, 43 *C.R.2d* 498, a judge in one Los Angeles superior court district, who had placed defendant on probation for an offense, revoked defendant's probation and sentenced him to state prison on the basis of a subsequent conviction, a probation violation in another district, despite assignment of the probation violation matter to a judge in the second district under a local court rule. *Held*, probation revocation reversed; the first judge acted in excess of jurisdiction.

(a) The jurisdiction of a multijudge, multidistrict superior court is vested in the court as a whole, and exercise by one department of authority in a matter that might properly be heard in another action, although irregular, does not amount to a defect of jurisdiction. (37 *C.A.4th* 795; citing *Shane v. Superior Court*, *supra*.) However, where a proceeding has been duly assigned for hearing and determination to one department of the superior court by the

presiding judge of that court in conformity with the court's rules, and the proceeding so assigned has not been finally disposed of in that court or legally removed from it, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been assigned. While one department is exercising the jurisdiction vested by the Constitution in the superior court of that county, the other departments of that court are as distinct from the court as other superior courts. (37 C.A.4th 795; citing *Williams v. Superior Court*, *supra*.)

(b) A superior court is but one tribunal, even if it is composed of numerous departments. An order made in one department during the progress of a cause can neither be ignored nor overlooked in another department. This is because Cal. Const., Art VI, §4, vests jurisdiction in the court and not in any particular judge or department, and whether sitting separately or together, the judges hold but one and the same court. One department of the superior court cannot enjoin, restrain, or otherwise interfere with the judicial act of another department of the same court. The first department to assume and exercise jurisdiction over a matter acquires exclusive jurisdiction. A judgment rendered in one department of the superior court is binding on that matter on all other departments until such time as the judgment is overturned. (37 C.A.4th 796.) These rules governing superior court departments are equally applicable to different superior court districts. (37 C.A.4th 796; citing *Shane v. Superior Court*, *supra*.)

In *People v. Ellison* (2003) 111 C.A.4th 1360, 1366, 4 C.R.3d 713, the first judge revoked defendant's probation following a notice of probation violation, the case was then assigned to a second judge for sentencing, and the second judge (a) continued the sentencing hearing pending a report from the probation department and (b) released defendant on his own recognizance. *Held*, the second judge obtained exclusive jurisdiction over sentencing and the first judge lacked jurisdiction to withdraw the release order and sentence defendant.

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2 Witkin Cal. Proc. Courts § 230

[§ 230] Probate Court.

In *Regents of Univ. of Calif. v. Superior Court* (1960) 185 C.A.2d 806, 8 C.R. 629, a probate proceeding was commenced and proceeded regularly before Judge G. Counsel for a devisee filed an affidavit challenging the judge, who terminated the hearing and allowed the parties to go to the courtroom of Judge S. Judge S continued the matter, took evidence, and continued it again. Then the main moving party moved in Judge G's department to strike the affidavit of challenge and to retransfer to Judge G, which motions were granted. *Held*, prohibition issued to restrain Judge G from retaking the case. When the parties proceeded before Judge S to try the issues, they waived any objections to the informal transfer by Judge G to Judge S's department; hence, Judge S was thereafter exercising the powers of the superior court of the county and had jurisdiction to decide the issues. In the absence of any intervening cause for retransfer (e.g., illness of Judge S), the attempt by Judge G to retransfer was an interference by one superior judge with proceedings before another who was exercising the jurisdiction of the court. (185 C.A.2d 809.)

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3. Juvenile Court.

2 Witkin Cal. Proc. Courts § 231

[§ 231] Juvenile Court.

If the principle of priority of jurisdiction over an assigned case (*supra*, §229) is applicable to ordinary departments, it must be even more true of departments exercising distinct subject matter jurisdiction. This is made clear in *People v. Sanchez* (1942) 21 C.2d 466, 470, 132 P.2d 810, involving interference by a criminal department with the jurisdiction of the juvenile court. Defendant, a minor charged with robbery, pleaded guilty (under existing law) and was committed by Department 39, the Los Angeles juvenile court, to Preston Reformatory. Later, Department 41, a criminal department, vacated the order of commitment, directed defendant's return, and eventually sentenced him to state prison. *Held*, on the authority of *Williams v. Superior Court* (1939) 14 C.2d 656, 96 P.2d 334, *supra*, §229, the order of Department 41 was void. "When defendant was declared a ward of the juvenile court, he became subject to its continuing jurisdiction. Whatever power the superior court had over him was thereby vested in the juvenile court, and until the latter remanded his case for disposition under the general law no other department of the superior court acting in a general capacity had the jurisdictional authority to act upon the matter." (21 C.2d 471.)

In *Sanchez*, the state, conceding this continuing jurisdiction, advanced the familiar argument that there was but one court, that any judge of it could sit as a juvenile court and exercise its jurisdiction to vacate the commitment to Preston, and then sit as a criminal department to sentence defendant to prison; and that any failure to make formal orders of transfer between the departments (i.e., from the judge of Department 41 to himself) was a mere irregularity, waived by the failure of defendant to object. (See dissent, 21 C.2d 473.) The majority opinion gave the following answer: "Under the Juvenile Court Law the superior court acting as a juvenile court should have entered an order vacating defendant's commitment and remanding him to the superior court for further proceedings to enable the superior court acting under the general law to impose sentence upon him. The court could not perform both functions in a single capacity. The superior court acting as such had no power to vacate the order of commitment; the juvenile court had no power to impose a criminal sentence." (21 C.2d 472.)

Two aspects of this holding should be stressed: (a) The departments involved were occupied by different judges, and the judge of Department 41 actually did interfere with the existing authority of the judge of Department 39 over the juvenile delinquent. (b) The language of the opinion implies, however, that even in a single-judge court the same

interference would be involved in the absence of a transfer to the juvenile department. The reason is that, even where the same judge acts in all capacities, the jurisdiction and procedure of the juvenile court are by statute entirely different from those of a criminal court. The defect, therefore, is not merely the lack of a formal order of transfer; this could be deemed a mere irregularity. The defect is the failure of the court to follow the statutory requirement of convening in separate, special session, in the customary informal manner, to exercise the special jurisdiction of the juvenile court. "It is inconsistent with the mode of operation required by the act to allow other departments of the court acting under the general authority of superior courts to act upon cases within the Juvenile Court Law over which the juvenile court is exercising its jurisdiction." (21 C.2d 471.)

Slevats v. Feustal (1963) 213 C.A.2d 113, 28 C.R. 517, is distinguishable. Plaintiff mother obtained a declaration of paternity and a support order against defendant father, with which defendant complied. Later plaintiff was committed as a mentally ill person, the child was made a ward of the juvenile court, and defendant, as ordered, made the payments to the county. Then, on leave from the hospital plaintiff took the child and left the state, and the juvenile court thereupon dismissed its proceeding. Over 3 years later plaintiff sought execution for accumulated support payments, which the court granted for the period from the date of dismissal of the juvenile court proceeding. *Held*, affirmed. The juvenile court took exclusive jurisdiction when it made the child its ward, and the order for payments to plaintiff was nullified during the period of the wardship. But the superseding jurisdiction of the juvenile court is always temporary, and, on dismissal of its proceeding, the jurisdiction of the civil department revived and its order again became effective. (213 C.A.2d 118.)

In re Shannon W. (1977) 69 C.A.3d 956, 138 C.R. 432, 10 Summary (10th), *Parent and Child*, §319, held that a proceeding in the superior court to sever the parental relationship of a dependent child does not interfere with the continuing jurisdiction of the juvenile court to make temporary custody arrangements for the child.

In *Slone v. Inyo County Juvenile Court* (1991) 230 C.A.3d 263, 282 C.R. 126, plaintiff mother was a Native American, and her three children were either members of her tribe or eligible for membership. Defendant county's department of social services instituted dependency proceedings, declared the children dependents, and made orders on placement and discontinuance of reunification services. Plaintiff filed a petition in the superior court seeking invalidation of the juvenile court orders, on the ground that the federal Indian Child Welfare Act (25 U.S.C., §1901 et seq.) gave the superior court review jurisdiction. *Held*, the superior court had no jurisdiction to hear the petition.

(a) 25 U.S.C., §1914 states: "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title." (230 C.A.3d 267.) The legislative history indicates that "Congress did not intend to let local rules concerning such matters as pleading or burden of proof defeat the purpose of the act." (230 C.A.3d 267.) But the enforcement of substantive rights created by the Act was left to the state courts otherwise having jurisdiction of the subject matter. No case law or other authority indicates that the Act confers jurisdiction on superior courts to hear petitioners under 25 U.S.C., §1914. (230 C.A.3d 267.)

(b) A department of the court exercising distinct subject matter jurisdiction has exclusive jurisdiction. (230 C.A.3d 269, quoting the text.) Thus, the holding in *People v. Sanchez*, *supra*, applies to dependency proceedings in the juvenile court. (230 C.A.3d 270.)

(c) In this case the juvenile court had exclusive jurisdiction over the dependency matter at the time plaintiffs brought their petition under 25 U.S.C., §1914 in the superior court, attempting to invalidate a ruling of the juvenile court in the dependency case. Under *Williams v. Superior Court*, *supra*, and *People v. Sanchez*, *supra*, the superior court was not the competent state court to entertain such a petition. "While the dependency matter is before the juvenile court, plaintiffs are required to bring their petition in the juvenile court. Once all the issues raised by the petition have been adjudicated in the juvenile court, plaintiffs' recourse for review is to the appellate court." (230 C.A.3d 270.)

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4. Jurisdictional Aspects of Division into Departments.

e. Priority of Jurisdiction: Interference With Pending Case.

4. Family Court.

2 *Witkin Cal. Proc. Courts* § 232

[§ 232] Family Court.

In *Glade v. Glade* (1995) 38 C.A.4th 1441, 45 C.R.2d 695, a trustee filed an action on behalf of the trust to foreclose on the community property residence of a couple who were in dissolution proceedings in the family court. Although the family court issued a stay of the foreclosure proceedings, the trial court in the foreclosure action granted summary judgment for the trust, and denied the wife's motion for reconsideration. *Held*, reversed; the family court had priority of jurisdiction.

(a) Because a superior court is but one tribunal, an order made in one department can neither be ignored nor overlooked in another department. It follows that where a proceeding has been assigned to one department by the presiding judge and has not been finally disposed of, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been assigned. (38 C.A.4th 1449.)

(b) Once the dissolution action was underway, the family court acquired jurisdiction over alleged community property in the hands of third parties and could properly order their joinder and the sale of that property. There was a threat of multiple actions and inconsistent verdicts that could have undermined the family court's ability to characterize and dispose of the couple's community property. Because the wife's dissolution action was the first one pending, vesting the family court with jurisdiction over alleged community property before the foreclosure action commenced, the family court had priority of jurisdiction and its order staying the foreclosure action was proper. Assuming that the judge who granted summary judgment in the foreclosure action had knowledge of the stay, he was bound to respect it. (38 C.A.4th 1456.)

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4. Jurisdictional Aspects of Division into Departments.

f. Successive Inconsistent Decisions by Different Departments.

2 *Witkin Cal. Proc. Courts* § 233

[§ 233] Successive Inconsistent Decisions by Different Departments.

The system of distribution of business among departments, particularly in the larger counties, often results in different departments properly hearing and determining different parts of an action or proceeding. Thus, one department may try an action or proceeding, and another may hear motions after judgment. (*Graziani v. Denny* (1917) 174 C. 176, 179, 162 P. 397 [trial in one department, motion to vacate in another]; *Haines v. Commercial Mortg. Co.* (1928) 206 C. 10, 12, 273 P. 35 [order by one department, order vacating it by another]; *People v. Connolly* (1951) 103 C.A.2d 245, 248, 229 P.2d 112 [conviction in one criminal department; application for probation in another]; see C.R.C., Rule 10.910(a) [trial judge, for good cause, may reassign case to judge supervising master calendar for further disposition].) May the judge in the second department make a determination inconsistent with that of the judge of the first department? Clearly so.

There is *no jurisdictional conflict* if the cause has actually been transferred to the second department, so that the first department is no longer exercising continuing jurisdiction. And the first determination of a preliminary or interlocutory matter, e.g., an intermediate ruling on pleadings, is not *res judicata*. The judge who made the ruling may reverse himself or herself (see *Vertex Inv. Co. v. Schwabacher* (1943) 57 C.A.2d 406, 410, 134 P.2d 891), and it necessarily follows that another judge of the same court exercising the jurisdiction over the cause may likewise reverse or modify the prior ruling. (*Wrightson v. Dougherty* (1936) 5 C.2d 257, 265, 54 P.2d 13 [demurrer overruled in one department, judgment on pleadings later granted by trial judge in another department]; see *Haines v. Commercial Mortg. Co.*, *supra* [judge of one department made *ex parte* appointment of receiver; judge of another department vacated it]; *Davis v. Conant* (1935) 10 C.A.2d 73, 75, 51 P.2d 151 [jury trial denied in calendar department for failure to make timely deposit of fees; relief from default granted by trial department and jury trial allowed].)

People v. Grace (1926) 77 C.A. 752, 759, 247 P. 585, contains a strong statement to the contrary: "An order made in one department during the progress of a cause can neither be ignored nor overlooked in another department in which the cause falls by transfer." But the case is probably distinguishable on the grounds that (a) the prior order involved the substantial right of the defendant to a trial on the issue of his sanity (see 77 C.A. 760, 762), and (b) it was not reconsidered but was overlooked (77 C.A. 759). (See *Elsea v. Saberi* (1992) 4 C.A.4th 625, 630, 631, 5 C.R.2d 742 [adopting view expressed in *Grace*; judge lacked jurisdiction to grant relief from default where another motion for relief on same grounds had been denied by different judge].)

The general rule and practice are explained in *Timm v. McCartney* (1935) 9 C.A.2d 230, 232, 49 P.2d 315, where the law and motion department overruled a general demurrer, but the trial judge granted judgment on the pleadings: "It is a somewhat common occurrence for a trial court to change its rulings upon questions of law during the progress of a trial, and a ruling on demurrer occupies no better position in this regard than any other ruling from which an appeal cannot be taken. ... The inconvenience caused the plaintiff is an occasional by-product of the system which exists in Los Angeles County of settling the pleadings in one department and of trying the issues in another. ... Occasionally the law and motion department judge differs with the trial department judge, but this must be endured as it would be quite impracticable to require the trial judge to proceed to the trial of a case in which the complaint does not state facts sufficient to entitle the plaintiff to any relief. Nevertheless, the trial judge should keep in mind that the judge who presides over the law and motion department soon becomes an expert in matters of pleading, and the trial judge should make such a reverse ruling with great caution. Certainly it would be better practice when such a drastic and unexpected order is made, for the trial judge to volunteer to the plaintiff a reasonable continuance of the case with permission to amend the complaint, to the end that where possible cases be tried upon the merits." (9 C.A.2d 232.) (The opinion then proceeded to support this last admonition by reversing the trial judge's order for judgment on the pleadings.)

In *Estate of Casimir* (1971) 19 C.A.3d 773, 97 C.R. 623, an interlocutory decree of divorce was entered on July 31, 1969; the period began to run in July 1967, so the final decree could have been entered immediately. The husband signed the application for it, filed it with the clerk on August 8, 1969, and died the next day. On August 11, 1969, the wife advised the clerk of the husband's death, and no final decree was entered. Thereafter the will, which expressly left nothing to the wife, was offered for probate, and the wife petitioned for a family allowance. The executor advised the probate court that a motion was pending in another department to enter the final decree nunc pro tunc as of August 4, 1969, before decedent's death, and that granting the motion would eliminate the wife's claim as a widow. The probate judge nevertheless granted a family allowance on May 26, 1970. On June 12, 1970, the judge of the other department granted the motion for entry nunc pro tunc. *Held*, the order for a family allowance was void.

(a) The situation was unique, in that (1) the probate court, with full subject matter and personal jurisdiction in the probate proceeding, made an order for family allowance; (2) 1 month later another department, with full subject matter jurisdiction of the marriage status and the parties, determined that the marriage was legally terminated prior to decedent's death, thus precluding the wife's claim as a widow.

(b) However, the conflicting orders must be viewed as actions of a single court. Hence, when the court decreed that the dissolution was final before the decedent's death, it necessarily eliminated the jurisdictional basis on which the previous order for a family allowance was based. (19 C.A.3d 783.)

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D. Presiding Judge.

1. In General.

2 Witkin Cal. Proc. Courts § 234

[§ 234] In General.

(1) *General Responsibility.* "The presiding judge is responsible, with the assistance of the court executive officer, for leading the court, establishing policies, and allocating resources in a manner that promotes access to justice for all members of the public, provides a forum for the fair and expeditious resolution of disputes, maximizes the use of judicial and other resources, increases efficiency in court operations, and enhances services to the public." (C.R.C., Rule 10.603(a).) (On authority of presiding judge, see C.R.C., Rule 10.603(b)(1); on use of executive committee to advise presiding judge, see C.R.C., Rule 10.605; on executive officer, see *infra*, §368; on delegation of duties of presiding judge to another judge or to executive officer, see C.R.C., Rule 10.603(d).) A local rule or policy may not limit the authority of the presiding judge granted in the California Rules of Court. (C.R.C., Rule 10.603(b)(2).) (See Rothman, *California Judicial Conduct Handbook* 3d, §6.00 et seq.)

(2) *Selection Criteria.* The presiding judge is the supervising head of the court, and his or her duties and responsibilities, particularly in the larger courts, have become exceedingly complex. Accordingly, a strong movement for selection on the basis of administrative ability, rather than on rotation or seniority, is reflected in pronouncements of the Legislature and the Judicial Council. (See C.R.C., Rule 10.602(b) [presiding judge must have at least 4 years' experience as judge, unless this requirement is waived by majority vote of judges of court; listing factors of interest and ability to be considered in nomination and selection of presiding judge].)

(3) *Court With Two Judges.* In courts with only two judges, the presiding judge is chosen by the judges annually. The selection is made on the basis of "administrative qualifications and interest." (*Govt.C. 69508.5(a)*.) In the event of a disagreement, the office is rotated each year between the judges, beginning with the senior judge. In cases of equal seniority, the first presiding judge is selected by lot. (*Govt.C. 69508.5(b)*; see C.R.C., Rule 10.602(a)(2) [selection must conform to *Govt.C. 69508.5*].) The presiding judge is elected for a term of not less than 1 year. He or she may serve additional terms, with the duration set by internal local rule or policy. (C.R.C., Rule 10.602(c).)

(4) *Court With Three or More Judges.* The judges of a superior court having three or more judges "choose from their own number a presiding judge who serves as such at their pleasure." (*Govt.C. 69508(a)*.) The court selects the presiding judge by secret ballot. (C.R.C., Rule 10.602(a)(1).) The presiding judge is elected for a term of not less than 2 years. He or she may serve additional terms, with the duration set by internal local rule or policy. (C.R.C., Rule

10.602(c).)

(5) *Acting Presiding Judge*. The court may elect an assistant presiding judge, and, if the court's local rule or policy does not provide for an acting presiding judge to serve in the event the presiding judge is absent or unable to act, the presiding judge must designate one. (C.R.C., Rule 10.602(d).)

(6) *Removal*. The presiding judge may be removed by a majority vote of the judges of the court. (C.R.C., Rule 10.602(c).)

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D. Presiding Judge.

2. Duty To Distribute Business.

2 *Witkin Cal. Proc. Courts* § 235

[§ 235] Duty To Distribute Business.

(1) *In General.* The business of the court is distributed by the presiding judge. (C.R.C., Rule 10.603(b)(1)(B).) In counties with three or more judges, the presiding judge must "distribute the business of the court among the judges, and prescribe the order of business." (*Govt.C. 69508(a)*; on mandamus to compel exercise of discretion to distribute business under *Govt.C. 69508*, see *Anderson v. Phillips* (1975) 13 C.3d 733, 735, 736, 119 C.R. 879, 532 P.2d 1247.)

(2) *Assignments.* The presiding judge must designate a presiding judge in each department, a presiding judge of the juvenile division, a supervising judge for each division, district, or branch, and, when appropriate, a master calendar judge. Assignments may not be based solely or primarily on seniority. (C.R.C., Rule 10.603(c)(1)(A).) If a matter is required to be heard or determined by a particular judge and that judge is absent, deceased, or unable to act, the presiding judge designates a judge to act. (C.R.C., Rule 10.603(c)(1)(E).) The presiding judge supervises the calendar, apportions business among the court's departments "as equally as possible," and publishes the court's calendar. (C.R.C., Rule 10.603(c)(1)(C).) The presiding judge reassigns cases between departments "as convenience or necessity requires." (C.R.C., Rule 10.603(c)(1)(D).) (See *Guardianship of Simpson* (1998) 67 C.A.4th 914, 941, 79 C.R.2d 389 [under Cal. Const., Art. VI, §21 (*infra*, §348) temporary judge sitting by stipulation may act until final determination; thus, presiding judge lacked authority to reassign pending case without good cause].)

(3) *Performance of Judicial Duties.* The presiding judge ensures that the duties of judges specified by C.R.C., Rule 10.608 are "timely and orderly performed." (C.R.C., Rule 10.603(a)(2).) C.R.C., Rule 10.608 requires all judges to hear all assigned matters unless disqualified, state in writing the reasons for refusing to hear an assigned cause, notify the presiding judge or the master calendar judge of the completion or continuation of an assigned matter, request the approval of the presiding judge for an intended absence of half a day or more, follow the court's personnel plan for dealing with employees, and follow the presiding judge's authorized directives in matters of court management and administration.

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D. Presiding Judge.

3. Duty To Monitor Pending Cases.

2 Witkin Cal. Proc. Courts § 236

[§ 236] Duty To Monitor Pending Cases.

(1) *In General.* To ensure that no cause under submission remains undecided and pending longer than 90 days, the presiding judge must do the following:

(a) Require each judge to report causes under submission for 30 to 60 days, 61 to 90 days, and over 90 days. (C.R.C., Rule 10.603(c)(3)(A).)

(b) Compile and circulate to the judges of the court a list of submitted causes, listing the causes under submission before each judge and the length of time each has been under submission. (C.R.C., Rule 10.603(c)(3)(B) and (c)(3)(C).)

(c) Discuss with each judge who has a cause under submission for over 30 days ways to ensure that the cause is timely filed. (C.R.C., Rule 10.603(c)(3)(D).)

(d) Consider providing assistance to a judge who has a cause under submission for over 60 days. (C.R.C., Rule 10.603(c)(3)(E).)

(e) Consider asking the Administrative Office of the Courts to review the court's calendar management system if, for 3 months, more than 90 active civil cases are pending for each judicial position or more than 10% of the cases on the civil active list have been pending for 1 year or more. (C.R.C., Rule 10.603(c)(3)(F).)

(2) *When Cause Is Under Submission.* A cause is deemed under submission on the date the final paper is required to be filed or on the date argument is heard, whichever is later, unless the court orders the matter submitted before that time. (C.R.C., Rule 2.900(a).) Submission may be vacated only by an order served on the parties "stating reasons constituting good cause and providing for resubmission." (C.R.C., Rule 2.900(b).)

(3) *When Cause Is Pending.* A submitted cause is pending and undetermined until (a) the court announces its tentative decision, or (b) the cause is terminated. The time required to "finalize" a tentative decision is not time in which the cause is pending and undetermined. (C.R.C., Rule 2.900(c).)

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4. Other Duties.

2 *Witkin Cal. Proc. Courts* § 237

[§ 237] Other Duties.

The presiding judge must do the following:

- (1) *Local Rules*. Propose local rules (see supra, §199 et seq.) to "expedite and facilitate" court business. (C.R.C., Rule 10.603(c)(11).)
- (2) *Judicial Schedules*. Prepare a plan for judges' vacations and absences. (C.R.C., Rule 10.603(c)(2).)
- (3) *Regular Meetings*. Establish a process for consulting with the judges of the court and call meetings of the judges "as needed." (C.R.C., Rule 10.603(c)(7).)
- (4) *Committees*. Appoint standing and special committees of judges to assist in the proper performance of court duties and functions. (C.R.C., Rule 10.603(c)(7).)
- (5) *Administrative Business*. Ensure the effective management and administration of the court, consistent with rules, policies, strategic plans, and budgets adopted by the court and the Judicial Council. (C.R.C., Rule 10.603(a)(1).)
- (6) *Personnel Administration*. Supervise the court executive officer, or, if there is no executive officer, perform the personnel duties of the executive officer specified in C.R.C., Rule 10.610(c)(1) (infra, §368). (C.R.C., Rule 10.603(c)(5).)
- (7) *Liaison With Other Agencies*. Provide for liaison between governmental and civic agencies and the court. (C.R.C., Rule 10.603(c)(8).)
- (8) *Community Relations*. Meet, or designate a judge or judges to meet, with bench, bar, news media, or community committees to review problems and promote understanding of the administration of justice and encourage judges to engage in appropriate community outreach. (C.R.C., Rule 10.603(c)(8).)
- (9) *Complaints Against Court Commissioners and Referees*. Prepare and submit to the judges for consideration procedures for dealing with complaints against court commissioners and referees. (C.R.C., Rule 10.603(c)(4)(C).)

(10) *Notice of Failure To Perform Judicial Duties*. Notify the Commission on Judicial Performance (*supra*, §71), and the judge when appropriate, of a judge's substantial failure to perform judicial duties, including any habitual neglect of duty, or absences totaling more than 90 court days in a 12-month period that are due to disability. (C.R.C., Rule 10.603(c)(4)(A), (c)(4)(B).)

(11) *Written Policies and Procedures*. Assure that the court adopts written policies and procedures allowing the presiding judge to perform administrative duties efficiently. (C.R.C., Rule 10.603(a)(3).)

(12) *Transcripts on Appeal*. Supervise preparation of reporters' transcripts on appeal, maintain records of outstanding transcripts to be completed by each reporter, reassign court reporters to facilitate prompt completion of transcripts, and review reporters' requests for extensions of time to complete transcripts in criminal appeals. (C.R.C., Rule 10.603(c)(10)(A) [noting that these duties ordinarily should be delegated to the court's executive officer or administrator].)

(13) *Delinquent Reporters*. Declare any court reporter who is delinquent in completing a transcript on appeal not competent to act as a court reporter under *Govt.C. 69944*, after furnishing reasonable notice and a hearing. (C.R.C., Rule 10.603(c)(10)(B).)

(14) *Temporary Judges*. Be responsible for recruitment, training, supervision, approval, and performance of temporary judges (see *infra*, §348 et seq.). (C.R.C., Rule 10.603(c)(4)(D).)

(15) *Evaluation of Assigned Judges*. Submit an annual confidential evaluation of each assigned retired judge (see *supra*, §11 et seq.) to the administrative director of the courts. (C.R.C., Rule 10.603(c)(4)(E).)

(16) *Complaints About Assigned Judges*. Direct complaints about assigned retired judges to the administrative director of the courts and assist in investigating, evaluating, and determining complaints. (C.R.C., Rule 10.603(c)(4)(E).)

(17) *Budget and Fiscal Management*. Establish a process for consulting with the judges of the court on budget and fiscal matters, establish budget priorities and submit budget requests, and approve procurements, contracts, expenditures, and allocations. Specified fiscal duties may be delegated to the court executive officer. (C.R.C., Rule 10.603(c)(6).)

(18) *Strategic Planning*. Prepare a long-range strategic plan consistent with the plan and policies of the Judicial Council, and ensure that the court "regularly and actively examines access issues, including any physical, language, or economic barriers that impede the fair administration of justice." (C.R.C., Rule 10.603(c)(9).)

(19) *Judicial Education*. Budget for judicial education (C.R.C., Rule 10.501(f)) and provide judges with sufficient educational leave to participate in judicial education programs (C.R.C., Rule 10.501(g)).

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E. Management of Court Business.

1. In General.

2 Witkin Cal. Proc. Courts § 238

[§ 238] In General.

(1) *Policies and Procedures.* Each superior court must do the following:

(a) Adopt for use by judges and court personnel an internal operations manual outlining policies and procedures necessary for the efficient operation and management of the court. (C.R.C., Rule 10.901(2).)

(b) Maintain and periodically review for accuracy written local court procedures, policies, and operating practices that are not contained in local rules. (C.R.C., Rule 10.901(3).)

(2) *Duty To Manage Civil Calendar.* Each superior court must do the following:

(a) Maintain a calendar and caseflow management system that will insure, based on the court's experience, that a sufficient number of cases are set for trial so that all departments will be occupied with judicial business. (C.R.C., Rule 10.901(1).)

(b) Assure that calendaring functions are performed as directed by the court and that, to the maximum extent consistent with existing organizational structures, personnel rendering direct and immediate service to the court are within its administrative control. (C.R.C., Rule 10.901(4).)

West's Key Number Digest, Courts 50, 125

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E. Management of Court Business.

2. Management of Complex Litigation.

a. In General.

2 Witkin Cal. Proc. Courts § 239

[§ 239] In General.

Standard 3.10 of the Standards of Judicial Administration calls for continuous and active judicial management of complex litigation. (Standard 3.10(a).) (See C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §2.128 et seq.)

(1) *Definition.* A complex case is "an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." (C.R.C., Rule 3.400(a).) Under C.R.C., Rule 3.400(c), cases involving the following kinds of claims are provisionally complex unless declared by local rule not to be provisionally complex:

- (a) Antitrust or trade regulation claims.
- (b) Construction defect claims involving many parties or structures.
- (c) Securities or investment claims involving many parties.
- (d) Environmental or toxic tort claims involving many parties.
- (e) Mass tort claims.
- (f) Class action claims.
- (g) Insurance coverage claims arising from these kinds of claims.

(2) *Determination Whether Case Is Complex.* The parties may designate a case as complex or counterdesignate the case as not complex by making an indication on the civil case cover sheet. (C.R.C., Rules 3.401, 3.402.) With or without a hearing, the court may examine whether litigation is complex on its own motion or on a noticed motion. (C.R.C., Rule 3.403.) (On factors in determining whether case is complex, see C.R.C., Rule 3.400(b).)

(3) *Assignment*. "Complex litigation should be assigned to one judge for all purposes. If such an assignment is not possible, a single judge should be assigned to hear law and motion matters and discovery matters." (Standard 3.10(b).) In assigning judges to complex litigation, the presiding judge should consider the judge's ability, interest, training, experience, and willingness to participate in educational programs. Commissioners should be employed only under the judge's direct supervision. (Standard 3.10(c).)

(4) *Time Limits*. Time limits should be established early to expedite the major phases of the litigation and should be tailored to the particular circumstances of the individual case. And time limits, accompanied by other methods of sound judicial management, should be firmly and fairly maintained. (Standard 3.10(d).)

(5) *Preparation for Trial*. Litigants should be required to minimize evidentiary disputes and to efficiently organize their evidence before trial. (Standard 3.10(e).) (See 7 *Cal. Proc.* (5th), *Trial*, §6.)

(6) *Disciplinary Procedures*. Judges should be sensitive to, and prepared to use disciplinary procedures in case of, dilatory or abusive litigation tactics. (Standard 3.10(f).)

(7) *Education and Staff Assistance*. "Judges should be encouraged to attend educational programs on the management of complex litigation." (Standard 3.10(g).) When possible, judges assigned to complex litigation should be given extra staff assistance. (Standard 3.10(h).)

(8) *Scope of Court's Inherent Power*. Several decisions involve the court's inherent power to manage complex litigation. (See *Lu v. Superior Court* (1997) 55 *C.A.4th* 1264, 1270, 64 *C.R.2d* 561 [in managing complex litigation, court has inherent power under *C.C.P.* 187 (supra, §185) to appoint referee to conduct settlement conferences]; *First State Ins. Co. v. Superior Court* (2000) 79 *C.A.4th* 324, 329, 94 *C.R.2d* 104 [in complex litigation case, trial court contravened summary judgment statute (*C.C.P.* 437c) by issuing case management order that precluded parties from filing motion for summary judgment before resolution of choice of law issues; however, court had inherent power to defer hearing motion until resolution of those issues].)

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2. Management of Complex Litigation.

b. Supervision of Discovery.

2 Witkin Cal. Proc. Courts § 240

[§ 240] Supervision of Discovery.

In *Asbestos Claims Facility v. Berry & Berry* (1990) 219 C.A.3d 9, 267 C.R. 896, trial judges issued general orders in complex asbestos litigation appointing designated defense counsel to coordinate the scheduling of numerous discovery-related activities on behalf of all defendants and providing for the allocation of the counsel's costs and fees among all defendants in a given case. After the trial judge ordered certain defendants to pay challenged attorneys' fees, the defendants contended that the general orders were unlawful. *Held*, the designated defense counsel system was within the inherent managerial powers of the courts and did not interfere with defendants' right to counsel of their choice.

(a) "In addition to their inherent equitable power derived from the historic power of equity courts, all courts have inherent supervisory or administrative powers which enable them to carry out their duties, and which exist apart from any statutory authority. ... That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation, including discovery matters, in order to insure the orderly administration of justice." (219 C.A.3d 19; see *supra*, §173 et seq.)

(b) Former Section 19 (now Standard 3.10) of the Standards of Judicial Administration (*supra*, §239) presupposes the existence of these inherent managerial powers and provides for appointment of liaison counsel and control over discovery. (219 C.A.3d 19.) "The extent of the trial court's inherent managerial power in complex civil litigation has not yet been delineated by this state's reviewing courts. However, federal courts have long recognized that active and effective judicial management of such litigation is crucial. ... Several federal courts have concluded that in complex civil litigation, the trial court's inherent power extends to the appointment of general or liaison or lead counsel to perform certain functions on behalf of several parties with common interests, and that such an appointment does not interfere with a party's right to select its own counsel." (219 C.A.3d 20.)

(c) Although it is difficult in the abstract to draw a bright line between services which are primarily administrative and those which are legal, the general orders were meticulously drafted to delineate counsel's duties and circumscribe his authority. Counsel was not authorized to evaluate cases, set priorities, formulate or present positions on substantive or procedural issues for appellants, or present written or oral arguments to the court, and counsel was not authorized to

bind defendants in any aspect of the litigation without their consent. Instead, counsel's duties were limited to scheduling and coordinating depositions after the Defense Discovery Committee determined which plaintiffs should be deposed, and in what priority, scheduling medical examinations after the committee determined the nature and priority of those screenings, and scheduling, noticing, and coordinating depositions of expert witnesses after the committee determined which should be deposed. These functions were primarily administrative in nature, and the effect of the orders was not to substitute counsel for defendants' attorneys of choice. Given the burdens placed on the judicial system by asbestos litigation, the trial judges acted well within their inherent managerial powers. (219 C.A.3d 22, 23.) (See *Lu v. Superior Court* (1997) 55 C.A.4th 1264, 1269, 64 C.R.2d 561 [court had authority to appoint discovery referee in complex construction defect case even in absence of current discovery dispute]; 44 *Stanf. L. Rev.* 815 [Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts].)

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F. Limited Civil Cases.

1. Nature and Scope of Classification.

2 Witkin Cal. Proc. Courts § 241

[§ 241] Nature and Scope of Classification.

(1) *In General.* At one time, the jurisdiction of the municipal court was specified by statute. With various exceptions, cases below the jurisdictional dollar amount were within the jurisdiction of the municipal court and cases above that amount were within the jurisdiction of the superior court, although some actions were within the jurisdiction of the superior court regardless of the amount in controversy.

As part of the unification of trial courts, the concept of municipal court jurisdiction was replaced by the "limited civil case" in 1998. The California Law Revision Commission explains the change: "On unification of the trial courts in a county, all causes will be within the original jurisdiction of the superior court. Differentiating among superior court causes will be necessary, however, to preserve filing fees, economic litigation procedures, local appeals, and other significant procedural distinctions for matters that traditionally have been within the municipal court's jurisdiction." (28 Cal. Law Rev. Com. Reports, p. 64.) Causes traditionally within municipal court jurisdiction are now identified in *C.C.P.* 85 as limited civil cases. *C.C.P.* 86 and 86.1 identify particular proceedings as limited civil cases. (See *infra*, §243 et seq.) The Law Revision Commission Comment to *C.C.P.* 86 provides: "A limited civil case is equivalent to a matter within the original jurisdiction of the municipal court under former law." (28 Cal. Law Rev. Com. Reports, p. 144.) (See C.E.B., 1 Civil Proc. Before Trial 4th, §6.15 et seq.) Some decisions involving municipal court jurisdiction remain relevant and are cited in the following sections.

(2) *Small Claims Case.* A limited civil case within the jurisdiction of the small claims division is brought in the small claims division. Where a statute or rule applicable to a small claims case conflicts with a statute or rule applicable to a limited civil case, the small claims statute or rule is applicable. (*C.C.P.* 87(a).)

(3) *Unlimited Civil Case.* A civil action that is not a limited civil case may be referred to as an "unlimited civil case." (*C.C.P.* 88.)

(4) *Implied Authority in Limited and Unlimited Civil Cases.* "The existence of a statute relating to the authority of the court in a limited civil case does not, by itself, imply that the same authority does or does not exist in an unlimited civil case." (*C.C.P.* 89(a).) "The existence of a statute relating to the authority of the court in an unlimited civil case does not, by itself, imply that the same authority does or does not exist in a limited civil case." (*C.C.P.* 89(b).)

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2. Conditions for Limited Civil Cases.

2 Witkin Cal. Proc. Courts § 242

[§ 242] Conditions for Limited Civil Cases.

(1) *In General.* *C.C.P. 85* sets forth conditions for treating an action or proceeding as a limited civil case. Notwithstanding a statute that classifies an action or proceeding as a limited civil case, an action or proceeding "shall not be treated" as a limited civil case unless all the conditions are satisfied. The Law Revision Commission Comment notes that the statute facilitates differentiating among civil cases for purposes of (a) applying economic litigation procedures (*C.C.P. 91*) and (b) defining appellate jurisdiction (*C.C.P. 904.1, 904.2*). (28 Cal. Law Rev. Com. Reports, p. 139.) (See *C.C.P. 904.1* [appeal other than in limited civil case is to Court of Appeal]; *C.C.P. 904.2* [appeal in limited civil case is to appellate division of superior court]; *C.C.P. 904.3* [discretionary review of judgment of appellate division granting or denying writ of mandamus or prohibition in limited civil case is in appellate court].)

(2) *Amount in Controversy.* The amount in controversy does not exceed \$ 25,000. For this purpose, "amount in controversy" means the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, that is in controversy, excluding attorneys' fees, interest, and costs. (*C.C.P. 85(a)*.) The Law Revision Commission Comment notes that this requirement derives from the jurisdictional limit of the municipal court. (28 Cal. Law Rev. Com. Reports, p. 139.) Relief exceeding the maximum amount in controversy (excluding attorneys' fees, interest, and costs) may not be granted in a limited civil action. (*C.C.P. 580(b)(1)*.)

(3) *Type of Relief Sought.* "The relief sought is a type that may be granted in a limited civil case." (*C.C.P. 85(b)*.) The Law Revision Commission Comment states that this provision "reflects and preserves limitations on the types of equitable relief awardable in a municipal court." (28 Cal. Law Rev. Com. Reports, p. 139.) *C.C.P. 580(b)* lists the types of relief that may not be granted in a limited civil case. (See *infra*, §245.)

(4) *Statutory List.* The relief sought (whether in the complaint, cross-complaint, or otherwise) "is exclusively of a type described in" a statute that classifies an action or proceeding as a limited civil case or provides that an action or proceeding is within the original jurisdiction of the municipal court. (*C.C.P. 85(c)*.) *C.C.P. 85(c)* lists 22 illustrative statutes. The Law Revision Commission Comment points out that this provision continues the effect of former law under which joinder of a cause within the jurisdiction of the superior court to a municipal court case resulted in transfer to the superior court. (28 Cal. Law Rev. Com. Reports, p. 139.)

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a. Law.

1. In General.

2 *Witkin Cal. Proc. Courts* § 243

[§ 243] In General.

(1) *Monetary Limit of \$ 25,000.* The monetary limit has been increased several times. Cases at law in which the demand (excluding interest) or the value of the property in controversy amounts to \$ 25,000 or less are limited civil cases. (*C.C.P. 86(a)(1)*.) (On nature of legal actions, see 3 *Cal. Proc.* (5th), *Actions*, §119 et seq.; on determining amount in controversy, see 2 *Cal. Proc.* (5th), *Jurisdiction*, §22 et seq.) (See 1 C.E.B., 1 Civil Proc. Before Trial 4th, §6.15 et seq.)

(2) *Legality of Tax.* Cases involving the legality of a tax, etc., are expressly excluded, except "actions to enforce payment of delinquent unsecured personal property taxes if the legality of the tax is not contested by the defendant." (*C.C.P. 86(a)(1)*.) (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §46.)

(3) *Petitions Concerning Matters Under Arbitration.* Arbitration-related petitions are limited civil cases as follows:

(a) A petition under *C.C.P. 1292* et seq. (except for uninsured motorist arbitration proceedings) (1) if the petition is filed before the arbitration award becomes final and the matter to be resolved by arbitration is a limited civil case under *C.C.P. 86(a)(1)* to (a)(9), or (2) if the petition is filed after the arbitration award becomes final and the amount of the award and all other rulings and decisions made in the award are within *C.C.P. 86(a)(1)* to (a)(9). (*C.C.P. 86(a)(10)(A)*.)

(b) A petition to confirm, correct, or vacate a binding attorneys' fee arbitration award under *B. & P.C. 6200* et seq. where the award is \$ 25,000 or less. (*C.C.P. 86(a)(10)(B)*.)

(4) *Actions Against Long-Term Health Care Facilities.* An action under the Long-Term Care, Health, Safety, and Security Act (*Health & Saf.C. 1417* et seq.) is a limited civil case if civil penalties are not sought or amount to \$ 25,000 or less. (*C.C.P. 86.1*.)

West's Key Number Digest, Courts 188(1) et seq.

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a. Law.

2. Forcible Entry and Unlawful Detainer.

2 Witkin Cal. Proc. Courts § 244

[§ 244] Forcible Entry and Unlawful Detainer.

(1) *In General.* Proceedings in forcible entry or forcible or unlawful detainer, where the whole amount of damages claimed is \$ 25,000 or less, are limited civil cases. (*C.C.P. 86(a)(4).*)

The scope of unlawful detainer jurisdiction was the subject of a number of decisions before trial court unification. (See *Vargas v. Municipal Court* (1978) 22 C.3d 902, 910, 150 C.R. 918, 587 P.2d 714 [jurisdiction to try unlawful detainer action by employer against tenant farm workers despite pending administrative proceeding before Agricultural Labor Relations Board]; *Sun Terrace Manor v. Municipal Court* (1973) 33 C.A.3d 739, 743, 744, 108 C.R. 307 [relationship of cooperative apartment corporation and member is one of landlord and tenant; hence, municipal court had jurisdiction of unlawful detainer proceeding brought by corporation against member after termination of membership and occupancy rights]; *Singer v. Hunsinger* (1979) 91 C.A.3d Supp. 1, 4, 154 C.R. 398 [no remission of rental value for jurisdictional purposes].)

(2) *Class Action.* In *Little v. Sanchez* (1985) 166 C.A.3d 501, 213 C.R. 297, plaintiff tenants brought proceedings in municipal court on their own behalf and on behalf of 90 other similarly situated tenants seeking to set aside void unlawful detainer judgments obtained by their landlord. The municipal court refused to certify as a class all tenants against whom the void judgments had been entered. *Held*, reversed and remanded for reconsideration. The court refused to explicitly direct certification: "Due to its inherent complexities, a class action will rarely be appropriate in the municipal court, and even less frequently will it constitute the remedy of choice." (166 C.A.3d 507.) However, the class was sufficiently numerous, particularly because most of its members were poor, unsophisticated, and unversed in English; the object of the class action was not money damages in excess of the municipal court's jurisdiction; and only one question needed to be determined, namely, whether the unlawful detainer judgments were entered on a stipulation that purported to stay execution only so long as future "installment payments" were made to the landlord. (166 C.A.3d 506, 507.)

(3) *Abandonment of Mobilehome.* C.C. 798.61, a portion of the Mobilehome Residency Law, authorizes the management of a mobilehome park to petition the superior court in the county in which the mobilehome park is located

for a declaration that a mobilehome has been abandoned. The proceeding is a limited civil case. (C.C. 798.61(a).)

West's Key Number Digest, Courts 188(1) et seq.

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1. In General.

2 *Witkin Cal. Proc. Courts* § 245

[§ 245] In General.

C.C.P. 86 did not make any general grant of equity jurisdiction to the municipal court, but set forth a number of specific types of equitable actions. Accordingly the superior court retained jurisdiction over any equitable action, however small the amount in controversy, unless it was expressly mentioned in *C.C.P. 86*. (See *Bloniarz v. Roloson* (1969) 70 C.2d 143, 147, 74 C.R. 285, 449 P.2d 221, *infra*, §246; *Pasadena Inv. Co. v. Peerless Cas. Co.* (1955) 134 C.A.2d Supp. 902, 286 P.2d 1014 [declaratory relief]; *St. James Church of Christ Holiness v. Superior Court* (1955) 135 C.A.2d 352, 362, 287 P.2d 387 [permanent injunction]; *Strachan v. American Ins. Co.* (1968) 260 C.A.2d 113, 117, 66 C.R. 742; *Castellini v. Municipal Court* (1970) 7 C.A.3d 174, 176, 86 C.R. 698; C.E.B., 1 Civil Proc. Before Trial 4th, §6.15 et seq.)

C.C.P. 580(b) now lists the types of equitable relief that may not be granted in a limited civil case: a permanent injunction (except as otherwise authorized by statute; see, e.g., *B. & P.C. 12606, 12606.2*), a determination of title to real property, and declaratory relief (except as authorized by *C.C.P. 86*). (On declaratory relief authorized by *C.C.P. 86*, see *infra*, §249.)

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b. Equity.

2. Particular Equitable Actions.

2 Witkin Cal. Proc. Courts § 246

[§ 246] Particular Equitable Actions.

The following actions are limited civil cases:

(1) *Cancellation or Rescission*. An action to cancel or rescind a contract when the relief is sought "in connection with an action to recover money" not exceeding \$ 25,000 or property of a value not exceeding \$ 25,000, "paid or delivered under, or in consideration of, the contract." (*C.C.P. 86(a)(3)*; see *Glass v. Bank of America* (1936) 17 C.A.2d 645, 62 P.2d 764 [purchaser's action to rescind land contract and recover payments of \$ 665].)

(2) *Reformation*. An action to revise a contract where the relief is sought in an action on the contract, if the action is otherwise a limited civil case. (*C.C.P. 86(a)(3)*.)

(3) *Foreclosure of Liens on Personal Property*. An action to enforce and foreclose liens on personal property where the liens amount to \$ 25,000 or less. (*C.C.P. 86(a)(5)*; see *Hopkins v. Anderson* (1933) 218 C. 62, 65, 21 P.2d 560 [foreclosure of chattel mortgage; construing former statute with similar language].)

(4) *Foreclosure of Liens on Real Property*. An action to enforce or foreclose liens of "mechanics, materialmen, artisans, laborers," and others having liens under C.C. 3109 et seq., or assessment liens on common interest developments defined under C.C. 1351, where the amount of the lien is \$ 25,000 or less. (*C.C.P. 86(a)(6)*; see *Holbrook v. Phelan* (1931) 121 C.A. Supp. 781, 783, 6 P.2d 356 [no jurisdiction to declare or foreclose other types of liens on real property; here, lien for irrigation district assessment]; on common interest developments, see 12 *Summary* (10th), *Real Property*, §85 et seq.)

C.C.P. 86(a)(6) states two exceptions: (a) where a similar action affecting the same property is pending and is not a limited civil case; (b) where the total amount of liens sought to be foreclosed against the same property is more than \$ 25,000.

(5) *Title to Personal Property*. An action to try title to personal property where the amount involved is not more

than \$ 25,000. (*C.C.P. 86(b)(1).*)

(6) *Dissolution of Partnership*. An action for the dissolution of a partnership where the total assets of the partnership do not exceed \$ 25,000. (*C.C.P. 86(a)(2).*)

(7) *Interpleader*. An action of interpleader where the amount of money or the value of the property involved does not exceed \$ 25,000. (*C.C.P. 86(a)(2).*)

(8) *Equitable Relief Against Judgment*. An action to vacate a judgment or order of the court "obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect." (*C.C.P. 86(b)(3).*) This subdivision was enacted in 1969 to nullify the holding in *Bloniarz v. Roloson* (1969) 70 C.2d 143, 147, 74 C.R. 285, 449 P.2d 221, that the inherent power to vacate a judgment after the 6-month period of *C.C.P. 473* has elapsed is equitable in nature, and therefore could not be exercised by the municipal court without an express statutory grant of jurisdiction. Because all of the statutory jurisdiction of the municipal court was subject to the monetary limit (see *supra*, §243), an action to set aside a judgment for over the limit was outside the jurisdiction of the municipal court. (*Lacy v. Laurentide Finance Corp.* (1972) 28 C.A.3d 251, 260, 104 C.R. 547.)

The language of the subdivision couples "extrinsic fraud" and "mistake, inadvertence, or excusable neglect" in a confusing manner. In *Marianos v. Tutunjian* (1977) 70 C.A.3d 61, 138 C.R. 529, the motion to set aside the default was made on the ground of excusable neglect, after the 6-month period of *C.C.P. 473* had elapsed (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §175). The lower court, finding no express time limit in *C.C.P. 86(b)(3)*, granted the motion. *Held*, reversed. (a) The legislative intent in nullifying the *Bloniarz* holding was to give municipal courts jurisdiction coextensive with that of superior courts in setting aside defaults and default judgments. (b) The superior court in granting relief for excusable neglect can act only within the 6-month limit of *C.C.P. 473*; relief after that time has elapsed requires a showing of extrinsic fraud or mistake sufficient to justify equitable relief against a judgment (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §215). (c) The trial court's decision would give municipal courts jurisdiction beyond that of superior courts, contrary to the legislative intent. (d) Because there was no showing by defendant of extrinsic fraud or mistake, the municipal court lacked jurisdiction to relieve him from default after the 6-month period. (70 C.A.3d 65.)

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3. Ancillary Remedies.

2 Witkin Cal. Proc. Courts § 247

[§ 247] Ancillary Remedies.

The following actions are limited civil cases:

(1) *Preservation of Property or Rights.* An action to issue a temporary restraining order or a preliminary injunction, or to take an account where necessary to preserve the property or rights of a party in a limited civil case. (*C.C.P. 86(a)(8).*)

(2) *Appointment of Receiver.* An action to appoint a receiver in a limited civil case. (*C.C.P. 86(a)(8).*)

(3) *Enforcement of Judgment.* An action "to make any order or perform any act" pursuant to *C.C.P. 680.010* et seq. (enforcement of judgments) in a limited civil case. (*C.C.P. 86(a)(8).*)

(4) *Title to Personal Property.* An action to determine title to personal property seized in a limited civil case. (*C.C.P. 86(a)(8).*)

(5) *Creditor's Action.* A creditor's action under *C.C.P. 708.210* et seq. (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §291 et seq.) to recover an interest in personal property or to enforce the liability of the debtor of a judgment debtor, where the interest claimed or the debt denied does not exceed \$ 25,000. (*C.C.P. 86(a)(9).*)

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4. Equitable Defenses.

2 Witkin Cal. Proc. Courts § 248

[§ 248] Equitable Defenses.

A case is a limited civil case "when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case." (*C.C.P. 86(b)(2)*.) Decisions involving municipal court jurisdiction enlarged the statutory language by construction in several respects:

(1) The municipal court had jurisdiction over an equitable defense even though the defendant mistakenly regards his defensive matter as affirmative in nature and pleaded it as a cross-complaint. (*Jacobson v. Superior Court* (1936) 5 C.2d 170, 173, 53 P.2d 756 [action on insurance policy; cross-complaint seeking cancellation merely showed that plaintiff was in default and not entitled to recover]; *Gardenswartz v. Equitable Life Assur. Soc. of the United States* (1937) 23 C.A.2d Supp. 745, 756, 68 P.2d 322 [similar holding].) However, if the defendant's pleading was in substance a cross-complaint, e.g., where it sought to state a cause of action for equitable relief against a new party, the municipal court lost jurisdiction and the action had to be transferred to the superior court. (See *Gardenswartz v. Equitable Life Assur. Soc.*, *supra*, 23 C.A.2d Supp. 757.) (On distinction between defensive matter and cross-complaint, see 5 Cal. Proc. (5th), Pleading, §1163.)

(2) In an unlawful detainer action in the municipal court, the defendant could plead the defense of estoppel even though ordinarily, in this summary proceeding, such an equitable defense was improper. (*Altman v. McCollum* (1951) 107 C.A.2d Supp. 847, 856, 236 P.2d 914.)

(3) In *Arc Inv. Co. v. Tiffith* (1958) 164 C.A.2d Supp. 853, 330 P.2d 305, the municipal court issued an order restraining plaintiff creditor from making further attachments of defendant debtor's exempt wages. This was seemingly an exercise of power to grant a permanent injunction, which the municipal court lacked. But the Appellate Department of the Superior Court justified the order on two grounds: *First*, that this was an equitable matter asserted defensively by the defendant against the plaintiff (a somewhat strained construction of the statutory provision referring to "cases" in equity "pleaded as defensive matter"). *Second*, that the municipal court, like any other, has inherent power to prevent abuse of its process: "The power to control its process does not depend upon a court's equitable jurisdiction; it is incident to the jurisdiction to hear, decide, and give effect to judgments of all kinds." (164 C.A.2d Supp. 857.)

The second reason stated in *Arc Inv. Co.* is sound: A municipal court, though lacking general equity power, had the inherent power of any court of record to control its process and orders and prevent wrongful use of process. (See *Bloniarz v. Roloson* (1969) 70 C.2d 143, 148, 74 C.R. 285, 449 P.2d 221, supra, §246, citing *Arc Inv. Co.* on this point.) But the first reason, advanced also in *Bill Benson Motors v. Macmorris Sales Corp.* (1965) 238 C.A.2d Supp. 937, 941, 48 C.R. 123, is unsupportable on principle. A permanent injunction could not be deemed within the municipal court's jurisdiction merely because it is sought by the defendant "defensively." (See *Strachan v. American Ins. Co.* (1968) 260 C.A.2d 113, 118, 119, 66 C.R. 742, citing the text [criticizing *Arc Inv. Co.* and *Bill Benson Motors* on this point].)

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5. Declaratory Relief.

2 *Witkin Cal. Proc. Courts* § 249

[§ 249] Declaratory Relief.

The following actions are limited civil cases:

(1) *Indemnity*. An action for declaratory relief brought by way of a cross-complaint as to a right of indemnity with respect to the relief demanded in the complaint or a cross-complaint in an action or proceeding that is otherwise a limited civil case. (*C.C.P.* 86(a)(7)(A); see *C.C.P.* 1060.)

(2) *Attorney's Fee Dispute*. An action for declaratory relief to conduct a trial after nonbinding attorney-client fee arbitration under *B. & P.C.* 6200 et seq. where the amount in controversy is \$ 25,000 or less. (*C.C.P.* 86(a)(7)(B).)

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4. Economic Litigation Procedures in Limited Civil Cases.

a. Pilot Project.

2 Witkin Cal. Proc. Courts § 250

[§ 250] Pilot Project.

(1) *History.* The 1976 Legislature enacted former C.C.P. 1823 et seq., which created a pilot project with the stated purpose of developing pleading, pretrial, and trial procedures that would reduce the expense of litigation so that enforcing or defending a small claim would not be economically disadvantageous. (C.C.P. 1823.) The project applied to civil actions, other than small claims actions, in the municipal court and civil actions with \$ 25,000 or less in controversy, other than eminent domain actions, in the superior court. (C.C.P. 1823.2, 1823.3.) A variety of proceedings were exempt and any action could be withdrawn from the project "by order of the court for good cause." (C.C.P. 1823.2, 1823.3.) Superior and municipal courts in Los Angeles and Fresno Counties were chosen to participate in the project. After several extensions, the project ended when the governing rules were repealed effective July 1, 1983. The governing statutes were repealed in 1994. (For an analysis of the pilot project, see 53 So. Cal. L. Rev. 1497.)

(2) *Procedural Innovations.* Pleadings were limited to the complaint, answer, and cross-claim. (C.C.P. 1824.) Discovery was not allowed (C.C.P. 1825), but parties were required to file copies of documents to be used at trial and statements describing physical and documentary evidence and identifying witnesses (C.C.P. 1825.1) which were then made available to all parties (C.C.P. 1825.2). Trial was set at an early date. (C.C.P. 1826.) The judge had discretion to allow and limit the duration of opening and closing statements (C.C.P. 1826.2, 1826.10) and to determine the order of trial and the introduction of evidence (C.C.P. 1826.5). Procedures involving evidence were simplified to encourage the expeditious admission of all relevant evidence (C.C.P. 1826.4, 1826.6, 1826.8), and findings of fact and conclusions of law were replaced by a brief explanation of the decision (C.C.P. 1826.11).

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b. Nature and Scope of Statute.

2 Witkin Cal. Proc. Courts § 251

[§ 251] Nature and Scope of Statute.

(1) *Enactment.* The 1982 Legislature adopted many of the reforms of the pilot project (*supra*, §250) by enacting *C.C.P. 90* et seq., governing economic litigation in the municipal court. (See *14 Pacific L. J. 505.*) As part of the unification of trial courts, the statutes were amended in 1998 to apply to limited civil cases.

(2) *Scope and Applicability.* *C.C.P. 90* et seq. apply to limited civil cases. (*C.C.P. 91(a).*) Except as otherwise provided by *C.C.P. 90* et seq., "all provisions of law applicable to civil actions generally" also apply. (*C.C.P. 90.*)

C.C.P. 90 et seq. are not applicable to actions in the small claims court under *C.C.P. 116.110* et seq. (*infra*, §267 et seq.) or to summary proceedings to obtain possession of real property under *C.C.P. 1159* et seq. (see *12 Summary (10th), Real Property*, §757 et seq.). (*C.C.P. 91(b).*) In addition, on noticed motion, an action may be "withdrawn from the provisions of this article, upon a showing that it is impractical to prosecute or defend the action within the limitations of these provisions." (*C.C.P. 91(c).*)

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c. Pleadings and Motions.

2 Witkin Cal. Proc. Courts § 252

[§ 252] Pleadings and Motions.

(1) *Pleadings*. Complaints, answers, cross-complaints, answers to cross-complaints, and general demurrers are allowed. (*C.C.P.* 92(a).) Special demurrers are not allowed. (*C.C.P.* 92(c).) An answer need not be verified, even if the complaint or cross-complaint is verified. (*C.C.P.* 92(b).)

(2) *Motions*. All motions are permitted, except that a motion to strike is allowed "only on the ground that the damages or relief sought are not supported by the allegations of the complaint." (*C.C.P.* 92(d), (e).)

(3) *Case Questionnaires*. *C.C.P.* 93 authorizes the use of case questionnaires, on forms approved by the Judicial Council, "to elicit fundamental information about each party's case, including names and addresses of all witnesses with knowledge of any relevant facts, a list of all documents relevant to the case, a statement of the nature and amount of damages, and information covering insurance coverages, injuries and treating physicians." (*C.C.P.* 93(c).) The Judicial Council has approved a mandatory form. (See Judicial Council Form No. DISC-010 [Case Questionnaire--For Limited Civil Cases (Under \$ 25,000)].)

The plaintiff may elect to serve the defendant with a blank questionnaire along with the complaint. To do so, the plaintiff must include a completed questionnaire about the plaintiff's case. (*C.C.P.* 93(a).) A defendant served with a questionnaire must complete it and return it with the answer. (*C.C.P.* 93(b).) Either party may compel compliance with these requirements pursuant to *C.C.P.* 2023.010 et seq. (see 2 *Cal. Evidence* (4th), *Discovery*, §249 et seq.). Available sanctions include monetary sanctions, issue sanctions, evidence sanctions, and terminating sanctions. (*C.C.P.* 93(e).)

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d. Discovery.

2 *Witkin Cal. Proc. Courts* § 253

[§ 253] Discovery.

(1) *Authorized Methods.* The following forms of discovery are allowed as to each adverse party:

(a) *Deposition.* One oral or written deposition pursuant to *C.C.P. 2025.010* et seq., *2026.010* et seq., or *2028.010* et seq. For this purpose, a deposition of an organization is treated as a single deposition even though more than one person may be designated or required to testify. (*C.C.P. 94(b)*.) Any party may serve any person with a deposition subpoena duces tecum to provide copies of documents, books, or records. The issuing party must make a copy of the response available to any other party who tenders the reasonable cost of copying. (*C.C.P. 94(c)*.) (On depositions generally, see 2 *Cal. Evidence (4th), Discovery*, §29 et seq.)

(b) *Examination.* Mental or physical examination pursuant to *C.C.P. 2032.010* et seq. (see 2 *Cal. Evidence (4th), Discovery*, §140 et seq.). (*C.C.P. 94(d)*.)

(c) *Expert witnesses.* Identification of expert witnesses pursuant to *C.C.P. 2034.010* et seq. (see 2 *Cal. Evidence (4th), Discovery*, §178 et seq.). (*C.C.P. 94(e)*.)

(d) *Document production, admissions, and interrogatories.* Any combination of the following, up to 35 in number:

(1) Demands to produce documents or things pursuant to *C.C.P. 2031.010* et seq. (see 2 *Cal. Evidence (4th), Discovery*, §118 et seq.). (*C.C.P. 94(a)(2)*.)

(2) Requests for admission (with no subparts) pursuant to *C.C.P. 2033.010* et seq. (see 2 *Cal. Evidence (4th), Discovery*, §157 et seq.). (*C.C.P. 94(a)(3)*.)

(3) Interrogatories (with no subparts) pursuant to *C.C.P. 2030.010* et seq. (see 2 *Cal. Evidence (4th), Discovery*, §87 et seq.). There is an approved form. (See Judicial Council Form No. DISC-004 [Form Interrogatories--Limited Civil Cases (Economic Litigation)].)

(2) *Additional Discovery.* On noticed motion, and on "a showing that the moving party will be unable to prosecute

or defend the action effectively" without additional discovery, the court may authorize additional discovery "subject to such terms and conditions as are just." The court must take into account "whether the moving party has used all applicable discovery in good faith, and whether the party has attempted to secure the additional discovery by stipulation or by means other than formal discovery." (C.C.P. 95(a).) The parties may also stipulate to additional discovery. (C.C.P. 95(b).)

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e. Disclosure of Witnesses and Evidence.

2 Witkin Cal. Proc. Courts § 254

[§ 254] Disclosure of Witnesses and Evidence.

(1) *Form of Request.* Any party may request any other party to state the names and addresses of witnesses to be called at trial, to describe physical and documentary evidence to be offered, and to provide copies of available documents. (C.C.P. 96(a).) The statute sets forth a form for the request, which must be substantially followed. (C.C.P. 96(a).) The Judicial Council has adopted a mandatory form. (See Judicial Council Form No. DISC-015 [Request for Statement of Witnesses and Evidence--For Limited Civil Cases (Under \$ 25,000)].)

(2) *Time for Service and Response.* Unless otherwise ordered, the request must be served no more than 45 nor less than 30 days before the date set for trial. (C.C.P. 96(b).) A responding statement must be served within 20 days from service of the request. (C.C.P. 96(c).) (On computation of time, see C.C.P. 96(g).) Neither the request nor the statement is filed with the court, unless otherwise ordered. (C.C.P. 96(e).) "No additional, amended or late statement is permitted except by written stipulation or unless ordered for good cause on noticed motion." (C.C.P. 96(d).)

(3) *Effect of Nondisclosure.* Generally, on an objection by a party who has properly filed a request, the party requested to respond may not call nondisclosed witnesses or introduce nondisclosed evidence against the objecting party. (C.C.P. 97(a).) The following exceptions apply:

(a) A person appearing as a party in an individual capacity may call himself or herself. (C.C.P. 97(b)(1).)

(b) An adverse party may be called. (C.C.P. 97(b)(2).)

(c) Witnesses or evidence used for impeachment are allowed. (C.C.P. 97(a), (b)(3).)

(d) Documents obtained by discovery authorized by the economic litigation statutes may be introduced. (C.C.P. 97(b)(4).)

(e) The court may allow nondisclosed witnesses or evidence on a finding that a party has made a good faith effort to respond to a request or has failed to comply as the result of "mistake, inadvertence, surprise or excusable neglect" as provided by C.C.P. 473. The court may do so on "such terms as may be just" including a reasonable continuance and an

award of costs and litigation expenses. (*C.C.P.* 97(b)(5).)

(4) *Evidence in Hearing on Default.* Nothing in *C.C.P.* 90 et seq. limits the introduction of evidence in a hearing pursuant to *C.C.P.* 585 (default judgment). (*C.C.P.* 97(c).) (On default judgment, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §133 et seq.)

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f. Use of Prepared Testimony.

2 *Witkin Cal. Proc. Courts* § 255

[§ 255] Use of Prepared Testimony.

(1) *Offer of Prepared Testimony.* In lieu of presenting direct testimony, a party may offer the prepared testimony of relevant witnesses, including the opinions of experts and testimony that authenticates documentary evidence, in the form of affidavits or declarations under penalty of perjury. The court determines whether an affidavit or declaration is read into the record in lieu of oral testimony or admitted as a documentary exhibit. (*C.C.P.* 98.)

(2) *Conditions for Admission.* "To the extent the contents of the prepared testimony would have been admissible were the witness to testify orally," the prepared testimony must be received in evidence in either of the following circumstances:

(a) A copy is served on the party against whom the testimony is offered at least 30 days before trial and the affiant is available for service of process within 150 miles of the place of trial during the 20 days immediately prior to trial. (*C.C.P.* 98(a).)

(b) The statement is in the form of a deposition and the party against whom it is offered had an opportunity to participate in the deposition. (*C.C.P.* 98(b).)

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g. Judgment and Appeal.

2 *Witkin Cal. Proc. Courts* § 256

[§ 256] Judgment and Appeal.

(1) *Effect of Judgment.* "A judgment or final order, in respect to the matter directly adjudged, is conclusive between the parties and their successors in interest but does not operate as collateral estoppel of a party or a successor in interest to a party in other litigation with a person who was not a party or a successor in interest to a party to the action in which the judgment or order is rendered." (*C.C.P.* 99.)

(2) *Right To Appeal.* Any party may appeal any judgment or final order "consistent with the law governing appeals." (*C.C.P.* 100.)

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G. Trial Court Delay Reduction Act.

1. Nature and Scope.

2 Witkin Cal. Proc. Courts § 257

[§ 257] Nature and Scope.

(1) *Pilot Program.* The Trial Court Delay Reduction Act (commonly known as "Fast Track") was enacted as a pilot project in 1986 as former Govt.C. 68600 et seq. The Act provided for experimental programs in selected counties designed to speed up the process of litigation. Under former Govt.C. 68608, the experimental programs were to begin January 1, 1988, and last for 3 years. They were later extended. Uniform delay reduction rules (Former C.R.C., Rule 1901 et seq.) were adopted effective January 1, 1990, and repealed effective January 1, 1994. (For current requirements governing delay reduction, see *infra*, §259.)

(2) *Scope of Act.* In 1990, the original Act was repealed, and a revised Act (Govt.C. 68600 et seq.) was added, extending the provisions statewide beginning July 1, 1992. (Govt.C. 68605.5.) (See Cal. Civil Practice, 2 Procedure, §12:1 et seq.; C.E.B., 3 Civil Proc. Before Trial 4th, §40.1 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §2.11 et seq.)

Juvenile, probate, and domestic relations cases are excluded from the delay reduction program, and cases "assigned to a judge or judges for all purposes based on subject matter need not be assigned to the program." (Govt.C. 68608(a).) With these exceptions, the Act applies to all actions and proceedings in the superior court. (Govt.C. 68605.5.)

Special provisions apply to limited civil cases. Each superior court must adopt a delay reduction program for limited civil cases or the Judicial Council may adopt a statewide program from delay reduction in limited civil cases. In either circumstance, small claims cases (see *supra*, §267 et seq.), forcible entry and unlawful detainer proceedings, and civil discovery in actions under the economic litigation statutes for limited civil cases (see *supra*, §250 et seq.) are excluded. (Govt.C. 68620.)

No action may be removed from the program because of a challenge under C.C.P. 170.6 (peremptory challenge of judge; see *supra*, §130 et seq.). (Govt.C. 68607.5.)

(3) *Trial Preference for Elderly Litigants.* The trial preference for litigants over 70 years of age provided by C.C.P. 36(a) takes priority over actions assigned to the delay reduction program. (*Miller v. Superior Court* (1990) 221 C.A.3d 1200, 1209, 270 C.R. 766, 7 Cal. Proc. (5th), Trial, §69.)

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G. Trial Court Delay Reduction Act.

2. Duties and Powers of Judge.

2 *Witkin Cal. Proc. Courts* § 258

[§ 258] Duties and Powers of Judge.

(1) *In General.* Judges "have the responsibility to eliminate delay in the progress and ultimate resolution of litigation, to assume and maintain control over the pace of litigation, to actively manage the processing of litigation from commencement to disposition, and to compel attorneys and litigants to prepare and resolve all litigation without delay, from the filing of the first document invoking court jurisdiction to final disposition of the action." (*Govt.C. 68607.*) (See *Cottle v. Superior Court* (1992) 3 C.A.4th 1367, 1379, 5 C.R.2d 882, 7 Cal. Proc. (5th), Trial, §6 [trial judge in complex litigation under Trial Court Delay Reduction Act had inherent authority to exclude unmeritorious claims by excluding evidence where plaintiffs were unable to establish prima facie claim before trial]; *Harris v. Billings* (1993) 16 C.A.4th 1396, 1405, 20 C.R.2d 718, *infra*, §266 [trial judge lacked authority to dismiss with prejudice once dismissal without prejudice had been entered].) (On authority to impose sanctions, see *infra*, §264.)

(2) *Particular Duties.* Judges are required to perform the following duties:

(a) Actively monitor, supervise, and control the movement of cases from the time the first document is filed through final disposition. (*Govt.C. 68607(a).*)

(b) Seek to meet the Judicial Council's standards for timely disposition. (*Govt.C. 68607(b).*)

(c) Establish procedures to identify protracted cases and give them special judicial and administrative attention as appropriate, including special assignment. (*Govt.C. 68607(c).*)

(d) Establish procedures to identify and handle cases amenable to settlement or other alternative disposition techniques. (*Govt.C. 68607(d).*)

(e) Adopt a trial setting policy that, to the extent possible, schedules trial within the Judicial Council's standards for timely disposition, ensures efficient use of judicial time, and minimizes resetting causes for overcrowding. (*Govt.C. 68607(e).*)

(f) Commence trial on the scheduled date. (*Govt.C. 68607(f).*)

(g) Adopt a consistent policy against continuances in all stages of litigation, to the extent possible and reasonable. (Govt.C. 68607(g).)

(3) *Standards of Judicial Administration*. Standards of Judicial Administration, Standard 2.1, reads as follows:

(a) *Elimination of all unnecessary delays*. "Trial courts should be guided by the general principle that from the commencement of litigation to its resolution, whether by trial or settlement, any elapsed time other than reasonably required for pleadings, discovery, preparation, and court events is unacceptable and should be eliminated."

(b) *Court responsible for the pace of litigation*. "To enable the just and efficient resolution of cases, the court, not the lawyers or litigants, should control the pace of litigation. A strong judicial commitment is essential to reducing delay and, once achieved, maintaining a current docket."

(c) *Presiding judge's role*. "The presiding judge of each court should take an active role in advancing the goals of delay reduction and in formulating and implementing local rules and procedures to accomplish the following:"

(1) "The expeditious and timely resolution of cases, after full and careful consideration consistent with the ends of justice."

(2) "The identification and elimination of local rules, forms, practices, and procedures that are obstacles to delay reduction, are inconsistent with statewide case management rules, or prevent the court from effectively managing its cases."

(3) "The formulation and implementation of a system of tracking cases from filing to disposition."

(4) "The training of judges and nonjudicial administrative personnel in delay reduction rules and procedures adopted in the local jurisdiction."

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3. Local Standards and Procedure.

2 *Witkin Cal. Proc. Courts* § 259

[§ 259] Local Standards and Procedure.

In consultation with the county bar association, local judges are required to develop and publish procedures, standards, and policies to be used in the delay reduction program, "including time standards for the conclusion of all critical steps in the litigation process, including discovery." The procedures, standards, and policies must be filed, distributed, and maintained under *Govt.C. 68071* and the Rules of Court and must be published for general distribution. (*Govt.C. 68612.*) Each court must also adopt rules to allow for arbitration of uninsured motorist cases. (*Govt.C. 68609.5.*)

In *Hartford Acc. & Indem. Co. v. Gonzalez* (1994) 31 C.A.4th 51, 36 C.R.2d 769, a municipal court clerk refused to accept a civil complaint because the plaintiff failed to provide a case information sheet as required by local rule. The plaintiff then filed a petition for a writ of mandamus to challenge the rule, and the petition was denied. *Held*, affirmed.

(a) The local rule did not conflict with either *C.C.P. 412.10* (issuance of summons by clerk), or *C.C.P. 411.10* (commencement of action). The rule was meant to accomplish the objective of *C.C.P. 4* (Code is to be liberally construed, with view to effect its objects and to promote justice), in accordance with the provisions of the Trial Court Delay Reduction Act. Various sections of the Act (*Govt.C. 68607, 68612*) required courts to adopt and publish rules of court, such as the rule here, to enable the court to reduce delay in the adjudication of cases. Other statutes (*Govt.C. 68513, 68603, 68604*) require the Judicial Council to study and report on the recordkeeping practices in trial courts, and to collect data relating to court administration and the timely disposition of cases. (31 C.A.4th 54.)

(b) The project trial courts have wide procedural latitude in the development of rules and procedures to implement the Act. The Act requires active judicial management to aggressively monitor and manage litigation from the filing of the first pleading until final disposition. This broad authority encompasses local rules appropriate to carry out the purpose of the Act, including rules imposing procedural requirements in addition to those authorized by statute. (31 C.A.4th 56.) (See *Rojas v. Cutsforth* (1998) 67 C.A.4th 774, 777, 79 C.R.2d 292 [distinguishing *Hartford*]; *Carlson v. Department of Fish & Game* (1998) 68 C.A.4th 1268, 1275, 80 C.R.2d 601, *supra*, §202 [disagreeing with *Hartford* to extent that it suggests that local rule may be enforced by refusing to file complaint].)

Superior courts have developed their own local delay reduction forms. (See Cal. Civil Practice, 2 Procedure, §12.33

et seq.)

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4. Time Standards.

a. In General.

2 Witkin Cal. Proc. Courts § 260

[§ 260] In General.

The Judicial Council is required to adopt standards for the timely processing and disposition of civil and criminal actions, by which the progress of litigation in each superior court may be measured. The standards must reflect two principles: (1) "litigation, from commencement to resolution, should require only the time reasonably necessary for pleadings, discovery, preparation, and court events," and (2) "any additional elapsed time is delay and should be eliminated." (*Govt.C. 68603(a).*)

The Judicial Council must collect and publish statistics regarding compliance of each superior court with the standards. In doing so, the time for resolution of civil cases is measured from the filing of the first document invoking court jurisdiction. In criminal cases, the time is measured from the date of arrest. A separate measure is required in felony cases from the first appearance in superior court. (*Govt.C. 68604.*)

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G. Trial Court Delay Reduction Act.

4. Time Standards.

b. Maximum Time Standards.

2 Witkin Cal. Proc. Courts § 261

[§ 261] Maximum Time Standards.

Standards of Judicial Administration, Standard 2.2, provides case disposition time goals for superior courts:

(1) *Statement of Purpose.* "The recommended time goals are intended to guide the trial courts in applying the policies and principles of standard 2.1. They are administrative, justice-oriented guidelines to be used in the management of the courts. They are intended to improve the administration of justice by encouraging prompt disposition of all matters coming before the courts. The goals apply to all cases filed and are not meant to create deadlines for individual cases. Through its case management practices, a court may achieve or exceed the goals stated in this standard for the overall disposition of cases. The goals should be applied in a fair, practical, and flexible manner. They are not to be used as the basis for sanctions against any court or judge." (Standard 2.2(b).)

(2) *Application of Guidelines to Civil Cases.* "The goal of each trial court should be to process general civil cases so that all cases are disposed of within two years of filing." (Standard 2.2(d).) For this purpose, "general civil case" is defined in C.R.C., Rule 1.6(4) and includes both limited and unlimited civil cases. (Standard 2.2(c).) Each trial court should dispose of at least as many civil cases as are filed each year and, if necessary to meet the 2-year goal, more cases than are filed. (Standard 2.2(e).) "In managing individual civil cases, the court must consider each case on its merits. To enable the fair and efficient resolution of civil cases, each case should be set for trial as soon as appropriate for that individual case." (Standard 2.2(f)(3).)

(3) *Exception for Cases Removed From Court's Control.* If a case is removed from the court's control, the period of time until the case is restored to court control is excluded from the case disposition time goals. (Standard 2.2(n).) The standard lists various matters that remove a case from the court's control for this purpose. The following are illustrative: (a) an automatic stay resulting from the filing of an action in a federal bankruptcy court, (b) the pendency of contractual arbitration, (c) evaluation of mental competence, (d) a stay by a higher court or by a federal court for proceedings in another jurisdiction.

(4) *Goals for Particular Kinds of Cases.* The following case disposition goals are set forth:

(a) *Unlimited civil cases*: 75% within 12 months, 85% within 18 months, and 100% within 24 months of filing. (Standard 2.2(f)(1).)

(b) *Limited civil cases*: 90% within 12 months, 98% within 18 months, and 100% within 24 months of filing. (Standard 2.2(f)(2).)

(c) *Small claims cases*: 90% within 75 days and 100% within 95 days of filing. (Standard 2.2(h).)

(d) *Unlawful detainer cases*: 90% within 30 days and 100% within 45 days of filing. (Standard 2.2(i).)

(e) *Exceptional civil cases*: Disposition, consistent with exceptional circumstances, within 3 years. (Standard 2.2(g).)

(f) *Noncapital felony cases*: 100% within 1 year of defendant's first arraignment. (Standard 2.2(j).)

(g) *Noncapital felony preliminary examinations*: 90% within 30 days, 98% within 45 days, and 100% within 90 days of defendant's first arraignment. (Standard 2.2(l).)

(h) *Misdemeanor cases*: 90% within 30 days, 98% within 90 days, and 100% within 120 days of defendant's first arraignment. (Standard 2.2(k).)

(i) *Exceptional criminal cases*: Exceptional criminal cases are separately monitored, but the time goal remains the same. (Standard 2.2(m).)

Twelve months is the *maximum* time in which almost all general civil cases should be resolved. (*California Cas. Indem. Ins. Co. v. Mendoza* (1995) 36 C.A.4th 678, 681, 42 C.R.2d 258 [plaintiff unsuccessfully requested delay of 6 months after default before entry of default judgment to avoid possible defense motion for relief under C.C.P. 473; no abuse of discretion to then dismiss case after plaintiff failed to appear both at case management conference and at hearing to show cause on dismissal].)

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4. Time Standards.

c. Minimum Time Standards.

2 *Witkin Cal. Proc. Courts* § 262

[§ 262] Minimum Time Standards.

Govt.C. 68616 sets minimum time standards for various steps in the litigation process, applicable to delay reduction cases. Delay reduction rules may not require time periods shorter than the following:

(1) *Service of Complaint*. The minimum time is 60 days after filing. Exceptions for longer periods may be authorized by local rule and must be granted on a showing that service "could not reasonably be achieved within the time required with the exercise of due diligence consistent with the amount in controversy." (*Govt.C. 68616(a)*.)

(2) *Service of Responsive Pleadings*. The minimum time is 30 days after service of the complaint. The parties may stipulate to an additional 15 days and exceptions for longer periods may be authorized by local rule. (*Govt.C. 68616(b)*.)

(3) *Service of Notice and Papers*. The time provided by *C.C.P. 1005* (written notice of motion; see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §15 et seq.) and *C.C.P. 1013* (extension of time for service by mail; see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §30 et seq.) may not be shortened except as provided in those sections. (*Govt.C. 68616(c)*.)

(4) *Pleading After Service of Summons*. The time provided by *C.C.P. 412.20* (time for responsive pleading; see 3 *Cal. Proc.* (5th), *Actions*, §981) may not be shortened except as provided in that section. (*Govt.C. 68616(c)*.)

(5) *Continuance*. Within 30 days after service of responsive pleadings, parties may stipulate to a single continuance not to exceed 30 days. "It is the intent of the Legislature that these stipulations not detract from the efforts of the court to comply with standards of timely disposition. To this extent, the Judicial Council shall develop statistics that distinguish between cases involving, and not involving, these stipulations." (*Govt.C. 68616(d)*.)

(6) *Status Conference*. No status conference "or similar event" (other than a challenge to the court's jurisdiction) may be required to be conducted sooner than 30 days after service of the first responsive pleadings, or after the expiration of any continuance under *Govt.C. 68616(d)*. (*Govt.C. 68616(e)*.)

(7) *Discovery*. Except in arbitration proceedings, discovery is governed by *C.C.P. 2016.010* et seq. (see 2 *Cal.*

Evidence (4th), Discovery, §5 et seq.). (Govt.C. 68616(f).)

(8) *Arbitration*. Arbitration may not commence before 210 days after the complaint is filed, exclusive of a stipulated period under *Govt.C. 68616(d)*. (*Govt.C. 68616(g)*.) No delay reduction rule may contravene *C.C.P. 638* or *639* (appointment of referee: see 6 *Cal. Proc. (5th), Proceedings Without Trial, §63 et seq.*). (*Govt.C. 68616(g)*.)

(9) *Dismissal or Severance of Unnamed Defendants*. Doe defendants may not be dismissed or severed before the conclusion of the introduction of evidence at trial, except on stipulation or motion of the parties. (*Govt.C. 68616(h)*.)

(10) *Peremptory Challenge of Judge*. In direct calendar courts, challenges must be exercised within 15 days of the party's first appearance, notwithstanding *C.C.P. 170.6* (see *supra*, §130 et seq.). In master calendar courts, challenges are governed solely by *C.C.P. 170.6*. (*Govt.C. 68616(i)*.) (See *La Seigneurie U.S. Holdings v. Superior Court (1994) 29 C.A.4th 1500, 1503, 35 C.R.2d 175* ["appearance" in *Govt.C. 68616(i)* means general appearance, not special appearance; trial judge erred in denying as untimely defendant's motion to disqualify him based on defendant's earlier special appearance to quash service]; *Fight for the Rams v. Superior Court (1996) 41 C.A.4th 953, 958, 48 C.R.2d 851*, *supra*, §146 [if direct calendar assignment is made more than 15 days after complaint is filed, plaintiff's first appearance for purpose of peremptory challenge "coincides" with the direct calendar assignment]; *Stubblefield Const. Co. v. Superior Court (2000) 81 C.A.4th 762, 765, 97 C.R.2d 121* [60-day period of *C.C.P. 170.6(2)* (now *C.C.P. 170.6(a)(2)*); *supra*, §151), rather than 15-day period of *Govt.C. 68616(i)*, applied to peremptory challenge on remand following reversal of summary judgment]; *Zilog v. Superior Court (2001) 86 C.A.4th 1309, 104 C.R.2d 173*, *supra*, §142 [court in which case was assigned for all purposes except trial was not "direct calendar court" within meaning of *Govt.C. 68616(i)*; thus *C.C.P. 170.6(2)* (now *C.C.P. 170.6(a)(2)*) applied].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER II - Courts

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VI. THE SUPERIOR COURT

G. Trial Court Delay Reduction Act.

5. Differential Case Management.

2 *Witkin Cal. Proc. Courts* § 263

[§ 263] Differential Case Management.

(1) *In General.* The Judicial Council must adopt rules establishing a "case differentiation classification system" based on relative complexity. The rules must provide a longer period for the disposition of complex cases and may provide a presumption that cases, when filed, shall be classified in the least complex category. (*Govt.C. 68603(c).*)

C.R.C., Rules 3.700 et seq. implement this requirement. (C.R.C., Rule 3.700.) The rules are intended to advance the goals of *Govt.C. 68607* (supra, §258) and Standards of Judicial Administration, Standard 2.1 (supra, §258). (C.R.C., Rule 3.713.) Local rules are also required. (C.R.C., Rule 3.711.)

(2) *Application and Scope of Rules.* The case management rules apply to all general civil cases. (C.R.C., Rule 3.712(a).) For purposes of the Rules of Court, "general civil case" means all civil cases except probate, guardianship, conservatorship, juvenile, and family law proceedings, small claims proceedings, unlawful detainer proceedings, and various civil petitions (civil harassment, elder abuse, workplace violence, name change, election contest, relief from late claim). (C.R.C., Rule 1.6(4).) The rules do not apply to the following:

(a) Cases designated "uninsured motorist" cases until 180 days after the designation. (C.R.C., Rule 3.712(b).)

(b) Cases included in a petition for coordination. If coordination is granted, the judge may establish a case progression plan. (C.R.C., Rule 3.712(c).)

(c) Collections cases (as defined in C.R.C., Rule 3.740(a)) unless a defendant files a responsive pleading. (C.R.C., Rule 3.712(d).)

(3) *Assignment of Cases to Case Management Plan.* Three case management plans are authorized by C.R.C., Rule 3.714. Under C.R.C., Rule 3.714(a), the court must evaluate each case on its merits and assign it to one of the plans:

(a) *General case management plan.* Cases are ordinarily assigned to a general civil case plan under C.R.C., Rule 3.720 et seq., which provide for a case management conference within 180 days after the complaint is filed. (C.R.C., Rule 3.714(b).) Each of these cases is considered on its merits with the following goals as guidelines:

(1) *Unlimited civil cases*: 75% disposed of within 12 months, 85% within 18 months, and 100% within 24 months of filing. (C.R.C., Rule 3.714(b)(1).)

(2) *Limited civil cases*: 90% disposed of within 12 months, 98% within 18 months, and 100% within 24 months of filing. (C.R.C., Rule 3.714(b)(2).)

(b) *Local expedited case management plan*. The court may, by local rule, adopt a plan to dispose of "uncomplicated cases amenable to early disposition that do not need a case management conference" within 6 to 9 months. (C.R.C., Rule 3.714(d)(2).)

(c) *Exceptional case plan*. In the interest of justice, the court may exempt a general civil case from the disposition goals if "exceptional circumstances" will prevent the court and the parties from meeting those goals. The court must establish a case progression plan for exceptional cases with a goal of disposition within 3 years. (C.R.C., Rule 3.714(c).) (See *Polibrid Coatings v. Superior Court* (2003) 112 C.A.4th 920, 923, 6 C.R.3d 7 [under "exceptional circumstances" exemption, party brought into litigation 14 months after complaint was filed was entitled to 6 months' continuance to complete discovery and prepare summary judgment motion, despite 2-year dispositional guideline; fast track goals "must give way" to statutory right to bring summary judgment motion].)

(4) *Evaluating Cases for Assignment*. C.R.C., Rule 3.715 sets forth the factors to be considered in assigning cases:

- (a) Type and subject matter of the action.
- (b) Number of causes of action or affirmative defenses alleged.
- (c) Number of parties with separate interests.
- (d) Number of cross-complaints and the subject matter.
- (e) Complexity of issues, including issues of first impression.
- (f) Difficulty in identifying, locating, and serving parties.
- (g) Nature and extent of discovery anticipated.
- (h) Number and location of percipient and expert witnesses.
- (i) Estimated length of trial.
- (j) Whether some or all issues can be arbitrated or resolved through alternative dispute resolution processes.
- (k) Statutory priority for the issues.
- (l) Likelihood of review by writ or appeal.
- (m) Amount in controversy and the type of remedy sought, including measures of damages.
- (n) Pendency of other actions or proceedings that may affect the case.
- (o) Nature and extent of law and motion proceedings anticipated.
- (p) Nature and extent of the injuries and damages.
- (q) Pendency of underinsured claims.

(r) Any other factor that would affect the time for disposition of the case.

(5) *Judicial Council Form.* The Judicial Council has approved a case management form. (See Judicial Council Form No. CM-110 [Case Management Statement].)

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6. Sanctions.

a. In General.

2 *Witkin Cal. Proc. Courts* § 264

[§ 264] In General.

The Act encourages the imposition of sanctions. "Judges shall have all the powers to impose sanctions authorized by law, including the power to dismiss actions or strike pleadings, if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case. Judges are encouraged to impose sanctions to achieve the purposes of this article." (*Govt.C. 68608(b)*.) (See *C.E.B.*, 3 Civil Proc. Before Trial 4th, §40.89.)

In *Moyal v. Lanphear* (1989) 208 C.A.3d 491, 256 C.R. 296, plaintiff M, represented by her attorney A, filed a complaint for personal injuries in the San Diego Superior Court, and the case was placed on the fast track under the Trial Court Delay Reduction Act. Thereafter, A violated the local rules by failing to timely file a joint at-issue memorandum and failing to appear at a show cause hearing on sanctions. The court then issued two orders to appear and show cause, under *C.C.P. 575.2* and *177.5* (see 7 *Cal. Proc.* (5th), *Trial*, §58 et seq.), but neither order specifically gave notice that the court was considering dismissal of the complaint. At the hearing, the court dismissed the complaint and imposed \$ 450 monetary sanctions on A. *Held*, monetary sanction affirmed, dismissal sanction reversed.

(a) *Standard of review of fast track orders.* The Act mandates that trial courts resolve matters as expeditiously as possible, "consistent with the obligation of the courts to give full and careful consideration to the issues presented, and consistent with the right of parties to adequately prepare and present their cases to the courts." (208 C.A.3d 497, citing former *Govt.C. 68601(c)*.) Local rules may deviate from statutory language in ways reasonably necessary to carry out the provisions and goals of the Act. (208 C.A.3d 498, citing *Govt.C. 68612*, and *International Union of Operating Engineers, Local 12 v. Superior Court* (1989) 207 C.A.3d 340, 254 C.R. 782, *supra*, §145.) Because trial management is a discretionary area, the proper standard of review for a challenge to orders is abuse of discretion. (208 C.A.3d 498.) However, in view of the current litigation delays of "scandalous proportions," trial courts must be accorded "maximum flexibility" to the extent consistent with due process. (208 C.A.3d 498, 499.)

(b) *Available sanctions under fast track.*

(1) *C.C.P. 575.1* authorizes local superior court rules for judicial management of pretrial activities, and *C.C.P.*

575.2(a) authorizes dismissal of an action or lesser penalties for noncompliance with rules. (208 C.A.3d 499.) But C.C.P. 575.2(b) states an exception to the general rule that the negligence of an attorney is imputed to the client (see 7 Cal. Proc. (5th), Trial, §§60, 61): "It is the intent of the Legislature that if a failure to comply with these rules is the responsibility of counsel and not of the party, any penalty shall be imposed on counsel and shall not adversely affect the party's cause of action or defense." (208 C.A.3d 499.)

(2) C.C.P. 177.5 gives the court power to impose reasonable monetary sanctions. And former C.R.C., Rule 227 (now C.R.C., Rule 2.30) authorizes a wide variety of sanctions for failure to comply with the Rules of Court, local rules, and court orders. (208 C.A.3d 499.)

(3) Former Govt.C. 68609(d) (now Govt.C. 68608(b)) reiterates the powers created by the other statutes by stating that in fast track cases the trial courts have all the powers to impose sanctions authorized by law, but adds that dismissal should be ordered only if lesser sanctions would not be effective. (208 C.A.3d 500.) These sections "provide a comprehensive statewide scheme of regulation of fast track matters, which attempts to balance the need for expeditious processing of civil matters with the rights of individual litigants." (208 C.A.3d 500.) And local rules supplement the statewide scheme. (208 C.A.3d 500.)

(4) "Missing from this scheme, however, is any specific indication from the Legislature on how these stringent sanctions and dismissal provisions are to be implemented without offending traditional standards of trial court discretion and well-established policies favoring resolution of cases on their merits rather than on procedural grounds." (208 C.A.3d 500.)

(c) *Monetary sanction on attorney is proper.* The local rule on failure to file a joint at-issue memorandum places attorneys and parties on notice of possible sanctions for noncompliance, and the court's notice to A to appear and explain was sufficient; hence, the monetary sanctions imposed were reasonable and appropriate. (208 C.A.3d 501.)

(d) *Dismissal sanction on party is improper.*

(1) The limitation of C.C.P. 575.2(b) must be invoked on the court's own motion to protect an innocent party's right of action; and former Govt.C. 68609(d) (now Govt.C. 68608(b)) confirms the legislative intent that a dismissal sanction should be imposed only if less severe sanctions would be ineffective. (208 C.A.3d 502.)

(2) Here, the dismissal order failed to meet both abuse of discretion and due process standards. (a) The court did not exhaust other means for securing compliance; e.g., it could have set a firm date for filing of the joint at-issue memorandum and noticed a dismissal hearing if the deadline was not met. (b) The sanctions notice did not adequately advise plaintiff, a layperson, of the possibility of dismissal as a result of her attorney's delinquencies. (208 C.A.3d 503.)

(3) "The loss of a party's cause of action is a greater hardship than an attorney's loss of money through imposition of sanctions and accordingly requires more accurate and complete notice. The drastic measure of dismissal should only be used where there is a clear showing that the client is the cause of counsel's failure to comply with local fast track rules, e.g., where the client will not cooperate with or supply necessary material to his or her attorney or where no other reasonable sanction will produce compliance with the rules and orders of the court. Under the circumstances here, the trial court's order dismissing [M]'s complaint was not made upon adequate notice and thereby violated her due process rights." (208 C.A.3d 503.)

In *Traweck v. Finley, Kumble, Wagner et al.* (1991) 235 C.A.3d 1128, 1134, 1 C.R.2d 185, the court followed the reasoning of *Moyal*, and added the following comment: "The involuntary dismissal of a civil case has potentially serious consequences for the citizen who has sought to redress his or her grievances in a court of law. It signifies the unfavorable termination of the lawsuit, a refusal to resolve the merits of the dispute. As we explained in *Moyal*, a court considering the dismissal of a case must have a substantial reason significant enough to overcome the legislative and judicial policy of this state that litigation should be disposed of 'on the merits rather than on procedural grounds.' ... Here the trial court's concern with administrative efficiency is insufficient justification for the dismissal of a plaintiff's

case." (235 C.A.3d 1136.) (See 17 *Pepperdine L. Rev.* 665.)

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6. Sanctions.

b. Sanctions Proper.

2 Witkin Cal. Proc. Courts § 265

[§ 265] Sanctions Proper.

In *Intel Corp. v. USAIR* (1991) 228 C.A.3d 1559, 279 C.R. 569, the court held that it was not an abuse of discretion to dismiss plaintiff's action after pronounced and repeated failure to follow the requirements of local delay reduction rules. The opinion considers the effect of the two overlapping statutes, C.C.P. 575.2, and former Govt.C. 68609 (supra, §264).

(a) "A comparison of these two statutory schemes reveals a distinction in the authorization given to the trial court to impose sanctions for failure to comply with local rules. *Code of Civil Procedure* section 575.2 authorizes imposition of an entire range of sanctions, including dismissal, for violation of local rules, but expresses an intent that a party's case not suffer because of the irresponsibility of counsel. *Government Code* section 68609, subdivision (d), which authorizes imposition of sanctions to enforce the requirements of exemplary delay reduction programs, encourages the use of all sanctions including dismissal, but cautions against dismissal of actions and striking of pleadings unless the court has determined that less severe sanctions would not be effective in light of the ineffectiveness of previous sanctions or the previous lack of compliance in the case." (228 C.A.3d 1564.)

(b) "[B]oth statutes seek to command compliance with local court rules through imposition of penalties on counsel or the party, while expressing an intent not to unnecessarily penalize a party for failure to comply with local rules. The distinction is that *Code of Civil Procedure* section 575.2, subdivision (b) disapproves any penalty which adversely affects a party's case when the fault is that of counsel rather than the party, while *Government Code* section 68609, subdivision (d) merely cautions against the sanctions of dismissal and striking of pleadings until the court has determined that lesser sanctions would not be effective, after consideration of the effect of previous sanctions and previous lack of compliance in the case. The later enacted and specific statute governing trial court delay reduction programs, *Government Code* section 68609, subdivision (d), controls over the more general *Code of Civil Procedure* section 575.2, subdivision (b) dealing generally with adoption of local rules." (228 C.A.3d 1565.) (See *Laborers' Int. Union of North America, Local 89, AFL-CIO et al. v. El Dorado Landscape Co.* (1989) 208 C.A.3d 993, 1008, 256 C.R. 632 [monetary sanctions against attorney were proper].)

The reasoning in *Intel Corp. v. USAIR* was disapproved in *Garcia v. McCutchen* (1997) 16 C.4th 469, 478, footnote 4, 66 C.R.2d 319, 940 P.2d 906, infra, §266.

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c. Sanctions Improper.

2 *Witkin Cal. Proc. Courts* § 266

[§ 266] Sanctions Improper.

In *Harris v. Billings* (1993) 16 C.A.4th 1396, 1404, 1405, 20 C.R.2d 718, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §284, the trial judge deemed a voluntary dismissal without prejudice an attempt to obtain a continuance in contravention of local delay reduction rules, vacated the dismissal sua sponte, and ordered the case dismissed with prejudice. *Held*, reversed; plaintiff's statutory right to dismiss voluntarily under C.C.P. 581 is consistent with the mission of the delay reduction program, and the trial judge acted without jurisdiction once the dismissal without prejudice was entered.

In *Wantuch v. Davis* (1995) 32 C.A.4th 786, 39 C.R.2d 47, 3 Cal. Crim. Law (3d), *Punishment*, §49, a pro. per. action brought by a state prisoner against his former criminal defense attorney alleging legal malpractice and other causes of action, the trial judge struck plaintiff's complaint and his answer to defendant's cross-complaint and entered judgment against him solely because of his failure to appear at a scheduled status conference. *Held*, reversed. Terminating sanctions should not be ordered as a first response when noncompliance is through no fault of the party.

(a) Pro. per. litigants are entitled to the same, but no greater, rights than represented litigants and are presumed to know the delay-reduction rules. However, the delay-reduction rules and the policy of expeditious processing of civil cases do not override, in all situations, the trial court's obligation to hear cases on the merits. Preventing parties from presenting their cases on the merits is a drastic measure; terminating sanctions should only be ordered when there has been previous noncompliance with a rule or order and it appears that a less severe sanction would not be effective. (32 C.A.4th 795.)

(b) The trial court abused its discretion in ordering these sanctions. Plaintiff's nonappearance was not wilful, but was solely the result of his imprisonment. The status conference could have been conducted by written correspondence or by telephone. In all other respects, plaintiff had diligently prosecuted the matter. Moreover, the case was little more than a year old. (32 C.A.4th 795.)

In *Garcia v. McCutchen* (1997) 16 C.4th 469, 66 C.R.2d 319, 940 P.2d 906, an action was dismissed for failure of plaintiff's counsel to comply with local rules implementing the Trial Court Delay Reduction Act (Govt.C. 68600 et

seq.). Although the dismissal was without prejudice, the statute of limitations would have barred claims alleged in a new complaint. *Held*, reversed.

(a) *C.C.P. 575.2(b)* provides that if failure to comply with local rules designed to expedite court business is solely the responsibility of counsel, any penalty may not adversely affect the party's cause of action. This provision makes clear the legislative intent that a party's cause of action should not be impaired by his attorney's procedural mistakes. (16 *C.4th* 475.)

(b) Under *Govt.C. 68608(b)*, the trial court has "all the powers to impose sanctions authorized by law, including the power to dismiss actions." (16 *C.4th* 475.) Defendant argues that the court's power to dismiss under this statute is not subject to the limits of *C.C.P. 575.2(b)*. (16 *C.4th* 475.) However, the dismissal power set forth in *Govt.C. 68608(b)* is not independent of or greater than the court's power under *C.C.P. 575.2(b)*. By its terms *Govt.C. 68608(b)* gives trial courts only those sanctioning powers "authorized by law." Because *C.C.P. 575.2(b)* prohibits punishment of a party for counsel's noncompliance with local rules, dismissal without considering whether the client is at fault is not a sanction "authorized by law." To read *Govt.C. 68608(b)* as creating an independent sanctioning power would improperly delete the phrase "authorized by law" from *C.C.P. 575.2(b)*. (16 *C.4th* 476.)

(c) The statutes here can be harmonized by reading the limits of *C.C.P. 575.2(b)* into *Govt.C. 68608(b)*, thus avoiding the repeal of *C.C.P. 575.2(b)* with respect to fast track rules. (16 *C.4th* 477.) It is a matter of argument whether *Govt.C. 68608(b)* or *C.C.P. 575.2(b)* deals more specifically with delay reduction, but the principle that a specific provision prevails over a more general one applies only if the two statutes cannot be reconciled. (16 *C.4th* 478.)

(d) The power to dismiss actions when counsel violates fast track rules cannot be justified by legislative findings that dismissal furthers the public's interest in reducing delay. The general policy stated by these findings cannot supplant legislative intent expressed in a particular statute. *Govt.C. 68608(b)* expresses a legislative intent to grant trial courts only those sanctioning powers "authorized by law." *Govt.C. 68607* requires courts, in eliminating delay, to act "consistent with statute." And *C.C.P. 575.2(b)* provides that parties not be punished for counsel's failure to comply with local rules. (16 *C.4th* 478, 479.)

(e) An expanded dismissal power regarding fast track rules is not necessary to promote calendar control. Courts have numerous methods for maintaining control of their calendars, including the contempt power, imposition of reasonable expenses incurred by a party on an opposing party who intentionally causes unnecessary delay, and imposition of money sanctions. (16 *C.4th* 480.) To the extent inconsistent, *Intel Corp. v. USAIR* (1991) 228 *C.A.3d* 1559, 279 *C.R.* 569, *supra*, §265, is disapproved. (16 *C.4th* 478, footnote 4.) (See *Drum v. Superior Court* (2006) 139 *C.A.4th* 845, 853, 43 *C.R.3d* 279 [following *Garcia*; trial court did not abuse discretion by imposing increasing monetary sanctions for attorney's continued failure to abide by delay reduction rules rather than dismissing action].)

In *Tliche v. Van Quathem* (1998) 66 *C.A.4th* 1054, 78 *C.R.2d* 458, an action was dismissed for failure to comply with a local fast track rule, requiring service on the defendant within 60 days after the complaint was filed. *Held*, reversed.

(a) There are at least two limitations on the trial court's power to dismiss for noncompliance with local rules: (1) Under *C.C.P. 575.2(b)*, "dismissal is inappropriate if the noncompliance was the responsibility of counsel alone, rather than the party." (2) Under *Govt.C. 68608(b)*, "dismissal is appropriate only if less severe sanctions would be ineffective." (66 *C.A.4th* 1061, 1062.)

(b) Service of the complaint is ordinarily within the control of counsel, and here there was no evidence that the client was in any way responsible for the delay in service. Nor was there evidence of prior sanctions against either the attorney or the client. Thus, the dismissal order was unauthorized because the trial judge failed to apply the statutory principles. (66 *C.A.4th* 1062.)

A number of other decisions have held sanctions improper. (See *Cooks v. Superior Court* (1990) 224 *C.A.3d* 723,

727, 274 C.R. 113, 7 Cal. Proc. (5th), Trial, §61 [C.C.P. 575.2(b) precludes denial of jury trial as sanction for failure to submit proposed jury instructions as required by local fast track rule]; *Marriage v. Keener* (1994) 26 C.A.4th 186, 194, 31 C.R.2d 511 [trial court abused discretion by imposing severe sanction of dismissal in absence of prior, less severe sanctions]; *Simmons v. Pasadena* (1995) 40 C.A.4th Supp. 1, 5, 47 C.R.2d 102 [dismissal under local delay reduction rules was invalid where court did not comply with statutes and Rules of Court governing adoption of local rules]; *Interinsurance Exchange of the Auto. Club of Southern Calif. v. Faura* (1996) 44 C.A.4th 839, 843, 52 C.R.2d 199 [dismissal for failure to attend status conference required by local delay reduction rules was abuse of discretion where parties had reached conditional settlement under rule of court].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Conservatorship of Becerra* (2009) 175 C.A.4th 1474, 1482, 96 C.R.3d 910 [sanction for purported violation of Rules of Professional Conduct was invalid; no violation of court order, no written statement of reasons, inadequate notice; disciplinary authority for violation of Rules of Professional Conduct is in State Bar Court].



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 VII. THE SMALL CLAIMS COURT
 A. In General.

1. Nature and Organization.

2 *Witkin Cal. Proc. Courts* § 267

[§ 267] Nature and Organization.

The small claims court was created to provide a speedy, inexpensive, and informal method of settling small claims, without attorneys or conventional legal procedure. (See *C.C.P. 116.120*.)

It is not a separate tribunal; all superior courts exercise small claims jurisdiction. *C.C.P. 116.210* provides that there is a small claims division in each superior court, known as the small claims court. (See generally *Leuschen v. Small Claims Court* (1923) 191 C. 133, 134, 215 P. 391; *Hughes v. Municipal Court* (1926) 200 C. 215, 218, 252 P. 575; *Superior Wheeler Cake Corp. v. Superior Court* (1928) 203 C. 384, 386, 264 P. 488; *Sanderson v. Niemann* (1941) 17 C.2d 563, 573, 110 P.2d 1025, *infra*, §289; *Skaff v. Small Claims Court* (1968) 68 C.2d 76, 78, 65 C.R. 65, 435 P.2d 825; *Crouchman v. Superior Court* (1988) 45 C.3d 1167, 1171, 248 C.R. 626, 755 P.2d 1075, *infra*, §318; *Prudential Ins. Co. of America v. Small Claims Court* (1946) 76 C.A.2d 379, 383, 173 P.2d 38; *Cook v. Superior Court* (1969) 274 C.A.2d 675, 79 C.R. 285; *Burley v. Stein* (1974) 40 C.A.3d 752, 755, 115 C.R. 279, *infra*, §314 [asserted need for reform in handling of consumer complaints against corporate defendants]; *Eloby v. Superior Court* (1978) 78 C.A.3d 972, 976, 144 C.R. 597, *infra*, §321; *Jellinek v. Superior Court* (1991) 228 C.A.3d 652, 658, 279 C.R. 6, *infra*, §287; 29 *Cal. L. Rev.* 655; 52 *Cal. L. Rev.* 876 [comprehensive study and suggestions for reform]; 23 *So. Cal. L. Rev.* 291; 42 *So. Cal. L. Rev.* 493; 4 *Stanf. L. Rev.* 237; 21 *Stanf. L. Rev.* 1657; 37 *U.S.F. L. Rev.* 315 [analysis of small claims court system]; 20 *Am.Jur.2d* (2005 ed.), *Courts* §15; C.J.E.R., *Judges Benchbook: Small Claims Court and Consumer Law* §1.1 et seq.)

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2. Statutory Framework.

2 Witkin Cal. Proc. Courts § 268

[§ 268] Statutory Framework.

(1) *Statutory Development.* The original statutes dealing with small claims courts (original C.C.P. 116 et seq.) were adopted in 1933 and repealed in 1976, when new statutes were enacted (former C.C.P. 116 et seq.), specifying a jurisdictional limit for the small claims court of \$ 750. (See *8 Pacific L. J.* 241.)

Former C.C.P. 118 et seq. were added in 1976, to establish experimental court assistance and data collection projects, and former C.C.P. 123 et seq. were added in 1978, to establish experimental monetary jurisdiction projects. The projects were implemented by former C.R.C., Rule 1901 et seq.

The statutes and rules expired in 1980, and the experience in their operation was the basis for reports by the Department of Consumer Affairs to the Legislature. In response to the department's recommendations, the 1981 Legislature adopted various amendments to increase the accessibility and the efficiency of the small claims courts. The Legislature increased the jurisdictional amount to \$ 1,500; required night or Saturday sessions in some courts; required that claimants be informed concerning the waiver of fees for indigent claimants; required that small claims legal advisors be made available to litigants; and made various other changes. (See *13 Pacific L. J.* 607.)

The 1990 Legislature repealed the existing statutes (former C.C.P. 116 et seq.) and added new provisions (C.C.P. 116.110 et seq.) in a comprehensive revision and reorganization. Further amendments were made in 1991 and 1992.

(2) *Scope.* The Small Claims Act (C.C.P. 116.110 et seq.) consists of the following articles:

Article 1. General Provisions (C.C.P. 116.110 et seq.).

Article 2. Small Claims Court (C.C.P. 116.210 et seq.).

Article 3. Actions (C.C.P. 116.310 et seq.).

Article 4. Parties (C.C.P. 116.410 et seq.).

Article 5. Hearing (C.C.P. 116.510 et seq.).

Article 6. Judgment (*C.C.P. 116.610 et seq.*).

Article 7. Motion to Vacate and Appeal (*C.C.P. 116.710 et seq.*).

Article 8. Satisfaction and Enforcement of Judgment (*C.C.P. 116.810 et seq.*).

Article 9. Administration (*C.C.P. 116.910 et seq.*).

(3) *Definitions.* The Act defines the following terms:

(a) "Plaintiff" (*C.C.P. 116.130(a)*).

(b) "Defendant" (*C.C.P. 116.130(b)*).

(c) "Judgment creditor" (*C.C.P. 116.130(c)*).

(d) "Judgment debtor" (*C.C.P. 116.130(d)*).

(e) "Person" (*C.C.P. 116.130(e)*).

(f) "Individual" (*C.C.P. 116.130(f)*).

(g) "Party" (*C.C.P. 116.130(g)*).

(h) "Motion" (*C.C.P. 116.130(h)*).

(i) "Declaration" (*C.C.P. 116.130(i)*).

(j) "Good cause" (*C.C.P. 116.130(j)*).

(k) "Mail" (*C.C.P. 116.130(k)*).

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3. Judicial Council Rules and Forms.

2 Witkin Cal. Proc. Courts § 269

[§ 269] Judicial Council Rules and Forms.

(1) *Rules.* "The Judicial Council shall provide by rule for the practice and procedure and for the forms and their use in small claims actions." The rules and forms must be consistent with the Small Claims Act. (*C.C.P. 116.920(a)*; on required topics, see *C.C.P. 119.920(b)*.) (See *C.R.C.*, Rule 3.2100 et seq. [small claims cases at trial]; *C.R.C.*, Rule 8.900 et seq. [small claims cases on appeal].)

(2) *Forms.* The Judicial Council has adopted the following forms. Mandatory forms are designated with an asterisk:

<i>Form No.</i>	<i>Title</i>
SC-100*	Plaintiff's Claim and ORDER To Go To Small Claims Court
SC-100A*	Other Plaintiffs or Defendants (Attachment to Plaintiff's Claim and ORDER to Go to Small Claims Court)
SC-101*	Attorney Fee Dispute (After Arbitration) (Attachment to Plaintiff's Claim and ORDER to Go to Small Claims Court)
SC-103	Fictitious Business Name (Small Claims)
SC-104	Proof of Service (Small Claims)
SC-104A	Proof of Mailing (Substituted Service) (Small Claims)
SC-104B	What Is "Proof of Service"? (Small Claims)
SC-104C	How to Serve a Business or Public Entity (Small Claims)
SC-105	Request for Court Order and Answer (Small Claims)
SC-105A	Order on Request for Court Order (Small Claims)
SC-106	Request to Pay Judgment in Installments
SC-107*	Small Claims Subpoena for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration

SC-108	Request to Correct or Cancel Judgment and Answer (Small Claims)
SC-108A	Order on Request for Court Judgment (Small Claims)
SC-109	Authorization to Appear (Small Claims)
SC-110	Request to Postpone Small Claims Hearing
SC-111	Order on Request to Postpone Small Claims Hearing
SC-114	Request to Amend Claim Before Hearing (Small Claims)
SC-120*	Defendant's Claim and ORDER to Go to Small Claims Court (Small Claims)
SC-120A*	Other Plaintiffs or Defendants (Small Claims)
SC-130*	Notice of Entry of Judgment (Small Claims)
SC-132*	Attorney-Client Fee Dispute (Attachment to Notice of Entry of Judgment) (Small Claims)
SC-133*	Judgment Debtor's Statement of Assets (Small Claims)
SC-134*	Application and Order to Produce Statement of Assets and to Appear for Examination
SC-135	Notice of Motion to Vacate Judgment and Declaration
SC-140*	Notice of Appeal
SC-145*	Request to Pay Judgment to Court (Small Claims)
SC-150*	Information for the Small Claims Plaintiff (Small Claims)

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(1) *Rules.* C.R.C., Rule 8.900 et seq. were renumbered C.R.C., Rule 8.950 et seq. in 2008.(2) *Forms.* The following Judicial Council forms have been added or revoked:

Form No.	Title
SC-106	Request to Pay Judgment in Installments (Small Claims) [revoked]
SC-110	Request to Postpone Small Claims Hearing [revoked]
SC-111	Order on Request to Postpone Small Claims Hearing [revoked]
SC-112A	Proof of Service by Mail (Small Claims) [added]
SC-113A	Clerk's Certificate of Mailing [added]
SC-150	Request to Postpone Trial (Small Claims) [added]
SC-152	Order on Request to Postpone Trial (Small Claims) [added]
SC-200*	Notice of Entry of Judgment (Small Claims) [added]
SC-200-INFO	What to Do After the Court Decides Your Small Claims Case (Small Claims) [added]
SC-202A*	Decision on Attorney-Client Fee Dispute (Small Claims) [added]
SC-220	Request to Make Payments (Small Claims) [added]

SC-220-INFO	Payments in Small Claims Cases (Small Claims) [added]
SC-221	Response to Request to Make Payments (Small Claims) [added]
SC-222	Order on Request to Make Payments (Small Claims) [added]
SC-290	Acknowledgment of Satisfaction of Judgment [added]

Correction: Page 363, line 2, "119.920(b)" should be "116.920(b)".



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4. Manuals and Benchbooks.

2 *Witkin Cal. Proc. Courts* § 270

[§ 270] Manuals and Benchbooks.

(1) *Manuals on Rules and Procedures.* "Each small claims division may formulate and distribute to litigants and the public a manual on small claims court rules and procedures. The manual shall explain how to complete the necessary forms, how to determine the proper court in which small claims actions may be filed, how to present and defend against claims, how to appeal, how to enforce a judgment, how to protect property that is exempt from execution, and such other matters that the court deems necessary or desirable." (*C.C.P. 116.930(b).*)

The Department of Consumer Affairs, in cooperation with the Judicial Council, may prepare an information booklet on small claims court rules and procedures for distribution to the general public, provided there are sufficient private, public, or departmental funds available. Copies must be distributed to each small claims division. (*C.C.P. 116.930(c).*)

(2) *Bench Book.* The Judicial Council may "prepare and distribute to each judge who sits in a small claims court a bench book describing all state and federal consumer protection laws reasonably likely to apply in small claims actions." (*C.C.P. 116.930(d).*) Pursuant to this directive, C.J.E.R., the California Center for Judicial Education and Research (see *infra*, §397) has prepared a guide entitled *California Judges Benchbook: Small Claims Court and Consumer Law*. It is published in an annual, softcover edition by Thomson West.

A publication describing small claims court law and procedure, including the law and procedure applicable to the enforcement of judgments, must be provided in each courtroom in which small claims actions are heard. C.J.E.R.'s benchbook "is illustrative of a publication that satisfies" this requirement. (*C.C.P. 116.930(a).*)

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5. Small Claims Legal Advisers.

2 *Witkin Cal. Proc. Courts* § 271

[§ 271] Small Claims Legal Advisers.

Each county is required to provide legal advisors for small claims litigants. (See *C.C.P. 116.940*; *San Francisco v. Small Claims Court* (1983) 141 *C.A.3d* 470, 480, 190 *C.R. 340*, *infra*, §278; *C.J.E.R.*, Judges Benchbook: Small Claims Court and Consumer Law §3.35.) The following provisions apply:

(1) In each county, individual assistance must be made available to litigants and potential litigants without charge. (*C.C.P. 116.260*.) The clerk informs the parties orally or in writing about the availability of advisors at no additional charge. (*C.R.C.*, Rule 3.2120(a).) (On role of clerk in assisting litigants, see *C.R.C.*, Rule 3.2120.)

(2) Each advisory service must provide individual personal advisory services, in person or by telephone, and by any other means "reasonably calculated to provide timely and appropriate assistance." Topics covered by the service must include, at a minimum, preparation of small claims court filings, procedures (including procedures related to the conduct of the hearing), and information on the collection of small claims judgments. (*C.C.P. 116.940(b)(1)*.) Recorded messages may also be used, but may not be the sole means of providing advisory services in the county. (*C.C.P. 116.940(b)(2)*.) Adjacent counties may provide advisory services jointly. (*C.C.P. 116.940(b)(3)*.)

(3) Counties in which the number of small claims actions filed annually is 1,000 or fewer may elect to be exempt from the requirements of *C.C.P. 116.940(b)*. However, even an exempted county must provide minimum advisory services in accordance with Judicial Council rules, including recorded messages and information booklets. (*C.C.P. 116.940(c)*.)

(4) The advisory service must operate in conjunction and cooperation with the small claims division, and must be administered to avoid the existence or appearance of a conflict of interest between the advisors and any small claims party or judicial officer. (*C.C.P. 116.940(d)*.) An advisor must disclose known conflicts of interest and may not disclose or use information obtained in the course of his or her duties. (*C.R.C.*, Rule 3.2120(d).)

(5) Advisors may be volunteers and must be either members of the State Bar, law students, paralegals, or persons experienced in resolving minor disputes. They must be familiar with small claims rules and procedures and may not appear in court as advocates for any party. (*C.C.P. 116.940(e)*.) Counties must provide advisors with training sufficient

to ensure competence in small claims court practice and procedure and specified substantive areas. (C.R.C., Rule 3.2120(b).) Counties may establish additional qualifications. (C.R.C., Rule 3.2120(c).)

(6) With respect to advice provided as a public service to small claims litigants and potential litigants under the Small Claims Act, advisers, including independent contractors, other court employees, and volunteers have the immunity conferred by *Govt.C. 818.9*. (C.C.P. 116.940(f).) The clerk informs the parties orally or in writing about the immunity. (C.R.C., Rule 3.2120(a).)

(7) Except as provided in C.C.P. 116.940 or in Judicial Council rules, each county may determine the characteristics of the advisory service "in accordance with local needs and conditions." (C.C.P. 116.940(a).)

(8) In consultation with the Department of Consumer Affairs, the Judicial Council must adopt rules to ensure that litigants receive adequate notice that the assistance of advisers is available and to prescribe qualifications, conduct, and training standards for advisers. (C.C.P. 116.920(b).)

A litigant is not required to use the advisory service. To impose such a requirement would be inconsistent with the rationale that the small claims process is designed to provide an inexpensive, expeditious, and informal means of settling small disputes. (*Black v. Hepner* (1984) 156 C.A.3d 656, 660, 202 C.R. 799.)

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A. In General.

6. No Action for Malicious Prosecution.

2 Witkin Cal. Proc. Courts § 272

[§ 272] No Action for Malicious Prosecution.

A substantive effect of the distinct small claims court procedure is that a suit for malicious prosecution of a civil action (see 5 *Summary* (10th), *Torts*, §486 et seq.) cannot be based on a small claims proceeding. "To permit an action for malicious prosecution to be grounded on a small claims proceeding would frustrate the intent of the Legislature in adopting an expeditious and informal means of resolving small disputes, would inject into a simple and accessible proceeding elements of time, expense, and complexity which the small claims process was established to avoid, and would require a prudent claimant to consult with an attorney before making use of this supposedly attorney-free method for settling disputes over small amounts." (*Pace v. Hillcrest Motor Co.* (1980) 101 C.A.3d 476, 479, 161 C.R. 662; see *Black v. Hepner* (1984) 156 C.A.3d 656, 661, 202 C.R. 799 [adoption of statute providing for free advisory service to small claims litigants did not invalidate holding of *Pace*]; *Cooper v. Pirelli Cable Corp.* (1984) 160 C.A.3d 294, 298, 206 C.R. 581 [following *Pace*; fact that small claims defendant lost in small claims court but won on appeal to superior court does not compel different rule]; *Jellinek v. Superior Court* (1991) 228 C.A.3d 652, 658, 279 C.R. 6, infra, §287; 23 Western State L. Rev. 2 [malicious prosecution in small claims court].)

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B. Parties and Appearance.

1. In General.

2 *Witkin Cal. Proc. Courts* § 273

[§ 273] In General.

(1) *Who May Be Party.* Any person at least 18 years of age or legally emancipated and mentally competent may be a party to a small claims action. (*C.C.P. 116.410(a)*.) A minor or incompetent may appear by a guardian ad litem. (*C.C.P. 116.410(b)*.) In specified circumstances, the personal appearance of the plaintiff or defendant is excused. (See *infra*, §299.)

(2) *Judgment Against Non-Party.* The small claims court escapes not only from formal requirements of pleading but from the basic jurisdictional principal that a judgment cannot be given against a person not made a party to the action (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §316). In *Community Nat. Bank v. Superior Court* (1966) 242 *C.A.2d* 770, 51 *C.R.* 782, plaintiff J claimed that Community National Bank gave him a \$ 100 counterfeit bill. He filed a small claims court action to recover this sum, naming as defendant "Robert Parker, President Community National Bank." The small claims court ordered judgment for plaintiff against Parker; he appealed, and the superior court ordered judgment for plaintiff against the Bank. The Bank then sought prohibition, contending that, because it was never named as a defendant, the judgment against it was void. (See dissent, 242 *C.A.2d* 773, supporting this conventional position.) *Held*, judgment affirmed. The Bank could have been, and should have been, the defendant; if properly designated, it could have been represented by its president who was served with process; the layman's designation naming both the president and the Bank should not be strictly interpreted; and the Bank, represented by the same attorney as the president, had full knowledge of the action and the facts of the dispute. "It does not seem to be an unreasonable construction to hold that by naming the bank in the caption of the affidavit and delivering such affidavit to the president of the bank, the real party in interest felt that he had subjected the bank to the jurisdiction of the court, and refined legal terminology should not be used for the first time in this court to defeat his claim." (242 *C.A.2d* 773.)

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B. Parties and Appearance.

2. Assignee May Not Sue.

a. General Rule.

2 Witkin Cal. Proc. Courts § 274

[§ 274] General Rule.

One of the important characteristics of the small claims court is its prohibition against suit by any person other than the creditor. "No claim shall be filed or maintained in small claims court by the assignee of the claim." (*C.C.P.* 116.420(a); for exceptions, see *infra*, §275.) (See C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §3.23.)

An attempt to nullify the predecessor statute was thwarted in *Merchants Service Co. v. Small Claims Court* (1950) 35 C.2d 109, 216 P.2d 846. A purchaser bought a ring on credit, but acknowledged its receipt from, and agreed to pay installments to, plaintiff collection agency. Contemporaneously, the seller executed a "quitclaim" of his interest to plaintiff, together with a "guarantee" of the validity of the contract of sale. Plaintiff sought to compel the small claims court to entertain its action, on the theory that it was a third-party beneficiary of the original contract and therefore a primary creditor. *Held*, plaintiff could not bring the action. Construing all of the papers together, it was clear that there was an original sale with delivery of goods by the seller to the buyer, followed by a "relinquishment" of a chose in action (seller-creditor's claim) to the plaintiff with typical warranties of an assignor ("guarantee" of validity). And "the studious avoidance of the word 'assign' in the language of the relinquishment cannot affect its proper classification as an assignment." (35 C.2d 114.) The small claims statute "does not confine its prohibition, in use of the small claims court, to assignees for collection or assignees for the purposes of suit. Rather it prohibits the filing of a claim by any and every 'assignee'; and as so used without limitation, the word suggests a broad meaning was intended to attach thereto and to include anyone who stands in the place of the original creditor." (35 C.2d 115.)

Because subrogation operates as an equitable assignment (see 13 *Summary* (10th), *Equity*, §183 et seq.), a subrogee is an assignee within the meaning of the statute. (*Allianz Ins. Co. v. Municipal Court* (1981) 126 C.A.3d 1043, 1045, 179 C.R. 334 [citing *Merchants Service Co.*].)

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2. Assignee May Not Sue.

b. Exceptions.

2 *Witkin Cal. Proc. Courts* § 275

[§ 275] Exceptions.

The prohibition on a claim by an assignee (*supra*, §274) does not prevent the filing or defense of an action in the small claims court by either of the following persons:

(1) *Trustee in Bankruptcy*. A trustee in bankruptcy in the exercise of the trustee's duties as trustee. (*C.C.P.* 116.420(b).)

(2) *Investor*. The holder of a security agreement, retail installment contract, or lien contract subject to the Unruh Act (C.C. 1801 et seq.) or the Automobile Sales Finance Act (C.C. 2981 et seq.), purchased by the holder for the holder's portfolio of investments, provided the holder is not an assignee for the purpose of collection. (*C.C.P.* 116.420(b).) (On Unruh Act, see 4 *Summary* (10th), *Sales*, §263 et seq.; on Automobile Sales Finance Act, see 4 *Summary* (10th), *Sales*, §239 et seq.)

C.C.P. 116.420 does not prevent the filing of a small claims court action by a self-insured local government seeking workers' compensation subrogation under *Lab.C.* 3852 (see 2 *Summary* (10th), *Workers' Compensation*, §69 et seq.). (*C.C.P.* 116.420(c).)

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B. Parties and Appearance.

3. Attorney or Agent May Not Appear.

a. General Rule.

2 Witkin Cal. Proc. Courts § 276

[§ 276] General Rule.

A vital element of the small claims procedure has long been a general prohibition on participation by attorneys and agents. (See *Lee v. Small Claims Court* (1941) 46 C.A.2d 530, 534, 116 P.2d 170 [son of deceased party could not appear; administrator of estate had to be substituted]; *Mendoza v. Small Claims Court* (1958) 49 C.2d 668, 673, 321 P.2d 9; see C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §§3.8, 4.11 et seq.) The statute provides as follows:

(1) *Attorney*. Except as provided in C.C.P. 116.530 (infra, §277), no attorney may take part in the conduct or defense of a small claims action. (C.C.P. 116.530(a).)

(2) *Agent*. Except as provided in C.C.P. 116.540 (infra, §279), no individual other than the plaintiff and defendant may take part in the conduct or defense of a small claims action. (C.C.P. 116.540(a).)

Prudential Ins. Co. of America v. Small Claims Court (1946) 76 C.A.2d 379, 383, 173 P.2d 38, explains the purpose and justification for the exclusion of *attorneys* as follows: "The delay and expense incident to litigation have long discouraged the attempts of the poor litigant to secure redress for claims meritorious but small in amount. These cases are relatively of as great importance to those litigants as those heard in our highest courts, but the expense of employing an attorney and paying normal court costs is more than the cause will bear. The solution to this problem arrived at not only by many states in the United States, but also in England and in many continental countries, has been to create small claims or conciliation courts where small claims may be prosecuted informally and without the cost, delay, or procedural difficulties incident to normal litigation. ... If one of the litigants in such a court could employ counsel it would of necessity mean that the poor untrained litigant who could not afford to pay such costs would be at a disadvantage." (76 C.A.2d 383.) The court held that there was no denial of due process in this restriction, for the plaintiff elects to sue in the small claims court instead of in another court in which he could use an attorney, and the defendant has the right to appeal to a court allowing attorneys to appear. (See infra, §312.)

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3. Attorney or Agent May Not Appear.

b. When Attorney May Appear.

2 Witkin Cal. Proc. Courts § 277

[§ 277] When Attorney May Appear.

Exceptions to the rule against representation by an attorney (*supra*, §276) are set forth in *C.C.P. 116.530* as follows:

- (1) An attorney may appear to maintain or defend an action by or against himself or herself. (*C.C.P. 116.530(b)(1).*)
- (2) An attorney may appear to maintain or defend an action by or against a partnership in which the attorney is a general partner and in which all the partners are attorneys. (*C.C.P. 116.530(b)(2).*)
- (3) An attorney may appear to maintain or defend an action by or against a professional corporation of which the attorney is an officer or director and of which all other officers and directors are attorneys. (*C.C.P. 116.530(b)(3).*)
- (4) An attorney may provide advice to a party, either before or after the commencement of the action. (*C.C.P. 116.530(c)(1).*)
- (5) An attorney may testify to facts of which the attorney has personal knowledge and about which the attorney is competent to testify. (*C.C.P. 116.530(c)(2).*)
- (6) An attorney may represent a party on an appeal to the superior court or in connection with the enforcement of a judgment. (*C.C.P. 116.530(c)(3)* and (c)(4).)

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3. Attorney or Agent May Not Appear.

c. Distinction: Attorney Adviser.

2 Witkin Cal. Proc. Courts § 278

[§ 278] Distinction: Attorney Adviser.

In *San Francisco v. Small Claims Court* (1983) 141 C.A.3d 470, 190 C.R. 340, 170, plaintiffs filed individual claims against defendant city for damages resulting from airport noise. Defendant raised two main objections: (a) to jurisdiction of the small claims court to consolidate and try cases involving a very large aggregate sum (see *infra*, §283); and (b) to the use of attorneys as legal advisers for the plaintiffs, in violation of former C.C.P. 117.4 (now C.C.P. 116.530(b); *supra*, §277). It appeared that the attorneys acted as "coordinators," reviewing records of the Noise Abatement Center at the airport to discover the names of potential plaintiffs, preparing "master" small claims complaints, hiring and consulting attorneys, and holding workshops and other meetings at which attorneys offered advice on testimony. (141 C.A.3d 479, footnote 5.) *Held*, these activities were proper.

(a) Plaintiffs could not be certified as a class because of the individuality of their claims; and the fact that they exercised their constitutional right to meet to assist and advise each other in organizing and filing their claims did not change the fundamental nature of the individual claims. (141 C.A.3d 479.) And the small claims statute cannot be construed to conflict with the right of citizens to act collectively in seeking access to the courts. (141 C.A.3d 478, 479.)

(b) The mandatory requirement of advisory services for small claims litigants (see *supra*, §271), and the authority for attorneys to give advice on small claims litigation (see *supra*, §277), likewise support the activities of the "coordinators." These activities are either allowed under the statute or are constitutionally protected. (141 C.A.3d 480.)

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B. Parties and Appearance.

3. Attorney or Agent May Not Appear.

d. When Agent May Appear.

2 *Witkin Cal. Proc. Courts* § 279

[§ 279] When Agent May Appear.

(1) *Corporate or Entity Party*. An exception to the rule against representation by an agent becomes necessary where a corporation is a party. (See *Prudential Ins. Co. of America v. Small Claims Court* (1946) 76 C.A.2d 379, 383, 173 P.2d 38 [dictum]; *Taliaferro v. Locke* (1960) 179 C.A.2d 777, 781, 4 C.R. 223 [corporation appeared by attorney who was also assistant secretary of corporation; appearance was proper]; *Community Nat. Bank v. Superior Court* (1966) 242 C.A.2d 770, 51 C.R. 782, supra, §273; 8 A.L.R.5th 653 [corporation's appearance through agent who is not attorney].)

A corporation or other party who is not a natural person may appear and participate only through a regular employee, a duly appointed or elected officer or director, or a partner, who is employed, appointed, elected, or engaged for purposes other than solely representing the corporation or other party in small claims court. (C.C.P. 116.540(b), (c).) (See Judicial Council Form No. SC-109 [Authorization to Appear (Small Claims)].)

An association managing a common interest development may appear through an agent, representative, or bookkeeper. (C.C.P. 116.540(i).)

In the *Prudential* case, a disability policyholder had previously obtained a default judgment against defendant insurance company (a foreign corporation) in the small claims court, after the court had refused to allow an appearance by W, the company's local attorney. In the present action for another installment, W sought to appear by reason of a written appointment by defendant as "agent and representative" for purpose of the action. *Held*: (a) Although a corporation cannot appear in pro. per. in an ordinary court, the prohibition against representation by an attorney in the small claims court necessarily implies that the corporation may appear through some other representative. (76 C.A.2d 385, 386.) (b) Directors, officers, or managing agents are clearly proper representatives; and, in the absence of any restrictive legislation, "any regular employee, not directly employed as a lawyer, but whose duties give him peculiar knowledge of the facts of such cases, could appear to represent the corporation, and this is so whether or not he is an attorney." (76 C.A.2d 386.) (c) But W was not an employee of the corporation, and never represented it in any capacity other than as attorney. "His purported 'agency' was nothing more than an obvious attempt to circumvent the law prohibiting the appearance of attorneys in the small claims court." (76 C.A.2d 388.)

(2) *Experts.* Unless otherwise prohibited by law, a representative of an insurer or other expert in a matter before the court may assist a party either before or after commencement of the action, except during the conduct of the hearing. In addition, these individuals may testify to facts of which they have personal knowledge and about which they are competent to testify. (C.C.P. 116.531.)

(3) *Interpreters and Assistants.* Interpreters may assist parties without adequate proficiency in English. (C.C.P. 116.550, *infra*, §300.) If a party cannot properly present a claim or defense, the court has discretion to allow another individual to assist. (C.C.P. 116.540(l).)

(4) *Where Personal Appearance of Party Is Excused.* Participation by a representative is authorized when the personal appearance of a party is excused. (C.C.P. 116.540, *infra*, §299.)

(5) *Department of Corrections and Rehabilitation.* The Department of Corrections (now the Division of Adult Operations within the Department of Corrections and Rehabilitation) and the Department of Youth Authority (now the Division of Juvenile Facilities within the Department of Corrections and Rehabilitation), or an employee defendant of either Department, may appear and participate in small claims actions through a regular employee of the department. (C.C.P. 116.541(a), (e).) (See *infra*, §288.)

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e. Agent's Declaration.

2 *Witkin Cal. Proc. Courts* § 280

[§ 280] Agent's Declaration.

An individual appearing as a representative must file a declaration that the representative is authorized to appear and the basis for the declaration. If the representative is appearing under *C.C.P. 116.540(b)*, (c), (d), (h), or (i) (see *supra*, §279, and *infra*, §299), the declaration must also state that the representative is not employed solely to represent the party in small claims court. If the representative is appearing under *C.C.P. 116.540(e)*, (f), or (g) (see *infra*, §299), the declaration must also state that the representative is serving without compensation and has appeared in small claims court on behalf of others no more than four times during the calendar year. (*C.C.P. 116.540(j)*.) (On similar requirement for representative of Department of Corrections and Rehabilitation, see *C.C.P. 116.541(c)*, *infra*, §288.)

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 C. Jurisdiction.
 1. In General.

2 *Witkin Cal. Proc. Courts* § 281

[§ 281] In General.

(1) *General Monetary Limit.* Subject to an exception for certain guarantors (*infra*, §282), and an exception for various actions filed by incarcerated plaintiffs (*infra*, §288), the small claims court has jurisdiction in an action for the recovery of money if the amount of the demand does not exceed \$ 5,000. (*C.C.P. 116.220(a)(1)*.) (See C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §§1.6, 3.5.) The restrictive language of the former statute ("for recovery of money only") was liberally construed to cover tort claims as well as those based on contract. (*Leuschen v. Small Claims Court* (1923) 191 C. 133, 134, 215 P. 391 [action for damages for negligence].) In *Miller v. Municipal Court* (1943) 22 C.2d 818, 851, 142 P.2d 297, the statute was held applicable to a consumer's action to recover a statutory penalty for violation of the federal Price Control Act.

(2) *Higher Limit for Claims by Natural Persons.* In addition to the jurisdiction conferred by *C.C.P. 116.220*, the small claims court has jurisdiction in an action brought by a natural person if the demand does not exceed \$ 7,500, except for actions otherwise prohibited by *C.C.P. 116.220(c)* (defendant guarantor; *infra*, §282) or *C.C.P. 116.231(a)* (limit on number of number of actions in calendar year; *infra*, this section). (*C.C.P. 116.221*.) (See Stats. 2005, Chap. 118, §1 [expressing intent of Legislature that increase in jurisdictional limit applies only to individual natural persons].)

(3) *Waiver of Excess Demand.* The general rule of *C.C.P. 396*, permitting waiver of an excess in the amount of the demand in order to sustain jurisdiction (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §27), applies to the small claims court. "Section 396 is particularly efficacious in actions in small claims courts. Even a party who asserts a demand for more than the jurisdictional limits of a small claims court will often benefit financially by sacrificing part of the claim to avoid the expense and delay of prosecution through municipal or justice courts." (*Skaff v. Small Claims Court* (1968) 68 C.2d 76, 77, footnote 1, 65 C.R. 65, 435 P.2d 825.) (See *infra*, §287.)

The right to waive excess demand was codified in 1990. "In any case in which the lack of jurisdiction is due solely to an excess in the amount of the demand, the excess may be waived, but any waiver is not operative until judgment." (*C.C.P. 116.220(d)*.)

(4) *Limit on Number of Actions.* In a calendar year, no person may file more than two small claims actions in which the demand exceeds \$ 2,500. (*C.C.P. 116.231(a)*.) If the demand exceeds \$ 2,500, the party making the demand must

file a declaration under penalty of perjury stating that not more than two small claims actions with excess demand have been filed within the calendar year. (*C.C.P. 116.231(b)*.) This limitation does not apply to cities, counties, school districts, and other local public entities, which may file small claims court claims not in excess of \$ 5,000. If the defendant in such an action informs the court, by written notice before the hearing or at the time of the hearing, that he or she is represented by legal counsel, the action must be transferred out of the small claims division. (*C.C.P. 116.231(d)*.)

(5) *Limited Civil Case*. A limited civil case within the jurisdiction of the small claims division is brought in the small claims division. Where a statute or rule applicable to a small claims case conflicts with a statute or rule applicable to a limited civil case, the small claims statute or rule is applicable. (*C.C.P. 87(a)*.) For example, *C.C.P. 904.5* governing appeals in small claims cases prevails over *C.C.P. 904.2*, governing appeals in limited civil cases. (Law Rev. Com. Comment.) (On limited civil case, see *supra*, §241 et seq.)

(6) *Forum Selection Agreement*. An agreement establishing a forum outside California for an action "arising from an offer or provision of goods, services, property, or extension of credit primarily for personal, family, or household purposes" is void and unenforceable as against public policy if the action is otherwise within the jurisdiction of the small claims court. (*C.C.P. 116.225*.)

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(3) *Waiver of Excess Demand*. *C.C.P. 396*, the general statute on waiver of excess demand, was repealed as obsolete in 2008.



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C. Jurisdiction.
2. Particular Actions.

2 Witkin Cal. Proc. Courts § 282

[§ 282] Particular Actions.

(1) *Recovery of Delinquent Taxes.* Subject to limited exceptions, the small claims court has jurisdiction in actions to enforce the payment of delinquent unsecured personal property taxes not in excess of \$ 5,000 "if the legality of the tax is not contested by the defendant." (*C.C.P. 116.220(a)(2).*)

(2) *Recovery of Security for Rental of Residential Property.* The small claims court has jurisdiction in an action under C.C. 1950.5 (recovery of security deposit and damages; see 1 *Summary* (10th), *Contracts*, §522 et seq.) "if the damages claimed, whether actual or statutory or both," are within the jurisdictional amount specified by *C.C.P. 116.220* or *116.221*. (C.C. 1950.5(n).)

(3) *Enforcement of Innkeeper's Lien.* The small claims court has jurisdiction to issue writs of possession under C.C. 1861.5 and 1861.10 (innkeeper's lien; see 13 *Summary* (10th), *Personal Property*, §222 et seq.) for claims not in excess of \$ 5,000. (*C.C.P. 116.220(a)(3).*)

(4) *Attorney's Fee Arbitration.* The small claims court has jurisdiction (a) to "confirm, correct, or vacate" a binding attorney's fee arbitration award not over \$ 5,000, and (b) to conduct a hearing de novo between an attorney and client after nonbinding arbitration of a fee dispute involving no more than \$ 5,000 in controversy. (*C.C.P. 116.220(a)(4)*); on fee arbitration under *B. & P.C. 6200* et seq., see 1 *Cal. Proc.* (5th), *Attorneys*, §220 et seq.) (See Judicial Council Form No. SC-101 [Attorney Fee Dispute (After Arbitration) (Attachment to Claim and ORDER to Go to Small Claims Court)]; Judicial Council Form No. SC-132 [Attorney-Client Fee Dispute (Attachment to Notice of Entry of Judgment)].)

(5) *Civil Rights Action.* The small claims court has jurisdiction in civil rights actions under C.C. 52 (discrimination) and C.C. 54.3 (admission to or enjoyment of public facilities) where the damages sought do not exceed the jurisdictional limits set forth in *C.C.P. 116.220* and *116.221*. (C.C. 52.2.)

(6) *Action Against Defendant Guarantor.* The court has jurisdiction over a defendant guarantor as follows:

(a) For an action by a natural person against the Registrar of the Contractors' State License Board, the jurisdictional

limit stated in *C.C.P. 116.221* applies (\$ 7,500). (*C.C.P. 116.220(c)(1)*.)

(b) For an action against a defendant guarantor that does not charge a fee for its guarantor or surety services, the jurisdictional limit is \$ 2,500. (*C.C.P. 116.220(c)(2)*.)

(c) For an action against a defendant guarantor that charges a fee for its guarantor or surety services or an action by an entity other than a natural person against the Registrar of the Contractors' State License Board, the jurisdictional limit is \$ 4,000. (*C.C.P. 116.220(c)(3)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Attorney's Fee Arbitration*. In 2010, the Judicial Council adopted the following form for mandatory use:

Judicial Council Form No. SC-202A [Decision on Attorney-Client Fee Dispute (Small Claims)].

(6) *Action Against Defendant Guarantor*.

(c) *Guarantor that charges fee*: In 2008, *C.C.P. 116.220(c)(3)* was renumbered *C.C.P. 116.220(c)(4)*. Under *C.C.P. 116.220(c)(4)*, as amended in 2008, the jurisdictional limit in an action brought by an entity other than a natural person against a defendant guarantor that charges a fee is \$ 4,000. Under *C.C.P. 116.220(c)(3)*, added in 2008, the jurisdictional limit in an action brought by a natural person against a defendant guarantor that charges a fee is \$ 6,500.(7) *(New) Equitable Relief*. The small claims court has jurisdiction in an action for an injunction or other equitable relief "only when a statute expressly authorizes a small claims court to award that relief." (*C.C.P. 116.220(a)(5)*, added in 2009.)



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 3. Mass Claims.

2 *Witkin Cal. Proc. Courts* § 283

[§ 283] Mass Claims.

In *San Francisco v. Small Claims Court* (1983) 141 C.A.3d 470, 190 C.R. 340, 170, plaintiffs filed individual claims in the small claims court against defendant city and county as the owner and operator of the San Francisco International Airport. The plaintiffs alleged that noise from the airport constituted a continuing nuisance causing damages of \$ 750 (the then jurisdictional limit) to each claimant. The cases were consolidated, judgment was entered in favor of 116 plaintiffs, and defendant appealed. Then the same plaintiffs filed another 183 claims, and defendant sought prohibition in the superior court, to restrain the small claims court from hearing this or similar airport nuisance cases arising from the same subject matter. The theory of the petition was that the Legislature did not intend that "complex cases" filed in "waves of mass claims" against a public entity could be tried in the small claims court. The superior court denied the writ and defendant appealed. *Held*, affirmed.

(a) "*Minor civil disputes*" refers to individual plaintiff's claim. Former C.C.P. 116.1 (now C.C.P. 116.120), expressing the legislative intent, uses the phrase "individual minor civil disputes." The language makes it clear that the word "minor" refers to the financial value of the claim to the individual plaintiff. (141 C.A.3d 474.) And it was precisely because the cost of suing in the superior court would have been prohibitive that the plaintiffs used the small claims court. (141 C.A.3d 474.) No authority supports defendant's argument that airport nuisance cases should be barred from the small claims court because of their relatively complex issues. (141 C.A.3d 475.)

(b) *Small claims court jurisdiction over nuisance*. The small claims court has jurisdiction over a nuisance action, and airport noise may give rise to such an action. (141 C.A.3d 475, citing *Greater Westchester Homeowners Assn. v. Los Angeles* (1979) 26 C.3d 86, 160 C.R. 733, 603 P.2d 1329, 5 Summary (10th), *Torts*, §339.) The argument that the "broad social policy impact" of these cases makes them inappropriate for initial resolution in a small claims court is not a proper challenge to jurisdiction of the court. Under *Long Beach v. Bozek* (1982) 31 C.3d 527, 183 C.R. 86, 645 P.2d 137, 5 Summary (10th), *Torts*, §487, filing suit against a governmental entity is an aspect of the constitutional right to petition for redress of grievances; and the right defended in *Bozek* includes the right of access to small claims courts. (141 C.A.3d 476, 477.)

(c) *Class action distinguished*. In *San Jose v. Superior Court (Lands Unlimited)* (1974) 12 C.3d 447, 115 C.R. 797, 525 P.2d 701, 4 Cal. Proc. (5th), *Pleading*, §290, certification of a class action alleging airport noise as a nuisance was

denied because each member's right to recover depended on facts peculiar to his or her case. In a class action, any unfairness to the defendant resulting from certification could not be cured on appeal; but in a small claims action the defendant's right to a trial de novo in the superior court is a cure for the informal procedures of which defendant complains. (141 C.A.3d 477.)

(d) *Mass filing and waves of claims.* (1) Although defendant's ultimate liability may exceed \$ 135,000, the jurisdictional limit applies to each plaintiff's claim, and the fact that on consolidation the aggregate amount is greater than the limit is immaterial. (141 C.A.3d 477, citing the text.) (2) The objection to "waves" of claims is answered by *Spaulding v. Cameron* (1952) 38 C.2d 265, 239 P.2d 625, 6 Summary (10th), *Torts*, §1737: A defendant who is able to abate a nuisance cannot complain of the plaintiff's successive actions as damages accrue until abatement takes place. (141 C.A.3d 477.)

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4. No Jurisdiction in Workers' Compensation Matters.

2 Witkin Cal. Proc. Courts § 284

[§ 284] No Jurisdiction in Workers' Compensation Matters.

The small claims court has no jurisdiction over the claim of a medical witness for fees for testifying in a worker's compensation proceeding, or over a claim by an attorney against a doctor for alleged loss of fees in the proceeding; the Workers' Compensation Appeals Board has exclusive jurisdiction. (*Work. Comp. App. Bd. v. Small Claims Court* (1973) 35 C.A.3d 643, 646, 111 C.R. 6.)

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5. No Jurisdiction To Enforce Child Support Order.

2 Witkin Cal. Proc. Courts § 285

[§ 285] No Jurisdiction To Enforce Child Support Order.

In re Marriage of Lackey (1983) 143 C.A.3d 698, 191 C.R. 309, held that a judgment of the small claims court in favor of a mother for arrearages in court-ordered child support was void for lack of subject matter jurisdiction.

(a) The Legislature--in the Family Law Act and other statutes--has given exclusive jurisdiction to the superior court to enforce orders for child support. (143 C.A.3d 702.) The small claims court has no concurrent jurisdiction over an independent action to determine and liquidate arrearages; by definition arrearages relate to an existing order for support. (143 C.A.3d 702.)

(b) Although small claims court jurisdiction now extends to tort as well as contract, and its essential purpose is to resolve disputes over relatively small amounts of money owed, not every claim for money owing may be heard in that court. (143 C.A.3d 704, citing *Work. Comp. App. Bd. v. Small Claims Court* (1973) 35 C.A.3d 643, 111 C.R. 6, supra, §284.) Moreover, the claim asserted by plaintiff mother is not based on contract, tort, or any other wrong by defendant father; it rests on his failure to obey a court order. (143 C.A.3d 704.) A binding agreement between former spouses regarding financial assistance to the custodial parent, independent of the dissolution decree, is distinguishable: this separate agreement would be justiciable in the small claims court. (143 C.A.3d 705.)

(c) Judicial economy also requires that enforcement of child support orders remain in the superior court: (1) In the superior court either parent may seek prospective modification of the order; to allow a custodial parent to sue in the small claims court, but require the superior court to hear the modification request, would be inefficient. (2) When a plaintiff sues in the small claims court, amounts owed in excess of the jurisdictional limit are waived; it is in the state's interest for the noncustodial parent to pay child support in the full amount ordered. (143 C.A.3d 707.)

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6. No Splitting Cause of Action.

2 *Witkin Cal. Proc. Courts* § 286

[§ 286] No Splitting Cause of Action.

In *Lekse v. Municipal Court* (1982) 138 C.A.3d 188, 187 C.R. 698, landlords rented premises to L on a month-to-month tenancy for \$ 375 per month. In April 1980, when \$ 1,500 rent was overdue for a 4-month period, the landlords simultaneously filed two separate complaints in the small claims court to recover rent--one for December and January, and the other for February and March. The purpose of the two complaints was to overcome the then jurisdictional limit of \$ 750. Judgments by default were entered on both complaints, and an earnings withholding order was issued and satisfied as to the first judgment. When the second earnings withholding order was served, L retained counsel and made a motion in the municipal court to quash the second judgment. On denial of the motion, L petitioned for mandamus in the superior court. That court granted the writ, ordering the municipal court to consolidate the two cases and to quash any further proceedings, because the amount due within the jurisdictional limit had already been paid on the first judgment. The municipal court appealed. *Held*, affirmed.

(a) *Technical legal defenses are not permitted.* The municipal court contended that it had discretion not to order consolidation of the two complaints, and that L waived any objection to splitting the cause of action. This contention is unsound:

(1) In *Sanderson v. Niemann* (1941) 17 C.2d 563, 110 P.2d 1025, *infra*, §289, the court refused to apply the doctrine of res judicata to small claims court judgments, pointing out that the technical aspects of causation and imputed negligence could not have been fully presented or considered, and that parties appearing without professional counsel "cannot be expected to observe rules which they do not know." (138 C.A.3d 192.) And in *Work. Comp. App. Bd. v. Small Claims Court* (1973) 35 C.A.3d 643, 111 C.R. 6, *supra*, §284, the court observed that the typical method of preventing a court from proceeding without jurisdiction--as a motion to dismiss--was not available to the small claims court defendant. (138 C.A.3d 192.)

(2) Applying these holdings to the problem of the instant case: (a) A lay litigant should not have been expected to make a motion in the municipal court to consolidate the two complaints; hence, failure to move cannot be considered a waiver of the right. (b) There is little difference between disallowing the applicability of res judicata and holding that the affirmative defense of splitting a cause of action is not to be expected from a small claims lay litigant. (138 C.A.3d 192.)

(b) *Improper splitting of cause of action.* The municipal court's argument that there were separate causes of action for monthly rent, and that it therefore had discretion to refuse consolidation, is unsound. For purposes of the *statute of limitations*, a cause of action accrues on each installment of rent when it becomes due. (138 C.A.3d 193, citing *Tillson v. Peters* (1940) 41 C.A.2d 671, 107 P.2d 434.) But for *pleading* purposes, there is only one cause of action for all the rent due at the time suit is filed; and an attempt to set forth separate causes of action for separate installments violates the rule against splitting a cause of action. (138 C.A.3d 193, citing *Love v. Waltz* (1857) 7 C. 250, federal and out-of-state cases, and the text.)

(c) *Lack of jurisdiction of subject matter.* The small claims court had no subject matter jurisdiction over a single cause of action for an amount in excess of its jurisdictional limit. (138 C.A.3d 194, quoting the text.)

(d) *Proper procedure.* The problem could not be resolved by ignoring the jurisdictional limitations. "Such litigants have the option of following the rules and making proper use of the small claims court by suing for past due rent as each installment comes due, or by consolidating past due claims up to the jurisdictional limit of the small claims court." (138 C.A.3d 195.)

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7. Restrictions on Transfer.

2 Witkin Cal. Proc. Courts § 287

[§ 287] Restrictions on Transfer.

In *Jellinek v. Superior Court* (1991) 228 C.A.3d 652, 279 C.R. 6, plaintiff D sued defendant physician in the small claims court for malpractice, seeking damages of \$ 1,500. After the statute of limitations had run, plaintiff moved for a transfer to the superior court, on the ground that her damages exceeded \$ 25,000. Defendant did not appear at the hearing on the motion, and a temporary judge granted it. In the superior court, defendant's motion to quash summons was denied. *Held*, mandamus issued to compel granting the motion and to order the matter remanded to the small claims court.

(a) Plaintiff argued that *C.C.P.* 396 (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §399 et seq.) authorized the transfer because her damages exceeded the jurisdictional limit of the small claims court. However, the small claims court did not lack jurisdiction of the original malpractice action; regardless of actual damages, a plaintiff who files in the small claims court intentionally waives excess damages over the limit. (228 C.A.3d 656.) (On waiver of excess demand under *C.C.P.* 116.220(d), see *supra*, §281.)

(b) Even under *C.C.P.* 396, a transfer must further the ends of justice, and if the transfer were approved here justice would be subverted. The original claim was allowed to lie fallow for 2 years. The case was then revived by a lawyer who advised plaintiff that she should get the matter transferred to avoid the bar of the statute of limitations. Although the use of an attorney in a small claims proceeding is permitted for rendering advice (see *supra*, §278), here the advice given "encompassed conceiving a sophisticated transfer strategy and preparing a formal motion to transfer the case, including a complaint bearing the attorney's name and ready to file in the superior court." (228 C.A.3d 657.)

(c) Defendant excused his failure to appear for the hearing on the motion by stating that he was necessarily unrepresented by counsel and thought the matter had long since died. "He notes the obvious unfairness of the procedure in which [D] was essentially represented by counsel to make a sophisticated procedural motion which ought not to happen at all in small claims court, while the unrepresented defendant was caught unawares." (228 C.A.3d 657.)

(d) "It has been repeatedly pointed out that we must protect the informal nature and the simplicity of small claims procedures in order to preserve the nature of that forum as one which yields speedy commonsense justice without the need to resort to lawyers. ... [I]f a small claims lawsuit had the potential to become, at plaintiff's option, a larger superior

court lawsuit after expiration of the statute of limitations, a prudent defendant would consult with an attorney before allowing a small claims action to go by default." (228 C.A.3d 658.)

(e) "[D] here is no more disadvantaged than any other plaintiff who does not realize the extent of her injury until after the limitations period has run. ... [D] should not be able to derive any special advantage from having filed a small claims action because such an action is not fair notice to the defendant that he may be liable for anything beyond the jurisdictional limit of the small claims court. Also, statutes of limitations are normally tolled by the filing and service of a complaint because that event should cause a prudent defendant to consult a lawyer or to take other protective action. But the filing of the small claims action ... should not have that effect; defendant should not need to consult an attorney and he should be able to assume a definite monetary limit on his potential liability in the action." (228 C.A.3d 660.)

SUPPLEMENT: [This section is current through the latest supplement]

C.C.P. 396, the general statute on waiver of excess demand, was repealed as obsolete in 2008.



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C. Jurisdiction.

8. Action Against Department of Corrections and Rehabilitation.

2 Witkin Cal. Proc. Courts § 288

[§ 288] Action Against Department of Corrections and Rehabilitation.

In an action by a plaintiff incarcerated in a facility of the Department of Corrections and Rehabilitation against the department or an employee of the department, the small claims court has jurisdiction over the defendant only if the complaint alleges that administrative remedies have been exhausted, or the department's final determination of the plaintiff's claim is attached to the complaint. (*C.C.P. 116.220(e), (g).*) If the plaintiff fails to provide proof of compliance with this requirement, the small claims court may either dismiss the action or continue the action to give the plaintiff an opportunity to do so. (*C.C.P. 116.220(f).*) (See 27 *Pacific L. J.* 491 [inmate representation].)

The department (or an employee defendant) may appear and participate in small claims actions through a regular employee of the department. (*C.C.P. 116.541(a), (e).*) The court may require the department's representative to file a declaration stating that the representative is authorized to appear, setting forth the basis of that authority, and stating that the representative is not employed solely to represent the department in small claims court. (*C.C.P. 116.541(c).*) Where the department is named as a defendant, the representative need not appear personally to challenge the plaintiff's compliance with pleading requirements, and may assert the challenge on pleadings or declaration. (*C.C.P. 116.541(b).*)

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 1. In General.

2 *Witkin Cal. Proc. Courts* § 289

[§ 289] In General.

(1) *Informal Procedure.* The peculiar nature and functions of the court were well described in *Sanderson v. Niemann* (1941) 17 C.2d 563, 110 P.2d 1025: "The theory behind its organization is that only by escaping from the complexity and delay of the normal course of litigation could anything be gained in a legal proceeding which may involve a small sum. Consequently, the small claims court functions informally and expeditiously. The chief characteristics of its proceedings are that there are no attorneys, no pleadings and no legal rules of evidence; there are no juries, and no formal findings are made on the issues presented. At the hearings the presentation of evidence may be sharply curtailed, and the proceedings are often terminated in a short space of time. The awards--although made in accordance with substantive law--are often based on the application of common sense; and the spirit of compromise and conciliation attends the proceedings." (17 C.2d 573.) (See *Skaff v. Small Claims Court* (1968) 68 C.2d 76, 80, 65 C.R. 65, 435 P.2d 825, *infra*, §311 ["Since resolution of disputes by small claims courts conserves the resources of both the parties and the state, we seek within the statutory framework to encourage their utilization"]; *Lekse v. Municipal Court* (1982) 138 C.A.3d 188, 191, 192, 187 C.R. 698, *supra*, §286.)

(2) *No Extension of Time Where Notice Is Given by Mail.* C.C.P. 1005(b) and 1013(a), extending the time for action when notice is given by mail (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §§17, 30), do not apply in small claims actions. (C.C.P. 116.140(a).)

(3) *No Prejudgment Attachment.* C.C.P. 481.010 *et seq.*, providing for prejudgment attachment (see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §46 *et seq.*), do not apply in small claims actions. (C.C.P. 116.140(b).)

(4) *No Formal Discovery.* The formal pretrial discovery procedures provided by C.C.P. 2019.010 (see 2 *Cal. Evidence* (4th), *Discovery*, §2) are not permitted in small claims actions. (C.C.P. 116.310(b).)

(5) *No Security for Costs.* Actions in small claims courts are specifically exempted from the security for costs requirements in actions against architects, engineers, or surveyors (C.C.P. 1029.5(b)) and in medical malpractice actions (C.C.P. 1029.6(b)). (See 3 *Cal. Proc.* (5th), *Actions*, §359.)

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2. Uniform Fees.

2 Witkin Cal. Proc. Courts § 290

[§ 290] Uniform Fees.

(1) *In General.* Uniform fees in small claims court proceedings were adopted in 2005. (See *C.C.P. 116.230(a)*; on deposit and distribution of fees, see *C.C.P. 116.230(f)*, (g), and (h).)

(2) *Filing Fee for Twelve or Fewer Claims.* If the party filing a claim has filed 12 or fewer small claims in the state in the previous 12 months, the filing fee is as follows:

(a) \$ 30 if the amount of the demand is \$ 1,500 or less. (*C.C.P. 116.230(b)(1)*.)

(b) \$ 50 if the amount of the demand is more than \$ 1,500 but less than or equal to \$ 5,000. (*C.C.P. 116.230(b)(2)*.)

(c) \$ 75 if the amount of the demand is more than \$ 5,000. (*C.C.P. 116.230(b)(3)*.)

If an amendment raises the amount of the demand so that a higher fee would have been charged, the increase in the fee is due when the amendment is filed. If an amendment reduces the amount of the demand so that a lower fee would have been charged, no reimbursement is authorized. (*C.C.P. 116.230(d)*.)

(3) *Filing Fee for More Than Twelve Claims.* If the party filing a claim has filed more than 12 small claims in the state in the previous 12 months, the filing fee is \$ 100. (*C.C.P. 116.230(c)*.)

(4) *Fee for Mailing Claim.* A fee of \$ 10 is imposed on the plaintiff for each defendant to who the claim is mailed under *C.C.P. 116.340* (notice to appear; *infra*, §294). (*C.C.P. 116.232*.)

(5) *Fee for Postponement of Hearing.* A fee of \$ 10 is imposed for filing a request for postponement and rescheduling of a hearing after service of the claim on the defendant. (*C.C.P. 116.570(d)*, *infra*, §297.)

(6) *Fee for Motion To Vacate.* A fee of \$ 20 is imposed for filing a motion to vacate. (*C.C.P. 116.745*, *infra*, §308.)

(7) *Fee for Filing Notice of Appeal.* A fee of \$ 75 is imposed on the appealing party for filing a notice of appeal. (*C.C.P. 116.760(a)*, *infra*, §316.)

(8) *Fee for Writ of Execution or Abstract of Judgment.* A fee of \$ 15 is imposed for issuance of a writ of execution or abstract of judgment. (*C.C.P. 116.820(b)*, *infra*, §303.)

(9) *Fee for Examination of Judgment Debtor.* A fee of \$ 40 is imposed for an application for an order for examination of a judgment debtor. (*C.C.P. 116.820(b)*, *infra*, §302.)

(10) *Fee for Payment of Judgment to Court.* A fee of \$ 20 is imposed on the judgment debtor for electing to pay the judgment to the court. (*C.C.P. 116.860(h)*, *infra*, §306.)

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(8) *Fee for Writ of Execution or Abstract of Judgment.* *C.C.P. 116.820(b)*, as amended in 2009, requires the clerk to collect all fees associated with the enforcement of judgments under *C.C.P. 680.010* et seq. Under *Govt.C. 70626*, as amended in 2009, the fee for issuance of a writ of execution or abstract of judgment is \$ 25.

(9) *Fee for Examination of Judgment Debtor.* *C.C.P. 116.820(b)*, as amended in 2009, requires the clerk to collect all fees associated with the enforcement of judgments under *C.C.P. 680.010* et seq. Under *Govt.C. 70617*, the fee for an order for the examination of a judgment debtor is \$ 40.



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3. Venue, Location, and Sessions.

2 *Witkin Cal. Proc. Courts* § 291

[§ 291] Venue, Location, and Sessions.

(1) *Venue and Location.* *C.C.P. 116.370* governs venue and court location as follows:

(a) Venue and court location requirements in small claims actions are the same as in other civil actions. The location of small claims court actions may be prescribed by local rule. (*C.C.P. 116.370(a)*.) (See C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §3.7.)

(b) "A defendant may challenge venue or court location by writing to the court and mailing a copy of the challenge to each of the other parties to the action, without personally appearing at the hearing." (*C.C.P. 116.370(b)*.)

(c) In all cases, including those in which the defendant either does not challenge venue or court location or does not appear, the court determines whether venue and court location are proper. (*C.C.P. 116.370(c)*; see C.R.C., Rule 3.2106.)

(d) If the court determines that venue is not proper, it must, on its own motion, dismiss the action without prejudice, unless all defendants are present and agree that the action may be heard. If the court determines that court location is not proper, it must transfer the action to the proper location. (*C.C.P. 116.370(c)(1)*.)

(e) If the court determines that venue and court location are proper and all parties are present, it may hear the case. If the defendant challenged venue or court location and all parties are not present, the court must postpone the hearing for at least 15 days and notify the parties of the new hearing date by mail. (*C.C.P. 116.370(c)(2)*.)

(2) *Sessions.* "Sessions of the small claims court may be scheduled at any time and on any day, including Saturdays, but excluding other judicial holidays." (*C.C.P. 116.250(a)*.) (On judicial holidays, see *supra*, §46 et seq.)

Night or Saturday sessions are required in small claims divisions in superior courts with seven or more judicial officers. These sessions are for hearing small claims cases, but not small claims appeals. For this purpose, a session includes a proceeding conducted by an attorney acting as a mediator or referee. (*C.C.P. 116.250(b)*.)

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4. Plaintiff's Claim.
a. In General.

2 *Witkin Cal. Proc. Courts* § 292

[§ 292] In General.

(1) *Nature of Claim.* The plaintiff commences the action by filing a claim under oath with the clerk of the court. The claim is filed in person or by mail or, if authorized, by fax or electronic means. (*C.C.P. 116.320(a)*.) (See C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §1.7.) (On filing fee, see *supra*, §290.)

(2) *Form of Claim.* The claim form must be a simple nontechnical form approved or adopted by the Judicial Council. It must set forth a place for (a) the name and address of the defendant, if known; (b) the amount and the basis of the claim; (c) a statement that the plaintiff, where possible, has demanded payment and, in applicable cases, the possession of the property; (d) a statement that the defendant has failed or refused to pay and, where applicable, has refused to surrender the property; and (e) a statement that the plaintiff understands that the judgment on the claim will be conclusive and without a right of appeal. (*C.C.P. 116.320(b)*.) (See *C.C.P. 116.230(e)* [party filing claim must also file declaration stating whether party has filed more than 12 small claims in California within last 12 months]; Judicial Council Form No. SC-100 [Plaintiff's Claim and ORDER to Go to Small Claims Court]; Judicial Council Form No. SC-100A [Other Plaintiffs or Defendants (Attachment to Plaintiff's Claim and ORDER to Go To Small Claims Court)].)

The form or the accompanying instructions must include information that the plaintiff (a) may not be represented by an attorney, (b) has no right to appeal, and (c) may ask the court to waive fees on the ground that the plaintiff is unable to pay them, using forms approved by the Judicial Council for that purpose. (*C.C.P. 116.320(c)*.) (See Judicial Council Form No. SC-150 [Information for the Small Claims Plaintiff].)

(3) *Action To Enforce Payment of Debt.* Additional requirements apply where the action is to enforce a debt. "If the action is to enforce the payment of a debt, the statement of calculation of liability shall separately state the original debt, each payment credited to the debt, each fee and charge added to the debt, each payment credited against those fees and charges, all other debits or charges to the account, and an explanation of the nature of those fees, charges, debits, and all other credits to the debt, by source and amount." (*C.C.P. 116.222*.)

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4. Plaintiff's Claim.

b. Use of Fictitious Business Name.

2 Witkin Cal. Proc. Courts § 293

[§ 293] Use of Fictitious Business Name.

(1) *Claim of Plaintiff Using Fictitious Business Name.* If the plaintiff operates or does business under a fictitious business name and the claim relates to the business, the claim must be accompanied by a declaration stating that the plaintiff has executed, filed, and published a fictitious business name statement as required by law. (C.C.P. 116.430(a).) An action filed by a person who has not complied with fictitious business name requirements must be dismissed without prejudice. (C.C.P. 116.430(b).) For this purpose, "fictitious business name" is defined in B. & P.C. 17900 and a fictitious business name statement is one described in B. & P.C. 17913. (C.C.P. 116.430(c).) (See C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §3.13.)

The clerk must make the declaration available to the claimant in any one of the following ways: (a) The declaration may be placed on a separate Judicial Council form, (b) the Judicial Council form may be placed on the reverse of the plaintiff's statement to the clerk or the reverse of any one-sided small claims form, or (c) the precise language of the declaration in the Judicial Council form may be incorporated into the plaintiff's statement. (C.R.C., Rule 3.2100(b).) (See Judicial Council Form No. SC-103 [Fictitious Business Name (Small Claims)].)

(2) *Amendment To State Defendant's Legal Name.* When a claim is filed against a person operating or doing business under a fictitious business name and the claim relates to the business, the judge inquires into the defendant's correct legal name and business name. If the correct legal name, or the name actually used by the defendant, is other than the name stated in the claim, the court must amend the claim to state the correct legal name and the name actually used. (C.C.P. 116.560(a).) For this purpose, "fictitious business name" is defined in B. & P.C. 17900. (C.C.P. 116.560(c).) At any time, before or after judgment, the plaintiff may request the court to amend the claim or the judgment to include both the correct legal name and the name actually used. (C.C.P. 116.560(b).) (On amendment of judgment to reflect legal name and actual name used, see C.C.P. 116.630.) (See Judicial Council Form No. SC-114 [Request to Amend Claim Before Hearing (Small Claims)]; C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §3.9.)

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 5. Notice To Appear.

2 Witkin Cal. Proc. Courts § 294

[§ 294] Notice To Appear.

(1) *Service on Defendant.* Two alternative methods are available for bringing the defendant before the court:

(a) *Order to appear.* When a claim is filed, the clerk schedules the case for hearing and issues an order directing the parties to appear on a designated hearing date. The case is scheduled for hearing no earlier than 20 days and no later than 70 days after the date of the order. (C.C.P. 116.330(a).)

(b) *Service of claim.* In lieu of setting the case for hearing as provided by C.C.P. 116.330(a), the clerk may cause a copy of the claim to be served on the defendant by return receipt mail. On proof that the claim was properly served, the clerk schedules the case for hearing, issues an order directing the parties to appear on a designated hearing date, and causes the order to be served on the parties by return receipt mail. (C.C.P. 116.330(b).)

(2) *Methods of Service.* C.C.P. 116.340 authorizes service of the claim and order on the defendant by any of the following methods: (a) return receipt mail, (b) personal delivery, (c) substituted service under C.C.P. 415.20(a) or (b) (see 3 Cal. Proc. (5th), Actions, §1010 et seq.), or (d) service as provided by C.C.P. 116.330(b). (C.C.P. 116.340(a).) Where substituted service is authorized, due diligence is not required. (C.R.C., Rule 3.2102.) Substituted service may be made at the office of the sheriff or marshal, who must deliver copies of the claim and order to any person authorized to receive service, and mail copies to the defendant's "usual mailing address." (C.C.P. 116.340(a)(3).) (See C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §§1.12, 3.4.)

(3) *Fee for Mailing Claim.* A fee of \$ 10 is imposed on the plaintiff for each defendant to whom the claim is mailed under C.C.P. 116.340. (C.C.P. 116.232.)

(4) *When Service Is Deemed Complete.* Service must be completed at least 15 days before the hearing date if the defendant resides within the county in which the action is filed and at least 20 days before if the defendant resides outside the county. (C.C.P. 116.340(b).) Depending on the method of service used, service is deemed complete (a) on the date the defendant signs the return receipt, (b) on the date of personal service, (c) as provided in C.C.P. 415.20 (substituted service), or (d) as established by "other competent evidence." (C.C.P. 116.340(d).)

(5) *Proof of Service*. Proof of service of the claim and the order must be filed with the court at least 5 days before the hearing. (C.C.P. 116.340(c).)

(6) *Place of Service*. Under C.C.P. 116.340(e), service must be made within California with two exceptions:

(a) *Nonresident owner of real property*. An owner of record of California real property who resides out of state and who has not designated an agent for service of process may be served by any method described in C.C.P. 116.340 if the claim relates to that property. (C.C.P. 116.340(f).)

(b) *Nonresident owner or operator of vehicle*. A nonresident owner or operator of a motor vehicle involved in an accident in California may be served by constructive service on the Director of the Department of Motor Vehicles under Veh.C. 17450 et seq. "without regard to whether the defendant was a nonresident at the time of the accident or when the claim was filed." Notice to the defendant must be served by any method described in C.C.P. 116.340 or by registered mail under Veh.C. 17454 or 17455. (C.C.P. 116.340(g).)

(7) *Service on Principal*. If an action is filed against a principal and the principal's guaranty or surety under a guarantor or suretyship agreement, a "reasonable attempt" must be made to complete service on the principal. If the principal is not served, the action must be transferred to the court of appropriate jurisdiction. (C.C.P. 116.340(h).)

(8) *Judicial Council Forms*. The Judicial Council has approved the following forms:

Form No. SC-104 [Proof of Service (Small Claims)].

Form No. SC-104A [Proof of Mailing (Substituted Service) (Small Claims)].

Form No. SC-104B [What Is "Proof of Service"? (Small Claims)].

Form No. SC-104C [How to Serve a Business or Public Entity (Small Claims)].

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(8) *Judicial Council Forms*. Two additional forms have been approved:

Form No. SC-112A [Proof of Service by Mail (Small Claims)].

Form No. SC-113A [Clerk's Certificate of Mailing].



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6. Defendant's Claim.
a. Claim in Same Action.

2 Witkin Cal. Proc. Courts § 295

[§ 295] Claim in Same Action.

The defendant may file a claim in the same action in an amount not exceeding the limitations set forth in *C.C.P. 116.220, 116.221, and 116.231* (supra, §281). (*C.C.P. 116.360(a)*.) (See *C.C.P. 116.540(e)*, infra, §299 [defendant may file claim not in excess of jurisdictional limit where plaintiff is on active duty in armed forces and does not personally appear].) The defendant's claim need not relate to the same subject or event as the plaintiff's claim. (*C.C.P. 116.360(a)*; *C.R.C.*, Rule 3.2104.) (See *C.C.P. 116.230(e)* [party filing claim must also file declaration stating whether party has filed more than 12 small claims in California within last 12 months]; Judicial Council Form No. SC-120 [Defendant's Claim and ORDER to Go to Small Claims Court (Small Claims)]; Judicial Council Form No. SC-120A [Other Plaintiffs or Defendants (Attachment to Defendant's Claim and ORDER to Go To Small Claims Court)].)

The defendant's claim is filed and served in the same manner as the plaintiff's claim under *C.C.P. 116.330 and 116.340* (supra, §294). (*C.C.P. 116.360(b)*.) The defendant must cause a copy of the claim and order to be served on the plaintiff at least 5 days before the hearing, unless the defendant was served within 10 days of the hearing, in which case the defendant's claim and order must be served at least 1 day before the hearing. (*C.C.P. 116.360(c)*.)

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6. Defendant's Claim.

b. Action on Claim in Another Court.

2 *Witkin Cal. Proc. Courts* § 296

[§ 296] Action on Claim in Another Court.

(1) *Right To Sue*. If the defendant has a claim against the plaintiff that exceeds the jurisdiction limit stated in *C.C.P.* 116.220, 116.221, and 116.231 (see *supra*, §281), and the claim relates to the contract, transaction, matter, or event that is the subject of the plaintiff's claim, the defendant may sue in a court of competent jurisdiction and have the plaintiff's small claims court proceeding transferred to that court. (*C.C.P.* 116.390(a).) (See C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §3.31; on nature of new action, see *Davis v. Taliaferro* (1962) 206 C.A.2d 764, 766, 24 C.R. 197 [decided under predecessor statute].)

(2) *Declaration*. The defendant files a declaration with the small claims court, at or before the time set for the hearing of the small claims action, setting forth the facts concerning the action. The defendant must attach a copy of the complaint. The defendant causes a copy of the declaration and complaint to be personally delivered to the plaintiff at or before the time set for the hearing. (*C.C.P.* 116.390(b).)

(3) *Determination*. In ruling on the transfer motion, the small claims court may either (a) render judgment on the small claims case before the transfer, (b) transfer the case without rendering judgment, or (c) refuse to transfer the case on the ground that "the ends of justice would not be served." If the action is transferred before judgment, the actions are then tried together in the other court. (*C.C.P.* 116.390(c).) The small claims court transmits all files and papers to the other court if the action is transferred. (*C.C.P.* 116.390(d).)

(4) *Fees and Costs*. The plaintiff in the small claims action does not pay a transmittal, appearance, or filing fee in the defendant's new action, unless the plaintiff appears in the transferee court, in which case the plaintiff must pay the filing fee and any other fee required of a defendant appearing in that court. However, the plaintiff in the transferee court may be ordered to pay the costs, including attorneys' fees, resulting from the transfer if the court rules against him or her. (*C.C.P.* 116.390(e).)

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 7. Postponement.

2 Witkin Cal. Proc. Courts § 297

[§ 297] Postponement.

(1) *Time for Hearing.* The case is scheduled for hearing no earlier than 20 days and no later than 70 days after the date of the order. (*C.C.P. 116.330(a).*)

(2) *Request for Postponement.* Any party may submit a written request for postponement of the hearing date, either by letter or on a Judicial Council form. The request must be filed at least 10 days before the hearing date, unless the court determines that the requesting party has good cause to file at a later date. On the date of the request, the requesting party must mail or deliver a copy to all other parties. The court must promptly respond by mail, and if the interests of justice would be served, must postpone the hearing and notify the parties of the new hearing date by mail. (*C.C.P. 116.570(a).*) Nothing in this provision limits the inherent power of the court to order postponement in appropriate circumstances. (*C.C.P. 116.570(c).*) The fee for requesting a postponement is \$ 10, which is collected after service on the defendant. (*C.C.P. 116.570(d).*) (See Judicial Council Form No. SC-110 [Request to Postpone Small Claims Hearing]; Judicial Council Form No. SC-111 [Order on Request to Postpone Small Claims Hearing].)

(3) *Postponement for Delay in Service.* If service of the claim and order on the defendant is not completed within the number of days before the hearing required by *C.C.P. 116.340(b)* (*supra*, §294), and the defendant has not personally appeared and requested a postponement, the court must postpone the hearing for at least 15 days and notify the parties of the new hearing date by mail. (*C.C.P. 116.570(b).*) Nothing in this provision limits the inherent power of the court to order postponement in appropriate circumstances. (*C.C.P. 116.570(c).*)

(4) *Postponement Where All Parties Are Not Present.* If venue and court location are proper (see *supra*, §291), but the defendant challenged venue or court location and all parties are not present, the court must postpone the hearing for at least 15 days and notify the parties of the new hearing date by mail. (*C.C.P. 116.370(c)(2).*)

(5) *Automatic Postponement on Request of Defendant Guarantor.* On the written request of a defendant guarantor, the court must, on one occasion, postpone the hearing for at least 30 days. This action must be taken without a hearing. (*C.C.P. 116.570(a).*)

(6) *Postponement To Obtain Interpreter.* If an interpreter is appropriate (see *infra*, §300) but not available, the

hearing must be postponed once to allow the party an opportunity to obtain an interpreter (other than an attorney). Additional continuances are in the court's discretion. (*C.C.P. 116.550(d)*.)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Request for Postponement*. In 2010, Judicial Council Form Nos. SC-110 and SC-111 were revoked and the following forms were added:

Judicial Council Form No. SC-150 [Request to Postpone Trial (Small Claims)].

Judicial Council Form No. SC-152 [Order on Request to Postpone Trial (Small Claims)].



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8. Conduct of Hearing.

2 *Witkin Cal. Proc. Courts* § 298

[§ 298] Conduct of Hearing.

(1) *Informality*. "The hearing and disposition of the small claims action shall be informal, the object being to dispense justice promptly, fairly, and inexpensively." (*C.C.P. 116.510*.)

(2) *No Default Judgment*. If the defendant fails to appear, the court must still require the plaintiff to present evidence to prove the claim. (*C.C.P. 116.520(b)*.)

(3) *Temporary Judge*. With the consent of the parties who appear, the court may order the case heard by an attorney acting as a temporary judge who is sworn and empowered to act until final determination. (*C.C.P. 116.240(a)*.) (On qualifications and training of temporary judges in small claims proceedings, see *C.C.P. 116.240(b)*; on temporary judges, see *infra*, §348 et seq.)

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9. When Personal Appearance Is Excused.

2 Witkin Cal. Proc. Courts § 299

[§ 299] When Personal Appearance Is Excused.

(1) *In General.* *C.C.P. 116.540* specifies various circumstances in which a personal appearance is excused. However, nothing in *C.C.P. 116.540* authorizes an attorney to participate in a small claims action except as expressly provided in *C.C.P. 116.530* (*supra*, §277). (*C.C.P. 116.540(m)*.) Persons appearing in a representative capacity must file a declaration to that effect. (*C.C.P. 116.540(j)*, *supra*, §280.)

(2) *Sole Proprietor.* An individual party doing business as a sole proprietorship need not personally appear where (a) the claim can be proved or disputed by evidence of an account that constitutes a business record, (b) there is no other issue of fact in the case, and (c) a representative (who is a regular employee of the party for purposes other than solely representing the party in small claims actions) is qualified to testify as to the identity and preparation of the record. (*C.C.P. 116.540(d)*.)

(3) *Military Service.* The plaintiff need not personally appear and may submit evidence by declaration or authorize another to appear as a representative if (a) the plaintiff is on active duty in the armed forces outside California, (b) the plaintiff was assigned to his or her duty station after the claim arose, (c) the assignment is for more than 6 months, (d) the representative is serving without compensation, and (e) the representative has appeared for others no more than four times during the calendar year. (*C.C.P. 116.540(e)*.)

(4) *Incarceration.* A party incarcerated in a penal institution need not personally appear and may submit evidence by declaration or may authorize another individual to appear and participate as a representative if the representative is serving without compensation and has appeared for others no more than four times during the calendar year. (*C.C.P. 116.540(f)*.)

(5) *Nonresident Owner of Real Property.* A defendant who is a nonresident owner of real property may defend a claim relating to that property without personally appearing and may submit evidence by declaration or may authorize another individual to appear and participate as a representative if the representative is serving without compensation and has appeared for others no more than four times during the calendar year. (*C.C.P. 116.540(g)*.)

(6) *Owner of Rental Real Property.* A party who is the owner of rental real property may appear and participate

through a property agent under contract to manage the property if the claim relates to that property and the owner has retained the agent to manage that property and not "principally" to represent the owner in small claims court. (*C.C.P. 116.540(h).*)

(7) *Spouse*. One spouse may participate on behalf of the other if the claim is a joint claim, the represented spouse consents, and the court determines that the interests of justice would be served. (*C.C.P. 116.540(k).*)

SUPPLEMENT: [This section is current through the latest supplement]



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10. Use of Interpreters.

2 *Witkin Cal. Proc. Courts* § 300

[§ 300] Use of Interpreters.

Gardiana v. Small Claims Court (1976) 59 C.A.3d 412, 421, 130 C.R. 675, held that the small claims court has inherent power to appoint an interpreter at public expense for an indigent litigant who does not speak or understand English. C.C.P. 116.550 implements the holding as follows:

- (1) If a party does not speak or understand English sufficiently to comprehend the proceedings or give testimony, the court may permit another person (other than an attorney) to assist the party. (C.C.P. 116.550(a).)
- (2) Each small claims court must make a reasonable effort to maintain and make available to the parties a list of interpreters able and willing to aid parties in the small claims court either for no fee or for a fee that is reasonable considering the "nature and complexity of the claims." (C.C.P. 116.550(b).)
- (3) "The list shall include interpreters for all languages that require interpretation before the court, as determined by the court in its discretion and in view of the court's experience." (C.C.P. 116.550(b).)
- (4) However, failure to maintain the list, or failure to have an interpreter for a particular language on the list, does not invalidate any proceeding before the court. (C.C.P. 116.550(c).)
- (5) If an interpreter is not available at the first hearing, the hearing must be postponed once to allow the party an opportunity to obtain an interpreter (other than an attorney). Additional continuances are in the court's discretion. (C.C.P. 116.550(d).)

SUPPLEMENT: [This section is current through the latest supplement]



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11. Admission and Exclusion of Evidence.

2 *Witkin Cal. Proc. Courts* § 301

[§ 301] Admission and Exclusion of Evidence.

"The parties have the right to offer evidence by witnesses at the hearing or, with the permission of the court, at another time." (*C.C.P. 116.520(a)*.) "The court may consult witnesses informally and otherwise investigate the controversy, with or without notice to the parties." (*C.C.P. 116.520(c)*.) (See *C.J.E.R.*, Judges Benchbook: Small Claims Court and Consumer Law §4.18 et seq.)

In *Houghtaling v. Superior Court* (1993) 17 C.A.4th 1128, 21 C.R.2d 855, plaintiff's automobile had been repaired by defendant. Later, while out of state, the vehicle needed additional repairs. In plaintiff's original action in the small claims court for negligent repair, a notarized statement from a Nebraska mechanic was admitted. At the trial de novo in the superior court, the statement was excluded on hearsay grounds. *Held*, the statement should have been admitted; relevant hearsay evidence is admissible in small claims proceedings, subject only to testimonial privileges and to the court's discretion to exclude nonprobative evidence.

(a) *Informal hearing.* Under *C.C.P. 116.510* (supra, §298), small claims court proceedings are informal. Although that term is not defined, lack of formal rules of evidence is a chief characteristic. (17 C.A.4th 1134, citing *Sanderson v. Niemann* (1941) 17 C.2d 563, 110 P.2d 1025, supra, §289.) Under *C.C.P. 116.520(c)*, the court may consult witnesses informally and otherwise investigate the controversy. (17 C.A.4th 1134.) On a more practical level, "it is simply unrealistic to expect lay litigants to understand and abide by the formal rules of evidence." (17 C.A.4th 1136.) To apply technical rules of evidence throughout the hearing would mire the proceeding and frustrate litigants. (17 C.A.4th 1137.)

(b) *Limits on admission of hearsay.* (1) The privileges established by *Ev.C. 930* et seq. (see 2 *Cal. Evidence* (4th), *Witnesses*, §98 et seq.) reflect important public policy concerns and remain applicable. (17 C.A.4th 1137, 1138.) (2) The trial court retains discretion under *Ev.C. 352* (see 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §17 et seq.) to exclude evidence that is irrelevant, cumulative, overly time-consuming, confusing, or prejudicial. Subject to this discretion, "[o]ur holding places no restrictions upon the type or amount of relevant hearsay evidence which shall be received." (17 C.A.4th 1138.) While *Ev.C. 352* on its face applies only to jury trials, its principles with respect to cumulative evidence have been recognized as applicable to court trials. (17 C.A.4th 1138, footnote 8.)

(c) *Rule applicable to trial de novo.* The holding here applies equally to the trial de novo. *C.C.P. 116.770* expressly

incorporates the statutes governing the original proceeding and provides that the trial de novo is conducted informally. (17 C.A.4th 1139.) While additional rights may be required in the trial de novo in other situations, such as the right to counsel, the "rules of evidence do not rise to this level of significance." (17 C.A.4th 1139.)

A strong concurring and dissenting opinion criticizes the "sweeping dicta" of the majority opinion. (17 C.A.4th 1141.)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Judgment.
1. In General.

2 *Witkin Cal. Proc. Courts* § 302

[§ 302] In General.

(1) *Scope of Judgment and Orders.* The court gives judgment for damages, equitable relief, or both, within the jurisdictional limits set forth in *C.C.P. 116.220, 116.221, and 116.231* (supra, §281), and makes "any orders as to time of payment or otherwise as the court deems just and equitable for the resolution of the dispute." (*C.C.P. 116.610(a)*; see *C.R.C., Rule 3.2108.*) (See *C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law* §7.1 et seq.)

(2) *Equitable Relief.* In any action seeking relief authorized by *C.C.P. 116.220(a)* (supra, §282), the small claims court may grant equitable relief (rescission, restitution, reformation, and specific performance) in lieu of or in addition to money damages. The court may issue a conditional judgment, and retains jurisdiction until full payment or performance of the judgment or order. (*C.C.P. 116.220(b).*)

(3) *Continuance for Informal Resolution.* The court may continue the matter to a later date "to permit and encourage the parties to attempt resolution by informal or alternative means." (*C.C.P. 116.610(b).*)

(4) *Description of Property.* Specific property referred to in the judgment must be identified with sufficient detail to permit efficient implementation or enforcement of the judgment. (*C.C.P. 116.610(e)*; *C.R.C., Rule 3.2108.*)

(5) *Judgment in Case Involving Vehicle Accident.* The judgment must state whether it resulted from a highway motor vehicle accident caused by the defendant or involving a vehicle registered in the defendant's name. (*C.C.P. 116.610(c)*; on suspension of motor vehicle license for failure to satisfy judgment, see *infra*, §307.)

(6) *Multiple Defendants.* In an action against several defendants, the court may render judgment against one or more, leaving the action to proceed against others, if a several judgment is proper. (*C.C.P. 116.610(f).*)

(7) *Statement of Liability of Each Party.* If the defendant has filed a claim against the plaintiff, or if the judgment is against more than one defendant, the judgment and any statement of decision must specify the basis for, the character, and the amount of the liability of each party, including whether the liability of multiple judgment debtors is joint or several. (*C.C.P. 116.610(d).*)

(8) *Notice of Entry of Judgment.* The clerk must promptly mail or deliver notice of entry of the judgment to the

parties. (*C.C.P. 116.610(h)*.) The notice must be on a Judicial Council form. (*C.C.P. 116.610(i)*.) (See Judicial Council Form No. SC-130 [Notice of Entry of Judgment (Small Claims)].)

(9) *Costs*. The prevailing party is entitled to the costs of the action, including the costs of serving the order for the appearance of the defendant. Recovery is limited, however, where the filing fee was paid under *C.C.P. 116.230(c)* (more than 12 claims filed within 12-month period; see *supra*, §290). (*C.C.P. 116.610(g)*.) (See C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §7.17 et seq.)

(10) *Judgment Debtor's Statement of Assets*. At the time judgment is rendered or notice of judgment is mailed to the parties, the clerk delivers or mails to the judgment debtor a form requesting information about the debtor's assets. (*C.C.P. 116.830(a)*.) The judgment debtor must complete and deliver the form to the judgment creditor within 30 days unless the judgment has been satisfied. (*C.C.P. 116.830(b)*.) However, if a motion to vacate the judgment or a notice of appeal is filed, the judgment debtor must return the form within 30 days after the clerk has mailed or delivered notice of denial of the motion or notice of dismissal of the appeal or entry of judgment on the appeal. (*C.C.P. 116.830(c)*.) Sanctions for failure to comply may be imposed pursuant to *C.C.P. 708.170* (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §288). (*C.C.P. 116.830(d)*.) The Judicial Council has approved forms for this purpose. (See Judicial Council Form No. SC-133 [Judgment Debtor's Statement of Assets (Small Claims)]; Judicial Council Form No. SC-134 [Application and Order to Produce Statement of Assets and to Appear for Examination (Small Claims)].) A fee of \$ 40 is imposed for an application for an order for examination of a judgment debtor. (*C.C.P. 116.820(b)*.)

(11) *Correction and Vacation of Judgment*. The court may correct a clerical error in the judgment or set aside and vacate the judgment "on the ground of an incorrect or erroneous legal basis for the decision." A motion for a correction may be made by the court at any time or by a party within 30 days after the clerk mails notice of entry of the judgment. (*C.C.P. 116.725(a)*.) Each party may file only one motion. (*C.C.P. 116.725(b)*.) The Judicial Council has adopted a form for the request. (See Judicial Council Form No. SC-108 [Request to Correct or Vacate Judgment and Answer].) (On motion to vacate default judgment, see *infra*, §308; on amendment of judgment to reflect legal name and actual name used, see *C.C.P. 116.630*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Equitable Relief*. The authority of the small claims court to grant equitable relief was restricted in 2009. The court has jurisdiction in an action for an injunction or other equitable relief "only when a statute expressly authorizes a small claims court to award that relief." (*C.C.P. 116.220(a)(5)*, added in 2009.) The portion of *C.C.P. 116.220(b)* discussed in the text was amended to refer to an action seeking relief authorized by *C.C.P. 116.220(a)(1)-(a)(4)(8)* *Notice of Entry of Judgment*. In 2010, the following Judicial Council forms were added:

Judicial Council Form No. SC-200 [Notice of Entry of Judgment (Small Claims)].

Judicial Council Form No. SC-200-INFO [What to Do After the Court Decides Your Small Claims Case (Small Claims)].

(10) *Judgment Debtor's Statement of Assets*.

Fee for application for examination of judgment debtor: *C.C.P. 116.820(b)*, as amended in 2009, requires the clerk to collect all fees associated with the enforcement of judgments under *C.C.P. 680.010* et seq. Under *Govt.C. 70617*, the fee for an application for an order for the examination of a judgment debtor is \$ 40.



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2. Enforcement and Stay.

2 *Witkin Cal. Proc. Courts* § 303

[§ 303] Enforcement and Stay.

(1) *Methods Available for Enforcement.* Under *C.C.P. 116.820(a)*, the judgment of a small claims court and the judgment of a superior court on appeal in a small claims case (see *infra*, §316) may be enforced as provided in the following statutes:

(a) *C.C.P. 680.010* et seq. (enforcement of money judgments; see 8 *Cal. Proc. (5th)*, *Enforcement of Judgment*, §53 et seq.).

(b) *C.C.P. 674* (abstract of judgment; see 7 *Cal. Proc. (5th)*, *Judgment*, §64).

(c) *C.C.P. 1174* (enforcement of judgment for possession; see 8 *Cal. Proc. (5th)*, *Enforcement of Judgment*, §332 et seq.).

(2) *Fee for Writ of Execution or Abstract of Judgment.* A fee of \$ 15 is imposed for issuance of a writ of execution or abstract of judgment. (*C.C.P. 116.820(b)*.)

(3) *Costs and Interest.* The prevailing party is entitled to the costs of enforcing the judgment and accrued interest. (*C.C.P. 116.820(c)*.) (See C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §7.17 et seq.)

(4) *Automatic Temporary Stay.* *C.C.P. 116.810* provides for an automatic stay of enforcement:

(a) Enforcement of the judgment, including the issuance or recording of an abstract of judgment, is automatically stayed, without bond, until expiration of the time for appeal. (*C.C.P. 116.810(a)*.) The judgment may be enforced if the appeal is dismissed. (*C.C.P. 116.810(b)*.)

(b) Unless otherwise ordered, suspension of enforcement under *C.C.P. 116.810* suspends enforcement procedures in *C.C.P. 680.010* et seq. (enforcement of money judgments), *C.C.P. 674* (abstract of judgment), and *C.C.P. 1174* (enforcement of judgment for possession). (*C.C.P. 116.810(c)*.)

(5) *Stay Pending Motion To Vacate.* The court may stay enforcement pending the hearing and determination of a

motion to vacate the judgment. (*C.C.P. 116.740(b)*; see *infra*, §308.) The judgment may be enforced if the superior court determines that the small claims court properly denied the defendant's motion to vacate. (*C.C.P. 116.810(b)*.)

(6) *Authority To Amend Judgment.* In *Issa v. Alzammam* (1995) 38 C.A.4th Supp. 1, 44 C.R.2d 617, decided before the unification of the trial courts, plaintiff prevailed both in the small claims court and in a subsequent trial de novo in the superior court. The superior court then transferred the case back to the municipal court for further proceedings. After the writ of execution was returned unsatisfied, plaintiff moved to change defendant's name on the complaint and judgment from that of a corporation to that of an individual. In response, the municipal court amended the judgment. *Held*, reversed. Under *C.C.P. 187*, a court may amend a judgment to add a new defendant, and under *C.C.P. 116.820*, the small claims division of the municipal court enforces superior court judgments resulting from the trial de novo in a small claims action. (38 C.A.4th Supp. 4, 5.) However, it does not follow that the small claims court may *amend* a superior court judgment. *C.C.P. 116.820(a)* provides that these superior court trial de novo judgments must be enforced the same way other judgments are enforced, and most motions made to enforce a judgment must be heard by the court that entered the judgment. In addition, the enforcement of judgments statutes define "court" as "the court where the judgment sought to be enforced was entered." (See *C.C.P. 680.160*.) Thus, it appears that the Legislature intended that motions to enforce a judgment in small claims proceedings be brought in the court that entered the judgment. Plaintiff's motion should have been heard by the judge who presided at the trial de novo in the superior court or by another judge of that court. (38 C.A.4th Supp. 5.) (See *General Elec. Capital Auto Financial Services v. Appellate Div. (2001) 88 C.A.4th 136*, 105 C.R.2d 552, *infra*, §341 [jurisdiction to review postjudgment enforcement order is in appellate division].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Fee for Writ of Execution or Abstract of Judgment.* *C.C.P. 116.820(b)*, as amended in 2009, requires the clerk to collect all fees associated with the enforcement of judgments under *C.C.P. 680.010* et seq. Under *Govt.C. 70626*, as amended in 2009, the fee for issuance of a writ of execution or abstract of judgment is \$ 25.



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3. Payment.

a. Terms and Conditions.

2 Witkin Cal. Proc. Courts § 304

[§ 304] Terms and Conditions.

At the option of the judgment debtor, the judgment may be paid to the judgment creditor under *C.C.P. 116.850* (infra, §305), or to the court under *C.C.P. 116.860* (infra, §306). (*C.C.P. 116.840(a)*.)

The judgment debtor must pay the amount of the judgment immediately or under the terms and conditions the court orders, including installment payments. (*C.C.P. 116.620(a)*.) In determining the terms and conditions of payment, the court may consider any factors relevant to a claim of exemption under *C.C.P. 703.010* et seq. (8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §168 et seq.). (*C.C.P. 116.620(c)*; see C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §7.9 et seq.) The Judicial Council has approved a form to request installment payments. (See Judicial Council Form No. SC-106 [Request to Pay Judgment in Installments].)

For good cause on a noticed motion, the court may amend the terms and conditions for payment of the judgment to provide for installment payments. "The determination shall be made without regard to the nature of the underlying debt and without regard to whether the moving party appeared before entry of the judgment." (*C.C.P. 116.620(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]

In 2010, Judicial Council Form No. SC-106 was revoked and the following forms were added:

Judicial Council Form No. SC-220 [Request to Make Payments (Small Claims)].

Judicial Council Form No. SC-220-INFO [Payments in Small Claims Cases (Small Claims)].

Judicial Council Form No. SC-221 [Response to Request to Make Payments (Small Claims)].

Judicial Council Form No. SC-222 [Order on Request to Make Payments (Small Claims)].



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b. Payment to Creditor and Acknowledgement.

2 Witkin Cal. Proc. Courts § 305

[§ 305] Payment to Creditor and Acknowledgement.

(1) *Requirement.* If full payment of the judgment is made to the judgment creditor or an assignee of record, the creditor or assignee must file with the clerk an acknowledgement of satisfaction "immediately" on receipt. (*C.C.P. 116.850(a).*)

(2) *Failure To File.* A creditor or assignee who receives full payment and who fails without good cause to execute an acknowledgement of satisfaction within 14 days after a written demand by the judgment debtor is liable for damages sustained by reason of the failure and for a penalty of \$ 50. (*C.C.P. 116.850(b).*)

(3) *Acknowledgment by Cancelled Check or Money Order.* As a substitute for a creditor's acknowledgement of satisfaction, a rebuttable presumption of either full or partial payment, whichever is applicable, is created when the judgment debtor files both the following items with the clerk:

(a) A cancelled check or money order, written subsequent to the judgment by the judgment debtor for the full or partial amount of the judgment, made payable to and endorsed by the judgment creditor, or a cash receipt written subsequent to the judgment for the full or partial amount and signed by the judgment creditor. (*C.C.P. 116.850(d)(1).*)

(b) A declaration by the judgment debtor that (1) the judgment debtor has paid the full or partial amount of the judgment, accrued interest, and costs; (2) the judgment creditor has been requested to file an acknowledgment of satisfaction of judgment and has refused to do so, or the judgment creditor refuses to accept subsequent payments, or the judgment creditor's present address is unknown; and (3) the documents attached constitute evidence of receipt of the payment. (*C.C.P. 116.850(d)(2).*)

(4) *Entry of Satisfaction.* The clerk enters satisfaction of the judgment at the request of the judgment debtor if the debtor establishes a rebuttable presumption of full payment, or establishes a rebuttable presumption of partial payment and complies with *C.C.P. 116.860(c)* (payment to court; see *infra*, §306). (*C.C.P. 116.850(c).*) (See *C.C.P. 116.840(b)* [court may order satisfaction of judgment in accordance with *C.C.P. 116.850(c)* and (d)].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirement.* In 2010, the Judicial Council approved a form for the acknowledgement: Judicial Council Form No. SC-290 [Acknowledgement of Satisfaction of Judgment].



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3. Payment.

c. Payment to Court.

2 Witkin Cal. Proc. Courts § 306

[§ 306] Payment to Court.

C.C.P. 116.860 sets forth the following procedure for payment to the court and remittance to the judgment creditor:

(1) *Judgment Debtor's Request.* The judgment debtor files a request to pay the judgment to the court and pays the amount of the judgment and accrued interest plus any required fee. (*C.C.P. 116.860(a)*, (b), (f).) The Judicial Council must provide an appropriate declaration form. (*C.C.P. 116.860(a)*.) (See Judicial Council Form No. SC-145 [Request to Pay Judgment to Court].)

(2) *Fee.* A fee of \$ 20 is paid by the judgment debtor. (*C.C.P. 116.860(h)*.)

(3) *Notice to Judgment Creditor.* The clerk must then notify the judgment creditor at the last known address that the judgment debtor has satisfied the judgment. The notification must explain the procedures for the creditor to obtain payment from the court. (*C.C.P. 116.860(e)*.)

(4) *Satisfaction of Judgment.* The clerk enters satisfaction of the judgment and remits payment to the judgment creditor. (*C.C.P. 116.860(b)*); see *C.C.P. 116.840(b)* [court may order satisfaction of judgment in accordance with *C.C.P. 116.860(b)*].) Where payment is made by any means other than money order, certified or cashier's check, or cash, the entry of satisfaction of judgment must be delayed for 30 days. (*C.C.P. 116.860(d)*.)

(5) *Partial Payment.* If partial payment has been made, the clerk must enter satisfaction of judgment on receipt of the balance owing, plus accrued interest and the required fee. (*C.C.P. 116.860(c)*.)

(6) *Unclaimed Funds.* Payments unclaimed for 3 years escheat to the superior court under *Govt.C. 68084.1* (see 13 *Summary* (10th), *Personal Property*, §36 et seq.). (*C.C.P. 116.860(g)*.)

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4. Motor Vehicle License Suspension.

2 *Witkin Cal. Proc. Courts* § 307

[§ 307] Motor Vehicle License Suspension.

(1) *Judgment Over \$ 750.* *Veh.C. 16250* et seq. provide for the suspension of the motor vehicle driver's license of a judgment debtor who fails to satisfy a judgment. (See 8 *Cal. Proc. (5th), Enforcement of Judgment*, §438 et seq.) These provisions apply to a small claims judgment if (a) the judgment is for bodily injury or death or for property damage in excess of \$ 750, and (b) the judgment resulted from the operation of a vehicle on a California highway by the defendant or by one for whose conduct the defendant is liable, except liability based on signing a minor's application for a license. (*C.C.P. 116.870.*)

(2) *Judgment Under \$ 750.* The following provisions apply where the judgment is for \$ 750 or less:

(a) *Notice to Department of Motor Vehicles.* If the judgment is for \$ 750 or less, resulted from an accident caused by the defendant's operation of a motor vehicle on a California highway, and has remained unsatisfied for more than 90 days, the judgment creditor may file a notice with the Department of Motor Vehicles requesting that the judgment debtor's license be suspended. (*C.C.P. 116.880(a)*; on content of notice and fee, see *C.C.P. 116.880(b).*)

(b) *Suspension of license.* The license is suspended beginning 20 days after receipt of the notice. (*C.C.P. 116.880(c)*; on notice of suspension, see *C.C.P. 116.880(c)*; on nonliability of public agency for suspension, termination of suspension, or failure to suspend license, see *C.C.P. 116.880(g).*)

(c) *Termination of suspension.* The suspension is terminated after 90 days, on deposit of the amount of the unsatisfied judgment, or on proof that the judgment has been satisfied, that the debtor is complying with a court-ordered payment schedule, or that the judgment debtor has sufficient insurance. (*C.C.P. 116.880(e).*) Once the suspension has been terminated, the action is final and may not be reinstituted. (*C.C.P. 116.880(f).*) (See C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §8.15.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Motion To Vacate Default Judgment.

2 Witkin Cal. Proc. Courts § 308

[§ 308] Motion To Vacate Default Judgment.

(1) *By Defendant Who Does Not Appear at Hearing.* A defendant who does not appear at the hearing may move to vacate the judgment under *C.C.P. 116.730*. (*C.C.P. 116.710(d), 116.730(a)*.) (See C.J.E.R., Judges Benchbook: Small Claims Court and Consumer Law §8.2 et seq.) The following procedure applies:

(a) The defendant may move to vacate the judgment within 30 days after the clerk has mailed notice of entry of the judgment to the parties. (*C.C.P. 116.730(a)*.)

(b) The defendant must appear at the hearing on the motion or submit written justification for not appearing and a declaration in support of the motion. (*C.C.P. 116.730(b)*.) If the plaintiff is not present, the court hears the motion in his or her absence. (*C.C.P. 116.730(c)*.)

(c) On a showing of good cause, the court may grant the motion. (*C.C.P. 116.730(c)*.) If the motion is granted and all parties are present and agree, the court may hear the case without rescheduling it. If the plaintiff is not present, the case is rescheduled and the clerk gives notice under *C.C.P. 116.330* (supra, §294). (*C.C.P. 116.730(d)*.)

(d) If the motion is denied, the defendant may appeal to the superior court on the denial of the motion to vacate the judgment. (*C.C.P. 116.710(d), 116.730(e)*.) The defendant must file a notice of appeal with the small claims court within 10 days after the court has mailed or delivered notice of the denial of the motion. (*C.C.P. 116.730(e)*.)

(e) If the superior court determines that the motion to vacate should have been granted, it may (1) hear the claims of all parties without rescheduling the matter, provided that all parties are present and the defendant has complied with *C.C.P. 116.710* et seq., or (2) order the case transferred to the small claims court for a hearing. (*C.C.P. 116.730(f)*.)

(2) *By Defendant Who Is Not Properly Served.* A defendant who is not properly served and does not appear at the hearing may move to vacate the judgment under *C.C.P. 116.740*. (*C.C.P. 116.710(d), 116.740(a)*.) The following procedure applies:

(a) The defendant may move to vacate the judgment within 180 days after the defendant "discovers or should have discovered" that the judgment was entered. The motion is accompanied by a supporting declaration. (*C.C.P. 116.740(a)*)

.) The court may suspend enforcement of the judgment pending a hearing and determination on the motion to vacate. (*C.C.P. 116.740(b)*.)

(b) On a showing of good cause, the court may grant the motion. If the plaintiff is not present, the court hears the motion in his or her absence. (*C.C.P. 116.740(c)*.)

(c) *C.C.P. 116.730(d)*, (e), (f), *supra*, apply to the motion. (*C.C.P. 116.740(d)*.)

(3) *By Plaintiff.* A plaintiff who did not appear at the hearing may move to vacate the judgment under *C.C.P. 116.720*. (*C.C.P. 116.710(a)*, *116.720(a)*.) The plaintiff must move to vacate within 30 days after the clerk has mailed notice of entry of judgment to the parties. (*C.C.P. 116.720(a)*.) The clerk schedules a hearing on the motion no earlier than 10 days after the clerk has mailed written notice of the date of the hearing. (*C.C.P. 116.720(b)*.) If the defendant is not present, the court hears the motion in his or her absence. On a showing of good cause, it may grant the motion. (*C.C.P. 116.720(c)*.) If the motion is granted and all parties are present and agree, the court may hear the case without rescheduling it, but if the defendant is not present, the case is rescheduled and the defendant must be notified under *C.C.P. 116.330* (*supra*, §294). (*C.C.P. 116.720(d)*.)

(4) *Fee.* The fee for filing a motion to vacate is \$ 20. (*C.C.P. 116.745*.)

(5) *Form.* The Judicial Council has adopted a form for the motion to vacate the judgment. (See Judicial Council Form No. SC-135 [Notice of Motion To Vacate Judgment and Declaration].)

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E. Judgment.

6. Judgment Is Conclusive on Plaintiff.

a. No Appeal From Adverse Judgment.

2 Witkin Cal. Proc. Courts § 309

[§ 309] No Appeal From Adverse Judgment.

(1) *In General.* The judgment of the small claims court is, in the ordinary case, conclusive upon the plaintiff, who has no right to appeal the judgment on the plaintiff's claim. (*C.C.P.* 116.710(a); see *Parada v. Small Claims Court* (1977) 70 C.A.3d 766, 769, 139 C.R. 87, *infra*, §310; on plaintiff's motion to vacate judgment, see *supra*, §308.)

The validity of this restriction in a prior statute was upheld in *Superior Wheeler Cake Corp. v. Superior Court* (1928) 203 C. 384, 264 P. 488, in the following language: "Thus it will be seen that a quick and inexpensive method of trial and judgment is provided largely in the interest of complaining plaintiffs; that the right of jury trial is denied the defendant in such cases and service by mail upon him is deemed sufficient without actual personal notice. These and perhaps other things are present showing the advantage plaintiff may have or may think he has over the defendant by resorting to this special remedy. The plaintiff, in other words, comes under the yoke of this system voluntarily, but the defendant comes thereunder only by the strong arm of the law. The parties, therefore, do not enter the forum upon equal terms. If the plaintiff does not feel that he will be benefited by the procedure, he has the alternative of entering the regular jurisdiction of the justice's court, where the right of appeal is equal and reciprocal. ... The advantage voluntarily accepted must be held a complete compensation for the loss of the right of appeal." (203 C. 387.)

(2) *Multiple Defendants.* The prohibition against appeal by the plaintiff can have odd results where there are several defendants and one of them appeals only from that part of the judgment that affects that defendant. In *Cook v. Superior Court* (1969) 274 C.A.2d 675, 79 C.R. 285, plaintiff sued S and C in the small claims court. The judgment was that she recover \$ 225 from S and take nothing from C. S appealed, and the superior court judge, after a trial *de novo*, rendered judgment that plaintiff recover \$ 200 from C and nothing from S. C sought certiorari in the Court of Appeal. *Held*, judgment against C annulled. To the extent that the small claims court judgment determined that C was not liable, it was final and binding and could not be altered by the superior court in its trial *de novo*. (274 C.A.2d 678.)

The opinion does not indicate the effect of the decision, but it may be that plaintiff ultimately recovered nothing in an action in which both courts thought she was entitled to recover something: (a) Recovery against C was barred by the final nonappealable judgment of the small claims court. (b) Recovery against S was barred by the final nonappealable judgment of the superior court on trial *de novo*.

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E. Judgment.

6. Judgment Is Conclusive on Plaintiff.

b. No Review by Extraordinary Writ.

2 Witkin Cal. Proc. Courts § 310

[§ 310] No Review by Extraordinary Writ.

In *Parada v. Small Claims Court* (1977) 70 C.A.3d 766, 139 C.R. 87, plaintiff automobile serviceman sued G for money allegedly owing for repairs on G's automobile. The small claims court gave judgment for G on the erroneous ground that the Automotive Repair Act required written authorization for the work. Plaintiff, having no right to appeal from this judgment contrary to law, sought mandamus to compel entry of judgment in his favor. *Held*, writ denied. To issue an extraordinary writ to review the judgment would emasculate the prohibition against appeal by the plaintiff. "Inherent in this scheme is, as is the case herein, the possibility of an occasional error of law that will be uncorrectable." (70 C.A.3d 769.)

A dissenting justice contended that the judgment of the small claims court, in disregard of undisputed evidence and contrary to the governing statute, was in effect a denial of a fair trial, and therefore an act in excess of jurisdiction (70 C.A.3d 771, quoting at length from *McClatchy v. Superior Court* (1897) 119 C. 413, 51 P. 696, 2 Cal. Proc. (5th), *Jurisdiction*, §308). He concluded that certiorari should have issued to annul the arbitrary judgment. (70 C.A.3d 770, 772.)

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6. Judgment Is Conclusive on Plaintiff.

c. Distinction Where Defendant Files Cross-Claim.

2 *Witkin Cal. Proc. Courts* § 311

[§ 311] Distinction Where Defendant Files Cross-Claim.

(1) *Case Law*. In the ordinary action by a plaintiff against a defendant, the plaintiff is denied the right of appeal because he or she has voluntarily chosen to proceed in the inexpensive forum against a defendant who is forced into it by the law. But if the defendant files a claim (see *supra*, §295), the defendant is in effect a plaintiff, and the plaintiff is in effect a defendant. Hence, though the literal language of the former statute precluded appeal by the plaintiff, it was construed to permit appeal where the plaintiff was really a defendant.

In *Skaff v. Small Claims Court* (1968) 68 C.2d 76, 65 C.R. 65, 435 P.2d 825, S filed a small claims court action for \$ 250 against H. H counterclaimed (authorized before a cross-complaint was made the sole method of pleading a cross-claim) for \$ 175. The judge denied plaintiff's claim and awarded H \$ 175 on the counterclaim. S attempted to appeal, but the clerk refused to permit the filing, and the superior court denied mandamus. *Held*, reversed with directions to issue the writ to compel filing of the appeal.

(a) "When plaintiff becomes metamorphosed into a defendant the situation is reversed: he does not choose the quick but nonappealable route of recovery; defendant, by filing the counterclaim, does so; plaintiff should no more become the victim of defendant's choice than defendant should become the victim of plaintiff's choice on the original claim." (68 C.2d 79.)

(b) To deny the appeal would discourage choice of the small claims court in litigation, for the plaintiff might forgo a legitimate claim to avoid the risk of being hit by an adverse judgment which could not be reviewed. (68 C.2d 79.)

(c) Where the defendant voluntarily chooses to set up a cross-claim he becomes a plaintiff for that purpose and is not entitled to appeal from an adverse judgment. But where the cross-claim arises out of the transaction set forth in the complaint it is a compulsory cross-claim and barred unless pleaded; hence, the defendant does not voluntarily submit the claim and is entitled to appeal from an adverse judgment on it. (68 C.2d 79, footnote 3 [dictum].) (See 56 Cal. L. Rev. 1655.)

(2) *Codification*. The later revision of the law on cross-claims substituted the cross-complaint for the counterclaim,

and made the mandatory cross-complaint inapplicable to small claims court actions. (See 5 *Cal. Proc.* (5th), *Pleading*, §1179.) This rendered the *Skaff* distinction obsolete, and the rule on an ordinary permissive cross-claim was codified. "The defendant with respect to the plaintiff's claim, and a plaintiff with respect to a claim of the defendant, may appeal the judgment." (*C.C.P.* 116.710(b).) "Thus a defendant presenting a cross-complaint in small claims court is a voluntary claimant seeking to have his claim adjudicated in the informal setting of the small claims court. As a voluntary claimant he, like the plaintiff, gives up his right to appeal on the cross-complaint." (*Davis v. Superior Court* (1980) 102 C.A.3d 164, 170, 162 C.R. 167.) (See *Upton Metal Fabricators v. Superior Court* (1988) 203 C.A.3d 67, 69, 251 C.R. 304 [following *Skaff*; "as plaintiff has not selected the forum in which to litigate defendant's claim against him, he may not be deprived of his right to appeal an unfavorable decision"].)

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F. Appeal.

1. Nature of Right.

2 Witkin Cal. Proc. Courts § 312

[§ 312] Nature of Right.

(1) *In General.* "The defendant with respect to the plaintiff's claim, and a plaintiff with respect to a claim of the defendant, may appeal the judgment to the superior court in the county in which the action was heard." (C.C.P. 116.710(b); see *Mendoza v. Small Claims Court* (1958) 49 C.2d 668, 671, 321 P.2d 9.) The appeal is taken to the superior court for a trial de novo. (See C.R.C., Rule 8.900 et seq.) (For procedure in superior court appeal (trial de novo) and finality of superior court decision, see *infra*, §316 et seq.)

(2) *Appeal by Defendant's Insurer.* The defendant's insurer may appeal from the judgment with respect to the plaintiff's claim if the judgment exceeds \$ 2,500 and the insurer stipulates that its policy covers the matter to which the judgment applies. (C.C.P. 116.710(c).)

(3) *No Appeal by Defendant Who Defaults.* A defendant who does not appear may not appeal from the judgment, but may move to vacate the judgment. (C.C.P. 116.710(d); see *infra*, §314; on motion to vacate default judgment, see *supra*, §308.)

(4) *Former Appeal Bond Requirement Is Unconstitutional.* The statute originally required an undertaking or deposit to cover the amount of the judgment, interest, costs, and a small attorneys' fee. (See *Carpenter v. Superior Court* (1936) 14 C.A.2d 664, 58 P.2d 938.) In *Brooks v. Small Claims Court* (1973) 8 C.3d 661, 105 C.R. 785, 504 P.2d 1249, the requirement was held unconstitutional: The *Sniadach* line of decisions, holding it a denial of due process to take property without an opportunity for a hearing (see 7 *Summary* (10th), *Constitutional Law*, §646), applies. Defendant's payment of a nonrefundable premium on a bond or the deposit of his own money constitutes a taking of property. (8 C.3d 670.) (See 62 Cal. L. Rev. 421.)

West's Key Number Digest, Courts 176.5

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 8.900 et seq. were renumbered C.R.C., Rule 8.950 et seq. in 2008.



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F. Appeal.

2. Abandonment and Dismissal.

2 *Witkin Cal. Proc. Courts* § 313

[§ 313] Abandonment and Dismissal.

(1) *Voluntary Abandonment.* The appeal may be abandoned on the written request of the appellant or by the stipulation of the parties. (C.R.C., Rule 8.913(a), (b); see C.E.B., 1 Civil Appellate Practice 3d, §10.27; on notification of abandonment, see C.R.C., Rule 8.913(d); on compromise of case of ward or conservatee, see C.R.C., Rule 8.913(f).)

(2) *Dismissal.* The superior court may dismiss the appeal if the appealing party does not appear at the hearing or if the appeal is not heard within 1 year from the date the notice of appeal is filed with the clerk of the small claims court. (C.C.P. 116.795(a).) On dismissal of the appeal, the small claims court has the same jurisdiction as though no appeal had been filed. (C.C.P. 116.795(b).) The 1-year period for bringing the case to trial may be extended by written stipulation or by a showing that the appellant exercised reasonable diligence to bring the case to trial. However, the appeal must be dismissed if the case is not brought to trial within 3 years. (C.R.C., Rule 8.913(c).)

The clerk of the court assigned to hear the appeal immediately notifies the parties of the order of dismissal or of judgment for the defendant (C.R.C., Rule 8.913(d)), transmits a copy of the order to the small claims court, and returns all original papers and exhibits (C.R.C., Rule 8.913(e)). The small claims court then proceeds with the case "as if no appeal had been taken." (C.R.C., Rule 8.913(e).)

West's Key Number Digest, Courts 176.5

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Voluntary Abandonment.* C.R.C., Rule 8.913 was renumbered C.R.C., Rule 8.963 in 2008.

(2) *Dismissal.* C.R.C., Rule 8.913 was renumbered C.R.C., Rule 8.963 in 2008.



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3. Appeal by Defendant Who Defaults.

2 Witkin Cal. Proc. Courts § 314

[§ 314] Appeal by Defendant Who Defaults.

In *Burley v. Stein* (1974) 40 C.A.3d 752, 115 C.R. 279, plaintiff patient sued defendant dentist for \$ 499 in damages for alleged negligent performance of his duties. Defendant did not appear, the judge gave a default judgment for plaintiff, and defendant appealed. In the superior court both parties appeared in pro. per., and the court affirmed the judgment on the ground that defendant, having failed to move to vacate the default judgment, had no standing to appeal. Defendant then engaged counsel, who moved for a new trial, on the ground that defendant had failed to appear by reason of inadvertence and misleading information from the small claims court clerk. The superior court judge denied the motion, and criticized the "cynical practices" of corporate and financially able defendants in small claims court actions: in particular, routine defaults or token defenses, with routine appeals resulting in new trials in the superior court with representation by counsel and the use of complicated discovery proceedings and legal motions. The Court of Appeal certified the case for hearing and reversed the judgment with directions to refer the matter back to the small claims court to allow defendant to move to set aside the default.

(a) *Defaulting defendant cannot appeal while default remains.* By statute, the rules of procedure apply to all courts, and the general rule is that a defaulting party who fails to take steps in the trial court to set aside the entry of default cannot appeal. (40 C.A.3d 759; see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §175.)

(b) *Default may be set aside under C.C.P. 473.* The defendant may obtain the right to appeal by moving to set aside the default for mistake, inadvertence, etc., under C.C.P. 473(b). (40 C.A.3d 759; see 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §144 et seq.) And good grounds were present here: The court form of "Claim of Plaintiff and Order" served on defendant prior to the hearing had printed information on its back, referring to default judgment, but also stating that a dissatisfied defendant may appeal. The statement concerning appeal did not distinguish between judgments on the merits and judgments by default, and did not advise the defendant of the necessity of a motion to set aside the default on a showing of good cause. In addition, defendant was advised by the clerk that he could appeal. Thus, the form and the clerk's advice were misleading and led to defendant's justifiable assumption that he could appeal without further proceedings in the small claims court. (40 C.A.3d 760, 761.)

Under C.C.P. 116.710(d), a defendant who does not appear at the hearing has no right to appeal from the judgment, but may move to vacate the judgment. (On motion to vacate judgment, see *supra*, §308.)

If the superior court finds that the defaulting defendant did not have a good reason for appeal and that the motion to vacate was properly denied, it will affirm the lower court's ruling without an appellate hearing. (*Miller v. Superior Court* (1979) 92 C.A.3d 29, 31, 154 C.R. 491.)

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F. Appeal.

4. Notice of Appeal.

2 *Witkin Cal. Proc. Courts* § 315

[§ 315] Notice of Appeal.

(1) *Filing Notice of Appeal.* An appeal from a judgment in a small claims case is taken by filing a notice of appeal in the small claims court. (*C.C.P. 116.750(a)*; *C.R.C.*, Rule 8.904(a).) (See *C.J.E.R.*, Judges Benchbook: Small Claims Court and Consumer Law §9.9.)

(2) *Form of Notice.* The notice must be signed by the appellant or the appellant's attorney, and is sufficient if it states in substance that the appellant appeals from a specified judgment, or, in the case of a defaulting defendant, from the denial of a motion to vacate the judgment. (*C.R.C.*, Rule 8.904(a); see *C.E.B.*, 1 Civil Appellate Practice 3d, §10.114 et seq.; Judicial Council Form No. SC-140 [Notice of Appeal].)

(3) *Notification by Clerk.* The clerk must "promptly" mail notification of the filing of the notice of appeal to each party (other than appellant) at the party's last known address. Failure to give the notification does not, however, extend the time for filing the notice of appeal or affect the validity of the appeal. (*C.R.C.*, Rule 8.904(b).)

(4) *Time To Appeal.* A notice of appeal must be filed no later than 30 days after the clerk delivers or mails notice of entry of the judgment to the parties. A notice filed after the 30-day period is ineffective for any purpose. (*C.C.P. 116.750(b)*.) The time for filing a notice of appeal is not extended by a request to correct a mistake or by subsequent proceedings on that request, except that a new period to file the notice begins when the clerk delivers or mails notice of entry of a modified judgment. (*C.C.P. 116.750(c)*.) *C.R.C.*, Rule 8.904(c) provides the usual protection for a premature appeal. (See 9 *Cal. Proc.* (5th), *Appeal*, §620 et seq.)

(5) *Time Is Jurisdictional.* The general rule that timely notice is jurisdictional (see 9 *Cal. Proc.* (5th), *Appeal*, §617) applies to small claims court appeals. (See *Mills v. Superior Court* (1969) 2 *C.A.3d* 214, 217, 219, 82 *C.R.* 469 [recognizing rule but holding that relief from default was properly granted where appellants relied on clerk's erroneous advice].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Filing Notice of Appeal*. C.R.C., Rule 8.904 was renumbered C.R.C., Rule 8.954 in 2008.

(2) *Form of Notice*. C.R.C., Rule 8.904 was renumbered C.R.C., Rule 8.954 in 2008.

(3) *Notification by Clerk*. C.R.C., Rule 8.904 was renumbered C.R.C., Rule 8.954 in 2008.(4) *Time To Appeal*.
C.R.C., Rule 8.904 was renumbered C.R.C., Rule 8.954 in 2008.



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5. Trial De Novo in Superior Court.
a. In General.

2 *Witkin Cal. Proc. Courts* § 316

[§ 316] In General.

(1) *Nature of Appeal.* The appeal in the superior court consists of a new hearing before a judicial officer other than the one who heard the action in the small claims division. (*C.C.P. 116.770(a)*.) It includes the claims of all parties who were parties at the time the notice of appeal was filed and the claim of a defendant that was heard in the small claims court. (*C.C.P. 116.770(d)*.) (See *C.E.B.*, 1 Civil Appellate Practice 3d, §10.122.)

The requirement of a different judicial officer was necessitated by the unification of the trial courts. (See *supra*, §166.) The California Law Revision Commission explains: "The current appeal route for a small claim is a new trial in the superior court, a court of higher jurisdiction. Upon unification of the municipal and superior courts in a county, the superior court will include the small claims division and will not be a court of higher jurisdiction. ... [A] hearing before a new judicial officer, with legal representation, is a sufficient review opportunity for the litigants without being a substantial burden on judicial resources." (28 Cal. Law Rev. Com. Reports, p. 75.)

(2) *Informal Procedure.* The hearing on appeal to the superior court is conducted informally, and no tentative decision or statement of decision is required. (*C.C.P. 116.770(b)*.) The Judicial Council may prescribe the practice and procedure on appeal and the time and manner in which the record on appeal is prepared and filed. (*C.C.P. 116.770(f)*.) (See *C.R.C.*, Rule 8.900 et seq.)

(3) *Applicable Statutes.* *C.C.P. 116.510* et seq. (hearings in small claims court) apply except that attorneys may participate. (*C.C.P. 116.770(c)*.)

(4) *Examination of Witnesses.* The court may allow the parties or their attorneys to conduct direct and cross-examination, but it retains discretion to control "the manner, mode, and duration of examination in keeping with informality and the circumstances." (*C.R.C.*, Rule 8.916.)

(5) *Discovery.* The pretrial discovery procedures provided by *C.C.P. 2019.010* (see 2 *Cal. Evidence (4th)*, *Discovery*, §2) are not permitted. (*C.C.P. 116.770(b)*; *Bruno v. Superior Court* (1990) 219 C.A.3d 1359, 1363, 269 C.R. 142.)

(6) *Record on Appeal*. The clerk of the small claims court must transmit the file and all related papers, including the notice of appeal, to the clerk of the court assigned to hear the appeal within 5 days after the filing of the notice of appeal and the payment of the fees required by law. (C.R.C., Rule 8.907.)

(7) *Fees*. The appellant pays a fee of \$ 75 for filing the notice of appeal. (C.C.P. 116.760(a).) A party who does not appeal is not charged a fee for filing a document "relating to the appeal." (C.C.P. 116.760(b).)

(8) *Setting for Trial*. The clerk of the superior court schedules the hearing "for the earliest available time" and mails written notice of the hearing to the parties at least 14 days before the hearing date. (C.C.P. 116.770(e).)

(9) *Continuances*. For good cause, the court assigned to hear the appeal may grant a continuance not to exceed 30 days, but may grant a continuance exceeding 30 days in a case of extreme hardship. A request for a continuance may be presented by one party or by stipulation. (C.R.C., Rule 8.910.)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Informal Procedure*. C.R.C., Rule 8.900 et seq. were renumbered C.R.C., Rule 8.950 et seq. in 2008.(4)
Examination of Witnesses. C.R.C., Rule 8.916 was renumbered C.R.C., Rule 8.966 in 2008.

(6) *Record on Appeal*. C.R.C., Rule 8.907 was renumbered C.R.C., Rule 8.957 in 2008.

(9) *Continuances*. C.R.C., Rule 8.910 was renumbered C.R.C., Rule 8.960 in 2008.



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5. Trial De Novo in Superior Court.

b. Affirmative Relief to Losing Defendant.

2 *Witkin Cal. Proc. Courts* § 317

[§ 317] Affirmative Relief to Losing Defendant.

At one time, it was held that a defendant who filed a cross-claim, and lost to the plaintiff on both the plaintiff's claim and his or her own cross-claim, could not be awarded affirmative relief at the trial de novo. (See *Anderson v. Superior Court* (1990) 226 C.A.3d 698, 701, 276 C.R. 18.) However, under C.C.P. 116.770 (supra, §316), the court hears the defendant's claim at a new hearing. *Township Homes v. Superior Court* (1994) 22 C.A.4th 1587, 27 C.R.2d 852, held that the court could offset the plaintiff's claim by a portion of the defendant's claim sufficient to reduce the plaintiff's judgment to nothing, but that the court could not "enter an affirmative award of damages in favor of a defendant who has appealed from an adverse judgment on plaintiff's claim." (22 C.A.4th 1594.)

The limitation set forth in *Township Homes* was rejected in *Linton v. Superior Court* (1997) 53 C.A.4th 1097, 62 C.R.2d 202. "The prohibition imposes a peculiar restriction on the scope of a de novo superior court trial. Without textual support, *Township Homes* has, in effect, amended the Legislature's directive to 'rehear the claim of a defendant' and has prescribed an unprecedented partial hearing of the claim. ... The Legislature has decreed that if only plaintiff has filed a claim only a defendant may institute an appeal. However, as we read the statutes, if both sides have filed claims, either may appeal the other's claim and the superior court will fully retry all claims." (53 C.A.4th 1105.) (See *Universal City Nissan v. Superior Court* (1998) 65 C.A.4th 203, 209, 75 C.R.2d 910 ["full review of an unsuccessful claim or counterclaim is available when a party appeals to superior court"; following *Linton* and rejecting limitation in *Township Homes* and result in *Anderson*].)

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5. Trial De Novo in Superior Court.
c. No Right to Jury Trial.

2 Witkin Cal. Proc. Courts § 318

[§ 318] No Right to Jury Trial.

(1) *Former Right in Unlawful Detainer Action.* At one time, certain unlawful detainer actions were within the jurisdiction of the small claims court, and it was held that *C.C.P. 1171*, governing the right to a jury trial in unlawful detainer actions, was applicable to the small claims court. (See *Maldonado v. Superior Court* (1984) 162 C.A.3d 1259, 1266, 1267, 209 C.R. 199.) Unlawful detainer actions were removed from small claims court jurisdiction in 1992.

(2) *No Right in Other Actions.* In *Smith v. Superior Court* (1979) 93 C.A.3d 977, 980, 156 C.R. 149, plaintiff sued for damages for injuries to property, and the appealing defendant sought a jury trial. *Held*, the action was one at law, involving legal issues triable by jury. *Smith* was disapproved in *Crouchman v. Superior Court* (1988) 45 C.3d 1167, 248 C.R. 626, 755 P.2d 1075. Plaintiff sued in the small claims court for money due on a rental contract and for damages for injury to the rented property and received judgment. Defendant appealed to the superior court and demanded a jury trial. *Held*, denial of the demand was proper.

(a) The statutes and rules governing small claims court procedures do not contemplate a jury trial on appeal. "[I]t is apparent that the scheme created by statute and rules requires the superior court trial de novo to be conducted pursuant to the same summary procedures as govern the small claims court itself (except that attorneys may participate). It follows that there is no right to a jury trial at any point in a small claims proceeding under the small claims statute and rules." (45 C.3d 1173.)

(b) The constitutional right to a jury trial under Cal. Const., Art. I, §16, is the right as it existed at common law in 1850 (see 7 Cal. Proc. (5th), Trial, §84); and it was well established at common law that small claims were to be resolved expeditiously without a jury. (45 C.3d 1173, 1175, 1177, 1178.)

(c) The holding in *Smith* was vitiated by a 1983 amendment to former C.R.C., Rule 155, providing that trials de novo "shall be conducted informally." "The patent intent of the Judicial Council was to rescind any implicit declaration of similarity between de novo appeals and ordinary superior court trials. ... Thus, to the extent that the *Smith* opinion was based on the former California Rules of Court, rule 155, it is no longer viable. To the extent that *Smith* is otherwise inconsistent with our opinion herein, it is hereby disapproved." (45 C.3d 1179.)

The result in *Crouchman v. Superior Court* was codified in 1992. Under *C.C.P. 116.770(b)*, no party has a right to a trial by jury on appeal to the superior court. (See *70 A.L.R.4th 1119* [jury trial rights on appeal].)

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d. No Power To Consolidate or Dismiss Action.

2 *Witkin Cal. Proc. Courts* § 319

[§ 319] No Power To Consolidate or Dismiss Action.

In *Acuna v. Gunderson Chevrolet* (1993) 19 C.A.4th 1467, 24 C.R.2d 62, plaintiff prevailed in a small claims action, and defendant appealed. Before the trial de novo in the superior court, plaintiff filed another action against defendant in the superior court and requested that the court hearing the small claims appeal transfer and consolidate that action with the new action. The superior court denied the request for lack of jurisdiction. Plaintiff then requested that the superior court dismiss the small claims complaint without prejudice, but the court instead granted defendant's request to dismiss the appeal only. *Held*, affirmed. The superior court lacked jurisdiction either to consolidate the actions or to dismiss the complaint.

(a) *No jurisdiction to consolidate.* (1) If the actions had been consolidated, various statutory limitations applicable to small claims proceedings would have been violated, including prohibitions on pretrial discovery, jury trial, and appeal by the plaintiff, and the requirement that the matter be transferred to the small claims court following appellate proceedings. (2) Consolidation would "create a risk of impermissible forum shopping by a plaintiff dissatisfied with the result obtained in the small claims court." (19 C.A.4th 1472.) (3) In appropriate circumstances, a small claims defendant may request a transfer under C.C.P. 116.390 (supra, §296). "This grant to a small claims *defendant* of the right to request transfer, and the absence of any similar provision for a small claims *plaintiff*, demonstrates that the Legislature did not intend the plaintiff to have such a privilege." (19 C.A.4th 1473.)

(b) *No jurisdiction to dismiss complaint.* (1) Under C.C.P. 116.810(b) (supra, §303), filing a small claims appeal merely "supersedes" the judgment during the appeal; the judgment is not vacated. (2) The right to dismiss before trial under C.C.P. 581(c) (see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §286) is inapplicable here because trial in a small claims case occurs in the small claims court, not at the trial de novo on appeal. Thus, the superior court's power to dismiss in small claims actions extends only to dismissal of the appeal, not dismissal of the entire action. (19 C.A.4th 1473.)

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e. Judgment.

2 Witkin Cal. Proc. Courts § 320

[§ 320] Judgment.

(1) *In General.* Subject to *C.C.P. 116.780*, the statutes governing judgment in the small claims court (*C.C.P. 116.610* et seq.; supra, §302) apply to superior court judgments after the hearing on appeal. (*C.C.P. 116.780(b)*.) (See *Issa v. Alzamar* (1995) 38 C.A.4th Supp. 1, 4, 44 *C.R.2d* 617, supra, §303 [motion to enforce superior court judgment rendered on appeal in small claims action must be made in superior court]; *C.E.B.*, 1 Civil Appellate Practice 3d, §10.126 et seq.; 67 *A.L.R.4th* 1117 [authority of appellate court to award damages in excess of jurisdictional limit].)

(2) *Attorneys' Fees and Expenses.* "For good cause and where necessary to achieve substantial justice between the parties," the court may award (a) attorneys' fees up to \$ 150, and (b) actual loss of earnings and expenses of transportation and lodging up to \$ 150. (*C.C.P. 116.780(c)*.) (See *Alturas v. Superior Court* (1940) 36 C.A.2d 457, 461, 97 *P.2d* 816 [upholding constitutionality of predecessor statute].)

If the appeal was without substantial merit and not in good faith, and was intended to harass or delay the other party or to encourage the other party to abandon the claim, the court may award (a) attorneys' fees up to \$ 1,000, and (b) actual loss of earnings and expenses of transportation and lodging up to \$ 1,000, after a hearing on the matter. (*C.C.P. 116.790*.)

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f. No Appeal or Motion Attacking Judgment.

2 Witkin Cal. Proc. Courts § 321

[§ 321] No Appeal or Motion Attacking Judgment.

(1) *No Appeal*. "The judgment of the superior court after a hearing on appeal is final and not appealable." (*C.C.P.* 116.780(a); see *Los Angeles Bond & Sec. Co. v. Superior Court* (1934) 1 C.A.2d 634, 637, 37 P.2d 159; *Davis v. Superior Court* (1980) 102 C.A.3d 164, 168, 162 C.R. 167.)

(2) *No Motions Attacking Judgment*. The phrase "final and not appealable" in the prior statute was construed in *Eloby v. Superior Court* (1978) 78 C.A.3d 972, 144 C.R. 597, to prohibit motions for new trial under *C.C.P.* 659 and motions to vacate under *C.C.P.* 663. Plaintiff sued for \$ 750 in the small claims court for allegedly defective work done on his automobile, and recovered judgment as prayed. Defendant appealed, the action was tried anew in the superior court, and judgment was again rendered for plaintiff but only for \$ 300 and costs. Plaintiff moved for a new trial, and the judge refused to consider the motion on its merits. Plaintiff sought mandamus. *Held*, writ denied; the trial court had no jurisdiction to entertain the motion.

(a) *Argument for jurisdiction over motion*. Under former *C.C.P.* 34, procedural provisions of the Code of Civil Procedure apply to all courts except where a special provision is made for particular courts or where there are jurisdictional limitations. And the rules dealing with small claims court appeals contemplate the possibility of a new trial after a trial *de novo*. (78 C.A.3d 974, 975.)

(b) *Effect of statutory prohibition on appeal*. (1) The statute expressly prohibits a further appeal; review by the Court of Appeal is available only on certification (see *infra*, §324). (2) The statute also makes the judgment "final." Apparently, "the legislative purpose in using the word 'final' was to preclude also motions for new trial ... and motions to vacate the judgment." (78 C.A.3d 976.)

(c) *Policy reasons for conclusion*. The object of speedy and inexpensive settlement of disputes (see *supra*, §267) would be defeated if the normal postjudgment motion proceedings were made available in small claims cases. And it would be incongruous to deny the plaintiff the right to appeal from a defendant's judgment but nevertheless allow the plaintiff to seek a new trial after the defendant has appealed. (78 C.A.3d 976.)

(d) *Case law distinguished.* In *Burley v. Stein* (1974) 40 C.A.3d 752, 115 C.R. 279, supra, §314, a defendant's motion for a new trial in the superior court was considered on the merits; but there was no challenge to jurisdiction and the opinion did not decide the point. (78 C.A.3d 974.)

A motion under C.C.P. 473(b) to vacate the judgment for excusable neglect of counsel is not permitted. (*ERA-Trotter Girouard Assn. v. Superior Court* (1996) 50 C.A.4th 1851, 1856, 58 C.R.2d 381.)

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g. Rehearing.

2 *Witkin Cal. Proc. Courts* § 322

[§ 322] Rehearing.

Eloby v. Superior Court (1978) 78 C.A.3d 972, 144 C.R. 597, *supra*, §321, was distinguished, and its strict approach to postjudgment proceedings was relaxed, in *Adamson v. Superior Court* (1980) 113 C.A.3d 505, 169 C.R. 866. Plaintiff A sued defendant O, the builder of his home, for construction defects. He won judgment in the small claims court and in the trial de novo in the superior court. Defendant then requested either a rehearing or certification to the Court of Appeal (see *infra*, §324). The superior court granted a rehearing and filed a new judgment in favor of defendant on the grounds that the statute of limitations had barred the action and that there had been an accord and satisfaction. *Held*, the superior court had jurisdiction to grant a rehearing.

(a) Former C.R.C., Rule 107 (now C.R.C., Rule 8.708), providing for a rehearing after judgment in the Appellate Department (now Appellate Division) (see 9 *Cal. Proc.* (5th), *Appeal*, §1019), does not in terms apply to small claims court appeals, which are not heard in the Appellate Department but are tried *de novo*. (113 C.A.3d 507.) However, some remedies have been found applicable to small claims causes despite lack of express mention, even though they undermine the concept of absolute finality. (113 C.A.3d 508.)

(b) Absolute finality for such judgments cannot exist; thus, it has been held that the Court of Appeal may issue a writ to review a small claims court judgment in extraordinary situations (see *infra*, §323). And courts have inherent jurisdiction to prevent frauds upon them or to nullify acts in excess of jurisdiction. (113 C.A.3d 508.) For the superior court to correct on rehearing a mistake of law or fact that it has made in the trial de novo is a speedier and more economical procedure than to procure the correction through a Court of Appeal by certification or extraordinary writ. (113 C.A.3d 509.) *Eloby* "may well have been correct in finding the time consuming remedy of a new trial unavailable after a trial anew," but the same conclusion does not necessarily follow as to rehearing. It is preferable to construe the statutes and rules to permit the simple and speedy rehearing procedure of the rule. (113 C.A.3d 509.) (See *ERA-Trotter Girouard Assn. v. Superior Court* (1996) 50 C.A.4th 1851, 1857, 58 C.R.2d 381 [rejecting holding in *Adamson* and assuming, without deciding, that reconsideration is only proper for fraud on the court, action in excess of jurisdiction, or correction of irregular or improvident order].)

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SUPPLEMENT: [This section is current through the latest supplement]
C.R.C., Rule 8.708 was renumbered C.R.C., Rule 8.889 in 2008.



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h. Review of Decision by Mandamus.

2 *Witkin Cal. Proc. Courts* § 323

[§ 323] Review of Decision by Mandamus.

In *Green v. Superior Court* (1974) 10 C.3d 616, 111 C.R. 704, 517 P.2d 1168, the Supreme Court reviewed a small claims court judgment by invoking the writ procedure to obtain a decision on an important issue of law. A landlord brought an unlawful detainer proceeding in the small claims court against a residential tenant, seeking possession and \$ 300 in back rent. The tenant admitted nonpayment but set up the defense of breach of the warranty of habitability. The small claims court gave judgment for the landlord; the superior court did likewise; and the superior court also denied certification to the Court of Appeal (see *infra*, §324). The tenant then sought a writ from the Court of Appeal to compel the lower court to recognize the warranty defense in unlawful detainer and, on denial of the writ, sought a hearing in the Supreme Court. The Supreme Court, exercising its original jurisdiction, issued an alternative writ of mandamus staying execution, and then, in an elaborate opinion, decided the issue in favor of the tenant. (10 C.3d 622.)

In *Davis v. Superior Court* (1980) 102 C.A.3d 164, 162 C.R. 167, plaintiff, injured in an automobile accident, sued defendant in the small claims court for \$ 331.08, and defendant cross-complained for \$ 332.34. The small claims court gave judgment against defendant in the amount sought by the complaint and denied recovery on the cross-complaint. Defendant appealed, and the superior court gave judgment for defendant in the amount sought by the cross-complaint and denied recovery on the complaint. On plaintiff's petition, mandamus issued to compel dismissal of defendant's appeal from the adverse judgment on the cross-complaint.

(a) The decision in *Green* was rendered before the enactment of former C.C.P. 117.12 (now C.C.P. 116.780(a); *supra*, §321), but *Eloby v. Superior Court* (1978) 78 C.A.3d 972, 144 C.R. 597, *supra*, §321, suggests that the statute precludes only appeal, a motion for a new trial, or a motion to vacate judgment. Accordingly, the statute should be read as not foreclosing review by extraordinary writ. (102 C.A.3d 168.)

(b) "Since statewide precedents can only be created by appellate courts, jurisdiction to decide appropriate small claims court issues must be retained by appellate courts in order to secure uniformity in the operations of the small claims courts and uniform interpretation of the statutes governing them. We do not believe that the Legislature intended to make all actions of the superior courts in such cases totally unreviewable or reviewable only on certification." (102 C.A.3d 168.) (See *Houghtaling v. Superior Court* (1993) 17 C.A.4th 1128, 1131, 21 C.R.2d 855, *supra*, §301 [following

Davis]; *Bricker v. Superior Court* (2005) 133 C.A.4th 634, 639, 35 C.R.3d 7 [superior court's sua sponte ruling that effectively dismissed petitioner's appeal from small claims court judgment without notice violated petitioner's due process rights; appropriate remedy was peremptory writ of mandamus directing superior court to vacate dismissal].)

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i. Certification to Court of Appeal.

2 Witkin Cal. Proc. Courts § 324

[§ 324] Certification to Court of Appeal.

Another practical exception to the rule of finality of the superior court judgment (see *supra*, §321) is the procedure for certification of a superior court decision to the Court of Appeal, under *C.C.P.* 911 and *C.R.C.*, Rule 8.1005. (See *Corcoran v. Universal Guardian Corp.* (1977) 72 *C.A.3d* 904, 908, 910, 140 *C.R.* 421, 9 *Cal. Proc.* (5th), *Appeal*, §1023.)

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A. In General.

1. Nature of Reviewing Courts.

2 *Witkin Cal. Proc. Courts* § 325

[§ 325] Nature of Reviewing Courts.

A *reviewing court* is one that reviews the judgments, orders, or other acts of a lower tribunal. The term *appellate court* is more common, and is entirely appropriate, but is not quite as accurate a description. A review of the proceedings of a lower tribunal may be accomplished not only by appeal, but by means of extraordinary writs such as certiorari, mandamus, prohibition, and habeas corpus. Moreover, California lawyers often speak of the Court of Appeal as "the appellate court" and of the highest court as "the Supreme Court." In the Appellate Rules, governing appeals from the superior court, the term "reviewing court" means the Supreme Court and the Court of Appeal. (C.R.C., Rule 8.10(6).) In the Rules Relating to the Superior Court Appellate Division, the term means the Appellate Division of the Superior Court. (C.R.C., Rule 8.804(22).)

The reviewing courts in California are the Supreme Court, the Courts of Appeal, and the Appellate Division of the Superior Court. The listing of the three does not, however, give any clear indication of the nature and operations of the reviewing court system in this state. The subject is extensively covered in later chapters on *Appeal* and *Extraordinary Writs*, but the following outline will be helpful in considering the structure and jurisdiction of these courts:

(1) The Constitution originally provided for departments of the Supreme Court and for the apportionment of the business between them by the Chief Justice. (See *Niles v. Edwards* (1892) 95 C. 41, 30 P. 134.) After the Courts of Appeal were established in 1904, the departments served no useful purpose, and they were eliminated by the constitutional revision of 1966.

(2) The Supreme Court Commission, established in 1889, consisted of five lawyers ("commissioners") appointed to assist the court by studying records and briefs, and preparing drafts of opinions, many of which were adopted by the court in whole or in part. (See *People v. Hayne* (1890) 83 C. 111, 121, 23 P. 1.) The Commission was abolished at the time of the creation of the Courts of Appeal.

(3) There are now six districts with Courts of Appeal, but some have divisions, and each division functions as a separate reviewing court. (See *infra*, §332.)

(4) The appellate division of the superior court has appellate jurisdiction in appeals in limited civil cases, appeals in

misdemeanor and infraction cases, and certain reviewing power over acts of administrative agencies. (See *infra*, §341.)

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A. In General.

2. Powers of Individual Judges.

2 *Witkin Cal. Proc. Courts* § 326

[§ 326] Powers of Individual Judges.

Individual judges of the reviewing courts have certain powers that they may exercise independently of the rest of the members of the court. These are of two kinds:

(1) *Supervisory and Administrative Powers.* The Chief Justice of California and the presiding justices of the divisions of the Courts of Appeal have supervisory and administrative powers. Some are a result of the unwritten practices of the court, and others are recognized by the Rules of Court. (See, e.g., C.R.C., Rule 8.60 [extending time]; C.R.C., Rule 8.200 [additional and amicus briefs]; C.R.C., Rule 8.204 [length of briefs and attachments]; C.R.C., Rule 8.212(b) [extension of time to file briefs]; C.R.C., Rule 8.220(d) [extension of time to file briefs]; and C.R.C., Rule 8.520(f) [amicus briefs].) Similar powers are exercised by the presiding judge of the appellate division of the superior court. (See C.R.C., Rule 8.80 [extension of time]; C.R.C., Rule 8.882(c) [amicus briefs].)

(2) *Powers of Individual Judges in Chambers.* "The justices of the Supreme Court and of the courts of appeal, or any of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application, except writs of mandamus, certiorari, and prohibition; and may, in their discretion, hear applications to discharge such orders and writs." (*C.C.P.* 165.) There is no reported decision on this statute, and its purported grant of power is of little importance. Orders made ex parte are almost invariably considered within the powers of the Chief Justice or the presiding justice. As to writs, the section excludes the three writs commonly issued by reviewing courts, and supersedeas is not issued ex parte. (See C.R.C., Rule 8.112.) The only remaining writ to which the section could properly apply is habeas corpus, and the power of an individual justice to grant it is constitutional. (See Cal. Const., Art. VI, §10.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Supervisory and Administrative Powers.* C.R.C., Rule 8.882(c) was relettered C.R.C., Rule 8.882(d) in 2008.



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B. Supreme Court.

1. Organization.

2 *Witkin Cal. Proc. Courts* § 327

[§ 327] Organization.

(1) *Chief Justice and Associates.* The Supreme Court consists of the Chief Justice of California and six associate justices. (Cal. Const., Art. VI, §2.) "An acting Chief Justice shall perform all functions of the Chief Justice when the Chief Justice is absent or unable to act. The Chief Justice or, if the Chief Justice fails to do so, the court shall select an associate justice as acting Chief Justice." (Cal. Const., Art. VI, §2.)

(2) *Current Members.* The current members of the court are:

(a) Chief Justice Ronald M. George

(b) Associate Justice Marvin R. Baxter

(c) Associate Justice Ming W. Chin

(d) Associate Justice Carol A. Corrigan

(e) Associate Justice Joyce L. Kennard

(f) Associate Justice Carlos R. Moreno

(g) Associate Justice Kathryn M. Werdegarr

(3) *Concurrence for Judgment.* The concurrence of four judges "present at the argument" is necessary for a judgment. (Cal. Const., Art. VI, §2.) (See 9 *Cal. Proc.* (5th), *Appeal*, §775.)

(4) *Records.* Original records in newer cases are on file in the court's San Francisco office. Original records in older cases are lodged with the State Archives in Sacramento.

(5) *Opinions.* Decisions of the court must be "in writing with reasons stated." (Cal. Const., Art. VI, §14; see 9 *Cal. Proc.* (5th), *Appeal*, §779.) The Constitution requires prompt publication of such opinions "as the Supreme Court deems

appropriate." (Cal. Const., Art. VI, §14.) Under C.R.C., Rule 8.1105, all Supreme Court opinions are published. (See 9 *Cal. Proc.* (5th), *Appeal*, §815.)

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B. Supreme Court.

2. Sessions and Conferences.

2 *Witkin Cal. Proc. Courts* § 328

[§ 328] Sessions and Conferences.

(1) *Transacting Business.* The Supreme Court may transact business at any time. (*C.C.P.* 41; see *supra*, §45.) The court is convened by the Chief Justice. (*Cal. Const.*, Art. VI, §2.)

(2) *Sessions.* Sessions (i.e., calendar hearings of causes for oral argument) are left entirely to the discretion of the court. "The Supreme Court holds regular sessions in San Francisco, Los Angeles, and Sacramento on a schedule fixed by the court, and may hold special sessions elsewhere." (*C.R.C.*, Rule 8.524(b); see 17 *So. Cal. L. Rev.* 239.) The current practice is to hold San Francisco sessions in January, March, May, and September; Los Angeles sessions in April, June, October, and December; and Sacramento sessions in February and November.

(3) *Conferences.* Conferences of the court are customarily held each Wednesday at 10 a.m. to consider applications and petitions for hearing and rehearing. It is improper to interview any justice personally with reference to a petition, and appearances by counsel are not permitted at the conferences. (See *Metropolitan Water Dist. of Southern Calif. v. Adams* (1942) 19 *C.2d* 463, 468, 122 *P.2d* 257, 9 *Cal. Proc.* (5th), *Appeal*, §950.)

(4) *Internal Operation.* The internal management of the court has been the subject of commentary. (See 62 *Cal. L. Rev.* 309; 65 *Cal. L. Rev.* 231; 67 *Cal. L. Rev.* 788; 71 *Cal. L. Rev.* 1134.) A booklet describing the Supreme Court's internal operation, membership, and history, entitled *The Supreme Court of California*, was first published in 1985. The most recent revision was published in 2007. A portion of the booklet, entitled *Internal Operating Practices and Procedures of the California Supreme Court* (IOP), is usually published with the Rules of Court. Both are also available on the judicial branch website: www.courtinfo.ca.gov. The IOP covers the following matters:

- (a) The transfer and submission of cases (IOP II, VII).
- (b) Sessions and conferences (IOP III, V).
- (c) Preparation of conference and calendar memoranda (IOP IV, VI).
- (d) Assignment, circulation, and filing of opinions (IOP VIII, IX, X).

- (e) Absence and disqualification of justices (IOP I, XII, XIII).
- (f) Review of determinations by the Commission on Judicial Performance (IOP XI).
- (g) Executive clemency, habeas corpus, and stay matters (IOP XIV).
- (h) Appointment of attorneys in criminal cases (IOP XV).
- (i) Communications from counsel in pending cases (IOP XVI).
- (j) The suspension of procedures (IOP XVII).

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B. Supreme Court.

3. Appellate Jurisdiction.

2 *Witkin Cal. Proc. Courts* § 329

[§ 329] Appellate Jurisdiction.

(1) *Former Law.* The California Constitution originally gave appellate jurisdiction in equity cases to the Supreme Court, with the result that any equity case beyond the limited equity jurisdiction later given to municipal and justice courts was appealable only to the Supreme Court. (See *DeGarmo v. Goldman* (1942) 19 C.2d 755, 759, 123 P.2d 1.) The California Constitution also reserved appellate jurisdiction to the Supreme Court over four types of cases at law: (a) those involving title or possession of real estate, (b) those involving the legality of a tax, impost, assessment, toll, or municipal fine, (c) probate matters, and (d) criminal cases where the death penalty was imposed.

(2) *Current Law.* The Supreme Court now has only one kind of appellate jurisdiction: in a criminal case "when judgment of death has been pronounced." (Cal. Const., Art. VI, §11(a).) (See 64 *Cal. L. Rev.* 663 [statistical analysis of court's workload]; 65 *Cal. L. Rev.* 531 [same]; 26 *Loyola L.A. L. Rev.* 1085 [The Business of the California Supreme Court: A Comparative Study]; 3 *Stanf. L. Rev.* 121 [historical study of work of state supreme courts].)

Despite this narrow direct appellate jurisdiction, the Supreme Court exercises virtually unlimited reviewing power, as follows:

(a) Direct appeals in death cases. (See Cal. Const., Art. VI, §11(a); 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §1.)

(b) Appeals taken to the Court of Appeal, but transferred by the Supreme Court to itself before final decision. (See Cal. Const., Art. VI, §12; C.R.C., Rule 8.552; 9 *Cal. Proc.* (5th), *Appeal*, §766.)

(c) Appeals taken to the Court of Appeal, in which review is granted by the Supreme Court after the Court of Appeal decision. (See Cal. Const., Art. VI, §12; C.R.C., Rule 8.500; 9 *Cal. Proc.* (5th), *Appeal*, §913 et seq.)

(d) Extraordinary writ proceedings in the Supreme Court to review decisions of superior courts or Courts of Appeal. (See *infra*, §330; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §5.)

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B. Supreme Court.

4. Original Jurisdiction.

2 Witkin Cal. Proc. Courts § 330

[§ 330] Original Jurisdiction.

(1) *Habeas Corpus*. The Supreme Court has the same jurisdiction as the Courts of Appeal and the superior courts in habeas corpus proceedings. (Cal. Const., Art. VI, §10; see *supra*, §214; 6 Cal. Crim. Law (3d), *Criminal Writs*, §11.)

(2) *Mandamus, Certiorari, and Prohibition*. The Supreme Court has the same jurisdiction as the Courts of Appeal and the superior courts "in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." (Cal. Const., Art. VI, §10; see *supra*, §216; 8 Cal. Proc., (5th) *Extraordinary Writs*, §1 et seq.)

(3) *Other Writs*. The Constitution formerly gave the Supreme Court power to issue all other writs "necessary or proper to the complete exercise of its appellate jurisdiction." The most common examples of these writs are supersedeas (see C.R.C., Rule 8.10) and coram nobis (see P.C. 1265, *supra*, §215). The quoted language was eliminated as unnecessary in 1966 because the court has inherent power to issue these writs. (See 9 Cal. Proc. (5th), *Appeal*, §280; 6 Cal. Crim. Law (3d), *Criminal Writs*, §99.)

(4) *Review of Public Utilities Commission Decisions*. The Supreme Court has original jurisdiction to review a final decision of the Public Utilities Commission by means of a statutory writ of review. (*Pub.Util.C. 1756, 1759*; see C.R.C., Rule 8.496; 8 *Summary* (10th), *Constitutional Law*, §1108.) Generally, final decisions are subject to review by either the Supreme Court or the Court of Appeal. (*Pub.Util.C. 1756(a)*.) However, decisions pertaining solely to water companies are subject to review only by the Supreme Court, except that review of complaint or enforcement proceedings are subject to review by either the Supreme Court or the Court of Appeal. (*Pub.Util.C. 1756(f)*.)

(5) *Review of Energy Commission Decisions*. The Supreme Court has exclusive original jurisdiction to review Energy Commission decisions on applications for certification of sites and related facilities. (*Pub.Res.C. 25531*; see *Sonoma v. State Energy Resources Conservation & Dev. Com.* (1985) 40 C.3d 361, 370, 220 C.R. 114, 708 P.2d 693 [*Pub.Res.C. 25531* is valid exercise of Legislature's constitutional authority over Public Utilities Commission]; *Santa Teresa Citizen Action Group v. State Energy Resources Conservation & Dev. Com.* (2003) 105 C.A.4th 1441, 1446, 1449, 130 C.R.2d 392 [exclusive review of power plant certification decision is in Supreme Court; summary denial of review petition was decision on merits, even though court did not consider certified record of proceedings before Energy Commission].)

(6) *Admission to Practice and Disciplinary Proceedings.* The Supreme Court has exclusive original jurisdiction of proceedings (a) for admission of attorneys to practice, and (b) to review disciplinary determinations of the State Bar Court. (See C.R.C., Rule 9.13; 1 *Cal. Proc.* (5th), *Attorneys*, §§367 et seq., 613 et seq.)

(7) *Clemency to Twice Convicted Felon.* Where a convict has been twice convicted of a felony, the Governor may not grant a pardon or commute a sentence "except on recommendation of the Supreme Court, 4 judges concurring." (Cal. Const., Art. V, §8(a); see 3 *Cal. Crim. Law* (3d), *Punishment*, §663.)

(8) *Determination of California Law on Request of Federal or State Courts.* The California Supreme Court may decide questions of California law at the request of the federal appellate courts and state courts of last resort. A decision has the same precedential effect as other decisions of the court and is published in the Official Reports. (C.R.C., Rule 8.548; see 9 *Cal. Proc.* (5th), *Appeal*, §14.)

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C. Courts of Appeal.

1. Organization.

a. In General.

2 *Witkin Cal. Proc. Courts* § 331

[§ 331] In General.

(1) *Districts and Divisions.* "The Legislature shall divide the State into districts each containing a court of appeal with one or more divisions. Each division consists of a presiding justice and 2 or more associate justices. It has the power of a court of appeal and shall conduct itself as a 3-judge court." (Cal. Const., Art. VI, §3; on current districts and divisions, see *infra*, §332; on presiding justices, see *infra*, §333.) The power conferred on the Legislature by Cal. Const., Art. VI, §3, includes the power to create new districts and divisions as the Legislature deems necessary. (*Brown v. Superior Court* (1982) 33 C.3d 242, 245, 252, 188 C.R. 425, 655 P.2d 1260; *Brown v. Superior Court* (1982) 137 C.A.3d 778, 782, 784, 187 C.R. 324.)

(2) *Concurrence for Judgment.* The concurrence of two judges "present at the argument" is necessary for a judgment. (Cal. Const., Art. VI, §3; see 9 *Cal. Proc.* (5th), *Appeal*, §775.)

(3) *Opinions.* Decisions of the Courts of Appeal must be "in writing with reasons stated." (Cal. Const., Art. VI, §14; see 9 *Cal. Proc.* (5th), *Appeal*, §779.) The Constitution requires prompt publication of such opinions "as the Supreme Court deems appropriate." (Cal. Const., Art. VI, §14.) (See 9 *Cal. Proc.* (5th), *Appeal*, §813.) Until 1964, all opinions of the Courts of Appeal were published. Today, the following rules govern publication:

(a) C.R.C., Rule 8.1105 sets forth the standards for selective publication and provides that only those Court of Appeal opinions that meet the standards are published. (See 9 *Cal. Proc.* (5th), *Appeal*, §815.)

(b) C.R.C., Rule 8.1110 authorizes partial publication.

(c) C.R.C., Rule 8.1115 prohibits the citation of unpublished opinions except in limited circumstances. (See 9 *Cal. Proc.* (5th), *Appeal*, §821.)

(d) C.R.C., Rule 8.1120 provides a procedure for requesting publication of unpublished opinions. (See 9 *Cal. Proc.* (5th), *Appeal*, §819.)

(e) C.R.C., Rule 8.1125 provides a procedure for requesting depublication of published opinions. (See 9 *Cal. Proc.*

(5th), *Appeal*, §817.)

(4) *Local Rules*. The Courts of Appeal may adopt local rules, and all six districts have done so. These are generally published with the California Rules of Court, and are also available on the judicial branch website: www.courtinfo.ca.gov.

Local rules must be published in the advance sheets to the Official Reports. (C.R.C., Rule 10.1030(a).) A local rule may not take effect sooner than 45 days after the date of publication of the advance pamphlet. (C.R.C., Rule 10.1030(b).)

A record, brief, or other document that complies with the California Rules of Court must be accepted for filing notwithstanding any local rule imposing other requirements. (C.R.C., Rule 8.20.)

(5) *Internal Operation*. Each of the six appellate districts has adopted Internal Operating Practices and Procedures. These are generally published with the California Rules of Court, and are also available on the judicial branch website: www.courtinfo.ca.gov.

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C. Courts of Appeal.

1. Organization.

b. Current Districts and Divisions.

2 Witkin Cal. Proc. Courts § 332

[§ 332] Current Districts and Divisions.

Under the constitutional directive (*supra*, §331) the Legislature has divided the state into six judicial districts, each consisting of counties specified by statute. (See *Govt.C. 69100 et seq.*) Each volume of the California Reports, the California Appellate Reports, and the California Reporter lists the districts, divisions, and justices. The current organization is as follows:

(1) *First District, San Francisco*: Five divisions, each having 4 judges. (*Govt.C. 69101.*)

(2) *Second District, Los Angeles and Santa Barbara*: Eight divisions, each having 4 judges. (*Govt.C. 69102.*)

(3) *Third District, Sacramento*: One division, having 11 judges. (*Govt.C. 69103.*)

(4) *Fourth District, San Diego, San Bernardino, and Orange County*: One division having 10 judges; one division having 7 judges; one division having 8 judges. (*Govt.C. 69104.*)

(5) *Fifth District, Fresno*: One division, having 10 judges. (*Govt.C. 69105.*)

(6) *Sixth District, San Jose*: One division having 7 judges. (*Govt.C. 69106.*)

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C. Courts of Appeal.

2. Presiding Justices.

2 *Witkin Cal. Proc. Courts* § 333

[§ 333] Presiding Justices.

(1) *Presiding Justice and Acting Presiding Justice.* Each division has a presiding justice. An acting presiding justice performs the functions of the presiding justice when the presiding justice is absent or unable to act. "The presiding justice or, if the presiding justice fails to do so, the Chief Justice shall select an associate justice of that division as acting presiding justice." (Cal. Const., Art VI, §3.)

(2) *Administrative Presiding Justice.* Each Court of Appeal has an administrative presiding justice. In a Court of Appeal with one division, the presiding justice acts as the administrative presiding justice. In a Court of Appeal with more than one division, the Chief Justice designates one of the presiding justices to act as the administrative presiding justice. The administrative presiding justice or the Chief Justice appoints an acting administrative presiding justice to serve in the absence of the administrative presiding justice. (C.R.C., Rule 10.1004(a).)

(3) *Duties.* The following duties are specified by the Rules of Court:

(a) The administrative presiding justice performs the duties specified in the Rules of Court and, with the concurrence of the Chief Justice, those duties delegated by a majority of the justices in the district. (C.R.C., Rule 10.1004(c).)

(b) The administrative presiding justice has the general direction and supervision of the clerk/administrator and of court employees not specifically assigned to a particular justice or division. (C.R.C., Rule 10.1004(c)(1).)

(c) The administrative presiding justice has the authority of a presiding justice with respect to matters that have not been assigned to a particular division. (C.R.C., Rule 10.1004(c)(2).)

(d) The administrative presiding justice cooperates with the Chief Justice in assigning judges and retired judges, in expediting judicial business, and in equalizing the work of judges when appropriate by recommending the transfer of cases by the Supreme Court. (C.R.C., Rule 10.1004(c)(3), (c)(4).) (On distribution of business among divisions, see C.R.C., Rule 10.1008.)

(e) The administrative presiding justice supervises the administration of the court's day-to-day operations, including

facilities, budget, and personnel, but must secure the approval of a majority of justices in the district before implementing changes in court policy. (C.R.C., Rule 10.1004(c)(5), (c)(6), (c)(7).) (On duties where districts are geographically separate, see C.R.C., Rule 10.1004(d).)

(f) The presiding justice or the administrative presiding justice is responsible for ensuring that appellate records and briefs are promptly filed. (C.R.C., Rule 10.1012(a).) The presiding justice or the administrative presiding justice may grant or deny applications to extend the time for filing records and briefs, may order authorized sanctions (including dismissal) for noncompliance with the Rules of Court, and may grant relief from default or a sanction (other than dismissal) imposed for the default. (C.R.C., Rule 10.1012(b).)

(g) The presiding justice notifies the Commission on Judicial Performance of the failure of a reviewing court justice to perform judicial duties. The administrative presiding justice notifies the Commission of the failure of a presiding justice to perform judicial duties. (C.R.C., Rule 10.1016(a).)

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C. Courts of Appeal.

3. Sessions and Conferences.

2 *Witkin Cal. Proc. Courts* § 334

[§ 334] Sessions and Conferences.

(1) *Transacting Business.* The Courts of Appeal may transact business at any time. (*C.C.P.* 41; see *supra*, §45.) The time of sitting is discretionary with the particular court, subject to the broad directive of C.R.C., Rule 8.256(a)(1): "Each Court of Appeal and division must hold a session at least once each quarter."

(2) *Regular Sessions.* The courts of the six appellate districts hold regular sessions in the following places:

(a) *First District, San Francisco:* Five divisions hold regular sessions in San Francisco. (*Govt.C.* 69101.)

(b) *Second District, Los Angeles and Santa Barbara:* Seven divisions hold regular sessions in Los Angeles; one division holds regular sessions in Ventura County, Santa Barbara County, or San Luis Obispo County, at the discretion of the judges of that division. (*Govt.C.* 69102.)

(c) *Third District, Sacramento:* One division holds regular sessions in Sacramento. (*Govt.C.* 69103.)

(d) *Fourth District, San Diego, San Bernardino, and Orange County:* One division holds regular sessions in San Diego; one division holds regular sessions in the San Bernardino/Riverside area; one division holds regular sessions in Orange County. (*Govt.C.* 69104.)

(e) *Fifth District, Fresno:* One division holds regular sessions in Fresno. (*Govt.C.* 69105.)

(f) *Sixth District, San Jose:* One division holds regular sessions in San Jose. (*Govt.C.* 69106.)

(3) *Circuit-Riding Sessions.* A Court of Appeal may hold sessions at places in the district other than the court's permanent location. (C.R.C., Rule 8.256(a)(2).)

(4) *Special Session in Another District.* To equalize caseloads, the Supreme Court may transfer cases from one Court of Appeal or division to another. (See *infra*, §338.) Litigants thereby obtain an earlier hearing, but often suffer inconvenience and expense in appearing for oral argument before a distant appellate court. To avoid this hardship, C.R.C., Rule 8.256(a)(3) permits a Court of Appeal, with the approval of the Chair of the Judicial Council, to hold a

special session in the appellate district from which the cause was transferred.

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C. Courts of Appeal.

4. Appellate Jurisdiction.

a. Cases Directly Appealed.

2 *Witkin Cal. Proc. Courts* § 335

[§ 335] Cases Directly Appealed.

(1) *Former Restricted Jurisdiction.* The Constitution formerly specified the types of cases in which the courts had appellate jurisdiction. The effect of the specification was roughly to keep appeals in equity cases, real property title cases, tax cases, and probate cases in the Supreme Court, and to channel appeals in actions at law and special proceedings into the Courts of Appeal. (See *Keech v. Joplin* (1909) 157 C. 1, 7, 106 P. 222; *In re Shafter-Wasco Irr. Dist.* (1942) 55 C.A.2d 484, 486, 130 P.2d 755.) However, in one equitable proceeding--an action to prevent or abate a nuisance--the Court of Appeal had appellate jurisdiction. (See *Moore v. Purse Seine Net* (1941) 18 C.2d 835, 842, 118 P.2d 1.)

(2) *Constitutional Revision of 1966.* With the exception of death cases, which go directly to the Supreme Court (supra, §329), Courts of Appeal under the constitutional revision of 1966 had appellate jurisdiction "when superior courts have original jurisdiction and in other causes prescribed by statute." (Former wording of Cal. Const., Art. VI, §11.) This seemingly fundamental change merely confirmed the existing system. The Constitution gave the Court of Appeal appellate jurisdiction in all matters transferred to it by the Supreme Court. As the Supreme Court's caseload increased, the practice arose of transferring nearly all its direct appeals to the Court of Appeal. The result was that appeals in equity, real property title cases, tax cases, and probate cases had long been decided by the intermediate appellate court. (See *Holt v. Superior Court* (1950) 100 C.A.2d 403, 404, 223 P.2d 881.) And, despite the deletion in 1966 of a specific reference to appeals in prohibition proceedings, the Court of Appeal continues to have appellate jurisdiction in those cases under Cal. Const., Art. VI, §11. (*Bloom v. Municipal Court* (1976) 16 C.3d 71, 75, 127 C.R. 317, 545 P.2d 229.) (See 28 *Santa Clara L. Rev.* 293 [symposium on restructuring jurisdiction of Court of Appeal].)

(3) *Unification of Trial Courts.* As part of the unification of trial courts (supra, §166), Cal. Const., Art. VI, §11, was subdivided and amended at the June 1998 primary election. The Court of Appeal now has appellate jurisdiction (except in death cases) "when superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes prescribed by statute." (Cal. Const., Art. VI, §11(a).) The California Law Revision Commission explains the change: The intent of this provision is "to preserve the appellate jurisdiction of the court of appeal in cases historically within the original jurisdiction of the superior court." The new provision makes "a statutory grant of appellate jurisdiction to the court of appeal in cases within the original jurisdiction

of the superior court, excluding limited civil cases (cases historically within the original jurisdiction of the municipal courts) and misdemeanor and infraction criminal cases." (28 Cal. Law Rev. Com. Reports, p. 73.) (See *California Commerce Casino v. Schwarzenegger* (2007) 146 C.A.4th 1406, 1417, 53 C.R.3d 626 [statute providing for direct review of superior court judgment in specified tribal compact cases by writ petition in Supreme Court was unconstitutional abridgment of appellate jurisdiction of Court of Appeal].)

(4) *Nature of Review*. The constitutional grant of "appellate jurisdiction" to the Court of Appeal does not require the Legislature to provide for direct appeal; statutes providing for review by extraordinary writ are constitutional. (See *Powers v. Richmond* (1995) 10 C.4th 85, 113, 40 C.R.2d 839, 893 P.2d 1160, 9 Cal. Proc. (5th), *Appeal*, §3 [Govt.C. 6259(c), providing that superior court decisions in Public Records Act cases are reviewable by extraordinary writ, is constitutional]; *Leone v. Medical Bd. of Calif.* (2000) 22 C.4th 660, 665, 94 C.R.2d 61, 995 P.2d 191 [B. & P.C. 2337, providing that superior court decisions in physician discipline cases are reviewable by extraordinary writ, is constitutional; following *Powers*].)

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(4) *Nature of Review*. See *Hollywood Park Land Co., LLC v. Golden State Trans. Financing Corp.* (2009) 178 C.A.4th 924, 940, 100 C.R.3d 752 [under *California Commerce Casino v. Schwarzenegger* (2007) 146 C.A.4th 1406, 53 C.R.3d 626, text, p. 427, statute providing for direct review of superior court judgment in specified tribal compact bond validation cases by writ petition in Supreme Court was unconstitutional abridgment of appellate jurisdiction of Court of Appeal; however, statute could be reformed to provide that writ review in Court of Appeal, rather than appeal, is exclusive means of review in those cases].



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C. Courts of Appeal.

4. Appellate Jurisdiction.

b. Hearing After Superior Court Appeal.

2 Witkin Cal. Proc. Courts § 336

[§ 336] Hearing After Superior Court Appeal.

(1) *Former Law.* Before 1960, a decision of the superior court or its appellate department, on an appeal from a justice or municipal court, was final; there was no further appeal to, or right to a hearing in, the Court of Appeal or the Supreme Court. (See *Herbold v. Atchison, Topeka & Santa Fe Ry. Co.* (1931) 117 C.A. 430, 4 P.2d 184; *Unemployment Reserves Com. v. St. Francis Homes Assn.* (1943) 58 C.A.2d 271, 274, 137 P.2d 64; *Lucey v. Municipal Court* (1944) 65 C.A.2d 228, 231, 150 P.2d 549; *McMurtry v. Lucero* (1954) 122 C.A.2d 636, 265 P.2d 164; *Golden v. Stansbury* (1957) 155 C.A.2d 480, 482, 318 P.2d 134; 36 Cal. L. Rev. 558.)

This restriction, which resulted in the conclusive determination of many important questions of law, including the constitutionality of statutes, by judges of the superior court, was subjected to much criticism, and several practical exceptions were recognized:

(a) Where a federal question was involved, e.g., a right arising under the Constitution of the United States, a review in the federal courts was possible. (See *Edwards v. California* (1941) 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119.)

(b) Where the erroneous judgment of a justice or municipal court was considered an assumption of subject matter jurisdiction which the court did not have, or an act in excess of jurisdiction, review by prohibition, mandamus, or habeas corpus was possible. (See *Rescue Army v. Municipal Court* (1946) 28 C.2d 460, 464, 171 P.2d 8 [prohibition entertained]; *Andrews v. Superior Court* (1946) 29 C.2d 208, 174 P.2d 313 [mandamus issued]; *Gorbacheff v. Justice's Court* (1947) 31 C.2d 178, 187 P.2d 407 [entertaining prohibition proceeding, though ultimately rejecting jurisdictional challenge]; *In re Beamer* (1955) 133 C.A.2d 63, 64, 283 P.2d 356; 36 Cal. L. Rev. 558; 2 Cal. Proc. (5th), *Jurisdiction*, §398.)

(c) Where the case itself was actually within the original jurisdiction of the superior court, but was mistakenly tried in the justice court, appealed to the superior court, and retried there without objection, the decision on appeal (retrial) could be treated as a judgment of the superior court, appealable in the usual manner to the Court of Appeal or the Supreme Court. (See *Redlands High School Dist. v. Superior Court* (1942) 20 C.2d 348, 356, 125 P.2d 490; *Thomasian v. Superior Court* (1953) 122 C.A.2d 322, 331, 265 P.2d 165; 2 Cal. Proc. (5th), *Jurisdiction*, §20.)

(2) *Discretionary Hearing*. The occasional opportunity to obtain review in a higher court by extraordinary writ did not solve the problem; and, as the jurisdiction of the municipal courts was increased, conflicts of decision between appellate departments (now divisions) caused serious concern, for no practical means of reconciling them was available. The solution was the adoption of a constitutional amendment in 1960, and implementing legislation in 1961, providing for a discretionary hearing in the Court of Appeal. (See *C.C.P.* 911; *P.C.* 1471.) The express constitutional enabling provision was eliminated in the 1966 constitutional revision, but the legislative authority is now derived from the broader provision of Cal. Const., Art. VI, §11(a) (*supra*, §335), that "courts of appeal have appellate jurisdiction ... in other causes prescribed by statute."

(3) *No Right to Additional Appeal in Limited Civil Case*. There is no constitutional or statutory right to appeal the decision of the appellate division in a limited civil case to the Court of Appeal. (*Anchor Marine Repair Co. v. Magnan* (2001) 93 C.A.4th 525, 528, 113 C.R.2d 284.)

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C. Courts of Appeal.

5. Original Jurisdiction.

2 *Witkin Cal. Proc. Courts* § 337

[§ 337] Original Jurisdiction.

The original jurisdiction of the Court of Appeal is specified in the same grant as that made to the Supreme Court: writs of habeas corpus, and proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. (Cal. Const., Art. VI, §10; see *supra*, §330.)

This would seem to imply that this jurisdiction is concurrent with that of the Supreme Court, and that a petition may be filed, seeking one of these writs, in whichever court the petitioner might choose. However, like other generalizations, the constitutional declaration does not accurately depict the practice, which is controlled by certain rules of policy limiting the exercise of original jurisdiction by one or both of these courts:

(1) Neither the Supreme Court nor a Court of Appeal will issue a writ unless the petitioner makes a satisfactory showing of circumstances justifying the failure to seek the relief first from the superior court. (C.R.C., Rule 8.490(b); see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §144.)

(2) Neither the Supreme Court nor a Court of Appeal will issue a writ where the main case is appealable to, or is pending on appeal in, a different appellate court. (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §§138, 139.)

(3) Other limitations on the concurrent original jurisdiction of the Courts of Appeal are the result of the exclusive jurisdiction of the Supreme Court in some types of proceedings: (a) review of certain decisions of the Public Utilities Commission; (b) review of recommendations of the State Bar Court; and (c) coram nobis where the criminal judgment was affirmed in the Supreme Court. (See *supra*, §330.)

(4) In one peculiar respect concurrent jurisdiction is entirely lacking; the Supreme Court may issue a writ against a Court of Appeal, but no comparable power exists in the Courts of Appeal. (See *Abelleira v. District Court of App., Third Dist.* (1941) 17 C.2d 280, 287, 109 P.2d 942, 2 *Cal. Proc.* (5th), *Jurisdiction*, §340 [prohibition].)

(5) Neither reviewing court has original jurisdiction over a special proceeding under C.C.P. 1138 for the submission of a controversy without action (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §79). The reviewing courts may, however, treat the pleadings, if sufficient, as an application for a writ of mandamus. (See *Northridge Park*

County Water Dist. v. McDonell (1958) 158 C.A.2d 123, 125, 322 P.2d 25, quoting the text.)

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In 2008, the portion of C.R.C., Rule 8.490(b) discussed in the text was renumbered C.R.C., Rule 8.486(a)(1).



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C. Courts of Appeal.

6. Cases Transferred by Supreme Court.

2 Witkin Cal. Proc. Courts § 338

[§ 338] Cases Transferred by Supreme Court.

The Supreme Court may make two kinds of transfers to a Court of Appeal:

(1) *Transfer of Supreme Court Cause.* The Supreme Court may, before decision, transfer a cause "from itself to a court of appeal." (Cal. Const., Art. VI, §12(a).) This language permits the Supreme Court to transfer cases in which the Supreme Court has original jurisdiction (see *supra*, §330), and cases in which the Supreme Court has granted review after a Court of Appeal decision (see *supra*, §329). (See 67 *Cal. L. Rev.* 807.) However, transfer of an appeal involving a judgment of death is prohibited. (Cal. Const., Art. VI, §12(d).)

(2) *Transfer of Court of Appeal Cause.* The Supreme Court may, before decision, transfer a cause "from one court of appeal or division to another." (Cal. Const., Art. VI, §12(a).) The chief purpose of this provision is to permit congestion in particular Courts of Appeal to be relieved by transferring cases from heavily burdened districts and divisions to those with lighter caseloads. (See 9 *Cal. Proc.* (5th), *Appeal*, §766.)

The Court of Appeal to which the case is transferred has jurisdiction. (Cal. Const., Art. VI, §12(a).)

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D. Appellate Division of the Superior Court.

1. Organization.

2 *Witkin Cal. Proc. Courts* § 339

[§ 339] Organization.

(1) *Constitutional Authorization.* Except as provided by Cal. Const., Art. VI, §11(a) (*supra*, §335), "the appellate division of the superior court has appellate jurisdiction in causes prescribed by statute." (Cal. Const., Art. VI, §11(b).)

As part of the unification of trial courts (see *supra*, §166), the former appellate department was renamed the appellate division in 1998. The California Law Revision Commission explains the change: "The appellate division is similar to the existing appellate department, but is intended to have greater autonomy so that it can exercise a true review function in a unified superior court. ... Under prior law, the appellate jurisdiction of the superior court was defined in terms of causes 'that arise in municipal courts in their counties.' ... The proposed law would make clear that the appellate jurisdiction of the appellate division covers limited civil cases and misdemeanor and infraction cases--causes traditionally within the original jurisdiction of the municipal courts--regardless of whether the courts in a county have unified." (28 Cal. Law Rev. Com. Reports, p. 74.)

(2) *Statutory Provisions.* In every county, there is an appellate division of the superior court. The Chief Justice assigns judges of the appellate division for specified terms. Judges assigned to the division must be current or retired superior court judges or retired judges of higher courts. (*C.C.P.* 77(a); see *C.R.C.*, Rule 10.1100.) In an appellate division with four judges, no more than three (designated by the presiding judge) may participate in the hearing or decision of any case. (*C.C.P.* 77(b).) However, appeals from convictions of traffic infractions may be heard and decided by a single judge. (*C.C.P.* 77(h).)

(3) *Rules of Court.* "The Judicial Council shall promulgate rules, not inconsistent with law, to promote the independence of, and govern the practice and procedure and the disposition of the business of the appellate division." (*C.C.P.* 77(g); see *infra*, §340.) Procedure on appeal is governed by the Rules of Court. (See 9 *Cal. Proc.* (5th), *Appeal*, §10.) Substantive matters, such as appealable orders and stays of execution, are governed by statute. (See 9 *Cal. Proc.* (5th), *Appeal*, §§85 et seq., 221 et seq.)

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CHAPTER II - Courts

Witkin Summary of California Law

VIII. THE REVIEWING COURTS

D. Appellate Division of the Superior Court.

2. Operation.

2 Witkin Cal. Proc. Courts § 340

[§ 340] Operation.

(1) *Presiding Judge.* The presiding judge is designated by the Chief Justice. (*C.C.P. 77(a).*) The presiding judge convenes the division "when necessary," supervises its business, and transacts such business as may be done in chambers. (*C.C.P. 77(d).*) (On responsibilities of presiding judge and designation of acting presiding judge, see *C.R.C.*, Rule 10.1104.)

(2) *Extension of Time and Other Routine Matters.* Except as otherwise provided by the Appellate Rules, applications to extend time and to shorten time must be served and filed. (*C.R.C.*, Rule 8.806(a).) The presiding judge for good cause may extend the time to do any act required or permitted by the rules except the time to file a notice of appeal. (*C.R.C.*, Rule 8.810(c).)

(3) *Sessions.* The division holds sessions at least once each quarter unless there are no matters set for oral argument during the quarter. The time and place are determined by the presiding judge. (*C.R.C.*, Rule 10.1108.)

(4) *Decisions and Opinions.* The concurrence of two judges is necessary for a decision in any case, or for any business except business that may be done in chambers by the presiding judge. (*C.C.P. 77(d).*) The court is not required to write opinions in all cases (see 9 *Cal. Proc.* (5th), *Appeal*, §781), and those written are selectively published (see 9 *Cal. Proc.* (5th), *Appeal*, §813 et seq.). (See *C.R.C.*, Rule 8.887.)

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VIII. THE REVIEWING COURTS

D. Appellate Division of the Superior Court.

3. Jurisdiction.

2 *Witkin Cal. Proc. Courts* § 341

[§ 341] Jurisdiction.

(1) *Appellate Jurisdiction.* The appellate division has jurisdiction on appeal "in all cases in which an appeal may be taken to the superior court or the appellate division of the superior court as provided by law, except where the appeal is a retrial in the superior court." (*C.C.P.* 77(e).) The powers of the appellate division are those provided by law or by the Rules of Court relating to appeals to the appellate division. (*C.C.P.* 77(f); see *Whittaker v. Superior Court* (1968) 68 C.2d 357, 66 C.R. 710, 438 P.2d 358.) (See *C.C.P.* 904.2 [appeal in limited civil case is to appellate division].)

The appellate jurisdiction of the superior court is wholly statutory. Under the former wording of *Veh.C.* 40230, judicial review of a parking violation was provided by an appeal to the municipal court. *Lagos v. Oakland* (1995) 41 C.A.4th Supp. 10, 12, 49 C.R.2d 203, held that, in the absence of an express statutory provision for a further appeal, there was no right to appeal the municipal court judgment to the appellate department of the superior court. (See *Smith v. Los Angeles Dept. of Trans.* (1997) 59 C.A.4th Supp. 7, 8, 73 C.R.2d 838.) As part of the unification of trial courts, *Veh.C.* 40230 was amended in 1998 to provide for appeal to the superior court.

General Elec. Capital Auto Financial Services v. Appellate Div. (2001) 88 C.A.4th 136, 105 C.R.2d 552, involved a writ of mandamus challenging a postjudgment enforcement order of the small claims court. *Held*, the appellate division of the superior court, not the Court of Appeal, had jurisdiction to review the order.

(a) The appellate division has no appellate jurisdiction over appeals from small claims judgments. Under *C.C.P.* 116.770(a), that jurisdiction rests with the superior court by way of a trial de novo. However, under former *C.C.P.* 116.780(d) (since repealed), the judgment after de novo review is returned to the small claims court for enforcement, and under *C.C.P.* 116.820(a), that judgment is enforced in the same manner as other judgments. (88 C.A.4th 144.)

(b) Under *C.C.P.* 87(a), a small claims case is a limited civil case, and, because no small claims statutes or rules govern the appeal of postjudgment enforcement orders, the statutes and rules governing limited civil cases are applicable. Thus, *C.C.P.* 904.2(b), governing limited civil cases, provides for appellate division jurisdiction to review a postjudgment order in a limited civil case. To hold otherwise would require review in the Court of Appeal and defeat the legislative purpose of resolving minor civil disputes expeditiously. (88 C.A.4th 144.)

(2) *Original Jurisdiction*. The appellate division, as such, has only appellate functions; the statutes confer no original jurisdiction upon it. And it was held at one time that the original jurisdiction of the superior court was exercised by the ordinary departments of the superior court. (See *Unemployment Reserves Com. v. St. Francis Homes Assn.* (1943) 58 C.A.2d 271, 275, 137 P.2d 64.)

In *Thomasian v. Superior Court* (1953) 122 C.A.2d 322, 265 P.2d 165, the municipal court granted plaintiff's motions for leave to amend and to transfer the cause to the superior court. Defendant petitioned the superior court for certiorari, alleging that the order was in excess of jurisdiction. The writ of certiorari was issued by a judge of the appellate department, which thereafter rendered an opinion annulling the municipal court's order. *Held*, mandamus should issue to compel the superior court, not the appellate department, to hear and determine the certiorari proceeding. The appellate department is "a distinct and separate department of the superior court (a species of entity) with jurisdiction and powers defined by statute pursuant to express constitutional sanction, limited to the consideration of 'appeals' from the municipal court not requiring a retrial, hence not embracing jurisdiction to review a municipal court judgment through the medium of an original proceeding." (122 C.A.2d 331.) "The conclusion seems inescapable that the judges participating in the decision were acting in the exercise of the jurisdiction and powers of the appellate department, not in the exercise of the general jurisdiction and powers of the superior court, and that the resultant judgment was rendered by the appellate department in excess of its jurisdiction and void." (122 C.A.2d 333.)

Cal. Const., Art. VI, §10, now provides in part: "The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction."

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CHAPTER II - Courts

Witkin Summary of California Law

IX. JUDICIAL AND MINISTERIAL OFFICERS

A. In General.

2 Witkin Cal. Proc. Courts § 342

[§ 342] In General.

(1) *Labor Relations*. The Court Employee Labor Relations Rules govern labor relations with trial court employees. (See C.R.C., Rule 10.650 et seq.)

(2) *Government Claims*. Judges, subordinate judicial officers, trial court executive officers, and trial court employees are covered by the Government Claims Act (*Govt.C. 810* et seq.). (*Govt.C. 811.9*.)

(3) *Status of Trial Court Employees*. Trial court employees are employees of the court, not the county. (See *Jones v. Los Angeles* (2002) 99 C.A.4th 1039, 1046, 121 C.R.2d 621 [summary judgment for county in employment discrimination action by superior court secretary].)

(4) *Code of Ethics*. The Judicial Council has approved a model Code of Ethics for the Court Employees of California. It consists of 12 tenets and related guidelines. Copies of the code are available from the Administrative Office of the Courts. Standard 10.16 of the Standards of Judicial Administration provides in part: "Each trial and appellate court should adopt a code of ethical behavior for its support staff, and in doing so should consider ... the model Code of Ethics for the Court Employees of California approved by the Judicial Council."

(5) *Nondiscrimination in Court Appointments*. In selecting attorneys, referees, mediators, and other persons, the courts should make selections on the basis of merit. No court may discriminate in selection on the basis of gender, race, ethnicity, disability, sexual orientation, or age. (C.R.C., Rule 10.611.) Standard 10.21 of the Standards of Judicial Administration provides for nondiscrimination in appointment lists, recruitment, and application and selection procedures for attorneys, referees, mediators, and others. (On avoidance of gender and other bias in court proceedings, see *supra*, §31.)

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IX. JUDICIAL AND MINISTERIAL OFFICERS

B. Trial Court Commissioners.

1. In General.

2 *Witkin Cal. Proc. Courts* § 343

[§ 343] In General.

(1) *Constitutional and Statutory Authorization.* "The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties." (Cal. Const., Art. VI, §22.) Each trial court may establish and appoint subordinate judicial officers "necessary for the performance of subordinate judicial duties." (*Govt.C. 71622.*) (On meaning of "subordinate judicial duties," see *infra*, §345.) (See *20 Am.Jur.2d (2005 ed.), Courts* §3.)

"Within the jurisdiction of the court and under the direction of the judges, commissioners shall exercise all the powers and perform all the duties prescribed by law. At the direction of the judges, commissioners may have the same jurisdiction and exercise the same powers and duties as the judges of the court with respect to any infraction or small claims action." (*Govt.C. 72190.*)

(2) *Nature of Office.* Court commissioners are salaried judicial officers. (See *Govt.C. 71623.*) Hence, they are prohibited from receiving fines or fees for their own use. (Cal. Const., Art. VI, §17.) In addition, they may not practice law or have a partner practicing law. (*Govt.C. 68082, 69917.*) (See *Barfield v. Superior Court (1963) 216 C.A.2d 476, 477, footnote 1, 31 C.R. 30* [except by rule of appointing court, commissioners need not be members of the State Bar].)

Although some commissioners serve as judges pro tempore virtually all of the time, it is improper for a commissioner seeking election to a judicial office to use the ballot designations "judge pro tempore," "acting judge," or any other designation containing the word "judge" or a derivative. (*Luke v. Superior Court (1988) 199 C.A.3d 1360, 1363, 245 C.R. 594.*)

(3) *Undertaking.* Where a commissioner's duties involve the custody of personal property or the receipt or disbursement of money, an undertaking to the State of California is required. (*C.C.P. 571.*)

(4) *Special Types of Commissioners.* Statutes provide for similar officers with narrower functions or more limited powers, including the following:

(a) Jury commissioner. (*C.C.P. 195.*)

(b) Child support commissioner. (*Family C. 4250 et seq.*; see 11 *Summary* (10th), *Husband and Wife*, §327.)

(c) Counselor of family conciliation court. (*Family C. 1814, 1815*; see 11 *Summary* (10th), *Husband and Wife*, §91 et seq.)

A "commissioner" appointed for a particular ministerial task is to be distinguished from these permanent court officers. And the terms "commissioner" and "commission" are also used in another entirely different sense when referring to administrative officers and bodies, exercising quasi-judicial or quasi-legislative functions, such as the Corporation Commissioner, Insurance Commissioner, Civil Service Commissioner, etc.

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B. Trial Court Commissioners.

2. Statutory Duties.

2 Witkin Cal. Proc. Courts § 344

[§ 344] Statutory Duties.

(1) *General Duties.* Subject to the supervision of the court, court commissioners are empowered to do the following:

(a) "Hear and determine ex parte motions for orders and alternative writs and writs of habeas corpus." (*C.C.P.* 259(a).)

(b) Take proof and make findings. (*C.C.P.* 259(b).)

(c) Take and approve bonds and undertakings. (*C.C.P.* 259(c).)

(d) "Act as temporary judge when otherwise qualified so to act and when appointed for that purpose, on stipulation of the parties litigant." (*C.C.P.* 259(d).) (See *In re Title U.S.A. Ins. Corp.* (1995) 36 *C.A.4th* 363, 369, 42 *C.R.2d* 498 [under prior law, nonappearing party could not challenge other party's unilateral approval of court commissioner as temporary judge]; on stipulation to appointment, see *infra*, §351.)

(e) "Hear and report findings and conclusions to the court for approval, rejection, or change, all preliminary matters including motions or petitions for the custody and support of children, the allowance of temporary spousal support, costs and attorneys' fees, and issues of fact in contempt proceedings in proceedings for support, dissolution of marriage, nullity of marriage, or legal separation." (*C.C.P.* 259(e).)

(f) Hear actions to establish paternity and to establish or enforce child and spousal support. (*C.C.P.* 259(f).) (See 11 *Summary* (10th), *Husband and Wife*, §327.)

(g) Hear, report on, and determine uncontested actions and proceedings subject to the requirements of *C.C.P.* 259(d). (*C.C.P.* 259(g).)

(h) Administer oaths and affirmations (*C.C.P.* 2093), and take acknowledgments (*C.C.* 1181).

(2) *Duties Under Attachment Law.* *C.C.P.* 482.060 authorizes court commissioners to perform subordinate judicial duties under the Attachment Law, with certain specified exceptions for contested matters. (See *Loeb & Loeb v. Beverly*

Glen Music (1985) 166 C.A.3d 1110, 1121, 212 C.R. 830 [court commissioner is authorized to hear and determine application for prejudgment attachment and opposition]; 6 *Cal. Proc.* (5th), *Provisional Remedies*, §93.)

(3) *Enforcement of Innkeeper's Lien.* C.C. 1861.28 authorizes court commissioners to perform the judicial duties specified in C.C. 1861 et seq. (See 13 *Summary* (10th), *Personal Property*, §222 et seq.)

(4) *Arraignment and Bench Warrants.* If directed to do so by the presiding judge, a commissioner may: (a) conduct arraignment proceedings, including the issuance and signing of bench warrants (*Govt.C. 72190.1*), and (b) issue and sign bench warrants for the arrest of defendants who fail either to make required court appearances or to perform any act required by court order (*Govt.C. 72190.2*). (See *Branson v. Martin* (1997) 56 C.A.4th 300, 305, 65 C.R.2d 401 [court commissioner was magistrate empowered to conduct traffic infraction arraignment].)

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B. Trial Court Commissioners.

3. Scope of Authority.

2 Witkin Cal. Proc. Courts § 345

[§ 345] Scope of Authority.

The former constitutional provision contained specific language referring to the duties of commissioners; the current provision merely describes them as "subordinate judicial duties." (Cal. Const., Art. VI, §22, *supra*, §343.) Hence, though the specification of authority will be found only in statute and rules, any statutory powers must meet the constitutional test. (See *Guardianship of Slakmon* (1978) 83 C.A.3d 224, 232, 147 C.R. 777 [issuance of ex parte order approving fees was not exercise of "subordinate judicial duty"]; *Settemire v. Superior Court* (2003) 105 C.A.4th 666, 672, 129 C.R.2d 560 [in contested hearing on multiple family law issues, including injunction, custody, and disposition of community assets, broad reference to court commissioner that did not specify facts to be determined, without stipulation of parties, was improper delegation of judicial duties to subordinate judicial officer].)

Generally, a commissioner has authority in uncontested matters. An action is uncontested when no answer or opposition is filed, and entry of a default judgment is then a "subordinate judicial duty." (*E.N.W. v. Michael W.* (1983) 149 C.A.3d 896, 899, 198 C.R. 355; see *Reisman v. Shahverdian* (1984) 153 C.A.3d 1074, 1093, 201 C.R. 194 [commissioner properly heard uncontested petition to confirm binding arbitration of attorney fee dispute].)

In *Mosler v. Parrington* (1972) 25 C.A.3d 354, 101 C.R. 829, the court held that a superior court commissioner had no power to strike a defendant's answer and enter judgment by default as a sanction for discovery abuse where the defendant had an answer on file, even though the defendant did not appear at the hearing of the motion. *Mosler* was disapproved in *Rooney v. Vermont Inv. Corp.* (1973) 10 C.3d 351, 361, 366, 110 C.R. 353, 515 P.2d 297.

(a) The 1966 constitutional revision changed "chamber business ... and such other business" to "subordinate judicial duties." The intent was to broaden, not restrict, the duties of commissioners and to make it possible for the Legislature to specify powers and duties free from challenge under the separation of powers doctrine. (10 C.3d 362, 365.)

(b) Assignment to commissioners of duties with respect to uncontested matters is therefore within the scope of the constitutional authorization. (10 C.3d 366.) And the statute empowers a commissioner to hear and determine an ex parte application for rendition of a judgment under the terms of a stipulation for judgment; i.e., the stipulation eliminates the contested nature of the action and the commissioner is consequently determining an uncontested action or proceeding. (10 C.3d 367.) The entry of judgment in the instant case was, however, improper; the stipulation here left some matters

open, and the commissioner's determination, made on the basis of plaintiffs' declarations, without notice or hearing afforded defendants, was improper. (10 C.3d 369, 370.)

(c) A variety of methods of appointing a commissioner to hear an uncontested matter are available: (1) The order need not be expressly addressed to the particular proceeding, but may be a blanket order assigning specific duties to named commissioners. (2) A court rule may provide that all commissioners of the court or of particular departments may exercise specified powers. (3) The court may order the commissioner to hear and determine a matter or class of matters simply by instructing the clerk of the court to channel those matters to the commissioner. "The order may take any form that establishes the court's official determination that the proceeding is one that the commissioner should hear and determine." (10 C.3d 368.)

In *Badgley v. Van Upp* (1993) 20 C.A.4th 218, 24 C.R.2d 406, a property dispute between cotenants, the trial judge referred the action to a court commissioner to take "all evidence." Defendant objected to the proceeding before the commissioner beyond the issue of an accounting and a long account. After the hearing, the judge then rendered a statement of decision and entered judgment for plaintiff. *Held*, reversed. The hearing was beyond the scope of the commissioner's authority.

(a) The commissioner was not acting as a commissioner under C.C.P. 259(b); the reference order did not require the commissioner to "make and report findings" as required by the statute. To hold otherwise would deny defendant the right "to a decision upon the controverted facts from the judge who heard the evidence." (20 C.A.4th 224, quoting *Linsk v. Linsk* (1969) 70 C.2d 272, 74 C.R. 544, 449 P.2d 760, 1 Cal. Proc. (5th), *Attorneys*, §251.)

(b) The commissioner was not acting as a general referee under C.C.P. 638(1) (now C.C.P. 638(a); see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §64); defendant did not agree in writing and the reference order did not require the commissioner to make a statement of decision as required by the statute. (20 C.A.4th 224.)

(c) The commissioner was not acting as a temporary judge under Cal. Const., Art. VI, §21 (infra, §348); the parties did not stipulate to trial by the commissioner and the reference did not contemplate that the commissioner was "empowered to act until final determination of the cause" as required by the constitutional provision. (20 C.A.4th 225.)

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IX. JUDICIAL AND MINISTERIAL OFFICERS

C. Referees.

1. In General.

2 *Witkin Cal. Proc. Courts* § 346

[§ 346] In General.

(1) *Nature of Reference.* When it is necessary or convenient to obtain information or ascertain facts independently of a trial or hearing, for later report to the court, a reference is appropriate. Two kinds are recognized:

(a) *Voluntary Reference.* A voluntary reference occurs by the agreement of the parties. (See *C.C.P.* 638; *C.R.C.*, Rule 3.900 et seq.)

(b) *Compulsory Reference.* A compulsory reference occurs by court order. (See *C.C.P.* 639; *C.R.C.*, Rule 3.920 et seq.)

The conditions for a reference and the procedure are treated in a later chapter (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §63 et seq.). The present topic deals with the appointment and powers of the referee. (See generally *Cal. Civil Practice*, 4 Procedure §26:13 et seq.; 94 *Harv. L. Rev.* 1592; 20 *Am.Jur.2d* (2005 ed.), *Courts* §3; on use of referees under private judging procedure, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §496.)

(2) *Appointment and Objection.* The court must appoint up to three referees agreed on by the parties. If the parties do not agree on the selection, the court may select up to three referees from among qualifying persons nominated by the parties or from among other qualifying persons if none is nominated. (*C.C.P.* 640.) Objections to a referee appointed by the court or to the reference must be in writing. Objections are heard and disposed of by the court, not by the referee. (*C.C.P.* 642; on grounds for objection, see *C.C.P.* 641.)

(3) *Undertaking.* When a referee's duties involve the custody of personal property or the receipt or disbursement of money, an undertaking to the State of California is required. (*C.C.P.* 571.)

(4) *Requirements in Particular Cases.* Special statutes provide for the appointment and fix the qualifications of standing referees for particular courts. (See *C.C.P.* 873.010 et seq. [referee for partition actions]; *Govt.C.* 72403 [traffic referee].)

(5) *Referees in Reviewing Courts.* When questions of fact arise in original proceedings in a reviewing court, which has no facilities for trying cases, the use of a referee may become essential, and a common practice is to appoint a

superior court judge. (See, e.g., *People v. Bailey* (1969) 1 C.3d 180, 187, 81 C.R. 774, 460 P.2d 974 [late notice of appeal; reference to determine facts]; *Holt v. Kelly* (1978) 20 C.3d 560, 562, 143 C.R. 625, 574 P.2d 441 [petitioner seeking return of property taken on arrest; reference to determine facts regarding property]; *In re O'Malley* (1950) 101 C.A.2d 80, 224 P.2d 488 [habeas corpus by incarcerated prisoner; reference to determine alleged violation of parole]; *Cross v. Superior Court* (1951) 104 C.A.2d 594, 596, 232 P.2d 255 [mandamus proceeding; reference to determine proper charge for transcript on appeal]; *In re Robelet* (1953) 121 C.A.2d 598, 600, 263 P.2d 486 [custody of children pending appellate court action; reference to superior court commissioner].)

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C. Referees.

2. Court Commissioner as Referee.

2 *Witkin Cal. Proc. Courts* § 347

[§ 347] Court Commissioner as Referee.

Although *C.C.P. 640* authorizes a free selection of any qualified person as a referee, it also provides that the court may select a court commissioner of the county. (On federal procedure, see *F.R. Civ. P., Rule 53*; 9A Federal Practice and Procedure (Wright & Miller) §2601 et seq.; 7 Federal Procedure, L. Ed. §14:69; 17 *U.C. Davis L. Rev.* 753 [Remedial Special Masters in Federal Institutional Reform Litigation].)

The frequent use of court commissioners as referees gives rise to a procedural problem: A court commissioner has only statutory powers (see *supra*, §344), while a referee derives his or her powers from the order of appointment. In case of doubt about the capacity in which the referee undertakes the hearing or other inquiry, the preferred construction of the order is in favor of the broader authority. Thus, in *Estate of Hart (1938) 11 C.2d 89, 91, 77 P.2d 1082*, the minutes merely read: "Referred to J. W. Mullin, Jr." Mullin, a court commissioner, held a hearing, described himself as a referee, and made findings, which the court adopted. Appellants raised no objection until they became aware of an adverse determination, and then, as allowed by statute, sought to except to the report and argue exceptions before the court. *Held*, under the circumstances, the commissioner acted as a referee, whose findings were reviewable only in the same manner as those of a court. (See *Jackson v. Puget Sound Lumber Co. (1898) 123 C. 97, 101, 55 P. 788* [order "to Stuart S. Wright, court commissioner" for accounting and report was reference; Wright's subsequent resignation as court commissioner did not impair his authority as referee].)

In *International Jet Ski Boating Assn. v. Superior Court (1991) 232 C.A.3d 112, 283 C.R. 33*, Commissioner B, sitting as a temporary judge by stipulation (see *infra*, §351) ruled on two motions dealing with plaintiff's causes of action. Defendant then filed a motion for summary judgment on the surviving cause, and it was also assigned to Commissioner B, but defendant refused to stipulate to him as a temporary judge. The trial judge, over defendant's objection, then directed B to make a report and recommendations under *C.C.P. 259*; and B's report recommending that the motion be denied was approved by the judge. *Held*, mandamus granted to compel the lower court to vacate the order and reconsider the motion. A *C.C.P. 259* referral is for the purpose of making findings on matters of fact, and a ruling on summary judgment involves a question of law--whether triable issues exist. (232 *C.A.3d* 115.) For this purpose, a reference to a court commissioner is inappropriate in the absence of a stipulation. (232 *C.A.3d* 116.)

Although *P.C. 166(a)(2)* prohibits contempt "in the presence of any referee," the terms "referee" and

"commissioner" are not synonymous for this purpose, and conduct before a municipal court traffic division commissioner who was not a referee could not be the basis for a prosecution under the statute. (*People v. Kalnoki* (1992) 7 C.A.4th Supp. 8, 12, 9 C.R.2d 827.)

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IX. JUDICIAL AND MINISTERIAL OFFICERS

D. Attorney as Temporary Judge.

1. Nature of Position.

2 *Witkin Cal. Proc. Courts* § 348

[§ 348] Nature of Position.

(1) *In General.* "On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause." (Cal. Const., Art. VI, §21; see *Estate of Kent* (1936) 6 C.2d 154, 158, 57 P.2d 901 [discussing use of probate commissioners as temporary judges in probate proceedings, and holding that only active parties who have appeared must stipulate]; *Quezada v. Superior Court* (1959) 171 C.A.2d 528, 340 P.2d 1018 [contempt proceeding arising out of husband's failure to make support payments is "cause"]; *People v. Moore* (1969) 270 C.A.2d 486, 490, 76 C.R. 150 [discussing different qualifications for temporary judge and court commissioner]; *Health Industries of America v. Los Angeles County Metropolitan Trans. Authority* (2002) 102 C.A.4th 1372, 1377, 126 C.R.2d 294 [stipulation for trial by retired judge "subject to the schedule of the Judge" authorized him to toll 5-year period for bringing case to trial under C.C.P. 583.310, even though discovery and pretrial matters were reserved to commissioner]; 97 A.L.R.5th 537 [construction and validity of statutes governing designation of temporary judge]; Cal Civil Practice, 4 Procedure §§26:26 et seq., 26:58, 26:59.)

(2) *Definition.* A temporary judge is an active or inactive member of the State Bar of California who, under Cal. Const., Art. VI, §21, and the Rules of Court, "serves or expects to serve as a judge once, sporadically, or regularly on a part-time basis under a separate court appointment for each period of service or each case heard." (C.R.C., Rule 1.6(13).)

(3) *Effect of Judgments and Orders.* The judgments and orders of a temporary judge carry the same presumption of regularity as those of a permanent judge of the court. (*Estate of Kent*, *supra*, 6 C.2d 163 ["Consequently the failure of the record herein to show that certain heirs or litigants stipulated in writing or orally to the selection of the judge *pro tempore*, in the absence of any showing in the record that they did not stipulate, is ineffective to refute the presumption"].) (See *Shasta Lake v. Shasta* (1999) 75 C.A.4th 1, 10, 88 C.R.2d 863 [parties stipulated that decision of all issues by retired judge would have effect of judgment after court trial; judge's order was appealable judgment by temporary judge].)

(4) *Duration of Authority.* The authority of a temporary judge continues until the final disposition of the case. (See *Anderson v. Bledsoe* (1934) 139 C.A. 650, 651, 34 P.2d 760 [temporary judge had power to hear motion to set aside his

previous order granting new trial]; *McCartney v. Superior Court* (1990) 223 C.A.3d 1334, 1339, 273 C.R. 250 [stipulation authorizing commissioner to hear defendant's demurrer also authorized him to hear plaintiff's motion to reconsider; "Those proceedings which question the finality of the temporary judge's ruling or which are a part of or a continuation of the stipulated cause are not ancillary but direct progeny of the stipulated cause"]; *Kim v. Superior Court* (1998) 64 C.A.4th 256, 261, 75 C.R.2d 468 [stipulation to appointment of B to act as temporary judge with sweeping judicial power "until the conclusion of all matters in this cause" was not general consent to appointment of successor temporary judge on death of B]; *Guardianship of Simpson* (1998) 67 C.A.4th 914, 941, 79 C.R.2d 389 [temporary judge sitting by stipulation may act until final determination; thus, presiding judge lacked authority to reassign pending case without good cause].)

However, the power of a temporary judge does not exclude the normal authority of any other judge of the court. (See *Graziani v. Denny* (1917) 174 C. 176, 179, 162 P. 397; *New Tech Dev. v. Bank of Nova Scotia* (1987) 191 C.A.3d 1065, 1070, 236 C.R. 746 [retired commissioner sitting as temporary judge had power to act until determination of preliminary injunction, but at subsequent hearing on motion to dissolve injunction, temporary judge was unavailable and superior court judge had jurisdiction to grant motion].)

(5) *Code of Judicial Ethics*. The ethical obligations of temporary judges are set forth in Canon 6D of the Code of Judicial Ethics. A lawyer serving as a temporary judge must comply with those provisions. (*Rules of Professional Conduct, Rule 1-710*.)

(6) *Governing Rules*. Originally, the appointment of temporary judges by stipulation was governed by C.R.C., Rule 244. It was replaced in 2006 by new rules providing separately for temporary judges appointed by the court and temporary judges requested by the parties. These two categories of temporary judges are now governed by the Rules of Court as follows:

(a) Temporary judges appointed by the trial courts are governed by C.R.C., Rule 2.810 et seq. (See *infra*, §349.)

(a) Temporary judges requested by the parties are governed by C.R.C., Rule 2.830 et seq. (See *infra*, §350.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Attorney as Temporary Judge.

2. Temporary Judge Appointed by Court.

2 Witkin Cal. Proc. Courts § 349

[§ 349] Temporary Judge Appointed by Court.

(1) *In General.* C.R.C., Rule 2.810 et seq. apply to attorneys who serve as court-appointed temporary judges in trial courts. These rules do not apply to subordinate judicial officers, to retired judicial officers appointed to serve as temporary judges, or to attorneys appointed to serve as temporary judges at the parties' request. (C.R.C., Rule 2.810(a).) (On appointment of subordinate judicial officer as temporary judge, see C.R.C., Rule 10.700.)

(2) *Purpose.* The purpose of court-appointed temporary judges is to provide the court with a panel of trained, qualified, and experienced attorneys who may serve at the discretion of the court if the court needs judicial assistance that it cannot provide using full-time judicial officers. (C.R.C., Rule 2.811(a).)

(3) *Qualification.* Generally, a temporary judge must be a member of the State Bar for at least 10 years before appointment. However, an attorney admitted to practice for at least 5 years may be appointed for good cause. (C.R.C., Rule 2.812(a).) The temporary judge (a) must be a member in good standing of the State Bar, without a disciplinary action pending, (b) must not have been convicted of a felony or plead guilty or no contest to a felony, (c) must satisfy the education and training requirements specified by the Rules of Court, and (d) must satisfy any other general or special conditions required by the court. (C.R.C., Rule 2.812(b), (f).)

(4) *Education and Training.* C.R.C., Rule 2.812(c) sets forth minimum training requirements, including mandatory training in bench conduct and ethics, and substantive training in small claims, traffic, and other subject areas. C.R.C., Rule 2.813 specifies the contents of training programs. C.R.C., Rule 2.815 imposes continuing education requirements.

(5) *Appointment.* Appointment and service as a temporary judge are at the discretion of the presiding judge and do not create an employment relationship between the court and the attorney. (C.R.C., Rule 2.811(b), (c).) Generally, a trial court may only appoint an attorney who has satisfied the requirements of C.R.C., Rule 2.812. However, a member of the State Bar who has satisfied C.R.C., Rule 2.812(a) but is not otherwise qualified may be appointed for a limited time in extraordinary circumstances. (C.R.C., Rule 2.810(c), (d).) (On administration of court's temporary judge program, see C.R.C., Rule 10.740 et seq.)

(6) *Application and Order.* An attorney must apply to be a temporary judge. (C.R.C., Rule 2.812(f); on information

required in application, see C.R.C., Rule 10.744.) An attorney may serve as a temporary judge only after the court has issued an order of appointment. (C.R.C., Rule 2.814.)

(7) *Oath and Certification.* A temporary judge must subscribe the oath of office and certify that he or she will comply with the applicable provisions of the Code of Judicial Ethics and the Rules of Court. (C.R.C., Rule 2.814.)

(8) *Disclosures.* A temporary judge must make all disclosures required by the Code of Judicial Ethics and has a continuing obligation to do so. (C.R.C., Rules 2.817, 2.819.)

(9) *Disqualification.* A temporary judge must disqualify himself or herself as provided by the Code of Judicial Ethics and has a continuing obligation to do so. (C.R.C., Rules 2.818(a), 2.819.) In addition to disqualification under the Code of Judicial Ethics, an attorney may not serve as a court-appointed temporary judge (a) if the attorney, in any type of case, is appearing on the same day in the same courthouse as an attorney or a party, (b) if the attorney, in the same type of case, is a party to an action or proceeding in the court, or (c) if, in a family law or unlawful detainer case, one party is self-represented and the other party is an attorney or represented by an attorney. (C.R.C., Rule 2.818(b).) (On disqualification procedure and waiver of disqualification, see C.R.C., Rule 2.818.)

(10) *Notice and Stipulation.* Before the first witness is sworn in a small claims hearing, before the entry of a plea at a traffic arraignment, or before the commencement of any other proceeding, the court must notify each party that a specified temporary judge will hear the matter and that the party has a right to have the matter heard before a judge, commissioner, or referee. (C.R.C., Rule 2.816(b).) The notice may be given by (a) a written notice to each party, or (b) a conspicuous sign posted at the courtroom and an oral or taped notification given by a court officer on the day of the hearing. (C.R.C., Rule 2.816(c).) After the notice has been given, a party may stipulate to the attorney serving as a temporary judge by either of the following methods:

(a) A party may sign a written stipulation agreeing that the matter may be heard by the temporary judge. (C.R.C., Rule 2.816(d)(2).)

(b) A party who fails to object to the matter being heard by the temporary judge before the proceeding begins is deemed to have stipulated to the attorney serving as the temporary judge. (C.R.C., Rule 2.816(d)(1).) (On conduct tantamount to stipulation, see *infra*, §§352, 353; on application of stipulation requirement to default proceedings, see *infra*, §354 et seq.)

(11) *Withdrawal of Stipulation.* An application or motion to withdraw a stipulation for the appointment of a temporary judge must be supported by a declaration of facts establishing good cause for allowing a party to withdraw the stipulation. A declaration that a ruling is based on error of fact or law does not establish good cause. The application or motion must be served and filed, with a copy mailed or delivered to the presiding judge. The application or motion is heard by the presiding judge or a judge designated by the presiding judge. If the application or motion is based on grounds for disqualification that appear or arise after the temporary judge has made a ruling but before judicial action in the proceeding is concluded, rulings made up to the time of disqualification may not be set aside by the replacement judicial officer or temporary judge without good cause. (C.R.C., Rule 2.816(e).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 2.810(a) was amended in 2008 to delete the exclusion for retired judicial officers.(6)
Application and Order. C.R.C., Rule 2.812(f) was relettered C.R.C., Rule 2.812(g) in 2008.



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D. Attorney as Temporary Judge.

3. Temporary Judge Requested by Parties.

2 *Witkin Cal. Proc. Courts* § 350

[§ 350] Temporary Judge Requested by Parties.

(1) *In General.* C.R.C., Rule 2.830 et seq. apply to attorneys designated as temporary judges under Cal. Const., Art. VI, §21, at the request of the parties, rather than by prior appointment of the court, including pro bono and privately compensated temporary judges. (C.R.C., Rule 2.830(a); see C.R.C., Rule 2.830(b) ["privately compensated" means temporary judge is paid by parties].) These rules do not apply to subordinate judicial officers or to attorneys who are appointed by the court to serve as temporary judges for the court. (C.R.C., Rule 2.830(c).) (On private judging, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial* §495 et seq.; Cal. Civil Practice, 4 Procedure §26:9 et seq.)

(2) *Stipulation.* When the parties request that an attorney be appointed as a temporary judge, a written stipulation, with the name and office address of the proposed appointee, is submitted to the presiding judge. (C.R.C., Rule 2.831(a).) An attorney's stipulation may be binding on the client. (See *In re Samkirtana S.* (1990) 222 C.A.3d 1475, 1484, 272 C.R. 489, 1 *Cal. Proc.* (5th), *Attorneys*, §254; *In re Marriage of Crook* (1991) 235 C.A.3d 30, 35, 286 C.R. 537.) (On conduct tantamount to stipulation, see *infra*, §§352, 353; on application of stipulation requirement to default proceedings, see *infra*, §354 et seq.)

(3) *Oath and Certification.* The temporary judge must take and subscribe the oath of office and certify that he or she will comply with the applicable provisions of the Code of Judicial Ethics and the Rules of Court. (C.R.C., Rule 2.831(b).) The oath is mandatory and jurisdictional; an order by a purported temporary judge who fails to qualify by taking the oath is a nullity. (See *In re Damian V.* (1988) 197 C.A.3d 933, 938, 939, 243 C.R. 185 ["the unsworn temporary judge lacked authority to proceed with this matter and the error was jurisdictional"]; *Kajima Engineering & Const. v. Pacific Bell* (2002) 103 C.A.4th 1397, 1400, 127 C.R.2d 464 [retired superior court judge who tried case by stipulation but lacked legal authority to enter judgment was general referee, not temporary judge; thus, oath of office was not required].)

(4) *Order and Filing.* The order designating the temporary judge must be signed by the presiding judge and must refer to the stipulation. (C.R.C., Rule 2.831(b).) The temporary judge may proceed with the hearing, trial, and determination of the cause once the stipulation, order, oath, and certification have been filed. (C.R.C., Rule 2.831(c).)

(5) *Disclosures.* The temporary judge must disclose to the parties any matter subject to disclosure under the Code

of Judicial Ethics. (C.R.C., Rule 2.831(d).)

(6) *Disqualification.* The temporary judge must, in addition to any disqualification required by law, disqualify himself or herself as provided by the Code of Judicial Ethics. (C.R.C., Rule 2.831(e).)

(7) *Withdrawal of Stipulation.* A motion to withdraw a stipulation for the appointment of a temporary judge must be supported by a declaration of facts establishing good cause for allowing a party to withdraw the stipulation. A declaration that a ruling is based on error of fact or law does not establish good cause. Notice of the motion must be served and filed, with a copy mailed or delivered to the temporary judge. The motion is heard by the presiding judge or a judge designated by the presiding judge. If the motion is granted, the presiding judge assigns the case for hearing or trial as promptly as possible. (C.R.C., Rule 2.831(f).)

(8) *Compensation.* Temporary judges serve without compensation unless the parties provide in writing for a rate of compensation. (C.R.C., Rule 2.832.) (See *C.C.P.* 259(d) [court commissioner, if otherwise qualified, may be appointed, but may not receive additional compensation].)

(9) *Special Requirements Where Temporary Judge Is Privately Compensated.* A number of special rules apply to proceedings before privately compensated judges. A party who elects to use the services of a privately compensated temporary judge is deemed to have elected to proceed outside the courtroom. Court facilities and personnel and summoned jurors may not be used without a finding by the presiding judge that their use would further the interests of justice. (C.R.C., Rule 2.833(b).) The clerk must post a notice at the courthouse indicating the name and telephone number of the person to contact to arrange for attendance at any proceeding that would be open to the public if held at the courthouse. (C.R.C., Rule 2.833(a).) (On order that proceeding be heard at site appropriate for public access, see C.R.C., Rule 2.833(c); on motion or application to seal records, see C.R.C., Rule 2.834(a); on motion for leave to file complaint in intervention, see C.R.C., Rule 2.834(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Stipulation.* See *Gridley v. Gridley* (2008) 166 C.A.4th 1562, 1585, 83 C.R.3d 715 [stipulation authorizing temporary judge to resolve family disputes during probate administration did not extend to ancillary property dispute involving nonfamily members that arose during administration of testamentary trust 10 years after probate administration was closed]. (9) *Special Requirements Where Temporary Judge Is Privately Compensated.* The Rules of Court discussed in the text were revised and renumbered in 2009. The rules now refer to temporary judges requested by the parties rather than temporary judges who are privately compensated. The following provisions apply:

(a) Temporary judges requested by the parties and parties in proceedings before them must comply with the applicable requirements of C.R.C., Rule 2.400 (see Supp., *infra*, §§370, 372) concerning the filing and handling of documents and exhibits. (C.R.C., Rule 2.833(a), added in 2009.)

(b) "All proceedings before a temporary judge requested by the parties that would be open to the public if held before a judge must be open to the public, regardless of whether they are held in or outside a court facility." (C.R.C., Rule 2.834(a), added in 2009.) The temporary judge must file, and the court clerk must post at the courthouse, a statement containing specified identification and contact information with respect to proceedings that would be open to the public if heard before a judge. (C.R.C., Rule 2.834(b), renumbered and amended in 2009.)

(c) A party using the services of a temporary judge requested by the parties is deemed to have elected to proceed outside court facilities. Court facilities and personnel and summoned jurors may not be used without a finding by the presiding judge (or the presiding judge's designee) that their use would further the interests of justice. (C.R.C., Rule 2.834(c), renumbered and amended in 2009.) (On order that proceedings be heard at site appropriate for public access, see C.R.C., Rule 2.834(d), renumbered in 2009; on motion or application to seal records, see C.R.C., Rule 2.835(a), renumbered in 2009; on motion for leave to file complaint in intervention, see C.R.C., Rule 2.835(b), renumbered in 2009.)



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D. Attorney as Temporary Judge.

4. Selection of Court Commissioner as Temporary Judge.

2 *Witkin Cal. Proc. Courts* § 351

[§ 351] Selection of Court Commissioner as Temporary Judge.

Although Cal. Const., Art. VI, §21 (supra, §348) requires a stipulation, former C.R.C., Rule 244, imposing a written stipulation requirement and specifying the procedures for the oath and the appointment order, was expressly inapplicable to the selection of a court commissioner as a temporary judge. It was accordingly held by the Court of Appeal that a minute order of the Los Angeles superior court, appointing a commissioner with enlarged powers, was sufficient without a stipulation of the parties. (*Martin v. Martin* (1963) 215 C.A.2d 338, 339, 30 C.R. 293; cf. *In re Gould* (1961) 195 C.A.2d 172, 176, 15 C.R. 326 [similar blanket appointment, but parties then stipulated that commissioner could hear particular matter].)

In *People v. Tijerina* (1969) 1 C.3d 41, 81 C.R. 264, 459 P.2d 680, the California Supreme Court took a different view, disapproving the holding in *Martin*. The stipulation is a constitutional requirement. As to the exception of court commissioners in former C.R.C., Rule 244, a commissioner, by statute, can be a temporary judge "when otherwise qualified so to act," but "in the absence of a stipulation of the parties, he is not so qualified." (1 C.3d 49.) (See *Flahive v. Dana Point* (1999) 72 C.A.4th 241, 246, 85 C.R.2d 51 [court commissioner hearing nuisance abatement application by stipulation had authority to issue abatement warrant]; *Foosadas v. Superior Court* (2005) 130 C.A.4th 649, 653, 30 C.R.3d 358 [defendant who refused to stipulate to preliminary hearing before court commissioner was entitled to appear before judge, even though court commissioner had performed subordinate judicial duties in prior proceeding; invalidating local practice under which party who failed to object to commissioner before commencement of first hearing was deemed to have stipulated to commissioner acting as temporary judge].)

The stipulation need not be in writing, and a party's appearance before and submission for consideration to a commissioner qualified to act as a temporary judge may be a sufficient de facto stipulation. (*E.N.W. v. Michael W.* (1983) 149 C.A.3d 896, 899, 198 C.R. 355.) However, an implied stipulation will not be found where the facts indicate that, although a party did appear before the commissioner, there was no intent to stipulate. (See *In re Horton* (1991) 54 C.3d 82, 284 C.R. 305, 813 P.2d 1335, infra, §353; *People v. Moore* (1969) 270 C.A.2d 486, 490, 76 C.R. 150 [in quasi-criminal proceeding, i.e., narcotic addict commitment, stipulation should not be accepted without full explanation of choices given in open court and made matter of record]; *Yetenekian v. Superior Court* (1983) 140 C.A.3d 361, 367, 189 C.R. 458 [counsel announced ready for trial in mistaken belief that commissioner was responsible only for assigning cases for trial; objection to commissioner's authority was made as soon as counsel learned otherwise]; *In re*

Frye (1983) 150 C.A.3d 407, 409, 197 C.R. 755 [neither petitioner nor attorney knew that commissioner was not judge; posted notice that failure to object would be deemed stipulation was insufficient to establish stipulation]; *In re Courtney H.* (1995) 38 C.A.4th 1221, 1227, 45 C.R.2d 560, *infra*, §352 ["tantamount stipulation" to commissioner acting as temporary judge].)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Knowing Participation Tantamount to Stipulation.

a. In General.

2 Witkin Cal. Proc. Courts § 352

[§ 352] In General.

In re Robert S. (1988) 197 C.A.3d 1260, 1265, 243 C.R. 459, held that the objection of failure to execute a written stipulation may be waived by an express oral stipulation on the record. *In re Lamonica H.* (1990) 220 C.A.3d 634, 637, 270 C.R. 60, relied on *Robert S.* in holding that the requirement of a written stipulation is directory, not jurisdictional, and that knowing participation in proceedings before a referee acting as a temporary judge will be "deemed tantamount to a stipulation."

The county Department of Social Services filed petitions to make the four children dependents of the juvenile court. A contested jurisdictional hearing was conducted by one referee, who found that the children came within Welf.C. 300(d); and a dispositional hearing was conducted by another referee, who ordered that the parents comply with reunification plans and submit to psychological evaluations. H, the father, filed an application for rehearing, on the ground that he did not sign an agreement to allow the referee or temporary judge to hear the case. His application was denied, and he appealed. *Held*, order affirmed.

(a) *Written stipulation requirement is not jurisdictional.*

(1) *In re Heather P.* (1988) 203 C.A.3d 1214, 250 C.R. 468, relying on *In re Damian V.* (1988) 197 C.A.3d 933, 243 C.R. 185, declared that failure to comply with the conditions of former C.R.C., Rule 244 for a written stipulation would make orders by the temporary judge void. (220 C.A.3d 639, 640.)

(2) *Heather* and *Damian* are in direct conflict with *In re Robert S.*, and *Robert S.* is more persuasive. The assumption that the word "shall" in former C.R.C., Rule 244 was intended to void any action taken without compliance with the rule is contrary to Supreme Court decisions rejecting this assumption. (220 C.A.3d 641, citing *Morris v. Marin* (1977) 18 C.3d 901, 136 C.R. 251, 559 P.2d 606, 5 Summary (10th), *Torts*, §248, and *Phillips v. Barron* (1958) 158 C.A.2d 316, 322 P.2d 506.)

(3) Determining whether a provision should be mandatory or directory in effect requires ascertainment of the legislative intent; i.e., the use of "shall" in former C.R.C., Rule 244 is the beginning of the analysis rather than the end.

(220 C.A.3d 642.) Originally the constitutional provision that permitted referees to act as temporary judges further provided that they "shall also be subject to such regulations and orders as may be prescribed by the Judicial Council." But when Cal. Const., Art. VI, §21, was adopted in 1966, the reference to Judicial Council regulations and orders was eliminated; and this omission supports the inference that compliance with former C.R.C., Rule 244 is not a constitutional prerequisite to empowering a temporary judge to act. (220 C.A.3d 643.)

(4) More significant is a consideration of the interests protected by former C.R.C., Rule 244; the rule was not intended to protect a person's rights, but to serve administrative purposes. "Whether consent is oral, written, express or implied, if in fact a party agrees to proceed before a referee and thereafter receives a ruling on the merits from the referee, his reasonable expectations have been fulfilled." The detailed procedure set forth in the rule serves collateral interests of the judicial system. "By requiring a written instrument, the rule prevents disputes as to whether parties have in fact consented and the scope of their consent. ... By further requiring the written approval of a supervising judge and an oath, the rule insures that the activities of temporary judges are monitored and do not impair the administration of the trial courts. These interests are entirely unrelated to [H]'s interest in having his dispute heard in a competent and unbiased tribunal." (220 C.A.3d 644.)

(5) The conclusion that the written stipulation requirement serves strictly administrative purposes is buttressed by consideration of the duties referees may discharge in juvenile proceedings under Welf.C. 300 when they are *not* sitting as temporary judges (Welf.C. 248). Even when a parent or child is unwilling to stipulate, a referee may act as a temporary judge; the stipulation is not necessary to empower a referee, it is necessary only to give his or her acts finality. "[I]t would be illogical to hold that even though a stipulation is not necessary for a referee to act, the failure to obtain one in writing deprived him of jurisdiction." (220 C.A.3d 645.)

(b) *Father's conduct as implied stipulation.*

(1) The department, citing *In re Mark L.* (1983) 34 C.3d 171, 193 C.R. 165, 666 P.2d 22, 10 Summary (10th), *Parent and Child*, §869, argued that a "tantamount stipulation" could be found from H's proceeding without objection in the jurisdictional proceedings. This is unsound; his lack of objection was consistent not only with an understanding that the referee was acting as a temporary judge, but with a belief that the referee was acting as a referee whose decisions would be subject to hearing before a judge. *Mark L.* should be read as holding that the absence of an objection will give rise to a tantamount stipulation "*when a referee exercises some power which is vested only in temporary judges.*" (220 C.A.3d 647.)

(2) "Here the referee at the jurisdictional hearing did not give the notice required by rule 1416(a). Were the referee acting only as a referee and not as a temporary judge, plainly this failure would have been an error. However, if the referee, the parties and their counsel understood the referee was acting as a temporary judge whose orders were not subject to rehearing in the superior court, there was no need to provide the oral notice. In our view the record discloses just such an understanding by the parties. First, the failure to give the notice was not a simple oversight. The record discloses that at the close of the hearing the referee pointedly advised the parties they would receive their 'appellate rights' at the disposition hearing. Thus the parties' right to seek review had not escaped the referee's attention. Second, [counsel for all parties] were present when the referee set the disposition date and declined to give the rule 1416(a) notice. As in *Mark*, we believe their silence reflected a common intent that the referee in the case do things which, in fact, can only be done by a judge. Our conclusion in this regard is supported by the fact that although the disposition date was continued, [H]'s counsel told the referee at the close of the jurisdictional hearing his client wanted an immediate disposition. In our view this conduct is not consistent with any reservations on [H]'s or his counsel's part as to the referee's competence to fully adjudicate [H]'s rights." (220 C.A.3d 647.)

(3) H filed his request for rehearing on the day of the dispositional hearing. "The timing of the request and its reliance on *Heather* suggest strongly [H] and his counsel knew [H]'s consent was necessary for the referee to act as a temporary judge but nonetheless made a conscious decision to remain silent at a time when any error could have been avoided. Indeed, had [H] been unwilling to be bound by the findings of either referee and had he made his feelings

known in a timely manner, one of the referees could have made arrangements for the entire matter to be heard by a superior court judge, thus avoiding the necessity for any de novo review at the trial court level. In our view, given [H]'s and his counsel's obvious knowledge of [H]'s rights, the failure to assert them in a timely manner was tantamount to a stipulation [H]'s case could be heard by the referees sitting as temporary judges." (220 C.A.3d 648.)

In re Richard S. (1991) 54 C.3d 857, 2 C.R.2d 2, 819 P.2d 843, held that lack of a written stipulation is not a jurisdictional defect when the requirements of Cal. Const., Art. VI, §21, are otherwise met. The court approved the reasoning and conclusions in *Robert S. and Lamonica H.* (54 C.3d 864, 865, 866), and disapproved the contrary holdings in *Heather P. and Damian V.* (54 C.3d 866, footnote 5). (See *In re Julio N.* (1992) 3 C.A.4th 1120, 1123, 5 C.R.2d 86 [following *Richard S.*]; *In re Aontae D.* (1994) 25 C.A.4th 167, 171, 30 C.R.2d 176 [following *Richard S.*; requirement of written stipulation in Welf.C. 248 was directory]; 20 *Pepperdine L. Rev.* 294.)

The "tantamount stipulation" doctrine was again applied in the case of *In re Courtney H.* (1995) 38 C.A.4th 1221, 45 C.R.2d 560, a juvenile court proceeding in which a superior court commissioner adjudicated a minor to be a ward of the court and committed him to the California Youth Authority. Although the commissioner had authority only if the parties stipulated to her acting as a temporary judge, under the circumstances--neither the minor nor his counsel having objected to the commissioner acting--they could be deemed to have impliedly given their consent. "Under the 'tantamount stipulation' doctrine, the parties confer judicial power not because they thought in those terms; had they done so, the stipulation presumably would be express. Rather, an *implied* stipulation arises from the parties' common intent that the subordinate judicial officer hearing their case do things which, *in fact*, can only be done by a judge." (38 C.A.4th 1227; quoting *In re Mark L.*, *supra*, and citing *In re Horton* (1991) 54 C.3d 82, 98, 284 C.R. 305, 813 P.2d 1335, *infra*, §353.)

Several additional decisions have involved waiver of the express stipulation requirement. (See *Estate of Fain* (1999) 75 C.A.4th 973, 987, 89 C.R.2d 618 [tantamount stipulation to trial of contested probate matter by private judge; counsel engaged in extended deliberation on choice of judge, filed numerous trial documents, and failed to object to proceedings throughout lengthy trial]; *In re Brittany K.* (2002) 96 C.A.4th 805, 813, 117 C.R.2d 813 [trial of juvenile dependency proceeding before court commissioner sitting as temporary judge; failure to object at time hearing was set before commissioner was tantamount to implied waiver of stipulation, despite refusal to stipulate at hearing; further, claim that implied stipulation was withdrawn on day of hearing was waived by failure to seek rehearing of commissioner's decision before juvenile court judge]; *In re Brittany K.* (2005) 127 C.A.4th 1497, 1503, 26 C.R.3d 487 [claim that commissioner was acting as referee rather than temporary judge was waived by failure to object before expiration of time for rehearing].)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Knowing Participation Tantamount to Stipulation.

b. Capital Case.

2 *Witkin Cal. Proc. Courts* § 353

[§ 353] Capital Case.

In re Horton (1991) 54 C.3d 82, 284 C.R. 305, 813 P.2d 1335, states the issue involved as "whether a court commissioner may conduct a trial in a capital case when no oral or written stipulation of the parties authorized him to act as a temporary judge, but when defense counsel proceeded to trial without objection, knowing that the judge was a court commissioner." (54 C.3d 86.)

Defendant was found guilty of murder and the death penalty was imposed. While his automatic appeal was pending, he filed a petition for habeas corpus. It was uncontroverted (a) that the commissioner's standard practice was to inquire of all counsel whether a stipulation had been filed appointing him as a temporary judge; (b) that neither defendant, nor his counsel, nor the district attorney had ever executed a written stipulation appointing the commissioner as a temporary judge in defendant's case; (c) that neither the commissioner nor defense counsel informed defendant that he had the right to be tried by a regularly appointed or elected superior court judge; (d) that defendant was not given a copy of a stipulation form to sign; and (e) that defendant did not, either orally or in writing, stipulate to trial by the commissioner as a temporary judge. (54 C.3d 87.)

The commissioner's declaration stated that he had reminded defendant's counsel of their understanding that counsel would obtain a stipulation; that both defense counsel had appeared before him on many occasions and knew that he was a commissioner; that neither had ever declined to stipulate to his presiding; and that, when defendant finally appeared in his courtroom, the commissioner assumed that the stipulation had been filed, and believed that counsel shared this assumption. (54 C.3d 88.) *Held*, petition for habeas corpus denied.

(a) The jurisdiction of a court commissioner or any other temporary judge to try a cause derives from the parties' stipulation; in the absence of a proper stipulation the judgment entered by a court commissioner would be void. (54 C.3d 90.)

(b) Petitioner contended that the right to be tried by a judge was within the class of fundamental rights that cannot be denied without a personal, knowing, and voluntary waiver. (54 C.3d 90.) This contention is unacceptable. The cases recognize that a valid stipulation for purposes of the constitutional provision may arise as a result of the *conduct* of the

parties; i.e., conduct "may be tantamount to a stipulation that a court commissioner may sit as a temporary judge." (54 C.3d 91, citing the text.) And the cases refer to the client's *and* the attorney's conduct in entering into the stipulation. (54 C.3d 92.) Thus, "our ratification of the doctrine of tantamount stipulation strongly suggests not only that an express stipulation by the client is unnecessary, but also that counsel's conduct may provide the basis for the tantamount stipulation." (54 C.3d 93.)

(c) The right to trial by a regularly appointed or elected superior court judge is not so fundamental that it necessitates the kind of admonition and waiver that must precede a guilty plea. (54 C.3d 93.) It is the general rule that procedural steps must be taken by the attorney of record, and the term "stipulation" normally refers to an agreement between attorneys. (54 C.3d 94, citing the text.) In criminal as well as civil cases, "counsel is captain of the ship." (54 C.3d 95.) "When the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to *counsel's* complete control of defense strategies and tactics." (54 C.3d 95.)

(d) Federal cases hold that litigants have a personal interest in being tried by an Article III judge; but nothing in these cases suggests that a state constitution cannot provide for consent to trial by a temporary judge. (54 C.3d 96.) The California Constitution contemplates that the ranks of the regular judiciary may be extended from time to time by qualified temporary judges. "This community interest in judicial efficiency is of constitutional magnitude, and somewhat tempers the individual's interest in trial by a regularly appointed judge. This distinction between our Constitution and the federal Constitution persuades us that litigants lack the essential, personal interest in trial by a regularly appointed judge that requires personal waiver." (54 C.3d 97.)

(e) Petitioner also contended that neither his conduct nor that of his attorneys was tantamount to a stipulation, because he did not know he had a right to a regularly appointed judge, and neither he nor his counsel intended to enter into a stipulation. However, under the tantamount stipulation doctrine, "the parties confer judicial power not because they thought in those terms; had they done so the stipulation presumably would be express." (54 C.3d 98.) "Here, it is uncontroverted that counsel participated fully and vigorously in the trial, at every point treating the commissioner as competent to rule on matters which rest solely in the discretion of a superior court judge. This conduct was a tacit recognition of, and reliance upon, the authority of the commissioner to act as a temporary judge." (54 C.3d 98.) And counsel "evinced every intention of securing petitioner's personal written stipulation to trial by the commissioner; that through some oversight they failed to do so does not change the meaning of their conduct." (54 C.3d 100.)

One justice dissented, arguing that the lack of the defendant's personal signature could not be condoned in a death sentence case. (54 C.3d 101.) (On use of court commissioners as temporary judges in criminal cases generally, see 4 Cal. Crim. Law (3d), *Introduction to Criminal Procedure*, §47.)

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6. Default Proceedings.

a. In General: Stipulation Is Not Required.

2 *Witkin Cal. Proc. Courts* § 354

[§ 354] In General: Stipulation Is Not Required.

Barfield v. Superior Court (1963) 216 C.A.2d 476, 478, 31 C.R. 30, created a large and unclear exception to the stipulation requirement of Cal. Const., Art. VI, §21 (supra, §348). A default divorce decree was granted by court commissioner G sitting as a temporary judge. Petitioner husband attacked the decree on the ground that the appointment was invalid. The court first pointed out that, under the then applicable statute, G, as a mere court commissioner, could not act in an uncontested divorce. However, G could act in that proceeding as a properly appointed temporary judge. (216 C.A.2d 478.)

But was he properly appointed without a stipulation, i.e., an *agreement* between the parties or their attorneys? *Held*, in this case: (a) The husband, whose default was duly entered, was not a "party litigant." (b) The California Constitution requires a stipulation "of" and not "between" the litigants, and "[t]he decision to refer a pending cause to a judge pro tempore, and the selection of the individual member of the bar who is to so act, are, in the end, with the court, which must approve and order the designation, not with the litigant. If 'agreement' is here required, it is the agreement between court and litigant which controls." (216 C.A.2d 479.)

A further relaxation of the stipulation requirement was made in *Bill Benson Motors v. Macmorris Sales Corp.* (1965) 238 C.A.2d Supp. 937, 48 C.R. 123. Plaintiff brought a proper municipal court action for damages of less than \$ 5,000. Defendant M Corp., by cross-complaint, sought equitable relief of a purely ancillary and defensive nature, which did not oust the court of jurisdiction (see supra, §§247, 248). Nevertheless, defendant's counsel, insisting on his erroneous position, left the courtroom. The case was assigned for a "default" hearing, and plaintiff and defendant K stipulated that court commissioner H could hear it as a temporary judge. *Held*, judgment for plaintiff affirmed, on alternative grounds:

(a) Quite apart from the stipulation, H, as a municipal court commissioner, had the same power as a judge in chambers to hear an uncontested matter. (238 C.A.2d Supp. 944, citing *West v. U. L. C. Corp.* (1965) 232 C.A.2d 85, 42 C.R. 603.)

(b) A stipulation for a temporary judge need not be signed by a party in default. (238 C.A.2d Supp. 943, citing

Barfield.) To apply this rule to the present case, the court had to treat defendant's refusal to appear at the trial as equivalent to a default entered on failure to answer, relying in part on a broad definition of "default" and in part on the policy against permitting litigants to obstruct the efficient conduct of judicial business. "We conclude that the phrase 'parties litigant or their attorneys of record' does not include parties or attorneys who wilfully remain away from the trial of a cause as appellants and their counsel did in this case. This being a civil case, they cannot be held in contempt, but there is no injustice in ruling that they waived their rights to object to the appointment of the commissioner as a judge pro tempore in this case by their wilful absence." (238 C.A.2d Supp. 944.) (See *Sarracino v. Superior Court* (1974) 13 C.3d 1, 118 C.R. 21, 529 P.2d 53, *infra*, §356; *Lint v. Chisholm* (1981) 121 C.A.3d 615, 621, 177 C.R. 314 [citing *Barfield*, *Bill Benson Motors*, and *Sarracino*; stipulation by plaintiff was sufficient where defendant appeared throughout pretrial proceedings but failed to appear at trial]; *Reisman v. Shahverdian* (1984) 153 C.A.3d 1074, 1092, 201 C.R. 194, *infra*, §355.)

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b. Distinction: Status as Party Litigant Is Not Relinquished.

2 *Witkin Cal. Proc. Courts* § 355

[§ 355] Distinction: Status as Party Litigant Is Not Relinquished.

In *Yetenekian v. Superior Court* (1983) 140 C.A.3d 361, 189 C.R. 458, petitioner's counsel, having requested a jury trial, appeared before a commissioner and announced ready in the belief that the case would be assigned to another department for the trial. The commissioner ruled that petitioner had waived his right to a jury trial, and, when informed that petitioner had not stipulated to trial before a temporary judge, ruled that the attorney's earlier failure to say that he did not stipulate waived the right to object. Petitioner then filed an affidavit of prejudice under C.C.P. 170.6 (supra, §133), which was ruled untimely. Petitioner's attorney, to avoid any contention that his further participation might be construed as a waiver of his objections, then left the courtroom, and the matter was tried in his absence. *Held*, petitioner's refusal to participate in the trial "was consistent with the status of a party litigant throughout the proceeding." (140 C.A.3d 366.)

In *Reisman v. Shahverdian* (1984) 153 C.A.3d 1074, 201 C.R. 194, defendants filed no answer and made no appearance. The commissioner, acting as a temporary judge under stipulation by plaintiff, entered judgment for plaintiff. Despite defendants' refusal to stipulate, the commissioner also heard and denied defendants' subsequent motion to vacate the judgment. *Held*, reversed. The rule that a temporary judge's authority continues until final disposition of the case (see supra, §348) applies in situations where both parties have actually stipulated. (153 C.A.3d 1095, 1096.) When a stipulation is entered by only one party in the other party's absence, and the absent party appears at a subsequent proceeding, that party becomes a party litigant with the right to stipulate or to refuse to stipulate to the temporary judge's power to act in the subsequent proceeding. (153 C.A.3d 1096, 1097.)

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c. Ancillary Proceeding.

2 *Witkin Cal. Proc. Courts* § 356

[§ 356] Ancillary Proceeding.

In *Sarracino v. Superior Court* (1974) 13 C.3d 1, 118 C.R. 21, 529 P.2d 53, a divided court upheld a stipulation for a commissioner to try applications for temporary support, signed only by plaintiff wife. The wife filed a proceeding for dissolution of marriage and an action for support of an adult daughter. The husband was personally served with summonses, initial pleadings, and notices of hearing on the applications for temporary support. He did not appear at the hearing, the wife and her counsel signed a stipulation for the appointment of a commissioner as a temporary judge, and the commissioner heard the matter and rendered support orders. The husband then filed responsive pleadings and motions to vacate the orders. The motions were denied, and he sought mandamus. *Held*, writ denied.

The argument of the husband, accepted by the Court of Appeal and three dissenting Supreme Court justices, was that (a) the "stipulation" must be an agreement between both parties, and that (b) his time to plead in the main proceeding had not yet expired, and his default in the ancillary proceeding for a pendente lite order did not constitute the kind of default that deprived him of his status as a "party litigant." The majority opinion answered this argument as follows:

(a) The construction of the phrase "parties litigant," as it appears in *Estate of Kent* (1936) 6 C.2d 154, 57 P.2d 901, and *Barfield v. Superior Court* (1963) 216 C.A.2d 476, 31 C.R. 30, *supra*, §354, was retained by the Constitutional Revision Commission when Cal. Const., Art. VI, §21, was adopted in 1966. (13 C.3d 7.)

(b) Service of the order to show cause in the proceeding for temporary support gave jurisdiction over the husband, and put him in default for purposes of entering orders which have most of the attributes of final judgments (e.g., severable from the judgment in the main proceeding, appealable). (13 C.3d 8, 9.)

(c) Temporary judges may be appointed to hear causes connected with but distinct from the underlying principal case; and, for the purpose of defining "party litigant," petitioner's default with respect to the applications for temporary support is "indistinguishable" from that of a defendant whose default is entered for failure to plead within the required time. (13 C.3d 10.)

The dissenting opinion finds this conclusion most alarming: "Under the rule embraced by the majority a party to a lawsuit not in default may have his status as a party litigant ebb and flow throughout the lawsuit, dependent entirely upon his physical presence in a courtroom. Indeed his status may change if he is absent when a proceeding begins, but appears late in the courtroom after the hearing is under way. To illustrate the vagaries of the majority theory: one is a party litigant when served with summons, he is not a party litigant when he fails to appear at the order to show cause hearing, he becomes a party litigant again when he seeks a modification of the order to show cause, he loses his role as a party litigant when he fails to appear at a hearing on an order to show cause in re contempt, and he becomes one once again when he appeals from the order. Under such an oscillating concept, the status of the parties from moment to moment becomes a definitional quagmire." (*13 C.3d 15.*) (See *64 Cal. L. Rev. 655.*)

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7. Scope of Stipulation.

2 *Witkin Cal. Proc. Courts* § 357

[§ 357] Scope of Stipulation.

The stipulation and order must relate to the particular proceeding. In the case of *In re Chapman* (1956) 141 C.A.2d 387, 295 P.2d 573, C, selected as a temporary judge, tried a husband's petition for modification of a child custody order, found for the husband, and ordered the wife to deliver the children. Thereafter, on the affidavit of the husband, a contempt order to show cause was signed by a regular judge, but the proceedings were transferred to the temporary judge who heard them, found the wife guilty, and committed her to the county jail. On habeas corpus, the appellate court ordered her discharged. There was no stipulation or order that C be appointed to hear the *contempt proceedings*, and he was therefore entirely without jurisdiction. (141 C.A.2d 390.) (See *In re Wales* (1957) 153 C.A.2d 117, 315 P.2d 433 [following *Chapman* on similar facts]; *Walker v. San Francisco Housing Authority* (2002) 100 C.A.4th 685, 692, 122 C.R.2d 758 [deemed stipulation under local rules giving commissioner acting as temporary judge authority to rule on discovery matters included ruling on motion to set aside default judgment entered following terminating sanctions for discovery abuse; motion was direct continuation of discovery proceedings].)

In re Plotkin (1976) 54 C.A.3d 1014, 127 C.R. 190, involved a show cause proceeding to compel P, an expert witness, to testify at a deposition. Only the moving litigant stipulated that a commissioner could act as a temporary judge. P, ordered to appear and testify on a given date, refused. Thereafter, both litigants in the main action stipulated that the commissioner could hear evidence of P's failure to comply with the order. P was found in contempt and sentenced. *Held*, habeas corpus granted. The "cause" before the court was the order to show cause, and the "parties litigant" were P, who demanded his witness fee before testifying, and the litigant in the main action seeking to take his deposition. Because P was not a party to the stipulations, the orders were in excess of jurisdiction. (54 C.A.3d 1017.) (On power of temporary judge to cite attorney for contempt, see 7 *Cal. Proc.* (5th), *Trial*, §170.)

In re Steven A. (1993) 15 C.A.4th 754, 19 C.R.2d 576, involved dependency proceedings, including a jurisdictional hearing under Welf.C. 356, a dispositional hearing under Welf.C. 358, and a permanency planning hearing. The child's father stipulated that a court commissioner could act as a temporary judge to hear the "within action" until final determination and "any new proceedings," while reserving the right to withdraw the stipulation as to new proceedings. The father attempted to withdraw the stipulation after the jurisdictional hearing and again after the dispositional hearing. *Held*, the stipulation was irrevocable as to the jurisdictional and dispositional hearings, but could have been withdrawn as to the permanency planning hearing.

(a) Although the jurisdictional and dispositional hearings are separate events, and the dispositional hearing may be long delayed, the statutory framework contemplates that one follows the other. If jurisdiction is sustained, disposition must be determined. Orders at the dispositional hearing are directly related to the findings at the jurisdictional hearing, and an appeal from the dispositional order is sufficient to raise issues arising from the jurisdictional hearing. Thus, the jurisdictional and dispositional hearings are facets of the same underlying cause and the stipulation remains binding through the dispositional hearing. (*15 C.A.4th 769.*)

(b) The ambiguous stipulation here is analogous to a contract, and, under principles of contract law, ambiguous language is interpreted to give effect to all provisions. If "within action" referred to the entire dependency proceeding, the reference to "new proceedings" would be irrelevant. Thus, the appropriate interpretation limits "within action" to the pending jurisdictional/dependency hearing, and "new proceedings" refer to later, separate hearings, like the permanency planning hearing, which do not flow automatically from the pending matter. (*15 C.A.4th 771.*)

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E. Clerks and Administrative Employees.

1. Supreme Court.

2 Witkin Cal. Proc. Courts § 358

[§ 358] Supreme Court.

(1) *Clerk.* The Supreme Court Clerk/Administrator is appointed by the court and serves at its pleasure. With the approval of a majority of the justices, the clerk appoints such deputy clerks and other employees as are required. The clerk's duties, and those of the deputy clerks and other employees, are determined by the court. (*Govt. C. 68843.*) For the most part, these are specified in the California Rules of Court. (See, e.g., C.R.C., Rule 8.500 et seq. [proceedings in Supreme Court]; C.R.C., Rule 10.1020 [authority and duties of clerk/administrator].) (On duties with respect to court records, see *supra*, §327.)

(2) *Clerical and Administrative Staff.* "The Supreme Court may appoint and employ during its pleasure such phonographic reporters, assistants, secretaries, librarians, marshals, and other employees as it deems necessary for the performance of the duties and exercise of the powers conferred by law upon it and its members." Except as otherwise provided, the Supreme Court determines the duties and fixes the compensation of these officers and employees. (*Govt.C. 68806.*)

(3) *Research Attorneys.* Under this statutory authority the court maintains a staff of professional research attorneys assigned to individual justices and a central research staff. (See *62 Cal. L. Rev. 309*; *81 Cal. L. Rev. 765* [federal judicial clerkship selection]; on modern law clerk or research attorney, see generally Witkin, *Manual on Appellate Court Opinions*, §7 et seq.)

(4) *Reporter of Decisions.* The Supreme Court appoints a Reporter of Decisions and assistant reporters, to serve at its pleasure. They perform the duties prescribed by law and by the rules, orders, and practices of the Supreme Court. (*Govt.C. 68900.*) The usual function of a reporter is to handle the publication of the opinions of the courts, and to write various editorial notes, including headnotes and syllabi. Some states delegate the headnote-writing function to law book publishers, and in 1940 this plan was adopted in California. Under the present system, headnotes are prepared under contract by Lexis-Nexis, which publishes the Official Reports. Editorial material is, however, under the general supervision of the Reporter, who edits the opinions as directed by the Supreme Court. (C.R.C., Rule 8.1105(e).)

The Reporter has prepared a handbook of legal style for California courts and lawyers, entitled *California Style Manual*. The manual sets forth the style to be used in the publication of the Official Reports. The fourth edition was

published by Thomson West in 2000.

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E. Clerks and Administrative Employees.

2. Courts of Appeal.

2 *Witkin Cal. Proc. Courts* § 359

[§ 359] Courts of Appeal.

(1) *Clerk*. Each Court of Appeal appoints a clerk who serves at its pleasure. (*Govt.C. 69141*.) A single clerk (with deputies) serves the court even though it may have more than one division. The clerks perform the duties determined by the appointing court. (*Govt.C. 69141*; see, e.g., C.R.C., Rule 10.1008 [clerk must keep records showing divisions in which cases and proceedings are pending]; C.R.C., Rule 10.1020 [authority and duties of clerk/administrator].)

(2) *Clerical and Administrative Staff*. "Each court of appeal may appoint and employ during its pleasure ... such phonographic reporters, assistants, secretaries, librarians, and other employees as it deems necessary for the performance of the duties and exercise of the powers conferred by law upon it and its members." Except as otherwise provided, the court determines the duties and fixes the compensation of these officers and employees. (*Govt.C. 69141*.)

(3) *Research Attorneys*. Like the Supreme Court, the Courts of Appeal employ a staff of professional research attorneys. (See *supra*, §358.)

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E. Clerks and Administrative Employees.

3. Superior Court.

a. Clerk and Deputy Clerks.

1. Nature of Office.

2 *Witkin Cal. Proc. Courts* § 360

[§ 360] Nature of Office.

(1) *Statutory Authorization*. "The Legislature shall ... provide for the officers and employees of each superior court." (Cal. Const., Art. VI, §4; see generally *15A Am.Jur.2d* (2000 ed.), *Clerks of Court* §1 et seq.)

(2) *County Clerk*. At one time, there was no separate office of clerk of the superior court; the *county clerk* was ex officio the clerk of the superior court of the county, and it was one of the clerk's official duties as county clerk to act as clerk of the court. (See *Union Bank & Trust Co. of Los Angeles v. Los Angeles* (1938) 11 C.2d 675, 678, 81 P.2d 919 [sureties on bond of county clerk were liable for derelictions in capacity as clerk of court]; *Zumwalt v. Superior Court* (1989) 49 C.3d 167, 171, 260 C.R. 545, 776 P.2d 247, *infra*, §369; *Anderson v. Superior Court* (1995) 11 C.4th 1152, 48 C.R.2d 766, 907 P.2d 1312, *infra*, §369; *Santa Clara v. Santa Clara* (1969) 1 C.A.3d 493, 495, 81 C.R. 643 [offices are legally distinct; hence, when county clerk performed duties of court clerk, county was not responsible for clerk's torts]; *St. John v. Superior Court* (1978) 87 C.A.3d 30, 37, 150 C.R. 697; *Price v. Superior Court* (1986) 186 C.A.3d 156, 163, 230 C.R. 442, *infra*, §369, quoting the text [single office of county clerk, one of whose duties was to act as clerk of court].)

(3) *Clerk of the Court*. The clerk of the superior court is now a separate office. In addition to the powers, duties, and responsibilities provided by statute, the clerk of the court exercises or performs the powers, duties, and responsibilities required or permitted of the county clerk in connection with judicial actions, proceedings, and records. (*Govt.C. 69840*.)

(4) *Deputies*. The clerk attends the sessions of the court. (*Govt.C. 69841*.) This duty is generally performed by a deputy or courtroom clerk. (See *People v. Ramirez* (1931) 112 C.A. 507, 510, 297 P. 51 [authority of deputy county clerk].) An important practical application of this practice is in connection with the filing of papers. The judge of a department of the superior court sits as a court, with his or her own clerk. Where a statute or rule requires that papers be filed with the *clerk*, it is not necessary that they be delivered to the clerk's main office; it is sufficient if they are deposited with the courtroom clerk in the courtroom or chambers. (See *Keller v. Gerber* (1920) 49 C.A. 515, 518, 193 P. 809 ["every courtroom in which a deputy county clerk is assigned under the law is as much a part of the county clerk's office as if the partitions were removed and it was in fact a part of one room"]; *Andrews v. Metzner* (1927) 83

C.A. 764, 770, 257 P. 203 [time of filing is time of delivery to courtroom clerk]; *People v. Ramirez, supra* [filing is complete on delivery of papers to courtroom clerk even though they are subsequently lost].) However, filing in the clerk's office may be required. (See C.R.C., Rule 3.1302(a) [papers related to law and motion proceeding must be filed in clerk's office unless otherwise provided by local rule].)

(5) *Duties*. The many duties of the clerk cannot be satisfactorily described except in connection with the particular areas in which they are performed. The listing in *Govt.C. 69841* et seq. is, however, an instructive guide. (See *infra*, §361 et seq.)

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3. Superior Court.

a. Clerk and Deputy Clerks.

2. Ministerial Functions.

2 Witkin Cal. Proc. Courts § 361

[§ 361] Ministerial Functions.

The familiar declaration that the clerk has purely ministerial functions does not mean that the clerk's duties are confined to such clerical tasks as accepting papers for filing and keeping records. Many of the clerk's acts are judicial in the sense that they determine the rights of parties to the litigation; e.g., the entry of a judgment or order, default, or dismissal. The significance of the "ministerial" label is that the clerk has neither power to decide questions of law nor any discretion in performing those judicial duties; the clerk must act in strict conformity with statutes, rules, and orders of the court. The many applications of this principle are discussed in detail in particular subjects of this work. (For illustrations see *Lane v. Pellissier* (1929) 208 C. 590, 592, 283 P. 810 [no power to change record entry of judgment to correct what he thought was mistake in date]; *Crossman v. Vivienda Water Co.* (1902) 136 C. 571, 574, 69 P. 220 [no power to enter default contrary to statutory authority]; *Isbell v. Sonoma* (1978) 21 C.3d 61, 71, 145 C.R. 368, 577 P.2d 188 [no authority to reject confession of judgment for inadequate proof that debtor has made valid waiver of due process rights]; *Rose v. Leland* (1912) 20 C.A. 502, 504, 129 P. 599 [no power to enter default by determining that defendant's answer is legally insufficient]; *Montgomery v. Neilon* (1919) 41 C.A. 184, 189, 182 P. 456 [no power to enter plaintiff's voluntary dismissal by determining that defendant's answer seeking affirmative relief is legally insufficient]; *Liberty Loan Corp. of North Park v. Petersen* (1972) 24 C.A.3d 915, 919, 101 C.R. 395 [no authority to enter default judgment for deficiency after creditor has dealt with and sold personal property that was security for debt sued upon; exercise of judicial discretion is required].)

This observation in *Page v. Superior Court* (1888) 76 C. 372, 18 P. 385, is worth noting: "True, in determining in a particular case whether he shall make the register entry, the clerk enters into an inquiry *quasi* judicial, but this does not make him a judicial officer. A ministerial officer is frequently required to make such an inquiry antecedently to official action." (76 C. 374.)

Because the clerk does not act judicially, the conclusive presumption of regularity and correctness that ordinarily protects a judgment against collateral attack is not applicable to a clerk's entry. But the lesser rebuttable presumption that "official duty has been regularly performed" (*Ev.C. 664; 1 Cal. Evidence (4th), Burden of Proof and Presumptions, §89*) does apply and gives verity to the clerk's record unless it is affirmatively shown to be wrong. (*Hart v. Capital Film*

Co. (1921) 54 C.A. 659, 664, 202 P. 483 [entry of default]; *Estate of Crabtree (1992) 4 C.A.4th 1119, 1125, 6 C.R.2d 224* [endorsement of notice of appeal with date on which it was presented for filing]; cf. *Lane v. Pellissier*, supra [time of entry of judgment; presumption overcome].) (See *People v. Funches (1998) 67 C.A.4th 240, 243, 78 C.R.2d 882*, quoting the text [duty of clerk to mark untimely notice of appeal "received but not filed"].)

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3. Superior Court.

a. Clerk and Deputy Clerks.

3. Control by Court.

2 *Witkin Cal. Proc. Courts* § 362

[§ 362] Control by Court.

The clerk, as a ministerial officer of the court, is subject to the control of the judge. Four practical implications of this principle are as follows:

(1) The clerk must obey orders of the court within its jurisdiction and cannot be held civilly liable to a litigant for the results of doing so. (*Mundell v. Wells* (1919) 181 C. 398, 400, 184 P. 666; cf. *Navarro v. Lippold* (1948) 86 C.A.2d 677, 679, 195 P.2d 543 [clerk properly refused to comply with order made by superior court after taking of appeal had wholly deprived it of jurisdiction].)

(2) The normal remedy of a party aggrieved by an act or omission of the clerk is to apply to the court for an order directed to the clerk. (*Wolf v. Mulcrevy* (1917) 35 C.A. 80, 169 P. 259 [denying petition for mandamus to clerk, on ground that remedy of application to superior court is adequate].)

(3) "Misbehavior in office, or other willful neglect or violation of duty" by the clerk is punishable as contempt. (*C.C.P. 1209(a)(3)*.)

(4) The failure of a clerk to perform any duty imposed by statute or the Appellate Rules that delays the filing of the appellate record is an unlawful interference with the reviewing court's proceedings. "It may be treated as an interference in addition to or instead of any other sanction that may be imposed by law for the same breach of duty." (C.R.C., Rule 8.23.)

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4. Process and Notices.

2 *Witkin Cal. Proc. Courts* § 363

[§ 363] Process and Notices.

The clerk must issue required process and notices. (*Govt.C. 69843.*) Familiar examples include the following:

- (1) Summons (*C.C.P. 412.20*).
- (2) Writ of execution (*C.C.P. 699.510*).
- (3) Probate notices and citations (*Prob.C. 1230, 1240*).
- (4) Subpenas to witnesses (*C.C.P. 1986*).
- (5) Notices in connection with appeal (*C.R.C., Rules 8.100, 8.130, 8.616*).

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5. Minutes and Entries.

aa. In General.

2 *Witkin Cal. Proc. Courts* § 364

[§ 364] In General.

The clerk must keep the minutes and records of the court, and enter all orders, judgments, and decrees that are required to be entered. Entry must be made "within the time specified by law, or forthwith if no time is specified," but failure in this respect does not affect the entry's validity or effectiveness. (*Govt.C. 69844*; see *Cox v. Tyrone Power Enterprises* (1942) 49 C.A.2d 383, 394, 121 P.2d 829 [making minute entries and filing written orders]; *Deshrow v. Rhodes* (1969) 1 C.A.3d 733, 738, 82 C.R. 138, *infra*, §365.)

When an in camera proceeding is held and a party is excluded from being represented, the clerk must include in the minutes the nature of the hearing and only those references to writings or witnesses that will not disclose privileged information. (C.R.C., Rule 2.585(a).)

Generally, permanent minutes of court orders are maintained separately from the case files in minute books and judgment records are maintained separately from the case files in judgment books. However, in counties in which the clerk places individual minute orders in the court's file of actions in chronological order, and a microfilmed copy is made for the permanent records of the court before the case files are destroyed, the clerk need not keep a minute book, but must still keep a judgment book. (*Govt.C. 69844.7*.)

Among the relevant statutes governing the entry of judgments and orders are the following:

- (1) *C.C.P. 585* (entry of default judgment).
- (2) *C.C.P. 664, 668, 668.5* (entry of judgment).
- (3) *C.C.P. 1134* (entry of confession of judgment).
- (4) *Prob.C. 1048* (entry of probate orders).

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5. Minutes and Entries.

bb. Permanent Minutes.

2 *Witkin Cal. Proc. Courts* § 365

[§ 365] Permanent Minutes.

The specified time to take certain steps, such as entering an order granting a new trial, is jurisdictional. Hence, the order (unless signed and filed) must be entered in the permanent minutes within the 60-day period after service of notice of entry of judgment. (*C.C.P.* 660; see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §§72, 73.) In the larger counties with many judges, there may be a lapse of several days between the minute order and the entry in the permanent minutes. (See *Desherow v. Rhodes* (1969) 1 *C.A.3d* 733, 738, 82 *C.R.* 138 [no uniform system in California courts]; *Meskeil v. Culver City Unified School Dist.* (1970) 12 *C.A.3d* 815, 821, 96 *C.R.* 773 [permanent minutes are only official record]; *Fortenberry v. Weber* (1971) 18 *C.A.3d* 213, 219, 95 *C.R.* 834, 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §86 [where only minutes are in longhand, these are permanent minutes].)

In *Desherow*, an order granting a new trial was made on the 60th day, by a written direction of the judge delivered to the clerk with instructions to enter it in the permanent minutes on that day. The actual entry in the permanent minutes was, however, 2 days later, as shown by the clerk's entry stamp. *Held*, the order was timely.

(a) Entry in the permanent minutes is not a single act, but a process followed in making minute orders part of the permanent records. (1 *C.A.3d* 740.) The essential elements of the process are preparation of a written minute order, recordation of the date and substance in a permanent record, and delivery to the custodian of records. Additional steps, not essential elements of the process, include filing of the order in a temporary minute binder and stamping it with the date of entry. (1 *C.A.3d* 741.)

(b) Timely performance of the essential steps was substantial compliance with the time provisions of the statute, even though there was a delay in performing one of the additional steps. "[T]he sole procedural error arose from the failure of a deputy clerk to stamp an order for a new trial with the clerk's entry stamp on the day he was instructed to do so by the judge. We do not think such a slip nullifies the timely entry of the order in the permanent minutes of the court when the essentials of such entry have otherwise been complied with. The failure of the minute and calendar clerk to follow the judge's instructions in stamping the minute order amounts to no more than clerical nonfeasance with respect

to an order whose processing had already satisfied the essentials of entry in the permanent minutes of the court. Since essentials had been satisfied, deficiencies in the further processing of the order were properly classified as clerical error, which could be either disregarded, or, if deemed appropriate, routinely corrected." (1 C.A.3d 745.) (See *Hollister Convalescent Hosp. v. Rico* (1975) 15 C.3d 660, 671, 125 C.R. 757, 542 P.2d 1349, 9 Cal. Proc. (5th), Appeal, §617 [approving result of *Desherow* and its reasoning regarding substantial compliance but disapproving its reliance on estoppel; defendant had proceeded with second trial without raising timeliness issue until after appeal from second judgment was taken].)

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6. Miscellaneous Duties.

2 Witkin Cal. Proc. Courts § 366

[§ 366] Miscellaneous Duties.

Other duties of the clerk include the following:

- (1) Approve and accept bail (P.C. 1269b(a)); mail notices regarding forfeiture of bail (P.C. 1305, 1305.2).
- (2) Keep the seal of the court (*Govt.C. 68080*).
- (3) Administer oaths or affirmations (*C.C.P. 2093*); take affidavits (*C.C.P. 2012*).
- (4) Transfer records to other courts (*C.C.P. 399*).
- (5) Receive verdicts (*C.C.P. 618*).
- (6) Accept papers served on an attorney whose office or residence is unknown (*C.C.P. 1011*) or on a nonresident party whose attorney's office is unknown (*C.C.P. 1015*).
- (7) Perform various acts in connection with preparation of the record on appeal (C.R.C., Rule 8.130 et seq.) and the transmission of the record and exhibits to the reviewing court (C.R.C., Rule 8.150 et seq.).
- (8) Make the return in a proceeding for a writ of review (*C.C.P. 1070*).
- (9) Report to the Judicial Council on the business of the court (*Govt.C. 68505*).
- (10) Deposit money paid into court with the county treasurer (*Govt.C. 68084*; *C.C.P. 573*; see *Metropolitan Water Dist. of Southern Calif. v. Adams* (1948) 32 C.2d 620, 626, 197 P.2d 543).

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7. Fees.

2 *Witkin Cal. Proc. Courts* § 367

[§ 367] Fees.

(1) *In General.* The clerk must charge and collect statutory fees for specified services, such as filing pleadings and other papers, preparing or certifying copies, issuing writs, etc. *Govt.C. 70611* et seq. list services calling for fees. (On uniform fee schedule, see 4 *Cal. Proc. (5th), Pleading*, §25.)

No fees are payable by the state or political subdivisions or by public officers acting in their official capacity. (*Govt.C. 6103*; see *Garden Grove Sanitary Dist. v. Orange (1984)* 162 *C.A.3d* 842, 852, 208 *C.R.* 777 [*Govt.C. 6103* does not exempt sanitary districts from payment of landfill and transfer station gate fees].)

(2) *Payment by Credit Card.* Under specified circumstances, trial courts may accept the payment of fees by credit card and may impose a fee for that purpose. (See *Govt.C. 6159*; see *C.R.C., Rules* 3.100, 10.820.)

(3) *Collection in Advance.* The clerk must collect fees in advance and must refuse to file a paper until receipt of the fee. (*Kientz v. Harris (1953)* 117 *C.A.2d* 787, 789, 257 *P.2d* 41; *Carpenters Health & Welfare Trust Fund v. Shafer (1983)* 146 *C.A.3d* 504, 509, 194 *C.R.* 266.)

(4) *Collection Procedure.* The following provisions govern the collection of fees:

(a) *Notice if check is returned without payment.* If the clerk accepts a first paper for filing, the payment is made by check, and the check is later returned without payment, the clerk must notify the party who tendered the check that the check has been returned, that an administrative charge will be imposed to reimburse the court for the cost of processing the returned check, and that the party has 20 days from the date the notice is mailed to pay the filing fee and the administrative charge. If the check was tendered by a person who is not a party, the clerk must notify both that person and the party's attorney (or the party, if not represented). The fee and the administrative charge may be paid in cash, by certified check, or by other means specified by the court, but not by traveler's check or personal check. (*C.C.P. 411.20(a).*) The same rules apply where a check tendered by or on behalf of an adverse party is returned without payment. (*C.C.P. 411.20(d).*)

(b) *Filing is voided if check is returned without payment.* The clerk must void the filing if the full amount of the fee is not paid within the 20-day period. Voided filings may be disposed of without preserving a copy in the court records immediately after the 20-day period has elapsed. (C.C.P. 411.20(b).) The same rules apply where a check tendered by or on behalf of an adverse party is returned without payment. (C.C.P. 411.20(d).) (See *Hu v. Silgan Containers Corp.* (1999) 70 C.A.4th 1261, 1266, 83 C.R.2d 333 [trial court lost jurisdiction to reinstate complaint voided for failure to pay fee within 20 days after notice of nonpayment].)

(c) *Fee must be paid before trial or hearing.* If a trial or hearing is scheduled to be heard before expiration of the 20-day period in which to pay a fee for which a check has been returned without payment, the fee must be paid before the trial or hearing. If it is not, the court must "void the filing and proceed as if it had not been filed." (C.C.P. 411.20(e).)

(d) *Proceedings are suspended if check is returned without payment.* If the clerk performs a service or issues a document for which a fee is required, the fee is paid by check, and the check is returned without payment, the court may suspend further proceedings "as to the party for whom the check was tendered." If the court so orders, the party tendering the check is notified by mail of the suspension. Additional notice is required where the person who tenders payment is not a party but only acts on behalf of a party. (C.C.P. 411.20(f).)

(e) *Administrative charge.* Where a check for a filing fee has been returned without payment, the clerk must impose an administrative charge for the administrative costs incurred. The charge is either \$ 25 or a reasonable amount not exceeding the actual cost, determined by the court. The notice of nonpayment must state the amount of the charge. (C.C.P. 411.20(g).) The charge must be paid with the filing fee. (C.C.P. 411.20(a).)

(f) *Refund of adverse party's fee if first paper is voided for nonpayment.* Where an adverse party files a responsive pleading and pays a filing fee and the original filing is later voided for nonpayment, the responsive pleading is also voided. Within 20 days from the date the court mails notice that the response has been voided, the adverse party may request a refund. The court must refund the fee without an administrative charge. A refund is available if the adverse party has filed a responsive pleading only, but not if that party has filed a cross-complaint or other first paper seeking affirmative relief for which there is a filing fee. (C.C.P. 411.20(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* As amended in 2008, Govt.C. 6103 does not apply to civil jury fees and deposits.



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b. Administrative Officers and Employees.

1. In General.

2 Witkin Cal. Proc. Courts § 368

[§ 368] In General.

A court may employ an executive officer. (C.R.C., Rule 10.610(a).) "Acting under the direction of the presiding judge, the court executive officer is responsible for overseeing the management and administration of the nonjudicial operations of the court and allocating resources in a manner that promotes access to justice for all members of the public, provides a forum for the fair and expeditious resolution of disputes, maximizes the use of judicial and other resources, increases efficiency in court operations, and enhances service to the public." (C.R.C., Rule 10.610(b).) (On particular duties, see C.R.C., Rule 10.610(c).) The executive officer has the authority, consistent with the court's personnel plan, to hire, discipline, and terminate nonjudicial employees. (See *Suidan v. San Diego* (1999) 72 C.A.4th 916, 921, 85 C.R.2d 535 [superior court judges properly delegated power to fire court employees to administrative officer].)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Transfer of Duties From Clerk to Executive Officer.

2 *Witkin Cal. Proc. Courts* § 369

[§ 369] Transfer of Duties From Clerk to Executive Officer.

At one time, the county clerk was ex officio the clerk of the superior court. (See *supra*, §360.) Former Govt.C. 69898 (repealed in 2002) authorized superior courts by local rule to transfer the county clerk's judicial duties to the court's executive or administrative officer. In *Price v. Superior Court* (1986) 186 C.A.3d 156, 230 C.R. 442, the Madera County Superior Court adopted a local rule assigning the duties of four court clerks from the county clerk to the executive officer. The county clerk sought mandamus to nullify the transfer. *Held*, petition denied.

(a) Characterization of the county clerk as ex officio clerk of the superior court does not indicate an intent to maintain two distinct offices. Rather, there is a single office of county clerk, one of whose duties is to act as clerk of the superior court. (186 C.A.3d 162, 163, citing *Union Bank & Trust Co. of Los Angeles v. Los Angeles* (1938) 11 C.2d 675, 81 P.2d 919, and disagreeing with *St. John v. Superior Court* (1978) 87 C.A.3d 30, 150 C.R. 697.)

(b) The legislative intent in enacting former Govt.C. 69898 was to promote efficiency in the operation of the superior courts, and there is no support for the conclusion in *St. John* that the Legislature intended to limit the authority granted by the statute to those functions least related to the court's daily operation. (186 C.A.3d 165, 166.)

(c) Apart from the statutory authority, the rule can also be upheld under the doctrine of separation of powers. (186 C.A.3d 166.) The inherent powers of the courts would permit the transfer of the clerks to the superior court staff when necessary to the court's effective functioning. (186 C.A.3d 171, 172.)

In *Zumwalt v. Superior Court* (1989) 49 C.3d 167, 260 C.R. 545, 776 P.2d 247, the court rejected a constitutional challenge by a county clerk to a similar rule. "[T]he designation of the county clerk as ex officio clerk of the superior court does not create a separate office whose incumbent may claim any right by virtue of his status as county clerk alone to perform court-related duties. The county clerk must perform any duties required by the Legislature to be performed by a superior court clerk. He may not, however, claim the right to perform any such duties which the Legislature has, by enactment of section 69898, permitted a superior court to transfer to an executive or administrative officer." (49 C.3d 180.) "To the extent that *Price v. Superior Court* ... suggests that some court-related duties must be left to the county

clerk to avoid 'destruction of the office,' it is disapproved, as is *St. John v. Superior Court* ... , which misconstrued section 69898 as authorizing transfer of those duties which were allocated by statute to the 'county clerk,' but not those which the statute specified were to be performed by the 'clerk of the superior court.' " (49 C.3d 180, footnote 16.)

In *Anderson v. Superior Court* (1995) 11 C.4th 1152, 48 C.R.2d 766, 907 P.2d 1312, plaintiff county clerk challenged the transfer of his duties as court clerk to the court's executive officer. *Held*, the transfer could be made before expiration of the county clerk's elective term.

(a) Former Govt.C. 69898 by its terms permits transfer of the county clerk's duties, and plaintiff took office with actual or constructive notice of its provisions. Although the statute is silent as to transferring duties before expiration of the clerk's term, it is not ambiguous or uncertain on that point. (11 C.4th 1161.)

(b) In deciding whether a transfer of the duties of an elected official implicates the right to vote, the issue is whether the transferred duty is one that may be performed only by a person elected to do so, or whether it is properly assignable in the first instance to an appointee. The duties of the clerk fall into the latter category. No provision of law requires that the person assigned the duties of superior court clerk be elected to perform those duties. (11 C.4th 1160.)

(c) Furthermore, the voters' rights were not infringed, because voters have no right to elect the official who will perform the duties of clerk of the superior court. Cal. Const., Art. VI, §4, gives to the Legislature authority to determine who will carry out the functions of court clerk. (11 C.4th 1161.)

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c. Records and Papers.

1. In General.

2 *Witkin Cal. Proc. Courts* § 370

[§ 370] In General.

(1) *Custody of Records and Papers.* The clerk must "safely keep or dispose of according to law all papers and records filed or deposited in any action or proceeding before the court." (*Govt.C. 69846*; see *20 Am.Jur.2d (2005 ed.)*, *Courts* §24 et seq.; on clerk's use of facsimile signature on documents maintained in the ordinary course of business, see *Govt.C. 69848*.) "Only the clerk may remove and replace papers in the court's files. Unless otherwise ordered by the court, filed papers may only be inspected by the public in the office of the clerk and released to a court officer or authorized court personnel for use in a court facility. No original papers filed with the clerk may be used in any location other than a court facility, unless so ordered by the presiding judge." (C.R.C., Rule 2.400(a).) (On restricting public access to court records, see *supra*, §35; on public access to evidence, see *supra*, §39; on sealing court records, see *supra*, §41 et seq.)

(2) *Proceedings Before Temporary Judge or Referee.* In a case pending before a temporary judge or referee, whether privately compensated or not, original papers must be filed with the clerk. The filing party provides the temporary judge or referee with a filed-stamped copy of each relevant paper, but may, where the paper may be filed without the payment of a fee, provide a true copy accompanied by a declaration about the date of filing in lieu of a filed-stamped copy. (C.R.C., Rule 2.400(b).)

(3) *Unlawful Detainer Files.* In 1991, a 3-year pilot project in three counties restricted public access to unlawful detainer files until 30 days after the complaint was filed. The intended goal was to limit defective claims under *Arrieta v. Mahon* (1982) 31 C.3d 381, 182 C.R. 770, 644 P.2d 1249, 8 Cal. Proc. (5th), *Enforcement of Judgment*, §336, prompted by "unscrupulous" eviction defense services using court filings to solicit and defraud tenants. (See Stats. 1991, Chap. 1007, §1.) The restriction on public access was extended statewide in 1993.

Access to the file in an unlawful detainer proceeding filed as a limited civil case is restricted for 60 days, except in an action to terminate a mobilehome park tenancy. If the defendant prevails in the action within the 60-day period, the restriction on access becomes permanent. Access during the 60-day period is available in specified circumstances, including to any person by court order on a showing of good cause. (C.C.P. 1161.2.) (See 12 *Summary* (10th), *Real*

Property, §731.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Custody of Records and Papers*. The portion of C.R.C., Rule 2.400(a) quoted in the text was amended in 2008 and 2009. It now provides as follows: "Only the clerk may remove and replace records in the court's files. Unless otherwise provided by these rules or ordered by the court, court records may only be inspected by the public in the office of the clerk and released to authorized court personnel or an attorney of record for use in a court facility. No original court records may be used in any location other than a court facility, unless so ordered by the presiding judge or his or her designee."

(2) *Proceedings Before Temporary Judge or Referee*. C.R.C., Rule 2.400(b) was subdivided, revised, and expanded in 2009. It now provides as follows:

(a) Original documents in a case pending before a temporary judge or referee must be filed with the clerk in the same manner as though the case were being heard by a judge, including time limits specified by law and required fees. The filing party must provide the temporary judge or referee with a filed-stamped copy of each document related to the issues before the temporary judge or referee. (C.R.C., Rule 2.400(b)(1).)

(b) If a document must be filed with the court before it is considered by a judge, the temporary judge or referee may not accept or consider a copy unless the document has the clerk's file stamp or is accompanied by a declaration stating that the original has been submitted to the court for filing. (C.R.C., Rule 2.400(b)(2).)

(c) If a document would ordinarily be filed with the court after it is submitted to a judge or if a party submits an ex parte application, the party that submits the document or application to a temporary judge or referee must file the original with the court no later than the next court day and must promptly provide a filed-stamped copy of the document or application. (C.R.C., Rule 2.400(b)(3).)

(d) A party that has submitted a document to a temporary judge or referee must immediately notify the temporary judge or referee if the document is not accepted for filing by the court or if the filing is subsequently canceled. (C.R.C., Rule 2.400(b)(4).)



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c. Records and Papers.

2. Register and Index of Actions.

2 Witkin Cal. Proc. Courts § 371

[§ 371] Register and Index of Actions.

(1) *Register of Actions.* The clerk is permitted, but not required, to keep a register of actions with the title of the cause, the date of commencement, and a memorandum of each subsequent proceeding in the action with its date. (*Govt.C. 69845.*) In lieu of a register under *Govt.C. 69845*, the clerk may keep a register by preserving all the records "filed, lodged, or maintained in connection with the case." (*Govt.C. 69845.5.*)

(2) *Indexes.* The clerk must keep indexes of all actions and proceedings, separately indexed for plaintiffs and defendants in civil actions, and for defendants in criminal actions. (*Govt.C. 69842.*) A single alphabetical index may be maintained as long as the plaintiff-defendant distinction is retained. Indexes may be created and maintained "by photographic, microphotographic, photocopy, mechanical, magnetic or electronic means." (C.R.C., Rule 10.851.) (For comparable records in federal courts under *F.R. Civ. P., Rule 79*, see 12 Federal Practice and Procedure (Wright and Miller) §3106; 8 Federal Procedure, L. Ed. §20:237.)

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c. Records and Papers.

3. Exhibits, Depositions, and Administrative Records.

aa. Custody.

2 *Witkin Cal. Proc. Courts* § 372

[§ 372] Custody.

(1) *In General.* The clerk is the custodian of exhibits. The clerk may not release an exhibit except by a court order, and must require a signed receipt for a released exhibit. (C.R.C., Rule 2.400(c)(1).) (See *Union Bank & Trust Co. of Los Angeles v. Los Angeles* (1934) 2 C.A.2d 600, 609, 38 P.2d 442 [money deposited as exhibit]; *People v. Brucker* (1983) 148 C.A.3d 230, 241, 195 C.R. 808 [transcript of sentencing proceedings was properly admitted as evidence of prior conviction; it was copy of public record in custody of public entity and had been certified by its custodian, the superior court clerk].)

(2) *Proceeding Outside Court Facilities.* Where a proceeding before a temporary judge or referee is held outside court facilities, the temporary judge or referee keeps exhibits and delivers them to the clerk at the conclusion of the proceeding, unless the parties provide for an alternative disposition by written stipulation. On the request of the temporary judge or referee, the clerk delivers exhibits to the temporary judge or referee, who may not release them to any person other than the clerk. However, the temporary judge or referee must make exhibits available during business hours for inspection by any person within a reasonable time after a request. (C.R.C., Rule 2.400(c)(2).)

(3) *Deposition Transcripts and Tapes.* The attorney for the party who notices a deposition is the custodian of the transcript (C.C.P. 2025.550) and the taping operator is the custodian of tape copies (C.C.P. 2025.560).

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Proceeding Outside Court Facilities.* The provisions of C.R.C., Rule 2.400 discussed in the text were renumbered, revised, and expanded in 2009. The following provisions apply:

(a) In proceedings conducted outside of court facilities, the temporary judge or referee must keep the exhibits and deliver them, properly marked, to the clerk at the conclusion of the proceedings, unless the parties file, and the court approves, a written stipulation providing for a different disposition of the exhibits. On request of the temporary judge or referee, the clerk must deliver exhibits filed or lodged with the court to the temporary judge or referee, who may not

release them to any person other than the clerk, unless the court orders otherwise. (C.R.C., Rule 2.400(c)(2).)

(b) "Documents and exhibits in the possession of a temporary judge or referee that would be open to the public if filed or lodged with the court must be made available during business hours for inspection by any person within a reasonable time after request and under reasonable conditions." (C.R.C., Rule 2.400(d)(1).) The temporary judge or referee must file with the court a statement of contact information for purposes of access to documents and exhibits. (C.R.C., Rule 2.400(d)(2).)

(3) *Deposition Transcripts and Tapes*. As amended in 2009, *C.C.P. 2025.560* now refers to audio or video recordings.



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3. Exhibits, Depositions, and Administrative Records.

bb. Destruction.

2 Witkin Cal. Proc. Courts § 373

[§ 373] Destruction.

Exhibits, depositions, and administrative records introduced at the trial of a civil action or proceeding must be retained by the clerk until dismissal or final determination of the action, unless the court orders return of an exhibit, deposition, or administrative record to one of the parties. (*C.C.P. 1952(a)*.) At the conclusion of the trial, the court must order that exhibits and depositions be destroyed or otherwise disposed of by the clerk. (*C.C.P. 1952(c)*.) The clerk must send written notice of the order to the parties by first-class mail. (*C.C.P. 1952(c), (d)*.) However, a party may preclude destruction or disposition for a period not to exceed 1 year by filing a written notice requesting preservation for a stated period. (*C.C.P. 1952(b)*.)

For exhibits, depositions, and administrative records introduced at *trial*, the "operative destruction or disposition date shall be 60 days following final determination of the action or proceeding," including final determination on appeal. (*C.C.P. 1952(c)*.) For exhibits, depositions, and administrative records introduced at *posttrial hearings*, the "operative date of destruction or disposition shall be 60 days following the conclusion of the hearing, or if an appeal is taken, upon final determination of the appeal." (*C.C.P. 1952(d)*.)

Notwithstanding any other provision of the law, the court may order the destruction or disposition of an exhibit, deposition, or administrative record that remains in the custody of the court or clerk for 5 years following: (1) the expiration of the time for appeal, (2) a final determination following appeal, (3) the granting of a motion for a new trial if no memorandum or motion to set for trial has been made within 5 years, or (4) the dismissal of the action or proceeding. The court also retains discretion to order the destruction or disposition of an exhibit, deposition, or administrative record that remains in the custody of the court or clerk for 10 years after the introduction or filing of the action or proceeding. A party may preclude destruction or disposition for a period not to exceed 1 year by filing a request that the exhibit, deposition, or administrative record be preserved for a stated period. Sealed files must be retained for at least 2 years after the date on which destruction would otherwise be authorized. (*C.C.P. 1952.3*.)

SUPPLEMENT: [This section is current through the latest supplement]



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aa. In General.

2 Witkin Cal. Proc. Courts § 374

[§ 374] In General.

(1) *Standards and Statutory Scheme.* Standard 10.80 of the Standards of Judicial Administration requires courts to develop records management standards consistent with standards adopted by the Judicial Council for the creation, use, maintenance, and destruction of court records. The Judicial Council's Court Record Management Standards are available from the Administrative Office of the Courts.

The statutes governing the retention and destruction of trial court records were extensively revised in 1994. A statutory scheme for the management of all trial court records was adopted as a new chapter of the Government Code (*Govt.C. 68150 et seq.*). (On public access to electronic trial court records, see C.R.C., Rule 2.500 et seq., *supra*, §40.)

(2) *Definitions.* The following definitions apply:

(a) *Court record.* The term includes (1) all filed papers and documents, (2) administrative records filed in an action or proceeding, depositions, paper exhibits, transcripts, and tapes of recorded proceedings "filed, lodged, or maintained in connection with the case" unless properly disposed of earlier, and (3) records listed in *Govt.C. 68152(j)* (listing 18 categories of records, including warrants, bonds, reporter's notes, electronic recordings, and a number of other items). (*Govt.C. 68151(a).*)

(b) *Notice of destruction and no transfer.* The term means that the clerk has given notice of the destruction of superior court records and there is no request and order to transfer the records as provided by the Rules of Court. (*Govt.C. 68151(b).*) (On notice of destruction of superior court records under C.R.C., Rule 10.856, see *infra*, §377.)

(c) *Final disposition of the case.* The term means that an acquittal, dismissal, or order of judgment has been entered, the judgment has become final, and no postjudgment motions or appeals are pending. In a criminal prosecution, "order of judgment" means imposition of sentence, entry of an appealable order, or forfeiture of bail without issuance of a bench warrant or calendaring of other proceedings. (*Govt.C. 68151(c).*)

(d) *Retain permanently.* The term means that the original records "shall never be transferred or destroyed." (*Govt.C. 68151(d).*) (On records permanently retained, see *infra*, §376.)

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(2) *Definitions.*

(a) *Court record.* *Govt.C. 68151(a)* was amended in 2009 to refer to recordings of electronically recorded proceedings rather than tapes.



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bb. Preservation.

2 *Witkin Cal. Proc. Courts* § 375

[§ 375] Preservation.

(1) *Preservation Media.* Trial court records may be preserved "in any form of communication or representation, including optical, electronic, magnetic, micrographic, or photographic media or other technology capable of accurately producing the original record" according to specified industry standards. Specifications for electronic recordings as the official record of oral proceedings are governed by the Rules of Court (see C.R.C., Rule 2.954). (*Govt.C. 68150(a).*) No "additions, deletions, or changes" may be made to the content, and records must be indexed for "convenient access." (*Govt.C. 68150(b).*)

(2) *Certified Copies.* A copy of a record preserved or reproduced according to *Govt.C. 68150(a)* and (b) is deemed the original record and may be certified as a correct copy of the original. (*Govt.C. 68150(c).*) (See C.R.C., Rule 2.952.)

(3) *Public Access.* Records preserved or reproduced according to *Govt.C. 68150(a)* and (b) must be made "reasonably accessible" to the public for viewing and duplication "as would the paper records," and reasonable provision must be made for duplicating at cost. (*Govt.C. 68150(h).*)

(4) *Storage and Backup.* A record preserved or reproduced according to *Govt.C. 68150(a)* and (b) must be stored in a manner and place that "reasonably assures its preservation" for the prescribed retention period. A backup copy of electronic recordings made as the official record of oral proceedings may not be required unless otherwise specified by the Rules of Court. (*Govt.C. 68150(d).*)

(5) *Periodic Review of Media.* Courts must periodically review the media in which records are stored to assure that a medium is not obsolete and that the records can be accessed and reproduced using current technology. Instructions for access in a medium other than paper must be documented. Records must be reproduced before the expiration of their estimated lifespan for the medium in which they are stored according to specified industry standards. (*Govt.C. 68150(g).*)

(6) *Archived Records*. Records that are preserved permanently (see *infra*, §376) and historical records preserved for research (see *infra*, §376) may be preserved or reproduced according to *Govt.C. 68150(a)* and (b) but must also be preserved for the duration of the record's retention period on paper or microfilm, or in another archival form according to specified industry standards. Records that must be preserved more than 10 years but not permanently may be reproduced on media other than paper or microfilm, but must be reproduced before the expiration of their estimated lifespan for the medium in which they are stored according to specified industry standards. (*Govt.C. 68150(f)*.)

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cc. Retention.

2 *Witkin Cal. Proc. Courts* § 376

[§ 376] Retention.

(1) *Records Permanently Retained.* The following records are permanently retained:

(a) Adoption. (*Govt.C. 68152(a).*)

(b) Change of name. (*Govt.C. 68152(b).*)

(c) Eminent domain. (*Govt.C. 68152(c)(4).*)

(d) Paternity. (*Govt.C. 68152(c)(8).*)

(e) Actions affecting title or interest in real property, except unlawful detainer. (*Govt.C. 68152(c)(10).*)

(f) Capital felony. (*Govt.C. 68152(e)(1).*)

(g) Probate. (*Govt.C. 68152(h)(3).*)

(h) Various indexes. (*Govt.C. 68152(j)(10).*)

(i) Superior court judgments in other than infraction, misdemeanor, and limited civil cases. (*Govt.C. 68152(j)(12).*)

(2) *Records Retained for Historical and Research Purposes.* Former *Govt.C. 69503(e)* required the superior court clerk to retain a scientifically valid sample of cases for historical or other research purposes, and *C.R.C., Rule 10.855* establishes a program for sampling superior court records.

(3) *Statutory Retention Periods.* *Govt.C. 68152* sets forth time periods following "final disposition of the case" (see *supra*, §374) for various categories of cases after which particular records may be destroyed if there is no request and

order for transfer of the records. (On transfer, see *infra*, §377.) For example, except as otherwise specified, records in family law cases must be retained for 30 years. (*Govt.C. 68152(c)(5).*) For civil actions generally, the retention period is 10 years unless another period is specified. (*Govt.C. 68152(c)(1).*) Historical superior court records preserved for research are exempt. (*Govt.C. 68152.*)

(4) *Extension.* The retention period otherwise provided is extended in the following circumstances:

(a) By court order on application of a party or an interested member of the public or on the court's own motion. (*Govt.C. 68152(k)(1).*)

(b) On renewal of a judgment, to the extended time for enforcing the judgment. (*Govt.C. 68152(k)(2).*)

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dd. Transfer.

2 Witkin Cal. Proc. Courts § 377

[§ 377] Transfer.

The following requirements govern the transfer of superior court records:

(1) *Notice*. The court gives 30 days' written notice of the intent to destroy records open to public inspection to entities that have informed the Judicial Council or the court directly that they wish to be notified. (C.R.C., Rule 10.856(b).) For this purpose, the term "records" does not include records in limited civil, small claims, misdemeanor, or infraction cases. (C.R.C., Rule 10.856(a).) The time for retention of any records specified in the notice may be extended on the court's own motion or on application of any interested person. (C.R.C., Rule 10.856(g).)

(2) *Transfer Order*. If an entity requests possession, the records are transferred to the entity on the written order of the presiding judge unless the request is denied for good cause. The cost of the transfer is paid by the requesting entity. (C.R.C., Rule 10.856(c).) No fee may be charged for requesting possession. (C.R.C., Rule 10.856(g).)

(3) *Competing Requests*. If two or more entities request the same records, the records are transferred to the entity "that shows the greatest capacity of caring for and preserving the records according to commonly recognized archival principles and practices of preservation and access, and that provides the greatest likelihood of making them available for historical or research purposes." (C.R.C., Rule 10.856(d).)

(4) *Public Access*. The receiving entity must make the records reasonably available to the public, and must provide for duplicating the records at cost. (C.R.C., Rule 10.856(e).)

(5) *Destruction*. If no request for transfer is received within 30 days, the clerk may destroy records on the written order of the presiding judge. Records retained for historical and research purposes under C.R.C., Rule 10.855 (*supra*, §376) are exempt. (C.R.C., Rule 10.856(f).)

(6) *Forms*. C.R.C., Rule 10.856(h) requires the following Judicial Council forms for the transfer of superior court

records:

Form No. REC-001(N) [Notice of Intent to Destroy Superior Court Records; Offer to Transfer Possession].

Form No. REC-001(R) [Request for Transfer or Extension of Time for Retention of Superior Court Records].

Form No. REC-002(N) [Notice of Hearing on Request for Transfer or Extension of Time for Retention of Superior Court Records; Court Record; Release and Receipt of Records].

Form No. REC-002(R) [Release and Receipt of Superior Court Records].

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ee. Destruction.

2 *Witkin Cal. Proc. Courts* § 378

[§ 378] Destruction.

(1) *Destruction of Records.* Except as provided by *Govt.C. 68150(f)* (records preserved permanently; see *supra*, §375), records preserved or reproduced according to *Govt.C. 68150(a)* and (b) (*supra*, §375) may be disposed of under *Govt.C. 68153. (Govt.C. 68150(e).)* Court records ready for destruction under the retention periods set forth in *Govt.C. 68152* (*supra*, §376) may be destroyed on order of the presiding judge by shredding, burning, and other means. However, confidential or sealed records may not be destroyed by burial or recycling unless the text of the records is first obliterated. An index of destroyed records must be kept. (*Govt.C. 68153.*)

(2) *Report to Judicial Council.* The superior court must semiannually provide the Judicial Council with a list of records (a) destroyed, (b) preserved for research (see *supra*, §376), or (c) transferred (see *supra*, §377). (C.R.C., Rule 10.855(l).) The Judicial Council has adopted a form for that purpose. (See Judicial Council Form No. REC-003 [Report to Judicial Council: Superior Court Records Destroyed, Preserved, and Transferred].)

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F. Trial Court Reporters.

1. Appointment and Qualifications.

2 Witkin Cal. Proc. Courts § 379

[§ 379] Appointment and Qualifications.

(1) *Official Reporters.* The superior court may appoint as many competent phonographic reporters, known as official reporters, and as many temporary official reporters, as necessary to perform the duties and exercise the powers conferred by law on the court and its members. (*Govt.C. 69941.*) (See *Govt.C. 68086* [use of certified shorthand reporter as temporary official reporter].)

The official reporter must be licensed as a certified shorthand reporter (*Govt.C. 69942*) and must take an oath of office (*Govt.C. 69946*). (On licensing requirements, see *B. & P.C. 8000* et seq.; on nature of position, see *McNeil v. Board of Retirement (1958) 51 C.2d 278, 332 P.2d 281*; *Los Angeles v. Vaughn (1961) 55 C.2d 198, 10 C.R. 457, 358 P.2d 913*; *Malick v. Contra Costa County Flood Control & Water Conservation Dist. (1982) 131 C.A.3d 50, 52, 53, 182 C.R. 386.*)

(2) *Sequential Record of Reporters.* The clerk of the court must keep a sequential record of reporters working on each case and provide requested information to the public within 1 working day. (C.R.C., Rule 2.950.)

West's Key Number Digest, Courts 57(1)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Official Reporters.* On licensing requirements and disciplinary action, see C.E.B., Professional Licensing §16.47 et seq.



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2. Duties of Reporter.

a. Reporting and Clerical Assistance.

2 Witkin Cal. Proc. Courts § 380

[§ 380] Reporting and Clerical Assistance.

(1) *Shorthand Report of Proceedings.* The reporter reports the proceedings (a) in a civil case, on the order of the court or at the request of a party, (b) in a felony case, on the order of the court or at the request of the prosecution, the defendant, or the defendant's attorney, and (c) in a misdemeanor or infraction case, on the order of the court. Reporting consists of taking down in shorthand all testimony, objections made, rulings, exceptions taken, arraignments, pleas, sentences, arguments of the attorneys to the jury, and remarks and instructions given by the judge or other judicial officer. (C.C.P. 269(a).) (On electronic recording, see *infra*, §383.)

(2) *Reporter's Notes.* Govt.C. 69955, governing the reporter's notes, provides as follows:

(a) *Official record.* Reporting notes are "official records of the court," and must be kept by the reporter in a place designated by the court, or, if ordered by the court, delivered to the clerk. (Govt.C. 69955(a).)

(b) *Form.* Notes may be kept in any communication form, including paper, electronic, magnetic media, or other appropriate technology under specified preservation and reproduction standards, and must be stored in an appropriate environment. (Govt.C. 69955(b).) Notes must be labeled and indexed, and instructions for accessing notes not in paper form must be documented. (Govt.C. 69955(c).) A duplicate copy of notes not in paper form must be stored in a manner and place reasonably assuring preservation. (Govt.C. 69955(d).)

(c) *Cost of medium.* The reporter must be reimbursed for the actual cost of the medium on which notes are kept, whether paper, diskette, or other media. (Govt.C. 69955(i).)

(d) *Transcript by same reporter.* If notes are to be transcribed, the reporter who took the notes must be given the first opportunity to do so, unless the reporter cannot be located, refuses to do so, or is incompetent. (Govt.C. 69955(h); on transcription, see *infra*, §381.)

(e) *Destruction.* Reporting notes in criminal cases may, on court order, be destroyed after 10 years, except that notes in a capital felony case (including the preliminary hearing) may only be destroyed as authorized by the Supreme

Court. Reporting notes in other cases may, on court order, be destroyed after 5 years. (*Govt.C. 69955(e)*.) The statute does not require an independent order of destruction in each case; a standing administrative order of the superior court permitting destruction after 5 years unless a judge of the superior court issues a written order prohibiting destruction meets the requirements of the statute. (*People v. Everett (1990) 224 C.A.3d 932, 936, 274 C.R. 429.*)

(f) *Storage technology.* Stored records must be reviewed periodically to assure that current technology is capable of accessing and reproducing the records for the required retention period. (*Govt.C. 69955(f)*.)

(g) *Delivery to clerk.* Reporting notes must be delivered to the clerk of the court on the reporter's death, retirement, resignation, dismissal, termination of appointment, or any other absence for more than 30 days as designated by the court. On the court's order, the notes may be returned to the reporter after the reporter returns from an absence. (*Govt.C. 69955(g)*.)

(3) *Shorthand Report of Order or Opinion.* Judges of the superior court may have a shorthand report and transcription made of (a) an opinion rendered in the trial of a felony case or an unlimited civil case, (b) an order, petition, citation, commitment, or judgment in a probate proceeding, a juvenile court proceeding, or a proceeding concerning the bond of a county official, or (c) testimony or judgment in a proceeding relating to child custody or support. (*C.C.P. 274a*.)

(4) *Other Duties.* When not engaged in these duties, the reporter must render stenographic and clerical assistance as directed by the court. (*Govt.C. 69956*.)

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2. Duties of Reporter.

b. Transcription.

2 Witkin Cal. Proc. Courts § 381

[§ 381] Transcription.

(1) *In General.* If a transcript is ordered by the court or requested by a party, the reporter must, within a reasonable time after trial designated by the court, transcribe the proceedings or a specified portion of the proceedings, certify the transcripts as correctly reported and transcribed, and, when directed by the court, file them with the clerk. The reporter must also transcribe the proceedings if requested to do so by a nonparty who is entitled to a transcript, regardless of whether the party was permitted to attend the proceedings. (*C.C.P.* 269(b); see Law Rev. Com. Comment [discussing circumstances in which nonparty is entitled to transcript].)

(2) *Daily Transcript.* The transcription is usually made as a part of the record on appeal. (See *C.R.C.*, Rules 8.130, 8.144, 8.320.) However, a daily transcript is sometimes requested in civil cases or ordered in criminal cases. (See *Peoples Ditch Co. v. Foothill Irr. Dist.* (1932) 123 C.A. 257, 260, 11 P.2d 86; *Fraser v. Payne* (1935) 3 C.2d 630, 45 P.2d 345.)

(3) *Copy of Transcript in Electronic Form.* Although the original transcript is on paper, a court, party, or other person entitled to a transcript may request a copy in machine-readable form. (*C.C.P.* 271.)

(4) *Transcription of Recording.* Unless otherwise ordered, the reporter need not transcribe an electronic recording that is admitted into evidence. The party submitting the evidence must submit a typewritten transcript that becomes part of the clerk's transcript in the event of an appeal. (*C.R.C.*, Rule 2.1040.)

(5) *Effect of Certification.* A certified transcript is prima facie evidence of the proceedings. (*C.C.P.* 273(a).) A rough draft transcript may not be certified as the official transcript, used as the official transcript, or used to contradict the official transcript. (*C.C.P.* 273(b).)

In *Los Angeles County Court Reporters Assn. v. Superior Court* (1995) 31 C.A.4th 403, 37 C.R.2d 341, *infra*, §383, the court discussed the effect of *C.C.P.* 273: The statute "does nothing more than create an evidentiary presumption. ... It may apply when a party seeks to prove that something was said or done during the course of a proceeding. If a transcribed and certified report of the official reporter or official reporter pro tempore is not obtainable because a

request for such a record was not made ... , then the presumption would not be available to prove what occurred in the proceeding. However, the absence of an official shorthand record would not prohibit litigants from establishing the relevant event by other legitimate means, such as by an admission ... or independent testimony. ... Conversely, the existence of an official shorthand record would not bar the presentation of evidence tending to demonstrate its inaccuracy. ... Moreover, an official reporter's transcript is not required in every instance to perfect an appeal; a settled statement or an agreed statement is, under specified terms and conditions, an authorized substitute." (31 C.A.4th 409, 410.)

West's Key Number Digest, Courts 57(.5) et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Effect of Certification*. The instant visual display of testimony or proceedings may not be certified as the official transcript, used as the official transcript, or used to contradict the official transcript. (C.C.P. 273(c), added in 2009.) Unless extended, this provision is effective until January 1, 2017. (C.C.P. 273(d), added in 2009.)



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2. Duties of Reporter.

c. Sanctions for Failure To File Transcript.

2 Witkin Cal. Proc. Courts § 382

[§ 382] Sanctions for Failure To File Transcript.

A reporter may not act as an official reporter in any court until the reporter "has fully completed and filed all transcriptions of the reporter's notes in any case on appeal which the reporter is required by law to transcribe." (*Govt.C. 69944*; see *Malick v. Contra Costa County Flood Control & Water Conservation Dist. (1982) 131 C.A.3d 50, 52, 53, 182 C.R. 386* [reporter was prohibited from acting as official reporter until all transcripts were filed, even though failure to file civil transcript was due to necessity of giving priority to criminal transcripts].)

The failure of a court reporter to perform any duty imposed by statute or the Rules of Court that delays the filing of the appellate record is an unlawful interference with the reviewing court's proceedings. "It may be treated as an interference in addition to or instead of any other sanction that may be imposed by law for the same breach of duty." (C.R.C., Rule 8.23.)

A reporter's certificate may be suspended or revoked, or certification may be denied, on the basis of repeated failure, whether wilful or not, to transcribe notes and file transcripts of cases pending on appeal within the time required by law, or to transcribe or file notes of other proceedings within the time required by law or agreed by contract. (*B. & P.C. 8025(e)*.)

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d. Electronic Recording.

2 *Witkin Cal. Proc. Courts* § 383

[§ 383] Electronic Recording.

Electronic recording in lieu of shorthand reporting is authorized only in limited circumstances. A limited civil case or a misdemeanor or infraction proceeding may be electronically recorded with electronic equipment approved by the Judicial Council when an official court reporter or a temporary court reporter is not available. (*Govt.C. 69957.*)

C.R.C., Rule 2.952 governs the marking and storage of recordings, the preparation of transcripts, and the use of recordings as the record on appeal without transcription. C.R.C., Rule 2.954 states the specifications for audio and audiovisual equipment used in making recordings. (See *Moustakas v. Dashevsky* (1994) 25 C.A.4th 752, 754, 30 C.R.2d 753 [certified transcript of audio portion of videotape, but not videotape itself, is part of record on appeal].)

In *Los Angeles County Court Reporters Assn. v. Superior Court* (1995) 31 C.A.4th 403, 37 C.R.2d 341, a superior court maintained records of general civil proceedings by means of electronic recording devices where neither the court nor a party requested that a verbatim record be taken by an official shorthand reporter pursuant to C.C.P. 269 (supra, §381). The county court reporters association and a county employees association petitioned the Los Angeles Superior Court for a writ of mandamus, challenging the use of electronic recording in these circumstances. The trial judge issued a writ ordering the county's superior courts, other than those courts authorized to use electronic recording in a demonstration project pursuant to former C.C.P. 270, to cease this practice. *Held*, reversed; electronic recording was proper.

(a) There is nothing in C.C.P. 269 that condemns the policy implemented by the court. That statute only requires that the official reporter "take down" civil proceedings if requested by either party or the judge. (31 C.A.4th 407.)

(b) The pilot project statute does not manifest a legislative intent that only certified shorthand reporters may be used in other superior courts. The statute is applicable only when C.C.P. 269 would otherwise have required that a record be taken by an official reporter. (31 C.A.4th 409.)

(c) The fact that the record prepared by the official reporter is deemed by C.C.P. 273 (supra, §381) to constitute prima facie evidence of its contents does nothing more than create an evidentiary presumption. It does not evidence a

legislative intent to forbid all means of making a verbatim record of civil proceedings in superior courts except by the use of official shorthand reporters. (31 C.A.4th 410.)

(d) The fact that former Govt.C. 72194.5 expressly provided for electronic recording in municipal courts when a court reporter was unavailable does not indicate a legislative intent to restrict the use of electronic recording to municipal courts. (31 C.A.4th 411.)

The Judicial Council adopted Rules of Court, effective January 1, 1994, to permit electronic recording of superior court proceedings. In *California Court Reporters Assn. v. Judicial Council of Calif.* (1995) 39 C.A.4th 15, 46 C.R.2d 44, plaintiff court reporters petitioned for a writ of mandamus to prevent implementation of the electronic recording rules. The trial court denied the writ, but the parties stipulated to a stay of enforcement of the rules during the appeal. *Held*, the rules are inconsistent with statute and beyond the authority of the Judicial Council.

(a) Under Cal. Const., Art. VI, §6 (infra, §390), the Judicial Council may adopt rules for court administration, practice, and procedure not "inconsistent with statute." The correct test of inconsistency is not whether it is impossible to give both the statute and the rule concurrent effect but whether the rule is inconsistent with the legislative intent behind the statute that the rule was intended to implement. (39 C.A.4th 25, 26, citing *People v. Hall* (1994) 8 C.4th 950, 35 C.R.2d 432, 883 P.2d 974.)

(b) Under *Los Angeles County Court Reporters Assn. v. Superior Court*, electronic recording may be used in the absence of a request for an official shorthand reporter. (39 C.A.4th 26.) While no statute expressly prohibits a superior court from making an official record by electronic means, the statutes governing official records evidence a legislative intent to authorize electronic recording only in specified circumstances, not in superior courts generally. (39 C.A.4th 29.) The fact that the Legislature has authorized electronic recording in some contexts (e.g., in municipal court) "suggests strongly" that the Legislature "does not intend that electronic recording of superior court proceedings be the method of creating an official record." (39 C.A.4th 31.)

(c) Until the Legislature amends C.C.P. 269 to permit electronic recording to create an official record, "the normal practice in California superior courts is for an official shorthand reporter to create the official record." In adopting rules to the contrary, the Judicial Council exceeded its constitutional authority. (39 C.A.4th 33.) (See *California Court Reporters Assn. v. Judicial Council of Calif.* (1997) 59 C.A.4th 959, 964, 69 C.R.2d 529 [later appeal; "The Legislature has *not* authorized the creation of an official superior court record by electronic means under any circumstances"]; 37 *San Diego L. Rev.* 47 [response of Orange and Los Angeles Counties to ban on electronic recording]; 40 *Santa Clara L. Rev.* 103.)

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SUPPLEMENT: [This section is current through the latest supplement]

The instant visual display of testimony or proceedings may not be certified as the official transcript, used as the official transcript, or used to contradict the official transcript. (C.C.P. 273(c), added in 2009.) Unless extended, this provision is effective until January 1, 2017. (C.C.P. 273(d), added in 2009.)



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F. Trial Court Reporters.

3. Compensation.

a. Fees in Civil Cases.

2 Witkin Cal. Proc. Courts § 384

[§ 384] Fees in Civil Cases.

Except in counties where a special statute provides otherwise, the reporter receives specified fees. (*Govt.C. 69947.*) These are:

(1) *Reporting contested case*: \$ 55 per day. (*Govt.C. 69948(a).*) Higher fees are provided by statute for certain counties, while in others the board of supervisors is permitted to prescribe a higher rate. (*Govt.C. 69948(b)-(z).*)

(2) *Reporting default or uncontested case*: \$ 10 for each case; if more than four are reported in 1 day, or two or more are reported in conjunction with a contested case, \$ 45 per day. (*Govt.C. 69949.*)

(3) *Transcription*: The transcription fee is (a) 85 cents for 100 words for the original ribbon or printed copy, and (b) 15 cents for 100 words for a copy purchased at the same time by the court, party, or person purchasing the original. (*Govt.C. 69950(a).*) The fee is (a) 20 cents for 100 words for a first copy purchased by a court, party, or person who does not simultaneously purchase the original, and (b) 15 cents for 100 words for each additional copy purchased at the same time. (*Govt.C. 69950(b).*)

The reporter may charge an additional 50% for providing a daily copy. (*Govt.C. 69951.*) Where a daily transcript in a civil case requires the services of more than one reporter, an additional fee equal to the daily rate for temporary reporters is required. (*Govt.C. 69953.5.*)

Transcripts prepared by a reporter using computer assistance and delivered on a medium other than paper are compensated at the same rate set for paper transcripts, except that the reporter may charge an additional fee not to exceed the cost of the medium or any copies. (*Govt.C. 69954(a).*) The fee for a second copy of a transcript on appeal in computer-readable form ordered by the requesting party within 120 days after the original transcript was filed or delivered is one-third of the rate for a second copy specified in *Govt.C. 69950.* (*Govt.C. 69954(b).*) (On authority to make copy for internal use without additional fee and prohibition on providing copy to others, see *Govt.C. 69954(d).*)

The fees listed above are subject to exceptions under several statutes dealing with different classes of larger

counties. The reporters are placed on a salary basis and receive no fees for reporting; they are, however, entitled to the regular fees for transcribing. (See *Govt.C. 70040* et seq.; *People v. Moroney* (1944) 24 C.2d 638, 642, 150 P.2d 888 [additional fees payable by state officer despite exemption provisions of *Govt.C. 6103*].)

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F. Trial Court Reporters.

3. Compensation.

b. Advance Payment in Civil Cases.

2 Witkin Cal. Proc. Courts § 385

[§ 385] Advance Payment in Civil Cases.

A reporter may not perform any services in a civil action, other than transcription, until the reporter's fee has been deposited with the clerk or the reporter. (*Govt.C. 69953.*) The parties are responsible for paying a fee equal to the actual cost of those services per half day of each judicial day. (*Govt.C. 68086.*) (On computation of fee under *Govt.C. 68086*, see C.R.C., Rule 2.958; on recovery of official reporting service costs as taxable costs at conclusion of trial, see 7 *Cal. Proc.* (5th), *Judgment*, §135; on Transcript Reimbursement Fund, which reimburses reporting costs incurred by indigent and low-income litigants, see *B. & P.C. 8030.2* et seq.)

Preparation of a reporter's transcript on appeal is also subject to an advance payment requirement. With the notice designating a reporter's transcript, the appellant must deposit the approximate cost of preparing the reporter's transcript, using either the reporter's written estimate or an amount calculated at \$ 650 per day or partial day longer than 3 hours and \$ 325 per partial day shorter than 3 hours. In lieu of a deposit, the appellant may substitute the reporter's written waiver, an application for payment from the Transcript Reimbursement Fund, or a certified transcript. (C.R.C., Rule 8.130(b).) In the absence of a deposit or an authorized substitute, the clerk must file a notice of default. (C.R.C., Rule 8.130(d)(2).) (On payment of cost of transcript from deposit, refund of excess, and bill for unpaid amount, see C.R.C., Rule 8.130(f).)

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F. Trial Court Reporters.

3. Compensation.

c. Free Transcript in Criminal and Specified Civil Proceedings.

2 *Witkin Cal. Proc. Courts* § 386

[§ 386] Free Transcript in Criminal and Specified Civil Proceedings.

"The court may specifically direct the making of a verbatim record and payment therefor shall be from the county treasury on order of the court" in criminal matters, juvenile proceedings, proceedings to declare a minor free from custody, Lanterman-Petris-Short proceedings (Welf.C. 5000 et seq.), and "[a]s otherwise provided by law." (*Govt.C. 69952(a)*.) Although, under a prior version of the statute, it was held that the trial judge had discretion to deny a free transcript on appeal (*Richards v. Superior Court* (1904) 145 C. 38, 40, 78 P. 244), the right of a criminal appellant to a free transcript, at county expense, is now recognized. (See C.R.C., Rules 8.320, 8.336, 8.610, 8.616; *People v. Smith* (1949) 34 C.2d 449, 452, 211 P.2d 561; *People v. Hosner* (1975) 15 C.3d 60, 64, 123 C.R. 381, 538 P.2d 1141; 17 So. Cal. L. Rev. 275; on constitutional right, see 6 Cal. Crim. Law (3d), *Criminal Appeal*, §107 et seq.; on content of transcript and calculation of payment, see *Govt.C. 69952(b)*.)

In *Gross v. Superior Court* (1954) 42 C.2d 816, 270 P.2d 1025, an appeal from an order redetermining that the petitioner was a sexual psychopath (subsequently termed "mentally disordered sex offender") was held to come within the test of "criminal case," and mandamus was issued to compel the preparation of a transcript at state expense. "The proceeding is not strictly a criminal case as above seen yet it is to be noted it has some of the features pertinent to such cases. The state is defendant's opponent. The one sought to be declared a sexual psychopath is entitled to bail pending determination. ... He is entitled to be present at the hearing and if he has no counsel the court may appoint one for him or order the public defender to serve. ... His liberty is at stake. Since these things are matters pertaining to the protection and rights of a person similar to one involved in a criminal case we believe he falls within the terms of section 69952." (42 C.2d 821.)

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G. Interpreters and Translators.

2 Witkin Cal. Proc. Courts § 387

[§ 387] Interpreters and Translators.

(1) *Statutory Authorization.* Court interpreters and translators, including translators for the deaf and hearing-impaired, are authorized by *Ev.C. 750* et seq. (See *C.E.B.*, 1 Civil Proc. During Trial 3d, §11.28 et seq.; 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §26 et seq.) Small claims courts have inherent power to furnish interpreters at public expense. (See *supra*, §174.)

(2) *Court Interpreter Services.* *Govt.C. 68560* et seq. provide for court interpreter services. (See 24 *Pacific L. J.* 682.) These statutes do not apply to interpreters for the deaf or hearing-impaired. (*Govt.C. 68560.5(b)*.) *Govt.C. 68560* states the legislative finding that there is a need for testing programs to assure adequate interpreter services to non-English speakers.

(3) *Supervision by Judicial Council.* The Judicial Council is charged with supervising court interpreter programs. It must (a) designate languages for interpreter certification, (b) establish standards to approve testing and certifying entities, and (c) adopt programs for recruitment, training, evaluation, and continuing education. (*Govt.C. 68562*.) (See *C.R.C.*, Rule 2.890 et seq.)

(4) *Designated Languages.* The Judicial Council has designated the following languages for interpreter certification: Arabic, Eastern Armenian, Western Armenian, Cantonese, Japanese, Korean, Mandarin, Portuguese, Russian, Spanish, Tagalog, and Vietnamese.

(5) *Certified Interpreters.* An interpreter in a language designated by the Judicial Council who holds a valid certificate from an approved certifying entity is designated a "certified court interpreter." (*Govt.C. 68566*.)

(6) *Registered Interpreters.* An interpreter in a language not designated by the Judicial Council must be qualified by the court under the procedures and guidelines adopted by the Judicial Council. An interpreter who also passes an English fluency examination offered by an approved testing entity is designated a "registered interpreter." (*Govt.C. 68561(d)*.)

(7) *Use of Noncertified Interpreters.* Except on a showing of good cause, only certified interpreters may be used. (*Govt.C. 68561*.) However, noncertified interpreters may be used in criminal cases and juvenile delinquency

proceedings in specified circumstances. (See *Govt.C. 26806* [large counties]; C.R.C., Rule 2.893.) The Judicial Council has adopted the following mandatory forms for that purpose:

Form No. INT-100 [Procedures and Guidelines to Appoint a Noncertified Interpreter In Criminal and Juvenile Delinquency Proceedings (Designated Languages)].

Form No. INT-110 [Qualifications of a Noncertified Interpreter].

Form No. INT-120 [Certification of Unavailability of Certified Interpreters].

(8) *Determining When Interpreter Is Needed.* Standard 2.10 of the Standards of Judicial Administration sets forth procedures for determining the need for an interpreter and a preappearance interview. Standard 2.11 deals with instructing the participants in an interpreted proceeding.

(9) *Employment and Labor Relations.* *Govt.C. 71800* et seq. provide for the employment of interpreters and implement a legislative policy that the trial courts rely on employees rather than independent contractors for interpretation services. These statutes do not apply to sign language interpreters. (*Govt.C. 71801(a)*.) Only registered and certified interpreters may be hired as trial court employees and nonregistered or noncertified interpreters may provide services as independent contractors only in limited circumstances. (*Govt.C. 71802(d)*.) (For restrictions on outside employment, see *Govt.C. 71812.5*.)

(10) *Professional Conduct.* C.R.C., Rule 2.890 governs the professional conduct of interpreters, including remaining impartial, avoiding conflicts of interest, preserving confidentiality, refraining from giving legal advice, and reporting ethical violations. An interpreter must interpret accurately "without embellishing, omitting, or editing" and must interpret everything that is said.

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SUPPLEMENT: [This section is current through the latest supplement]

(7) *Use of Noncertified Interpreters.* *Judicial Council Forms:* The forms cited in the text have been renamed or renumbered:

Judicial Council Form No. INT-100-INFO [Procedures and Guidelines to Appoint a Noncertified or Nonregistered Interpreter in Criminal and Juvenile Delinquency Proceedings] [renamed; renumbered].

Judicial Council Form No. INT-110 [Qualifications of a Noncertified or Nonregistered Interpreter (Provisional Qualification by Order of Presiding Judge)] [renamed].

Judicial Council Form No. INT-120 [Certification of Unavailability of Certified or Registered Interpreters] [renamed].



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IX. JUDICIAL AND MINISTERIAL OFFICERS

H. Sheriff.

1. In General.

2 Witkin Cal. Proc. Courts § 388

[§ 388] In General.

(1) *Nature of Office.* The sheriff is a county ministerial officer; the office is created by the Constitution and is elective, but the duties of the officer are wholly governed by statute. (Cal. Const., Art. XI, §§1(b), 4(c); *Govt.C. 24000(b)*.) The sheriff has the same power as other county officers to appoint deputies, who have equal authority to perform the duties of the office. (*Govt.C. 24100, 24101*.) (On authority of successor, see *C.C.P. 262.3*.) (See *Penrod v. San Bernardino (2005) 126 C.A.4th 185, 189, 23 C.R.3d 717* [constitutionality of ordinance governing removal of sheriff].)

(2) *Duties.* The sheriff has many distinct nonjudicial functions, such as preserving the peace, making arrests, managing the county jail, etc. (See *Govt.C. 26600 et seq.*) Other duties have a close connection with the judiciary and with litigation, e.g., serving process and notices of all kinds (*Govt.C. 26608 et seq., 26660 et seq.*; see *infra*, §389), acting as the court crier, and calling witnesses (*Govt.C. 26611*). Fees are prescribed by *Govt.C. 26720 et seq.*

(3) *Security Officer.* The sheriff or the sheriff's designee may be designated as the court security officer, with responsibility for the court security plan. (Standards of Judicial Administration, Standard 10.40.) (On role of sheriff in superior court security, see *Govt.C. 69920 et seq.*)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Security Officer.* Standards of Judicial Administration, Standard 10.40, was repealed in 2008. Court security is now governed by C.R.C., Rule 10.170 et seq.



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H. Sheriff.

2. Duties in Connection With Process and Notices.

2 Witkin Cal. Proc. Courts § 389

[§ 389] Duties in Connection With Process and Notices.

(1) *In General.* The sheriff has the duty to serve all process and notices in the manner prescribed by law. (Govt.C. 26608.) The sheriff must also "certify upon process or notices the manner and time of service, or if he fails to make service, the reason of his failure, and return the process or notices without delay." (Govt.C. 26609.)

The sheriff cannot rely on the direction of a party as an excuse for neglect or misconduct with respect to process unless that direction is in writing and signed by the attorney (or the party if not represented). (C.C.P. 262.)

Except as otherwise provided, an officer executing process must show it to any person interested on request so long as the officer retains the original process. He must show it, with all papers attached, at his office, whenever the office is open for business. (C.C.P. 262.2.)

When the sheriff is a party to a proceeding, process or orders may be executed by the *coroner* (C.C.P. 262.6), and, if both the sheriff and the coroner are parties, by a person selected by the court and known as an *elisor* (C.C.P. 262.8).

(2) *Definitions.* For this purpose, the term "process" includes "all writs, warrants, summons, and orders of courts of justice, or judicial officers." The term "notice" includes "all papers and orders required to be served in any proceedings before any court, board, or officer, or when required by law to be served independently of such proceeding." (Govt.C. 26660.)

(3) *Liability for Failure To Return.* A sheriff who fails to return a process or notice promptly with the necessary endorsement on it is liable to a person aggrieved for all actual damages sustained. (Govt.C. 26663; see *Glidden v. Wills* (1955) 136 C.A.2d 596, 598, 289 P.2d 55.)

(4) *Immunity From Reliance on Process.* The sheriff is a ministerial officer with a duty to execute all orders of the court unless they are patently irregular and void. Hence, the sheriff must execute process or orders regular on their face and issued by competent authority, regardless of defects in the main proceeding. (C.C.P. 262.1.) And the sheriff is immune from civil liability when doing so. (*Vallindras v. Massachusetts Bonding & Ins. Co.* (1954) 42 C.2d 149, 153, 265 P.2d 907 [sheriff was not liable for false imprisonment for taking plaintiff into custody under contempt

commitment, despite plaintiff's later release on habeas corpus on ground that contempt order was invalid]; *Lopez v. Oxnard* (1989) 207 C.A.3d 1, 11, 254 C.R. 556 [sheriff was not liable for false imprisonment; he could properly rely on valid warrant even though he refused to look at "disposition sheet" indicating that arrestee was not person named in warrant].)

The immunity of the sheriff was extended in *Hayward Lumber & Inv. Co. v. Biscailuz* (1957) 47 C.2d 716, 306 P.2d 6. Plaintiff attached a debtor's bank account of over \$ 6,000. The debtor moved to release all sums over \$ 2,000, the court granted the motion, and plaintiff filed a timely appeal and undertaking to continue the attachment in force. But the superior court clerk's certificate erroneously recited that no undertaking had been timely filed, and, in reliance on this certificate, the sheriff ordered the bank to release all sums over \$ 2,000. Plaintiff recovered judgment for \$ 5,000, the debtor became bankrupt, and plaintiff brought this action against the sheriff, deputies, and sureties. *Held*, the same principle that protects a sheriff who relies on a court order applies where the sheriff relies on a certificate of the clerk that is regular on its face. And the immunity of a sheriff who acts in conformity with a court order directed to him is equally available where he carries out a court order not specifically addressed to him. (47 C.2d 722.)

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X. THE JUDICIAL COUNCIL

A. In General.

1. Nature and Purpose.

2 *Witkin Cal. Proc. Courts* § 390

[§ 390] Nature and Purpose.

(1) *In General.* Judicial councils are established in many states as permanent bodies engaged in improving the administration of justice and exercising limited or complete rulemaking power. Some councils include lawyers and laypeople among their members. (See 42 *Harv. L. Rev.* 817.)

The California Judicial Council was created in 1926 by a constitutional amendment (now Cal. Const., Art. VI, §6). (See *Fay v. District Court of Appeal* (1927) 200 C. 522, 526, 254 P. 896; *Reimel v. Alcoholic Bev. Control App. Bd.* (1967) 254 C.A.2d 340, 345, 62 C.R. 54; 22 *Hastings L. J.* 121, 176, 177; 11 *Pacific L. J.* 877, 884 [history of Judicial Council from 1940 to 1977].) It consists of a number of judges and others. (See *infra*, §391.) It meets at the call of the Chief Justice (the Chair of the Council) "or as otherwise provided by it." (*Govt.C.* 68509.)

(2) *Surveys, Studies, and Reports.* "To improve the administration of justice" the council must survey judicial business, make recommendations to the courts, and make annual recommendations to the Governor and the Legislature. (Cal. Const., Art. VI, §6(d).)

Judges must report to the Judicial Council "as the Chief Justice directs" concerning the "condition of judicial business in their courts" and must "cooperate with the council." (Cal. Const., Art. VI, §6(f).) The same duty to cooperate is imposed by statute on all court clerks. (See *Govt.C.* 68505.)

(3) *Rules of Court.* The Constitution requires the Council to adopt rules for court administration, practice and procedure, not "inconsistent with statute." (Cal. Const., Art. VI, §6(d); see *Lorraine v. McComb* (1934) 220 C. 753, 756, 32 P.2d 960; *Helbush v. Helbush* (1930) 209 C. 758, 762, 290 P. 18; *Cantillon v. Superior Court* (1957) 150 C.A.2d 184, 187, 309 P.2d 890; *Paul D. v. Superior Court* (1984) 158 C.A.3d 838, 841, 205 C.R. 77 [unless rules "transcend legislative enactments," they "have the force of law"]; *California Court Reporters Assn. v. Judicial Council of Calif.* (1995) 39 C.A.4th 15, 46 C.R.2d 44, *supra*, §383 [Judicial Council rules authorizing electronic record in superior court were inconsistent with statutes providing for shorthand reporters].) The normal power of the Council under this provision is to make rules supplementing the statutory system; but, as in the case of the original appellate rules (former C.R.C., Rule 1 et seq.), complete rulemaking power may be given by special legislative grant. (See *supra*, §181 et seq.) (On Council's rulemaking authority and the effect of its rules, standards, and forms, see *supra*, §187.)

(4) *Forms and Jury Instructions.* The Judicial Council adopts official forms (see *infra*, §398 et seq.) and jury instructions. (On official civil instructions (CACI) see 7 *Cal. Proc.* (5th), *Trial*, §§271, 272; on official criminal instructions (CALCRIM), see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, Supp., §628B.)

(5) *Other Duties.* In specifying the functions of the Judicial Council, the Constitution adds the catch-all provision: "perform other functions prescribed by statute." (Cal. Const., Art. VI, §6(d).)

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X. THE JUDICIAL COUNCIL

A. In General.

2. Composition.

2 Witkin Cal. Proc. Courts § 391

[§ 391] Composition.

(1) *Membership.* The California Judicial Council was originally composed exclusively of judges chosen by the Chief Justice. It now includes judges, lawyers, legislators, and others. The Council consists of the Chief Justice, another judge of the Supreme Court, three judges of the Courts of Appeal, ten judges of the superior court, two nonvoting court administrators, and other nonvoting members, each appointed by the Chief Justice, four members of the State Bar appointed by the Board of Governors, and one member from each house of the Legislature appointed by that house. The term of office is 3 years. (Cal. Const., Art. VI, §6(a).) Membership terminates if a member ceases to hold the position that qualified the member for appointment, and the vacancy must be filled by the appointing power for the remainder of the term. (Cal. Const., Art. VI, §6(b); see C.R.C., Rule 10.2.) Members are reimbursed for necessary expenses but receive no compensation for services. (*Govt.C. 68510.*)

(2) *Officers.* The Chief Justice is the Chair of the Council (C.R.C., 10.1(a)) and the Administrative Director of the Courts serves as its Secretary (C.R.C., 10.1(e)). (On structure and operation of Judicial Council generally, see *11 Pacific L. J. 877.*)

(3) *Staff and Committees.* Although the actual membership is limited by the Constitution, the work of the Council is materially assisted by other groups:

(a) The administrative staff, consisting of a number of research attorneys and clerical assistants. (See *Govt.C. 68500.*)

(b) Advisory committees of judges, retired judges, attorneys, and experts in specialized fields, appointed by the Chief Justice to assist in the performance of the duties of the Council without exercising its powers. They receive expenses but no additional compensation. (See *Govt.C. 68501 et seq.*; C.R.C., Rule 10.30 et seq.)

(c) Committees of the State Bar of California, which closely cooperate with the Council in its rulemaking and statutory revision programs. (For an illustration of the State Bar's participation in rulemaking, see *17 So. Cal. L. Rev. 80.*)

(d) The Judicial Council may appoint an Administrative Director of the Courts, to serve at its pleasure, and to perform "functions delegated by the council or the Chief Justice, other than adopting rules of court administration, practice and procedure." (Cal. Const., Art. VI, §6(c); C.R.C., Rule 10.80.) The director employs, organizes, and directs the Administrative Office of the Courts. (See C.R.C., Rule 10.81.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Officers.* C.R.C., Rule 10.1(e) was renumbered C.R.C., Rule 10.1(d) in 2009.



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X. THE JUDICIAL COUNCIL

A. In General.

3. Governing Rules.

2 *Witkin Cal. Proc. Courts* § 392

[§ 392] Governing Rules.

Title 10 of the California Rules of Court, entitled *Judicial Administration Rules*, governs the Judicial Council and court administration.

C.R.C., Rule 10.1 et seq. deal with the authority, mission, membership, meetings, and internal committees of the Judicial Council.

C.R.C., Rule 10.30 et seq. establish and regulate advisory committees and task forces.

C.R.C., Rule 10.80 et seq. govern the Administrative Office of the Courts and the Center for Judicial Education and Research.

C.R.C., Rule 10.101 et seq. govern budget and fiscal management, court facilities and security, human resources, training, and litigation involving the judicial branch.

C.R.C., Rule 10.601 et seq. deal with administration of the trial courts.

C.R.C., Rule 10.1001 et seq. deal with administration of the appellate courts.

SUPPLEMENT: [This section is current through the latest supplement]



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X. THE JUDICIAL COUNCIL

A. In General.

4. Electronic Data Systems.

2 *Witkin Cal. Proc. Courts* § 393

[§ 393] Electronic Data Systems.

The Judicial Council has the authority to prescribe "methods, means, and standards for electronic collection of data related to court administration, practice, and procedure." (*Govt.C. 68500.1.*) Under *Govt.C. 68513*, it is required to provide for the uniform entry, storage, and retrieval of court data relating to civil cases other than limited civil cases. Both the use of litigant statements and forms, and the collection and analysis of statistically reliable samples are authorized for this purpose. The uniformity requirement applies to the following:

- (a) The category of civil case. (*Govt.C. 68513(a).*)
- (b) The time from filing an action to settlement. (*Govt.C. 68513(b).*)
- (c) The type of any settlement procedure that contributed to the disposition. (*Govt.C. 68513(c).*)
- (d) The character and amount of any settlement, "but preserving the confidentiality of such information if the settlement is not otherwise public." (*Govt.C. 68513(d).*)
- (e) The character and amount of judgments rendered by court and jury trials for comparison with settled cases. (*Govt.C. 68513(e).*)
- (f) The extent to which damages sought compare to settlement or judgment in character and amount. (*Govt.C. 68513(f).*)
- (g) The extent to which collateral sources contribute to satisfaction of the judgment or settlement. (*Govt.C. 68513(g).*)

C.R.C., Rule 10.400 creates the Judicial Branch Statistical Information System for collecting information about the judicial branch. The Judicial Council publishes an annual report on court statistics, which is posted on the judicial branch website: www.courtinfo.ca.gov.

SUPPLEMENT: [This section is current through the latest supplement]



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B. Judicial Education.

1. In General.

2 Witkin Cal. Proc. Courts § 394

[§ 394] In General.

(1) *Institutes and Workshops.* One of the Judicial Council's "other functions prescribed by statute" (see *supra*, §390) is to conduct institutes and seminars, regionally or statewide, "for the purpose of orienting judges to new judicial assignments, keeping them informed concerning new developments in the law and promoting uniformity in judicial procedure." (*Govt.C. 68551.*) Judicial education for judicial officers is mandatory. (See *infra*, §395; on duty of presiding judges to ensure that judges are able to attend educational programs, see C.R.C., Rule 10.603(c)(2) [presiding judge to plan for judges' attendance at schools, conferences, and workshops].)

The California Center for Judicial Education and Research (C.J.E.R.) has responsibility for the Judicial Council's educational programs for judges. (See *infra*, §397.) The Council, however, conducts court management programs for presiding judges, traffic court commissioners and referees, court administrators, and family court mediators. The work of the Judicial Council and C.J.E.R. is supplemented by educational conferences and workshops of the California Judges Association.

(2) *Manuals.* The Judicial Council is authorized to publish and distribute "manuals, guides, checklists and other materials designed to assist the judiciary." (*Govt.C. 68552.*) Numerous benchbooks, manuals, guides, checklists, and other materials, including audio- and videotaped programs, have been published by the Judicial Council, C.J.E.R., the California Judges Association, and individual judges.

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B. Judicial Education.

2. Mandatory Requirement.

2 *Witkin Cal. Proc. Courts* § 395

[§ 395] Mandatory Requirement.

(1) *Judiciary Is Responsible for Judicial Education.* "The responsibility for planning, conducting, and overseeing judicial branch education properly resides in the judicial branch." (C.R.C., Rule 10.451(a).) Minimum education requirements, expectations, and recommendations are set forth in C.R.C., Rules 10.452 et seq. (On administrative responsibilities, see C.R.C., Rule 10.452.)

(2) *Scope of Requirement.* Judicial branch education is essential for all justices, judges, subordinate judicial officers, and court personnel, and participation in educational activities is part of the official duties of judicial officers and court personnel. (C.R.C., Rule 10.451(a).)

(3) *Objectives.* Under C.R.C., Rule 10.451(b), judicial branch education should achieve the following objectives:

(a) Provide knowledge, skill, and techniques required to perform responsibilities competently, fairly, and efficiently.

(b) Ensure that opportunities for orientation, continuing education, and professional development are available for justices, judges, subordinate judicial officers, and court personnel.

(c) Assist in preserving the integrity and impartiality of the judicial system by ensuring that members of the public have equal access to the courts and equal ability to participate in court proceedings and are treated fairly and justly.

(d) Promote adherence to the highest ideals of personal and official conduct stated in the California Code of Judicial Ethics and the Code of Ethics for the Court Employees of California.

(e) Improve the administration of justice, reduce court delay, and promote fair and efficient management of court proceedings.

(f) Promote standardized practices and procedures.

(g) Implement the Standards of Judicial Administration.

(4) *Specific Requirements, Expectations, and Recommendations.* Minimum education requirements, expectations, and recommendations for particular persons are set forth in the Rules of Court as follows:

- (a) Supreme Court and Court of Appeal justices. (C.R.C., Rules 10.461, 10.469.)
- (b) Trial court judges and subordinate judicial officers. (C.R.C., Rules 10.462, 10.469, 10.701.)
- (c) Family court judges and subordinate judicial officers. (C.R.C., Rules 10.463, 10.469.)
- (d) Supreme Court and Court of Appeal clerk/administrators. (C.R.C., Rules 10.471, 10.479.)
- (e) Supreme Court and Court of Appeal managing attorneys, supervisors, and other personnel. (C.R.C., Rules 10.472, 10.479.)
- (f) Trial court executives. (C.R.C., Rules 10.473, 10.479.)
- (g) Trial court managers, supervisors, and other personnel. (C.R.C., Rules 10.474, 10.479.)
- (h) Administrative Office of the Courts executives, managers, supervisors, and other employees. (C.R.C., Rule 10.491.)

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B. Judicial Education.

3. Specialized Programs.

2 *Witkin Cal. Proc. Courts* § 396

[§ 396] Specialized Programs.

(1) *Child Sexual Abuse Cases.* The Judicial Council is required to establish a program for training judicial personnel in handling proceedings involving the victims of child sexual abuse. The program is intended to ensure that children who are the victims of sexual abuse are treated with "special consideration" during trials, administrative hearings, and other proceedings related to allegations of sexual abuse. (P.C. 13828, 13828.1.)

(2) *Family Law Cases.* The Judicial Council is required to establish a program for training judicial personnel in family law matters, including instruction in the "effects of gender on family law proceedings, the economic effects of dissolution on the involved parties, and ... the effects of allegations of child abuse or neglect made during family law proceedings." The program must include an annual training session and an orientation session for new judges. (*Govt.C.* 68553; see C.R.C., Rule 10.463.)

(3) *Sentencing.* The Judicial Council is required to conduct annual sentencing institutes for trial court judges "toward the end of assisting the judge in the imposition of appropriate sentences." (P.C. 1170.5.)

(4) *Juvenile Court Law.* The Judicial Council is required to conduct periodic conferences for juvenile court judges and juvenile referees "for the purpose of improving the administration of justice in the juvenile courts." (*Welf.C.* 264.)

(5) *Small Claims Court Information.* The Judicial Council, in cooperation with the Department of Consumer Affairs, must "prepare and distribute to each judge who sits in a small claims court a bench book describing all state and federal consumer protection laws reasonably likely to apply in small claims actions." (*C.C.P.* 116.930(d).) Under this directive, C.J.E.R. produces *California Judges Benchbook: Small Claims and Consumer Law* in an annual, softcover edition (published by Thomson West).

(6) *Domestic Violence.* The Judicial Council is required to establish programs for training judicial personnel in domestic violence matters. The programs must include a domestic violence session in orientation sessions for new judges and an annual training session in domestic violence. (*Govt.C.* 68555.)

(7) *Bias and Harassment.* The Judicial Council may adopt Rules of Court providing training for judges,

commissioners, and referees in the areas of racial, ethnic, gender, and other bias, and sexual harassment. (*Govt.C. 68088.*) (See *supra*, §31.)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Domestic Violence*. See C.R.C., Rule 10.464, added in 2009 [requirements and expectations for judicial officers].



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B. Judicial Education.

4. Center for Judicial Education and Research.

2 Witkin Cal. Proc. Courts § 397

[§ 397] Center for Judicial Education and Research.

The California Center for Judicial Education and Research (C.J.E.R.) was created in 1973, with funding by a grant from the California Council on Criminal Justice. C.J.E.R. is a joint enterprise of the Judicial Council and the California Judges Association. It has a Governing Committee of eight judges appointed by the Chief Justice, and a professional staff.

Since 1976, C.J.E.R. has been a permanent part of the California judicial system, funded through annual state appropriations to the Judicial Council. As part of the Educational Division of the Administrative Office of the courts, it is also responsible for court staff education. It has a wide range of activities including the following:

(1) Classifying and indexing existing judicial education materials as a permanent pool of information and instructional data. A complete list of published and unpublished judicial materials is published annually. C.J.E.R. has also made a detailed assessment of the educational needs of California judges, which is used to plan its many educational activities.

(2) Training of new judges, in orientation programs during their first year on the bench. These in-service programs include the assignment of an experienced mentor judge to assist every new judge; a 1-week general orientation program, held immediately after a judge assumes the bench, covering judicial conduct and skills; and the annual 2-week comprehensive California Judicial College. Self-instructional materials in the form of benchbooks, benchguides, manuals, and other references, including videotapes dealing with all major areas of judicial work and ethics, are provided for study and reference on the bench.

(3) Continuing education programs for the entire judiciary, including nine annual 3-day judicial institutes to inform judges of new developments in the law and promote uniformity in judicial procedure; a municipal courts institute; trial court institutes on, respectively, criminal law and sentencing, family law, probate, civil procedure, mental health, and juvenile law; a superior court institute for rural judges; an appellate courts institute; and an appellate research attorneys institute. Between institutes the judges' continuing in-service educational needs are met by C.J.E.R. publications and videotapes. Experienced judges may also attend continuing studies programs in which judges receive a 1-week comprehensive update of substantive and procedural developments and in-depth training for new court assignments.

The program curriculum includes a number of "judicial assignment" courses, each dealing with a different type of court assignment, and courses on jurisprudence and the humanities. Other courses concern communication skills, judicial decisionmaking, cultural diversity, and courtroom fairness.

(4) Research on and development of modern methods of judicial education.

(5) Publication of judges' benchbooks, benchguides, and other reference materials. C.J.E.R. publications available for sale to members of the Bar include the following:

California Judges Benchbook: Civil Proceedings--Discovery (1994)

California Judges Benchbook: Civil Proceedings--Before Trial 2d (2008)

California Judges Benchbook, Civil Proceedings: Trial (1997)

California Judges Benchbook, Civil Proceedings: After Trial (1998)

California Judges Benchbook: Small Claims Court and Consumer Law (annual)

California Judges Benchbook: Domestic Violence Cases in Criminal Court 4th (2007)

California Judges Benchbook: Search and Seizure 2d (2002)

Felony Sentencing Handbook (annual)

Mandatory Criminal Jury Instructions Handbook (annual)

The first five of the publications listed above are published by Thomson West. The remaining four are published by C.E.B.

West's Key Number Digest, Courts 78

SUPPLEMENT: [This section is current through the latest supplement]



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C. Approval of Legal Forms.

1. In General.

2 *Witkin Cal. Proc. Courts* § 398

[§ 398] In General.

(1) *History.* An important function of the Judicial Council is the approval of uniform legal forms. The program began in 1950 as a cooperative effort with the State Bar, but use of the forms was then only recommended and therefore optional. The Judicial Council was authorized to prescribe forms in 1968. *Govt.C. 68511* provides in part: "The Judicial Council may prescribe by rule the form and content of forms used in the courts of this state. When any such form has been so prescribed by the Judicial Council, no court may use a different form which has as its aim the same function as that for which the Judicial Council's prescribed form is designed."

(2) *Mandatory and Optional Forms.* Forms are either mandatory or optional. (C.R.C., Rule 1.30(b).) C.R.C., Rule 1.31 governs mandatory forms and C.R.C., Rule 1.35(c) governs optional forms. References to statutes and rules on the bottom of Judicial Council forms are advisory only. (C.R.C., Rule 1.40.)

Mandatory forms must be used by all parties and must be accepted for filing by all courts "[w]herever applicable." (C.R.C., Rule 1.31(a).) Mandatory forms are "adopted" by the Judicial Council, and must be designated as mandatory. (C.R.C., Rule 1.31(c).) The lower left corner of the first page of each form indicates whether the form is mandatory or optional.

Optional forms may be used by the parties and must be accepted for filing by all courts "[w]herever applicable." (C.R.C., Rule 1.35(a).) Optional forms are "approved" by the Judicial Council, and must be designated as optional. (C.R.C., Rule 1.35(c).) The lower left corner of the first page of each form indicates whether the form is mandatory or optional.

(3) *List of Judicial Council Forms.* Appendix A to the California Rules of Court lists Judicial Council forms by form number, year, and title. Mandatory forms are marked by an asterisk. The list is also available on the judicial branch website: www.courtinfo.ca.gov. (For a complete list of forms, see *infra*, §400 et seq.)

(4) *Forms in Foreign Languages.* The Judicial Council has adopted or approved translated versions of a number of forms, primarily dealing with protective orders, domestic violence, and child custody. Various forms are in Chinese, Cambodian, Hmong, Korean, Russian, Spanish, or Vietnamese and are identified by C, Cam, H, K, R, S, or V added to

the form number.

(5) *Pleading Forms*. The Judicial Council must approve forms for pleadings in actions based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud, and for a statement of damages in specified circumstances. (C.C.P. 452.12.) (See Judicial Council Form No. PLD-050 et seq.) An approved cause of action form may be attached to any approved form of complaint or cross-complaint. If no cause of action form has been approved, a cause of action may be prepared in the format prescribed by C.R.C., Rule 2.100. Paragraphs within a cause of action must be numbered consecutively and "[e]ach paragraph number must be preceded with one or more identifying letters derived from the title of the cause of action." (C.R.C., Rule 1.45.)

(6) *Proof of Service Forms*. Proof of service is included in some Judicial Council forms for the convenience of the parties. A party may use the included proof of service or any other proper proof of service. (C.R.C., Rule 1.41.) Typewritten or computer-generated proof of service forms may be used where designated conditions related to format, margins, and typeface are met, despite the adoption of mandatory proof of service forms. (C.R.C., Rule 2.150.)

(7) *Order Valid Despite Defects in Form*. An otherwise legally sufficient court order for which there is a mandatory Judicial Council form is not invalid or unenforceable even though the order is not prepared on a Judicial Council form or is not prepared on the correct form. (C.R.C., Rule 1.31(g).)

(8) *Local Restrictions*. Subject to limited exceptions, a court may not alter a mandatory or optional form and require the altered form to be used. (C.R.C., Rules 1.31(e), 1.35(e); for exceptions, see C.R.C., Rule 5.504(c) [mandatory juvenile forms]; C.R.C., Rule 7.101.5 [forms for specified orders in Probate Code proceedings].) Nor may a court require that a form be submitted on nonwhite paper. (C.R.C., Rules 1.31(f), 1.35(f).) A court may not reject a Judicial Council form for designated reasons, e.g., lack of the court's local form number or preprinted title and address, use of a form printed by a publisher or another court, use of a publisher's name or symbol, or use of a form that is not the latest version. (C.R.C., Rule 1.42.) However, the current version of the form must be used unless the Rules of Court provide otherwise. (C.R.C., Rule 1.37.)

(9) *Approved Form as Subject to Demurrer*. In *People v. Superior Court (San Barbara)* (1992) 5 C.A.4th 1480, 7 C.R.2d 498, plaintiffs filed a Judicial Council form complaint against the State Department of Transportation that failed to state a cause of action for injuries suffered from maintenance of public property in a dangerous condition. Defendant's demurrer was overruled by the trial court on the theory that a Judicial Council form is nondemurrable. *Held*, mandamus issued to compel entry of a new order sustaining the demurrer with leave to amend.

(a) The Judicial Council's simplified pleading forms have made the task of drafting much easier. Nevertheless, in some cases more is required than merely placing an "X" in a box; the form complaint must comply with the statutory requirement of stating facts essential to the cause of action. (5 C.A.4th 1484.)

(b) Where specific allegations are necessary, the form complaint is incomplete; and, standing alone, it is no more immune to demurrer than any other complaint that fails to state a cause of action. (5 C.A.4th 1486.)

(10) *Computer Assistance for Pro. Per. Litigants*. In accordance with Judicial Council rules, courts may establish interactive computer systems to provide information and assist pro. per. litigants in preparing standardized documents in various civil actions, including (a) enforcement of visitation, child custody, property division, and other orders, (b) landlord and tenant actions, (c) uncontested dissolution of marriage, and (d) probate. (C.C.P. 1062.20.)

SUPPLEMENT: [This section is current through the latest supplement]

(8) *Local Restrictions*. C.R.C., Rules 1.31(e) and 1.35(e) were amended in 2008 to provide that a judicial officer may modify a Judicial Council form order "as necessary or appropriate to adjudicate a particular case."



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C. Approval of Legal Forms.

2. Format Requirements.

2 *Witkin Cal. Proc. Courts* § 399

[§ 399] Format Requirements.

The following provisions govern the format of Judicial Council forms:

(1) *True Copy*. Any form filed must be a true copy of the original form and must be as legible as a printed form. (C.R.C., Rule 1.43.) A party or attorney who files a Judicial Council form certifies by filing the form that it is a true copy of the form. (C.R.C., Rule 2.132.)

(2) *Electronically Produced Forms*. A party or attorney may file a duplicate of a Judicial Council form produced by a computer and printer or similar device with a resolution of at least 300 dots per inch. (C.R.C., Rule 1.44.)

(3) *Multipage Forms*. If a form is longer than one page, the form may be filed on sheets printed on only one side even if the original form has two printed sides to a sheet. If a form is filed on a sheet printed on two sides, the reverse must be rotated 180 degrees (printed head to foot). A form longer than one page must be firmly bound at the top. (C.R.C., Rule 2.134.)

(4) *Hole Punching*. Forms must contain prepunched holes 2 1/2 inches apart and 5/8 inch from the top of the page. (C.R.C., Rule 2.133.)

(5) *Recycled Paper*. Forms and copies of forms filed with the court must be on recycled paper. (C.R.C., Rule 2.131.)

(6) *Local Forms*. C.R.C., Rules 2.130 et seq. and 10.614 set forth format requirements for local forms. (See C.R.C., Rule 2.141.)

(7) *Handwritten Forms*. A local or Judicial Council form may not be rejected or refused by the clerk solely on the ground that the form is handwritten or that the handwriting is in a color other than blue-black or black. (C.R.C., Rule 2.135.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Adoption.

2 Witkin Cal. Proc. Courts § 400

[§ 400] Adoption.

<i>Form No.</i>	<i>Title</i>
ADOPT-050	How to Adopt a Child in California
ADOPT-200	Adoption Request
ADOPT-210	Adoption Agreement
ADOPT-215	Adoption Order
ADOPT-220	Adoption of Indian Child
ADOPT-225	Parent of Indian Child Agrees to End Parental Rights
ADOPT-230	Adoption Expenses
ADOPT-310	Contact After Adoption Agreement
ADOPT-315	Request to: Enforce, Change, End Contact After Adoption Agreement
ADOPT-320	Answer to Request to: Enforce, Change, End Contact After Adoption Agreement
ADOPT-325	Judge's Order to: Enforce, Change, End Contact After Adoption Agreement
ADOPT-330	Request for Appointment of Confidential Intermediary
ADOPT-331	Order for Appointment of Confidential Intermediary

SUPPLEMENT: [This section is current through the latest supplement]



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4. Alternative Dispute Resolution.

2 *Witkin Cal. Proc. Courts* § 401

[§ 401] Alternative Dispute Resolution.

<i>Form No.</i>	<i>Title</i>
ADR-100	Statement of Agreement or Nonagreement
ADR-101	ADR Information Form
ADR-102	Request for Trial de Novo After Judicial Arbitration
ADR-103	Petition After Attorney-Client Fee Arbitration Award
ADR-104	Rejection of Award and Request for Trial After Attorney-Client Fee Arbitration (Alternative Dispute Resolution)
ADR-105	Information Regarding Rights After Attorney-Client Fee Arbitration (Alternative Dispute Resolution)
ADR-106	Petition to Confirm, Correct, or Vacate Contractual Arbitration Award (Alternative Dispute Resolution)
ADR-107	Attendance Sheet for Court-Program Mediation of Civil Case
ADR-109	Stipulation or Motion for Order Appointing Referee
ADR-110	Order Appointing Referee
ADR-111	Report of Referee (Alternative Dispute Resolution)

SUPPLEMENT: [This section is current through the latest supplement]
The following Judicial Council form has been added or renamed:

Form	Title
No.	

ADR-103 Petition to Confirm, Correct, or Vacate Attorney-Client Fee
Arbitration Award (Alternative Dispute Resolution) [renamed]



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5. Appeal.

2 *Witkin Cal. Proc. Courts* § 402

[§ 402] Appeal.

<i>Form No.</i>	<i>Title</i>
APP-001	Information on Appeal Procedures for Unlimited Civil Cases
APP-002	Notice of Appeal/Cross-Appeal (Unlimited Civil Case)
APP-003	Appellant's Notice Designating Record on Appeal (Unlimited Civil Case)
APP-004	Civil Case Information Statement (Appellate)
APP-005	Abandonment of Appeal (Unlimited Civil Case)
APP-006	Application for Extension of Time to File Brief (Civil Case)
APP-007	Request for Dismissal of Appeal (Civil Case)
APP-008	Certificate of Interested Entities or Persons

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or renamed:

Form No.	Title
APP-006	Application for Extension of Time to File Brief (Civil Case) (Appellate) [renamed]
APP-009	Proof of Service (Court of Appeal) [added]
APP-009-I NFO	Information Sheet For Proof of Service (Court of Appeal) [added]
APP-010	Respondent's Notice Designating Record on Appeal (Unlimited Civil

	Case) [added]
APP-011	Respondent's Notice Electing to Use an Appendix (Unlimited Civil Case) [added]
APP-015	Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division) [added]
APP-016	Order on Court Fee Waiver (Court of Appeal or Supreme Court) [added]
APP-101-I NFO	Information on Appeal Procedures for Limited Civil Cases [added]
APP-102	Notice of Appeal/Cross-Appeal (Limited Civil Case) [added]
APP-103	Appellant's Notice Designating Record on Appeal (Limited Civil Case) [added]
APP-104	Proposed Statement on Appeal (Limited Civil Case) [added]
APP-105	Order Concerning Appellant's Notice Proposed Statement on Appeal (Limited Civil Case) [added]
APP-106	Application for Extension of Time to File Brief (Limited Civil Case) [added]
APP-107	Abandonment of Appeal (Limited Civil Case) [added]
APP-109	Proof of Service (Appellate Division) [added]
APP-109-I NFO	What Is Proof of Service? [added]
APP-110	Respondent's Notice Designating Record on Appeal (Limited Civil Case) [added]
APP-150-I NFO	Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases [added]
APP-151	Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) [added]



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6. Attachment.

2 Witkin Cal. Proc. Courts § 403

[§ 403] Attachment.

<i>Form No.</i>	<i>Title</i>
AT-105	Application for Attachment, Temporary Protective Order, Etc.
AT-115	Notice of Application and Hearing for Right To Attach Order and Writ of Attachment
AT-120	Right To Attach Order After Hearing and Order for Issuance of Writ of Attachment
AT-125	Ex Parte Right To Attach Order and Order for Issuance of Writ of Attachment (Resident)
AT-130	Ex Parte Right To Attach Order and Order for Issuance of Writ of Attachment (Nonresident)
AT-135	Writ of Attachment
AT-138	Application and Order for Appearance and Examination
AT-140	Temporary Protective Order
AT-145	Application and Notice of Hearing for Order to Terminate, Modify, or Vacate Temporary Protective Order
AT-150	Order to Terminate, Modify, or Vacate Temporary Protective Order
AT-155	Notice of Opposition to Right to Attach Order and Claim of Exemption
AT-160	Undertaking by Personal Sureties (Attachment and Claim and Delivery)

	very)
AT-165	Notice of Attachment
AT-167	Memorandum of Garnishee
AT-170	Application to Set Aside Right to Attach Order and Release Attached Property, Etc.
AT-175	Order to Set Aside Attachment, to Substitute Undertaking, Etc.
AT-180	Notice of Lien

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been renamed:

Form No.	Title
AT-105	Application for Right to Attach Order, Temporary Protective Order, etc. (Attachment)
AT-115	Notice of Application and Hearing for Right to Attach Order and Writ of Attachment (Attachment)
AT-120	Right to Attach Order After Hearing and Order for Issuance of Writ of Attachment (Attachment)
AT-125	Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Resident) (Attachment)
AT-130	Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Nonresident) (Attachment)
AT-140	Temporary Protective Order (Attachment)



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7. Case Management.

2 *Witkin Cal. Proc. Courts* § 404

[§ 404] Case Management.

<i>Form No.</i>	<i>Title</i>
CM-010	Civil Case Cover Sheet
CM-015	Notice of Related Case
CM-020	Ex Parte Application for Extension of Time to Serve Pleading and Orders
CM-110	Case Management Statement
CM-180	Notice of Stay of Proceedings
CM-181	Notice of Termination or Modification of Stay
CM-200	Notice of Settlement of Entire Case

SUPPLEMENT: [This section is current through the latest supplement]



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8. Civil.

2 *Witkin Cal. Proc. Courts* § 405

[§ 405] Civil.

<i>Form No.</i>	<i>Title</i>
CIV-010	Application and Order for Appointment of Guardian Ad Litem-Civil
CIV-025	Application and Order for Reissuance of Order to Show Cause and Temporary Restraining Order
CIV-050	Statement of Damages (Personal Injury or Wrongful Death)
CIV-090	Offer to Compromise and Acceptance Under Code of Civil Procedure Section 998
CIV-100	Request for Entry of Default (Application to Enter Default)
CIV-110	Request for Dismissal
CIV-120	Notice of Entry of Dismissal and Proof of Service

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added:

Form No.	Title
CIV-020	Notice of Intent to Appear by Telephone
CIV-130	Notice of Entry of Judgment or Order



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9. Civil Harassment.

2 *Witkin Cal. Proc. Courts* § 406

[§ 406] Civil Harassment.

<i>Form No.</i>	<i>Title</i>
CH-100	Request for Orders to Stop Harassment (Civil Harassment)
CH-102	Confidential CLETS Information (Domestic Violence, Civil Harassment, Elder Abuse)
CH-110	Answer to Request for Orders to Stop Harassment (Civil Harassment)
CH-120	Notice of Hearing and Temporary Restraining Order (CLETS) (Civil Harassment)
CH-125	Reissue Temporary Restraining Order (Civil Harassment)
CH-130	Proof of Personal Service (Civil Harassment)
CH-131	Proof of Service by Mail (Civil Harassment)
CH-135	What is "Proof of Service"? (Civil Harassment)
CH-140	Restraining Order After Hearing to Stop Harassment (CLETS) (Civil Harassment)
CH-145	Proof of Firearms Turned In or Sold (Civil Harassment)
CH-150	Can a Civil Harassment Restraining Order Help Me? (Civil Harassment)
CH-151	How Can I Answer a Request for Orders to Stop Harassment? (Civil Harassment)

SUPPLEMENT: [This section is current through the latest supplement]



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10. Claim and Delivery.

2 *Witkin Cal. Proc. Courts* § 407

[§ 407] Claim and Delivery.

<i>Form No.</i>	<i>Title</i>
CD-100	Application for Writ of Possession (Claim and Delivery)
CD-110	Notice of Application for Writ of Possession and Hearing (Claim and Delivery)
CD-120	Order for Writ of Possession (Claim and Delivery)
CD-130	Writ of Possession (Claim and Delivery)
CD-140	Undertaking by Personal Sureties (Claim and Delivery)
CD-160	Application and Notice of Application and Hearing for Order To Quash Ex Parte Writ of Possession (Claim and Delivery)
CD-170	Order for Release and Redelivery of Property (Claim and Delivery)
CD-180	Declaration for Ex Parte Writ of Possession (Claim and Delivery)
CD-190	Application for Temporary Restraining Order (Claim and Delivery)
CD-200	Temporary Restraining Order (Claim and Delivery)

SUPPLEMENT: [This section is current through the latest supplement]



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11. Court Records.

2 Witkin Cal. Proc. Courts § 408

[§ 408] Court Records.

<i>Form No.</i>	<i>Title</i>
REC-001(N)	Notice of Intent to Destroy Superior Court Records; Offer To Transfer Possession
REC-001(R)	Request for Transfer or Extension of Time for Retention of Superior Court Records
REC-002(N)	Notice of Hearing on Request for Transfer or Extension of Time for Retention of Superior Court Record; Release and Receipt of Records
REC-002(R)	Release and Receipt of Superior Court Records
REC-003	Report to the Judicial Council: Superior Court Records Destroyed, Preserved, and Transferred

SUPPLEMENT: [This section is current through the latest supplement]



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12. Criminal.

2 *Witkin Cal. Proc. Courts* § 409

[§ 409] Criminal.

<i>Form No.</i>	<i>Title</i>
CR-100	Fingerprint Form
CR-101	Plea Form, With Explanation and Waiver of Rights--Felony
CR-110	Order for Restitution and Abstract of Judgment
CR-112	Instructions: Order for Restitution and Abstract of Judgment
CR-115	Defendant's Statement of Assets
CR-117	Instructions: Defendant's Statement of Assets
CR-118	Information Regarding Income Deduction Order (Pen. Code, §1202.42)
CR-119	Order for Income Deduction (Pen. Code, §1202.42)
CR-120	Notice of Appeal--Felony (Defendant)
CR-125	Order to Attend Court or Provide Documents: Subpoena/Subpoena Duces Tecum (Criminal and Juvenile)
CR-130	Notice of Appeal--Misdemeanor (Defendant)
CR-150	Certificate of Identity Theft: Judicial Finding of Factual Innocence (Pen. Code §530.6)
CR-151	Petition for Certificate of Identity Theft (Pen. Code, §530.6)
CR-160	Criminal Protective Order--Domestic Violence (CLETS-CPO) (Penal Code, §§ 136.2 and 1203.097(a)(2))
CR-161	Criminal Protective Order--Other Than Domestic Violence (CLETS-

	COP) (Penal Code, § 136.2)
CR-162	Order to Surrender Firearms in Domestic Violence Case (CLETS-COP) (Penal Code, § 136.2(a)(7)(B))
CR-165	Notice of Termination of Protective Order in Criminal Proceeding (CLETS) (Penal Code, §§136.2 and 1203.097(a)(2))
CR-168	Batterer Intervention Program Progress Report
CR-170	Notification of Decision Whether to Challenge Recommendation (Pen. Code, §2972.1)
CR-175	Notice and Request for Ruling (Cal. Rules of Court, Rule 4.551(a)(3)(B))
CR-180	Petition and Order for Expungement (Pen. Code, §§17, 1203.4, 1203.4a)
CR-190	Order Appointing Counsel in Capital Case
CR-191	Declaration of Counsel for Appointment in Capital Case
CR-200	Form Interrogatories--Crime Victim Restitution

SUPPLEMENT: [This section is current through the latest supplement]
The following Judicial Council forms have been added or renamed:

Form No.	Title
CR-101	Plea Form, With Explanations and Waiver of Rights--Felony (Criminal) [renamed]
CR-120	Notice of Appeal--Felony (Defendant) (Criminal) [renamed]
CR-131-INFO	Information on Appeal Procedures for Misdemeanors [added]
CR-132	Notice of Appeal (Misdemeanor) [added]
CR-133	Request for Court-Appointed Lawyer in Misdemeanor Appeal [added]
CR-134	Notice Regarding Record of Oral Proceedings (Misdemeanor) [added]
CR-135	Proposed Statement on Appeal (Misdemeanor) [added]
CR-136	Order Concerning Appellant's Proposed Statement on Appeal (Misdemeanor) [added]
CR-137	Abandonment of Appeal (Misdemeanor) [added]
CR-141-INFO	Information on Appeal Procedures for Infractions [added]
CR-142	Notice of Appeal and Record of Oral Proceedings (Infraction) [added]
CR-143	Proposed Statement on Appeal (Infraction) [added]
CR-144	Order Concerning Appellant's Proposed Statement on Appeal

- (Infraction) [added]
- CR-145 Abandonment of Appeal (Infraction) [added]
- CR-160 Criminal Protective Order--Domestic Violence (CLETS-CPO) (Penal Code, §§ 136.2, 1203.097(a)(2), 273.5(i), and 646.9(k)) [renamed]
- CR-161 Criminal Protective Order--Other Than Domestic Violence (CLETS-CPO) (Penal Code, §§ 136.2 and 646.9(k)) [renamed]
- CR-165 Notice of Termination of Protective Order in Criminal Proceeding (CLETS) (Penal Code, §§ 136.2, 1203.097(a)(2), 273.5(i), and 646.9(k)) [renamed]
- CR-180 Petition for Dismissal [renamed]
- CR-181 Order for Dismissal [added]
- CR-185 Petition for Expungement of DNA Profiles and Samples (Pen. Code, § S299) [added]
- CR-186 Order for Expungement of DNA Profiles and Samples (Pen. Code, § S299) [added]



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13. Decedents' Estates.

2 Witkin Cal. Proc. Courts § 410

[§ 410] Decedents' Estates.

<i>Form No.</i>	<i>Title</i>
DE-111	Petition for Probate
DE-120	Notice of Hearing--Decedent's Estate or Trust
DE-120(MA)	Attachment to Notice of Hearing Proof of Service by Mail
DE-120(P)	Proof of Personal Service of Notice of Hearing--Decedent's Estate or Trust
DE-120(PA)	Attachment to Notice of Hearing Proof of Personal Service
DE-121	Notice of Petition To Administer Estate
DE-121(MA)	Attachment to Notice of Petition to Administer Estate--Proof of Service by Mail
DE-122	Citation--Probate
DE-125	Summons
DE-131	Proof of Subscribing Witness
DE-135	Proof of Holographic Instrument
DE-140	Order for Probate
DE-147	Duties and Liabilities of Personal Representative
DE-147S	Confidential Supplement to Duties and Liabilities of Personal Representative
DE-150	Letters
DE-154	Request for Special Notice

DE-157	Notice of Administration to Creditors
DE-160	Inventory and Appraisal
DE-161	Inventory and Appraisal Attachment
DE-165	Notice of Proposed Action (Objection--Consent)
DE-166	Waiver of Notice of Proposed Action
DE-172	Creditor's Claim
DE-174	Allowance or Rejection of Creditor's Claim
DE-200	Order Prescribing Notice
DE-221	Spousal or Domestic Partner Property Petition
DE-226	Spousal or Domestic Partner Property Order
DE-260	Report of Sale and Petition for Order Confirming Sale of Real Property
DE-265	Order Confirming Sale of Real Property
DE-270	Ex Parte Petition for Authority To Sell Securities and Order
DE-275	Ex Parte Petition for Approval of Sale of Personal Property and Order
DE-295	Ex Parte Petition for Final Discharge and Order
DE-305	Affidavit re Real Property of Small Value (Probate)
DE-310	Petition To Determine Succession to Real Property (Estates \$ 100,000 or Less)
DE-315	Order Determining Succession to Real Property (Estates \$ 100,000 or Less)
DE-350	Petition for Appointment of Guardian Ad Litem--Probate
DE-351	Order Appointing Guardian Ad Litem--Probate

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council form has been renamed:

Form No.	Title
DE-174	Allowance or Rejection of Creditor's Claim (Probate--Decedents' Estates)



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14. Discovery.

2 *Witkin Cal. Proc. Courts* § 411

[§ 411] Discovery.

<i>Form No.</i>	<i>Title</i>
DISC-001	Form Interrogatories--General
DISC-002	Form Interrogatories--Employment Law
DISC-003	Form Interrogatories--Unlawful Detainer
DISC-004	Form Interrogatories--Limited Civil Cases (Economic Litigation)
DISC-010	Case Questionnaire--For Limited Civil Cases (Under \$ 25,000)
DISC-015	Request for Statement of Witnesses and Evidence--For Limited Civil Cases (Under \$ 25,000)
DISC-020	Request for Admission
DISC-030	Commission to Take Deposition Outside California

SUPPLEMENT: [This section is current through the latest supplement]



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15. Domestic Violence Prevention.

2 Witkin Cal. Proc. Courts § 412

[§ 412] Domestic Violence Prevention.

<i>Form No.</i>	<i>Title</i>
DV-100	Request for Order (Domestic Violence Prevention)
DV-101	Description of Abuse (Domestic Violence Prevention)
DV-105	Child Custody, Visitation, and Support Request (Domestic Violence Prevention)
DV-108	Request for Order: No Travel With Children (Domestic Violence Prevention)
DV-110	Temporary Restraining Order and Notice of Hearing (CLETS-TRO) (Domestic Violence Prevention)
DV-120	Answer to Temporary Restraining Order (Domestic Violence Prevention)
DV-125	Reissue Temporary Restraining Order (Domestic Violence Prevention)
DV-126-INFO	How to Reissue a Temporary Restraining Order (Domestic Violence Prevention)
DV-130	Restraining Order After Hearing (CLETS-OAH) (Order of Protection) (Domestic Violence Prevention)
DV-140	Child Custody and Visitation Order (Domestic Violence Prevention)
DV-145	Order: No Travel with Children (Domestic Violence Prevention)

DV-150	Supervised Visitation Order (Domestic Violence Prevention)
DV-160	Child Support Order--Order of Protection (Domestic Violence Prevention)
DV-170	Other Orders (Domestic Violence Prevention)
DV-200	Proof of Service (In Person) (CLETS) (Domestic Violence Prevention)
DV-210-INFO	What Is "Proof of Service"? (Domestic Violence Prevention)
DV-250	Proof of Service by Mail (CLETS) (Domestic Violence Prevention)
DV-260	Confidential CLETS Information (Domestic Violence, Civil Harassment, Elder Abuse)
DV-500-INFO	Can a Domestic Violence Restraining Order Help Me? (Domestic Violence Prevention)
DV-505	Forms You Need for a Temporary Restraining Order (Domestic Violence Prevention)
DV-510-INFO	I Filled Out the Forms----What Now? (Domestic Violence Prevention)
DV-520-INFO	Get Ready for Your Hearing (For Protected Person) (Domestic Violence Prevention)
DV-530-INFO	How to Enforce Your Order (Domestic Violence Prevention)
DV-540-INFO	Information for the Restrained Person (Domestic Violence Prevention)
DV-550-INFO	Get Ready for Your Hearing (For Restrained Person) (Domestic Violence Prevention)
DV-560	How Can I Make the Order Permanent? (Domestic Violence Prevention)
DV-570	Which Financial Form--FL-155 or FL-150? (Domestic Violence Prevention)
DV-600	Register Out-of-State Restraining Order (CLETS) (Domestic Violence Prevention)
DV-700	Request to Renew Restraining Order (Domestic Violence Prevention)
DV-710	Notice of Hearing to Renew Restraining Order (CLETS) (Domestic Violence Prevention)
DV-720-INFO	How Do I Ask the Court to Renew My Restraining Order? (Domestic Violence)
DV-800	Proof of Firearms Turned In or Sold (Domestic Violence Prevention)
DV-810	What Do I Do With My Gun or Firearm? (Domestic Violence Prevention)

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SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or renamed:

Form No.	Title
DV-100	Request for Order [renamed]
DV-101	Description of Abuse (Domestic Violence Prevention) [renamed]
DV-109	Notice of Court Hearing (Domestic Violence) [added]
DV-110	Temporary Restraining Order (CLETS-TRO) (Domestic Violence) [renamed]
DV-112	Waiver of Hearing on Denied Request for Temporary Restraining Order [added]
DV-120	Answer to Temporary Restraining Order [renamed]
DV-125	Reissue Notice of Court Hearing and Temporary Restraining Order (Domestic Violence Prevention) [renamed]
DV-130	Restraining Order After Hearing (CLETS-OAH) (Order of Protection) [renamed]
DV-170	Other Orders [renamed]
DV-200	Proof of Service (In Person) (CLETS) [renamed]
DV-510-IN	I Filled Out the Forms--What Now? [renamed]
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16. Elder or Dependent Adult Abuse.

2 Witkin Cal. Proc. Courts § 413

[§ 413] Elder or Dependent Adult Abuse.

<i>Form No.</i>	<i>Title</i>
EA-100	Request for Orders to Stop Elder or Dependent Adult Abuse
EA-102	Confidential CLETS Information (Domestic Violence, Civil Harassment, Elder Abuse)
EA-110	Response to Request for Orders to Stop Elder or Dependent Adult Abuse
EA-120	Notice of Hearing and Temporary Restraining Order (CLETS-TEA or TEF)
EA-125	Request and Order for Reissuance of Temporary Restraining Order (CLETS-TEA or TEF)
EA-130	Order After Hearing Restraining Elder or Dependent Adult Abuse (CLETS-TEA or TEF)
EA-140	Proof of Personal Service--CLETS
EA-141	Proof of Service by Mail--CLETS
EA-142-INFO	What is "Proof of Service"?
EA-145	Proof of Firearms Turned In or Sold
EA-150-INFO	Can a Restraining Order to Prevent Elder or Dependent Adult Abuse Help Me?
EA-151-INFO	How Can I Respond to a Request for Orders to Stop Elder or Dependent Adult Abuse?

SUPPLEMENT: [This section is current through the latest supplement]
The following Judicial Council forms have been renamed:

Form No.	Title
EA-100	Request for Orders to Stop Elder or Dependent Adult Abuse (Elder or Dependent Adult Abuse Prevention) [renamed]
EA-120	Notice of Hearing and Temporary Restraining Order (CLETS-TEA or TEF) (Elder or Dependent Adult Abuse Protection) [renamed]
EA-130	Order After Hearing Restraining Elder or Dependent Adult Abuse (CLETS-EAR or EAF) (Elder or Dependent Adult Abuse Protection) [renamed]



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17. Emergency Protective Order.

2 *Witkin Cal. Proc. Courts* § 414

[§ 414] Emergency Protective Order.

<i>Form No.</i>	<i>Title</i>
EPO-001	Emergency Protective Order (CLETS-EPO) (Domestic Violence, Child Abuse, Elder or Dependent Adult Abuse, or Stalking)

SUPPLEMENT: [This section is current through the latest supplement]



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18. Enforcement of Judgment.

2 *Witkin Cal. Proc. Courts* § 415

[§ 415] Enforcement of Judgment.

<i>Form No.</i>	<i>Title</i>
EJ-001	Abstract of Judgment--Civil and Small Claims
EJ-100	Acknowledgment of Satisfaction of Judgment
EJ-105	Application for Entry of Judgment on Sister-State Judgment
EJ-110	Notice of Entry of Judgment on Sister-State Judgment
EJ-125	Application and Order for Appearance and Examination
EJ-130	Writ of Execution
EJ-150	Notice of Levy (Enforcement of Judgment)
EJ-152	Memorandum of Garnishee (Attachment---Enforcement of Judgment)
EJ-155	Exemptions from the Enforcement of Judgments
EJ-160	Claim of Exemption (Enforcement of Judgment)
EJ-165	Financial Statement (Wage Garnishment--Enforcement of Judgment)
EJ-170	Notice of Opposition to Claim of Exemption (Enforcement of Judgment)
EJ-175	Notice of Hearing on Claim of Exemption (Wage Garnishment--Enforcement of Judgment)
EJ-180	Notice of Hearing on Right to Homestead Exemption (Enforcement of Judgment)
EJ-182	Declaration for Rehearing on Homestead Exemption (Enforcement of Judgment)

f Judgment)

EJ-185 Notice of Lien (Attachment--Enforcement of Judgment)

EJ-190 Application for and Renewal of Judgment

EJ-195 Notice of Renewal of Judgment

SUPPLEMENT: [This section is current through the latest supplement]



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19. Family Law.

2 *Witkin Cal. Proc. Courts* § 416

[§ 416] Family Law.

<i>Form No.</i>	<i>Title</i>
FL-100	Petition--Marriage (Family Law)
FL-103	Petition--Domestic Partnership (Family Law)
FL-105	Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)
FL-110	Summons (Family Law)
FL-115	Proof of Service of Summons (Family Law--Uniform Parentage--Custody and Support)
FL-117	Notice and Acknowledgment of Receipt (Family Law)
FL-120	Response--Marriage (Family Law)
FL-123	Response--Domestic Partnership (Family Law)
FL-130	Appearance, Stipulations, and Waivers (Family Law--Uniform Parentage--Custody and Support)
FL-140	Declaration of Disclosure (Family Law)
FL-141	Declaration Regarding Service of Declaration of Disclosure (Family Law)
FL-142	Schedule of Assets and Debts (Family Law)
FL-144	Stipulation and Waiver of Final Declaration of Disclosure
FL-145	Form Interrogatories--Family Law
FL-150	Income and Expense Declaration

FL-155	Financial Statement (Simplified)
FL-160	Property Declaration
FL-161	Continuation of Property Declaration (Family Law)
FL-165	Request to Enter Default (Family Law--Uniform Parentage)
FL-170	Declaration for Default or Uncontested Dissolution or Legal Separation
FL-180	Judgment (Family Law)
FL-190	Notice of Entry of Judgment (Family Law--Uniform Parentage--Custody and Support)
FL-191	Child Support Case Registry Form
FL-192	Notice of Rights and Responsibilities (Health-Care Costs and Reimbursement Procedures)
FL-195	Order/Notice to Withhold Income for Child Support
FL-196	Instructions to Complete the Order/Notice to Withhold Income for Child Support
FL-200	Petition to Establish Parental Relationship (Uniform Parentage)
FL-210	Summons (Uniform Parentage--Petition for Custody and Support)
FL-220	Response to Petition to Establish Parental Relationship (Uniform Parentage)
FL-230	Declaration for Default or Uncontested Judgment (Uniform Parentage--Custody and Support)
FL-235	Advisement and Waiver of Rights Re: Establishment of Parental Relationship (Uniform Parentage)
FL-240	Stipulation for Entry of Judgment Re: Establishment of Parental Relationship (Uniform Parentage)
FL-250	Judgment (Uniform Parentage--Custody and Support)
FL-260	Petition for Custody and Support of Minor Children
FL-270	Response to Petition for Custody and Support of Minor Children
FL-272	Notice of Motion to Set Aside Judgment of Paternity (Family Law--Governmental)
FL-273	Declaration in Support of Motion to Set Aside Judgment of Paternity (Family Law--Governmental)
FL-274	Information Sheet for Completing Notice of Motion to Set Aside Judgment of Paternity (Family Law--Governmental)
FL-276	Response to Notice of Motion to Set Aside Judgment of Paternity (Family Law--Governmental)
FL-278	Order After Hearing on Motion to Set Aside Judgment of Paternity (Family Law--Governmental)

FL-280	Request for Hearing and Application to Set Aside Voluntary Declaration of Paternity (Family Law--Governmental)
FL-281	Information Sheet for Completing Request for Hearing and Application to Set Aside Voluntary Declaration of Paternity (Family Law--Governmental)
FL-285	Responsive Declaration to Application to Set Aside Voluntary Declaration of Paternity (Family Law--Governmental)
FL-290	Order After Hearing on Motion to Set Aside Voluntary Declaration of Paternity (Family Law--Governmental)
FL-300	Order to Show Cause
FL-301	Notice of Motion
FL-305	Temporary Orders
FL-306	Application and Order for Reissuance of Order to Show Cause (Family Law--Governmental--Uniform Parentage--Custody and Support--Juvenile)
FL-310	Application for Order and Supporting Declaration
FL-311	Child Custody and Visitation Application Attachment
FL-312	Request for Child Abduction Prevention Orders
FL-314-INFO	Child Custody Information Sheet
FL-315	Application for Separate Trial (Family Law)
FL-320	Responsive Declaration to Order to Show Cause or Notice of Motion
FL-322	Declaration of Counsel for a Child Regarding Qualifications
FL-323	Order Appointing Counsel for a Child
FL-325	Declaration of Court-Connected Child Custody Evaluator Regarding Qualifications
FL-326	Declaration of Private Child Custody Evaluator Regarding Qualifications
FL-327	Order Appointing Child Custody Evaluator
FL-330	Proof of Personal Service
FL-335	Proof of Service by Mail
FL-340	Findings and Order After Hearing (Family Law--Custody and Support--Uniform Parentage)
FL-341	Child Custody and Visitation Order Attachment
FL-341(A)	Supervised Visitation Order
FL-341(B)	Child Abduction Prevention Order Attachment
FL-341(C)	Children's Holiday Schedule Attachment
FL-341(D)	Additional Provisions--Physical Custody Attachment
FL-341(E)	Joint Legal Custody Attachment
FL-342	Child Support Information and Order Attachment

FL-342(A)	Non-Guideline Child Support Findings Attachment
FL-343	Spousal, Partner, or Family Support Order Attachment (Family Law)
FL-344	Property Order Attachment to Findings and Order After Hearing
FL-345	Property Order Attachment to Judgment
FL-350	Stipulation to Establish or Modify Child Support and Order
FL-355	Stipulation and Order for Custody and/or Visitation of Children
FL-360	Request for Hearing and Application to Set Aside Support Order Under Family Code Section 3691
FL-365	Responsive Declaration to Application to Set Aside Support Order
FL-367	Order After Hearing on Motion to Set Aside Support Order
FL-370	Pleading on Joinder--Employee Benefit Plan
FL-371	Notice of Motion and Declaration for Joinder
FL-372	Request for Joinder of Employee Benefit Plan and Order
FL-373	Responsive Declaration to Motion for Joinder and Consent Order of Joinder
FL-374	Notice of Appearance and Response of Employee Benefit Plan
FL-375	Summons (Joinder)
FL-380	Application for Expedited Child Support Order
FL-381	Response to Application for Expedited Child Support Order and Notice of Hearing
FL-382	Expedited Child Support Order
FL-390	Notice of Motion and Motion for Simplified Modification of Order for Child, Spousal, or Family Support
FL-391	Information Sheet--Simplified Way to Change Child, Spousal, or Family Support
FL-392	Responsive Declaration to Motion for Simplified Modification of Order for Child, Spousal, or Family Support
FL-393	Information Sheet--How to Oppose a Request to Change Child, Spousal, or Family Support
FL-395	Ex Parte Application for Restoration of Former Name After Entry of Judgment and Order (Family Law)
FL-396	Request for Production of an Income and Expense Declaration After Judgment
FL-397	Request for Income and Benefit Information From Employer
FL-398	Notice of Activation of Military Service and Deployment and Request to Modify a Support Order (Family Law--Governmental)

FL-400	Order for Child Support Security Deposit and Evidence of Deposit
FL-401	Application for Disbursement and Order for Disbursement From Child Support Security Deposit
FL-410	Order to Show Cause and Affidavit for Contempt
FL-411	Affidavit of Facts Constituting Contempt (Financial and Injunctive Orders)
FL-412	Affidavit of Facts Constituting Contempt (Domestic Violence/Custody and Visitation)
FL-415	Findings and Order Regarding Contempt (Family Law--Domestic Violence Prevention--Uniform Parentage--Governmental)
FL-420	Declaration of Payment History (Family Law--Governmental--Uniform Parentage Act)
FL-421	Payment History Attachment (Family Law--Governmental--Uniform Parentage Act)
FL-430	Ex Parte Application for Earnings Assignment Order
FL-435	Earnings Assignment Order for Spousal or Partner Support (Family Law)
FL-440	Statement for Registration of California Support Order
FL-450	Request for Hearing Regarding Earnings Assignment (Family Law--Governmental--UIFSA)
FL-455	Stay of Service of Earnings Assignment Order
FL-460	Qualified Domestic Relations Order for Support (Earnings Assignment Order for Support)
FL-461	Attachment to Qualified Domestic Relations Order for Support (Earnings Assignment Order for Support)
FL-470	Application and Order for Health Insurance Coverage
FL-475	Employer's Health Insurance Return
FL-478	Request and Notice of Hearing Regarding Health Insurance Assignment
FL-478-INFO	Information Sheet and Instructions for Request and Notice of Hearing Regarding Health Insurance Assignment
FL-480	Abstract of Support Judgment
FL-485	Notice of Delinquency
FL-490	Application to Determine Arrearages
FL-510	Summons (UIFSA)
FL-511	Ex Parte Application for Order for Nondisclosure of Address and Order (UIFSA)

FL-515	Order to Show Cause (UIFSA)
FL-520	Response to Uniform Support Petition (UIFSA)
FL-530	Judgment Regarding Parental Obligations (UIFSA)
FL-560	Ex Parte Application for Transfer and Order (UIFSA)
FL-570	Notice of Registration of Out-of-State Support Order
FL-575	Request for Hearing Regarding Registration of Support Order
FL-580	Registration of Out-of-State Custody Order
FL-585	Request for Hearing Regarding Registration of Out-of-State Custody Decree
FL-600	Summons and Complaint or Supplemental Complaint Regarding Parental Obligations
FL-605	Notice and Acknowledgment of Receipt
FL-610	Answer to Complaint or Supplemental Complaint Regarding Parental Obligations (Governmental)
FL-611	Information Sheet for Service of Process
FL-615	Stipulation for Judgment or Supplemental Judgment Regarding Parental Obligations and Judgment (Governmental)
FL-616	Declaration for Amended Proposed Judgment (Governmental)
FL-618	Request for Dismissal (Governmental, UIFSA)
FL-620	Request to Enter Default Judgment (Governmental)
FL-625	Stipulation and Order (Governmental)
FL-626	Stipulation and Order Waiving Unassigned Arrears (Governmental)
FL-627	Order for Genetic (Parentage) Testing
FL-630	Judgment Regarding Parental Obligations (Governmental)
FL-632	Notice Regarding Payment of Support
FL-635	Notice of Entry of Judgment and Proof of Service by Mail (Governmental)
FL-640	Notice and Motion to Cancel (Set Aside) Support Order Based on Presumed Income (Governmental)
FL-643	Declaration of Obligor's Income During Judgment Period--Presumed Income Set-Aside Request (Governmental)
FL-645	Notice to Local Child Support Agency of Intent to Take Independent Action to Enforce Support Order (Governmental)
FL-646	Response of Local Child Support Agency to Notice of Intent to Take Independent Action to Enforce Support Order (Governmental)
FL-650	Statement for Registration of California Support Order (Governmental)
FL-651	Notice of Registration of California Support Order (Governmental)

	l)
FL-660	Ex Parte Motion by Local Child Support Agency and Declaration f or Joinder of Other Parent (Governmental)
FL-661	Notice of Motion and Declaration for Joinder of Other Parent in Governmental Action (Governmental)
FL-662	Responsive Declaration to Motion for Joinder of Other Parent--C onsent Order of Joinder (Governmental)
FL-663	Stipulation and Order for Joinder of Other Parent (Governmental)
FL-665	Findings and Recommendation of Commissioner (Governmental)
FL-666	Notice of Objection (Governmental)
FL-667	Review of Commissioner's Findings of Fact and Recommendation (G overnmental)
FL-670	Notice of Motion for Judicial Review of License Denial (Governm ental)
FL-675	Order After Judicial Review of License Denial (Governmental)
FL-676	Request for Judicial Determination of Support Arrearages (Gover nmental)
FL-677	Notice of Opposition and Notice of Motion on Claim of Exemption (Governmental)
FL-678	Order Determining Claim of Exemption or Third-Party Claim (Gove rnmental)
FL-679	Request for Telephone Appearance (Governmental)
FL-679-INFO	Information Sheet--Request for Telephone Appearance (Government al)
FL-680	Notice of Motion (Governmental)
FL-681	Clerk Calendar Cover Sheet (For Court Clerk Use Only)
FL-683	Order to Show Cause (Governmental)
FL-684	Request for Order and Supporting Declaration (Governmental)
FL-685	Response to Governmental Notice of Motion or Order to Show Caus e (Governmental)
FL-687	Order After Hearing (Governmental)
FL-688	Short Form Order After Hearing (Governmental)
FL-692	Minutes and Order or Judgment
FL-693	Guideline Findings Attachment (Governmental)
FL-694	Advisement and Waiver of Rights for Stipulation (Governmental)
FL-697	Declaration for Default or Uncontested Judgment (Governmental)
FL-800	Joint Petition for Summary Dissolution of Marriage

FL-810	Summary Dissolution Information
FL-820	Request for Judgment, Judgment of Dissolution of Marriage, and Notice of Entry of Judgment (Family Law--Summary Dissolution)
FL-830	Notice of Revocation of Petition for Summary Dissolution (Family Law--Summary Dissolution)
FL-920	Notice of Consolidation
FL-935	Application and Order for Appointment of Guardian Ad Litem of Minor--Family Law
FL-940	Office of the Family Law Facilitator Disclosure
FL-945	Family Law Information Center Disclosure
FL-950	Notice of Limited Scope Representation
FL-955	Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation
FL-956	Objection to Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation
FL-958	Order on Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation
FL-960	Notice of Withdrawal of Attorney of Record
FL-970	Request and Declaration for Final Judgment of Dissolution of Marriage (Family Law)

SUPPLEMENT: [This section is current through the latest supplement]
The following Judicial Council forms have been added or renamed:

Form No.	Title
FL-105(A)	Attachment to Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) [added]
FL-315	Application or Response to Application for Separate Trial (Family Law) [renamed]
FL-318-IN FO	Retirement Plan Joinder--Information Sheet (Family Law) [added]
FL-328	Notice Regarding Confidentiality of Child Custody Evaluation Report [added]
FL-329-IN FO	Child Custody Evaluation Information Sheet [added]
FL-336	Order to Pay Waived Court Fees and Costs (Superior Court) [added]
FL-337	Application to Set Aside Order to Pay Waived Court Fees--Attachment [added]

- FL-338 Order After Hearing on Motion to Set Aside Order to Pay Waived
Court Fees (Superior Court) [added]
- FL-347 Bifurcation of Status of Marriage or Domestic
Partnership--Attachment (Family Law) [added]
- FL-348 Pension Benefits--Attachment to Judgment (Attach to form FL-180) [
added]
- FL-910 Request of Minor to Marry (Family Law) [added]
- FL-915 Order on Request of Minor to Marry (Family Law) [added]



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C. Approval of Legal Forms.

20. Fee Waiver.

2 Witkin Cal. Proc. Courts § 417

[§ 417] Fee Waiver.

<i>Form No.</i>	<i>Title</i>
FW-001	Application for Waiver of Court Fees and Costs (Fee Waiver)
FW-001-INFO	Information Sheet on Waiver of Court Fees and Costs (California Rules of Court, rules 3.50-3.63) (Fee Waiver)
FW-002	Application for Additional Waiver of Court Fees and Costs (Fee Waiver)
FW-003	Order on Application for Waiver of Court Fees and Costs (Fee Waiver)
FW-004	Order on Application for Waiver of Additional Court Fees and Costs (Fee Waiver)
FW-005	Notice of Waiver of Court Fees and Costs (Fee Waiver)

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or renamed:

Form No.	Title
FW-001	Request to Waive Court Fees [renamed]
FW-001-IN	Information Sheet on Waiver of Court Fees and Costs [renamed]
FO	
FW-002	Request to Waive Additional Court Fees (Superior Court) [renamed]
FW-003	Order on Court Fee Waiver (Superior Court) [renamed]

FW-005	Notice: Waiver of Court Fees (Superior Court) [renamed]
FW-006	Request for Hearing About Court Fee Waiver Order (Superior Court) [added]
FW-007	Notice on Hearing About Court Fees [added]
FW-008	Order on Court Fee Waiver After Hearing (Superior Court) [added]
FW-010	Notice to Court of Improved Financial Situation or Settlement [added]
FW-011	Notice to Appear for Reconsideration of Fee Waiver [added]
FW-012	Order on Court Fee Waiver After Reconsideration Hearing (Superior Court) [added]
FW-015-IN FO	Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division) [added]
FW-016	Order on Court Fee Waiver (Court of Appeal or Supreme Court) [added]



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21. Guardianship and Conservatorship.

2 Witkin Cal. Proc. Courts § 418

[§ 418] Guardianship and Conservatorship.

<i>Form No.</i>	<i>Title</i>
GC-005	Declaration of Private Professional Conservator or Guardian--Qualifications (Probate--Guardianships and Conservatorships)
GC-006	Declaration of Private Professional Conservator or Guardian--Continuing Education (Probate--Guardianships and Conservatorships)
GC-020	Notice of Hearing--Guardianship or Conservatorship
GC-020(C)	Clerk's Certificate of Posting Notice of Hearing--Guardianship or Conservatorship (Probate--Guardianships and Conservatorships)
GC-020(MA)	Attachment to Notice of Hearing Proof of Service by Mail (Probate--Decedents' Estates and Guardianships and Conservatorships)
GC-020(P)	Proof of Personal Service of Notice of Hearing--Guardianship or Conservatorship (Probate--Guardianships and Conservatorships)
GC-020(PA)	Attachment to Notice of Hearing Proof of Personal Service (Probate--Decedents' Estates and Guardianships and Conservatorships)
GC-021	Order Dispensing with Notice--Guardianship or Conservatorship
GC-022	Order Prescribing Notice
GC-035	Request for Special Notice
GC-040	Inventory and Appraisal
GC-041	Inventory and Appraisal Attachment
GC-042	Notice of Filing of Inventory and Appraisal and How to Object t

	o the Inventory or the Appraised Value of Property
GC-042(MA)	Attachment to Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property
GC-045	Objections to Inventory and Appraisal of Conservator or Guardian
GC-050	Notice of Taking Possession or Control of an Asset of Minor or Conservatee
GC-051	Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe-Deposit Box
GC-060	Report of Sale and Petition for Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships)
GC-065	Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships)
GC-070	Ex Parte Petition for Authority to Sell Securities and Order
GC-075	Ex Parte Petition for Approval of Sale of Personal Property and Order
GC-079	Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward
GC-079(MA)	Attachment to Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward
GC-080	Change of Residence Notice
GC-085	Petition to Fix Residence Outside the State of California
GC-090	Order Fixing Residence Outside the State of California
GC-090(MA)	Attachment to Post-Move Notice of Change of Residence of Conservatee or Ward
GC-100	Petition for Appointment of Guardian Ad Litem--Probate
GC-101	Order Appointing Guardian Ad Litem--Probate
GC-110	Petition for Appointment of Temporary Guardian
GC-110(P)	Petition for Appointment of Temporary Guardian of the Person
GC-111	Petition for Appointment of Temporary Conservator
GC-120	Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)
GC-140	Order Appointing Temporary Guardian or Conservator
GC-150	Letters of Temporary Guardianship or Conservatorship
GC-205	Guardianship Pamphlet
GC-210	Petition for Appointment of Guardian of Minor
GC-210(CA)	Guardianship Petition--Child Information Attachment (Probate--Guardianships and Conservatorships)

GC-210(P)	Petition for Appointment of Guardian of the Person
GC-211	Consent of Guardian, Nomination of Guardian, and Consent to Appointment of Guardian and Waiver of Notice
GC-212	Confidential Guardian Screening Form (Probate--Guardianships and Conservatorships)
GC-240	Order Appointing Guardian of Minor
GC-248	Duties of Guardian (Probate)
GC-250	Letters of Guardianship
GC-251	Confidential Guardianship Status Report
GC-255	Petition for Termination of Guardianship (Probate--Guardianships and Conservatorships)
GC-260	Order Terminating Guardianship (Probate--Guardianships and Conservatorships)
GC-310	Petition for Appointment of Probate Conservator (Probate--Guardianships and Conservatorships)
GC-312	Confidential Supplemental Information (Probate Conservatorship)
GC-313	Attachment Requesting Special Orders Regarding Dementia (Petition for Exclusive Authority to Give Consent for Medical Treatment) (Petition for Appointment of Probate Conservator)
GC-314	Confidential Conservator Screening Form (Probate--Guardianships and Conservatorships)
GC-320	Citation for Conservatorship (Probate--Guardianships and Conservatorships)
GC-322	Citation--Probate
GC-330	Order Appointing Court Investigator (Probate Conservatorship)
GC-333	Ex Parte Application for Order Authorizing Completion of Capacity Declaration--HIPAA (Probate--Guardianships and Conservatorships)
GC-334	Ex Parte Order Re Completion of Capacity Declaration--HIPAA (Probate--Guardianships and Conservatorships)
GC-335	Capacity Declaration--Conservatorship
GC-335A	Dementia Attachment to Capacity Declaration--Conservatorship
GC-340	Order Appointing Probate Conservator (Probate--Guardianships and Conservatorships)
GC-341	Notice of Conservatee's Rights
GC-341(MA)	Attachment to Notice of Conservatee's Rights
GC-348	Duties of Conservator and Acknowledgment of Receipt of Handbook (Probate Conservatorship)
GC-350	Letters of Conservatorship

GC-380	Petition for Exclusive Authority to Give Consent for Medical Treatment (Probate Conservatorship)
GC-385	Order Authorizing Conservator to Give Consent for Medical Treatment
GC-395	Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships)
GC-400(A)(1)	Schedule A, Receipts, Dividends--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(A)(2)	Schedule A, Receipts, Interest--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(A)(3)	Schedule A, Receipts, Pensions, Annuities, and Other Regular Periodic Payments--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(A)(4)	Schedule A, Receipts, Rent--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(A)(5)	Schedule A, Receipts, Social Security, Veterans' Benefits, Other Public Benefits--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(A)(6)	Schedule A, Receipts, Other Receipts--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(A)(C)	Schedule A and C, Receipts and Disbursements Worksheet--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(AP)	Additional Property Received During Period of Account--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-400(B)	Schedule B, Gains on Sales--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-400(C)(1)	Schedule C, Disbursements, Conservatee's Caregiver Expenses--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(C)(2)	Schedule C, Disbursements, Conservatee's Residential or Long-Term Care Facility Expenses--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(C)(3)	Schedule C, Disbursements, Ward's Education Expenses--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(C)(4)	Schedule C, Disbursements, Fiduciary and Attorney Fees--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(C)(5)	Schedule C, Disbursements, General Administration Expenses--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(C)(6)	Schedule C, Disbursements, Investment Expenses--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(C)(7)	Schedule C, Disbursements, Living Expenses--Standard Account (Probate--Guardianships and Conservatorships)

	robate--Guardianships and Conservatorships)
GC-400(C)(8)	Schedule C, Disbursements, Medical Expenses--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(C)(9)	Schedule C, Disbursements, Property Sale Expenses--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(C)(10)	Schedule C, Disbursements, Rental Property Expenses--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(C)(11)	Schedule C, Disbursements, Other Expenses--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(D)	Schedule D, Losses on Sales--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-400(DIST)	Distributions to Conservatee or Ward--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-400(E)(1)	Cash Assets on Hand at End of Account Period--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-400(E)(2)	Non-Cash Assets on Hand at End of Account Period--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-400(F)	Schedule F, Changes in Form of Assets--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-400(G)	Schedule G, Liabilities at End of Account Period--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-400(NI)	Net Income From Trade or Business--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(NL)	Net Loss From Trade or Business--Standard Account (Probate--Guardianships and Conservatorships)
GC-400(OCH)	Other Charges--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-400(OCR)	Other Credits--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-400(PH)(1)	Cash Assets on Hand at Beginning of Account Period--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-400(PH)(2)	Non-Cash Assets on Hand at Beginning of Account Period--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-400(SUM)	Summary of Account--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-405(A)	Schedule A, Receipts--Simplified Account (Probate--Guardianships and Conservatorships)
GC-405(AP)	Additional Property Received During Period of Account--Standard

	and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-405(B)	Schedule B, Gains on Sales--Standard and Simplified Accounts
GC-405(C)	Schedule C, Disbursements--Simplified Account
GC-405(D)	Schedule D, Losses on Sales--Standard and Simplified Accounts
GC-405(DIST)	Distributions to Conservatee or Ward--Standard and Simplified Accounts
GC-405(E)(1)	Cash Assets on Hand at End of Account Period--Standard and Simplified Accounts
GC-405(E)(2)	Non-Cash Assets on Hand at End of Account Period--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-405(F)	Schedule F, Changes in Form of Assets--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-405(G)	Schedule G, Liabilities at End of Account Period--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-405(OCH)	Other Charges--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-405(OCR)	Other Credits--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-405(PH)(1)	Cash Assets on Hand at Beginning of Account Period--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-405(PH)(2)	Non-Cash Assets on Hand at Beginning of Account Period--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-405(SUM)	Summary of Account--Standard and Simplified Accounts (Probate--Guardianships and Conservatorships)
GC-505	Forms You Need to Ask the Court to Appoint A Guardian of the Person (Probate--Guardianships and Conservatorships) (Probate--Guardianships and Conservatorships)
GC-510	What is "Proof of Service" in a Guardianship? (Probate--Guardianships and Conservatorships)

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or renamed:

Form No.	Title
GC-010	Certification of Attorney Concerning Qualifications for Court Appointment in Conservatorships or Guardianships [added]
GC-011	Annual Certification of Court-Appointed Attorney (Probate--Guardianships and Conservatorships) [added]

- GC-050 Notice of Taking Possession or Control of an Asset of Minor or Conservatee (Probate--Guardianships and Conservatorships) [renamed]
- GC-110 Petition for Appointment of Temporary Guardian of the Person (P) (Probate--Guardianships and Conservatorships) [renamed]
- GC-112 Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator (Probate--Guardianships and Conservatorships) [added]
- GC-112 Declaration in Support of Ex Parte Application for Good Cause (A-1) Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator (Probate--Guardianships and Conservatorships) [added]
- GC-112 Declaration Continuation Page (Probate--Guardianships and (A-2) Conservatorships) [added]
- GC-115 Order on Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator (Probate--Guardianships and Conservatorships) [added]
- GC-120 Attachment to Declaration Under Uniform Child Custody Jurisdiction (A) and Enforcement Act (UCCJEA) [added]
- GC-140 Order Appointing Temporary Guardian (Probate--Guardianships and Conservatorships) [renamed]
- GC-141 Order Appointing Temporary Conservator (Probate--Guardianships and Conservatorships) [added]
- GC-150 Letters of Temporary Guardianship or Conservatorship (Probate--Guardianships and Conservatorships) [renamed]
- GC-210 Professional Fiduciary Attachment to Petition for Appointment of (A-PF) Guardian or Conservator [added]
- GC-212 Confidential Guardian Screening Form [renamed]
- GC-250 Letters of Guardianship (Probate--Guardianships and Conservatorships) [renamed]
- GC-310 Petition for Appointment of Probate Conservator [renamed]
- GC-310 Professional Fiduciary Attachment to Petition for Appointment of (A-PF) Guardian or Conservator [added]
- GC-314 Confidential Conservator Screening Form [renamed]
- GC-350 Letters of Conservatorship (Probate--Guardianships and Conservatorships) [renamed]



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C. Approval of Legal Forms.

22. Ignition Interlock Device.

2 Witkin Cal. Proc. Courts § 419

[§ 419] Ignition Interlock Device.

<i>Form No.</i>	<i>Title</i>
ID-100	Order To Install Ignition Interlock Device (Ignition Interlock Device)
ID-110	Ignition Interlock Installation Verification (Ignition Interlock Device)
ID-120	Ignition Interlock Calibration Verification and Tamper Report (Ignition Interlock Device)
ID-130	Ignition Interlock Noncompliance Report (Ignition Interlock Device)
ID-140	Ignition Interlock Removal and Modification to Probation Order (Ignition Interlock Device)
ID-150	Notice to Employers of Ignition Interlock Restriction (Ignition Interlock Device)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Approval of Legal Forms.

23. Indian Child Welfare Act.

2 *Witkin Cal. Proc. Courts* § 420

[§ 420] Indian Child Welfare Act.

<i>Form No.</i>	<i>Title</i>
ICWA-005-INFO	Information Sheet on Indian Child Inquiry Attachment and Notice of Child Custody Proceeding for Indian Child
ICWA-010(A)	Indian Child Inquiry Attachment
ICWA-020	Parental Notification of Indian Status
ICWA-030	Notice of Child Custody Proceeding for Indian Child
ICWA-030(A)	Attachment to Notice of Child Custody Proceeding for Indian Child
ICWA-040	Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child
ICWA-050	Notice of Petition and Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction
ICWA-060	Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction

SUPPLEMENT: [This section is current through the latest supplement]



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C. Approval of Legal Forms.

24. Interpreter.

2 *Witkin Cal. Proc. Courts* § 421

[§ 421] Interpreter.

<i>Form No.</i>	<i>Title</i>
INT-001	Semi-Annual Report to the Judicial Council on the Use of Noncertified Interpreters
INT-002	Semi-Annual Report to the Judicial Council on the Use of Noncertified Interpreters (Attachment)
INT-100	Procedures and Guidelines to Appoint a Noncertified Interpreter in Criminal and Juvenile Delinquency Proceedings (Designated Languages)
INT-110	Qualifications of a Noncertified Interpreter
INT-120	Certification of Unavailability of Certified Interpreters
INT-200	Foreign Language Interpreter's Duties--Civil and Small Claims (For Noncertified and Nonregistered Interpreters)

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added, renumbered, or renamed:

Form No.	Title
INT-001	Semiannual Report to the Judicial Council on the Use of Noncertified or Nonregistered Interpreters [renamed]
INT-002(A)	Semiannual Report to the Judicial Council on the Use of Nonregistered Interpreters (Attachment to INT-001) [renumbered;

- renamed]
- INT-100- Procedures and Guidelines to Appoint a Noncertified or
INFO Nonregistered Interpreter in Criminal and Juvenile Delinquency
Proceedings [renumbered; renamed]
- INT-110 Qualifications of a Noncertified or Nonregistered Interpreter
(Provisional Qualification by Order of Presiding Judge) [renamed]
- INT-120 Certification of Unavailability of Certified or Registered
Interpreters [renamed]



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25. Judgment.

2 *Witkin Cal. Proc. Courts* § 422

[§ 422] Judgment.

<i>Form No.</i>	<i>Title</i>
JUD-100	Judgment

SUPPLEMENT: [This section is current through the latest supplement]



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X. THE JUDICIAL COUNCIL

C. Approval of Legal Forms.

26. Juvenile.

2 *Witkin Cal. Proc. Courts* § 423

[§ 423] Juvenile.

<i>Form No.</i>	<i>Title</i>
JV-050	Information for Parents (Juvenile Dependency)
JV-055	Juvenile Court--The Dependency Court: How it Works
JV-060	Juvenile Court--Information for Parents
JV-100	Juvenile Dependency Petition (Version One)
JV-101(A)	Additional Children Attachment--Juvenile Dependency Petition
JV-110	Juvenile Dependency Petition (Version Two)
JV-120	Serious Physical Harm (§ 300(a))
JV-121	Failure To Protect (§ 300(b))
JV-122	Serious Emotional Damage (§ 300(c))
JV-123	Sexual Abuse (§ 300(d))
JV-124	Severe Physical Abuse (§ 300(e))
JV-125	Caused Another Child's Death Through Abuse or Neglect (§ 300(f))
JV-126	No Provision for Support (§ 300(g))
JV-127	Freed for Adoption (§ 300(h))
JV-128	Cruelty (§ 300(i))
JV-129	Abuse of Sibling (§ 300(j))
JV-140	Notification of Mailing Address
JV-150	Supplemental Petition for More Restrictive Placement (Attachment)

	t) (Welfare and Institutions Code, § 387)
JV-180	Request to Change Court Order
JV-182	Confidential Information (Request to Change Court Order)
JV-185	Child's Information Sheet--Request to Change Court Order (Welf. & Inst. Code, §§ 353.1, 388)
JV-190	Waiver of Rights--Juvenile Dependency
JV-195	Waiver of Reunification Services
JV-200	Custody Order--Juvenile--Final Judgment
JV-205	Visitation Order
JV-210	Application to Commence Proceedings by Affidavit and Decision by Social Worker (Welf. & Inst. Code, § 329)
JV-215	Application to Review Decision by Social Worker Not to Commence Proceedings (Welf. & Inst. Code, § 331)
JV-219-INFO	Information About Psychotropic Medication Forms
JV-220	Application Regarding Psychotropic Medication
JV-220(A)	Prescribing Physician's Statement--Attachment
JV-221	Proof of Notice: Application Regarding Psychotropic Medication
JV-222	Opposition to Application Regarding Psychotropic Medication
JV-223	Order Regarding Application for Psychotropic Medication
JV-225	Your Child's Health and Education
JV-245	Application and Affidavit for Restraining Order
JV-250	Restraining Order--Juvenile (CLETS--JUV)
JV-251	Application and Order for Reissuance of Order to Show Cause (Family Law--Governmental--Uniform Parentage--Custody and Support--Juvenile)
JV-252	Proof of Firearms Turned In or Sold (Domestic Violence Prevention)
JV-280	Notice of Review Hearing
JV-290	Caregiver Information Form
JV-290-INFO	Instruction Sheet for Caregiver Information Form
JV-295	De Facto Parent Request
JV-296	De Facto Parent Statement
JV-297	De Facto Parent Order
JV-298	Order Ending De Facto Parent Status
JV-299	De Facto Parent Pamphlet
JV-300	Notice of Hearing on Selection of a Permanent Plan
JV-305	Citation for Publication Under Welfare and Institutions Code Section 294
JV-310	Proof of Service Under Section 366.26 of the Welfare and Institutions Code

	utions Code
JV-320	Orders Under Welfare and Institutions Code Sections 366.26, 727.3, 727.31
JV-321	Request for Prospective Adoptive Parent Designation
JV-322	Confidential Information--Prospective Adoptive Parent
JV-323	Notice of Intent to Remove Child
JV-324	Notice of Emergency Removal
JV-325	Objection to Removal
JV-326	Proof of Notice
JV-326-INFO	Instructions for Notice of Prospective Adoptive Parent Hearing
JV-327	Prospective Adoptive Parent Designation Order
JV-328	Prospective Adoptive Parent Order After Hearing
JV-330	Letters of Guardianship (Juvenile)
JV-350	Guardianship Pamphlet
JV-364	Termination of Dependency (Juvenile)
JV-365	Termination of Dependency Jurisdiction--Child Attaining Age of Majority
JV-400	Visitation Attachment: Parental, Legal Guardian, Indian Custodian, Other Important Person
JV-401	Visitation Attachment: Sibling
JV-402	Visitation Attachment: Grandparent
JV-405	Continuance--Detention Hearing
JV-406	Continuance--General
JV-410	Findings and Orders After Detention Hearing (Welf. & Inst. Code, § 319)
JV-412	Findings and Orders After Jurisdictional Hearing (Welf. & Inst. Code, § 356)
JV-415	Findings and Orders After Dispositional Hearing (Welf. & Inst. Code, § 361 et seq.)
JV-416	Dispositional Attachment: Dismissal of Petition With or Without Informal Supervision (Welf. & Inst. Code, § 360(b))
JV-417	Dispositional Attachment: In-Home Placement With Formal Supervision (Welf. & Inst. Code, § 361)
JV-418	Dispositional Attachment: Appointment of Guardian (Welf. & Inst. Code, § 360(a))
JV-419	Guardianship--Consent and Waiver of Rights
JV-419A	Guardianship--Child's Consent and Waiver of Rights
JV-420	Dispositional Attachment: Removal From Custodial Parent--Placem

	ent With Previously Noncustodial Parent (Welf. & Inst. Code, §§ 361, 361.2)
JV-421	Dispositional Attachment: Removal From Custodial Parent--Placem
	ent With Nonparent (Welf. & Inst. Code, §§ 361, 361.2)
JV-425	Findings and Orders After In-Home Status Review Hearing (Welf.
	& Inst. Code, § 364)
JV-426	Findings and Orders After In-Home Status Review Hearing--Child
	Placed With Previously Noncustodial Parent (Welf. & Inst. Code, §§ 364, 366.21)
JV-430	Findings and Orders After Six-Month Prepermanency Hearing (Welf
	. & Inst. Code, § 366.21(e))
JV-431	Six-Month Prepermanency Attachment: Child Reunified (Welf. & In
	st. Code, § 366.21(e))
JV-432	Six-Month Prepermanency Attachment: Reunification Services Cont
	inued (Welf. & Inst. Code, § 366.21(e))
JV-433	Six-Month Prepermanency Attachment: Reunification Services Term
	inated (Welf. & Inst. Code, § 366.21(e))
JV-435	Findings and Orders After 12-Month Permanency Hearing (Welf. &
	Inst. Code, § 366.21(f))
JV-436	Twelve-Month Permanency Attachment: Child Reunified (Welf. & In
	st. Code, § 366.21(f))
JV-437	Twelve-Month Permanency Attachment: Reunification Services Cont
	inued (Welf. & Inst. Code, § 366.21(f))
JV-438	Twelve-Month Permanency Attachment: Reunification Services Term
	inated (Welf. & Inst. Code, § 366.21(f))
JV-440	Findings and Orders After 18-Month Permanency Hearing (Welf. &
	Inst. Code, § 366.22)
JV-441	Eighteen-Month Permanency Attachment: Child Reunified (Welf. &
	Inst. Code, § 366.22)
JV-442	Eighteen-Month Permanency Attachment: Reunification Services Te
	rminated (Welf. & Inst. Code, § 366.22)
JV-445	Findings and Orders After Postpermanency Hearing--Parental Righ
	ts Terminated; Permanent Plan of Adoption (Welf. & Inst. Code, § 366.3(f))
JV-446	Findings and Orders After Postpermanency Hearing--Permanent Pla
	n Other Than Adoption (Welf. & Inst. Code, § 366.3)
JV-448	Order Granting Authority to Consent to Medical, Surgical, and D
	ental Care (Welf. & Inst. Code, § 366.27)
JV-450	Order for Prisoner's Appearance at Hearing Affecting Prisoner's
	Parental Rights and Waiver of Appearance
JV-500	Paternity Inquiry--Juvenile

JV-501	Parentage--Finding and Judgment (Juvenile)
JV-505	Statement Regarding Parentage (Juvenile)
JV-510	Proof of Service--Juvenile
JV-520	Fax Filing Cover Sheet (Juvenile)
JV-525	Order to Attend Court or Provide Documents: Subpoena/Subpoena Duces Tecum (Criminal and Juvenile)
JV-530	Certified Request for Pupil Records----Truancy
JV-531	Local Educational Agency Response to JV-530
JV-535	Findings and Orders Limiting Right to Make Educational Decisions for the Child, Appointing Educational Representative, and Determining Child's Educational Needs--
JV-536	Local Educational Agency Response to JV-535--Appointment of Surrogate Parent
JV-537	Educational Representative or Surrogate Parent Information
JV-538	Findings and Orders Regarding Transfer from School of Origin
JV-539	Request for Hearing Regarding Child's Education
JV-540	Notice of Hearing on Joinder--Juvenile
JV-550	Juvenile Court Transfer Orders
JV-565	Findings and Request for Assistance Under Interstate Compact on the Placement of Children (ICPC)
JV-567	Interstate Compact on the Placement of Children Findings and Orders
JV-570	Petition for Disclosure of Juvenile Court Records--Welfare and Institutions Code, § 827
JV-575	Petition To Obtain Report of Law Enforcement Agency
JV-580	Notice to Child and Parent/Guardian RE: Release of Juvenile Police Records and Objection
JV-590	Order To Seal Juvenile Records
JV-600	Juvenile Wardship Petition
JV-610	Child Habitually Disobedient--§ 601(a)
JV-611	Child Habitually Truant--§ 601(b)
JV-615	Deferred Entry of Judgment Notice of Noncompliance
JV-620	Violation of Law by Child
JV-622	Informal Probation Agreement
JV-624	Terms and Conditions
JV-625	Notice of Hearing--Juvenile Wardship Proceeding--Welfare and Institutions Code, §§ 601, 602
JV-635	Promise to Appear--Juvenile Delinquency (Juvenile 14 Years or O

	lder)
JV-640	Juvenile Court Delinquency Proceeding
JV-642	Initial Appearance Hearing--Juvenile Delinquency
JV-644	Jurisdiction Hearing--Juvenile Delinquency
JV-665	Disposition--Juvenile Delinquency
JV-710	Juvenile Court Fitness Hearing Order (Welfare and Institutions Code, § 707)
JV-732	Commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice
JV-735	Notice of Hearing to Modify, Change, or Set Aside Previous Orders
JV-740	Petition to Modify Previous Orders--Change of Circumstances
JV-750	Determination of Eligibility--Deferred Entry of Judgment--Juvenile
JV-751	Citation and Written Notification for Deferred Entry of Judgment--Juvenile
JV-755	Deferred Entry of Judgment--Dismissal and Sealing of Juvenile Records
JV-760	Deferred Entry of Judgment Order
JV-790	Order for Restitution and Abstract of Judgment
JV-792	Instructions: Order for Restitution and Abstract of Judgment
JV-794	Petition to Terminate Wardship and Order
JV-800	Notice of Appeal--Juvenile (California Rules of Court, Rule 8.400)
JV-810	Recommendation for Appointment of Appellate Attorney for Child (California Rules of Court, Rule 5.661)
JV-820	Notice of Intent To File Writ Petition and Request for Record to Review Order Setting a Hearing Under Welfare and Institutions Code Section 366.26 (California Rules of Court, Rule 8.450)
JV-822	Notice of Intent to File Writ Petition and Request for Record to Review Order Designating or Denying Specific Placement of a Dependent Child After Termination of Parental Rights (California Rules of Court, Rule 8.454)
JV-825	Petition for Extraordinary Writ--Juvenile Dependency (California Rules of Court, Rules 8.452, 8.456)
JV-826	Denial of Petition (California Rules of Court, Rules 8.452, 8.456)
JV-828	Notice of Action (Rule 8.452)

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or renamed:

Form No.	Title
JV-183	Court Order on Form JV-180, Request to Change Court Order [added]
JV-184	Order After Hearing on Form JV-180, Request to Change Court Order [added]
JV-569	Proof of Service--Request for Disclosure [added]
JV-570	Request for Disclosure of Juvenile Case File [renamed]
JV-571	Notice of Request for Disclosure of Juvenile Case File [added]
JV-572	Objection to Release of Juvenile Case File [added]
JV-573	Order on Request for Disclosure of Juvenile Case File [added]
JV-574	Order After Judicial Review [added]
JV-796	Petition for Expungement of DNA Profiles and Samples (Pen. Code, § 299) [added]
JV-798	Order for Expungement of DNA Profiles and Samples (Pen. Code, § 299) [added]
JV-800	Notice of Appeal--Juvenile [renamed]
JV-825	Petition for Extraordinary Writ (California Rules of Court, Rules 8.452, 8.456) [renamed]
JV-828	Notice of Action (California Rules of Court, Rule 8.452) [renamed]



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C. Approval of Legal Forms.

27. Miscellaneous.

2 *Witkin Cal. Proc. Courts* § 424

[§ 424] Miscellaneous.

<i>Form No.</i>	<i>Title</i>
CP10	Claim of Right to Possession and Notice of Hearing
CP-10.5	Prejudgment Claim of Right to Possession
MC-001	Juror Questionnaire for Civil Cases
MC-002	Juror Questionnaire for Criminal Cases/Capital Case Supplement
MC-005	Facsimile Transmission Cover Sheet (Fax Filing)
MC-010	Memorandum of Costs (Summary)
MC-011	Memorandum of Costs (Worksheet)
MC-012	Memorandum of Costs After Judgment, Acknowledgment of Credit, and Declaration of Accrued Interest
MC-013	Memorandum of Costs on Appeal
MC-020	Additional Page <i>[to be attached to any form]</i>
MC-025	Attachment to Judicial Council Form
MC-030	Declaration
MC-031	Attached Declaration
MC-040	Notice of Change of Address
MC-050	Substitution of Attorney--Civil (Without Court Order)
MC-051	Notice of Motion and Motion to Be Relieved as Counsel--Civil
MC-052	Declaration in Support of Attorney's Motion to Be Relieved as Counsel--Civil

MC-053	Order Granting Attorney's Motion to Be Relieved as Counsel--Civil
MC-060	Confidential Cover Sheet--False Claims Action
MC-070	Juror's Motion to Set Aside Sanctions and Order
MC-095	Petition and Declaration Regarding Unresolved Claims and Deposit of Undistributed Surplus Proceeds of Trustee's Sale
MC-100	Petition for Order Striking and Releasing Lien, etc. (Government Employee)
MC-101	Order to Show Cause (Government Employee)
MC-120	Confidential Reference List of Identifiers
MC-200	Claim Opposing Forfeiture
MC-201	Claim Opposing Forfeiture of Vehicle (Vehicle Code, § 14607.6)
MC-202	Petition for Forfeiture of Vehicle and Notice of Hearing (Vehicle Code, § 14607.6)
MC-210	Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement
MC-265	Petition for Writ of Habeas Corpus--LPS Act (Mental Health)
MC-270	Petition for Writ of Habeas Corpus--Penal Commitment (Mental Health)
MC-275	Petition for Writ of Habeas Corpus
MC-280	Order for Commitment (Sexually Violent Predator)
MC-281	Order for Extended Commitment (Sexually Violent Predator)
MC-300	Petition for Declaration of Emancipation of Minor, Order Prescribing Notice, Declaration of Emancipation, and Order Denying Petition
MC-301	Emancipation Pamphlet
MC-305	Notice of Hearing--Emancipation of Minor
MC-306	Emancipation of Minor--Income and Expense Declaration
MC-310	Declaration of Emancipation of Minor After Hearing
MC-315	Emancipated Minor's Application to California Department of Motor Vehicles
MC-350	Petition to Approve Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor or Adult Person With a Disability
MC-351	Order Approving Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor or Adult Person With a Disability
MC-355	Order to Deposit Money into Blocked Account
MC-356	Receipt and Acknowledgment of Order for the Deposit of Money into Blocked Account
MC-357	Petition for Withdrawal of Funds from Blocked Account

MC-358	Order for Withdrawal of Funds from Blocked Account
MC-360	Petition to Establish Record of Death
MC-360A	Declaration in Support of Petition to Establish Record of Death
MC-400	Proof of Enrollment or Completion (Alcohol or Drug Program)
MC-410	Request for Accommodations by Persons with Disabilities and Response
MC-500	Media Request to Photograph, Record, or Broadcast
MC-510	Order on Media Request to Permit Coverage
MC-600	Petition To Determine If Dog Is Potentially Dangerous or Vicious (Menacing Dog)
MC-601	Notice of Hearing (Menacing Dog)
MC-602	Order After Hearing (Menacing Dog)
MC-603	Notice of Appeal (Menacing Dog)
MC-700	Prefiling Order--Vexatious Litigant
MC-701	Request and Order to File New Litigation by Vexatious Litigant
MC-800	Court Clerk's Office--Signage
MC-950	Notice of Limited Scope Representation
MC-955	Application to Be Relieved as Attorney on Completion of Limited Scope Representation
MC-956	Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation
MC-958	Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or renamed:

Form No.	Title
MC-210	Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense [renamed]
MC-350	Petition to Approve Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor or Person With a Disability (Miscellaneous) [renamed]
MC-350 (A-13b(5))	Medical Service Provider Attachment to Petition to Approve Compromise of Claim or Action or Disposition of Proceeds of Judgment (Miscellaneous) [added]
MC-350EX	Expedited Petition to Approve Compromise of Disputed Claim or

Pending Action or Disposition of Proceeds of Judgment for Minor
or Person With a Disability (Miscellaneous) [added]

MC-351 Order Approving Compromise of Disputed Claim or Pending Action or
Disposition of Proceeds of Judgment for Minor or Person With a
Disability (Miscellaneous) [renamed]



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C. Approval of Legal Forms.

28. Name Change.

2 *Witkin Cal. Proc. Courts* § 425

[§ 425] Name Change.

<i>Form No.</i>	<i>Title</i>
NC-100	Petition for Change of Name (Change of Name)
NC-110	Attachment to Petition for Change of Name
NC-110G	Supplemental Attachment to Petition for Change of Name (Declaration of Guardian)
NC-120	Order to Show Cause for Change of Name (Change of Name)
NC-121	Proof of Service of Order to Show Cause (Change of Name)
NC-130	Decree Changing Name (Change of Name)
NC-130G	Decree Changing Name (Change of Name of Minor by Guardian)
NC-200	Petition for Change of Name and Gender
NC-210	Declaration of Physician--Attachment to Petition (Change of Name and Gender/Change of Gender)
NC-220	Order to Show Cause for Change of Name and Gender
NC-230	Decree Changing Name and Gender
NC-300	Petition for Change of Gender and Issuance of New Birth Certificate
NC-310	Declaration of Physician--Attachment to Petition (Change of Name and Gender/Change of Gender)
NC-320	Notice of Hearing on Petition for Change of Gender and Issuance of New Birth Certificate

NC-330 Order for Change of Gender and Issuance of New Birth Certificate

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added:

Form No.	Title
NC-400	Confidential Cover Sheet--Name Change Proceeding Under Address Confidentiality Program (Safe at Home) (Change of Name)
NC-400-INFO	Information Sheet for Name Change Proceedings Under Address Confidentiality Program (Safe at Home)
NC-410	Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program (Safe at Home)
NC-420	Declaration in Support of Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program (Safe at Home)
NC-425	Order on Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program (Safe at Home)



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C. Approval of Legal Forms.

29. Pleading.

2 *Witkin Cal. Proc. Courts* § 426

[§ 426] Pleading.

<i>Form No.</i>	<i>Title</i>
PLD-050	General Denial
PLD-C-001	Complaint--Contract
PLD-C-001(1)	Cause of Action--Breach of Contract
PLD-C-001(2)	Cause of Action--Common Counts
PLD-C-001(3)	Cause of Action--Fraud
PLD-C-010	Answer--Contract
PLD-PI-001	Complaint--Personal Injury, Property Damage, Wrongful Death
PLD-PI-001(1)	Cause of Action--Motor Vehicle
PLD-PI-001(2)	Cause of Action--General Negligence
PLD-PI-001(3)	Cause of Action--Intentional Tort
PLD-PI-001(4)	Cause of Action--Premises Liability
PLD-PI-001(5)	Cause of Action--Products Liability
PLD-PI-001(6)	Exemplary Damages Attachment
PLD-PI-002	Cross-Complaint--Personal Injury, Property Damage, Wrongful Death
PLD-PI-003	Answer--Personal Injury, Property Damage, Wrongful Death

SUPPLEMENT: [This section is current through the latest supplement]



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C. Approval of Legal Forms.

30. Proof of Service.

2 Witkin Cal. Proc. Courts § 427

[§ 427] Proof of Service.

<i>Form No.</i>	<i>Title</i>
POS-010	Proof of Service of Summons
POS-015	Notice and Acknowledgement of Receipt--Civil
POS-020	Proof of Personal Service--Civil (Proof of Service)/Information Sheet for Proof of Personal Service--Civil
POS-020(D)	Attachment to Proof of Personal Service--Civil (Documents Served) (Proof of Service)
POS-020(P)	Attachment to Proof of Personal Service--Civil (Persons Served) (Proof of Service)
POS-030	Proof of Service by First-Class Mail--Civil (Proof of Service)/Information Sheet for Proof of Service by First-Class Mail--Civil
POS-030(D)	Attachment to Proof of Service by First-Class Mail--Civil (Documents Served) (Proof of Service)
POS-030(P)	Attachment to Proof of Service by First-Class Mail--Civil (Persons Served) (Proof of Service)
POS-040	Proof of Service--Civil (Proof of Service)/Information Sheet for Proof of Service--Civil
POS-040(D)	Attachment to Proof of Service--Civil (Documents Served) (Proof of Service)
POS-040(P)	Attachment to Proof of Service--Civil (Persons Served) (Proof of Service)

f Service)

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or renamed:

Form No.	Title
POS-040	Proof of Service--Civil (Proof of Service) [renamed]
POS-050	Proof of Electronic Service (Proof of Service/Electronic Filing and Service) [added]
POS-050(D)	Attachment to Proof of Electronic Service (Documents Served) (Proof of Service/Electronic Filing and Service) [added]
POS-050(P)	Attachment to Proof of Electronic Service (Persons Served) (Proof of Service/Electronic Filing and Service) [added]



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31. Receivership.

2 *Witkin Cal. Proc. Courts* § 428

[§ 428] Receivership.

<i>Form No.</i>	<i>Title</i>
RC-200	Ex Parte Order Appointing Receiver and Order to Show Cause and Temporary Restraining Order--Rents, Issues, and Profits
RC-210	Order Confirming Appointment of Receiver and Preliminary Injunction--Rents, Issues, and Profits
RC-300	Order to Show Cause and Temporary Restraining Order--Rents, Issues, and Profits
RC-310	Order Appointing Receiver After Hearing and Preliminary Injunction--Rents, Issues, and Profits

SUPPLEMENT: [This section is current through the latest supplement]



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32. Small Claims.

2 *Witkin Cal. Proc. Courts* § 429

[§ 429] Small Claims.

<i>Form No.</i>	<i>Title</i>
SC-100	Plaintiff's Claim and ORDER to Go to Small Claims Court
SC-100A	Other Plaintiffs or Defendants (Small Claims)
SC-101	Attorney Fee Dispute (After Arbitration) (Attachment to Plaintiff's Claim and ORDER to Go to Small Claims Court)
SC-103	Fictitious Business Name (Small Claims)
SC-104	Proof of Service (Small Claims)
SC-104A	Proof of Mailing (Substituted Service) (Small Claims)
SC-104B	What Is "Proof of Service"? (Small Claims)
SC-104C	How to Serve a Business or Public Entity (Small Claims)
SC-105	Request for Court Order and Answer (Small Claims)
SC-105A	Order on Request for Court Order (Small Claims)
SC-106	Request to Pay Judgment in Installments (Small Claims)
SC-107	Small Claims Subpoena for Personal Appearance and Production of Documents at Trial or Hearing and Declaration
SC-108	Request to Correct or Cancel Judgment and Answer (Small Claims)
SC-108A	Order on Request to Correct or Cancel Judgment (Small Claims)
SC-109	Authorization to Appear (Small Claims)
SC-110	Request to Postpone Small Claims Hearing
SC-111	Order on Request to Postpone Small Claims Hearing

SC-114	Request to Amend Party Name Before Hearing (Small Claims)
SC-120	Defendant's Claim and ORDER to Go to Small Claims Court (Small Claims)
SC-120A	Other Plaintiffs or Defendants (Small Claims)
SC-130	Notice of Entry of Judgment (Small Claims)
SC-132	Attorney-Client Fee Dispute (Attachment to Notice of Entry of Judgment) (Small Claims)
SC-133	Judgment Debtor's Statement of Assets (Small Claims)
SC-134	Application and Order to Produce Statement of Assets and to Appear for Examination (Small Claims)
SC-135	Notice of Motion to Vacate Judgment and Declaration (Small Claims)
SC-140	Notice of Appeal (Small Claims)
SC-145	Request to Pay Judgment to Court (Small Claims)
SC-150	Information for the Small Claims Plaintiff (Small Claims)

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or revoked:

Form No.	Title
SC-106	Request to Pay Judgment in Installments (Small Claims) [revoked]
SC-110	Request to Postpone Small Claims Hearing [revoked]
SC-111	Order on Request to Postpone Small Claims Hearing [revoked]
SC-112A	Proof of Service by Mail (Small Claims) [added]
SC-113A	Clerk's Certificate of Mailing [added]
SC-150	Request to Postpone Trial (Small Claims) [added]
SC-152	Order on Request to Postpone Trial (Small Claims) [added]
SC-200	Notice of Entry of Judgment (Small Claims) [added]
SC-200-INFO	What to Do After the Court Decides Your Small Claims Case (Small Claims) [added]
SC-202A	Decision on Attorney-Client Fee Dispute (Small Claims) [added]
SC-220	Request to Make Payments (Small Claims) [added]
SC-220-INFO	Payments in Small Claims Cases (Small Claims) [added]
SC-221	Response to Request to Make Payments (Small Claims) [added]
SC-222	Order on Request to Make Payments (Small Claims) [added]
SC-290	Acknowledgement of Satisfaction of Judgment [added]



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33. Subpoena.

2 Witkin Cal. Proc. Courts § 430

[§ 430] Subpoena.

<i>Form No.</i>	<i>Title</i>
SUBP-001	Civil Subpoena for Personal Appearance at Trial or Hearing
SUBP-002	Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration
SUBP-010	Deposition Subpoena for Production of Business Records
SUBP-015	Deposition Subpoena for Personal Appearance
SUBP-020	Deposition Subpoena for Personal Appearance and Production of Documents and Things
SUBP-025	Notice to Consumer or Employee and Objection

SUPPLEMENT: [This section is current through the latest supplement]
The following Judicial Council forms have been added:

Form No.	Title
SUBP-030	Application for Discovery Subpoena in Action Pending Outside California
SUBP-035	Subpoena for Production of Business Records in Action Pending Outside California
SUBP-040	Deposition Subpoena for Personal Appearance in Action Pending Outside California

- SUBP-04 Deposition Subpoena for Personal Appearance and Production of
5 Documents and Things in Action Pending Outside California
- SUBP-05 Subpoena for Inspection of Premises in Action Pending Outside
0 California



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C. Approval of Legal Forms.

34. Summons.

2 *Witkin Cal. Proc. Courts* § 431

[§ 431] Summons.

<i>Form No.</i>	<i>Title</i>
SUM-100	Summons
SUM-120	Summons (Joint Debtor)
SUM-130	Summons--Unlawful Detainer--Eviction
SUM-140	Summons--Storage Lien Enforcement
SUM-200(A)	Additional Parties Attachment (Attachment to Summons)
SUM-300	Declaration of Lost Summons After Service

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added:

Form No.	Title
SUM-110	Summons--Cross-Complaint
SUM-145	Summons--Enforcement of State Housing Law



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35. Traffic Infractions.

2 *Witkin Cal. Proc. Courts* § 432

[§ 432] Traffic Infractions.

<i>Form No.</i>	<i>Title</i>
TR-150	Instructions on Appeal Procedures for Infractions
TR-155	Notice of Appeal (Infraction)
TR-160	Proposed Statement on Appeal (Infraction)
TR-165	Abandonment of Appeal (Infraction)
TR-200	Instructions to Defendant (Trial by Written Declaration--Traffic)
TR-205	Request for Trial by Written Declaration (Trial by Written Declaration--Traffic)
TR-210	Notice and Instructions to Arresting Officer (Trial by Written Declaration--Traffic)
TR-215	Decision and Notice of Decision (Trial by Written Declaration--Traffic)
TR-220	Request for New Trial (Trial de Novo) (Trial by Written Declaration--Traffic)
TR-225	Order and Notice to Defendant of New Trial (Trial de Novo) (Trial by Written Declaration--Traffic)
TR-235	Officer's Declaration (Trial by Written Declaration--Traffic)
TR-300	Agreement to Pay and Forfeit Bail in Installments (Traffic Instructions)

TR-310	Agreement To Pay Traffic Violator School Fees in Installments (Traffic Instructions)

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council form has been added:

Form No.	Title
TR-INST	Notice to Appear and Related Forms



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C. Approval of Legal Forms.

36. Transitional Housing Misconduct.

2 Witkin Cal. Proc. Courts § 433

[§ 433] Transitional Housing Misconduct.

<i>Form No.</i>	<i>Title</i>
TH-100	Petition for Order Prohibiting Abuse or Program Misconduct (Transitional Housing Misconduct)
TH-110	Order to Show Cause and Temporary Restraining Order (Transitional Housing Misconduct)
TH-120	Participant's Response (Transitional Housing Misconduct)
TH-130	Order After Hearing (Transitional Housing Misconduct)
TH-140	Proof of Personal Service (Transitional Housing Misconduct)
TH-190	Restatement of Transitional Housing Misconduct Act (Transitional Housing Misconduct)
TH-200	Instructions for Program Operators (Transitional Housing Misconduct)
TH-210	Instructions for Participants (Transitional Housing Misconduct)

SUPPLEMENT: [This section is current through the latest supplement]



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37. Unlawful Detainer.

2 Witkin Cal. Proc. Courts § 434

[§ 434] Unlawful Detainer.

<i>Form No.</i>	<i>Title</i>
UD-100	Complaint--Unlawful Detainer
UD-105	Answer--Unlawful Detainer
UD-106	Form Interrogatories--Unlawful Detainer
UD-110	Judgment--Unlawful Detainer
UD-110S	Judgment--Unlawful Detainer Attachment
UD-115	Stipulation for Entry of Judgment (Unlawful Detainer)
UD-116	Declaration for Default Judgment by Court (Unlawful Detainer--Code Civ. Proc., § 585(d))
UD-150	Request/Counter-Request to Set Case for Trial--Unlawful Detainer

SUPPLEMENT: [This section is current through the latest supplement]



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38. Wage Garnishment.

2 *Witkin Cal. Proc. Courts* § 435

[§ 435] Wage Garnishment.

<i>Form No.</i>	<i>Title</i>
WG-001	Application for Earnings Withholding Order (Wage Garnishment)
WG-002	Earnings Withholding Order (Wage Garnishment)
WG-003	Employee Instructions (Wage Garnishment)
WG-004	Earnings Withholding Order for Support (Wage Garnishment)
WG-005	Employer's Return (Wage Garnishment)
WG-006	Claim of Exemption (Wage Garnishment)
WG-007	Financial Statement (Wage Garnishment--Enforcement of Judgment)
WG-008	Notice of Filing of Claim of Exemption (Wage Garnishment)
WG-009	Notice of Opposition to Claim of Exemption (Wage Garnishment)
WG-010	Notice of Hearing on Claim of Exemption (Wage Garnishment--Enforcement of Judgment)
WG-011	Order Determining Claim of Exemption (Wage Garnishment)
WG-012	Notice of Termination or Modification of Earnings Withholding Order (Wage Garnishment)
WG-020	Application for Earnings Withholding Order for Taxes (Wage Garnishment--State Tax Liability)
WG-021	Confidential Supplement to Application for Earnings Withholding Order for Taxes (Wage Garnishment--State Tax Liability)
WG-022	Earnings Withholding Order for Taxes (Wage Garnishment--State T

	ax Liability)
WG-023	Notice of Hearing--Earnings Withholding Order for Taxes (Wage Garnishment--State Tax Liability)
WG-024	Temporary Earnings Withholding Order for Taxes (Wage Garnishment--State Tax Liability)
WG-025	Confidential Supplement to Temporary Earnings Withholding Order for Taxes (Wage Garnishment--State Tax Liability)
WG-026	Claim of Exemption and Financial Declaration (Wage Garnishment--State Tax Liability)

SUPPLEMENT: [This section is current through the latest supplement]



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39. Workplace Violence.

2 *Witkin Cal. Proc. Courts* § 436

[§ 436] Workplace Violence.

<i>Form No.</i>	<i>Title</i>
WV-100	Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (Workplace Violence)
WV-110	Response to Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (Workplace Violence)
WV-120	Order to Show Cause and Temporary Restraining Order (CLETS) (Workplace Violence)
WV-130	Proof of Personal Service (Workplace Violence)
WV-131	Proof of Service by Mail of Completed Response (Workplace Violence)
WV-132	Proof of Service by Personal Delivery of Completed Response (Workplace Violence)
WV-140	Order After Hearing on Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (CLETS) (Workplace Violence)
WV-145	Proof of Sale or Turning in of Firearms
WV-150-INFO	Instructions for Petitions to Prohibit Workplace Violence

SUPPLEMENT: [This section is current through the latest supplement]



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II. JUDICIAL CONDUCT AND DISCIPLINE

D. (New) Ethics Opinion.

2 Witkin Cal. Proc. Courts § 92A

[§ 92A] (New) Ethics Opinion.

In 2009, the California Supreme Court established the Committee on Judicial Ethics to provide ethics advice and advisory opinions to judicial officers and candidates for judicial office. The Committee is authorized to provide formal or informal written opinions or oral advice on proper judicial conduct. Generally, communications to and from the Committee are confidential, although formal written opinions are public and must be posted on the Committee's website. (See C.R.C., Rule 9.80, adopted in 2009.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Approval of Legal Forms.

12A. (New) Disability Access Litigation.

2 Witkin Cal. Proc. Courts § 409A

[§ 409A] (New) Disability Access Litigation.

The following Judicial Council form has been added:

Form No.	Title
DAL-001	Important Information for Building Owners and Tenants

SUPPLEMENT: [This section is current through the latest supplement]



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16A. (New) Electronic Filing and Service.

2 Witkin Cal. Proc. Courts § 413A

[§ 413A] (New) Electronic Filing and Service.

The following Judicial Council forms have been added:

Form No.	Title
EFS-005	Consent to Electronic Service and Notice of Electronic Notification Address (Electronic Filing and Service)
EFS-010	Notice of Change of Electronic Notification Address (Electronic Filing and Service)
EFS-050	Proof of Electronic Service (Proof of Service/Electronic Filing and Service)
EFS-050(D)	Attachment to Proof of Electronic Service (Document Served) (Proof of Service/Electronic Filing and Service)
EFS-050(P)	Attachment to Proof of Electronic Service (Person Served) (Proof of Service/Electronic Filing and Service)

SUPPLEMENT: [This section is current through the latest supplement]